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WTO Jurisprudence & Its Critiques: The Appellate Body's Anti-Constitutional Resistance

William Magnuson*

In a time of financial crisis and rising demand for economic protectionism, the World Trade Organization, promoting free trade and economic growth, has never been more important. Enforcement of the WTO's provisions has grown increasingly contentious and high-stakes, and the Appellate Body empowered to rule on violations of the treaty has received harsh criticism. Three elements of WTO jurisprudence, in particular, stand out. First, the court's excessive use of narrow textualist argument tends to lead to short-sighted decisions that give little guidance to member states. Second, the court's decisions have increasingly interfered with sensitive democratic processes in sovereign countries. Third, the opinions handed down by the court have led countries to adopt trade-restrictive, rather than trade-liberalizing measures. These criticisms of WTO jurisprudence present serious challenges to the very *raison d'être* of the WTO. This jurisprudence cannot be explained without reference to the AB's history as an institution awkwardly positioned somewhere between the realm of diplomacy and law. This Article will argue that the WTO's jurisprudence can be usefully understood as a kind of resistance to constitutionalization in international trade law. The narrow textualism of the AB was intended to reduce the amount of contestation and politics at the WTO, but, paradoxically, the AB's resistance to constitutionalization has actually created the very controversy and division that it seeks to avoid.

I. INTRODUCTION

The recent and ongoing financial crisis has illustrated just how central international trade is to today's globalized world. Unwise home lending practices in

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the United States have led to a worldwide slowdown, from North America to Europe to Asia. As economies struggle to grow, states have turned more and more to economic nationalism in response to citizens' demands for protection. Economists denounce economic protectionism, but it continues to attract proponents from a wide array of domestic groups. At the same time, states are bound by international rules governing the structure of international trade and preventing the most egregious forms of economic protectionism, namely through the World Trade Organization (WTO). These rules in effect limit the ability of states to adopt trade-restrictive practices.

A major debate about the WTO, and international law in general, has focused on the question of enforcement powers. The WTO's enforcement powers rest in the Dispute Settlement Body (DSB), which allows for aggrieved states to bring their complaints before a Panel. The Panel has authority to address complaints that a state has violated the WTO's provisions, and losing parties may appeal the decision to the Appellate Body (AB).

Criticism of the DSB has been vociferous and broad-based. Many of these criticisms have dealt with the powers and competences of the body. This paper, however, will focus on three of the major criticisms of the actual jurisprudence of the body. First, the court's excessive use of narrow textualist argument tends to lead to short-sighted decisions that give little guidance. Second, the court's decisions have increasingly interfered with sensitive democratic processes in sovereign countries. Third, the opinions handed down by the court have led countries to adopt trade-restrictive, rather than trade-liberalizing, measures. Examples abound, but a particularly exemplary case is *Australia – Salmon*, a 1998 AB decision.

In *Australia – Salmon*, the AB held that Australia's prohibition of the importation of raw salmon violated its treaty obligations. Australia had implemented the ban due to worries about certain pathogens contained in the salmon. Canada complained that if Australia were truly worried about those pathogens, it would also have banned the importation of other foods that presented the same kinds of risks. After the decision, Australia decided to broaden the ban to include a wide array of other products, rather than to liberalize the importation of salmon.

In *Australia – Salmon*, then, the AB's narrow textual reading of treaty provisions led to a decision that interfered with sensitive domestic decisions about the level of risk that a society was willing to accept. These issues cut to the very heart of concepts of sovereignty. Additionally, the opinion did not force the violating country to adopt trade-liberalizing policies. Instead, the losing party decided to maintain or increase trade-restrictive policies, the very thing the WTO was created to prevent.

What explains these problematic characteristics of WTO jurisprudence? Why has the DSB chosen to adopt the approach it has? How can states accept the AB's sweeping claims to power over such sensitive domestic issues? And why do states permit losing parties to respond by raising barriers to trade rather than lowering them? Each of these questions presents serious challenges to the very *raison d'être* of the WTO. It is important to ask them because they call into question the effectiveness, legitimacy and purpose of the WTO.

Any attempt to explain the workings of the WTO today must begin with the history of the General Agreement on Tariffs and Trade (GATT), the WTO's predecessor. Nations founded the GATT with the expectation it would be a temporary organization. After World War II, the major powers sought a way to rebuild the economic order, and the US proposed an International Trade Organization (ITO) to oversee this system. However, because negotiations over the ITO would take time, the US negotiated the GATT as a temporary organization to structure trade talks. The GATT focused on lowering tariffs on imported goods, but had only a skeletal institutional architecture. All decisions required unanimous consent, and most provisions were aimed at allowing parties to come to mutually acceptable agreements. The opinions of the DSB could be blocked by a single state, including the losing party in the dispute.

At the time, this structure worked well. It was meant to be a temporary way to facilitate open trade between states. The consensus among economists and political scientists was that free trade would increase prosperity, create links of interdependence, and generally dissuade states from considering launching another war. No one thought that the GATT would last for much longer than it took to reach agreement on the broader ITO. But talks over the ITO broke down, and the GATT became the predominant forum for states to negotiate multilateral free trade agreements.

When the GATT became the WTO in 1995, however, things changed. The new agreement committed states to wide-ranging trade liberalization policies, including in important domestic areas such as trade in services and health and safety measures. The newly-created DSB also received decidedly strengthened powers: its decisions were treated as binding unless countries (including the winning party) unanimously voted to reject them.

The radical changes imposed upon the WTO did not result in a concomitant adjustment in the AB's jurisprudence, however. It continued to rely on narrow textual readings of the treaties. In essence, it remained a diplomatic mediator of disputes, rather than a court empowered to pronounce on the merits of a case. To some extent, this made sense. The AB wanted to ensure its enduring role in the WTO, and any shift in jurisprudential approach might have been seen as a power grab. It needed to keep its constituents happy and maintain its legitimacy. At the same time, though, the increased scope of the WTO's *acquis* meant that even "conservative" opinions could have drastic effects on the internal politics of member states. In addition, the new world of internal (as opposed to external) barriers to trade made it easy for states to adopt trade restrictive policies in response to an adverse ruling at the WTO. Indeed, states intended to give the DSB its new powers precisely to increase the "bite" of WTO provisions and prevent such backsliding by states. The tensions between the new content of the WTO and the old style of the AB were, and are, evident.

To some extent, the issues facing the AB are endemic to courts in general. After all, most courts face huge legitimacy issues when they are faced with decisions that some believe belong in the political realm or that have a counter-majoritarian element to them. These issues are only exacerbated within the AB, which does not have the advantage of operating in a single nation, and thus has an even more

attenuated democratic pedigree. In this setting, one might say that almost any AB decision would be open to criticism. This article does not dispute this claim, but rather intends to identify the root causes of the most problematic aspects of WTO jurisprudence and the perhaps unforeseen consequences of the AB's decisions.

The AB's jurisprudence, in the end, reflects one of the most fundamental debates in international trade scholarship: whether the WTO is a constitutional polity. Scholars have articulated at least three models of WTO constitutionalism: constitution as institutional architecture, constitution as normative commitment, and constitution as judicial mediation. Jeffrey Dunoff has suggested that all of these models are analytically deficient and that, in fact, they stem from anxieties about the status of international law in the world today. The AB's jurisprudence itself demonstrates the same debate about the status and role of the DSB and the WTO in general.

WTO jurisprudence, then, can be usefully understood as a kind of resistance to constitutionalization in international trade law. The narrow textualism of the AB was intended to reduce the amount of contestation and politics at the WTO. But paradoxically, the AB's resistance to constitutionalization has actually created the very controversy and division that it seeks to avoid.

This paper will proceed in five parts. Part II will describe the major critiques of WTO jurisprudence. It will highlight the AB's textualism, its interference in democracy, and its trade-restrictive consequences. Part III will focus on one of the most important cases in recent years, *Australia – Salmon*. It will conclude that *Australia – Salmon* is a case that demonstrates the full extent of the paradoxes inherent in WTO jurisprudence. Part IV will discuss the history of the WTO and the AB. It will argue that the AB's awkward position somewhere between diplomacy and law has contributed to the distortion of its case law. Part V will place WTO jurisprudence within the larger context of the debate about constitutionalism in international trade law. It will conclude that the AB's jurisprudence represents a kind of resistance to constitutionalization, but that this resistance has given rise to the politics and controversy that it was intended to prevent.

II. ASPECTS OF WTO JURISPRUDENCE

A. Textualism Run Amok

One of the most striking characteristics of WTO jurisprudence is its excessive use of narrow textualist interpretations of trade law. Even the most casual perusal of a decision by the AB (the WTO's highest court)¹ will uncover an at-first

¹ The WTO does not have the structure of a traditionally organized government. The highest authority resides in the Ministerial Conference, which consists of all the member states. It meets at least once every two years and makes the most important decisions about trade talks. Below the Ministerial Conference stands the General Council, which operates the DSB, responsible for resolving disputes between member states. World Trade Organization, "Understanding the WTO: The Organization," available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm (last visited May 11,

disorienting array of references to dictionaries, alternate meanings, and definitions. Some would argue that this is precisely the mandate of the AB: to find the exact meaning of treaty terms and apply them narrowly to the facts of the case at issue.² After all, doing anything more than interpreting the text would be judicial activism, unacceptable in an international organization governed by treaty. But a growing number of scholars have argued that the rigid textualism practiced by the AB is counterproductive, in the sense that it conceals the rationales and methodologies that underlie decisions and provides little guidance for member states in formulating trade policies.³ These scholars argue that the AB's refusal to articulate the more holistic approach to treaty interpretation that any court must engage in does serious harm to the AB's reputation and legitimacy.⁴ Nevertheless, all sides agree that the AB has clearly adopted narrow textualism as its presiding methodology of treaty interpretation.

Before discussing the AB's textualist jurisprudence, it would perhaps be appropriate to specify the bounds of the argument. This paper understands textualism as the view that judges should settle disputes by looking at the original meaning of treaty provisions. More importantly, textualists argue that the original meaning of treaty provisions must be determined by looking closely at the text.⁵ Textualist

2010). Under the terms of the Uruguay Round Agreement, a complaining party may request the formation of a panel to determine whether another member state has violated the treaty. The panel examines the matter and writes a report setting out its opinion on the dispute. If one party disagrees with the panel's conclusion, it may appeal the decision to the AB. The AB has authority to affirm, reverse or modify the panel's legal findings and conclusions. Both panel and AB decisions must be adopted by the Dispute Settlement Body to have legal force, but decisions are adopted according to the reverse consensus rule: unless there is a consensus of member states to not adopt a decision, the decision will be adopted. Thus, the winning party must also consent to not adopt a decision. Jeffrey L. Dunoff, *Does the U.S. Support International Tribunals? The Case of the Multilateral Trade System*, in *THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS* 322, 345 (Cesare Romano ed., 2009).

² See Claus-Dieter Ehlermann, *Six Years on the Bench of the World Trade Court*, in *THE WTO DISPUTE SETTLEMENT SYSTEM 1995-2003*, at 509 (Federico Ortino & Ernst-Ulrich Petersmann eds., 2004).

³ See, e.g., Henrik Horn & Joseph H. H. Weiler, *European Communities – Trade Description of Sardines: Textualism and its Discontent*, in *THE WTO CASE LAW OF 2002: THE AMERICAN LAW INSTITUTE REPORTERS' STUDIES* (Henrik Horn & Petros C. Mavroidis eds., 2005); Federico Ortino, *Treaty Interpretation and the WTO AB Report in US – Gambling: A Critique*, 9 *J. INT'L ECON. L.* 117 (2006); Daniel Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-dumping Decisions*, 34 *LAW & POL'Y INT'L BUS.* 109, 124 (2002).

⁴ *Id.* at 163-65.

⁵ For examples of textualist interpretation in the United States, see ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990); Akhil Reed Amar, *The Supreme Court: 1999 Term, Foreword: The Document and the Doctrine*, 114 *HARV. L. REV.* 26 (2000); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *YALE L.J.* 541 (1994). For a critical view of textualism and the U.S. Constitution, see William Michael Treanor, *Taking Text Too Seriously*:

proponents therefore focus their arguments on questions of grammar, word placement, and dictionary definitions. Textualism stands in contrast to broader, more holistic approaches to interpretation such as structuralism and developmentalism, which take into account the underlying purpose that animates the document.⁶ This purpose may be the promotion of certain values (such as equality, fairness and justice) or certain processes (such as democratic decision-making or separation of powers).⁷ In any case, textualism elevates the language of the document above its animating spirit.

The discussion should also be prefaced with a caveat. Criticism of a methodology should not be equated with criticism of a result. A textualist approach will often lead to a conclusion that is similar or identical to the conclusion that would be reached using a structuralist or developmentalist approach. The important point here is that textualism reaches this result in a different way. It arrives at its endpoint by focusing almost exclusively on the text of the treaty, rather than by the drafter's intent or the purpose of the treaty as a whole. The methodology of WTO jurisprudence is significant, because the methodology chosen will have a considerable effect on a decision's capacity to give guidance and structure decision-making in the future.

To proceed with the analysis of WTO jurisprudence, then, there is almost universal agreement among scholars that AB opinions are typified by narrow textualism, by a focus on the words and structure of treaty provisions. The full extent of the AB's textualist approach may best be illustrated by a close reading of AB case law. One particularly useful case is *EC – Sardines*,⁸ which involved a dispute between Peru and the European Community (EC) over the labeling of sardines. A 1989 EC regulation provided that only fish of the species *sardina pilchardus* could be labeled and marketed as "sardines." Peru, however, exported other kinds of fish, and in particular *sardinops sagax*, which it desired to label as "sardines." Peru sued the EC in the WTO, claiming that the EC regulation violated the terms of the Technical Barriers to Trade Agreement (TBT). Peru pointed to a non-binding international standard, the *Codex Alimentarius*, which would allow *sardinops sagax* and other fish to be labeled as sardines, as support for its argument. The AB agreed with Peru, holding that the EC

Modern Textualism, Original Meaning and the Case of Amar's Bill of Rights, 106 MICH. L. REV. 487 (2007).

⁶ Stephen Breyer is perhaps America's most prominent structuralist. He argues that the constitution should be interpreted so as to encourage popular participation in governmental decisions. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005). Former Chief Justice Earl Warren was long the most forceful advocate of developmentalism, arguing that the constitution should be interpreted in light of "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁷ See JOHN H. GARVEY & T. ALEXANDER ALEINIKOFF, *MODERN CONSTITUTIONAL THEORY: A READER* 91–101 (1999).

⁸ Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R (Sept. 26, 2002).

had indeed violated the TBT by failing to use relevant international standards as a basis for its regulation.⁹

While the substance of the dispute was quite technical, involving the proper designation of several genera of fish, the consequences of the decision were momentous. For the first time, the AB had held that a technical regulation adopted by a member state was invalid because it was not in conformity with an explicitly non-binding international standard. The AB was, in effect, giving more binding force to an international standard than that international standard itself purported to possess. The EC had claimed that this standard should not bind them because the Codex Alimentarius was not adopted by consensus, but the AB rejected this argument, stating that even non-consensual agreements were relevant international standards. The decision was a profoundly important development in international law.

But did the AB acknowledge the radical move it was making in the case? No. Instead, it focused its opinion on self-evident interpretations of treaty text and dictionary definitions. So, one of the first questions that the AB addressed was the proper definition of a technical regulation. The text of the TBT stated that a technical regulation was a “[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory.” The AB “interpreted” this provision to mean that the document must (1) apply to an identifiable product, (2) lay down characteristics of the product and (3) make compliance with the product characteristics mandatory.¹⁰ The most casual glance at the “interpretation” here by the AB will reveal that it bears a striking resemblance to the actual text itself. Indeed, it would be hard to say that the AB’s interpretation was an interpretation at all, rather than a regurgitation of the text of the treaty. The AB’s restatement does not provide any further guidance to member states about the actual meaning of the text.

Another important section of the AB’s decision dealt with the question of whether the EC had used the Codex Alimentarius as a basis for its regulation. The EC claimed that it had used the standard as a basis for its regulation, arguing that “as a basis” should be interpreted according to the basic structure of the text as a whole.¹¹ The AB settled the matter by referring to the definition of “basis” in a variety of dictionaries. First, the AB pointed out that Webster’s dictionary defines “basis” as “the principal constituent of anything, the fundamental principle or theory, as of a

⁹ Article 2.4 of the TBT states:

Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

Agreement on Technical Barriers to Trade art. 2.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) (hereinafter TBT Agreement).

¹⁰ Id. ¶ 176.

¹¹ Id. ¶ 241.

system of knowledge.”¹² Second, the AB stated that the New Shorter Oxford English Dictionary provided further support by defining “basis” as “the main constituent” and “[a] thing on which anything is constructed and by which its constitution or operation is determined.”¹³ Finally, the AB stated, “From these various definitions, we would highlight the similar terms ‘principal constituent’, ‘fundamental principle’, ‘main constituent’, and ‘determining principle’—all of which lend credence to the conclusion that there must be a very strong and very close relationship between two things in order to be able to say that one is ‘the basis for’ the other.”¹⁴ The AB concluded this discussion by holding that the EC had not used the Codex Alimentarius as a basis for its regulation.¹⁵

These reasoned arguments were essential parts of the AB’s conclusion that domestic technical regulations must be consistent with even non-binding international standards in order to satisfy the requirements of the WTO treaty. This profound shift in the binding power of international law was arrived at through narrow textualist reasoning.

A few characteristics of the particular WTO version of textualism stand out. The AB begins with the text, “interprets” it by restating the text, and then uses this interpretation to make a conclusion that was the very subject of dispute. Dictionary definitions of seemingly obvious terms are used to arrive at controversial holdings. The logic seems strained, as the AB jumps from self-evident statement to self-evident statement, arriving finally at hugely consequential and controversial conclusions.

This is textualism run amok. Critics of WTO jurisprudence have highlighted the failure of the AB to recognize the array of interests that are at issue and the potential consequences for the system as a whole.¹⁶ They explain this failure by reference to the AB’s concern for its legitimacy and its belief that close textual interpretation bestows greater authority on AB opinions.¹⁷ In other words, the AB has decided to refrain from more expansive explanations of its driving theory of interpretation because it fears that to do so would represent an overstepping of its limited mandate, that of resolving member state disputes.

But a number of questions arise from this explanation. First, does textualism provide the AB with more legitimacy? It is far from clear that obscuring the foundational assumptions in an opinion gives the opinion more persuasive pull. Second, does textualism do a better job at discovering the original meaning of treaty provisions? Textualists often assume that close readings reliably capture original meaning, but it might be that a more holistic analysis of the text would better realize the intent of the contracting parties.¹⁸ Finally, does the AB have other reasons for using a textualist approach? It might be that the AB has certain incentives to use a

¹² Id. ¶ 243 (quoting WEBSTER’S NEW WORLD DICTIONARY 117 (1976)).

¹³ Id. ¶ 244 (quoting 1 NEW SHORTER OXFORD ENGLISH DICTIONARY 188 (1993)).

¹⁴ Id. ¶ 245.

¹⁵ Id. ¶ 258.

¹⁶ Horn & Weiler, *supra* note 3; Ortino, *supra* note 3.

¹⁷ Horn & Weiler, *supra* note 3, at 6; Ortino, *supra* note 3, at 129.

¹⁸ See Treanor, *supra* note 5, at 490.

textual rather than structural or development approach, incentives that inhere in the nature of the WTO and international law in general. Could the AB be resisting the drive to “constitutionalize” international law?¹⁹

In order to answer these questions, it is necessary to look at other aspects of WTO jurisprudence of recent years. In particular, it will be useful to examine the extent to which WTO decisions interfere with sensitive democratic processes within the domestic sphere of member states.

B. Domestic Processes

A second line of criticism of WTO jurisprudence focuses on the interaction between WTO disciplines and democracy.²⁰ As the GATT has grown to include treaties governing trade in services and health and safety measures, many scholars have argued that AB decisions increasingly interfere with sensitive democratic processes in sovereign countries.²¹ In this line of argument, the WTO’s jurisprudence has tended to remove decision-making power from democratic majorities within countries in issue areas that cut to the very heart of the idea of sovereignty. By restricting a country’s ability to determine the level of health or safety risk that it finds desirable, the AB’s opinions constrain popular will.

There are at least two responses to this criticism of WTO jurisprudence. The first is to argue that AB opinions, by governing the process and methods by which

¹⁹ For a discussion of constitutionalization in international law, see Jeffrey L. Dunoff, *Constitutional Concepts: The WTO’s “Constitution” and the Discipline of International Law*, 17 *EUR. J. INT’L L.* 647 (2006); DEBORAH Z. CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION* (2005); Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?*, 16 *GOVERNANCE* 73 (2003); John H. Jackson, *The Perils of Globalization and the World Trading System*, 24 *FORDHAM INT’L L. J.* 371 (2000); JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* (1998); John H. Jackson, *The WTO “Constitution” and Proposed Reform: Seven “Mantras” Revisited*, 4 *J. INT’L ECON. L.* 67 (2001); Ernst-Ulrich Petersmann, *Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 *EUR. J. INT’L L.* 621 (2002); Ernst-Ulrich Petersmann, *The WTO Constitution and the Millennium Round*, in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON* 111 (Marco Bronckers & Reinhard Quick eds., 2000).

²⁰ CLAUDE E. BARFIELD, *FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION* (2001); CASS, *supra* note 19; BRADLY J. CONDON, *ENVIRONMENTAL SOVEREIGNTY AND THE WTO: TRADE SANCTIONS AND INTERNATIONAL LAW* (2006); Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO’s Treatment of Trade and Environment Matters*, 25 *HARV. ENVTL. L. REV.* 1 (2001); Robert Howse, *Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization*, 98 *MICH. L. REV.* 2329 (2000).

²¹ See Vern R. Walker, *Keeping the WTO from Becoming the “World Trans-Science Organization”*: *Scientific Uncertainty, Science Policy, and Factfinding in the Growth Hormones Dispute*, 31 *CORNELL INT’L L.J.* 251 (1998); David A. Wirth, *The Role of Science in the Uruguay Round and NAFTA Trade Disciplines*, 27 *CORNELL INT’L L.J.* 817 (1994).

health and safety measures may be adopted, improve, rather than defeat, democracy. In other words, WTO disciplines should be “understood not as usurping legitimate democratic choices for stricter regulations, but as enhancing the quality of rational democratic deliberation about risk and its control.”²² If WTO opinions improve the quality of information and participation, then they may actually contribute to democratic decision-making and not undermine it.²³

A second response to the democracy critique of WTO jurisprudence is that constraining democracy is precisely the purpose of the WTO. The founding purpose of the WTO was to liberalize trade. It accomplished this purpose by setting ground rules for international trade, for example by categorizing duties, setting tariff limits, and structuring trade talks. These rules would be undermined if democratic majorities within member states could decide to “cheat” on their commitments. Seen in this light, AB opinions constraining democratic decision-making in sensitive issue areas are a positive development, one allowing the WTO to fulfill its founding purpose.

But wherever one stands on this issue, it is clear that real concerns exist about the effect of WTO jurisprudence on democratic sovereignty. In recent years, AB opinions have reached farther and farther into the state, interfering with executive and legislative lawmaking. These moves have been controversial and have elicited signs of disapproval from many parties. Again, case law may prove to be the best way to bring to light the nature of AB jurisprudence in this area.

Japan – Apples is one of the more controversial cases of recent years concerning a government’s health and safety measures.²⁴ Japan – Apples involved a dispute between the United States and Japan over a ban on the importation of certain apples from the United States.²⁵ Japan justified this prohibition as a measure to prevent the introduction of fire blight, a disease that attacked a wide variety of fruits.²⁶ The United States, on the other hand, argued that the measure was an unjustified

²² Howse, *supra* note 20, at 2330.

²³ See Ernst-Ulrich Petersmann, Trade Policy as a Constitutional Problem. On the ‘Domestic Policy Functions’ of International Trade Rules, in 1 *THE WORLD TRADING SYSTEM: CRITICAL PERSPECTIVES ON THE WORLD ECONOMY* 121-51 (Robert Howse ed., 1998).

²⁴ Appellate Body Report, Japan – Measures Affecting the Importation of Apples, WT/DS245/AB/R, (Nov. 26, 2003) [hereinafter Japan – Apples].

²⁵ According to the United States, Japan’s prohibition included nine measures to prevent fire blight, including a prohibition of imported apples from orchards where fire blight had been detected, a requirement that export orchards be inspected three times yearly for fire blight, and prohibition of imports from any orchard that was located within 500 meters of another orchard in which fire blight had been detected. *Id.* ¶ 14 n.36.

²⁶ The AB in Japan – Apples gives a useful description of the disease:

Fruits infected by fire blight exude bacterial ooze, or inoculum, which is transmitted primarily through wind and/or rain and by insects or birds to open flowers on the same or new host plants. *E. amylovora* bacteria multiply externally on the stigmas of these open flowers and enter the plant by various openings. In addition to apple fruit, hosts of fire blight include pears, quince, and loquats, as well as several garden plants. Scientific evidence establishes, as the Panel found, that the risk of introduction and spread of fire blight varies considerably according to the host plant.

Id. ¶ 8.

quota that violated WTO provisions, and in particular the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). The SPS Agreement provided that health measures must be based on scientific principles and sufficient scientific evidence, and that they could only be applied to the extent necessary to protect plant life.²⁷ The AB concluded that Japan's measures lacked sufficient scientific evidence and therefore were impermissible under the SPS Agreement. The AB explained that the measure was "clearly disproportionate to the risk identified on the basis of the scientific evidence available."²⁸

Thus, the AB in Japan – Apples examined a health and safety measure implemented by a member state and struck it down on the basis that the scientific evidence was insufficient to support it. This opinion represented another extremely important shift in WTO jurisprudence. Traditionally, the WTO was understood to be an organization whose purpose was to promote liberalized trade by prohibiting discriminatory trade restrictions. Much of WTO jurisprudence focused on identifying measures that discriminated against foreign products. As one noted commentator has described it,

the underlying objective and rationale of Article III [concerning equal treatment for domestic and foreign products] [is] [s]eparating those State measures which are genuinely instituted to protect against risk to human, animals and plants from those which, by design or otherwise, are there to protect domestic production and cannot be justified in full or in part on legitimate SPS grounds.²⁹

In other words, WTO jurisprudence aimed mainly at distinguishing between protectionist measures, on the one hand, and genuine policy decisions, on the other.³⁰

But in Japan – Apples, neither side argued that Japan's measure was either intentionally or de facto discriminatory against foreign products. On its face, this case did not involve the kind of protectionist sentiments that the WTO had traditionally considered its mandate. Instead, Japan – Apples involved a measure that Japan had enacted to prevent the contamination of plants with fire blight, a destructive disease. The United States argued not that the measure was intended to discriminate against foreign products, but that the measure lacked a sufficient scientific basis. The AB, then, was called upon to determine whether Japan's restrictions were justified by the scientific evidence. This was a tremendously important holding: states could violate

²⁷ Agreement on the Application of Sanitary or Phytosanitary Measures art. 5.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex A(3)(a), Legal Instruments – Results of the Uruguay Round 33 I.L.M. 1125, 1381 [hereinafter SPS Agreement].

²⁸ Japan – Apples, *supra* note 24, ¶ 163, citing Panel Report, Japan – Measures Affecting the Importation of Apples, WT/DS245/R (July 15, 2003).

²⁹ Damien J. Neven & J.H.H. Weiler, One Bad Apple?: A Comment on "Japan – Measures Affecting the Importation of Apples – AB-2003-4," in *THE WTO CASE LAW OF 2003: THE AMERICAN LAW INSTITUTE REPORTERS' STUDIES* (Henrik Horn & Petros C. Mavroidis eds., 2006).

³⁰ See JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND 202* (2d ed. 1999).

the WTO Agreement even when their measures had no discriminatory purpose. As long as the measure lacked sufficient scientific justifications, it could be struck down.

Some might argue that assessing scientific evidence is outside the competence of the AB.³¹ Others would defend that the text of the SPS Agreement requires some sort of involvement by the AB.³² Both sides would agree, though, that the AB in Japan – Apples and other cases has gone further and further down the road to making policy judgments about the wisdom of national laws. In order to determine whether Japan had violated its WTO commitments, the AB looked at the effectiveness of its measures at preventing the risk of fire blight.

It is important to remember that the AB has insisted that members retain full autonomy to set their own level of acceptable risk.³³ It is perfectly acceptable for a state to decide that it wants a lower threat of food-borne disease than other states accept.³⁴ At the same time, the SPS Agreement makes clear that member states must have sufficient scientific evidence to justify their restrictions.³⁵ Read together, these requirements establish that member states may decide what level of risk they are willing to accept, but once they set this level, they are required to choose measures that are necessary to achieve the desired risk level. In other words, there must be some sort of rational relationship between the desired risk level and the safety measures adopted.

³¹ *Id.* at 22–26.

³² *Id.* at 10–22.

³³ See, e.g., Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, ¶ 125, WT/DS18/AB/R (Oct. 20, 1998), [hereinafter *Australia – Salmon*]; Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *Beef Hormone Report*].

³⁴ *Id.*

³⁵ SPS Agreement, *supra* note 27. The relevant provisions are Articles 2.2, 5.1 and 5.7. Article 2.2 states:

Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.

Article 5.7 states:

In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

Article 5.1 states:

Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organizations.

At times, though, the AB has struggled to distinguish between a state's desired risk level and its measures chosen to enforce that level. In *Japan – Apples*, the AB agreed with the Panel that Japan's measures were inappropriate. According to the AB, the risk of transmission of fire blight through a particular pathway was "unlikely."³⁶ The AB does not, however, ever address what particular risk Japan had decided to accept. Instead, the AB appears to have adopted the Panel's approach of assessing for itself what kind of measures were appropriate.

Issues of health and safety cut to the very heart of modern ideas of sovereignty. Democratic communities take very seriously their judgments about how best to protect the physical well-being of their citizens. The WTO's jurisprudence, however, has increasingly constrained the ability of governments to exercise their discretion in this sensitive area. By assessing the adequacy of the connection between a desired risk level and the measures adopted to achieve this level, the AB has come closer and closer to a jurisprudence that looks something like policy judgment. What is perhaps more worrying is the AB's tendency to blur the line between assessing that rational relationship with assessing the appropriateness of the risk level itself. As the AB strengthens its scrutiny of state decisions about acceptable risk levels, it prevents democracies from responding to the legitimate fears and concerns of its citizens.³⁷

To the extent that this narrowing of democratic choice reduces the ability of governments to adopt protectionist measures in response to domestic pressure, it may be seen as a positive development. After all, the SPS Agreement's primary purpose was to allow measures genuinely aimed at protecting citizens from health risks while banning measures adopted to protect domestic over foreign production.³⁸ At the same time, the critique that WTO jurisprudence somehow interferes with sensitive domestic processes is a potent one. The democracy critique finds widespread support in both the scholarly literature³⁹ and public opinion.⁴⁰ Again, though, critics and proponents alike acknowledge that the AB has increasingly addressed issues that reduce the ability of democratic governments to make sensitive policy decisions about the welfare of citizens.

The democracy critique of WTO jurisprudence has been a long-running debate in the literature. Another similarly controversial critique has focused on compliance with AB decisions. In particular, the compliance critique argues that the

³⁶ *Japan – Apples*, supra note 24, ¶ 77.

³⁷ See Tim Büthe, *The Globalization of Health and Safety Standards: Delegation of Regulatory Authority in the SPS Agreement of the 1994 Agreement Establishing the World Trade Organization*, 71 *LAW & CONTEMP. PROBS.* 219 (2008).

³⁸ See Neven & Weiler, supra note 29.

³⁹ See supra note 20. See also Bruce Silverglade, *The WTO Agreement on Sanitary and Phytosanitary Measures: Weakening Food Safety Regulations to Facilitate Trade?*, 55 *FOOD & DRUG L.J.* 517 (2000).

⁴⁰ Public protests at WTO have become a regular occurrence. At the 2003 WTO summit in Cancun, a South Korean citizen protesting against free trade committed suicide by stabbing himself on top of a police barricade. His final words were, "WTO kills farmers." The event received major press coverage. See Sang-Hun Choe, *Suicide Highlights Korean Farm Problems*, Associated Press, Sept. 22, 2003.

AB's decisions often lead to perverse results, by encouraging rather than reducing protectionist measures. The next section will address this contentious issue.

C. Varieties of Compliance

If the basic purpose of the WTO is to liberalize trade by restricting the imposition of trade barriers, one might expect that the WTO's judicial organ would develop a jurisprudence that encouraged trade-liberalizing measures. The AB, one might plausibly predict, would want to accomplish this purpose by declaring trade-restrictive measures incompatible with the WTO treaty and ordering their removal. These predictions, however, could not be farther from reality. In fact, the AB's opinions frequently lead to the introduction of more, rather than less, trade-restrictive measures in the violating country.⁴¹ The AB's decisions encourage the erection of trade barriers by imposing upon countries a choice in how to comply with an opinion: either to remove the offending measure or to raise other measures to an equal level. The structure of domestic politics tends to lead states to choose the more restrictive measure as the solution.

Compliance levels with WTO DSB decisions are exceptionally high when compared with other international tribunals.⁴² Losing parties comply with WTO opinions an estimated 95% of the time.⁴³ This compared with a 61.9% compliance rate at the International Court of Justice⁴⁴ and a 5% compliance rate at the Inter-American Court of Human Rights.⁴⁵ Scholars often equate compliance rate with the success of a tribunal.⁴⁶ But in the case of the WTO court, it is important to note the type of compliance that the AB demands.

In most cases, the AB recommends the losing party to "bring its measure . . . into conformity with its obligations" under the WTO Agreement.⁴⁷ While this may

⁴¹ See, e.g., *Australia – Salmon*, supra note 33 (after which Australia expanded its restrictions on the importation of fish); *Beef Hormone Report*, supra note 33 (after which the EC continued to have restrictions on the importation of beef injected with hormones); Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (Dec. 3, 2007) [hereinafter *Brazil – Tyres*] (which instructed Brazil that it was discriminatory to permit the importation of some tires but not others).

⁴² See Judith L. Goldstein & Richard H. Steinberg, *Negotiate or Litigate? Effects of WTO Judicial Delegation on U.S. Trade Politics*, 71 *LAW & CONTEMP. PROBS.* 257, 275 (2008); Laurence R. Helfer, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 *CAL. L. REV.* 899 (2005); William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 *J. INT'L ECON. L.* 17, 50 (2005). But see Donald McRae, *Measuring the Effectiveness of the WTO Dispute Settlement System*, 3 *ASIAN J. WTO & INT'L HEALTH L. & POL'Y* 1 (2008); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 *CALIF. L. REV.* 1, 27 (2005).

⁴³ See Goldstein & Steinberg, supra note 42, at 275.

⁴⁴ See Posner & Yoo, supra note 42, at 37.

⁴⁵ *Id.* at 41.

⁴⁶ *Id.*

⁴⁷ See, e.g., *Brazil – Tyres*, supra note 41, ¶ 259.

appear to be a firm order to the losing party, it actually gives member states considerable flexibility in how to implement the AB's recommendations. Take, for example, the case of Brazil – Tyres.⁴⁸ In this case, Brazil had banned the importation of retreaded tires, a kind of recycled tire that had a shorter useful life than newly made tires. Brazil justified the ban as necessary to protect its citizens from the threat of disease, since discarded tires tended to accumulate and become breeding grounds for disease.⁴⁹ The EC sued Brazil at the WTO, alleging that the ban on tires was not necessary to protect human life and health. They pointed to the fact that Brazil was allowing the importation of retreaded tires from Mercosur states, but not other states. The AB held that the ban, although provisionally justified as necessary to prevent the risk of disease, violated the requirement that health and safety measures not unjustifiably discriminate between countries.

Brazil, then, was faced with a stark choice. The AB's opinion indicated that the ban on importation of tires was improper because it arbitrarily discriminated against some countries. In order to comply with the decision, Brazil could take two tacks. First, it could remove the ban on importation of retreaded tires, thereby treating Mercosur and non-Mercosur countries equally. Second, it could ban the importation of retreaded tires from Mercosur countries as well as non-Mercosur countries. Either option was perfectly acceptable under the AB's formulation of Brazil's obligations under the treaty. In Brazil's case, its membership in Mercosur required it to continue to allow in retreaded tires from Mercosur members. But nothing in the AB's opinion prevented Brazil from raising restrictions on trade.

This is not an isolated problem. In general, the AB has opted to take a permissive approach to its concluding recommendations. For the most part, it requires states to bring their measures into compliance with the treaty, but allows states great flexibility in how they do this. When cases involve “unjustifiable discrimination” between states, the offending nation has a choice to either raise or lower the barriers to trade. In some cases, states decide to raise those barriers.⁵⁰ In other cases, they decide to lower them. But in either case, the AB's opinion plays a limited role in affecting this ultimate decision.

This aspect of WTO jurisprudence is troubling if viewed from the perspective of the aims and purposes of the organization as a whole. The WTO is a system that is devoted to reducing barriers to trade. The DSB is the organ with competence to enforce the terms of the treaty. But if the AB's decisions allow states to increase, rather than decrease, barriers to trade, it would appear to threaten the effectiveness of the system as a whole. Indeed, some AB decisions appear to do just this, giving member states the option of implementing further protective measures in order to reduce discrimination between states.

The alternative, of course, is for the AB to take a more directive approach to its rulings. Instead of giving states a choice between raising or lowering barriers to trade, the AB might instruct a member state to remove the offending measure. This

⁴⁸ *Id.*

⁴⁹ *Id.* ¶ 56.

⁵⁰ See discussion *infra* Part III.

would ensure that the underlying purposes of the WTO treaty were accomplished by directing the state to lower its barriers to trade.

On the other hand, when the AB has taken such a directive approach, it has sometimes faced criticism.⁵¹ Some argue that the AB only has the authority explicitly given to it in Article 19 of the Dispute Settlement Understanding (DSU), which provides that “where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.”⁵² According to this line of thought, the AB can only recommend that a member state bring its measure into conformity with the agreement and cannot go further and recommend that the member state remove the trade-restrictive measure.

But both the text and objective of the WTO treaty do not appear to prohibit the AB from engaging in the kind of directive rulings that they have shied away from in the past. Article 19 of the DSU provides that “[i]n addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.”⁵³ This language would suggest that the AB may do more than just recommend that a member state bring its measure into conformity with the treaty. It suggests that the AB has the power to issue more specific recommendations about how the member state is to do so. This interpretation is supported by basic principles of treaty interpretation. The Vienna Convention on the Law of Treaties states that treaties shall be interpreted in accordance with “the ordinary meaning” of the terms in light of the treaty’s “object and purpose.”⁵⁴ Given the WTO’s primary purpose of liberalizing trade, the claim that the AB has the power to issue rulings that recommend the removal of an offending measure finds some grounding in the applicable law.

This discussion has highlighted how the AB’s jurisprudence has paved the way for member states to raise barriers to trade rather than lower them. By giving states flexibility in deciding how to implement its recommendations, the AB has opened the door to a raft of new protectionist measures. This problematic jurisprudence has been a source of strife in recent years. Part of the problem inheres in the nature of internal barriers to trade: if the treaty is attempting to do away with discriminatory internal measures, then the discrimination may be gotten rid of by lowering the protectionist measure or raising the liberal measure. But part of the

⁵¹ The AB’s decision in *US – Anti-Dumping Act* faced particular criticism. In that case, the AB came close to requiring that the US remove the offending measure. The AB was accused of setting a troubling precedent. Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28, 2000). See Jeffrey S. Beckington, *The World Trade Organization’s Dispute Settlement Resolution in United States – Anti-Dumping Act of 1916*, 34 *VAND. J. TRANSNAT’L L.* 199 (2001).

⁵² See *Understanding on Rules and Procedures Governing the Settlement of Disputes* art. 19, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Texts – Results of the Uruguay Round, 33 *I.L.M.* 1125 (1994) [hereinafter DSU].

⁵³ *Id.*

⁵⁴ Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 *U.N.T.S.* 331, 8 *I.L.M.* 679 (entered into force Jan. 27, 1980).

problem stems from a conscious decision of the AB to refrain from giving authoritative rulings about how a member state is to bring its measure into conformity with the agreement. The above analysis shows that this decision is not explicitly required by either the terms or objective of the treaty. Rather, it is a jurisprudential choice.

The ultimate resolution of the choice is not an easy one. Difficult questions arise for judges and scholars faced with the problem of how to fashion judicial orders. First, it is not clear that states did not foresee this trade-restricting effect of AB decisions when they were negotiating the Uruguay Round. It is at least possible that the only way the Uruguay Round could succeed was to allow for the possibility that states might continue problematic actions but require that they pay a price for clear contraventions of the WTO agreements.⁵⁵ If states truly did intend to impose this troubled jurisprudence on the AB, then there is a strong argument that the AB should continue to use a flexible approach to recommendations. Second, and perhaps more importantly, it is an unsettled question how much judges should consider the consequences of their holdings before making a decision. That is, some commentators argue that judges should not shift how they decide because of how they imagine parties to the decision will act in response to the decision.⁵⁶ To do so would be unacceptable judicial activism. These are difficult problems that courts must deal with, but this article argues that they must be dealt with directly and forthrightly given their profound consequences for the WTO regime.

At this point, then, it may be useful to give a concrete example of a case in which all of the three major critiques of WTO jurisprudence are evident. Examples abound, but a particularly apt case stems from a dispute over the importation of salmon.

III. AUSTRALIA – SALMON AND WTO JURISPRUDENCE

Australia – Salmon is a case that exemplifies the three critiques of WTO jurisprudence. The AB in the case adopted an extremely narrow, textual approach to the dispute. Its analysis interfered with democratic processes involving sensitive domestic issues. The final opinion also opened the door to an increase in trade restrictive practices in the losing state, a door that the losing state promptly chose. The case, therefore, shines a light on WTO jurisprudence that would be impossible to replicate by looking at the aspects of AB law in isolation.

⁵⁵ For a discussion of the difficulties of ratifying the Uruguay Round, see John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 *COLUM. J. TRANSNAT'L L.* 157 (1997).

⁵⁶ William N. Eskridge, Jr., & Philip P. Frickey, *An Historical and Critical Introduction to the Legal Process*, in HENRY M. HART, JR., & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* lxxix-lxxx (William N. Eskridge, Jr., & Philip P. Frickey eds., 1994).

A. Background

Australia's waters teem with one of the most diverse populations of fish to be found in the world today. Its geographical isolation from other countries, its long coastline, and the incredible range of habitat types have all contributed to creating a truly unique marine fauna.⁵⁷ The Coral Triangle, located off the coast of Australia, has been described as having "the greatest marine biological diversity on the planet" and is home to seventy five percent of the world's known coral species and more than 3,000 species of fish.⁵⁸ The gross value of Australian fisheries production between 2006 and 2007 was a staggering \$2.18 billion.⁵⁹ The importance of the fishing industry in Australia has led to strong concerns within the country about maintaining the health and safety of fish species. In response to these concerns, in 1975 Australia implemented a prohibition on the import of fresh, chilled or frozen salmon.⁶⁰ The Quarantine and Inspection Service justified the prohibition as necessary to prevent the introduction of exotic diseases with the potential to damage the domestic salmon industry.⁶¹

Just like Australia, Canada has a large and important fishing industry. Exports of fish and seafood products amounted to more than \$3.6 billion in 2009.⁶² Important exports include lobster, crabs, shrimp, herring, and, most relevantly, Atlantic salmon.⁶³ Salmon exports from British Columbia alone totaled \$330.9

⁵⁷ Gillett, Preston and Associates, Inc., Food and Agriculture Organization of the United Nations [FAO], *The Sustainable Contribution of Fisheries to Food Security in the Oceania*, available at <http://www.fao.org/docrep/003/x6956e/x6956e09.htm> (last visited Apr. 19, 2010).

⁵⁸ Office of the Hon Peter Garrett MP (Austl.), *Media Release: Minister and Northern Neighbors in Solomon Islands to Advance Ocean Protection*, Nov. 18, 2009, available at <http://www.environment.gov.au/minister/garrett/2009/mr20091118.html> (last visited May 11, 2010).

⁵⁹ Australian Bureau of Agricultural and Resource Economics, *Australian Fisheries Statistics 2007 (June 2008)*, available at http://www.abareconomics.com/interactive/08afs_june/ (last visited Apr. 19, 2010).

⁶⁰ Quarantine Proclamation 86A (Feb. 19, 1975), reprinted in Panel Report, *Australia – Measures Affecting Importation of Salmon*, ¶ 2.14, WT/DS18/R (June 12, 1998) [hereinafter *Australia – Salmon Panel Report*]:

[Prohibiting] the importation into Australia of dead fish of the sub-order Salmonidae, or any parts (other than semen or ova) of fish of that sub-order, in any form unless . . . prior to importation into Australia the fish or parts of fish have been subject to such treatment as in the opinion of the Director of Quarantine is likely to prevent the introduction of any infectious or contagious disease, or disease or pest affecting persons, animals or plants.

⁶¹ See NATHALIE BERNASCONI-OSTERWALDER ET AL., *ENVIRONMENT AND TRADE: A GUIDE TO WTO JURISPRUDENCE* 279 (2006).

⁶² Fisheries and Oceans Canada, *News Release: Minister Shea Celebrates Strong Exports of Canadian Fish and Seafood Products*, Mar. 15, 2010, available at <http://www.dfo-mpo.gc.ca/media/npress-communique/2010/hq-ac10-eng.htm> (last visited May 11, 2010).

⁶³ *Id.*

million in 2009.⁶⁴ Canada has a long history of fiercely defending its fishing industry. In the so-called “Fish War” of 1978, after a breakdown of negotiations over fishing boundaries, Canada threatened to seize U.S. fishing vessels and their catches, and potentially prosecute U.S. fishermen, if the fishermen did not leave Canada’s fishing zone immediately.⁶⁵ So, when Australia enacted its import ban on salmon, threatening an important export market for Canadian salmon producers, Canada did not take the measure lightly. Canadian authorities protested the ban vociferously and began unofficial negotiations with Australia to solve the problem.⁶⁶ After nearly twenty years of unsuccessful negotiations, in 1994, Canada finally requested consultations with Australia under the auspices of the GATT.⁶⁷

The GATT consultations ended in an agreement that Australia would conduct an import risk analysis on the dangers of importing wild Pacific salmon.⁶⁸ The first draft of this report, released in May of 1995, concluded that importation of salmon could be safely permitted under certain circumstances.⁶⁹ The draft report, thus, recommended that the importation of salmon from Canada and the United States be permitted.⁷⁰ This recommendation, however, met with fierce opposition among the Australian public.⁷¹ In particular, Tasmanian fishermen protested that the importation of North American salmon could be harmful to the domestic fish industry.⁷²

By the time the final import risk analysis was issued in 1996, Australian authorities had reversed themselves. The final report identified up to 20 diseases that might spread to Australia by the importation of Pacific salmon.⁷³ Although the risk that the diseases would be introduced to Australia was low, the economic impact of such an occurrence would be immense, the report stated.⁷⁴ The diseases would be ineradicable and would threaten the very viability of the fishing industry.⁷⁵ Given these risks, the report concluded that the import ban on salmon should remain in

⁶⁴ Fisheries and Oceans Canada, *Background: Provincial and Territorial Breakdown of Canada’s Fish and Seafood Exports in 2009*, Mar. 2010, available at <http://www.dfo-mpo.gc.ca/media/back-fiche/2010/hq-ac10a-eng.htm> (last visited May 11, 2010).

⁶⁵ See Geoffrey Stevens, *Don’t Laugh at the Cod War: A Fine Kettle of Fish--And Complex, Too*, *THE GLOBE & MAIL* (Can.), June 6, 1978.

⁶⁶ See Office of the Minister for International Trade (Austl.), *Government Seeks Input on Possible Retaliation Against Australia* (May 28, 1999), cited by Matthew D. Taylor, *The WTO Panel Decision on Australia’s Salmon Import Guidelines: Evidence that the SPS Agreement Can Effectively Protect Human Health Interests*, 9 *PAC. RIM L. & POL’Y J.* 473, 481 (2000); Bryan Mercurio, *The Australian Contribution to the Jurisprudence of the WTO Dispute Settlement Process*, 12 *Currents Int’l Trade L.J.* 42, 45 (2003).

⁶⁷ See *Australia – Salmon Panel Report*, supra note 60, ¶ 2.27; Taylor, supra note 66, at 481.

⁶⁸ See *Australia – Salmon Panel Report*, supra note 60, ¶ 2.27.

⁶⁹ See *Cherry Ripe, Green at the Gills*, *WEEKEND AUSTRALIAN* (Austl.), May 13, 1995.

⁷⁰ See *Australia – Salmon Panel Report*, supra note 60, ¶ 2.28.

⁷¹ See Brian Toohey, *Howard Has Bigger Fish to Fry*, *SUN HERALD* (Sydney, Austl.), Sept. 8, 1996.

⁷² *Id.*

⁷³ See *Australia – Salmon Panel Report*, supra note 60, ¶ 2.30.

⁷⁴ *Id.*

⁷⁵ *Id.*

force.⁷⁶ Some commentators suggested that this sudden reversal was motivated by political considerations.⁷⁷

Unsatisfied, Canada requested the formation of a WTO dispute settlement panel to review Australia's import ban on salmon in 1997. Canada alleged that the import ban violated the SPS Agreement because it was not based on a risk assessment.⁷⁸ Article 5.1 of the SPS Agreement, it will be remembered, requires member states to "ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health. . . ."⁷⁹ Australia countered that its IRA was an appropriate risk assessment for the purposes of the SPS Agreement and that the ban was necessary to protect its diverse fisheries from exotic disease.⁸⁰ Canada, in return, argued that its salmon products for human consumption were not associated with the spread of salmon diseases.⁸¹

The Panel's report upheld the majority of the provisions of Australia's import ban. It found that Australia's Import Risk Assessment was a proper risk assessment.⁸² Furthermore, the guidelines for salmon, as compared to those for other fish, were not found to be disguised restrictions on trade.⁸³ Canada, again unsatisfied with the result, appealed the decision to the WTO's AB.

B. AB Decision

On appeal, the AB reversed much of the Panel's opinion, concluding that Australia's import ban was impermissible under the terms of the SPS Agreement.⁸⁴ In essence, the AB concluded that, because Australia allowed the import of other fish that carried the same pathogens, the import ban on salmon was arbitrary or unjustifiable. In other words, Australia imposed more severe trade restrictions on products that posed a lower threat of the risk that Australia was purportedly worried about. The decision rested on narrow textual analysis of the SPS Agreement, with little consideration for the broader consequences of the decision.

The AB began its analysis by interpreting the SPS Agreement's definition of "risk assessment."⁸⁵ The text of the agreement defines risk assessment as "[t]he evaluation of the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member according to the sanitary or phytosanitary measures which might be applied, and of the associated potential

⁷⁶ *Id.*

⁷⁷ See, e.g., Toohey, *supra* note 71.

⁷⁸ See *id.* ¶ 1.3.

⁷⁹ SPS Agreement, *supra* note 27, at art. 5.1.

⁸⁰ See *Australia – Salmon Panel Report*, *supra* note 60, ¶¶ 4.131-36.

⁸¹ *Id.* ¶¶ 4.67-70

⁸² *Id.* ¶ 7.71.

⁸³ *Id.* ¶¶ 7.102-03, 7.107, 7.154-57.

⁸⁴ *Australia – Salmon*, *supra* note 33.

⁸⁵ *Id.* ¶ 120.

biological and economic consequences. . . .”⁸⁶ The AB, in its typical fashion, “interpreted” the text to have an entirely self-evident meaning. According to the AB, therefore, a risk assessment must:

- (1) identify the diseases whose entry, establishment or spread a Member wants to prevent within its territory, as well as the potential biological and economic consequences associated with the entry, establishment or spread of these diseases;
- (2) evaluate the likelihood of entry, establishment or spread of these diseases, as well as the associated potential biological and economic consequences; and
- (3) evaluate the likelihood of entry, establishment or spread of these diseases according to the SPS measures which might be applied.⁸⁷

The AB’s interpretation of the definition provided no further guidance as to the potentially ambiguous meanings within the definition of risk assessment, but merely restated the text itself.

The AB then moved on to clarifying what the text means by “likelihood.” The AB analogized “likelihood” to “probability” and therefore cited a previous case that had referred to the dictionary meaning of probability as “degrees of likelihood” and “a thing that is judged likely to be true.”⁸⁸ Using this definition, the AB concluded that, in order for a risk assessment to satisfy the requirements of the SPS Agreement, “it is not sufficient that a risk assessment conclude that there is a possibility of entry, establishment or spread of diseases,” but “[a] proper risk assessment . . . must evaluate the ‘likelihood’, i.e., the ‘probability’, of entry, establishment or spread of diseases.”⁸⁹

Applying its newly fashioned rule to the facts of *Australia – Salmon*, the AB held that Australia’s risk assessment did not adequately evaluate the likelihood of entry of disease. According to the AB, Australia’s risk assessment “on occasions, results in general and vague statements of mere possibility of adverse effects occurring,” and this finding resulted in a violation of the requirements of Article 5.1 of the SPS Agreement.⁹⁰

The AB then went on to analyze whether Australia’s measure violated Article 5.5 of the SPS Agreement.⁹¹ Article 5.5 articulates the consistency principle of the SPS Agreement, which requires member states to apply health and safety measures

⁸⁶ *Id.*

⁸⁷ *Id.* ¶ 121.

⁸⁸ *Id.* ¶ 123, citing *Beef Hormone Report*, *supra* note 33.

⁸⁹ *Id.* ¶ 123.

⁹⁰ *Id.* ¶ 129.

⁹¹ Article 5.5 of the SPS Agreement, *supra* note 27, provides:

With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.

consistently across different areas. In other words, members must not use arbitrary or unjustifiable distinctions in application of their health and safety measures. The AB had previously set out a three-part test for determining whether a member had violated Article 5.5: (1) the member must have adopted different appropriate levels of risk in different situations, (2) those levels of protection must have arbitrary or unjustifiable differences, and (3) the measure must result in discrimination or a disguised restriction on international trade.⁹²

The AB, applying its three-part test, found that the risk of disease from salmon was actually lower than or equal to the risk from herring, cod, haddock and other fish.⁹³ Yet Australia did not impose a prohibition on the importation of these other kinds of fish. The distinctions in treatment, therefore, were arbitrary and unjustifiable.⁹⁴ The AB concluded that the measure resulted in discrimination or a disguised restriction on international trade, and thus that the measure violated Article 5.5 of the SPS Agreement.⁹⁵

In the final paragraph of the opinion, the AB recommended that the DSB request that Australia “bring its measure . . . into conformity with its obligations under [the] Agreement.”⁹⁶ The AB’s decision gave Australia some room to maneuver because it did not recommend how precisely Australia was to comply with the decision. Australia’s response would have severe repercussions for the entire WTO system.

C. Aftermath

The AB had found Australia’s salmon import prohibition lacking because it was not based on an adequate risk assessment and that it arbitrarily distinguished between different kinds of fish that presented similar levels of risk. Australia, thus, was faced with a choice. It could comply with the decision by lowering its restrictions on the import of salmon, or it could comply by raising its restrictions on other types of fish. In the end, it chose a combination of the two.

After a WTO arbitrator ordered Australia to modify its import ban, Australia quickly conducted another Import Risk Analysis.⁹⁷ This new risk analysis, completed in 1999, considered the risk that a wide variety of fish would introduce exotic diseases into Australian fisheries. Based on this new risk analysis, Australia issued revised import guidelines for salmon and many other types of fish.⁹⁸ The new guidelines

⁹² Australia – Salmon, *supra* note 33, ¶ 140, citing Beef Hormone Report, *supra* note 33.

⁹³ *Id.* ¶ 154.

⁹⁴ *Id.* ¶ 158.

⁹⁵ *Id.* ¶ 178.

⁹⁶ *Id.* ¶ 280.

⁹⁷ Australian Quarantine & Inspection Service, Import Risk Analysis on Live Ornamental Finfish, available at http://www.daff.gov.au/__data/assets/pdf_file/0018/16362/finalornamental.pdf (last visited May 11, 2010).

⁹⁸ Australian Quarantine & Inspection Service, Animal Quarantine Policy Memorandum 1999/51: Final Reports of Import Risk Analyses on Non-viable Salmonid Products, Non-viable Marine Finfish Products and Live Ornamental Finfish and Adoption of New Policies (July 19, 1999), available at

removed the ban on the import of salmon, but included a complex permit system before entry would be allowed. The guidelines also introduced certification and permit requirements for non-salmon fish.

In the end analysis, then, Australia complied with the AB's decision by slightly lowering its restrictions on the import of salmon and significantly raising its restrictions on the import of other types of fish. When Canada challenged this action at the WTO, a compliance panel upheld the regulatory measures. According to the Compliance Panel, the new risk assessment met the requirements of the SPS Agreement, and the import restrictions did not operate as a disguised restriction on international trade.⁹⁹ Therefore, Australia's import restrictions were WTO-compatible.

D. Discussion

As evident from the above description, Australia – Salmon is a case that highlights all of the major critiques of WTO jurisprudence. The AB interprets the SPS Agreement in a narrowly textual way that fails to give useful guidance to member states. Its opinion interfered with sensitive democratic issues in a domestic state. Finally, its decision opened the door to the imposition of new, higher trade restrictions in the importing country. Even the briefest of overviews will show just how significant these critiques are.

The AB in Australia – Salmon had to determine whether Australia's prohibition on the import of salmon was permitted under WTO disciplines. The AB framed the question as, first, whether Australia's risk assessment was consistent with the SPS Agreement and, second, whether the import ban was a disguised restriction on international trade. It concluded that Australia had failed both tests. There is nothing strange about this result. There are many reasons why Australia's measures might be lacking. If a risk assessment is supposed to fairly assess the risk of disease from a product, then one might say that Australia's risk assessment was biased or that it inaccurately put forward the relevant risks. If an import restriction must not be a disguised restriction on trade, then one might argue that Australia's measures were motivated by the protectionist desires of certain domestic groups. But what is peculiar about the AB's decision is that it reaches its conclusion without addressing any of these seemingly important questions.

Instead, the AB arrived at its conclusion using an extremely narrow, and at times mind-boggling, parsing of the agreement's text. It started with the definition of risk assessment in the SPS Agreement, which states that a risk assessment evaluates the likelihood of the entry of disease. It compared "likelihood" to "probability," and therefore cited a previous decision that defined probability by its dictionary definition of "degrees of likelihood." Purportedly having clarified the meaning of the text, the AB looked at Australia's recent risk assessment and concluded that, because the

http://www.daff.gov.au/__data/assets/pdf_file/0011/16022/99-051.pdf (last visited May 11, 2010).

⁹⁹ Article 21.5 Panel Report, Australia – Measures Affecting Importation of Salmon, ¶¶ 7.42, 7.58, 7.71, WT/DS18/RW (Feb. 18, 2000).

assessment “on occasions” used vague assertions about the possibilities of disease, the risk assessment did not meet the requirements of the SPS Agreement.

The AB’s analysis of whether Australia’s import ban on salmon was a disguised restraint on trade was similarly unhelpful. It began by looking at the text of the SPS Agreement, which provided that members must “avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade.”¹⁰⁰ It glossed over the many ambiguities inherent in the wording and focused on the fact that Australia put higher restrictions on salmon than other fish, when those other fish posed similar risks of introducing disease to Australian fisheries. This, the AB found, was evidence that Australia’s measure was arbitrary and unjustified, and, therefore, that it resulted in discrimination or a disguised restriction on international trade.

One understanding of the ruling might be that the AB effectively concluded, without saying so, that piecemeal efforts to combat health or safety risks were impermissible under the SPS Agreement. In other words, if a country desires to protect against a risk of disease, it must enact a comprehensive regulation of any factors that might introduce such a disease. A regulation that arbitrarily singles out only one element of the risk for special treatment would be unacceptable, in this view. Another understanding might be that the AB thought that Australia’s import ban was motivated by a desire to protect powerful domestic interests. Under this understanding, if a country’s regulations are motivated by protectionist impulses, those regulations must be struck down, even if they are neutral on their face. Either if these possible rulings would have profound repercussions for the entire WTO system. But the AB’s strictly textual analysis does not discuss any of the potential consequences of its interpretation, and it leaves member states unsure of how to proceed.

The AB’s ruling also interfered with sensitive democratic processes in a sovereign country. Australia adopted its import restrictions after concerned citizens became alarmed at the threat that imported salmon could pose to their domestic fisheries.¹⁰¹ Regional governments feared that the importation of Canadian fish could bring exotic diseases that would devastate the local populations of fish.¹⁰² Citizen groups and regional governments put pressure on the Australian government to prohibit the import of salmon in order to prevent serious harm to local species, and they were ultimately successful in this effort.¹⁰³

By overturning this result, the AB raised a highly important question about democracy and legitimacy. The ability to protect the health and safety of humans, animals, and plants stands at the very core of sovereign rights. While the removal of tariffs and quotas is often considered more trade-like and therefore legitimate for the WTO to engage in, the removal of health and safety measures strikes at one of the

¹⁰⁰ SPS Agreement, *supra* note 27, at art. 5.5.

¹⁰¹ J. McCallum, *Salmon Import Disease Alarm*, *HERALD SUN* (Melbourne, Austl.), July 7, 1995.

¹⁰² M.H. Moore, *Fish Import Move Not On*, *MERCURY* (Hobart, Austl.), May 27, 1995.

¹⁰³ *Id.*

most basic powers of a government, the protection of the security and well-being of its citizens. The point here is not that the AB improperly read the SPS Agreement. The SPS Agreement assuredly limits the ability of governments to adopt health and safety measures. What is significant about the decision is the strictness with which the AB scrutinized the scientific basis for these measures. The AB's decision to declare the measures invalid rested, not on a claim of discrimination or protectionist intent, but rather on a claim that the scientific basis for the measures was "insufficient." Such an overly invasive review is neither required by the SPS Agreement nor prudent, given that weighing scientific evidence is likely outside the AB's field of expertise. More importantly, this kind of searching analysis of democratic decisions interferes increasingly with domestic rights of states.

Finally, the AB's decision in *Australia – Salmon* led perversely to higher, not lower, trade restrictions in the violating state. The AB's holding focused on the fact that Australia had improperly discriminated between salmon and other kinds of fish that presented the same type of risks. In its recommendation, the AB stated that Australia should bring its measures into conformity with the agreement. The recommendation, however, had the potential of leading to further trade restrictions, as Australia could eliminate discrimination either by lowering restrictions on salmon or raising restrictions on other fish. Australia decided to do both.

This choice is paradoxical when seen from the point of view of the WTO's animating purpose. The GATT and the WTO were envisioned as world trade bodies that would improve individual welfare by reducing barriers to trade. But the AB's decisions in *Australia – Salmon* and other cases permit precisely the opposite result, that is, the raising of trade barriers. This paradox in WTO jurisprudence is in part inherent in all discrimination cases. After all, if the problem is disparate treatment, the solution is to treat different products alike. Generally, it presents member states with a choice of raising or lowering tariffs. Yet there is nothing in the WTO Agreement that obligates the AB to take such a hands-off approach to its recommendations. The AB could recommend that a member state remove the offending barrier. This would ensure that member states that violated WTO disciplines would be required to lower rather than raise trade barriers. But the AB has refused to engage in such a directive approach to its rulings. Instead, it has given member states wide leeway in fashioning methods to remedy past treaty violations.

IV. WTO HISTORY AS EXPLANATION

The above discussion has highlighted three major critiques of WTO jurisprudence. First, AB decisions have adopted a narrowly textual approach to interpreting and applying treaty provisions, an approach that has obscured the ability of past decisions to give guidance to member states. Second, AB decisions have increasingly interfered in sensitive democratic processes that cut to the very heart of ideas of sovereignty. Third, AB decisions have opened the door to the possibility of increasing trade restrictions by allowing member states to bring their measures into conformity with the treaty in any way possible. It is important to note that the argument is not that AB decisions have been wrong. Instead, the point is that these

controversial areas of WTO jurisprudence have been more or less voluntary choices of the AB. Nothing in the text of the agreement requires the AB to engage in the kind of decision-making highlighted above.

If these characteristics of WTO jurisprudence have been so controversial, why did the AB choose to take the path it chose? This section will argue that the AB's jurisprudence has sprung from the unique position of the WTO DSB. Occupying an awkward position in between diplomacy and law, the DSB has been torn between its duties to both. On the one hand, the AB has demonstrated that it is acutely aware that it was originally conceived as a means for states to settle disputes diplomatically and quickly, and that any overreaching by the court would imperil the very existence of the WTO. On the other hand, the AB has attempted to maintain its commitment to impartial interpretation and application of the law. To some extent, these two commitments of the AB have been complementary: an unbiased court that impartially interprets the terms of the treaty may be the best means for states to settle their disputes diplomatically. But the nature of WTO jurisprudence has clearly been distorted by a certain vision of law that stems from the hybrid nature of the WTO, in general, and the AB, in particular. WTO jurisprudence demonstrates a fierce resistance towards constitutionalization, as understood as the effort to remove or channel world trade politics.¹⁰⁴ In order to maintain its legitimacy in the eyes of member states, the AB has adopted a narrowly textual approach to treaty interpretation, an approach that may appear more palatable to member states. But as the above description of WTO jurisprudence makes clear, this textual approach has actually led to perverse and undesirable results. Thus, this section also argues that the AB has consciously chosen to avoid constitutionalization in order to increase its legitimacy as a hybrid diplomatic-legal institution, but that this effort ultimately has failed.

A. The WTO's Origins in GATT

In order to understand the development of WTO jurisprudence, a brief survey of the history of the WTO is necessary.¹⁰⁵ This history is one of a fragile organization (originally the GATT) birthed in the period after World War II, struggling to fulfill its ambitious goals with only a skeletal institutional infrastructure. It was only after many decades that it reached the point today where it is arguably the most successful international organization in the world.¹⁰⁶

After World War II, the major powers of the world came together to decide

¹⁰⁴ See *infra* Part V.

¹⁰⁵ For a more comprehensive history of the origins of the WTO in the GATT, see JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 31–43 (2d ed. 1997); DOUGLAS A. IRWIN ET AL., *THE GENESIS OF THE GATT* 98 (2008); KENNETH DAM, *THE GATT: LAW AND INTERNATIONAL TRADE ORGANIZATION* (1970).

¹⁰⁶ Guy de Jonquieres, *Poorer Countries are Likely to be the Biggest Losers from the Unexpected Breakdown in the Doha Round*, *FIN. TIMES*, Sept. 16, 2003, at 21.

on the future international system. This foundational period saw the formation of the United Nations, the World Bank, and the International Monetary Fund, all organizations whose purposes were intimately connected with world peace and economic prosperity. A fourth organization was also foreseen: the International Trade Organization (ITO).¹⁰⁷ The ITO was to improve economic welfare by liberalizing trade, in particular by reducing tariffs and other trade barriers.¹⁰⁸ The GATT was intended as a temporary agreement that would allow member states to implement the tariff reductions agreed upon during the ITO negotiations.¹⁰⁹ But when negotiations over the ITO fell apart, GATT, a provisional organization expected only to survive a few years, became a permanent post-war institution.

The essential problem arose from GATT's skeletal institutional infrastructure. GATT did not come equipped to become a powerhouse international organization that could structure and encourage widespread trade liberalization. Instead, it was a consensus-based organization that required unanimous support for any progress to be made. In particular, the dispute settlement system was weak and not particularly judicial. For example, GATT's unanimity requirement allowed a losing party to block the adoption of an adverse panel report, regardless of the views of other members, thereby avoiding an adverse judgment.¹¹⁰ This perplexing feature of GATT's dispute settlement body greatly diminished the dispute settlement panels' capacity to engage in the kind of searching judicial inquiry normally seen in domestic courts. After all, if a panel's decision was unacceptable to the losing party, the losing party could block its adoption.

In response to this perceived vulnerability, GATT panels developed a type of conservative interpretive approach aimed at reducing any risk of "judicial activism." Their narrow textualist jurisprudence attempted to adhere strictly to the text of the treaty. In doing so, panel members purported to eschew the imposition of individual biases or ideologies and rely entirely upon the agreement between the parties. This narrow textual jurisprudence is evident in all dispute settlement opinions during this period. The turn to textualism is unsurprising, given the weak and unformed nature of the GATT. Judges that exercise powers without explicit textual authority raise serious concerns for the legitimacy of the court in the eyes of the member states.¹¹¹ When even the GATT itself was struggling to establish its place in the world, the GATT panels occupied an especially precarious position.

¹⁰⁷ See The GATT years: from Havana to Marrakesh, *Understanding the WTO: Basics*, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited June 20, 2010).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ David Palmetier & Gregory J. Spak, *Resolving Antidumping and Countervailing Duty Disputes: Defining GATT's Role in an Era of Increasing Conflict*, 24 *LAW & POL'Y INT'L BUS.* 1145, 1146 (1993).

¹¹¹ See Cesare Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 *NYU J. INT'L L. & POL.* 791, 800 (2007); Caroline Henckels, *Overcoming Jurisdictional Isolationism at the WTO-FTA Nexus: A Potential Approach for the WTO*, 19 *EUR. J. INT'L L.* 571, 596 (2008).

Over time, though, the GATT gained power and legitimacy as world trade expanded and tariffs fell in the post-world war period. As tariffs and quotas fell, countries began to look for other means to protect domestic industries from competition, and internal barriers to trade (such as health and safety measures, and regulatory standards) became more prevalent. These new barriers to trade brought into stark relief all the weaknesses of the GATT system, and, in 1995, GATT's members created the WTO. The WTO had a more fleshed out institutional structure, which included the removal of the requirement of consensus decision-making that had hobbled the GATT. It also incorporated a range of agreements aimed at regulating the proliferating international barriers to trade that threatened trade liberalization efforts. These agreements included the Sanitary and Phytosanitary Measures Agreement¹¹² – which regulated health and safety measures – and the Technical Barriers to Trade Agreement¹¹³ – which governed domestic regulations, standards and certification procedures. With the conclusion of the WTO Agreement, then, GATT became an entirely different organization with significantly more power and legitimacy in the eyes of its members.¹¹⁴

With the expansion of the WTO's powers, the AB was called upon to assume a greater role than its GATT predecessor in resolving disputes in an ever-growing number of issue areas. At the same time, the AB's jurisprudential approach remained as textual and strict constructionist as before. The AB's decisions reflected the same sort of narrow-minded devotion to the text of the treaty that had typified the GATT era. The AB continued to avoid articulating a wider, more holistic understanding of the treaty, its structure and its purposes.

The strict textualist jurisprudence of the AB had perhaps unexpected consequences in the new era of the WTO. The expanding array of WTO disciplines complicated previously straightforward conflicts. When disputes had involved solely tariff issues, the AB simply needed to determine whether a tariff existed and whether it violated the member state's commitments. A recommendation that the losing party "bring [a] measure into conformity with [the] agreement"¹¹⁵ led to a single conclusion: the party must remove the tariff. But in the new regime of the WTO, the agreement's text required much more of the parties. The SPS Agreement restricted the ability of states to adopt health and safety measures and set out the scientific conditions that would permit such measures. The treaty also provided for a much more robust discrimination norm, that is, that member states must have consistent treatment of comparable products.

The combination of the AB's textualism and the expanded powers of the WTO resulted in the AB's taking a much more active role than the GATT panels had in previous years. The text of the SPS Agreement says that member states must base

¹¹² SPS Agreement, *supra* note 27.

¹¹³ TBT Agreement, *supra* note 9.

¹¹⁴ See Howse & Nicolaidis, *Enhancing WTO Legitimacy*, *supra* note 19; Jo Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the International and External Legitimacy of WTO Dispute Settlement*, 35 *J. WORLD TRADE* 191, 201 (2001).

¹¹⁵ DSU, *supra* note 52, at art. 19.

health and safety measures on a risk assessment that meets certain scientific standards. A domestic court might take a more conservative approach to the problem of judicial review by adopting a doctrine of deference to the legislature. Or it might decide to adopt a strict scrutiny test, setting out the precise conditions under which a legislature's regulation will pass muster under the law. But the AB's narrow textualism has taken these jurisprudential standards off the table. Because the treaty does not talk about deference or strict scrutiny, the AB has refused to adopt any such doctrines.¹¹⁶ Instead, the AB reads the language of the treaty to require it to determine, in the first instance, whether the scientific evidence is sufficient to support a trade restriction. One might think that the AB is the entity with the least ability to determine the adequacy of scientific evidence, but the AB has read the text in a strict way that requires such a conclusion.

Likewise, the AB's reading of its mandate has limited its ability to fulfill its primary purpose: ensuring the proper functioning of the trade liberalization regime. Article 19 of the Dispute Settlement Understanding states that "where a panel or the AB concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement."¹¹⁷ When the GATT regulated mainly tariffs and quotas, a panel's order that a member bring its measures into conformity with the agreement had a predictable result: the lowering of trade restrictions. But in a WTO that has much more complicated disciplines, the same vague and open-ended ruling can lead to paradoxical results. As seen in the *Australia – Salmon* case, "bringing a measure into conformity" can just as easily mean raising a trade barrier as lowering a trade barrier. A more fully developed jurisprudence that would recognize the AB's role as an integral part of the system might lead to different results.

The AB's retreat to formalism as a mechanism for legitimacy has ironically exacerbated the tensions that it originally sought to avoid. The AB cannot avoid the politics and its approach seems at times disingenuous. The retreat to formalism appears even more hypocritical when one considers that AB members are often chosen not for their legal acumen, but for political reasons.¹¹⁸ At the same time, it is perhaps unsurprising that the AB has adopted a strict textualist approach. The approach attempts to hew closely to the precise terms of the WTO Agreement. On the surface, it would also give the appearance of not engaging in politics, thereby making the decisions more palatable to important member countries. Finally, strict

¹¹⁶ Some scholars have argued that the WTO treaty does establish a doctrine of deference to member states' reasonable interpretations of treaty interpretations. See Roger Alford, *The WTO Appellate Body and International Judicial Deference*, OPINIO JURIS (Aug. 28, 2006), available at <http://opiniojuris.org/2006/08/28/the-wto-appellate-body-and-international-judicial-deference/> (last visited Apr. 19, 2010).

¹¹⁷ DSU, *supra* note 52, at art. 19.

¹¹⁸ AB members must be "individuals with recognized standing in the field of law and international trade, not affiliated with any government." World Trade Organization, Information and Media Relations Division, *Understanding the WTO* 61 (3d ed. 2005), available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_text_e.pdf (last visited Apr. 19, 2010). In practice, this requirement has been interpreted loosely.

textualism could conceivably accommodate the varying legal traditions of the WTO member countries more easily than a more open-ended judicial process would. After all, it may be easier for AB members to agree on dictionary definitions than on concepts requiring inference and politics.

This brief overview of the creation of the GATT and its transformation into the WTO is not meant to give a comprehensive understanding of the AB's role throughout the history of the organization. Hopefully, however, it does give a better explanation of how the WTO's steadily increasing importance and power has shifted and distorted the AB's jurisprudence. A textualist approach meant to recognize the WTO's awkward position somewhere between diplomacy and law has led to progressively more activist and controversial opinions. The next section will attempt to place this jurisprudence in the context of the larger debate about the constitutionalization of the WTO.

V. CONSTITUTIONALIZATION IN INTERNATIONAL TRADE LAW

One of the fiercest debates in international trade scholarship in recent years has raged over the so-called "constitution" of the WTO.¹¹⁹ Some debate its characteristics,¹²⁰ while others dispute its very existence.¹²¹ The debate has received such attention because it has profound implications for the ongoing legitimacy and strength of the WTO. The discussion takes place within the broader context of a move towards constitutionalization of international law in general; for example, in regimes like the European Court of Human Rights and the International Court of Justice.

Jeffrey Dunoff, a prominent international trade scholar, has identified three strands running through the different conceptions of WTO constitutionalism.¹²² These conceptions differ in the way they view the purpose and function of the WTO constitution, but they share one key characteristic: they all assert that the WTO should be properly understood as a constitutional entity. They tend to agree that this constitutionalization serves to remove or channel the role of politics in world trade.¹²³

One school of thought sees the WTO's constitution as "institutional architecture."¹²⁴ Typified by the works of John Jackson, this strand of scholarship focuses on the institutional design of the WTO.¹²⁵ Jackson argues that the purpose of

¹¹⁹ See Dunoff, *supra* note 19; Ernst-Ulrich Petersmann, *Judging Judges: From 'Principal-Agent Theory' to 'Constitutional Justice' in Multilevel 'Judicial Governance' of Economic Cooperation Among Citizens*, 11 J. INT'L ECON. L. 827 (2008); Joel P. Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT'L L. 3 (2006).

¹²⁰ See CASS, *supra* note 19; JACKSON, *supra* note 19; Petersmann, *supra* note 19.

¹²¹ See Dunoff, *supra* note 19.

¹²² See *id.* at 651-56 (discussing the three strands of constitutionalism).

¹²³ *Id.*

¹²⁴ See *id.* at 651-53.

¹²⁵ See JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION CONSTITUTION AND JURISPRUDENCE* (1998); John H. Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 L. & POL. INT'L BUS. 21 (1980); JACKSON, *WTO "CONSTITUTION" AND*

the WTO is “to give measured scope for legitimate national policy goals while preventing the use of these goals to promote particular interests at the expense of the greater common welfare.”¹²⁶ In order to achieve this goal, “[w]hat is needed is an institution” because “[i]n the long run, it may well be the machinery that is most important . . . rather than the existence of any one or another specific rule of trade conduct.”¹²⁷ Jackson argues that the WTO can only provide the security and predictability necessary for efficient markets if it adopts a constitutional rule-oriented approach, as opposed to a power-oriented one.¹²⁸

Another prominent strand of scholarship understands constitutionalism as a set of normative commitments.¹²⁹ Ernst-Ulrich Petersmann, one of the most important proponents of this view, thus argues that the WTO’s constitution protects a core of fundamental normative values, including the rule of law, separation of powers, and individual freedom.¹³⁰ By recognizing and protecting these values, the constitution prevents them from being overridden by “tyrannies of the majority.” This limitation may actually increase the democratic nature of the organization. As Petersmann puts it, “[t]he self-limitation of our freedom of action by rules and the self-imposition of institutional constraints . . . are rational responses designed to protect us against future risks of our own passions and imperfect rationality.”¹³¹

Finally, another line of scholarship understands constitutionalism in international trade law to mean the mediating and norm-generating nature of WTO dispute settlement.¹³² Deborah Cass, an exemplar of this approach, argues that the AB “is the dynamic force behind constitution-building by virtue of its capacity to generate constitutional norms and structures during dispute resolution.”¹³³ Cass sees in the jurisprudence of the AB a concern with the same kinds of issues that constitutional courts face: “questions about the division of powers; . . . [of] state sovereignty . . .

PROPOSED REFORM, *supra* note 19. JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION CONSTITUTION AND JURISPRUDENCE* (1998); John H. Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 L. & POL. INT’L BUS. 21 (1980); JACKSON, *WTO “CONSTITUTION” AND PROPOSED REFORM*, *supra* note 19.

¹²⁶ JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT 788* (1969), cited by Dunoff, *supra* note 19, at 652 n.14.

¹²⁷ *Id.*

¹²⁸ See JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM 52* (1990), cited by Dunoff, *supra* note 19, at 625 n.17.

¹²⁹ See Dunoff, *supra* note 19, at 653-54.

¹³⁰ See Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 *Nw. J. Int’l L. & Bus.* 398, 431 (1996); Ernst-Ulrich Petersmann, *How to Reform the UN System: Constitutionalism, International law, and International Organizations*, 10 *Leiden J. Int’l L.* 421, 427 (1997).

¹³¹ Ernst-Ulrich Petersmann, *How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?*, 20 *MICH. J. INT’L L.* 1, 1 (1998), cited by Dunoff, *supra* note 19, at 653 n.20.

¹³² See Dunoff, *supra* note 19, at 655-56.

¹³³ Deborah Z. Cass, *The “Constitutionalization” of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 *EUR. J. INT’L L.* 39, 42 (2001), cited by Dunoff, *supra* note 19, at 655 n.29. See also CASS, *supra* note 19.

[questions] about how a legal system is constituted, its overall validity, its democratic contours, its very legitimacy.”¹³⁴ In reaching decisions about these matters, the AB “is beginning to develop a set of rules and principles which share some of the characteristics of constitutional law; and . . . this in turn is what contributes to the constitutionalization of international trade law.”¹³⁵

These three views of constitutionalism at the WTO share the essential conclusion that the WTO is properly understood as a constitutional entity. At the same time, they differ dramatically in the way they view the structure and purpose of the WTO’s constitution. Jackson’s approach highlights the institutional design of the WTO’s constitution and posits that the constitution serves to efficiently resolve disputes between states. Petersmann’s conception of constitutionalism understands the constitution as a set of normative commitments to values such as individual freedom and the rule of law. Cass’s approach focuses on the role of the judiciary in gradually constructing a package of constitutional norms through dispute resolution.

But the turn to constitutional analogies in analyzing the WTO has not been met with universal approval. Jeffrey Dunoff, in particular, has criticized the scholarly emphasis on constitutionalization in the WTO.¹³⁶ Dunoff argues that the conception of the WTO as a constitutional polity is bereft of any factual support: “There is no constitutional court, no constitutional convention, no constitutional drafting process, and no readily identifiable constitutional moment.”¹³⁷ Instead, the turn to constitutionalism in the scholarly literature is an attempt to withdraw “controversial and potentially destabilizing issues from the parry and thrust of ordinary politics.”¹³⁸ This attempt is ultimately unsuccessful, Dunoff suggests, because the elevation of trade law into the realm of constitutions sparks, rather than resolves, contestation and controversy in world politics.¹³⁹

Precisely the same sort of dynamic is present in the jurisprudence of the AB. The WTO’s court has been concerned with its legitimacy in the eyes of the member states from the very beginnings of the GATT. Occupying an awkward position at the intersection of diplomacy and law, the AB has had to navigate a difficult route between establishing a reputation for expert, impartial dispute resolution and satisfying the underlying interests of states. This paper argues that the WTO’s jurisprudence can be usefully explained as a product of this tension. The turn to narrow, textualist interpretations of treaty law is an effort to resist the potentially divisive constitutionalism movement. But, in a paradoxical reversal of Dunoff’s argument, the resistance of constitutionalism in the WTO has sparked precisely the kinds of controversy and contestation that the AB sought to prevent. The dogged pursuit of narrow textualism at the expense of underlying legal principles has led to increasingly contentious assertions of judicial power. Due to the progressively more

¹³⁴ *Id.* at 72, cited by Dunoff, *supra* note 19, at 655-56 n.34.

¹³⁵ *Id.* at 52, cited by Dunoff, *supra* note 19, at 655 n.33.

¹³⁶ See Dunoff, *supra* note 19, at 4.

¹³⁷ *Id.* at 4.

¹³⁸ *Id.* at 2.

¹³⁹ *Id.*

complex and comprehensive nature of WTO disciplines, “conservative” AB opinions have actually interfered with sensitive democratic processes involving the health and safety of states’ citizens. At the same time, the AB has opened the door to rising restrictions to trade by adopting flexible, rather than directive, rulings.

This article assumes that the fierce criticism of AB decisions is not disingenuous. At least some commentators, however, have argued that the controversy surrounding WTO AB decisions is in reality rather contrived.¹⁴⁰ According to this view, the WTO serves as a kind of whipping boy for contentious political decisions. States that do not want to confront powerful interest groups bring suit at the WTO in order to appear to be vigorously pursuing all avenues of redress. Even if the state knows that a case is a loser, it will pursue it in order to gain political cover. One potential example of this is the United States Trade Representative and the Kodak – Fuji case,¹⁴¹ which was initiated at the behest of the powerful Kodak Company in the United States even though it appeared to be a losing case.¹⁴² Whatever the merits of this argument, though, there still appear to be many commentators who have criticized the AB’s jurisprudence for all the reasons outlined above. To dismiss these critiques as merely hot air is to ignore their very real causes and consequences.

Thus, the WTO’s jurisprudence may best be understood as a resistance to constitutionalization within an international organization. The AB has developed an interpretative approach that hews closely to the text of the treaty with little reference to its context or structure, in conscious repudiation of constitutional understandings of the treaty. This approach may be criticized for its tautologies or its lack of circumspection, but it was forged in response to the necessities of international law. The WTO was purportedly a legal entity, but it faced all the constraints of operating in a world still dominated by power politics. In the GATT era, this deferential approach to decision-making worked well, allowing for diplomatic resolution of disputes. But with the creation of the WTO and the concomitant expansion of the AB’s mandate, the AB’s jurisprudence increasingly exacerbated the contestation and controversy that it had so long sought to avoid.

VI. CONCLUSION

What does this mean for the AB, and the WTO more generally? Modern trade dispute resolution was created inside an organization, the GATT, that faced severe limitations due to its so-called “birth defects.” In order to overcome the problems presented by diplomacy and law, GATT panels developed a jurisprudence that relied almost entirely on a strict textualist analysis. This approach may have served it well during the pre-WTO period, but when the WTO came into existence in

¹⁴⁰ See Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT’L L.J. 333, 351 (1999).

¹⁴¹ Japan – Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R (Mar. 31, 1998).

¹⁴² John Linarelli, *The Role of Dispute Settlement in World Trade Law: Some Lessons from the Kodak-Fuji Dispute*, 31 LAW & POL’Y INT’L BUS. 263 (2000).

1995, the AB's continuation of its predecessor's approach formed new problems. The textual jurisprudence began to reach increasingly problematic results, including an invasive scrutiny of democratic policies and a tendency to open to the door to the erection of trade barriers. While the AB's treaty interpretation was initially intended to reduce contestation and politics in world trade, its resistance to constitutionalization actually created the kind of controversy that it had sought to avoid. The criticism of AB jurisprudence has raised profound questions about the continued relevance and legitimacy of the WTO as a whole.

Thus, the AB stands at a crossroad. It may continue its work as "business as usual," using narrow textualism and dictionary definitions to reach its results. Or it may strike out a new path, recognizing the legal doctrines and ideologies that underlie its decisions. This choice will not be easy, but it must nonetheless be made openly and honestly.

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