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Twenty years of the WTO Appellate Body's 'fragmentation jurisprudence'

The World Trade Organisation's new dispute settlement machinery was one of a number of new international courts and tribunals established during the long decade between the end of the Cold War and the beginning of the new millennium. For international lawyers – long accustomed to life on the margins – the proliferation of new and vibrant specialised regimes of international law was both energising and anxiety producing. At the heart of the anxiety, as Koskenniemi and Leino have described,¹ was a concern about the incoherence of international law, famously leading at the end of the 1990s to a debate amongst international lawyers about the dangers of the growing normative incoherence of the system. What would happen when two international tribunals sought to apply inconsistent rules to the same dispute? Could one tribunal legitimately consider rules of law which fell outside its specialised mandate, so as to reduce the chance of conflict? Given its position as one of the most significant, and certainly the most active, of this new generation of international tribunals, the WTO's Appellate Body has been closely scrutinised for the approach it has taken in cases which appear to raise questions about the relationship between WTO law and so-called 'non-WTO law', and a range of views have emerged within WTO scholarship about what the appropriate role that the WTO should play in this respect.

This contribution reflects on the first 20 years of the Appellate Body's jurisprudence, specifically as it relates to questions of normative fragmentation. The first section provides an overview of some of the highlights of the WTO's jurisprudence in this regard, focussing in particular on the often-discussed issue of the use which has been made of general public international law in the context of WTO dispute settlement. The second section then suggests that the primary driver of the Appellate Body's approach so far has not been the institutional myopia and normative closure of which they are sometimes accused, but rather a judicial sensibility which valorises the virtues of modesty, caution and self-restraint. In the third section, I offer a related argument, having to do with the causes of fragmentation. It is typically said that the problem of fragmentation arises from the specialised mandates of many international legal regimes, and the lack of institutionalised coordination between them. I note, however, that in fact the mandates, boundaries and specialisms of these regimes are not fixed in advance, but are in part the product of ongoing boundary work – and that the 'fragmentation' jurisprudence of the Appellate Body has predictably involved boundary work of a particularly intense kind.

1. An overview of the jurisprudence so far

¹ Koskenniemi and Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553.

In this section, my aim is to provide a brief overview of how the Appellate Body has considered ‘non-WTO’ law in its decisions, and has shown itself to be open to normative influences from outside the four corners of WTO law in its jurisprudence.

It is useful, as most commentators do, to begin by separating the question of applicable law from that of interpretation. As to the first question – the nature of the law applicable in WTO disputes – it is clear that the Appellate Body has adopted a relatively restrictive attitude. Although the Dispute Settlement Understanding does provide certain strong indications, particularly in Article 3.2, 7 and 11 that the applicable law is limited to WTO covered agreements, it does contain certain important ambiguities on this point,² but the Appellate Body has shown itself to be consistently reluctant to exploit them. In its first decision in the ongoing *Hormones* litigation, for example, it rejected the idea that the precautionary principle, even if it were accepted as an established principle of customary international law, could be used directly in WTO proceedings to modify the effect of the clear terms of the SPS Agreement, saying: ‘the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the normal principles of treaty interpretation in reading the provisions of the SPS Agreement’.³ Then, in *Mexico – Soft Drinks*, the Appellate Body then famously rejected an argument from Mexico that the US ought to be prevented from using WTO dispute settlement ‘as a result of the United States having prevented Mexico, by an illegal act ... from having recourse to the NAFTA dispute settlement mechanism’.⁴ Its grounds for rejecting that argument were made clear in the following passage:

Even assuming, arguendo, that the legal principle reflected in the passage referred to by Mexico is applicable within the WTO dispute settlement system, we note that this would entail a determination whether the United States has acted consistently or inconsistently with its NAFTA obligations. We see no basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes.⁵

While this statement probably went too far, confusing interpretation with adjudication,⁶ the point for present purposes is that it clearly illustrates a deep reluctance on the part of the Appellate Body to be drawn into expressing an opinion on the content and meaning of international legal texts other than the covered agreements.

² See, eg, Bartels, ‘Jurisdiction and Applicable Law in the WTO’, University of Cambridge Faculty Research Paper No. 59/2014, 1 October 2014, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2500684.

³ Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para 124.

⁴ Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, para 55, citations in original removed.

⁵ *id.* at para 56, citations in original removed.

⁶ For a persuasive argument to this effect, including illustrations taken from early WTO jurisprudence, see Bartels, ‘Applicable Law in WTO Dispute Settlement Proceedings’ (2001) 35 *Journal of World Trade* 499, also Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (CUP, 2003). It is also worth noting that, in the course of determining whether a rule of non-WTO law is ‘relevant’ to the interpretation of a WTO text for the purposes of Article 31(3)(c) of the Vienna Convention on the Law of Treaties 1969, some degree of ‘interpretation’ of the non-WTO law is necessary. In such a case, such interpretation is clearly appropriate, and does not raise questions of going beyond the institution’s mandate.

The Appellate Body has also been slow to recognise a role for general principles of international law in WTO dispute settlement. For example, in the same case of *Mexico – Soft Drinks*, the Appellate Body refused to decide whether the ‘clean hands’ doctrine relied on by Mexico was indeed part of WTO law. This approach – of refusing to decide one way or another – was also used in *EC – Sugar* in relation to the place of the doctrine of estoppel in WTO law.⁷ Similarly, it has adopted a relatively restrictive approach to the general principle of good faith, noting that such principle only formally enters WTO law to the extent that it is incorporated through the texts of the covered agreements themselves, for example by the explicit references to ‘good faith’ in DSU Articles 3.7 and 3.10.⁸

It is fair to say, then, that the Appellate Body has been less than fully open to the application of non-WTO law in WTO proceedings, whether direct or indirect. An important qualification, however, needs to be made in relation to the application of what we might call secondary rules of public international law, on questions relating to attribution, the law of countermeasures, customary rules relating to treaty interpretation, as well as customary rules on evidence, burden of proof and related matters. Here, the Appellate Body has adopted a very different approach, and in fact draws very heavily on materials and doctrines from outside WTO law.⁹ But, while I do not wish to minimise the general importance of this trend, nevertheless it is not particularly significant in the context of assessing the Appellate Body’s response to normative fragmentation. It is one thing to be attentive to, and aware of, the content and relevance of secondary rules of public international law. But it is quite a different matter directly to apply or even consider *substantive* norms taken from non-WTO law which may conflict with WTO obligations. If anything the Appellate Body’s openness on questions of secondary law serves only to highlight the very different, more cautious, approach taken to substantive law.

So much, then, for the question of fragmentation. What about interpretation? How far has the Appellate Body shown itself to be willing to use non-WTO law as a guide to the interpretation of WTO treaty texts? In this respect, there have been a few more twists and turns in the Appellate Body’s approach over time, and it is harder to make clear generalisations. Nevertheless, even here it is certainly possible to discern an overall tendency towards cautious incrementalism.

At the very beginning, it should be noted, the signs were pointing in the opposite direction. In its very first case, the Appellate Body famously noted that Article 3.2 of the DSU ‘reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law’.¹⁰ While this statement had relatively little formal legal significance, given that Article 3.2 refers only to the customary international legal rules relating to the

⁷ See, eg, Appellate Body Report, *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, paras 310, 312.

⁸ For the most recent illustration of this approach, see Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R, adopted 31 July 2015.

⁹ See, eg, Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (CUP, 2015).

¹⁰ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, p17.

interpretation of treaties, it was nevertheless of considerable symbolic importance, and undoubtedly represented a crucial statement of intent. Then, two years later, in *US – Shrimp*, the Appellate Body appeared delivered on this promise, drawing on a quite breathtaking range of international legal material in its interpretation of ‘exhaustible natural resources’ under GATT Article XX(g), exactly in the manner one might expect of general public international law tribunal.¹¹ But it became clear in retrospect that the true significance of *US – Shrimp* was more limited than it first appeared. It is one thing to interpret a term of art like ‘exhaustible natural resources’ by looking at how the international community writ large uses that term in other international legal documents. It is quite another to take into account a potentially conflicting normative principle from non-WTO law to shape the interpretation of obligations in ambiguous WTO texts. In the former case, the stakes are considerably lower, and the nature of the enquiry is quite different.

The significance of this distinction became very clear in the Panel decision in *EC – Biotech*. On one hand, the Panel in that case routinely turned to other international organisations for assistance in interpreting terms of art such as ‘pest’, ‘additive’ or ‘toxin’ in the SPS Agreement.¹² Just like in *US – Shrimp*, this part of the decision appeared routine and uncontroversial. On the other hand, when asked to take into account the Convention on Biological Diversity and its Cartagena Protocol on Biosafety, which contained versions of the precautionary principle, the Panel changed track, and adopted a famously and controversially restrictive approach to the interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties, according to which that Article only requires ‘consideration of those rules of international law which are applicable in the relations between all parties to the treaty which is being interpreted’.¹³ This was a radically limiting move: as has often been pointed out, there are very few, if any, treaties to which all WTO Members are parties. The result of this interpretation, then would be to rob Article 31(3)(c) of much of its potential significance in opening the WTO system to normative influence from general international law.

It is true that in the more recent case of *EC – Aircraft*, the Appellate Body signalled its willingness to depart from the *Biotech* panel’s approach in the certain circumstances. Still, its decision in this respect was cryptic and cautious, to say the least. On one hand, it noted that ‘one must exercise caution in drawing from an international agreement to which not all WTO members are party’. At the same time, it cautiously suggested that a ‘delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member’s international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members’.¹⁴ This is clearly an important statement of intent, signalling a re-opening of the door which the *Biotech* panel had

¹¹ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, paras 127-134.

¹² See, McMahon and Young, ‘The WTO’s Use of Relevant Rules of International Law: An Analysis of the *Biotech* Case’ (2007) 56(4) *International and Comparative Law Quarterly* 907.

¹³ Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, para 7.70.

¹⁴ Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, para 845.

shut so firmly, even if the nature of the delicate balance remains entirely unspecified. Yet, even here, the decision is noteworthy for its extreme caution, and its decided unwillingness to set out its approach in bold statements. Furthermore, it is worth noting that in that same case the Appellate Body decided that, regardless of the way one interprets ‘the parties’ in Article 31(3)(c), it did not need to refer to the agreement in question because the EC had not shown precisely how it was ‘relevant’ to the specific legal question at issue.¹⁵ This is another noteworthy feature of WTO jurisprudence on Article 31(3)(c): while some others have tended to downplay the legal significance of the term ‘relevant’ in Article 31(3)(c), the Appellate Body has treated it as a substantive requirement, requiring considerable effort to prove.¹⁶ The result, so far, has been that Article 31(3)(c) remains hardly used in WTO jurisprudence.

What about other windows through which non-WTO law might be considered? Non-WTO treaties may for example be relevant to interpretation as ‘subsequent agreements’ under VCLT Article 31(3)(a) – or they may be considered in the course of analysing ‘subsequent practice’ under Article 31(3)(b). But in the WTO jurisprudence so far, such routes have been used only to draw on what we might call intra-WTO documents – that is to say, documents produced during WTO negotiations or in WTO committees, Ministerial Declarations, and so on – which are contained within the WTO covered agreements but still clearly part of the broader WTO *acquis*.¹⁷ Furthermore, attempts to get the Appellate Body to take into account non-WTO treaties as ‘international standards’ which Members are required to use under Article 2.4 of the TBT agreement have not fared much better. In *Tuna II*, it was made clear that, in order to qualify as an international standard, the treaty must be open to all WTO Members, in the sense that inclusion in the treaty is essentially automatic and non-discretionary if a WTO Member expresses a desire to join.¹⁸ Again, there are few existing treaties for which this is clearly the case. And finally, the possibility of using VCLT Article 41 as a window to consider *inter se* agreements has recently suffered an important blow, with the Appellate Body in *Peru – Agricultural Products* deciding that WTO Members have largely contracted out of Article 41 as regards free trade agreements covered by GATT Article XXIV.¹⁹

While there is much more which could be said, even from these limited highlights, a reasonably clear picture emerges of a very cautious Appellate Body, on the one hand clearly acknowledging its place within the wider system of international law, but on the other very reticent to take explicitly into account normative influences from other specialised regimes of international law. While it *has* shown itself willing to elaborate and apply secondary rules of international law, and interpret terms of art using material from other fields of expertise, in such cases the stakes are relatively low. Where the stakes are high, that is to say where there

¹⁵ *id.* paras 846-851.

¹⁶ See, eg, Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R, adopted 31 July 2015, para 5.100ff.

¹⁷ See generally Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (CUP, 2015).

¹⁸ Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, para 386 and surrounding.

¹⁹ Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R, adopted 31 July 2015, para 5.113 and surrounding.

are potential conflicts between WTO and non-WTO law, it has adopted a very different approach.

2. Institutional myopia?

The conclusion sometimes drawn from this picture is that the WTO dispute settlement system is relatively inward-looking, and closed off from the broader system of international law and the values which underpin it. In this section, I want to suggest that this conclusion is somewhat misleading. To characterise the WTO, or the Appellate Body, primarily in terms of degrees of ‘openness’ or ‘closure’ to external values and rules does not seem to me to capture the essential aspects of the institution, or the dynamics of its decision-making.

The first and most simple point to make is that the Appellate Body’s general reluctance to make formal and explicit reference to non-WTO law is not quite the same thing as normative closure. For one thing, it is probably fair to say that (like all judicial institutions), the Appellate Body does take a great deal into account which does not formally enter the pages of its judgments. More importantly, the overall trajectory of the jurisprudence I have just described is only explicable once one acknowledges that the non-WTO law in question, is absolutely at the forefront of adjudicators’ minds. It is precisely because the Appellate Body is intensely aware of the reality of the fragmentation of international law, and very conscious of the high stakes of their decisions for other areas of international law, that it has as a consequence adopted a self-consciously cautious and non-confrontational style of decision-making. The reasons for this are not difficult to see. After all, in cases which raise potential normative conflicts between WTO and non-WTO law, the Appellate Body finds itself in a difficult position, being asked to adjudicate cases involving fundamental values conflicts which are hardly amenable to judicial resolution, at least not without threatening the legitimacy of the tribunals to whom the task falls.

What do I mean when I say that the Appellate Body has adopted a style of decision-making which attempts to defuse the stakes of inter-regime conflicts? The hallmarks of this style include actively seeking to avoid addressing the problem of normative conflicts, refusing to hierarchise different regimes of international law, rejecting anything which looks like an attempt to systematise or constitutionalise international law, and leaving controversial questions as open as possible, for as long as reasonable. At the level of technique, this is nothing more than the application of the methods which lawyers use everywhere to chart a careful path around sensitive normative or political questions, which appear at any given moment, and in any given context, to fall outside the boundaries of legal expertise. We find, for example, a heavy reliance on the specific configuration of facts in a number of the cases referred to earlier,²⁰ which naturally reduces their systemic significance, and provides a

²⁰ Examples would include Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998; Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012; Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R, adopted 14 November 2008; as well as Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to

number of grounds for future tribunals to distinguish them. We also see relatively frequent recourse to *arguendo* reasoning, which helps to leave certain key legal questions unresolved.²¹ Other avoidance techniques include a decision not to complete the analysis,²² or limiting the frame of reasoning by hewing closely to the content of parties' arguments.²³ The Appellate Body also sometimes relies heavily on the limits of its expertise, or of its institutional mandate, to avoid questions which they may not feel they have the legitimacy to address.²⁴ Furthermore, we see on occasion also the Appellate Body sidestepping systemic questions concerning the relation between WTO and non-WTO law, by recasting problems of fragmentation as *internal* questions of the interpretation of WTO texts.²⁵

Many years ago, Weiler famously wrote that WTO dispute settlement was hampered by the continuation of its 'diplomatic ethos', as it tried to re-invent itself in judicialised form.²⁶ There is I think a strong connection here with Weiler's story. While I am not suggesting that the style of decision-making I am describing here represents the continuation of a diplomatic ethos in place of a lawyerly culture, nevertheless, it does seem possible that the particular judicial style of the AB, its particular understanding of the judicial function and of the place of dispute settlement in the overall institutional structure, is a lawyerly expression of that diplomatic ethos carried out through judicial techniques. It is very different from the approach to fragmentation that we see in other institutions – think for example of the European Court of Justice, the European Court of Human Rights, and the German Constitutional Court – in which the imagined role of the judicature is an altogether more

Add.9 and Corr.1, adopted 21 November 2006. It is also worth mentioning the ongoing disputes over Australia's plain packaging regulations, in which a large proportion of the argument is built around reams of factual evidence relating to the effects of different sorts of packaging on consumers, as well as the effects of the measure in question.

²¹ There are numerous examples which could be given, two famous illustrations are Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011 (on the question of 'the parties' under Article 31(3)(c)), and both Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998 and Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R, adopted 14 November 2008 (on the question of the extraterritoriality of measures under Article XX).

²² See, eg, Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R, adopted 14 November 2008.

²³ Eg, Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014 (as to the contested meaning of 'related' in the definition of technical regulation).

²⁴ Eg, Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para 123, as well as Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, para 56.

²⁵ Note, for example, the way in which the Appellate Body in the *Hormones* litigation refocused the question of the status and relevance of the precautionary principle in WTO law into a question about the meaning of terms such as 'sufficient' in the SPS Agreement: Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para 124. A more recent example is in Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R, adopted 31 July 2015, paras 5.112-5.113 in which the Appellate Body made clear that, in relation to the question of whether an RTA between WTO Members can derogate from WTO obligations, the controlling text is GATT Article XXIV, not VCLT Article 41.

²⁶ Weiler, 'The Rule of Lawyers and the Ethos of Diplomats – Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2002) 13 *American Rev Int'l Arbitration* 177.

‘heroic’ one, standing firmly on behalf of fundamental norms, defining the basic commitments of a political body, or acting as the spokesperson for an imagined coherent legal order. It would not surprise me if this were one of the most enduring legacies of the Appellate Body’s work so far on questions of fragmentation – that is to say, the definition and performance of a particular style of judicial decision-making, which relies heavily on techniques of de-systematisation, issue avoidance and boundary-drawing, in service of its own valorised virtues of modesty, self-imposed narrowness, caution and incrementalism.

3. The causes of fragmentation

So far, I have said that the response of the WTO’s Appellate Body to cases involving fragmentation is more often driven by caution rather than the myopia of which it is sometimes accused. In this final section, let me now say something about the *causes* of fragmentation, and what this line of WTO cases may reveal about them.

The most prevalent story of how normative fragmentation arises begins with the proliferation of specialised regimes of international law, from the end of the Cold War. Fragmentation, in this story, emerges primarily from a structural weakness of the decentralised international legal system – that is to say, the lack of any clear institutional mechanisms for ensuring coordination and coherence across these different specialised regimes. Since each regime focusses on its own mandate largely to the exclusion of consideration of the system as a whole, and since each regime pursues a different set of objectives and values, the potential for conflict between rules and regime at their margins is high.

Importantly, this way of describing the problem of fragmentation predisposes us towards certain solutions. Since institutional myopia, and specialisation without coordination, seem to be at the root of the problem, then we can be led towards seeing the opposite – namely, institutional openness and mechanisms of formal coordination between regimes. Thus, the idea has taken root in many international legal circles that the international judiciary ought to act as an instrument of coherence and co-ordination, and to take responsibility for systemic integration through the aspiration towards a universal view. In light of the jurisprudence outlined above, the Appellate Body has often been criticised for failing to live up to this standard.

In these remarks, I do not want to broach directly the difficult question of whether or not this is in fact an appropriate and desirable role for the Appellate Body, or indeed for the international judiciary more generally. But I do want to suggest that it is a built on a picture of the causes of fragmentation which are partial at best.

An alternative account begins not with the structure of international law but with what we might think of a standard political struggles over domestic regulatory measures. Fragmentation, in this story, results in part as these regulatory disputes are projected internationally, and played out in international legal venues. Crucially, in this process of projection, such disputes take on a different character. While in the domestic context they are essentially about the rights and wrongs of the regulatory measure in question, in the international plane they come to be about much more. As rules from different fields of

international law are deployed on both sides, and as each side uses different international legal venues to further their argument, the issue becomes as much about the systemic fragmentation of international law as it is about the rights and wrongs of the original regulatory measure. Through this process, what starts out as a difficult and sensitive political controversy becomes even more difficult and sensitive, since its resolution now seems to implicate a broader hierarchy of values and objectives of the international community – or perhaps even the incremental constitutionalisation of international law.

This, then, is the dynamic which in my view leads the Appellate Body to adopt the approach outlined above. Faced with a dispute in which the stakes appear to be impossibly large, its response is *reduce* the stakes, to delimit and narrow the parameters of the dispute so as to make it amenable to judicial resolution, without calling into question its own legitimacy. As described earlier, this involves considerable boundary work to achieve, for example by redescribing issues in ways which locate them outside their competence. If it is true that the boundaries, mandate and expertise of the WTO are in part the *result* of the way they are interpreted in venues such as dispute settlement, then this is important. It means that the fragmentation of international law is in part the result of the projection into international law of standard regulatory struggles, and the operation of the cautious sensibility of the international adjudicator in dispute settlement processes, as they are about the structure of international law. Fragmentation, that is to say, is not just the result of flawed institutions, to which international lawyers must respond with projects of coherence, it is also in significant part the effect of the application of standard international legal techniques to internationalised regulatory disputes.

In the short or even medium term, I would argue, it is hard to see this dynamic changing a great deal. The Appellate Body's cautious approach is a response to the structural position in which it finds itself – asked to address sensitive questions which have proved too difficult for traditional political processes, but without the clear legitimacy needed to address them head on. There are many pressures pushing judicial tribunals in this position towards techniques of judicial avoidance and de-escalation. It is of course a separate question what the consequences of this approach will be, and what alternatives may exist. My point is simply that a clear-eyed response to international legal fragmentation needs to start with a fuller understanding of the conditions in which it emerges as a problem.