

Inherent Powers of and for the WTO Appellate Body¹

Isabelle Van Damme

University of Cambridge

and

Centre for Trade and Economic Integration

<http://www.graduateinstitute.ch/ctei>

¹This paper was prepared in summer 2008 during a stay at the Graduate Institute's Centre for Trade and Economic Integration as a Visiting Scholar.

© The Authors.

All rights reserved. No part of this paper may be reproduced without the permission of the authors.

Inherent Powers of and for the WTO Appellate Body

© Isabelle Van Damme*

‘If we want judges to act as judges,
we cannot constrain their powers beyond certain limits;
limits beyond which judges cease to be so and become mere simulacra’.¹

I. Introduction

The WTO dispute settlement system, consisting of a first-level panel process and an appeal procedure before the Appellate Body, has contentious jurisdiction over disputes between WTO Members over claims arising under the WTO covered agreements. This jurisdiction is binding, compulsory, exclusive, but not general. The WTO dispute settlement system is established by its constitutive treaty, the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), from which it sources most of its powers. It is also made operational through the Working Procedures for Appellate Review and other procedural decisions and rules.²

The WTO dispute settlement system is formally a quasi-judicial system, though the Appellate Body has chosen to operate and exercise its jurisdiction as if it were a court. The Appellate Body is a permanently constituted body that continuously and repeatedly interprets and applies the same, complex network of treaties, also called the ‘WTO covered agreements’. From the outset, the Appellate Body has made the conscious choice to function as if it were a court, even if finality of its decisions requires political approval by reverse consensus in the Dispute Settlement Body (DSB).³ Despite this required formalistic and political imprimatur, Appellate Body (and panel)

* Turpin-Lipstein Fellow, Clare College, University of Cambridge. Contact: iv218@cam.ac.uk.

¹ G. Abi-Saab, ‘Whither the Judicial Function? Concluding Remarks’ in L. Boisson de Chazournes, C.P.R. Romano and R. Mackenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (New York: Transnational Publishers, 2002) 241, at 247.

² Including dispute settlement rules and procedures in other (multilateral and plurilateral) WTO covered agreements, Working Procedures, Working Procedures for Appellate Review, Rules of Conduct for the Meetings of the DSB, the Decision on Certain Dispute Settlement Procedures for GATS, etc.

³ Articles 6.1, 16.4 and 17.14 DSU.

reports are read by the majority of its audience as decisions of 'judicial tribunals in the international law sense'.⁴

Appellate Body Members assume their role as members of the international judiciary, performing the international judicial function in the same way but in a different context as, for example, International Court of Justice (ICJ) judges.⁵ The international judicial function relates to the task of the international judge and transcends the mere mandate and context of a particular court and tribunal as established in its constitutive document and other procedural rules. This paper asserts that the WTO Appellate Body (and also panels) has exercised certain inherent powers associated with the status of a court or tribunal, thereby self-enforcing its initial choice to function as a court or tribunal. This observation is not novel, nor is it surprising after more than a decade of WTO jurisprudence – even if this development was not entirely inevitable. It raises, however, questions of international procedural law that have yet to be explained and understood. In particular, the scope of inherent powers of the Appellate Body remains, perhaps necessarily, unclear.

This paper examines inherent powers *of* the WTO Appellate Body, with occasional reference to panels, in the sense of such powers that the Appellate Body has already claimed or exercised. But it equally discusses inherent powers *for* the Appellate Body and intends to broaden the understanding of its judicial function and the powers associated therewith. This understanding is too commonly rooted in the DSU and a broader consideration in the light of international procedural law has become necessary. The objective of this paper is general. It is not intended to discuss inherent powers of the Appellate Body as a possible solution to resolve particular

⁴ J. Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' 2001 *American Journal of International Law* 95(3) 535, at 553.

⁵ For example, G. Abi-Saab, 'The Appellate Body and Treaty Interpretation' in G. Sacerdoti, A. Yanovich and J. Bohanes (eds), *The WTO at Ten – The Contribution of the Dispute Settlement System* (Cambridge: Cambridge University Press, 2006) 453, at 455-6; G. Sacerdoti, 'WTO Law and the "Fragmentation" of International Law: Specificity, Integration, Conflicts' in M.E. Janow, V. Donaldson and A. Yanovich (eds), *WTO at Ten: Governance, Dispute Settlement and Developing Countries* (Huntington: Juris Publishing Inc., 2008) Chapter 34; F.P. Feliciano, 'WTO Case Law in an International Context' M.E. Janow, V. Donaldson and A. Yanovich (eds), *WTO at Ten: Governance, Dispute Settlement and Developing Countries* (Huntington: Juris Publishing Inc., 2008) Chapter 39. See also J.H.H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats – Reflections on the International and External Legitimacy of WTO Dispute Settlement' 2001 *Journal of World Trade* 35(2) 191, at 200-1; A. Mitchell, 'The Legal Basis for Using Principles in WTO Disputes' 2007 *Journal of International Economic Law* 10(4) 795, at 829.

problems of the proliferation of courts and tribunals and their jurisdictions. No ‘fragmentation agenda’ underlies this paper.⁶ Its modest objective is to examine certain issues of procedural law in the light of (emerging) principles of international procedural law, and not merely the DSU.

International judges are judicial decision-makers with the mandate to resolve contentious or interpretive questions of international law through decisions enjoying judicial finality. Their application and interpretation of international law, as well as their competence to resolve disputes with an international element are not exclusive. It is a task they share with national judges. In many ways, the national judge is an international judge acting in a more clearly defined constitutional model of checks and balances. This paper will only consider the function of the international judge proper.

The first two sections of this paper describe the meaning and the role of the international judicial function in the WTO dispute settlement. Although the focus is mostly on the Appellate Body, the analysis applies also to panels. The paper then discerns different types of powers of judicial decision-makers and their sources. A distinction is made between explicit, inherent and implied powers. The remaining part of the paper focuses on inherent powers and attempts to describe how they have been and could be exercised in the WTO dispute settlement system. It does so in respect of four stages of the judicial process. The final section concludes.

II. The International Judicial Function and the WTO Appellate Body

The essence of the international judicial function remains unsettled, even 75 years after the publication of Hersch Lauterpacht’s *The Function of Law in the International Community* on the role of the judge in international law.⁷ It lies in the powers of judges acting in various types of international peaceful dispute settlement. The core activity of the international judge, acting

⁶ For consideration of inherent powers and competing jurisdictions of international courts and tribunals, see C. Henckels, ‘Overcoming Jurisdictional Isolationism at the WTO FTA Nexus: A Potential Approach for the WTO’ 2008 *European Journal of International Law* 19(3) 571; J. Pauwelyn and L.E. Salles, ‘Forum Shopping between International Tribunals: (Real) Concerns, (Im)possible Solutions’ *Cornell Journal of International Law* (forthcoming, article on file with author).

⁷ H. Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933).

under contentious jurisdiction, is to apply and interpret rules of international law to the concrete facts of a particular dispute by means of a legally binding and ultimately final decision.⁸ The powers associated with this function are perhaps less important than its limits. The essence of the judicial function lies in its limitations, as illustrated by the ICJ's statement in *Northern Cameroons*:

There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an application, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity ...

That function is circumscribed by inherent limitations which are no the less imperative because they may be difficult to catalogue, and may not frequently present themselves as a conclusive bar to adjudication in a particular case. Nevertheless, it is always a matter for the determination of the Court whether its judicial functions are involved.⁹

All limits to all powers of international courts and tribunals derive from the principle of consensual jurisdiction, irrespective of how this consent is expressed. An exhaustive list of such limits is aspirational and irreconcilable with the judicial function as such. Even if possible, the list would need to be tailored to the constitutive document(s) and context of a particular court or tribunal. But a few core principles can, nevertheless, be identified and discussed with application to the WTO dispute settlement system. One limitation is the principle of *non ultra petita*.¹⁰ Panels and the Appellate Body should not decide more than for what they have jurisdiction. In other words, the Appellate Body 'shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding'¹¹ and no more.¹² The exception to this principle in appellate

⁸ The WTO dispute settlement system only has contentious, not advisory, jurisdiction.

⁹ ICJ, *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports (1963) 15, at 30.

¹⁰ ICJ, *Request for the Interpretation of the Judgment of November 20th, 1950, in the Asylum Case (Colombia/Peru)*, Judgment, I.C.J. Reports (1950) 395, at 402.

¹¹ Article 17.12 DSU, referring to Article 17.6 DSU ('An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel').

¹² See, for example, Appellate Body Report, *Canada – Aircraft*, at para 21.

review is that the Appellate Body may review the exercise of inherent powers by panels, even in the absence of a claim to that effect.¹³ Another example is the principle that judges cannot legislate¹⁴ – though this is not to be taken too literally – and that they need to interpret treaties ‘as they stand’.¹⁵ Another limitation is the principle that it is for the State to decide how to implement and give effect to its international obligations, including obligations resulting from decisions of international courts and tribunals with judicial finality.¹⁶ Exceptionally, the WTO treaties may specify how to comply with a panel or Appellate Body report.¹⁷ Article 19.1 DSU confirms that ‘the panel or the Appellate Body may suggest ways in which the Member concerned could implement the recommendations’. This merely reflects the general principle: they can suggest but not impose.¹⁸

¹³ See, for example, Appellate Body Report, *US – Offset Act (Byrd Amendment)*, at para 208.

¹⁴ ICJ, *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports (1996) 226, at 267, para 18; Appellate Body Report, *US – Wool Shirts and Blouses*, at 340; Appellate Body Report, *US – Upland Cotton*, at para 509; Appellate Body Report, *India – Patents (US)*, at para 45.

¹⁵ PCIJ, *Question Concerning the Acquisition of Polish Nationality*, P.C.I.J. (1923) Ser. B, No. 7, at 20; PCIJ, *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory*, P.C.I.J. (1932) Ser. A/B, No. 44, at 40; ICJ, *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, I.C.J. Reports (1950) 4, at 8; ICJ, *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, I.C.J. Reports (1991) 53, at para 48; ICJ, *Case Concerning the Territorial Dispute (Libyan Arab Jamabiriyah/ Chad)*, I.C.J. Reports (1994) 6, at 25, para 51; ICJ, *LaGrand Case (Germany v. United States of America)*, I.C.J. Reports (2001) 466, at 494, para 77.

¹⁶ See, for example, ICJ, *LaGrand Case*, I.C.J. Reports (2001) 466, at 513-4, para 125. More intrusive approaches to national implementation are visible, however, in EC law and international criminal law.

¹⁷ For example, Article 7.8 SCM Agreement.

¹⁸ Panels are under no obligation to make such suggestions. See, for example, Panel Report, *US – Stainless Steel (Mexico)*, at paras 8.4-8.5; Panel Report, *EC – Salmon*, at paras 6.31-6.32; Panel Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, at para 5.7. In the context of Article 21.3(c) DSU arbitrations, one arbitrator has said that:

I am in agreement with previous arbitrators that it is not “the role of the arbitrator under Article 21.3(c) to identify [or select] a particular method of implementation and to determine the ‘reasonable period of time on the basis of that method’”. Rather, the choice of the method of implementation rests with the implementing Member. However, the implementing Member does not have an unfettered right to choose any method of implementation. Besides being consistent with the Member’s WTO obligations, the chosen method must be such that it could be implemented within a reasonable period of time in accordance with the guidelines contained in Article 21.3(c).

Award of the Arbitrator, *EC – Export Subsidies*, at para 69 (footnote omitted), referring also to Award of the Arbitrator, *US – Gambling*, at para 33; Award of the Arbitrator, *Korea – Alcoholic Beverages*, at para 45. The arbitrator in *Japan – DRAMS* found that ‘to determine *when* a Member must comply, it may be necessary to consider *how* a Member proposes to do so’. Award of the Arbitrator, *Japan – DRAMS*, at para 26 (original emphasis). The Appellate Body has stated more generally that ‘the WTO dispute settlement system is neutral in terms of the breadth of the actions to be adopted by the implementing Member, provided the changes are sufficient to bring that Member into compliance with its WTO obligations’. Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, at para 206; see also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, at para 184.

Understanding the judicial function requires a study of the type of powers of judges, as well as their sources. It implies a comparative survey of practices of various courts and tribunals to detect emerging principles of international procedural law and inherent powers associated with the status of the international judge.¹⁹ Simply put, the function of the international judge in contentious cases is to decide in concrete cases on the determination of particular rights, obligations, powers, benefits and responsibilities by reference to established rules of international law. The international judge can only exist because of the consent of States to the creation of his function. His or her task is not to create law, though this power is not entirely excluded from the judicial function.

The powers of any international judge can only be determined by reference to the constitutive document establishing the court or tribunal of which he or she is part, as well as supplementary procedural decisions and rules. In the WTO, for example, the DSU establishes the jurisdiction of panels and the Appellate Body, defines their standard terms of reference, informs the goals of the system, and sets out the procedural framework within which disputes between WTO Members will be resolved by third party dispute settlement. This treaty is an integral part of the WTO covered agreements, and is supplemented by a range of other procedural rules. These other rules are not all treaty language.

III. The Role of the Judicial Function in the WTO

The WTO dispute settlement system was created by the DSU, accompanied by a series of other procedural rules. Its origins are rooted in the GATT 1947 practice of dispute settlement that procedurally matured and evolved between 1947 and 1995.²⁰ The DSU is the starting point for

¹⁹ See, for example, C. Brown, 'The Inherent Powers of International Courts and Tribunals' 2005 *British Yearbook of International Law* (76) 195.

²⁰ See, generally, R.E. Hudec, 'The GATT Legal System: A Diplomat's Jurisprudence' 1970 *Journal of World Trade Law* 4(5) 615; R.E. Hudec, *Enforcing International Trade Law – The Evolution of the Modern GATT Legal System* (Salem: Butterworth Legal Publishers, 1993); J.H. Jackson, *The Jurisprudence of GATT and the WTO – Insights on treaty law and economic relations* (Cambridge: Cambridge University Press, 2000). Terris, Romano and Swigart observe that 'the negotiators ... did not spend much time working out the details' with the result that 'the WTO Appellate Body is very different from other international tribunals, whose statutes are usually the result of lengthy and complex negotiations and are considerably detailed'. D. Terris, C.P.R.

defining the function of WTO panels and the Appellate Body. It is their first and primary source of powers. But other powers may exist and be sourced elsewhere. General international law is not merely limited to customary international law applicable to all States. Fundamental principles rooted in principles of due process and the rule of law are also part of general international law governing international adjudication.

The function of any international judge is necessarily relative to that of other courts and tribunals, to the powers and consent of States,²¹ and to the competences of other bodies or organs within a particular institution.²² In the WTO, for example, the judicial function is exercised by panels and the Appellate Body for disputes between WTO Members, but also by the ILO Tribunal with respect to WTO staff disputes,²³ and possibly domestic or other international courts and tribunals with respect to disputes involving the WTO as a legal person.²⁴

Understanding the judicial function of Appellate Body Members means appreciating that the DSU and other procedural rules developed in the WTO may not be the only sources of their powers. International procedural law may provide other powers or restrict the exercise of existing ones. The appreciation of the judicial function in the WTO has been, perhaps, too

Romano and L. Swigart, *The International Judge – An Introduction to the Men and Women Who Decide the World's Cases* (Oxford: Oxford University Press, 2007) at 106.

²¹ See Appellate Body Report, *India – Patents (US)*, at para 92: 'a panel cannot assume jurisdiction that it does not have'.

²² The fact that the Appellate Body in *India – Quantitative Restrictions* (at paras 82-3) refused to accept the principle of institutional balance as part of the applicable law in resolving WTO disputes, does not exclude that the principle applies in practice.

²³ See ILO Administrative Tribunal, *Judgment No. 2637*, 103rd Session (11 July 2007); ILO Administrative Tribunal, *Judgment No. 2638*, 103rd Session (11 July 2007); ILO Administrative Tribunal, *Judgment No. 2639*, 103rd Session (11 July 2007); ILO Administrative Tribunal, *Judgment No. 2637*, 103rd Session (11 July 2007); ILO Administrative Tribunal, *Judgment No. 2638*, 103rd Session (11 July 2007); ILO Administrative Tribunal, *Judgment No. 2639*, 103rd Session (11 July 2007); ILO Administrative Tribunal, *Judgment No. 2637*, 103rd Session (11 July 2007); ILO Administrative Tribunal, *Judgment No. 2638*, 103rd Session (11 July 2007); ILO Administrative Tribunal, *Judgment No. 2639*, 103rd Session (11 July 2007).

²⁴ See, for example, Appellate Body Report, *India – Quantitative Restrictions*, at paras 102-4 (referring to the Panel Report, at para 5.91). This is subject to the availability of standing for the WTO in contentious proceedings, as a legal person and international organization, before an international court or tribunal. International organizations have no standing before, for example, the ICJ (Article 34 ICJ Statute; ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports (1949) 174, at 177-180); arbitration would be more easily available.

narrowly focused on the text of the DSU, without rooting it also in common principles of international adjudication developed through practice.²⁵ As one Appellate Body Member said:

The judicial function has its own requirements, and it is the same everywhere. However, it is like living in different houses. The rules of architecture are the same, but you feel the environment is very different. That is the judicial policy that varies from organ to organ. But judicial policy has to remain within the parameters of the judicial function.²⁶

IV. Powers and the Judicial Process

At each stage of the judicial process, a judge exercises certain powers. These powers are explicit, implicit or implied or incidental, and inherent. Although procedural variances exist, this process consists of four core stages:²⁷

- Establishing jurisdiction, involving the interpretation and application of jurisdictional clauses and the regularity of seisin.
- Deciding on admissibility, on whether to exercise the validly established jurisdiction.
- Interpreting and applying procedural law to enable the resolution of the substantive dispute.
- Interpreting and applying substantive law to resolve the dispute submitted.

Explicit powers are the powers stipulated in the constitutive document, commonly but not exclusively called treaty or Statute, and other procedural rules adopted either by the participating States or by the court or tribunal. Implied or incidental powers are powers that are not explicitly established in the constitutive document and other procedural rules, but the exercise of the

²⁵ Sometimes also referred to as ‘principles of international judicial law’, see G. Abi-Saab, ‘Whither the Judicial Function? Concluding Remarks’ in L. Boisson de Chazournes, C.P.R. Romano and R. Mackenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (New York: Transnational Publishers, 2002) 241, at 246.

²⁶ D. Terris, C.P.R. Romano and L. Swigart, *The International Judge – An Introduction to the Men and Women Who Decide the World’s Cases* (Oxford: Oxford University Press, 2007) at 139 (quoting Professor Abi-Saab).

²⁷ These four stages apply generally to the judicial process; the procedural life of a dispute is more complex and can only be described in function of the applicable procedural rules and principles. Judge Read, in his Dissenting Opinion in the *Peace Treaties* case, described three stages of the life of an (arbitral) tribunal: the constitution of the tribunal, hearing evidence and arguments, and deliberation and judgment. ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)*, Dissenting Opinion Judge Read, I.C.J. Report (1950) 231, at 242.

explicit powers defined therein requires the exercise of certain additional powers. They are derived from the interpretation of the constitutive document, and their assertion and exercise should be necessary in the light of the explicit powers, read and interpreted together with the objective of the particular dispute settlement system.²⁸ Such necessity requirement is often labelled by the Appellate Body as ‘effectiveness’.²⁹ Incidental or implied powers have been described as ‘jurisdiction ... as an incident of proceedings already before it’³⁰ with the objective of ‘serving, assisting or enabling the due consideration of the case’,³¹ such as the power to order provisional measures, allow third party interventions and the interpretation and revision of judgments. It relates to, for example, whether a court or tribunal can still accept and consider a late submission.³² Absent any particular and relevant procedural rule, the court or tribunal will decide the matter. Incidental or implied jurisdiction can result, for example, from interpreting the terms of reference of a panel, whereby the terms are broadened to incidental claims, not raised by the complainant, but found necessary to address those claims that the complainant did raise.³³ Another example is the Appellate Body’s report in *US – Shrimp*, where it described certain powers of panels that are implied in the text of the DSU:

a panel established by the DSB, and engaged in a dispute settlement proceeding, [has] ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a panel to discharge its duty imposed by Article 11 of the DSU ...³⁴

²⁸ The definition of implied powers of a court is similar to that of implied powers of an international organization. See ICJ, *Reparations for Injuries*, I.C.J. Reports (1949) 174, at 182:

Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.

²⁹ See, for example, Appellate Body Report, *EC – Sardines*, at paras 139-40; compare with ICJ, *Interhandel Case (Switzerland v. United States of America)*, Preliminary Objections, Dissenting Opinion Judge Lauterpacht, I.C.J. Reports (1959) 95, at 114-115.

³⁰ G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Volume 2 (Cambridge: Grotius Publications, 1986) at 533-4.

³¹ *Ibid.*, at 769.

³² See, for example, Appellate Body Report, *US – Stainless Steel (Mexico)*, at paras 163-4.

³³ See, for example, Panel Report, *Canada/US – Continued Suspension Hormones Dispute*, at paras 7.370-7.379.

³⁴ Appellate Body Report, *US – Shrimp*, at para 106.

In *US – Zeroing of Dumping Margins*, the Appellate Body applied the same reasoning to find that:

a panel also has broad authority to pose such questions to the parties as it deems relevant for the purposes of considering the issues that are before it. The asking of questions is, after all, part and parcel of the investigative function and duty of panels.³⁵

Implied powers can become explicit when written into the applicable Working Procedures,³⁶ even if working procedures mostly concern obligations, and less powers, of the Appellate Body, panels and disputants. An example is Rule 29 Working Procedures for Appellate Review, stating that ‘where a participant fails to file a submission within the required time periods or fails to appear at the oral hearing, the division shall, after hearing the views of the participants, issue such order, including dismissal of the appeal, as it deems appropriate’. Before the Panel in *Mexico – Taxes on Soft Drinks*, Mexico listed a series of examples of ‘incidental jurisdiction’ among which the power of panels (and arguably the Appellate Body) to:

‘decide all matters linked to the exercise of substantive jurisdiction that are inherent in the adjudicative function (i.e., decide claims under rules on the burden of proof, good faith, estoppel, due process, treatment of confidential information, etc.); ...³⁷

The assertion of an implied power, after interpreting the applicable rules, is an exercise of inherent powers. But not all incidental powers are also inherent, with the notable example of the power to order provisional measures.³⁸

³⁵ Appellate Body Report, *US – Zeroing of Dumping Margins*, at para 260.

³⁶ See, for example, Appellate Body Report, *EC – Sardines*, at para 139: ‘we emphasize that the Working Procedures must not be interpreted in any way that could undermine the effectiveness of the dispute settlement system, for they have been drawn up pursuant to the DSU and as a means of ensuring that the dispute settlement mechanism achieves the aim of securing a positive solution to a dispute ...’. Article 17.9 DSU delegates to the Appellate Body the power to draft its own working procedures, in consultation with the DSB Chairman and the Director-General, and communicated to WTO Members ‘for their information’ (and seemingly not to solicit any responses). See also, for example, Article 41 ICJ Statute gives the Court the power to order provisional measures, a power which the Court has subsequently interpreted and applied in a series of cases, including ICJ, *LaGrand Case (Germany v. United States of America)*, I.C.J. Reports (2001) 466. Part III, Section D of the 1978 Rules of Court of 1978 deals with ‘Incidental Proceedings’, see discussion in S. Rosenne, *The Law and Practice of the International Court 1920-2005*, Volume II, 4th edition (The Hague: Martinus Nijhoff, 2006) at 578-584. The DSU, by contrast, does not give panels or the Appellate Body a similar power.

³⁷ Panel Report, *Mexico – Taxes on Soft Drinks*, at para 4.185 (representing Mexico’s argument as part of its request for a preliminary ruling).

³⁸ See, for example, E. Lauterpacht, ‘“Partial” judgments and the inherent jurisdiction of the International Court of Justice’ in V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice – Essays in Honour of Sir Robert Jennings* (Cambridge: Cambridge University Press, 1996) 465, at 476-7; also S. Rosenne,

Inherent powers are powers that the judge enjoys by mere fact of his or her status as a judge. They are functional powers, only to be exercised when necessary for the purposes of fulfilling the judicial function and the values attached thereto in the context of a particular dispute settlement system. This is their justification.³⁹ Their exercise is not dependent on an explicit clause in the constitutive text of the court or tribunal to that effect. Their content, by contrast, does depend on the context in which they are exercised. The presumption is that by consenting to create a court or tribunals, States also consent to such necessary inherent powers. The presumption can be rebutted, but this requires explicit treaty text. In the words of the ICJ in the *Nuclear Tests Case*:

... an inherent jurisdiction enabling it to take such as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and, on the other, to provide for the orderly settlement of all matter in dispute, to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court, and to 'maintain its judicial character' [...]. Such inherent jurisdiction ... derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.⁴⁰

Previously, Judge Fitzmaurice had defined inherent jurisdiction in his Separate Opinion in *Northern Cameroons* as:

The power to exercise which is a necessary condition of the Court – or any court of law – being able to function at all.⁴¹

Later, Judge Higgins in her Separate Opinion in *Legality of Use of Force* observed that:

The Law and Practice of the International Court 1920-2005, Volume II, 4th edition (The Hague: Martinus Nijhoff, 2006) at 582.

³⁹ It is a justification and condition to their exercise but not a source of inherent powers. The sources are the constitutive document by a body is endowed with the judicial function and general principles. Contra C. Brown, 'The Inherent Powers of International Courts and Tribunals' 2005 *British Yearbook of International Law* (76) 195, at 222-9.

⁴⁰ ICJ, *Nuclear Tests Case (Australia v France)*, Merits, I.C.J. Reports (1974) 253, at 259-60 (citing ICJ, *Northern Cameroons*, I.C.J. Reports (1963) 15, at 29). For a comparative overview of the emergence of the concept in domestic courts, see C. Brown, 'The Inherent Powers of International Courts and Tribunals' 2005 *British Yearbook of International Law* (76) 195, at 205-8.

⁴¹ ICJ, *Northern Cameroons*, Separate Opinion Judge Fitzmaurice, I.C.J. Reports (1963) 97, at 103.

The Court's inherent jurisdiction derives from its judicial character and the need for powers to regulate matters connected with the administration of justice, not every aspect of which may have been foreseen in the Rules.⁴²

The very occasional need to exercise inherent powers may arise as a matter *in limine litis*, or as a decision by the Court not to exercise a jurisdiction it has, or in connection with the conduct or the merits of a case.⁴³

In principle, the judge will enjoy inherent powers absent contradictory language in the constitutive document.⁴⁴ In the event of (seemingly) contradictory language, either the entity created is not a court or tribunal and hence should not enjoy inherent powers (or at least not inherent judicial powers), either the inherent power will prevail over language that is contradictory to fundamental principles of due process of justice, or the more particular language will trump the inherent power and the court or tribunal will seek to reconcile the treaty language with principles of procedural law through interpretation.

Courts and tribunals can exercise these powers on their own initiative, irrespective of claims and arguments made by the disputants or third parties/participants. Even so, it is desirable for any court or tribunal to invite the views of the disputants on its exercise of a particular inherent power in a specific proceeding.⁴⁵ Any court or tribunal has an interest in exercising their inherent powers with the support of the disputants, even if their consent is not necessary. But what if the disputants agree to object to the court's exercise of certain inherent powers, absent any

⁴² ICJ, *Legality of Use of Force (Serbia and Montenegro v. Spain)*, Preliminary Objections, Separate Opinion Judge Higgins, I.C.J. Reports (2004) 1214, at 1216-7, para 10, relying on the PCIJ's reasoning for admitting the filing of preliminary objections to jurisdiction in PCIJ, *The Mavrommatis Palestine Concessions*, P.C.I.J. (1924) Ser. A., No. 2, 16.

⁴³ *Ibid*, at 1217, para 11.

⁴⁴ ICJ, *Nottebohm Case (Liechtenstein v. Guatemala) (Preliminary Objection)*, I.C.J. Reports (1953) 111, at 119; ICJ, *Case of Certain Norwegian Loans (France v. Norway)*, Separate Opinion Judge Lauterpacht, I.C.J. Reports (1957) 34, at 45.

⁴⁵ For example, the Appellate Body in *Canada – Autos* found that 'for purposes of transparency and fairness to the parties, a panel should, however, in all cases, address expressly those claims which it declines to examine and rule upon for reasons of judicial economy'. Appellate Body Report, *Canada – Autos*, at para 117. More generally, see E. Lauterpacht, "'Partial' judgments and the inherent jurisdiction of the International Court of Justice' in V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice – Essays in Honour of Sir Robert Jennings* (Cambridge: Cambridge University Press, 1996) 465, at 482-3; ICJ, *Legality of Use of Force*, Separate Opinion Judge Higgins, I.C.J. Reports (2004) 1214, at 1217.

contradictory treaty language? This is perhaps mostly a theoretical question, and the answer necessarily depends on the context and constitutive documents of the dispute settlement system in question and the case at issue. If inherent powers are defined by reference to the judicial function, the objection may contradict the intention of the States in establishing the court or tribunal. It becomes necessary to see whether the interpretation of the constitutive document(s) and other rules of procedure allow for the objection. Perhaps the objection to the exercise or the denial of the existence of the inherent power undermines the object and purpose and the effectiveness of the dispute settlement system in question. Perhaps, to the contrary, the objection is based on the constitutive text of the court or tribunal, and the conflict is of the type described in the earlier paragraph. Much would also depend on the type of inherent power at issue, and the legal basis in support of the power's existence. For example, the inherent power of a court to determine its own jurisdiction is undisputed, whereas that to order provisional measure is debatable. An *ad hoc* objection of all disputants to the former is less likely than to the latter, though the reasoning is admittedly somewhat circular.

Three sources of powers of courts and tribunals exist, all of which need to be appreciated against the background of the particular institutional and historical context of the court or tribunal in question. These sources are the constitutive treaty and other procedural rules, the consent of the disputants on an *ad hoc* basis, and principles of international procedural law. All courts and tribunals are established by means of a treaty whereby States establish a forum for third-party settlement of disputes between themselves or with other subjects of international law⁴⁶ and with general or specific jurisdiction. This treaty remains the ultimate and predominant source of powers of any judge. It is often complemented by various procedural decisions, declarations and other rules. Together, they provide the skeleton and the physiology of any court or tribunal, or

⁴⁶ For example, international criminal tribunals and investor-state arbitration.

any dispute settlement system for that account. These procedural rules sometimes make inherent powers explicit, without needing to.⁴⁷

V. Inherent Powers of the WTO Appellate Body

If the assumption of its status as a court or tribunal is accepted, the Appellate Body can exercise inherent powers associated with this status at various stages in the life of a dispute.⁴⁸ Its most basic inherent power is to determine its own jurisdiction. But other inherent powers have been exercised or at least claimed, including the power to complete the analysis in respect of a claim over which a panel exercised judicial economy. Other inherent powers may be available to the Appellate Body, but have not yet been claimed or exercised, mostly because there was no need to.

V.a. Inherent Powers and Jurisdiction

The study of the WTO dispute settlement system is generally organized around the paradigm of ‘applicable law-treaty interpretation’. The availability of jurisdiction is too often assumed, as illustrated by the attention given to principles of treaty interpretation and the enigma of the applicable law and accompanying conflict of norms rules. The preliminary stage of examining jurisdiction and admissibility is often neglected. So far, the jurisprudence confirms this assumption, which is based on the text of the DSU. DSB rulings and recommendations ‘cannot add to or diminish the rights and obligations provided in the covered agreements’ (Articles 3.2 and 19.2 DSU), they should be aimed at achieving a satisfactory settlement (Article 3.4 DSU), they ‘shall not nullify or impair benefits accruing to any Member under those agreements, nor

⁴⁷ Article 36.6 ICJ Statute confirms the inherent power of jurisdiction over jurisdiction: ‘In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court’. See also, for example, Article 288(4) UNCLOS; Article 41(1) ICSID Convention; Article 32(2) ECHR.

⁴⁸ See, generally, C. Brown, ‘The Inherent Powers of International Courts and Tribunals’ 2005 *British Yearbook of International Law* (76) 195; C. Brown, *A Common Law of International Adjudication* (Oxford: Oxford University Press, 2007) 55-81; A. Mitchell, ‘Due Process in WTO Disputes’ in R. Yerxa and B. Wilson (eds), *Key Issues in WTO Dispute Settlement: The First Ten Years* (Cambridge: Cambridge University Press, 2005) 144, at 157-60; A. Mitchell, ‘The Legal Basis for Using Principles in WTO Disputes’ 2007 *Journal of International Economic Law* 10(4) 795, at 829-33; J. Pauwelyn, *Conflict of Norms in Public International Law – How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003) at 447-55.

impede the attainment of any objective of those agreements' (Article 3.5 DSU) and they need to 'secure a positive solution to a dispute' (Article 3.7 DSU).

WTO Members can settle their disputes about the interpretation and application of the WTO covered agreements by agreement or by third-party decision. If they cannot settle their dispute by agreement, Article 23 DSU leaves no doubt over the fact that 'the WTO dispute settlement mechanism is the only means available to WTO Members to obtain relief, and only the remedial actions envisaged in the WTO system can be used by WTO Members'.⁴⁹ The exclusive character of the WTO dispute settlement is based on the mandatory language used in Article 23: WTO Members 'shall have recourse to, and abide by, the rules and procedures under this Understanding'.⁵⁰ The WTO dispute settlement system has jurisdiction to hear and resolve disputes between WTO Members about claims of breach of rights and obligations under the WTO covered agreements and, in the absence of a breach, claims of nullification or impairment of benefits accruing under those agreements.⁵¹ This is its subject-matter jurisdiction.

When establishing jurisdiction, panels and the Appellate Body exercise their inherent power to determine their own jurisdiction. This power is not provided for in the DSU.⁵² The Appellate Body in *US – 1916 Act* confirmed the existence of the 'widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it'.⁵³ This requires also the power of

⁴⁹ Panel Report, *US – Certain EC Products*, at para 6.23.

⁵⁰ Emphasis added.

⁵¹ Commonly referred to as violation complaints (Article XXIII:1(a) GATT 1994 and Article XXIII:1 GATS, read together with Article 3.8 DSU) and non-violation complaints (Article XXIII:1(b) GATT 1994 and Article XXIII:3 GATS, read together with Article 26.1 DSU). Situation complaints are rare but possible. Article XXIII:1 GATT 1994 (see also Article 19 Agreement on Agriculture, Article 11 SPS Agreement, Article 14(1) TBT Agreement, Article 8 TRIMS Agreement, Article 8 Preshipment Inspection Agreement, Article 8 Rules of Origin Agreement, Article 6 Licensing Agreement, Article 30 SCM Agreement, Article 14 Safeguards Agreement, Article 64 TRIPS Agreement, Article XXIII:3 GATS, Article 26 DSU (see also Article 17(1)-(3) Anti-Dumping Agreement, Article 19(1)-(2) Customs Valuation Agreement). Article 8(10) ATC refers to the DSU, but only to Article XXIII:2 GATT 1994.

⁵² Compare with, for example, Article 36(6) ICJ Statute, Article 41.1 ICSID Convention, Article 21 UNCITRAL (1976).

⁵³ Appellate Body Report, *US – 1916 Act*, at para 54, footnote 30; also Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, at para 78; Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, at para 73; Appellate Body Report, *US – Offset Act (Byrd Amendment)*, at para 208: '... the issue of a

panels and the Appellate Body to objectively identify the dispute at issue and decide whether it can decide on the ‘matter’, meaning ‘the specific measures at issue and the legal basis of the complaint (that is, the claims)’.⁵⁴ This power, sometimes called the principle of *Kompetenz-Kompetenz* or of jurisdiction over jurisdiction, is not exclusive to the judicial function. Its exercise can involve interpreting the jurisdiction of other WTO organs.⁵⁵ In principle, a court or tribunal can only determine the scope of its own jurisdiction; it cannot decide that of another court or tribunal. Appellate review of such a decision is not an exception to this principle so long as the review is procedurally provided, as in the WTO. In that event, the appellate court or tribunal may review the decision of the lower court or tribunal to determine its own jurisdiction, though the applicable standard of review will be contextual. One Appellate Body Member has described the principle, writing in an extra-judicial context, as meaning that:

panel’s jurisdiction is so fundamental that it is appropriate to consider claims that a panel has exceeded its jurisdiction even if such claims were not raised in the Notice of Appeal’. The AB found support in PCIJ, *Case Concerning the Administration of the Prince von Pless (Preliminary Objection)*, P.C.I.J. (1933) Ser. A/B, No. 52, at 15; ICJ, *Anglo – Iranian Oil Co. Case (United Kingdom v. Iran) (Preliminary Objection)*, Individual Opinion Judge McNair, I.C.J. Reports (1952) 116; ICJ, *Case of Certain Norwegian Loans (France v. Norway)*, Separate Opinion Judge Lauterpacht, I.C.J. Reports (1957) 34, at 43; ICJ, *Interhandel*, Dissenting Opinion Judge Lauterpacht, I.C.J. Reports (1959) 95, at 104; Iran – U.S. Claims Tribunal, *Marks & Umann v. Iran*, Case No. 458, 8 IRAN-U.S. C.T.R. 290, at 296-97; and doctrine (including Hudson, Fitzmaurice, Rosenne, Podesta Costa, Ruda, Diez de VelascoVallejo, van Hof). The principle was authoritatively established by the ICJ in the earlier cases (not referred to by the Appellate Body) of ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, I.C.J. Reports (1950) 65, at 75; ICJ, *The Corfu Channel Case (Merits)*, Judgment, I.C.J. Reports (1949) 4, at 25-6; see also ICJ, *Interhandel*, Jurisdiction, Lauterpacht, I.C.J. Reports (1959) 104. In *Fisberies Jurisdiction*, the Court added that ‘there is no burden of proof to be discharged in the matter of jurisdiction’. ICJ, *Fisberies Jurisdiction Case (Spain v. Canada) (Jurisdiction)*, I.C.J. Reports (2002) 432, at 450. The clearest affirmation of the principle was offered in ICJ, *Nottebohm Case (Liechtenstein v. Guatemala) (Preliminary Objection)*, I.C.J. Reports (1953) 111, at 119:

Since the *Alabama* case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction.

The irony is, of course, that by declaring this power to apply to all international courts and tribunals, the ICJ is in fact trespassing on the inherent power of those of other courts and tribunals, and thus the essence of the principle it is declaring to apply. For a historical and comparative overview, see C. Brown, ‘The Inherent Powers of International Courts and Tribunals’ 2005 *British Yearbook of International Law* (76) 195, at 212-5.

⁵⁴ Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, at para 201.

⁵⁵ The Panel in *Turkey – Textiles* refused to determine the scope of its own jurisdiction and exercised judicial economy, mostly on the ground that the resolution of the dispute did not require a finding on the WTO-compatibility of a customs union – a matter it found more appropriate for the WTO Committee on Regional Trade Agreements to determine. Panel Report, *Turkey – Textiles*, at paras 9.52-9.54. This part of the report was not appealed, though others were. For an example of interpreting the jurisdiction of an Article 21.5 panel in the light of powers of the DSB, see Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, at para 70; also Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, at paras 201-13.

‘... a court is the master of its own proceedings, that it determines the limits of its own jurisdiction, and it decides on challenges to it’.⁵⁶

The determination of a panel’s jurisdiction is a legal issue and can thus be appealed.⁵⁷ The Appellate Body can review a panel’s decision on whether it was competent to hear the case. In the ongoing dispute *Canada/US – Continued Suspension Hormones Dispute*, the Appellate Body is asked to respond to the silence in the DSU on what procedure applies to end the authorization for suspending concessions. The DSU provides for a procedure for authorization of retaliatory means to induce compliance, but lacks a procedure to lift that authorization. In this dispute between the EC and the US and Canada, the EC claims to have complied with the relevant panel and Appellate Body findings and recommendations because it has withdrawn the measure at issue and replaced it with a new measure that, it claims, is consistent with its obligations under the WTO covered agreements, particularly the SPS Agreement. As a result, the presumption of good faith application of its WTO obligations revives and the burden rests on the US and Canada to rebut that presumption by initiating Article 21.5 DSU compliance proceedings. The entire dispute is mostly one about the applicable burden of proof, and who has the burden of seizing an Article 21.5 panel. The underlying question is one of the Panel’s determination of jurisdiction.

The Appellate Body in *Mexico – Corn Syrup (Article 21.5 – US)* elaborated on the inherent power of panels and the Appellate Body to determine their own jurisdiction and their duty to address jurisdictional issues. It found that:

⁵⁶ G. Abi-Saab, ‘Whither the Judicial Function? Concluding Remarks’ in L. Boisson de Chazournes, C.P.R. Romano and R. Mackenzie (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (New York: Transnational Publishers, 2002) 241, at 246.

⁵⁷ The same applies to whether a Panel has respected its terms of reference. The standard terms of reference, though more specific terms can be agreed upon by the disputants, are described in Article 7.1 DSU:

To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).

First, as a matter of due process, and the proper exercise of the judicial function, panels are required to address issues that are put before them by the parties to a dispute.

Second, panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. In this regards, we have previously observed that '[t]he vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings'. For this reason, panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to classify themselves that they have authority to proceed.⁵⁸

The Appellate Body thus found that a panel is obliged 'to address issues' in at least two instances. The first obligation exists when objections are raised by the parties. It is merely an obligation to address the issue. The second obligation means that a panel must respond to certain objections 'of a fundamental nature' even if they are not raised by the parties. This is an obligation to address and dispose of the issue. Such a fundamental issue is a panel's jurisdiction. In this case, Mexico complained about the lack of consultations before referring an issue to the Panel and other irregularities in the consultation procedure. But it did not raise these objections in its two written submissions to the Panel, nor at the DSB meeting, nor in a request for a preliminary ruling. It only put these issues before the Panel at the occasion of first oral meeting. Even then, Mexico merely noted the issue and agreed with a third party's more formal request at the oral meeting that the Panel consider the matter. The Appellate Body considered this to be insufficient to qualify as a explicit objection. The Appellate Body found the situation to fall under the first obligation on panels to address issues relating to their authority to hear and dispose of the claims. As Mexico did not explicitly raise the objection, the Panel had the power to decline to address objections to its seisin if these are not explicitly stated:

The requirements of good faith, due process and orderly procedure dictate that objections [to the authority of the Panel], especially those of such potential significance, should be explicitly raised. Only in this way will the panel, the other party to the dispute,

⁵⁸ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, at para 36 (referring also to Appellate Body Report, *US – 1916 Act*, at para 54, footnote 32).

and the third parties, understand that a specific objection has been raised, and have an adequate opportunity to address and respond to it.⁵⁹

If Mexico had formally raised the matter, preferably in its written submissions to the Panel, the Appellate Body observed that ‘the Panel may well have been required to “address” those objections, whether by virtue of Article 7.2 and 12.7 of the DSU, or the requirements of due process’.⁶⁰ But the duty to address a matter does not entail a duty to decide the matter:

In such circumstances, however, the Panel could have satisfied that duty simply by stating in its Report that it declined to examine or rule on Mexico’s “objections” due to the *untimely* manner in which they were raised.⁶¹

The first duty thus applies if the objection is raised explicitly and timely. If these conditions are not met, a panel still has the power to address and dispose of the matter but is under no obligation to do so. The Appellate Body still considered whether the issues raised by Mexico were, nevertheless, of such a fundamental character to trigger the second obligation. If this were the case, the Panel should have addressed and disposed of the issues on its own initiative, irrespective of the lack of a explicit and timely objection. The test was whether the issues ‘are of such a nature that they could have deprived the Panel of its authority to deal with and dispute of the matter’.⁶² The lack of consultations was not such an issue, the Appellate Body found.⁶³ Despite their ‘undoubted practical importance’⁶⁴, consultations are a right of the respondent party. If that party does not respond or declines to give effect to the request, it is presumed to have waived that right and the complaining party may request the establishment of a panel. An effective interpretation of Articles 4.7 and 6.2 DSU further confirmed that the lack of consultations was not a procedural deficiency that could affect a panel’s jurisdiction.⁶⁵ The Appellate Body concluded that the second obligation did not apply because ‘the lack of prior consultations is not a defect that, by its very nature, deprives a panel of its authority to deal with and dispute of a matter, and that, accordingly, such a defect is not one which a panel must

⁵⁹ Ibid, at para 47.

⁶⁰ Ibid, at para 49; see also Appellate Body Report, *EC – Hormones*, at para 152.

⁶¹ Ibid (original emphasis).

⁶² Ibid, at para 53.

⁶³ Ibid.

⁶⁴ Ibid, at para 56, also footnote 48.

⁶⁵ Ibid, at paras 62-3.

examine even if both parties to the dispute remain silent thereon'.⁶⁶ Similarly, the failure to comply with the obligation in Article 6.2 DSU to indicate whether consultations were held was also not such a defect.⁶⁷ The same conclusion applied to the alleged failure of the complaining party to 'exercise its judgement as to whether action ... would be fruitful', as stated in Article 3.7 DSU.⁶⁸ As a result, the second obligation of a panel to address and dispose of issues on its own initiative applies, at least, to issues of jurisdiction but not to issues of seisin and other informative and good faith obligations on disputants. The Appellate Body did not in this case decide whether that obligation applies to questions of admissibility.

The jurisdiction of a court or tribunal is built on the consent of States, *ante hoc* or *ad hoc*, to submit all or certain disputes to that court for third party resolution.⁶⁹ Once jurisdiction is validly established, most courts and tribunals have seized the power to declare a case inadmissible, or at least to examine whether certain reasons compel the court not to exercise its jurisdiction. Such admissibility phase is procedurally not foreseen in the DSU. The jurisdictional stage is about whether a court or tribunal *can* hear a case and involves appreciating jurisdictional objections. If it can, the admissibility stage is about whether a court or tribunal *should* hear the case. It is a question to be answered 'on some other ground than [the] ultimate merits'⁷⁰ but for 'reasons why the Court should not proceed to an examination of the merits'.⁷¹

⁶⁶ Ibid, at para 64.

⁶⁷ Ibid, at para 70.

⁶⁸ Ibid, at para 74.

⁶⁹ See, for example, ICJ, *Corfu Channel*, Competence, Joint Separate Opinion Judges Basdevant, Alvarez, Winiarski, Zoričić, de Visscher, Badawi Pasha and Krylov, I.C.J. Reports (1948) 31; ICJ, *Peace Treaties (First Phase)*, I.C.J. Reports (1950) 71.

⁷⁰ G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Volume 2 (Cambridge: Grotius Publications, 1986) 438. Fitzmaurice defined the 'merits of a dispute' as consisting of 'all those propositions of fact and of law which must be established by a party in order to enable it to obtain a judgment in its favour, on the assumption that the tribunal has jurisdiction to entertain these propositions, and that there is no objection to the substantive admissibility of the claim'. Ibid, at 448. This definition was a refinement of the definition offered by Judge Read in ICJ, *Anglo-Iranian Oil Co. Case (United Kingdom v. Iran) (Preliminary Objection)*, Dissenting Opinion Judge Read, I.C.J. Reports (1952) 142, at 148.

⁷¹ ICJ, *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States) (Merits)*, I.C.J. Reports (2003) 161, at 177, para 29.

If a court or tribunal determines that it can and should hear a case, it is competent to hear that dispute.⁷² This understanding of competence was the basis for Mexico's argument before the Panel in *Mexico – Taxes on Soft Drinks* that:

... the mere conclusion that the Panel has substantive jurisdiction to hear the case [...] does not exhaust all issues relevant to the Panel's competence in this dispute.⁷³

...

The reason is that even though the substantive jurisdiction of any international court or tribunal may be granted explicitly by treaty, once such a forum has been seized of a specific matter, it has certain implied jurisdictional powers that derive from its nature as an adjudicative body.⁷⁴

The distinction made by Mexico between jurisdiction and admissibility is common knowledge in most contexts of dispute settlement, but it was a novel argument in the WTO context. Mexico characterized the power to decide on the admissibility as an 'implied jurisdictional power', though arguably it intended to label it an inherent power. The circumstances in which a court or tribunal can raise admissibility on its own initiative are less general than with respect to jurisdiction, though the possibility should not be excluded.

It is normally assumed that the occasion for declining jurisdiction cannot occur in the WTO, and so far panels and the Appellate Body have not declined to exercise their jurisdiction. As mentioned earlier, the jurisdiction of WTO panels and the Appellate Body is compulsory, contentious, exclusive, but not general. WTO panels and the Appellate Body do not enjoy

⁷² See S. Rosenne, *The Law and Practice of the International Court 1920-2005*, Volume II, 4th edition (The Hague: Martinus Nijhoff, 2006) at 524. Fitzmaurice notes the terminological confusion between jurisdiction and competence, but still upholds the distinction between 'the question of the general class of cases in respect of which a given tribunal has jurisdiction ...; and ... the question of its competence to hear and determine a particular individual case'. G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Volume 2 (Cambridge: Grotius Publications, 1986) 434. See also V. Heiskanen, 'Jurisdiction v. Competence: Revisiting a Frequently Neglected Distinction' 1994 *Finnish Yearbook of International Law* (V) 1. Heiskanen observes that 'the relationship between the two concepts is asymmetric in the sense that while competence necessarily requires a preceding finding of jurisdiction, a finding of jurisdiction does not necessarily entail competence' (at 5).

⁷³ Panel Report, *Mexico – Taxes on Soft Drinks*, at para 4.184 (representing Mexico's argument as part of its request for a preliminary ruling).

⁷⁴ *Ibid*, at para 4.185.

advisory jurisdiction. They have jurisdiction over disputes between WTO Members ‘brought pursuant to the consultation and dispute settlement provisions’ in the covered agreements.⁷⁵

Articles 1.1 and 6 DSU describes a panel’s ‘seisin’. A panel is lawfully and properly seized of a case, when the necessary preliminary steps are undertaken to bring a case before a panel. In the DSU, these steps are described in Articles 3.7 to 6 DSU. Once regularly seized of a matter, a panel determine and exercise its jurisdiction.⁷⁶ This might involve a preliminary determination by a panel on whether it was properly established by the DSB, including its own composition.⁷⁷ The improper or irregular seisin of a panel may be raised by one of the disputants in a promptly, timely and explicit manner.⁷⁸ As mentioned earlier, a panel is obliged to address the issue of irregular seisin in such an instance. Equally, it is a matter to be examined by the panel on its initiative but only when the irregularity in the seisin amounts to ‘a defect that, by its very nature, deprives a panel of its authority to deal with and dispute of a matter’.⁷⁹ This qualified obligation was ignored by the Panel in *US – Upland Cotton (Article 21.5 – Brazil)*, which refuted the claim of one third party that there was precedent for such an obligation. It found the claim ‘unpersuasive’ and did not find authority in the DSU to address the propriety of its own composition.⁸⁰ This finding contradicts the earlier statement of the Appellate Body in *EC – Bananas III* that:

As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very

⁷⁵ Article 1.1 DSU.

⁷⁶ The distinction between seisin and jurisdiction is clarified in ICJ, *Nottebohm (Preliminary Objection)*, I.C.J. Reports (1953) 111, at 122 (‘... the exercise of the powers conferred on the Court by the Statute, which the Court must exercise whenever it has been regularly seized and whenever it has not been shown, on some other ground, that it lacks jurisdiction or that the claim is inadmissible’); and more recently in ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports (1995) 6, at 23 (para 43).

⁷⁷ See, for example, Panel Report, *Australia – Automotive Leather*, at paras 9.10-9.15. The Panel found it unclear whether the DSU allows that ‘the panel so established has the authority to rule on the propriety of its own establishment’ (at para 9.12), but then examined the matter on the assumption it had this power.

⁷⁸ See Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, at paras 46-50.

⁷⁹ *Ibid*, at paras 63-4.

⁸⁰ Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, at para 8.28, footnote 83. None of the disputants had raised the matter, only the EC as a third party. A further ground for rejecting to examine the propriety of its own composition was that this would require an evaluation of the WTO Director-General’s exercise of powers under the DSU.

carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU...⁸¹

It also ignored the distinction made by the Appellate Body in *Mexico – Corn Syrup (Article 21.5 – US)*. If only a third party raised the issue of the Panel’s composition, the first obligation to address the issue would probably not apply. Following the reasoning developed in *Mexico – Corn Syrup (Article 21.5 – US)*, the Panel should have examined whether the second obligation to address the issue on its own initiative applied. This would depend on whether the propriety of a panel’s composition is of such fundamental character to affect its authority to hear the dispute.

V.b. Inherent Powers and Admissibility

Once the jurisdiction of a panel or the Appellate Body is established, the DSU does not contemplate the case being declared inadmissible. On first glance, it would appear that the decision on the merits of the case cannot be preceded by an admissibility phase, only a jurisdictional phase. The apparent lack of an admissibility phase in the DSU does not mean that this core stage in the judicial process is precluded from the life of a WTO dispute. The Appellate Body is seen to assert that it could have the power to declare a case inadmissible, even in the absence of exercising it. Such power would not find any strong basis in the DSU, not even in a broad construction of it. The Appellate Body would have this power as inherent to its judicial function – a power with limitations.

Admissibility applies to disputes, understood as the entirety of the claims. A broader definition includes also particular claims not constituting the entire dispute. The ICJ in *Oil Platforms* offered a general definition of admissibility:

Objections to admissibility (recevabilité) normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed

⁸¹ Appellate Body Report, *EC – Bananas III*, at para 142.

to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits.⁸²

Admissibility of disputes is more disputed than admissibility of claims, at least in the WTO.

Panels routinely decide to exercise judicial economy, and not rule on particular claims. They find that they should not resolve the claim, as it is not necessary to resolve the dispute.⁸³ The

Appellate Body approved of panels exercising this power in *US – Wool Shirts and Blouses*:

A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.⁸⁴

In *Canada – Wheat*, it explained the scope of this power:

The practice of judicial economy, which was first employed by a number of GATT panels, allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute. Although the doctrine of judicial economy *allows* a panel to refrain from addressing claims beyond those necessary to resolve the dispute, it does not *compel* a panel to exercise such restraint. At the same time, if a panel fails to make findings on claims where such findings are necessary to resolve the dispute, then this would constitute a false exercise of judicial economy and an error of law.⁸⁵

⁸² ICJ, *Oil Platforms*, Merits, I.C.J. Reports (2003) 161, at 177 (para 29).

⁸³ This is not necessarily contrary to Article 7.2 DSU, which instructs that ‘panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute’. Such obligation applies after a panel has decided to examine a claim and exercise its jurisdiction over it.

⁸⁴ Appellate Body Report, *US – Wool Shirts and Blouses*, at 19. The Panel had asserted this power when finding that ‘if we judge that the specific matter in dispute can be resolved by addressing only some of the arguments raised by the complaining party, we can do so’. Panel Report, *US – Wool Shirts and Blouses*, at para 6.6. See also Appellate Body Report, *Australia – Salmon*, at para 223; Appellate Body Report, *US – Lead and Bismuth II*, at para 71.

⁸⁵ Appellate Body Report, *Canada – Wheat*, at para 133 (original emphasis). For an overview of panels’ exercise of judicial economy (including GATT panels), see J. Bohanes and A. Sennekamp, ‘Reflections on the concept of ‘judicial economy’ in WTO dispute settlement’ in G. Sacerdoti, A. Yanovich, and J. Bohanes (eds), *The WTO at Ten – The Contribution of the Dispute Settlement System* (Cambridge: Cambridge University Press, 2006) 424-49.

The Appellate Body itself does not exercise judicial economy, or at least has not used this terminology for its own practices. Apparently, this would conflict with its mandate in Article 17.12 DSU to ‘address each of the issues raised in accordance with paragraph 6 during the appellate proceeding’.⁸⁶ But the obligation to address all issues raised on appeal does not mean that all these issues can be decided by means of a final decision. So far, the Appellate Body has not yet asserted the power to deliver a partial report, whereby it only partially responds to the claims on appeal despite sufficient information available to it to dispose of all the claims.⁸⁷ Only in circumstances where the panel had falsely exercised judicial economy and the Appellate Body was unable to complete the analysis because of insufficient factual information, has the Appellate Body issued partial reports. Absent remand to the original panel, part(s) of the claim(s) remain without a definitive judicial solution and the dispute remains – even if some resolution might occur at the Article 21.5 implementation stage.⁸⁸ The DSU does not provide for such a remand opportunity. The possibility of the Appellate Body suggesting to the parties or the disputants jointly requesting that it remand the case to the original panel has not yet materialized, but cannot be excluded as long as the source of the power of remand would be the joint consent of the disputants.⁸⁹

Inherent powers and admissibility were central in the *Mexico – Taxes on Soft Drinks* dispute. A dispute arose between the US and Mexico about the enforcement of particular sugar quota rights under NAFTA. Mexico responded to the US’ refusal to cooperate in establishing a NAFTA Chapter 20 Panel by imposing discriminatory taxes on US imports of soft drinks. The

⁸⁶ Article 17.6 DSU: ‘An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel’.

⁸⁷ Compare with ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Jurisdiction and Admissibility, I.C.J. Reports (1994) 112.

⁸⁸ See Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, at paras 210-3, where the Appellate Body interprets the scope of the jurisdiction of an Article 21.5 panel in the light of the lack of remand procedure and the fact that on the merits in the original proceedings, it ‘was unable to complete the analysis as a result of there being insufficient factual findings or undisputed facts on the record’ (at para 210).

⁸⁹ Brown mentions the example of a domestic court remanding a case in the exercise of inherent powers: *Carnegie-Mellon University v Cobill* 484 US 343, 357 (1988); C. Brown, ‘The Inherent Powers of International Courts and Tribunals’ 2005 *British Yearbook of International Law* (76) 195, at 206.

discriminatory tax was the measure at issue in the WTO dispute.⁹⁰ On appeal, Mexico did not dispute that the Panel had jurisdiction, but disagreed with the conclusion that a WTO panel does not enjoy the discretion to decline to exercise its jurisdiction. In Mexico's view, the Panel should have deferred to the jurisdiction of the NAFTA Chapter 20 Panel that Mexico sought to establish but the US had blocked.⁹¹

Before the Panel, Mexico had already argued that the Panel enjoyed 'the power to decide whether it should refrain from exercising its validly established substantive jurisdiction'.⁹² It cautioned, however, that this power was only available 'in the extraordinary circumstances of this case since there is an available forum for both parties to solve the dispute in a comprehensive manner'.⁹³ During the first substantive meeting, the Panel questioned Mexico and the other parties on this matter. In particular, it was interested to hear whether the DSU explicitly sets out the inherent power invoked by Mexico.⁹⁴ In a sense, this question misses the point. Although the DSU or any procedural agreement may confirm inherent powers, no explicit treaty basis is required for their exercise. The more relevant question, also asked by the Panel, was whether the DSU prevents panels from declining to exercise their jurisdiction. In other words, whether the DSU excluded admissibility.⁹⁵ Mexico's response was that:

... there is no provision in the WTO agreements that explicitly rules out or excludes such powers. By implicit consent, the Panel may have recourse to and apply the

⁹⁰ There were no conflicting jurisdictions in this dispute: two separate measures were taken by two different WTO Members/NAFTA Contracting Parties in respect of which each State made different claims before different courts or tribunals with different jurisdiction. See Panel Report, *Mexico – Taxes on Soft Drinks*, at para 7.14.

⁹¹ Mexico's request for establishing a NAFTA Chapter 20 Panel remained pending during the WTO proceedings. The US refused to appoint NAFTA panelists.

⁹² Panel Report, *Mexico – Taxes on Soft Drinks*, at para 4.185 (representing Mexico's argument as part of its request for a preliminary ruling).

⁹³ *Ibid.*, at para 4.190 (representing Mexico's argument as part of its request for a preliminary ruling). The extraordinary circumstance in this case was the fact that 'a broader dispute exists, as recognized by both parties, the United States and Mexico, but the United States has frustrated the Mexican right to have recourse to the appropriate dispute settlement mechanism in order to resolve its grievance'. *Ibid.*, at para 4.192 (representing Mexico's argument as part of its request for a preliminary ruling). In fact, the two disputes were inter-related, but not identical: different claims with respect to different measures were raised in different fora.

⁹⁴ Panel Report, *Mexico – Taxes on Soft Drinks*, Annex C-1, Response by Mexico to Questions Posed by the Panel after the First Substantive Meeting (20 December 2004), Question 2, see also Question 35 ('... what would be the legal basis for this specific jurisdictional powers and for the discretion that Panels may have under those powers to abstain from exercising its jurisdiction').

⁹⁵ *Ibid.*

principles of public international law. As international adjudicative bodies, WTO panels too have such incidental jurisdiction.⁹⁶

The Panel refused to decline exercising its jurisdiction in favour of the jurisdiction of a NAFTA Chapter 20 Panel. Its finding is somewhat open-ended (similar to that of the Appellate Body on appeal). It found that the DSU offered it ‘no discretion to decide whether or not to exercise its jurisdiction in a case properly before it’.⁹⁷ ‘Even if it had such discretion’, it added, the facts of this case did not warrant using this discretion and declining to exercise jurisdiction.⁹⁸

Furthermore, the Panel clarified that ‘it makes no findings about whether there may be other cases where a panel’s jurisdiction might be legally constrained, notwithstanding its approved terms of reference’.⁹⁹ Overall, the Panel signalled that inadmissibility would conflict with its mandate under Article 11 DSU, while confusing admissibility and jurisdiction.¹⁰⁰

On appeal, the Appellate Body confirmed that panels have inherent jurisdictional powers, including the power to establish their own jurisdiction and the scope of this jurisdiction. This is the principle of *Kompetenz-Kompetenz*. The Appellate Body was correct in characterizing this as an inherent jurisdictional power, but what about admissibility? Inherent powers could not stretch so far that ‘once jurisdiction has been validly established, WTO panels would have the authority to decline to rule on the entirety of the claims that are before them in a dispute’.¹⁰¹ To conclude otherwise, it reasoned, would imply a modification of the rights and obligations in the DSU,¹⁰² and would also prevent a panel from fulfilling its obligation under Article 11 DSU. Here, the Appellate Body excluded the possibility that, once jurisdiction is validly established, a panel declines to exercise its jurisdiction with respect of the entire set of claims defining its terms of reference. At this stage in its reasoning, it did not rule out the possibility of declaring part of that

⁹⁶ Ibid.

⁹⁷ Ibid, at para 7.1.

⁹⁸ Ibid.

⁹⁹ Ibid, at para 7.10.

¹⁰⁰ Ibid, at para 7.8.

¹⁰¹ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, at para 46.

¹⁰² Ibid (relying on Appellate Body Report, *India – Patents (US)*, at para 46). The Appellate Body still continued with interpreting the silences in Articles 3.2, 7.1, 7.2, 11, 19.2 and 23 DSU.

set of claims inadmissible. Quite understandably so, as panels have repeatedly exercised judicial economy, whether right or false,¹⁰³ with respect to particular claims or parts thereof. Exercising judicial economy implies declining to exercise jurisdiction over one or more particular claims, once jurisdiction has been established and exercised and when deemed necessary in the light of findings on other claims. This has not been disputed, and the Appellate Body has confirmed that panels have this inherent power though it has also attempted to discipline them in using it.

Ultimately, the Appellate Body in *Mexico – Taxes on Soft Drinks* left its report open-ended and internally contradictory. Despite its assumption that a decision of inadmissibility over the entire set of claims would diminish the rights of the complaining party under Articles 3.2 and 19.2 DSU,¹⁰⁴ the Appellate Body did hint to the inherent power of panels to declare an entire (set of) claim(s) inadmissible. It cautioned that '[m]indful of the precise scope of Mexico's appeal, [it] express[es] no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claim that are before it'.¹⁰⁵ This cannot be considered as an affirmation of the inherent power to declare the entire (set of) claim(s) inadmissible because, after all, the Appellate Body expressed no view on the matter. Nevertheless, the statement has two effects. First, it has the effect of calling into question the strength of its earlier statement that inadmissibility could only be an option for part of a claim, not the entire claim. Second, it signals that the Appellate Body reserves the freedom to assert and establish in the future the power to declare the entire (set of) claim(s) inadmissible. At least for the moment, the power is neither excluded, nor included.

¹⁰³ False judicial economy is the exercise of judicial economy in defiance of panels' duty, under Article 7.1 DSU, 'to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)' or in defiance of certain particular other obligations of panels (such as Article 4.7 SCM Agreement). See, for example, Appellate Body Report, *Australia – Salmon*, at para 224; Appellate Body Report, *EC – Export Subsidies on Sugar*, at para 335.

¹⁰⁴ Ibid, at para 53.

¹⁰⁵ Ibid, at para 54. The Panel, during its first substantive meeting, had also questioned the parties on whether there might be any NAFTA provision preventing the US from having recourse to WTO dispute settlement. Panel Report, *Mexico – Taxes on Soft Drinks*, Annex C-1, Response by Mexico to Questions Posed by the Panel after the First Substantive Meeting (20 December 2004), Question 4.

The Appellate Body's vague and seemingly deliberate statement is an invitation for further inquiry in what 'other impediments' could prompt a panel or the Appellate Body to declare part of or the entire (set of) claim(s) inadmissible. Such impediments could include reasons of political propriety, the doctrines of *forum non conveniens*, *res judicata*, *lis alibi pendens*, and *abus de droit*, though this list is by no means exclusive and exhaustive.¹⁰⁶ These are possible but not necessarily desirable or successful objections. The first reason of political propriety is likely of little practical value, as any capable lawyer should be able to frame a political question as a legal one and identify the underlying disagreement on points of law that are capable of resolution by means of interpreting and applying international law.¹⁰⁷ Nevertheless, there may be scope to apply the principle when it is not foreseeable that a judicial decision would 'have some practical consequence in the sense that it can affect existing legal rights and obligations of the parties, thus removing uncertainty from their legal relations'.¹⁰⁸ *Res judicata* stands for the principle that once a final judicial decision is rendered, a dispute between the same parties raising the same claims with respect to the same subject-matter is no longer admissible. The principle applies within a particular dispute settlement system, but less commonly between different such systems. Apart from the ICJ, international courts and tribunals have often exclusive and specific jurisdiction, the similarity of claims therefore becomes formally illusory.

The doctrine of *forum non conveniens* could apply in the event that a similar dispute between identical parties has been submitted to the jurisdiction of another court or tribunal whereby the claimant exercised his right to exclusively choose the forum, thereby excluding the jurisdiction of any other forum. Such an exclusive jurisdictional clause is not present in the DSU, but is

¹⁰⁶ See, for example, the discussion of 'comity' in this context in C. Henckels, 'Overcoming Jurisdictional Isolationism at the WTO FTA Nexus: A Potential Approach for the WTO' 2008 *European Journal of International Law* 19(3) 571; see also J. Pauwelyn and L.E. Salles, 'Forum Shopping between International Tribunals: (Real) Concerns, (Im)possible Solutions' *Cornell Journal of International Law* (forthcoming, article on file with author). Pauwelyn and Salles suggest a reformulation of the *forum non conveniens* principle: the notion of the 'natural forum'. See also L. Bartels, 'The Separation of Powers in the WTO: How to Avoid Judicial Activism' 2004 *International & Comparative Law Quarterly* 53(4) 861, at 862, 882-3.

¹⁰⁷ See, for example, ICJ, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, I.C.J. Reports (1988) 69, at 99, para 52; PCIJ, *Mavrommatis Palestine Concessions*, P.C.I.J. (1924) Ser. A, No. 2, at 11. Whether a legal dispute exists is itself a matter of law capable of resolution by a judicial decision. See, for example, ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)*, I.C.J. Reports (1986) 14, at 26-7.

¹⁰⁸ ICJ, *Northern Cameroons*, Preliminary Objections, I.C.J. Reports (1963) 15, at 33.

available to certain WTO Members who are parties to other treaties, and most prominently to NAFTA. In *Mexico – Taxes on Soft Drinks*, the precise scope of Mexico’s appeal was affected by the fact that Mexico had not relied on Article 2005(6) NAFTA,¹⁰⁹ nor was the subject matter and the legal claims of the disputants identical in the NAFTA and WTO disputes. In NAFTA, US investors also sought to challenge the Mexican tax claiming it was inconsistent with the principle of national treatment (Chapter 11 NAFTA). In comparing these two disputes, the measure was identical but the claims were different (Article 1102 NAFTA, Article 3 GATT 1994); the disputants are not the same; furthermore arbitral panels in investor-state arbitration have a different mandate and operate within a different context than a WTO panel.

Nevertheless, Mexico contended that ‘it would be possible and more constructive in the interests in securing a fairer and more positive solution for the case to be heard by another international tribunal with jurisdiction over all of the claims at issue’.¹¹⁰ This contention possibly conflicts with the inherent power of the Panel to determine its own jurisdiction. As mentioned earlier, the principle of jurisdiction over jurisdiction applies to a court or tribunal’s own jurisdiction.¹¹¹ If the Panel had declared the dispute inadmissible in favour of the jurisdiction of the NAFTA Chapter 20 Panel, this decision would have entailed also a decision on the jurisdiction of another court or tribunal, yet to be established. If the Panel had made such decision, it would have needed to add that this decision in no way prejudiced the power of a future NAFTA Chapter 20 Panel to

¹⁰⁹ Article 2005(6) NAFTA: ‘Once other dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4’. But compare with the ICJ’s caution that it ‘cannot decline to entertain a case simply because of a suggestion as to the motives of one of the parties or because its judgment may have implications in another case’. ICJ, *Case Concerning Legality of Use of Force (Serbia and Montenegro v. Portugal)*, Preliminary Objections, I.C.J. Reports (2004) 1160, at 1177, para 39.

¹¹⁰ Panel Report, *Mexico – Taxes on Soft Drinks*, Annex C-1, Response by Mexico to Questions Posed by the Panel after the First Substantive Meeting (20 December 2004), Answer to Question 35.

¹¹¹ The principle remains to stand, despite the apparent departure from the principle by the Court in ICJ, *Ambatielos*, I.C.J. Reports (1952) 22-3. For a discussion, see G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Volume 2 (Cambridge: Grotius Publications, 1986) 439-40, 457-92.

determine its own jurisdiction and in no way created an obligation (in this case, on the US) to establish the Panel.¹¹²

As a general comment on forum-shopping, the principle of consensual jurisdiction remains crucial in appreciating solutions or recommending judicial practices. As a result, any response to forum-shopping will likely need to be treaty-based. It remains unlikely that courts and tribunals will respond actively to the alleged problem of forum-shopping. Otherwise, they would risk undermining their inherent power to determine their own jurisdiction and the consent to which they owe their existence and mandate. Responses to forum-shopping – if deemed necessary – will need to come from States, and less desirably from courts and tribunals themselves developing particular principles and practices of procedural law.

In fact, the earlier comment that the DSU does not procedurally foresee admissibility is not entirely accurate. The DSU implicitly refers to situations where WTO Members should not benefit from bringing their dispute before a panel or the Appellate Body. The assumption of the right of WTO Members to seek third party resolution of their WTO disputes before panels and/or the Appellate Body still stands, but that right is less absolute than commonly perceived. The decision of a panel or the Appellate Body not to exercise their jurisdiction over part of a claim, or the entire (set of) claim(s), would not necessarily ‘add to or diminish’ the substantive rights of the disputants or other WTO Members. But as a matter of fact, it would negatively affect their right to dispute settlement guaranteed in Article 23.1 DSU.¹¹³

¹¹² Such qualifications were used in, for example, ICJ, *Peace Treaties* (First Phase), I.C.J. Reports (1950) 72; ICJ, *Anglo-Iranian Oil Co. Case*, Preliminary Objection, I.C.J. Reports (1952) 93. A further qualification relates to the risk of denial of justice, as stated by the PCIJ in *Chorzów Factory*:

The Court, when it has to define its jurisdiction in relation to that of another tribunal, cannot allow its own competency to give way unless confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice.

PCIJ, *Case Concerning the Factory at Chorzów Factory*, Jurisdiction, PCIJ Series A, No. 8 (1927) 30.

¹¹³ Article 23.1 DSU: ‘... they shall have recourse to, and abide by, the rules and procedures of this Understanding’. Article 6.1 DSU confirms the right to the establishment of a panel, subject to the negative consensus rule. This tension was raised by the Panel in *Mexico – Taxes on Soft Drinks*: Panel Report, *Mexico – Taxes on Soft Drinks*, Annex C-1, Response by Mexico to Questions Posed by the Panel after the First Substantive Meeting (20 December 2004), Question 34. It was also one of the reasons why the Panel refused Mexico’s request. *Ibid*, at para 7.9.

The DSU describes certain situations where the absoluteness of this right may be questioned. For example, Article 3.7 DSU informs that ‘before bringing a case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful’. The mandatory language of ‘shall’ establishes an obligation for WTO Members. It is a good faith obligation to ‘not frivolously set in motion the procedures contemplated in the DSU’.¹¹⁴ When submitting a request for the establishment of a panel, a Member is presumed to act in good faith ‘having duly exercised its judgment as to whether recourse to that panel would be “fruitful”’.¹¹⁵ The Appellate Body has added that Article 3.7 DSU concerns an obligation on WTO Members, it does not deal with the power of panels ‘to look behind that Member’s decision and to question [Members’] exercise of judgment’.¹¹⁶ As a result, a panel can examine the matter on its own initiative, but it’s not obliged to.¹¹⁷ Even if the obligation is ‘largely self-regulating’,¹¹⁸ the provision would lose its effectiveness without a corresponding power of panels and the Appellate Body to sanction non-compliance with this obligation. Also a largely self-regulating good faith obligation says little about the absoluteness of the right to WTO dispute settlement – it rather suggests the opposite.

Article 3.10 DSU specifies that a ‘request for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute’.

Rule 29 Working Procedures for Appellate Review, mentioned earlier, offers another example of when a disputant may lose its right to have its case decided by the Appellate Body. Other obligations on WTO Members in seeking to seize the jurisdiction of panels and the Appellate Body are formulated in less mandatory language, such as Article 4.5 DSU stating that ‘Members should attempt to obtain satisfactory adjustment of the matter’.

¹¹⁴ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, at para 73.

¹¹⁵ *Ibid.*, at para 74.

¹¹⁶ *Ibid.*, at para 74 (‘Article 3.7 neither requires nor authorizes ...’).

¹¹⁷ *Ibid.*, at 74.

¹¹⁸ Appellate Body Report, *EC – Bananas*, at para 135, footnote 20; Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, at para 74.

Admissibility also seems to underlie Article 12.9 DSU:

Where a settlement of the matter among the parties to the dispute has been found, the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached.

In such a case, the panel report is merely factual and descriptive, but it will also entail the conclusion that the panel declines the exercise of its jurisdiction in the light of the settlement reached between the disputants. Another example is Article 12.12 DSU, which provides that ‘if the work of the panel has been suspended for more than 12 months, the authority for establishment of the panel shall lapse’.¹¹⁹ In such a case, the jurisdiction lapses and it is no longer admissible for the panel to exercise the jurisdiction it once had. Deciding on the admissibility of a claim or a case is not always within the discretion of judicial decision-making. Sometimes, the procedural rules, and even the DSU, provide for the inadmissibility of a dispute. The following section looks closer at inherent powers and the interpretation of such procedural rules.

As stated earlier, the development of the jurisprudence on this matter is gradual but also incremental. In the recent report of *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body explicitly distinguished between jurisdiction and admissibility. The dispute was about whether the US had implemented the DSB’s recommendations and rulings in *US – Upland Cotton*. It raised questions about the scope of the general obligation in the DSU *to comply* and the more specific obligation on *how to implement* a ruling with respect to a WTO-inconsistent subsidy in Article 7.8 SCM Agreement. In defining the jurisdiction of an Article 21.5 panel in a dispute concerning measures taken to comply with a Member’s obligations under the SCM Agreement, it said that:

... the issue before us is one of admissibility. Even if the claim is allowed to proceed in an Article 21.5 proceeding, the complaining Member would still have to establish the existence of adverse effects that allegedly result from the subsidies at issue.¹²⁰

¹¹⁹ For an application of Article 12.12 DSU, see DSB, *EC and Certain Member States – Large Civil Aircraft, Lapse of Authority for the Establishment of the Panel – Note by the Secretariat*, WT/DS347/7 /9 October 2007).

¹²⁰ Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, at para 246.

The distinction was made but without too much explanation. The Appellate Body seemed to separate the definition of the scope of jurisdiction of an Article 21.5 panel from the question of whether the type of claim conditioned the exercise of this jurisdiction. In this dispute, the claim or legal basis for the complaint included Article 7.8 SCM Agreement, which provides that:

Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.

The Appellate Body considered the burden of proving the existence of adverse effects to be a condition to exercising jurisdiction in Article 21.5 proceedings. The complaining Member would need to prove that despite the measures taken to comply adverse effects continue to exist. The condition is not explicitly set out in Article 7.8, but is implied therein. The Appellate Body did not find that in an implementation dispute involving subsidies found to have adverse effects, the jurisdiction of the panel is defined by reading Article 21.5 DSU and Article 7.8 SCM Agreement together. It concluded that ‘the claim relates to whether the measure taken by the United States achieves full compliance with the DSB’s recommendations and rulings as informed by the obligation of the United States under Article 7.8 of the *SCM Agreement*’ and that this claim was ‘properly within the scope of these Article 21.5 proceedings’.¹²¹

V.c. Inherent Powers and Interpreting Other Procedural Rules

Once jurisdiction is established and the admissibility hurdle is overcome, inherent and implied powers continue to be relevant for panels and the Appellate Body in applying and interpreting the covered agreements, and especially (though not exclusively) the DSU. These powers might be greater with respect to procedural than substantive rules. It is inherent to the judicial function of panels and the Appellate Body that they ensure due process and uphold the rule of law in the context in which they operate. If the DSU and other existing procedural rules are incomplete in providing them with the tools to perform this task, panels and the Appellate Body cannot

¹²¹ Ibid, at paras 248-9.

sacrifice their function as a court or tribunal. In *Chile – Price Band System*, the Appellate Body confirmed that due process ‘is an obligation inherent in the dispute settlement system’.¹²² As one Appellate Body Member put it:

... the DSU provides a bare outline of the dispute settlement system. But, for the Appellate Body to exercise its judicial activity, it needs detailed rules of procedure and evidence, which are hardly provided therein. The Appellate Body had to formulate these rules, particularly the rules of evidence, from scratch, by reference to the general principles of law and of international law. And nobody protested against that.¹²³

Procedural rules are defined as rules governing the dispute settlement system. They govern not only the behaviour of WTO Members, but equally that of panels and the Appellate Body. Such rules are functional; they exist only in function of and for the purpose of enforcing the substantive rules. They may be equally incomplete and imperfect as the substantive rules, but a greater responsibility is reserved for panels and the Appellate Body in administering them. These rules enable them to exercise their judicial function. As long as they do not act contrary to the DSU or the consent of the disputants in a particular case, panels and the Appellate Body are the masters of their procedure. This power offers them flexibility in changing procedural rules with the consent of the disputants and when found appropriate and necessary. Part of this flexibility is described in the DSU. Article 17.9 DSU authorizes the Appellate Body to draft its own working procedures without defining the scope of such procedural rules. This is a power that States often defer to courts and tribunals that they establish.¹²⁴ Rule 16.1 Working Procedures for Appellate Review also states that:

In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an

¹²² Appellate Body Report, *Chile – Price Band System*, at para 175; see also the earlier Appellate Body Report, *India – Patents (US)*, at para 94.

¹²³ G. Abi-Saab, ‘The Appellate Body and Treaty Interpretation’ in G. Sacerdoti, A. Yanovich and J. Bohanes (eds), *The WTO at Ten – The Contribution of the Dispute Settlement System* (Cambridge: Cambridge University Press, 2006) 453, at 463

¹²⁴ See, for example, Articles 30 and 48 ICJ Statute; Articles 16 and 27 ITLOS Statute; Article 25 IACHR Statute; Article 15 ICTY Statute; Article 26(d) ECHR. Brown observes that ‘international courts have exercised these powers to expand their procedural powers appreciably’. C. Brown, ‘The Inherent Powers of International Courts and Tribunals’ 2005 *British Yearbook of International Law* (76) 195, at 202.

appropriate procedure for the purposes of that appeal only, provided that it is not inconsistent with the DSU, the other covered agreements and these Rules. Where such a procedure is adopted, the division shall immediately notify the parties to the dispute, participants, third parties and third participants as well as the other Members of the Appellate Body.

In *US – Lead and Bismuth II*, the Appellate Body interpreted Article 17.9 to mean that it ‘has broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements’.¹²⁵ In *Brazil – Aircraft*, the Appellate Body also relied on this authority to establish that it could adopt additional procedural rules on business confidential information, though ultimately it found no need to.¹²⁶ According to Article 12.2 DSU, ‘panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process’. Similarly, the Appellate Body in *EC – Hormones* acknowledged that ‘the DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated’.¹²⁷ In *EC – Bananas III*, for example, the Appellate Body decided that private counsel could represent disputants at hearings.¹²⁸ Other examples include the applicable standard of review,¹²⁹ the required interest to bring a claim,¹³⁰ or the effect of the late filing of a submission or other organizational issues relating to the proceedings. This section proceeds with a discussion of a few examples.

Amicus Curiae Briefs

¹²⁵ Appellate Body Report, *US – Lead and Bismuth II*, at para 39.

¹²⁶ Appellate Body Report, *Brazil – Aircraft*, at para 120-5; also Appellate Body Report, *Canada – Aircraft*, at para 141. The decision in *Brazil – Aircraft* was the subject of a preliminary ruling.

¹²⁷ Appellate Body Report, *EC – Hormones*, at para 152, footnote 138; also Appellate Body Report, *US – FSC (Article 21.5 – EC)*, at paras 247-8.

¹²⁸ Appellate Body Report, *EC – Bananas III*, at paras 10-2 [noting that ‘nothing [...] in customary international law or the prevailing practice of international tribunals, [...] prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings’]; also Panel Report, *Indonesia – Autos*, at para 14.1; Panel Report, *Korea – Alcoholic Beverages*, at paras 10.31-10.33. Note that the three decisions were the subject of a preliminary ruling.

¹²⁹ See Appellate Body Report, *EC – Hormones*, at paras 114-7.

¹³⁰ See Appellate Body Report, *EC – Bananas III*, at paras 15-7, 133-8.

The procedural rules in the DSU and other related documents are not exhaustive, nor complete. Panels and the Appellate Body interpret the DSU as any other WTO treaty, but they apply it differently. To exercise their powers in the DSU, it can become necessary to have other implied powers to ensure DSU powers are efficiently exercised. The most prominent example of such implied powers is likely the AB's conclusions in *US – Shrimp* on the admissibility of *amicus curiae* briefs of NGOs in panel proceedings. The DSU and the Working Procedures do not include a right of WTO Members, other than the disputants, and non-WTO Members and stakeholders to submit *amicus curiae* briefs. The Appellate Body searched in the text of the DSU for authority to conclude that *amicus curiae* briefs were allowed. The power of panels pursuant to Article 13 DSU to seek information and technical advice 'embrace[d] more than merely the choice and evaluation of the source of information or advice which it may seek'.¹³¹ Article 13 encompassed the negative right to decide not to seek such information or technical advice, or to reject the information or advice obtained. This was a pragmatic matter to be decided on a case-by-case basis. The Appellate Body interpreted the procedural silence in the DSU on *amicus curiae* briefs through a purposive reading of what the DSU did say, and in particular the object and purpose of Article 11 and the language in Article 13. Many WTO Members disagreed with the Appellate Body's asserted implied power to accept *amicus curiae* briefs, and to allow the same for panels. All but one WTO Member opposed the Appellate Body's interpretation on the grounds that either this was a matter to be decided by Members or the Appellate Body had disrespected Articles 3.2, 17, 19.2 DSU and Article IX WTO Agreement.¹³² They argued that the admissibility of *amicus*

¹³¹ Appellate Body Report, *US – Shrimp*, at para 104.

¹³² This was the opinion of, *inter alia*, Thailand, Pakistan, Malaysia, India, Brazil, Mexico, Hong Kong, China and Japan during the DSB Meeting of 6 November 1998. The US, normally sceptical towards the interpretation of silence, supported the AB's interpretation. See DSB, Minutes of Meeting, 6 November 1998. In 2000, a special GC meeting was held, on the request of the Informal Group of Developing Countries, to discuss the AB's jurisprudence on *amicus curiae* briefs. Uruguay, for example, considered the silence in the DSU 'a matter of interpretation with systemic effects and [...] the responsibility of the General Council' [at para 9]. Egypt described it as a matter of 'a systemic nature and of serious concern' [at para 11]; Hong Kong, China added that the matter was 'systemic and probably constitutional' [at para 22]. Other Members such as Mexico and Brazil made it clear that WTO Members 'were dealing with a matter that had to be decided by themselves' [at paras 47-50], and this should have been clear to the AB in the light of the discussion on *amicus curiae* briefs during the Uruguay Round negotiations on the DSU [see, for example, at paras 52, 64, 65]. In other words, this was a silence with deference to future negotiations and not to the dispute settlement system. Similar criticism was also uttered by India, the ANDEAN Members, Zimbabwe, ASEAN Members, Switzerland, Pakistan, Norway, Costa Rica, Canada, Bolivia, Turkey, Hungary, Bulgaria, Czech Republic, Latvia, Romania, Slovak Republic, Slovenia, Korea, New

curiae was either outside the scope of the DSU and/or an unresolved matter postponed to future negotiations. They found that the Appellate Body had unnecessarily interpreted the silence on this matter in the DSU as positive rather than disabling. Until now, panels and the Appellate Body have accepted *amicus curiae* briefs, but none has been acknowledged as influential in directing the outcome of their reports.¹³³

Open Hearings

In another response to greater transparency, or perhaps just visibility, of WTO dispute settlement, the Appellate Body in *Canada/US – Continued Suspension Hormones Dispute* decided to open its hearings to the public after the joint request of the three disputants. Its decision to make the hearings accessible to the public is itself not yet public. Although the reasoning underlying the Appellate Body’s decision remains unknown, it appears that its power to make the decision was sourced from the consent of the disputants. This is a similar approach to that of several panels that decided to open the hearings after joint requests from all disputants.¹³⁴ No panel has so far decided to open its hearings if not all of the disputants agreed. The consent of the third parties or participants has proven less important, though their reservations to open hearings have been respected.¹³⁵ The power to open hearings to the public is not explicit, neither for panels nor for the Appellate Body. It is also not an implied power, necessary to exercise an explicit power provided in the DSU. It is an inherent power that panels and the Appellate Body can exercise, absent and perhaps despite any contrary provisions in their procedural rules. But the availability of a power does not imply its exercise. There is no general international judicial

Zealand, Jamaica, Argentina, the EC [noting that ‘if the legislative arm fell short in legislating, the judiciary arm had the tendency to fill the gap’, at para 96], Chile, Panama, Australia, Tanzania and Japan. The US welcomed the AB’s decision and reacted that ‘it was a mistake to claim that the negotiating history of the DSU showed any intent to ban *amicus* submissions’ [at para 77]. One of the notable conclusions of the Chairman was that ‘in the light of the views expressed and in the absence of clear rules, [...] the Appellate Body should exercise extreme caution in future cases until Members had considered what rules were needed’ [at para 120]. General Council, *Minutes of Meeting*, 22 November 2000, esp. at paras 6-7, 9.

¹³³ Nevertheless, the classic statement of panels and the Appellate Body that they do not feel it necessary to take such briefs into account implies that they have read them and thus have absorbed the substance of the briefs. In many instances, such briefs have been illustrative, but not always demonstrative of essential knowledge that is not otherwise available to panels and the Appellate Body. For an example of a rejection of an *amicus curiae* brief (by preliminary ruling), see Appellate Body Report, *Thailand – H-Beams*, at para 74.

¹³⁴ See, for example, Panel Report, *Canada/US – Continued Suspension Hormones Dispute*, at paras 7.40-7.53.

¹³⁵ The simultaneous broadcasting of the hearings in a room separate from where the panel/Appellate Body hearings are organized has been interrupted when such objecting third parties/participants intervene.

practice supporting that the principle of due process and the proper administration of justice require open hearings. The source of the power also does not lie within the DSU, at least not for the Appellate Body. It leaves the Appellate Body and panels with only the consent of the disputants as enabling it to exercise this power. Furthermore, the unique political dimension within which they fulfil their judicial function helps understand why the consent of all disputants is necessary, while respecting the objections of any third parties/participants.¹³⁶

Legal Certainty and Jurisprudence Constante

The Appellate Body's acceptance (not necessarily usage) of *amicus curiae* briefs and its decision to open hearings are part of a broader debate about the extent to which it can respond to calls for greater transparency in the light of the current DSU. Defining transparency in the abstract has its limitations. It is an enabling concept, whose value is often over-emphasized without consideration of its particular function in a specific context. In WTO dispute settlement, transparency is mostly used as a header for proposals to open hearings to the public, and for allowing non-State actors to access the dispute settlement system by other means, including *amicus curiae* briefs. This is a narrow understanding of the concept and mostly a procedural and mechanical one. Ultimately, transparency is a feature of legal reasoning and a corollary of the principle of legal certainty, relating to the duty of decision-makers to present and explain their decisions in a clear, well-reasoned fashion to facilitate predictable and consistent jurisprudence.¹³⁷ They should justify their reasoning as reasonably necessary to understand the decision. And presumably ultimately to enable those bound by the relevant law to organize their behaviour by reference to it. The reasoning underlying the decision should make the decision comprehensible.

¹³⁶ It is perhaps also this context that justifies departing from the idea that a court or tribunal 'cannot, on the proposal of the parties, depart from the terms of the Statute'. PCIJ, *Case of the Free Zones of Upper Savoy and the District of Gex*, Order, P.C.I.J. Ser. A, No. 22 (1929), 12; also, ICJ, *Norwegian Loans*, Separate Opinion Judge Lauterpacht, I.C.J. Reports (1957) 34, at 43; ICJ, *Interhandel*, Jurisdiction, Dissenting Opinion Judge Lauterpacht, I.C.J. Reports (1959) 95, at 104. Contra G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Volume 2 (Cambridge: Grotius Publications, 1986) 774.

¹³⁷ The WTO Glossary defines transparency as the 'degree to which trade policies and practices, and the processes by which they are established, are open and predictable'. See WTO Glossary, <www.wto.org/english/thewto_e/glossary_e/glossary_e.htm> (last visited 25 June 2008). Article 56.1 ICJ Statute confirms that 'the judgment shall state the reasons on which it is based'.

Related to transparent decision-making and judicial reasoning is the expectation that the WTO audience can understand a decision against the background of the previous jurisprudence of panels and the Appellate Body.¹³⁸ This understanding does not necessarily require consistent, uniform interpretation. After all, consistent decisions may be consistently ill-explained, ill-informed or even incorrect. In disputes where similar issues are raised and similar treaty language is part of the applicable law, panels and the Appellate Body are expected to take into account the reasoning developed in earlier reports. The assumption is that, absent formal amendment, the treaty text ‘as interpreted’ remains the same. Otherwise, the text remains indeterminate. The Appellate Body has confirmed this idea in a series of cases, as recently as in *US – Stainless Steel (Mexico)*. The Panel in this dispute, as well as a few other panels in similar disputes, had expressed and explained its disagreement with the Appellate Body’s interpretation of the Anti-Dumping Agreement on whether the calculation methodology of zeroing is prohibited in particular circumstances. The Appellate Body previously reversed panels that developed similar interpretations of that Agreement.

Mexico appealed the Panel’s reasoning on this point, relying on particular DSU provisions to argue that the Panel should follow previous interpretations of the Appellate Body. For example, Mexico invoked Articles 3.2, 3.3 and 11 DSU to support its claim that the Panel’s reasoning ‘interfere[d] with the prompt settlement of this dispute and, thereby, frustrate[d] the effective functioning of the WTO dispute settlement system’.¹³⁹ The disputants and the third participants mostly argued in favour of or against an obligation on panels to follow previous Appellate Body jurisprudence on the basis of the text of the DSU and the effective functioning of the dispute settlement system. The EC, as third participant, argued in favour of such a persuasive effect of previous jurisprudence within the broader framework of international procedural law. In its third party submission to the Panel it explained at great length the practice of other national and international courts and tribunals to support the contention that panels should follow previous

¹³⁸ On the persuasive effect of judicial reasoning, see generally C. Perelman, *Le Champs de l’Argumentation* (Brussels: Presses Universitaires de Bruxelles, 1970); C. Perelman, *Justice et Raison*, 2ⁿ edition (Brussels: Editions de l’Université de Bruxelles, 1972), 221-2.

¹³⁹ Mexico’s appellant’s submission, at para 98.

Appellate Body jurisprudence absent cogent reasons. The EC's survey of this practice was extensive and convincing, also in the eyes of the Appellate Body. Although the Appellate Body merely cited the EC's third participant submission, its reasoning is built on the practice set out in the EC's third party submission.¹⁴⁰

An appreciation of the Appellate Body's reasoning in this part of its report requires distinguishing two separate issues, raised by Mexico's appeal. The first issue is whether there exists an obligation under WTO law and more broadly general international law that a subordinate judicial body follow, generally, the decisions of the superior judicial authority on similar issues, and whether a similar obligation applies to the superior authority itself. Assuming such obligation exists, the second issue relates to the consequences of non-compliance with this obligation. The answer to this question depends on the source of the obligation.

In addressing the first issue, the Appellate Body started its analysis with an interpretation of Article 11 DSU.¹⁴¹ The sequence of the separate sentences in Article 11 meant that the first sentence sets out a general description of panels' tasks, whereas the second sentence is more concrete in describing two specific functions of panels.¹⁴² The interpretation of Article 11 could also not be separated from the text of Article 3 DSU, setting out the general principles and objectives upon which the dispute settlement system is built and operates.¹⁴³ Following this descriptive part, the Appellate Body's reasoning is an attempt to make abstractions from previous cases in which the binding effect of its reports was discussed. At the outset, the Appellate Body noted that the fact that adopted DSB reports are only legally binding on the parties to that dispute 'does not mean that subsequent panels are free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the

¹⁴⁰ *US – Stainless Steel (Mexico)*, Third Party Submission by the European Communities, at paras 99-169.

¹⁴¹ Appellate Body Report, *US – Stainless Steel (Mexico)*, at para 155.

¹⁴² *Ibid*, at para 156. These two specific duties are 'to make an objective assessment of the matter before it' and 'to make such other findings as will assist the DSB in making the recommendations or in giving the rulings'.

¹⁴³ *Ibid*, at para 156.

DSB'.¹⁴⁴ This conclusion is mostly based on previous Appellate Body reports and the practice of WTO Members in participating in the dispute settlement system and not on the text of Articles 3 and 11 DSU, which initiated the Appellate Body's discussion.¹⁴⁵

The emergence of a coherent body of case law, interpreting similar or identical treaty text, from a permanent dispute settlement system is hardly surprising, nor is it entirely due to the Appellate Body's statement in the early case of *Japan – Alcoholic Beverages II* that 'adopted panel reports are an important part of the GATT acquis' creating 'legitimate expectations among WTO Members'.¹⁴⁶ The same principle was later held to apply to adopted Appellate Body reports.¹⁴⁷ The legitimate expectation created by adopted DSB reports is not merely imposed by the Appellate Body; it is also a matter of the Appellate Body confirming the practice of the disputants, and WTO Members in general. Such processes and practice are not particular to the WTO; they are visible in most dispute settlement systems.

In international procedural law, decisions of international courts and tribunals are binding only on the disputants, except if provided otherwise in the constitutive treaties establishing those courts and tribunals. So far, no example of such a contrary provision is available and no binding judicial precedent applies.¹⁴⁸ The general principle of law states that, in principle, final judicial decisions are only binding on the disputants and with respect to the specific dispute to which the decision applies. But this does not mean that interpretations developed in a particular judicial

¹⁴⁴ Ibid, at para 158.

¹⁴⁵ Ibid, at paras 158-60.

¹⁴⁶ Appellate Body Report, *Japan – Alcoholic Beverages II*, at 108.

¹⁴⁷ Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, at para 109, stating that: 'Thus, in taking into account the reasoning in an adopted Appellate Body Report – a Report, moreover, that was directly relevant to the Panel's disposition of the issues before it – the Panel did not err. The Panel was correct in using our findings as a tool for its own reasoning'. See also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, at para 188, 'Indeed, following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same'. Compare with ICJ, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Joint Declaration Ranjeva, Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, ICJ Reports (2004) 330, at 333, at para 3: '... [the Court] must ensure consistency with its own past case law in order to provide predictability. Consistency is the essence of judicial reasoning. This is especially true in different phases of the same case or with regard to closely related cases'.

¹⁴⁸ See, for example, Article 59 ICJ Statute: 'The decision of the Court has no binding force except between the parties and in respect of that particular case'; also Article 84.1 Convention for the Pacific Settlement of International Disputes; Article 46.1 ECHR.

decision remain in the vacuum of that particular dispute. Legal certainty and due process imply that such interpretations will be appreciated in subsequent decisions and by all stakeholders and participants in that dispute settlement system. The term ‘precedent’ is a misnomer in the international judicial context; a more appropriate terminology is the idea of a ‘jurisprudence constante’.¹⁴⁹ It was this idea that was the basis for the Appellate Body’s emphasis in *US – Stainless Steel (Mexico)* on:

the development of a coherent and predictable body of jurisprudence clarifying Members’ rights and obligations under the covered agreements as contemplated under the DSU.¹⁵⁰

It was also the motivation behind provisions such as Article 59 ICJ Statute, which reflect the general principle.¹⁵¹

The Appellate Body in *US – Stainless Steel (Mexico)* seemingly adopted an effective interpretation of the phrase ‘security and predictability’ in Article 3.2 DSU to mean that ‘absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case’.¹⁵² It then applied this principle to the WTO dispute settlement system, which consists of a first-level panel process with jurisdiction over issues of law and fact (Articles 7 and 11 DSU), and an appeals level with jurisdiction over issues of law (Article 17.6 DSU). This hierarchical structure further supported its interpretation of Article 3.2.¹⁵³ It is a statement of principle, meant to apply horizontally, to its own previous interpretations of the treaty text. The Appellate Body confirmed that the notion of a ‘jurisprudence constante’ applied to its own interpretations. The

¹⁴⁹ See, for example, G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Volume 2 (Cambridge: Grotius Publications, 1986) 583; H. Lauterpacht, *The Development of International Law by the Permanent Court of Justice*, revised edition (London: Stevens & Sons Limited, 1958), at 302. The term is also used by an ECJ judge, quoted in D. Terris, C.P.R. Romano and L. Swigart, *The International Judge – An Introduction to the Men and Women Who Decide the World’s Cases* (Oxford: Oxford University Press, 2007) at 119.

¹⁵⁰ Appellate Body Report, *US – Stainless Steel (Mexico)*, at para 161.

¹⁵¹ See Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice, 1945 *American Journal of International Law* (39 Suppl), 1, at 20, para 63:

What it means is not that the decisions of the Court have no effect as precedents for the Court or for international law in general, but that they do not possess the binding force of particular decisions in the relations between countries who are parties to the Statute. The provision in question in no way prevents the Court from treating its own jurisprudence as precedents.

¹⁵² Appellate Body Report, *US – Stainless Steel (Mexico)*, at para 160.

¹⁵³ *Ibid.*, at para 161.

language of ‘cogent reasons’ is not to be read, or litigated, technically. It is a language used to reflect the idea that the Appellate Body has the freedom to revisit its own caselaw where necessary, appropriate and reasonable, a reflection of the broader notion of *jura novit curia*.¹⁵⁴

The Appellate Body limited its observations to ‘clarifications’ developed in its earlier adopted reports. It distinguished between clarification and application: clarification ‘elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law’ and ‘is not limited to the application of a particular provision in a specific case’; application of the covered agreements, by contrast, is ‘confined to the context in which it takes place’.¹⁵⁵ This is a useful, even if simplistic, distinction. It is useful because it clarifies the distinction between provisions such as Article 59 ICJ Statute and the persuasive effect of previous interpretations. It is simplistic because the processes of interpretation and application are more entangled than the simple dichotomy in the Appellate Body’s statement.

As mentioned earlier, the Panel in this dispute had found it necessary to ‘respectfully disagree’ with the Appellate Body’s previous interpretation of the Anti-Dumping Agreement on a particular zeroing methodology.¹⁵⁶ Following the reasoning of the Appellate Body, it would only be prepared to revisit that interpretation when ‘cogent reasons’ are present. Apparently, such reasons were not present in this case. The Appellate Body was ‘deeply concerned about the Panel’s decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues’, adding that ‘the Panel’s approach has serious implications for the proper functioning of the WTO dispute settlement system’.¹⁵⁷ Ultimately, it decided not to make a finding on Article 11 DSU because at the origin of the Panel’s approach was ‘its

¹⁵⁴ The principle of *jura novit curia* was recognized in Appellate Body Report, *EC – Tariff Preferences*, at para 105. This idea needs to be distinguished from procedures that apply to the revision or re-interpretation of awards, judgments, and other decisions because their function is only case-specific. There is some support to claim that the power of revision is an inherent power, see C. Brown, ‘The Inherent Powers of International Courts and Tribunals’ 2005 *British Yearbook of International Law* (76) 195, at 218-21.

¹⁵⁵ *Ibid*, at para 161.

¹⁵⁶ Panel Report, *US – Stainless Steel (Mexico)*, at para 7.115.

¹⁵⁷ Appellate Body Report, *US – Stainless Steel (Mexico)*, at para 162.

misguided understanding of the legal provisions at issue', which the Appellate Body had corrected in addition to reversing all of the Panel's findings and conclusions. The decision not to make a finding on Article 11 DSU may be criticized as contradictory, but perhaps the lack of a finding on this provision also signals another message. The language of Article 11 DSU has its limitations. The interpretation of 'objective assessment' cannot sustain any claimed violation of a procedural principle, as fundamental as it may be. Not every procedural principle or matter that is not explicitly or implicitly reflected in the DSU can be anchored to Article 11 to make it part of the law governing the WTO dispute settlement procedures. Where relevant, panels and the Appellate Body can rely on general principles of procedure as developed by the growing practice of other courts and tribunals. The (in)famous dictum of the Appellate Body in *US – Gasoline* that the WTO Agreement, and thus including the covered agreements annexed to it, are 'not to be read in clinical isolation from public international law'¹⁵⁸ applies perhaps more frequently to the DSU than to the substantive provisions of the other covered agreements.

The Appellate Body's choice to construct its statement of principle on the basis of an interpretation of Articles 3 and 11 DSU is unstable and not entirely convincing. The DSU or other procedural rules do not provide for some type of jurisprudence constante, or for an explicit exception to the general principle. Nevertheless, the Appellate Body sought to derive the principle from interpreting Articles 3 and 11 DSU, while all it was doing was to fall back on general international law and the practice of other courts and tribunals absent a specific rule in the WTO text. In essence, this scheme of reasoning is no different from the Appellate Body's fall back in *US – Wool Shirts and Blouses* on practices and principles on the burden of proof. In *US – Wool Shirts and Blouses*, the Appellate Body openly acknowledged this; in *US – Stainless Steel (Mexico)*, the Appellate Body was less confident in relying on general international law. In that sense, the references to some of the literature and the practice in the ICTY and ICSID in footnote 313 are more persuasive than the construction of Articles 3 and 11 DSU.

¹⁵⁸ Appellate Body Report, *US – Gasoline*, at 16.

Finally, the Appellate Body did not define the term ‘cogent reasons’. Obviously, the concept of ‘cogent reasons’ indicates a non-exhaustive category of reasons. Cogent reasons can relate to either the quality of the legal reasoning in previous reports, or extrinsic elements influencing previously adopted Appellate Body reports and the interpretations therein. The first category of ‘cogent reasons’ has been described by the ICTY Appeals Chamber to include previous judgments ‘wrongly decided, usually because the judge or judges were ill-informed about the applicable law’.¹⁵⁹ Extrinsic elements may include the adoption of authoritative interpretations, a substantial change in the practice of WTO Members, consensus among Members in relevant WTO committees even absent a formal amendment or authoritative interpretation.¹⁶⁰

Overall, the Appellate Body’s decision in *US – Stainless Steel (Mexico)* confirms that the system allows for a panel to ‘respectfully disagree’ with the Appellate Body, but nevertheless sees its findings and reasoning overturned – why else create a system of appellate review? This general principle is supported by the practices of national and international courts and tribunals. It falls within the inherent jurisdiction of the Appellate Body to apply and interpret this principle as necessary within the particular context of the WTO dispute settlement, including the definition of what reasons may justify departing from the principle. The recent decision in *US – Stainless Steel (Mexico)* merely confirms this, but equally demonstrates apprehension and constraint in the Appellate Body exercising this power in the complex political context of this series of zeroing disputes.

Due Process and Preliminary Rulings

The Appellate Body in *Chile – Price Band System* recognized that due process ‘is an obligation inherent in the dispute settlement system’.¹⁶¹ And in *Mexico – Corn Syrup (Article 21.5 – US)*, it further explained that a ‘... Member is entitled to know the reasons for such finding as a matter

¹⁵⁹ ICTY, *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgment, 24 March 2000, at paras 107-8.

¹⁶⁰ See, for example, Appellate Body Report, *Japan – Alcoholic Beverages II*, at 31: ‘WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world’.

¹⁶¹ Appellate Body Report, *Chile – Price Band System*, at para 175; also Appellate Body Report, *India – Patents (US)*, at para 94.

of due process'.¹⁶² This objective is articulated in Article 3.2 DSU. Translated to the WTO context, the audience of Appellate Body reports – including disputants, other Members, other judges, academic and other civil society communities – sometimes expects it to explain every step of the interpretive process. In part, this expectation was created by the first generation of Appellate Body Members, who (understandably) used principles of treaty interpretation as a tool for protecting and developing judicial authority under the spotlight of the WTO Members, referring to narrowly defined interpretive community. Subsequent Appellate Body members have continued – and sometimes exaggerated – this tradition, though a contrary trend is starting to emerge.

Due process, and transparency as its corresponding policy concept, as a minimum requires that the judicial decisions themselves are made public. Panel and Appellate Body reports, with the exception of interim panel reports, are publicly available (on the WTO website) as soon as the decisions are circulated to all WTO Members. These reports include findings and recommendations on the merits of the case, as well as preliminary rulings and orders.

Orders are decisions of panels and the Appellate Body on matters of procedural organization, such as fixing time-limits and extending deadlines, the organization of hearings, representation, the submission of evidence, etc. Matters of procedural organization can require a decision at a preliminary stage but also when considering the merits of a dispute. No DSU provision explicitly mentions the power of panels and the Appellate Body to issue orders. But the power is assumed in several of its provisions. For example, Articles 12.3 and 12.4 instruct panels to fix the timetable for the proceedings after consulting the parties and set parties specific deadlines for submitting written submissions. The Working Procedures for Appellate Review do address orders, explicitly and implicitly. Explicitly, Rule 29 gives a Division the power to 'issue such

¹⁶² Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, at para 107. See also Appellate Body Report, *Japan – DRAMS (Korea)*, at para 279, where the Appellate Body responded to a concern of a third party about the drafting of the panel report, and how business confidential information was excluded: '... a panel must make efforts to ensure that the public version of its report circulated to all Members of the WTO is understandable'.

order, including dismissal of the appeal, as it deems appropriate' in the event of a late filing of a submission or a failure to appeal.¹⁶³ Implicitly, for example, Rule 16(1) Working Procedures for Appellate Review instructs the Division hearing a particular dispute to notify the parties when it adopts a procedure that is not provided for in the DSU or other procedural rules.¹⁶⁴

Preliminary objections concern challenges to jurisdiction and admissibility; they relate to competence and whether a panel or the Appellate Body should proceed with examining the merits of the case. Either the disputants will request a preliminary ruling or a court or tribunal may act on its own initiative. Either the preliminary matter will be dealt with separately or the matter is joined to the consideration of the merits of the case. The DSU does not instruct panels and the Appellate Body how to deal with requests for preliminary rulings. It does not provide guidance on whether to decide on objections to its competence, broadly understood, as a preliminary matter or to join the question to the merits of the case.

In the WTO, preliminary rulings and orders are not made public and not issued separately from the decision on the merits. Usually, preliminary rulings and orders are communicated to the disputants during the hearing, while informing them that the reasoning underlying the ruling will be provided in the final report on the merits.¹⁶⁵ For example, the order whereby the Appellate Body decided to open its hearings in *Canada/US – Continued Suspension Hormones Dispute* and the reasoning underlying that decision will only become available as part of the report on the merits. This is regrettable but understandable.

The DSU does not address preliminary objections to jurisdiction and admissibility. It neither instructs panels and the Appellate Body to address them separately, nor provides that they be joined to the merits. The practice of other courts and tribunals, as well as their constitutive

¹⁶³ See also Rule 10(5) Working Procedures for Appellate Review.

¹⁶⁴ See also, for example, Rules 16(2), 26, 27 Working Procedures for Appellate Review.

¹⁶⁵ See, for example, Panel Report, *Australia – Automotive Leather*, at para 9.9; Panel Report, *Mexico – Taxes on Soft Drinks*, at paras 7.1-7.2. In the latter, the preliminary ruling concerned admissibility. As a result, had the Panel found differently, it would have needed to issue a report, outlining its reasoning for the decision taken. The Panel acknowledged that, noting that 'an early decision to this effect would have saved time and resources'.

documents, suggests that they have the power to decide whether the objections are truly preliminary or ‘inextricably bound up with the facts’ of the dispute.¹⁶⁶ The growing practice of requesting preliminary rulings in WTO proceedings appears to correspond to that of other dispute settlement systems. For example, in *US – Softwood Lumber IV (Article 21.5 – Canada)* the US objected to the jurisdiction of the Panel to examine the First Assessment Review and requested a preliminary ruling. The Panel rejected that request in a statement of its Chairman, recommending to the parties that they ‘assume that the first assessment review does fall within the scope of these proceedings’ but ‘without prejudice to the Panel’s eventual ruling on this issue’.¹⁶⁷ The Panel effectively decided to join the preliminary objection with the consideration of the merits of the case.

Were a panel or the Appellate Body to issue such a preliminary decision separately, the decision would only receive binding force for the disputants upon political approval by the DSB. An order, by contrast, would likely not need to be adopted by the DSB, nor would it be appealable separately from the report on the merits – on the assumption that it can be distinguished from the merits.¹⁶⁸ Ideally, it should be made public and reflect the reasoning underlying the decision.

In *Mexico – Taxes on Soft Drinks*, the Panel observed that nothing in the DSU or the working procedures obliged it to issue a preliminary ruling.¹⁶⁹ If a panel would issue such a decision, in which a legal issue or a legal interpretation is provided, the decision would be arguably appealable. The Appellate Body implicitly admitted this in *EC – Hormones* when it noted in a

¹⁶⁶ See, for example, PCIJ, *Case Concerning the Administration of the Prince von Pless (Preliminary Objection)*, 4 February 1933, P.C.I.J. (1933) Ser. A/B, No. 52, at 14; ICJ, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain) (Preliminary Objections)*, 24 July 1964, I.C.J. Reports (1964) 6 (Second Phase), 5 February 1970, I.C.J. Reports (1970) 3, at 46; Article 79.9 ICJ Rules of Court; Article 41.2 ICSID.

¹⁶⁷ Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, at para 7 (paraphrasing the Statement by the Chairman of the Panel at the Substantive Meeting of the Panel with the Parties, 21 April 2005 (original underlining)); Panel Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, at para 5.1.

¹⁶⁸ This was not the case in, for example, Panel Report, *US – Export Restraints*, at para 8.2.

¹⁶⁹ *Ibid.*, at para 7.2; also Panel Report, *Canada – Aircraft*, at para 9.15. See also Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*: the Appellate Body apparently rephrased the scope of the US’ appeal to include an appeal of the Panel’s refusal to issue a preliminary ruling (see para 29). However, it did not address this procedural issue, it was not included in its list of issues raised by the appeal (para 48), and only examined the claim relating to the jurisdiction of an Article 21.5 panel. Nor was this separate claim, as identified in the Appellate Body Report, part of the US’ Notice of Appeal.

footnote that ‘an appellant requesting the Appellate Body to reverse a panel’s ruling on matters of procedure must demonstrate the prejudice generated by such legal ruling’.¹⁷⁰ It is unclear what effect this would have on the strict time schedule under which panels and the Appellate Body operate, though either disputant(s) could consent to extending deadlines or the panel proceedings could be suspended while awaiting the decision of the Appellate Body on appeal. Equally, the position and rights of third parties/participants would need to be reconsidered in such a procedure.¹⁷¹

If a preliminary stage to address jurisprudential and other incidental procedural issues would be included in the procedural framework, this would also affect the organization of hearings and oral and written submissions. Any preliminary or incidental procedural matter, but some more than others, needs to be decided on the basis of oral and written arguments.¹⁷² The uncertainty on these questions, absent formal rules on preliminary rulings and orders, was recognized by the Appellate Body in *EC – Bananas III*:

We note, in passing, that this kind of issue could be decided early in panel proceedings, without causing prejudice or unfairness to any party or third party, if panels had detailed, standard working procedures that allowed, inter alia, for preliminary rulings.¹⁷³

Panels need to follow the Working Procedures in Appendix 3 DSU, though they have the power to develop different procedures subject to the condition of consulting the parties (Article 12.1 DSU). The Appellate Body has more flexibility to draft its own Working Procedures. Absent DSU review, the availability of standard working procedures for preliminary rulings is perhaps not entirely excluded.

¹⁷⁰ Appellate Body Report, *EC – Hormones*, at para 152, footnote 138; for an illustration, see Appellate Body Report, *Thailand – H-Beams*, at para 95.

¹⁷¹ This concern was raised, for example, by the EC in its initial submission to the Panel in *US – Upland Cotton*, at para 14.

¹⁷² For example, the preliminary issue of the consequences of a late submission by one of the disputants is not as significant as a jurisdictional objection. An example relating to the objection to the late submission of evidence is Panel Report, *Korea – Alcoholic Beverages*, at paras 5.24-5.25. See also Panel Report, *Canada – Aircraft*, at para 9.15, suggesting the need for at least written submissions before providing a preliminary ruling.

¹⁷³ Appellate Body Report, *EC – Bananas III*, at para 144.

Burden of Proof

In *US – Wool Shirts and Blouses*, the Appellate Body established the applicable rules on the burden of proof on its own initiative. The DSU does not provide guidance on the applicable rules on the burden of proof. Any judicial process requires them. The silence in the DSU on this matter was remedied by reliance on general principles of international procedural law, as reflected by consistent and general practice of various courts and tribunals. This meant that the WTO rule on the burden of proof became the principle that ‘the party who asserts a fact, whether the claimant or respondent, is responsible for providing proof thereof’, meaning that the ‘burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence’.¹⁷⁴ Related to the burden of proof, is the power of panels to draw adverse inference from a disputant’s lack of cooperation in providing relevant information. The Appellate Body has considered this power to be ‘an ordinary aspect of the task of all panels to determine the relevant facts of any dispute involving any covered agreement’.¹⁷⁵

VI. Inherent Powers and Interpreting Substantive Rules

The substantive rules of the covered agreements define the rights, obligations and powers of WTO Members acting in the areas covered by those treaties. Imperfect and ambiguous as these rules may be, panels and the Appellate Body can only apply and interpret them. Their judicial function only reaches that far. WTO Members need to comply with their international law obligations, whether WTO-sourced or not, at all times. But this does not mean that panels and the Appellate Body can apply all those rules, their mandate is more limited. In terms of treaty law, the WTO covered agreements are the law on the basis of which they need to resolve disputes submitted to their jurisdiction.

The principle of *jura novit curia* stands for the principle that the judge is assumed to know the meaning of the law. It reflects the interpretive power associated with the judicial function. The

¹⁷⁴ Appellate Body Report, *US – Wool Shirts and Blouses*, at 335.

¹⁷⁵ Appellate Body Report, *Canada – Aircraft*, at para 202.

corresponding duty on panels is to explain their reasoning. In the WTO context, Article 12.7 DSU describes this duty on panels:

... the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes ...

The Appellate Body has interpreted Article 12.7 to set ‘a minimum standard for the reasoning that panels must provide in support of their findings and recommendations’.¹⁷⁶ This minimum standard means that ‘panels must set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations’.¹⁷⁷ It is an obligation sourced from principles of fairness and due process.¹⁷⁸ Apart from this minimum standard, the Appellate Body has allowed panels considerable power to judge how much explanation of their reasoning is necessary, relevant, and desirable in a particular dispute.¹⁷⁹ The Appellate Body itself has claimed and exercised that power, without possibility of review. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body further explained that a ‘... Member is entitled to know the reasons for such finding as a matter of due process’.¹⁸⁰ This is acknowledged in Article 3.2 DSU and the stated objective of ‘security and predictability’ therein. Even without Article 3.2, the principle would stand in WTO dispute settlement. The Appellate Body has also asserted the inherent power to explain the value of its interpretations of substantive and procedural rules both for the present and the future, as discussed in an earlier section of this paper.

Although desirable, the mandate of panels and the Appellate Body does not extend to resolving disputes on the basis of other treaty law or all rules of international law. In terms of customary international law, at least the customary principles of treaty interpretation apply (Article 3.2 DSU). Other customary international law can apply to the extent this is necessary to ensure the

¹⁷⁶ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, at para 106.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid, at para 107. The reasoning should enable a Member to comply and implement the decision and to make a well-informed decision on whether and what to appeal.

¹⁷⁹ Ibid, at para 109. See also Appellate Body Report, *Korea – Alcoholic Beverages*, at para 168; Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, at para 78.

¹⁸⁰ Ibid, at para 107.

enforceability of the WTO treaty language and to uphold the rule of law in the WTO. The fact that a matter is not provided for by the treaty does not mean that no law applies. Panels and the Appellate Body will interpret the existing text to find whether the matter is simply excluded from the treaty with the result that there is no WTO treaty law to apply. Other treaty law may apply but fall outside of the defined law that panels and the Appellate Body are mandated to apply.

In terms of general international law, the same reasoning does not apply. The WTO treaties and institution are created through general international law. Absent more specific rules in the WTO treaties, general international law continues to apply. General international law includes, for example, general principles of law such as good faith; due process; customary principles and rules on treaty formation, interpretation and application; and the principles on state responsibility and the responsibility of international organizations. All these rules and principles share the characteristic that they are not conceived in function of the regulation of a particular type of behaviour and apply to all States as the default rule. They are about how international law should be created, applied, interpreted and enforced.¹⁸¹

The Appellate Body has sought to deliver due process by a strict adherence to the customary principles of treaty interpretation, codified or not. This has been a successful approach in most, but not all, cases. After 12 years of Appellate Body jurisprudence, some tension has arisen between its formalism in applying the VCLT principles and its flexibility and lack of acknowledgement in using non-codified principles of treaty interpretation. In response, a trend of more informalism is starting to emerge. Excessive explanation and justification of treaty interpretation may not necessarily serve the quality that the Appellate Body aspires.

VII. Conclusion

The emergence of principles of international procedural law is a development confirmed and supported by Appellate Body jurisprudence. The Appellate Body is amenable to such principles

¹⁸¹ See, for example, Panel Report, *Turkey – Textiles*, at paras 9.33-9.43; Appellate Body Report, *EC – Hormones*, at para 128; Appellate Body Report, *Canada – Patent Term*, at paras 71-9.

in the absence of any or any contrary rules in the DSU and its Working Procedures, and absent any contrary will of the disputants. General principles of procedural law, if proven to exist, apply absent more specific WTO rules. When deciding that such principles exist and apply, the Appellate Body often does not justify their application on the basis of principles of treaty interpretation. It becomes a matter of the applicable law, not of treaty interpretation. The creative function of the Appellate Body then lies in the expansion of the mandate to apply only WTO law, whether procedural or substantive, and less in the norm-creating function as such.

Even if the DSU or the Working Procedures are not entirely silent on a particular procedural matter, the Appellate Body applies the rule in the light of emerging and established principles of international procedural law, with little or no help of the technique of treaty interpretation. The Appellate Body is becoming increasingly confident in its judicial function in the WTO. It is a development that can only be gradual and ultimately limited, especially in the context of a not fully developed institutional framework like the WTO. The assertion and exercise of inherent powers is illustrative of this maturing but equally self-enforces the Appellate Body's early decision to function as a court or tribunal. That decision was not inevitable, but perhaps its consequences were. In part, the evolution of procedural law in the WTO is the result from a dialectic relationship between consent-based powers and inherent powers. Increasingly, the consent of parties forces the Appellate Body on an *ad hoc* basis to source procedural powers from outside the DSU and look at the practice of other courts and tribunals and principles developed thereof. Occasionally, this has forced the Appellate Body to take a position on the scope of its powers, forming the basis for developing procedural principles that apply generally and not merely on an *ad hoc* basis.