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## **Rules and Values in International Adjudication: The Case of the WTO Appellate Body**

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*Current political challenges facing the WTO Appellate Body raise fundamental questions about the relationship between rules and values in international adjudication. This paper applies insights from legal philosophy to identify the role values should play in WTO adjudication. It argues that nothing about the specifics of WTO law would justify excluding values from adjudication; that the doctrinal, political and institutional context of WTO adjudication makes a positivist account of the role of values untenable; but an anti-positivist account requires complementing established economic accounts of WTO law's purpose with an account of fairness and justice in trade and trade regulation.*

WTO dispute settlement is in crisis. As I write this, four of seven positions on the Appellate Body are vacant, with new appointments blocked by the United States. Various factors explain this situation, including both long-standing frustrations at the US's poor record in trade remedies disputes, and the more recent turn, under the current administration, against multilateral cooperation generally. However, in explaining its position, the United States has emphasised more specific concerns with the Appellate Body's interpretive approach. "The most significant area of concern", we are told, is that panels and the Appellate body have been "adding to or diminishing rights and obligations under the WTO Agreement".<sup>1</sup> The Appellate Body is also criticised for discussing issues beyond those required to resolve disputes before it, filling gaps that the members left in the Covered Agreements, and illicitly making new law under the guise of legal interpretations which are in turn treated as precedents.<sup>2</sup>

Central to these criticisms is the idea that the Appellate Body is imposing, or even substituting, its own views on matters that are properly the preserve of political representatives in negotiations, whether these have been prescribed in existing

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<sup>1</sup> Office of the United States Trade Representative (USTR), *2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program*, (2018), p. 22

<sup>2</sup> *Ibid*, pp. 22-28

agreements, or left to subsequent agreement.<sup>3</sup> International trade regulation engages various competing concerns, including economic efficiency, national sovereignty, democratic legitimacy, international and domestic distributive justice, competitive fairness, economic development, human health, environmental protection, public morality, and so forth. It also engages competing interests of different groups, both within and between states. Different ways of understanding these various considerations, and the balance between them, will lead us to prefer different solutions to specific questions in trade law.<sup>4</sup> Balancing these considerations is what international trade policy is ultimately about. And when the United States complains about the ways the Appellate Body's more controversial decisions, expansive judicial pronouncements and informal system of precedents add to or subtract from rights and obligations under the WTO Agreements, its complaint is – at least in part – that the Appellate Body is engaging with questions about these underlying issues, rather than simply applying the rules agreed in political negotiations. At its most extreme, the Appellate Body is accused of substituting its own judgment for that of the membership – and applying solutions based on that judgment – instead of respecting those judgments and solutions expressed in the texts.

So understood, the Appellate Body's current political difficulties raise fundamental questions about the nature of legal reasoning, about the extent adjudicators' decisions can, or should, be determined exclusively by reference to texts, practices and conventions that we label sources, and about how far adjudicators may (or must) grapple with the substantive values at stake in their decisions. We can try to address US complaints at the level of specifics, whether focussing on particular provisions or practices:<sup>5</sup> but they also challenge us to think about these fundamental questions, about the relationship between text, reasoning and outcome, that are traditionally the preserve of legal theorists and philosophers rather than pragmatic international economic lawyers.

It is only once we have adequate answers to these questions that we can reasonably hope to evaluate, or to answer, criticisms of the Appellate Body's approach. If we think value judgments are inappropriate, we are more likely to endorse the United States' position. If, conversely, we think such judgements are central and unavoidable features of legal interpretation, we are likely to be more charitable in our evaluation of the Appellate Body.

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<sup>3</sup> These criticisms are by no means new, dating back at least to the *US–FSC* dispute in 2000. See for a brief overview: T Paysova, G Hufbauer, and JJ Schott, 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures', (2018) 18-5 *Peterson Institute for International Economics Policy Brief*. Cf. J Greenwald, 'WTO Dispute Settlement: An Exercise in Trade Law Legislation?', (2003) 6:1 *Journal of International Economic Law* 113

<sup>4</sup> On the ways such changing understandings shape international economic governance over time: J Ruggie, 'International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order', (1982) 36:2 *International Organization*, 379-415; R Howse, 'From Politics to Technocracy ... and back again: The Fate of the Multilateral Trading Regime' (2002) 96:1 *AJIL*, 94-117; A Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order*, (2011) Oxford University Press

<sup>5</sup> See, for such proposals: European Commission, *WK 8239/2018 INIT WTO – EU's Proposals for WTO Modernisation*, 5 July 2018; J Bacchus, 'How to Solve the WTO Judicial Crisis', *CATO at Liberty*, 6 August 2018, available at: <https://www.cato.org/blog/how-solve-wto-judicial-crisis> (accessed 9 August 2018)

Of course, a more capacious account of the role of values in adjudication need not imply an unbounded licence for adjudicators to dispense with positive law: anti-positivist lawyers are still lawyers, and must still be able to distinguish good from bad legal reasoning. But clarifying the ways values can, should or must feature in legal reasoning is a necessary step in determining whether the Appellate Body has indeed overstepped in its approach.

Without losing sight of the distinctive institutional, political and doctrinal context in which the Appellate Body operates, and the importance of specific disputes and decisions, it is at this latter level that this paper proceeds. Even the most cursory review of Appellate Body decision-making in cases like *US-Shrimp* or *EC-Seals* makes clear that it is adopting substantive positions on questions of values: this paper enquires whether and if so how it *should* be doing so. It addresses three linked, but distinct, questions, each with direct implications for assessing and responding to the current crisis. First, are there features of WTO law or adjudication that should lead adjudicators to exclude reference to substantive values when reasoning about and applying WTO law? Second, how should we understand the relationship between law and values in this specific context? And third, are some values, or particular orderings of values, especially relevant for WTO law and adjudication?

The first question is answered in the negative. I consider four sets of arguments for reading WTO law in wholly value-neutral terms, and show why each is unconvincing. From there, I consider the specific institutional context of WTO adjudication, including the mandate of the Dispute Settlement System and the political compromises underpinning the WTO agreements, arguing that these render a positivist account of the role of values in law untenable for the Appellate Body. This conclusion is important because many WTO lawyers and scholars implicitly assume a positivist approach: if positivism is untenable here, that has important implications for how we approach substantive questions. Some of those implications are developed in my answer to the third question, addressing the specific values, and ordering of values, that are relevant to WTO adjudication. This requires going beyond traditional emphases on state consent and economic efficiency, to engage with substantive duties of economic justice that states owe towards outsiders. Whether or not the WTO was conceived by its architects as a neo-liberal project, adjudication requires a broader normative foundation. Principles of global economic justice move, on this view, from being external standards for criticising the existing WTO regime, to being necessary components in WTO legal reasoning.

While a number of studies have touched on these questions, they have generally been addressed only indirectly. Mitchell, for example, addresses closely linked questions about the role of principles in WTO adjudication, but his focus on positive principles, whether drawn from WTO law or public international law more generally, means he avoids squarely addressing the role of substantive value judgments.<sup>6</sup> Van Damme highlights problems of gap-filling and silence in WTO adjudication, but emphasises how these are judicially and politically characterised, rather than underlying normative questions.<sup>7</sup> Similarly, Qureshi highlights the diverse ways that interpreters go beyond the texts of the

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<sup>6</sup> A Mitchell, *Legal Principles in WTO Disputes*, (2008), Cambridge University Press

<sup>7</sup> I Van Damme, *Treaty Interpretation by the WTO Appellate Body*, (2009), Oxford University Press, Ch. 4

agreements, and the principles that seem to guide them.<sup>8</sup> A number of scholars writing in constructivist or legal realist terms have highlighted the roles that (often unstated) value judgments play in WTO adjudication, but their predominantly sociological orientation means that normative questions are less explored.<sup>9</sup> While much scholarship on specific points of WTO law builds on one or more of the values or orderings of values noted above (perhaps most prominently economic efficiency<sup>10</sup>, but also democratic legitimacy<sup>11</sup>, human rights<sup>12</sup>, distributive justice<sup>13</sup>, economic development<sup>14</sup>, and specific policy concerns<sup>15</sup>), the legitimacy of adjudicators drawing on those values, and the logical relationship between the structure and content of WTO law and the values it makes relevant are less explored.

Before proceeding, let me clarify exactly what I mean by values, and how they might play a role in adjudication. My concern is not with the values that motivate adjudicators (e.g. judicial responsibility, fidelity, personal ambition), but rather with the ways values are engaged as grounds in reaching and justifying decisions. They are things to which we might refer in praising or criticising a decision. In the WTO, relevant values might include trade liberalization, national self-determination, economic efficiency, distributive justice, competitive fairness, and so on. These are distinguished from conventional or source-based grounds, including the texts of agreements and their negotiating histories, customary practices of states, and conventions obtaining within particular institutions. Values are things we have reason to value, and towards which we have reason to orient our behaviour, and perhaps our institutions. When we invoke source-based grounds, we rely on their form and provenance. When we invoke values, by contrast, their force derives from their content. I sometimes refer below to moral considerations, and moral

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<sup>8</sup> A Qureshi, *Interpreting WTO Agreements: Problems and Perspectives*, 2<sup>nd</sup> ed., (2015), Cambridge University Press

<sup>9</sup> See, e.g., Howse (2002), above n. 4; Lang (2011) above n. 4. For studies that move somewhat closer to normative theorising, while remaining predominantly sociological:, R Howse, 'Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence', in JHH Weiler (ed.), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade*, (2000), Oxford University Press; S Cho, 'Global Constitutional Lawmaking', 31 *U.Pa.J.Int'l L.* 621

<sup>10</sup> E.g. D Regan, 'What are trade agreements for? Two conflicting stories told by economists, with a lesson for lawyers', (2006) 9:4 *Journal of International Economic Law* 951-988

<sup>11</sup> E.g. R Howse & K Nicolaidis, 'Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far,' in R. B. Porter, P. Sauve, A. Subramanian, & A. B. Zampetti (Eds.), *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium*, (2001) Brookings Institution Press.

<sup>12</sup> E.g. FM Abbott, C Breining-Kaufman and T Cottier (eds.), *International Trade and Human Rights: Foundations and Conceptual Issues*, (2006), University of Michigan Press

<sup>13</sup> E.g. F Garcia, *Global Justice and International Economic Law: Three Takes*, (2013), Cambridge University Press; O Suttle, *Distributive Justice and World Trade Law: A Political Theory of International Trade Regulation*, (2018) Cambridge University Press

<sup>14</sup> E.g. SE Rolland, *Development at the World Trade Organization*, (2012), Oxford University Press

<sup>15</sup> E.g. T Cottier, O Nartova, & SZ Bigdeli (Eds.), *International Trade Regulation and the Mitigation of Climate Change*, (2009), Cambridge University Press

reasoning. Where I do so, unless otherwise indicated, I use these terms as short-hand for values generally, and for reasoning about values.<sup>16</sup>

## I. Some arguments for excluding values from WTO adjudication

Most legal theorists, regardless of specific views, recognise a substantial role for values in adjudication.<sup>17</sup> That adjudicators must sometimes reason about values to resolve cases is – at least amongst legal theorists – largely uncontroversial. In other subfields of international law – most prominently human rights – it is also widely accepted that judges deciding cases will engage in value-based reasoning. However, there are peculiar features of the WTO legal system that might lead us to think that here, more than elsewhere, it was both possible and appropriate to entirely exclude values. I do not find this view convincing. To show why, this section examines four possible arguments for it, explaining why each is unconvincing in its own terms.<sup>18</sup>

The arguments examined in this section are, in the main, normative: they claim that adjudicators *may* or *ought* to approach their role in a value-neutral manner, in order to respect or realise some underlying goal or value. As such, they can be answered in their own (normative) terms, by showing that the relevant claim does not hold, or that some competing considerations point the other direction. An *ought* can be met with an *ought not*, and a *may* with a *may not*. However, we can also answer a normative argument by showing that it is not possible to act in the manner proposed. There might be strong moral and prudential arguments why I should not leap tall buildings in a single bound, but the most compelling objection to such a proposal is the simple fact that human beings do not have the relevant capacity. Further, as well as being an argument against my actually doing so, this is also an argument against my trying to do so, or thinking that I have done so, and against others criticising me for not doing so. An *ought* and a *may* can be answered with a *can not*.

Similarly, if it is not possible for adjudicators to fulfil their role without recourse to value judgments, then normative arguments that they should do so necessarily fail. This is a shared conclusion of the positivist and anti-positivist approaches that I discuss in Parts II and III below. Adherents of those approaches will therefore regard the arguments that

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<sup>16</sup> For a similarly capacious conception of moral reasoning, J Raz, *Ethics in the Public Domain*, (1994), 328-30

<sup>17</sup> This is true as much for positivists as anti-positivists. See e.g. HLA Hart, *The Concept of Law*, 2<sup>nd</sup> ed, (1994) Oxford University Press, 1994, 130-133; J Raz, 'The Relevance of Coherence', (1992) 72:2 *Boston Univ. L. Rev.* 273; S Shapiro, *Legality*, (2011), Harvard University Press, 251. And for the leading anti-positivist view, R Dworkin, *Law's Empire*, (1986), Harvard University Press, *passim*.

<sup>18</sup> One set of arguments not considered here is those grounded in democratic legitimacy, as in e.g. Howse & Nicolaidis, (2001), n. 11 above. In endorsing some interpretations (those affording policy space to states to realise particular goals) over others on the ground that they better realise the value of democracy, such approaches necessarily endorse a role for values in adjudication. The question of *whether* values play a role is distinct from the question of *which* values are appropriate. It is on the former question that this first section concentrates, and on this question, advocates of democratic deference are committed to an affirmative answer.

I seek to answer in this part as advocating that we do the impossible, and as such requiring no further response. However, in so far as normative arguments for value-neutral adjudication can be advanced, it is worth enquiring whether they can be answered in their own terms, if only because such answers may be more convincing to some interlocutors. They may indeed be arguments for not doing the impossible, but this does not render them superfluous: the argument remains important because we may otherwise be led to attempt such value-neutral adjudication, leading to error, or to imagine that we have succeeded in it, leading to confusion, or be criticised for failing in it, undermining our credibility. I therefore largely eschew in this section the claim that value neutral adjudication is impossible, instead showing why it is undesirable. Those who - perhaps correctly - regard such responses as superfluous might choose to skip straight to Part II.

### **A. WTO Law does not deal in all things considered reasons**

WTO law is a subset of public international law. Specifically, at least for the purposes of discussing WTO adjudication, it is the law deriving from the “Covered Agreements”, the WTO Agreement and its various annexes.<sup>19</sup> The task of the WTO Dispute Settlement System is to resolve disputes “in accordance with the rights and obligations under ... the covered agreements”.<sup>20</sup> The governing law in WTO dispute settlement is thus WTO law, rather than public international law as a whole.<sup>21</sup> As such, the questions that Panels and the Appellate Body (AB) must answer are not all-things-considered legal questions.<sup>22</sup> Where they find a violation of a particular provision, this need not mean that a member has acted contrary to “international law”, as a comprehensive scheme of rights and obligations. Equally, where no breach is found this does not mean a member has complied with international law generally. The question of all-things-considered legal obligation is logically downstream from WTO adjudication.

Why might this matter?

Any normatively plausible positivist view of law will recognise a distinction between legal obligation (what the law says we should do) and moral obligation (what we in fact

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<sup>19</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), Article 1 and Annex 1. On the relation between WTO law and public international law more generally: J Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law relates to other Rules of International Law*, (2003), Cambridge University Press. Cf. M Trebilcock, R Howse, and A Eliason, *The Regulation of International Trade*, 4<sup>th</sup> ed., (2013), 190-2, 198-203.

<sup>20</sup> DSU Art 3.4

<sup>21</sup> For this view of the relation between WTO law and general international law: D Steger, ‘The WTO in Public International Law: Jurisdiction, Interpretation and Accommodation’ in *Ten Years of WTO Dispute Settlement*, International Bar Association, (2007). Although contrast Pauwelyn, (2003), n. 19 above. This does not mean that general international law is irrelevant to WTO adjudication. The Appellate Body regularly looks beyond the covered agreements to aid to interpretation, but causes of action and defences are limited to those in the agreements.

<sup>22</sup> G Marceau, ‘WTO Dispute Settlement and Human Rights’, (2002) 13:4 *EJIL*, 753, 762-3.

should do).<sup>23</sup> This allows the positivist to characterise an unjust law as law, while acknowledging there may be no all-things-considered obligation to obey it.<sup>24</sup> Identifying our legal obligations is simply one step in identifying our all-things-considered obligations.<sup>25</sup>

To the extent this strategy works for law in general, it applies *a fortiori* to any particular subset of law. To see why, consider the following example. We might think that a (domestic) legal system that avoidably placed individuals in extreme poverty was *ipso facto* unjust. This might lead us to think that relevant laws should be amended, or that we were justified in disobeying them, or that they should be (re-)interpreted to take account of the moral imperative to eliminate avoidable poverty. However, narrowing our focus to contract law, we might find nothing obviously wrong with this particular subfield, nor any obvious reason to reinterpret settled rules to, for example, relieve the needy of debts lawfully incurred. We could agree that the law should address avoidable poverty, and that its failure to do so was relevant to its moral force, but think some other subfield (tax, welfare or insolvency laws, for example) was better placed to do this. The upshot is that, if we ask the kind of partial question commonly asked in law schools (“What is the correct legal analysis *as a matter of contract law?*”) we might feel comfortable bracketing such concerns entirely. Similarly, if the question “what are Agraria’s all-things-considered legal obligations?” is distinct from the question “what are Agraria’s obligations, as a matter of WTO law?”, then, this argument suggests, there is nothing wrong with excluding values in answering the latter question. We can leave addressing these values to other subfields (environmental law, or human rights, or labor law).

However there are at least two reasons why this move won’t work.

First, as a matter of practice, WTO law and dispute settlement enjoy disproportionately greater influence than other areas of public international law and venues of international adjudication.<sup>26</sup> And there is no mechanism whereby the conclusions of WTO dispute

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<sup>23</sup> For a prominent positivist view highlighting the extent to which the law may fail to morally obligate: J Raz, ‘The Obligation to Obey the Law’, in *The Authority of Law*, 2<sup>nd</sup> ed., (2009), Oxford University Press. Greenberg emphasises this gap in criticising positivist views generally: M Greenberg, ‘The Moral Impact Theory of Law’, (2014), 123 *Yale LJ* 1288, 1304

<sup>24</sup> On the merits of making this distinction, Hart, (1994), note 17 above, 207-212;

<sup>25</sup> This is as true of Raz, with his understanding of pre-emption, as it is of Hart. While Raz characterises the directives of legitimate authorities as constituting content-independent and pre-emptive reasons, he denies that the law has the kind of extensive authority that it claims, and recognises that reasons other than dependent reasons may defeat the directives of legitimate authorities in appropriate circumstances. J Raz, *The Morality of Freedom*, (1986), Oxford University Press, 46, 62, 74-80; J Raz, ‘The Problem of Authority: Revisiting the Service Conception’, (2006) 90 *Minn. L. Rev.*, 1003, 1022.

<sup>26</sup> By way of illustration, Davey puts the successful implementation rate for WTO disputes in the first ten years at 83%. WJ Davey, ‘WTO Dispute Settlement: The First Ten Years’, (2005) 8:1 *Journal of International Economic Law*, 17-50. For a sceptical review of the extent to which WTO dispute settlement accords due respect to non-WTO international law: Lindroos, A., and Mehling, M., (2006) ‘Dispelling the Chimera of ‘Self-Contained Regimes’: International Law and the WTO’, 16:5 *European Journal of International Law* 857-877.



settlement are integrated with other international legal obligations (or – *a fortiori* – substantive values) to determine the demands states make of each-other's conduct: a successful complainant can demand compliance with the terms of a dispute settlement report, and withdraw concessions where there is continuing non-compliance, regardless of whether there are good non-WTO legal reasons for that non-compliance. The upshot is that, while formally characterised as merely stating rights and obligations under the WTO agreements, in practice dispute settlement reports are treated as stating the all things considered obligations of members. In these circumstances, it is as statements of all-things-considered, rather than partial, obligations that they must be judged.<sup>27</sup>

Second, even if we allow that many competing values can be addressed at subsequent stages, when propositions of WTO law are integrated with others, there may still be values that specifically relate to practices addressed by WTO law, and so require to be integrated here. Recalling again the example of contract law, imagine a law that regularly enforces agreements procured by force or fraud. If we assume that the function of contract law is to enforce promises<sup>28</sup>, or to protect legitimate expectations<sup>29</sup>, or to give effect to welfare enhancing exchanges<sup>30</sup>, then a contract law that regularly enforces agreements in these circumstances is defective *as contract law*. It is not sufficient that concerns about force and fraud are addressed elsewhere, in criminal or tort law for instance, because these are not defects of the legal system as a whole. They are defects of that part of the system that enforces promises / protects expectations / enables exchanges. Similarly, to the extent there are values specific to trade regulation, we cannot bracket these by reference to the partial nature of WTO law. This does not tell us whether there are such values. This will turn on our substantive views about trade regulation and the functions of WTO law, to which I turn in the third part of this paper.<sup>31</sup> However, it at least means that arguments for value-neutrality in WTO law omit a crucial step.

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<sup>27</sup> See e.g., on the ways a direct conflict between trade and environmental regimes would play out in dispute settlement: Winham, G.R., (2003) 'International regime conflict in trade and environment: The Biosafety Protocol and the WTO', 2:2 *World Trade Review* 131-155, 147-150. On the lack of mechanisms for resolving conflicts between WTO adjudication and dispute settlement under regional trade agreements, Hillman, J., (2009), 'Conflicts Between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO – What Should the WTO Do?', 42 *Cornell International Law Review* 193-208. Another worry here might be that admitting values in WTO adjudication will further encourage states to treat WTO decisions as stating their all-things-considered obligations. Hart celebrates the separation of validity and morality as enabling a clear-eyed assessment of how far laws in fact merit obedience: Hart (1994), note 17 above, 207-212. The more values are integrated within WTO law, the harder it is to separate these issues. This may be especially troubling if particular values are likely, in the hands of trade adjudicators, to acquire a distinctly pro-trade interpretation. See e.g. P Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13:4 *EJIL* 815.

<sup>28</sup> C Fried, *Contract as Promise*, (1981), Harvard University Press

<sup>29</sup> PS Atiyah, *The Rise and Fall of Freedom of Contract*, (1979), Clarendon Press

<sup>30</sup> R Posner, *Economic Analysis of Law*, 9<sup>th</sup> ed., (2014), Wolters Kluwer, Ch 4

<sup>31</sup> For detailed arguments for such trade-specific values: Garcia, (2013), note 13 above; A James, *Fairness in Practice: A Social Contract for A Global Economy*, (2012), Oxford University Press; Suttle (2018), note 13 above.

### ***B. WTO law is exclusively contractual***

A second possible argument highlights the ostensibly contractual quality of WTO law.

The WTO Agreements, on this view, are a set of bargained commitments given by the members exercising their respective sovereignties. The only obligations attaching to them are those expressly accepted, running to (at most) an obligation to comply with those commitments.<sup>32</sup> There is thus no basis on which other values could play a role in their interpretation.<sup>33</sup>

This argument might be understood in various ways.

As an argument about the moral obligations of states generally, it is obviously question-begging. Various scholars have written at length on the substantive political morality of trade regulation, and I take this up further in the second half of this paper.<sup>34</sup> If we assume that states do not owe any natural duties of economic justice to those beyond their borders, this view seems plausible; if we accept the existence of such duties, its appeal diminishes.<sup>35</sup>

We might instead read this argument as specifically addressing the moral obligations attaching to membership of the World Trade Organization. We might accept that states had certain moral obligations in relation to their trade policies. Further, we might accept that these substantially overlap with WTO legal obligations. Nonetheless, we might deny that their legal obligations *as WTO members* were expressive of, or fell to be interpreted

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<sup>32</sup> For this view of treaties generally, T Nagel, 'The Problem of Global Justice', (2005) 33:2 *Philosophy & Public Affairs*, 113-147, 141. Howse suggests that the WTO treaties are appropriately read in more contractarian terms than, for example, human rights treaties: R Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary', (2016) 27:1 *EJIL*, 9, pp 44-45. On some of the challenges that arise in applying ideas developed in the context of contractual treaties to 'law-making' treaties that do not fully fit that mould: J Klabbers, 'How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent', (2001) 34 *Vanderbilt J. Transnational Law*, 283. For a more general discussion of the ways the turn to law-making treaties might suggest rethinking treaty interpretation: Qureshi, (2015), note 8 above, pp 5-9. Cf. Mitchell (2008), note 6 above, pp 85-88

<sup>33</sup> This view seems implicitly engaged in AB Member Hernandez's analysis of the appointment crisis as in part reflecting "conceptual differences among the Membership as to the nature of the WTO. That is, is the WTO a contract or a constitution?". *Farewell speech of Appellate Body Member Ricardo Ramírez-Hernández*, 28 May 2018, available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/ricardoramirezfarwellspeech\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ricardoramirezfarwellspeech_e.htm) (last accessed 11 July 2018).

<sup>34</sup> See the sources at note 31 above.

<sup>35</sup> 'Natural' here is used in the sense in which Hart distinguishes natural rights from special rights, referring to duties that do not arise from particular transactions or special relationships into which states have entered: HLA Hart, 'Are there any natural rights?' (1955) 64:2 *The Philosophical Review*, 175-191

by reference to, those moral obligations: the two may simply be separate issues, with legal obligation constituting an additional, voluntarily accepted, layer, sitting apart from general moral obligation, and including only what is positively agreed.<sup>36</sup>

To the extent that this argument, so understood, is tenable, it depends on two controversial premises: first, a highly idealised view of the voluntary nature of agreement; and second, a quasi-libertarian account of the force of agreement as deriving from the will of self-owning individuals.<sup>37</sup> As to the first, whatever its applicability to interpersonal contracting given an appropriate background of social protections within domestic societies, it is wholly inadequate for a multilateral scheme like the WTO, negotiated among countries of widely varying power without effective protections, and where membership is effectively non-voluntary for many states, to the extent they seek to access international markets.<sup>38</sup> As to the second, it is significantly weakened by the move from interpersonal contracts, between persons plausibly possessed of the kind of autonomous wills that it presupposes, to interstate treaties, between collective agents whose choices are themselves political acts, deriving from complex social institutions and expressed through the exercise of non-voluntary political authority over individuals subject thereto. These points don't tell us what the binding force of interstate agreements is; but they suggest that a simple analogy to interpersonal contracting is inadequate to exclude values from their interpretation.

Finally, perhaps most significantly, the claim that values can be excluded because WTO law is exclusively contractual, howsoever understood, depends for its force on the assumption that we can in fact interpret contracts without recourse to values. However, as any contract lawyer will attest, in practice the interpretation of contracts relies heavily on judges' views about what is fair and reasonable between the parties, albeit clothed in the language of objective intent.<sup>39</sup> When identifying what contracting parties have agreed, judges have implicit recourse to what they think those parties, in their particular circumstances, *should* have agreed. The problem here is analogous to that of teleological treaty interpretation, discussed further in Part II, and the objection is itself one of possibility rather than desirability. Therefore, while I mention it here because it has particular relevance for those who regard contractual interpretation as an alternative to moralised interpretation, I will defer further discussion until the Part II. Suffice to note that the international lawyer's utopia of amoral, quasi-contractual treaty interpretation does not survive contact with the actual practices of contract lawyers and judges.

### ***C. WTO Law Does Not Claim Authority***

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<sup>36</sup> Something like this view is implicit in the discussion of the WTO's institutional role in: R Howse, J Langille and K Sykes, 'Pluralism in Practice: Moral Legislation and the Law of the WTO after *Seal Products*', (2015), 48 *George Washington L. Rev.*, 81, 89-91.

<sup>37</sup> On the latter point, and its significance in distinguishing liberal and libertarian views: S Freeman, 'Illiberal Libertarians: Why Libertarianism is not a Liberal View', (2005) 30 *Philosophy & Public Affairs* 105

<sup>38</sup> For a similar point, P Maffetone, 'The WTO and the limits of distributive justice', (2009) 35:3 *Philosophy and Social Criticism*, 243-267

<sup>39</sup> See e.g. E McKendrick, *Contract Law*, 12<sup>th</sup> ed., (2017), Palgrave, p. 171

A third potential argument against importing values into WTO adjudication queries whether WTO law purports to impose obligations on members at all. This may seem an odd suggestion, particularly to those persuaded by Joseph Raz's argument that claiming authority is a conceptual necessity of law.<sup>40</sup> However a number of scholars have queried whether WTO law claims authority in the sense in which Raz uses that term.<sup>41</sup> Rather than expressing obligations that attach to members, this view suggests, WTO law simply records a standing political bargain, from which states are free to depart, but at the cost of a consequent rebalancing by other affected states. This may be through the withdrawal of concessions following dispute settlement, the modification or withdrawal of concessions under GATT Art XXVIII, rebalancing in response to safeguards under GATT Article XI and the Safeguards Agreement, or otherwise. However, in each case, it is simply a rebalancing, as opposed to an expression of fault, or blame, or punishment, of a kind that might be appropriate where an obligation has been breached.

This view of WTO law has been heavily criticised.<sup>42</sup> However, assuming that it is plausible, might it support an argument against admitting a role for values in adjudication? The claim might be that, in other contexts, the linking of legal and moral reasoning reflects the fact that both law and morality are understood as normative. Both claim to guide action, answering the same questions, and so unavoidably interact.<sup>43</sup> If WTO law is not normative in this sense, then it might be more plausible to keep it insulated from moral reasoning.

This, however, ignores the extent to which, even if only conceived as a trigger for rebalancing, the questions WTO law answers are appropriate to moral evaluation. Where a member withdraws concessions, this can have significant impacts on the material wellbeing of individuals, including (at least) producers in the country against which concessions are withdrawn, and consumers in the retaliating country.<sup>44</sup> Without prejudging the answer, intentionally causing such impacts is clearly a potential object of moral evaluation.<sup>45</sup> To the extent that withdrawal of concessions is justified as ensuring

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<sup>40</sup> Raz (2009), note 23 above, Ch. 2, 'The Claims of Law'

<sup>41</sup> J Bello, 'The WTO Dispute Settlement Understanding: Less is More', (1996) 90 *AJIL*, 416; WF Schwartz and AO Sykes, 'The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization', (2002) 31 *J. Legal Studies* 179-204. And, for the opposite view, JH Jackson, 'The WTO Dispute Settlement Understanding: Misunderstandings on the Nature of Legal Obligation', (1997) 91 *AJIL* 60; JH Jackson, 'International Law Status of WTO Dispute Settlement Reports: Obligations to Comply or Option to "Buy Out"?', (2005) 98 *AJIL* 109-125.

<sup>42</sup> See Jackson (1998; 2004), note 41 above.

<sup>43</sup> On the ways the domains of law and morality overlap, Hart, (1994), note 17 above, pp. 167-180. Marmor suggests that the core claims of legal positivism are about distinguishing legal from other forms of normativity. A Marmor, 'What's left of General Jurisprudence? On law's ontology and content', (2018) *Cornell Legal Studies Research Paper* No. 18-26

<sup>44</sup> Indeed, in the context of dispute settlement, complainants tailor retaliation to impact politically influential constituencies, to maximise political pressure for compliance. They thus harm some agents instrumentally, in order to change the behaviour of others, which Kantians in particular will find morally troubling.

<sup>45</sup> Raz (1994), note 16 above, 328-9; R Alexy, *A Theory of Legal Argumentation*, (1978, R Adler and N MacCormick trans. 1989), Clarendon Press, 9

compliance with, or responding to violation of, the WTO agreements, the moral evaluation of those agreements in turn seems required. The specific question asked may be slightly different: the morality of endorsing or being bound by a rule is not identical to the morality of enforcing it against others who themselves are not morally bound.<sup>46</sup> However, simply denying the authority of WTO law doesn't take us very far.

#### ***D. Admitting values in WTO law will be self-defeating***

A fourth set of arguments against engaging with values in WTO law and adjudication emphasises the compliance mechanisms through which law affects state policies. If we assume (which seems reasonable) that the point of engaging values in WTO law depends significantly on affecting state behaviour, then we might ask how likely this is, given plausible views about how and why compliance with international law happens.<sup>47</sup> If moral law will not motivate moral behaviour, and especially if it risks undermining the less ambitious but still significant goods of stability, predictability and mutually beneficial cooperation, this would provide a significant argument against such an approach.<sup>48</sup>

Consider three alternative stories, drawing on three prominent schools of international relations theory.

First, realists characterise compliance as driven by pressure from powerful affected states.<sup>49</sup> The prominence of retaliation in WTO law suggests that this plays an important role. At first glance, this might seem to empower adjudicators by putting state power at their disposal.<sup>50</sup> However, this is true only in so far as interpretations proposed by adjudicators accord with those demanded by relevant powerful states. Where interpretations do not meet the expectations of powerful states, these states can be expected to instead act on their own judgment. The United States' recent enthusiasm for unilateral retaliation against perceived 'cheating' by China highlights this point.<sup>51</sup> The

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<sup>46</sup> For a similar point, Raz, (1994), note 16 above, 334-5

<sup>47</sup> This may not be the only relevant consideration. If we each have an interest in the justice of the institutions in which we participate then we will find value for just states in a just WTO law, even if this does not change unjust states' behaviour.

<sup>48</sup> The objection here links to arguments for normative minimalism in public international law more generally. See most prominently: P Weil, 'Towards Relative Normativity in International Law?', (1983) 77:3 *AJIL*, 413-442

<sup>49</sup> B Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', (1998), 19 *Michigan J. Int'l L.*, 344, 350-1. In the trade context, Krasner gives an account of the determinants of trade openness in these terms: S Krasner, 'State Power and the Structure of International Trade', (1976) 28:3 *World Politics*, 317, 322-3.

<sup>50</sup> As Fuller pointed out, the logic of the legal form and the requirements of effectiveness impose a limited 'internal morality', including a requirement of generality, regardless of the ultimate political motivation of lawgivers: L Fuller, *The Morality of Law*, (1964), Yale University Press, 33-94

<sup>51</sup> See e.g. Press Release, *President Trump Announces Strong Actions to Address China's Unfair Trade*, March 2018, Office of the United States Trade Representative, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/march/president-trump-announces-strong> (accessed 1 May 2018). Indeed, various features of the Uruguay Round Agreements

worry here is that engaging with values in WTO adjudication risks leading the Appellate Body to diverge from powerful states' expectations to such an extent that decisions cease to be credible triggers for retaliation.<sup>52</sup>

Second, institutionalists characterise compliance as driven by reputational concerns.<sup>53</sup> Under anarchy, the lack of centralised enforcement makes reputation a key determinant of states' capacity to enter into mutually beneficial agreements. This gives them reasons to value and preserve their reputations for good faith compliance with those agreements. Various features of the WTO system, including multilateral surveillance, suggest these mechanisms play an important role. The function of dispute settlement in this model is to increase the reputational costs of non-compliance. However, this will only work if decisions are seen as tracking states' compliance with commitments. If decisions are perceived as going beyond the commitments states saw themselves as making, then they cease to provide relevant information for assessing counterparties' compliance, and respondents no longer suffer reputational costs for noncompliance. So again, it appears that engaging with values risks undermining the effectiveness of dispute settlement.<sup>54</sup>

Finally, we might understand WTO compliance in constructivist terms. States, on this view, comply because they see this as appropriate behaviour, having regard to their identities as liberal / law-compliant / fair etc.<sup>55</sup> Compliance reflects not an instrumental calculus of enlightened self-interest, but an intrinsic judgment of right action in relevant circumstances. Given that, on this view, ideational, including moral, factors play an immediate role in determining state behaviour, we might imagine that it was most compatible with admitting values in WTO adjudication. However, this depends on a careful reading of the relevant social norms, identities and understandings. An identity as law-compliant gives greater influence to those authorised to interpret the law. However, it is also exposed to criticisms that adjudicators have gone beyond interpretation to impose their own values. The WTO Appellate Body has a plausible claim to be an authoritative legal interpreter, but is only one amongst many potential

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are explained as attempting to bring WTO law sufficiently close to US expectations that it would be willing to restrain its previous unilateralism: Howse, (2016), note 32 above, 18; D McRae, 'Measuring the Effectiveness of the WTO Dispute Settlement System', (2008) 3 *Asian Journal of WTO and International Health Law and Policy*, 1, 4-6

<sup>52</sup> Much recent commentary on problems adjudicating the GATT National Security exemption reflects similar concerns.

<sup>53</sup> See generally A Hasenclever, P Mayer and V Rittberger, *Theories of International Regimes*, (1997), Cambridge University Press, 33-36.

<sup>54</sup> For this challenge to the Appellate Body, Greenwald (2003), note 3 above, 114-5. For a recent discussion emphasising the specificity of relevant reputation in institutionalist accounts: R Brewster, 'Exit from Trade Agreements: A Reputational Analysis of Cooperation and Fairness', (2018) 21:2 *Journal of International Economic Law*, 379

<sup>55</sup> Kingsbury, (1998) note 49 above, 358-360. See generally A Wendt, *Social Theory of International Politics*, (1999), Cambridge University Press

contributors to debates about relevant values. And if its interpretations move too far from the mainstream, it will lose even that position, at least for some relevant stakeholders.<sup>56</sup>

Is there a response to these objections?

As regards the first two (realist and institutionalist), there remains significant leeway within the constraints imposed by the triggering and reputation functions that each attributes to dispute settlement. Constructing institutions, whether as tools for imposing one's will, or managing cooperation, is difficult and expensive. Acting through ostensibly impartial institutions provides benefits that are lost if these are too readily set aside, or are seen to be too responsive to the demands of more powerful states.<sup>57</sup> As such, states will tolerate some deviation from their perceived optimal outcomes before they seek to directly challenge, and ultimately undermine, existing institutions.<sup>58</sup> This at least provides a range within which adjudicators have agency to accommodate values in adjudication.

As to the third (constructivist), while the Appellate Body is not an authoritative interpreter of the morality of trade, it is plausibly a privileged contributor to discussions on the subject, in much the same way that constitutional courts enjoy a privileged place in domestic political debate. There is a limit to how far any individual voice can move a debate, and equally there is a limit to how far any contributor can move from the centre of the debate while retaining influence.<sup>59</sup> But within these constraints, incorporating values in adjudication can potentially move political debates about appropriate conduct in trade regulation, and the trade regime as a whole, in the right direction.

Under each of these three perspectives, then, there is scope for admitting substantive values in adjudication. They do however sound an important warning: if engaging with values moves adjudicators too far from the commitments particular members – and particularly more powerful members – see themselves as making, or their respective and shared understandings of right action, this must undermine the effectiveness of WTO law. These limits must therefore be borne in mind in identifying the “best” interpretation in any particular case.<sup>60</sup> At the same time, the diversity of such subjective commitments and

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<sup>56</sup> The issue here is one of ‘social legitimacy’ – how far relevant constituencies, whether those affected or those required to implement, regard decisions as being legitimate. See generally: Howse (2000), note 9 above.

<sup>57</sup> As Ruggie observes, “political authority represents the fusion of power with legitimate social purpose”. Ruggie,(1982), note 4 above, 382.

<sup>58</sup> See generally R Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, (1984), Princeton University Press. This echoes an insight of critical and Marxist thinkers about the emancipatory potential latent in hegemonic ideologies.

<sup>59</sup> On the ways existing understandings condition ethical reasoning and its limits in constructivist thought, Price, R., (2008) *Moral Limit and Possibility in World Politics*, Cambridge University Press, 9-12

<sup>60</sup> Indeed, Shaffer and Trachtman suggest that Article 3.4 DSU mandates Panels and the Appellate Body to make acceptability to members a consideration in crafting decisions: G Shaffer and J Trachtman, ‘Interpretation and Institutional Choice at the WTO’, (2011) 52 *Virginia J. Intl. Law* 103, 120. Howse reads the Appellate Body's evolving interpretive

understandings, which vary across members, and as regards a particular member across relevant persons and groups, and across time, mean that simply seeking to track those understandings cannot yield consistent answers. (This point is developed further in Part II.C and D below.) Further, making political acceptability the sole focus of, as opposed to a background constraint on, interpretation risks undermining the social legitimacy of law and dispute settlement, and indeed the system's essential nature as legal. Consider: most observers of the WTO will recognise that, if the United States, or the European Union, or China, loses every dispute, then they can be expected to disengage, with consequent damage to the system as a whole; yet an interpretive approach that explicitly sought to accommodate the demands, however unreasonable, of one or more of these powers, would thereby give up any pretence of being a system of reasoned decision-making. It would thus concede its authority both over the leading powers (who know that what matters is the force of their political demands, not the strength of their arguments) and over less influential states (whose see that success depends on political acceptability to and relationships with the great powers, rather than legal rights and principles). What is required is to strike a difficult balance, recognising and accommodating to political reality, without abdicating the distinctive function of law.<sup>61</sup>

The institutionalist and constructivist stories have a second important implication. Each highlights the importance, not simply of outcomes in adjudication, but also of the reasoning that supports those outcomes. The same conclusion, they suggest, might be effective or ineffective in moderating state behaviour, or might reinforce or undermine the regime as a whole, depending on the quality of the reasoning supporting it. Decisions that appear arbitrary or unmotivated are less likely to attract compliance and support than those that are supported by convincing reasoning. It is therefore necessary to consider whether, and to what extent, different ways of thinking about the role of values in adjudication might serve to enhance, or alternatively to undermine, the force of that reasoning.

## ***II. How to think about values in WTO law***

There may be other possible arguments for value-neutral WTO adjudication, but those considered in the previous section seem the most plausible. Insofar as each of these is unconvincing, we can reasonably assume that nothing about the particular institutional characteristics of WTO dispute settlement would lead us to exclude values from adjudication, interpretation and application of WTO law. The next logical question is therefore how exactly such values might become relevant?

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approach as reflecting this kind of political sensitivity, given the changing fortunes of the WTO as an institution and the neoliberal consensus on which he sees it being built: Howse (2016), note 32 above, 29-30.

<sup>61</sup> This reflects the oft-highlighted difference between the diplomatic dispute settlement of the GATT, particularly in its earlier years, and the legalized approach under the WTO. See generally Weiler, J.H.H., (2001) 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' 35 *Journal of World Trade*, 191-207; Lang (2011), n. 4 above.



At its most general, we can distinguish two sets of views about the relationship between law and values: positivists, who see law and values as distinct, and as playing distinct roles in adjudication, and anti-positivists, who see the two as more closely intertwined. In this section, I argue that the positivist understanding of the role of values in adjudication is incompatible with the institutional context in which the Appellate Body operates, with its specific mandate, and with its judicial self-presentation. I further suggest that taking seriously the injunction to apply customary rules of international law, given the nature and background of many of the WTO agreements, implies an anti-positivist approach to adjudication. The argument here requires not simply identifying the relevant political, institutional and doctrinal elements, but also drawing out certain consequences of the positivist view, and certain necessary features of legal reasoning: it is the intersection of these two lines of thought that renders positivism inadequate in this context. The practical implications of these arguments are developed further in the final section.

### ***A. Two Positivismisms and the Role of Discretion in Adjudication***

Before proceeding, it is necessary briefly to recite some familiar ideas from analytical jurisprudence. While this will take us a little way from WTO dispute settlement, the detour will be short, and will yield results that can be brought directly to bear on our object of inquiry.

Consider, first, the tradition that legal theorists label analytical positivism. As a tradition, it comprises a range of distinct views.<sup>62</sup> However, it is perhaps most readily identified with some version of what Joseph Raz labels the Social Thesis: “that what is law and what is not is a matter of social fact”.<sup>63</sup> Legal propositions, on this view, are valid exclusively in virtue of social facts, including most prominently facts about the past actions of political institutions. Whether a given proposition is or is not law is answered exclusively by reference to such facts, which we label sources. In the domestic context, these may include primary legislation, administrative acts, judicial decisions and so forth. Internationally, they will include treaties and the actions of both states and jurists that together constitute customary international law.

A key implication of legal positivism, so understood, is that the law is found without recourse to values or moral reasoning. It may be that in particular instances, the law will direct adjudicators to enquire into matters of value, or to apply moral standards, but the question of the law's content is answered exclusively by reference to non-moral facts.<sup>64</sup>

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<sup>62</sup> For a discussion of the problems that result from the conflation of a diverse tradition with a specific thesis or theses: J Gardner, ‘Legal Positivism: 5 ½ Myths’ (2001) 46:1 *American Journal of Jurisprudence* 199

<sup>63</sup> Raz (2009) note 23 above, 37

<sup>64</sup> The extent to which moral reasoning can constitute a subsidiary element in legal reasoning distinguishes ‘exclusive’ and ‘inclusive’ positivist views. See generally KE Himma, ‘Inclusive Legal Positivism’ in J Coleman and S Shapiro eds. *The Oxford Handbook of Jurisprudence and Philosophy of Law*, (2002), Oxford University Press. Coleman suggests that the core disagreement between inclusive positivism and Dworkin's anti-positivism is about whether the role of morality in legal reasoning is necessary or contingent/conventional: J Coleman,

Gardner offers the following formulation for this idea, which he characterises as the (minimal) shared core of analytical legal positivism:

In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources).<sup>65</sup>

It is not my purpose here to engage with the substantive merits of legal positivism. Rather, I want to highlight one implication that everyone – positivists and anti-positivists – accepts that this view implies. This is the fact that the law, so understood, is necessarily incomplete. If we understand law as exclusively a matter of sources, then it will inevitably be the case that, in at least some situations, there will be no legal “fact of the matter”.<sup>66</sup>

This may arise for one of a number of fairly uncontroversial reasons. First, it reflects the inherent limits of linguistic determinacy. Hart refers to this as the ‘open textured’ nature of language, which means that, for any given term, proposition or precedent, there will be some cases that fall squarely within it, which he labels the ‘core’, and others that might or might not fall under it, which he labels the ‘penumbra’.<sup>67</sup> Second, it reflects the impossibility of legislators anticipating in advance all possible circumstances that may arise in the future, which means that it falls to those applying the law to decide whether unforeseen situations that arise fit under a given rule or not. This is at once necessary (given the cognitive limits of human legislators), efficient (given the transaction costs of seeking to anticipate everything) and desirable (given the better position that judges are in to answer questions as they arise, instead of seeking to do so in the abstract in

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*The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory*, (2001), Oxford University Press, 108. To the extent this is the case, the argument I advance below may be compatible with inclusive positivism, insofar as my claims relate to a particular legal system, rather than addressing law in general. However, the arguments about customary interpretation and object and purpose are likely too general to be compatible with Coleman’s conventionalism. Regardless, nothing of substance in my argument turns on this point of classification.

<sup>65</sup> Gardner, (2001), note 60 above, 201 This does not commit positivists to a view of law as simply the semantic content of legislative acts; rather, the necessary implications, presuppositions etc of those texts as communicative acts can similarly fall under the positivist account of law: Marmor (2018), note 43 above.

<sup>66</sup> See e.g. R Dworkin, ‘The Model of Rules’ (1967) 35 *U. Chicago. L. R.*, 14, 17; Hart (1994), note 17 above, 127-8; Shapiro (2011), note 17 above, 251

<sup>67</sup> See generally Hart (1994), note 17 above, 124-8. This point requires slight modification in the international context, where state behaviour is an important source for customary international law which may in particular cases have little or no linguistic content. In such cases, the issue is not one of identifying whether new cases fall under old words, but rather whether the example constituted by past conduct extends to the facts of a new case. However, the same problem of uncertainty at the margins remains, and is probably more significant in the case of such non-linguistic sources.

advance).<sup>68</sup> Third, it reflects the political realities of both domestic and international law-making, where plural and often conflicting interests and perspectives are only partly integrated. This leads to gaps, ambiguities and contradictions, as lawmakers seek to paper over disagreement through ambiguous language, effectively delegating controversial decisions to subsequent interpreters.<sup>69</sup>

The upshot is that, while positivists characterise law's content as exclusively a matter of social facts, they do not claim that adjudication is, or can be, exclusively a matter of law, so understood.<sup>70</sup> Rather, adjudicators necessarily reach beyond law to resolve disputes in the penumbra, to fit rules to unforeseen circumstances, and to answer questions that legislators left unresolved.<sup>71</sup> These are commonly characterised as cases where adjudicators exercise 'discretion' in reaching decisions that take them beyond existing law.<sup>72</sup> Where their decisions have formal or informal precedential value, we may also characterise them as delegated judicial legislation.<sup>73</sup>

Positivism, in this analytical sense, is related to, but distinct from, positivism as that term is often understood by international lawyers.

For the international lawyer, positivism is primarily a claim about the relation between international law and state consent.<sup>74</sup> International law is law because, and only because, it has been consented to as such by states who are subject to it.<sup>75</sup> Treaty and custom are each understood as expressing that consent. Analytical legal positivism is a view about *what kinds of facts (social facts)* that constitute law, whereas international legal positivism is a view about *which social facts (state consent)* count as sources. An obvious case where the two come apart is the acts of international organisations, such as General Assembly Resolutions. These are clearly social facts, of a kind that analytical positivists can readily admit might make law, whereas international legal positivists will deny their

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<sup>68</sup> See generally, Hart (1994), note 17 above, 128-33; Shapiro (2011), note 17 above, 198-200. On the efficiency of legislative incompleteness in the WTO context, J Trachtman, 'The Domain of WTO Dispute Resolution', (1999) 40 *Harvard International Law Journal*, 333

<sup>69</sup> For this point in the WTO context, Van Damme (2009), note 7 above, 141-146

<sup>70</sup> For this point in the international context, albeit using the language of formalism rather than positivism: J D'Aspremont, *Formalism and the Sources of International Law*, (2011), Oxford University Press, 18-21

<sup>71</sup> Raz (1994), note 16 above, 330-335

<sup>72</sup> Hart (1994), note 17 above, 136

<sup>73</sup> Although, for the argument that judicial law-making is nonetheless not 'legislative', Gardner (2001) note 60 above, 214-218

<sup>74</sup> AV Lowe, *International Law*, (2007), Oxford University Press, 25-7; B Simma and APaulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View', (1999) 93:2 *AJIL*, 302, 303-4. The latter authors recognise a second aspect of positivism as the separation between 'law in force' and 'nonlegal factors', approximating the analytical positivism described above.

<sup>75</sup> See e.g. I Brownlie, *Principles of Public International Law*, 7<sup>th</sup> ed, (2008), Oxford University Press, 4; S Besson, 'Theorizing the Sources of International Law', in S Besson and J Tasioulas eds., *The Philosophy of International Law*, (2010), Oxford University Press, 165-6.

legal status, unless they can be treated as directly or indirectly expressing state consent.<sup>76</sup> Equally, an international legal positivist might readily admit (analytical) anti-positivist elements, including in particular a concern with object and purpose, in the interpretation of consent-based sources.<sup>77</sup> So analytical positivists need not be international law positivists, nor must international law positivists be analytical positivists.<sup>78</sup>

### ***B. Can WTO Adjudicators be (Analytical) Positivists?***

Analytical positivism thus implies a particular view about the role of values in adjudication.<sup>79</sup> Law, understood exclusively in terms of social facts, answers many questions. Where the law is silent, however, adjudicators committed to deciding cases have little choice but to look beyond law, including in particular to relevant values, to fill the gaps and provide answers in hard cases.<sup>80</sup> This, I suggest, renders analytical positivism incompatible with the political and doctrinal context in which the Appellate Body exists. The Appellate Body publicly endorses international law positivism; but the same reasons that lead it to that position preclude it from accepting the consequences of analytical positivism. I sketch below the Appellate Body's self-presentation, formal mandate and political context, and show how each points towards international legal positivism, but away from analytical positivism.

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<sup>76</sup> As to which see: Brownlie (2008) note 75 above, 19-24; Lowe (2007) note 74 above, 90-7.

<sup>77</sup> This point is highlighted, albeit as a criticism of the internal consistency of international legal positivists, in M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument, Reissue with Epilogue*, (2005), Cambridge University Press, p. 131-2

<sup>78</sup> D'Aspremont (2011) note 70 above, 21-24. Gardner draws a further distinction, between analytical positivists, who endorse positivism as conceptually true, and normative positivists, who endorse positivism because of perceived benefits from doing so. Nothing in my argument turns on this distinction. For clarity, I use 'analytical positivism' to refer to those who endorse the positivist thesis outlined above, regardless of reasons for doing so. Gardner (2001), note 60 above, 204-5. Many of the arguments that I rejected in Part I would fall under Gardner's normative positivism.

<sup>79</sup> Strictly speaking positivism, as an analytical claim about the truth conditions of legal propositions, only has implications for adjudication where it is combined with a further normative claim that the task of judges is – at least in part – to find and apply the law. An analytical positivist might consistently be a normative anarchist, holding that judges and legal subjects should generally ignore the law. As Gardner observes, analytical positivism strictly construed is 'normatively inert'. However, insofar as we are concerned with WTO adjudication, and with the approach and self-presentation of the WTO Appellate Body, we can largely discount this caveat. For this point generally: Gardner, (2001) note 60 above, 202-3

<sup>80</sup> Raz distinguishes between a narrower sense of legal reasoning ("reasoning about law"), which is limited to source-based considerations, and a wider sense ("reasoning in accordance with law"), which looks to non-source-based considerations to fill gaps and resolve ambiguities: Raz, (1994), note 16 above, 332-3. Cf. Gardner (2001), note 60 above, 215-217

The Appellate Body publicly presents itself as an exponent of international legal positivism.<sup>81</sup> Thus, in one of its earliest decisions, it observed as follows:

The *WTO Agreement* is a treaty -- the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the *WTO Agreement*.<sup>82</sup>

This concern with consent as the root of legal obligation among sovereign states has featured in the Appellate Body's reasoning in a number of subsequent cases.<sup>83</sup> More generally, its emphasis on the priority of the text in its interpretive approach seems to reflect a concern with state consent as the source of its authority.<sup>84</sup>

This professed enthusiasm for consent can be understood as a response to the Appellate Body's specific mandate, as set out in Article 3.2 of the Dispute Settlement Understanding, specifically its duty to "preserve the rights and obligation of Members under the covered agreements", and prohibition on "add[ing] to or diminish[ing] the rights and obligations provided in the covered agreements." While there is a lot squeezed into Art 3.2, a key message the Appellate Body has taken from it is that its task is squarely focussed on the positive law found in the WTO Agreements.<sup>85</sup> Those agreements are to be central to its reasoning, and constitute, in the first instance, the sources from which it is expected to

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<sup>81</sup> Whether its reasoning and conclusions can in fact be supported in these terms is a separate question: as Hudec has emphasised, there can be a gap between the the Appellate Body's self-presentation and what is going on beneath the surface: R Hudec, 'GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test, (1998) 32:3 *The International Lawyer* 619. For a more recent observation to this effect, J Trachtman, 'WTO Trade and Environment Jurisprudence: Avoiding Environmental Catastrophe', (2017) 58:2 *Harvard International Law Journal*, 273

<sup>82</sup> WT/DS8/AB/R *Japan – Alcoholic Beverages*, Appellate Body Report, 4 October 1996, p. 15

<sup>83</sup> See e.g. WT/DS26/AB/R *EC – Hormones*, Appellate Body Report, para 65; WT/DS103/AB/RW2 *Canada – Dairy (2<sup>nd</sup> Article 21.5 Reference, New Zealand)*, Appellate Body Report, para 94. In other cases the AB has emphasised the importance of respecting those sovereign rights that states have not agreed to restrict, including most prominently their right to tax (DS87/AB/R *Chile – Alcohol*, Appellate Body Report, para 60; WT/DS108/AB/R *US – FSC*, Appellate Body Report, para 90; WT/DS108/AB/RW *US – FSC (Art 21.5)*, Appellate Body Report, para 139, 148; WT/DS316/AB/R *EC – Aircraft*, Appellate Body Report, para 1130; WT/DS353/AB/R *US – Aircraft*, Appellate Body Report, para 811) and to choose regulatory goals (DS58/AB/R *US – Shrimp*, Appellate Body Report, para 87).

<sup>84</sup> On the importance of text in the AB's approach, see e.g.: WT/DS8/AB/R *Japan – Alcoholic Beverages*, Appellate Body Report, pp. 17-18; WT/DS50/AB/R *India – Patents (US)*, Appellate Body Report, para. 45-48; WT/DS58/AB/R, *US – Shrimp*, Appellate Body Report, para 114. Qureshi suggests that the AB's approach to subsequent practice similarly reflects a prominent concern for state consent: Qureshi, (2015), note 8 above, 40-45.

<sup>85</sup> On the AB's response to Art 3.2, A Mitchell, 'The Legal Basis for Using Principles in WTO Disputes', (2007) 10:4 *Journal of International Economic Law*, 795, 809

work.<sup>86</sup> The denial of precedential force to Panel/AB decisions further emphasises the priority of the texts to which the members have consented.

Emphasising the text of agreements and state consent is also understandable as a response to the Appellate Body's particular political and institutional vulnerability, especially in its early years. Like all international adjudicators, the Appellate Body is reliant on the continuing support of states to give effect to its decisions. However, three features render it especially vulnerable.

First, it has compulsory jurisdiction and is tasked with resolving disputes of immediate economic significance for both complainant and respondent states. This distinguishes it from human rights courts, where complainants are either individuals, or other states whose interest is often principled rather than practical. It also distinguishes it from the ICJ, where judgments on matters of high politics are expected to contribute to, but rarely to settle, ongoing political disputes, and where the need to establish jurisdiction limits risks from noncompliance. The AB is therefore more exposed than other international tribunals to non-compliance undermining its social legitimacy.

Second, as the current crisis illustrates, the role of consensus in WTO decision-making provides members – and especially those more powerful members capable of standing alone against pressure from others – with a powerful, but dangerously blunt, tool for disciplining adjudicators who fail adequately to legitimate their decisions and reasoning in the eyes of those members. Article IX.2 provides a mechanism for precisely targeted political control of Appellate Body jurisprudence, through the adoption of authoritative interpretations. However, the requirement of a three-fourths majority in that provision means that it does not provide an effective remedy for members dissatisfied with the way the agreements have been interpreted. This leaves procedural obstruction as the only effective mechanism of control. Yet the dramatic (because it requires making an existential threat against the system) and blunt (because it necessarily attacks the system as a whole) nature of that mechanism in turn places a significant onus on the Appellate Body to pre-empt its use by legitimating its conclusions in terms of the expressed consent of states.

Third, as Howse argues, the Marrakesh Agreement marks a high-water mark for neo-liberal globalisation. Within a few years of the WTO's creation, anti-globalization protest movements were challenging the legitimacy of its project. This led the Appellate Body in its early years to adopt a cautious, technical, judicial minimalism, insulating it from challenges to the WTO as a political institution.<sup>87</sup>

However, those same factors that push the Appellate Body towards international legal positivism constitute a barrier to its adopting analytical positivism.

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<sup>86</sup> As noted above, this does not mean that the agreements are read independent from general international law. Indeed, in its first decision, the AB emphasised that WTO law “is not to be read in clinical isolation from public international law”: WT/DS2/AB/R *United States – Gasoline*, Report of the Appellate Body. In doctrinal terms, non-WTO law may be relevant under Art 31.1 VCLT as context, or under Art 31.3, as subsequent agreements or practice, or relevant rules of international law.

<sup>87</sup> Howse (2016) note 32 above.

Recall, the analytical positivist commitment to understanding law as a matter of social facts brings with it a recognition that adjudication cannot be simply a matter of applying law; rather, on this view, adjudication involves a significant degree of judicial discretion, and decisions will frequently turn on extra-legal considerations.

Yet it seems clear from Article 3.2 DSU that the members understood the role of the Appellate Body as a strictly legal one. It is not the purpose of the dispute settlement system, at least as described there, to go beyond the law in deciding cases, or to create new law through extra-legal discretion. It is the membership, under Article IX of the Marrakesh Agreement, that is authorised to adopt authoritative interpretations, exercising the political discretion to fill any gaps in those agreements.<sup>88</sup>

Further, given the political context outlined above, any explicit recognition by the Appellate Body of the kind of discretion positivists identify with adjudication could be expected to evoke opposition from both member representatives within the 'political' WTO, and from wider political legitimacy constituencies. More than bare judicial fiat is required to legitimate interpretation.

There are certainly rational-choice models of adjudication under which 'we have decided' would be sufficient for these purposes, in the sense of motivating the parties thereto to comply. If we model adjudication as an iterated game of indefinite duration for relatively low stakes, then provided others can also be expected to do so, the losing party to a dispute will be motivated to comply by the expectation of future successes.<sup>89</sup> However, given the diversity of constituencies and interests involved, such mechanisms cannot plausibly stabilise a regime of 164 members: what are small stakes for some will be large stakes for others, decisions in one dispute have consequences for others, and no set of decisions can be expected to ensure every member continues to have a narrowly rational interest in compliance. Further, once we acknowledge the role of wider compliance constituencies beyond the 'trade insider' community, simply tracking the rational self-interest of members, as understood by relevant constituencies within their trade bureaucracies, ceases to be sufficient: decisions on economic, political, environmental and ethical matters of concern to wider populations require to be legitimated to those populations.<sup>90</sup> Simply asserting that the Appellate Body has so decided, without more, can be expected to carry little weight in this context.

We can here distinguish the position of the Appellate Body from certain other tribunals, both domestic and international, which might enjoy sufficient social legitimacy to

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<sup>88</sup> In practice, the Appellate Body applies an informal system of precedent, and expects panels to follow previous opinions. Further, in the substance of its reasoning, as Venzke explains, it is frequently the meaning of previous Appellate Body opinions, more than the agreements, that are the focus of argument: I Venzke, *How Interpretation Makes International Law*, (2012), Oxford University Press, Ch IV. As noted earlier, this practice of informal precedent is among the United States' current complaints about the Appellate Body. However criticism of the AB's 'gap-filling' is by no means a new phenomenon: Qureshi (2015), note 8 above, 15.

<sup>89</sup> In the logic of such iterated games, Axelrod, R., *The Evolution of Cooperation*, (1984), Basic Books.

<sup>90</sup> This point is well made in Howse (2002) note 4 above.

demand respect for decisions simply in virtue of their origin. Domestic courts, at least in stable democracies, are embedded within widely publicly endorsed social institutions. Further, they usually enjoy a degree of – admittedly mediated – democratic legitimacy, in virtue of their appointment processes, as well as epistemic legitimacy deriving from the professional reputation of individual judges and the social acceptance of their procedures. Even where – as in the United States – higher courts are intensely politicised, their decisions are accorded significant respect by other political institutions and by the wider population, simply in virtue of the fact that they are court decisions. Legal professionals, who themselves constitute an influential class within official bureaucracies and wider civil societies, are socialised to respect those decisions, whether or not they appear correct or well-reasoned on their merits.<sup>91</sup> This gives domestic courts a greater capacity to decide ‘off their own bat’ when faced with legal lacunae.

The international tribunal that has enjoyed perhaps the greatest success in establishing its own social legitimacy within its judicial domain, the European Court of Justice, has done so precisely by recognising this fact, and building implicit alliances with these influential domestic professional and judicial communities.<sup>92</sup> But the key tools through which the ECJ forged those alliances – preliminary reference and individual rights of action – are not available to the Appellate Body.<sup>93</sup> Other tribunals that have achieved significant popular legitimacy, such as the European Court of Human Rights, have relied on the support of civil society actors who in turn enjoy significant popular sympathy, while also – as noted above – addressing disputes where non-compliance is less likely to undermine long-term social legitimacy. The upshot is that – unlike many other tribunals – the Appellate Body lacks the degree of deep social legitimacy required to effectively exercise the kind of extra-legal discretion implied by analytical positivism.

Further, the Appellate Body has itself been careful to avoid acknowledging any such discretion in its role. This is perhaps clearest in its approach to the Anti-Dumping Agreement, where Art 17.6(ii) specifically anticipates legal indeterminacy, providing:

Where the panel [*or the AB on appeal*] finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel [*or AB*]

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<sup>91</sup> As Henkin notes, the role of legal advisers, and the significant proportion of legally trained officials and politicians in non-legal roles in foreign offices and international organizations allows international law and courts to benefit from some of this socialization effect. Henkin, L, *How Nations Behave: Law and Foreign Policy*, (1968), p. 61. However, the remoteness of international law from the educational experience and daily practice of most legal professionals means that this effect is substantially weaker, and can play little role as regards wider (non-trade) legitimacy constituencies.

<sup>92</sup> Weiler, J.H.H., (1991), ‘The Transformation of Europe’, 100:8 *Yale Law Journal*, 2403-2483

<sup>93</sup> Further, the direct effect of WTO law and dispute settlement has been excluded in key jurisdictions, whether through legislative or judicial decision. See e.g. (United States) Uruguay Round Agreements Act 1994 sec. 102, 19 USC 3512; (European Union) Joined cases C-120/06 P and 121/06 P *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM), Fedon & Figli and others v Council and Commission* [2008] ECR I-6513



shall find the [*domestic*] authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.<sup>94</sup>

From an analytical positivist perspective, this provision is perfectly intelligible. Where the law settles a particular question, domestic authorities should be required to follow it. Where a point is indeterminate (i.e. there is no legal fact of the matter), any permissible interpretation should be allowed, and the Panel/AB should not exercise its (extra-legal) discretion to determine the matter.

Yet the Appellate Body, on each occasion where Art 17.6(ii) has been invoked, has found that the underlying provision admitted only one permissible interpretation, interpreting its mandate to apply “customary rules of interpretation of public international law” so that it will almost never be the case that a provision “admits of more than one permissible interpretation”.<sup>95</sup> Rather, the AB’s view is that there will (almost) always be one (legally) right answer.<sup>96</sup> Given the limited textual resources underpinning these decisions and regular disagreements between Panels and Appellate Body, this is a difficult conclusion to square with the analytical positivist view of law’s limits. However, once we recognise the doctrinal and political impediments to extra-legal discretionary decision-making by the Appellate Body, it begins to make sense. After all, if the interpretation of the Anti-Dumping Agreement does not lead to a single right answer, then why should we expect the other agreements to do so? If there are multiple reasonable interpretations of the Anti-Dumping Agreement, the same will presumably be true of other agreements? But once that point is conceded, then the Appellate Body will struggle to maintain its authority to prescribe one of those reasonable interpretations as correct, and the others as incorrect.

### ***C. Analytical Positivism and the Customary Rules of Interpretation***

The Appellate Body’s formal mandate, institutional position, and judicial self-presentation are thus difficult to reconcile with the analytical positivist view of the limits of legal determinacy and the necessity of extra-legal discretion. That analytical positivist view is a necessary one: it claims to describe the nature of law, rather than simply the

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<sup>94</sup> ADA Art 17.6.ii

<sup>95</sup> WT/DS184/AB/R *US – Hot Rolled Steel*, Appellate Body Report, para 57-62; WT/DS350/AB/R *US – Continued Zeroing*, Appellate Body Report, para 267-273, 317. See also e.g. WT/DS322/AB/R *US-Zeroing (Japan)*, Appellate Body Report, para 188-189; WT/DS264/AB/R *US – Softwood Lumber V*, Appellate Body Report, para 113-116; WT/DS344/AB/R *US – Stainless Steel (Mexico)*, Appellate Body Report, para 136. The difficult relationship between Article 17.6(ii) and the requirements of Article 3.2 and the customary principles of interpretation in the VCLT, is highlighted in Qureshi (2015), note 8 above, 321-4

<sup>96</sup> Van Damme explains this by reference to the need for the Appellate Body to offer ‘judicial finality’, albeit expressing scepticism that there will always be a right answer, “given the complexities of language and context and changing circumstances, often unforeseen”: I Van Damme, ‘Treaty Interpretation by the WTO Appellate Body’, (2010) 21:3 *EJIL* 605, 610. Howse argues the AB’s difficulties with zeroing reflect a departure from an otherwise commendable judicial minimalism: Howse (2016), note 32 above, 71

conditions of any particular legal system.<sup>97</sup> If the Appellate Body's doctrinal mandate and political position preclude it exercising the kind of discretion that positivists identify with adjudication, then this poses a difficulty, regardless of any particular features of WTO law. However, the scale of the difficulty will vary, depending on the extent of the indeterminacy in that law. It is therefore worth exploring a little further how the indeterminacy of positivist sources plays out in the context of WTO adjudication, in order to appreciate the extent of the challenge in reconciling the two.<sup>98</sup>

Article 3.2 directs adjudicators to "customary rules of interpretation", which the Appellate Body has consistently read as referring, in the first instance, to those principles codified in Articles 31-33 of the Vienna Convention on the Law of Treaties.<sup>99</sup> Article 31.1, in particular, is regularly invoked in justifying the Appellate Body's interpretive approach. It provides as follows:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Three points should be noted about this provision.

First, Article 31.1 identifies not one but three different approaches to interpreting treaties: textual, contextual and teleological. In some cases, these three may point in the same direction, suggesting a high degree of confidence that a particular interpretation is correct. In others, a provision that appears indeterminate by reference to one standard may be clarified by another, again offering relative certainty as to the interpretation to be preferred. However, in yet other cases, different approaches point in different directions. Where this happens, some way must be found to choose between the interpretation suggested by the ordinary meaning (textual) of the terms of a provision, and that suggested by its object and purpose (teleological).<sup>100</sup> Yet neither Article 31, nor the prior

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<sup>97</sup> Strictly speaking, adjudicators faced with legal indeterminacy might simply declare a null result. However, in the context of an adversarial system, the result of such a rule is that the respondent 'wins' – the need for a legal decision is not avoided: Dworkin, (1986), note 17 above, 142-3. Such a pro-respondent presumption seems particularly inappropriate in the context of a dense multilateral regime like the WTO, with its complex balance of rights and obligations: Mitchell (2008), note 6 above, 53. Further, such a rule does not eliminate indeterminacy in adjudication. Rather (as the Article 17.6 cases illustrate), it simply changes the question, from what the law is, to whether it is clear what the law is.

<sup>98</sup> The point to take from this discussion is a relatively modest one: not that the indeterminacy of sources undermines legal positivism *tout court*, but simply that it renders it incompatible with the formal mandate, political position and judicial self-presentation of the Appellate Body, as outlined above.

<sup>99</sup> Van Damme explains the choice to refer to 'customary principles', rather than the VCLT, as reflecting the fact that not all WTO members are or can be parties to the VCLT. Van Damme (2010) note 96 above, 608

<sup>100</sup> The possibility that provisions that appear clear when examined textually become problematic once their purpose is considered is emphasised by Fuller in criticising Hart's core/penumbra distinction: L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart',

or subsequent customary practice that it codifies, provide a rule for choosing among these interpretive methods when they conflict.<sup>101</sup> The Appellate Body's characterisation of the interpretive exercise as 'holistic', and prominent emphasis on text in the first instance, merely obscure rather than excluding these choices.<sup>102</sup> Rather, in the analytical positivist view, these will be situations where adjudicators must exercise extra-legal discretion in deciding the case before them.<sup>103</sup> The more such situations we find, the greater the need for discretion, and hence – if we accept the positivist view – the greater the legitimisation problem.

Second, there are significant problems understanding the third of these criteria, object and purpose, in positivist terms.<sup>104</sup> Positivist theorists have generally been quite sceptical of legislative intent as a component of legal interpretation. Joseph Raz, for example, argues that the only legislative intent that is relevant is the intent to enact the particular legislation that has been enacted, understood in accordance with its terms and with prevailing legal and linguistic conventions.<sup>105</sup> However scepticism about legislative intent is not a necessary feature of positivism. In circumstances where it is possible to identify the relevant legislative intent by reference to the kinds of social facts that positivists emphasise, and where the prevailing conventions of legal interpretation

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(1958) 71:4 *Harvard L. Rev.* 630, 662-5. Cf. N MacCormick, *Legal Reasoning and Legal Theory*, (1979), Clarendon, Ch VIII

<sup>101</sup> Van Damme, (2010), note 96 above, 616-620. Further, as Van Damme observes, the three approaches mentioned in Article 31.1 are by no means the only principles relevant to treaty interpretation: *ibid*, 621.

<sup>102</sup> Qureshi, (2015), note 8 above, 24-6.

<sup>103</sup> For this point in respect of principles of interpretation generally, Van Damme, (2010), note 96 above, 616-7. Domestically the same point applies to the multiplicity of competing canons of interpretation: JR Macey, 'Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model', (1986) 86 *Colum. L. Rev.*, 223, 264. The recognition of competing interpretive approaches points towards what Dworkin labels 'theoretical disagreement', about the criteria for identifying law, which he argues is particularly challenging for positivism: Dworkin (1986), note 17 above, 4-6

<sup>104</sup> While my focus in this paper is interpretation, object and purpose plays various roles in the VCLT, and its exact content may vary across these. See generally: DS Jonas and TN Saunders, 'The Object and Purpose of a Treaty: Three Interpretive Methods', (2010) 43 *Vanderbilt J. Transnational Law*, 565; J Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties', (1997), 8 *Finnish Y.B. Int'l L.*, 138; U Linderfalk, 'On the meaning of the 'Object and Purpose' criterion in the Context of the Vienna Convention on the Law of Treaties, Article 19', (2003) 72 *Nordic J. Int'l Law*, 429.

<sup>105</sup> J Raz, *Between Authority and Interpretation*, (2009), Oxford University Press, pp. 285-8. This is not to say that anti-positivist views will have any greater interest in the 'originalist' intent of legal drafters. However, as discussed further below, anti-positivists can at least make identify a plausible role for object and purpose in legal interpretation. On the minimal role of legislative intention in anti-positivist views, R Dworkin, 'Originalism and Fidelity' in *Justice in Robes*, (2006), Harvard University Press.

characterise it as relevant, interpreting the law by reference to such positive intent need not necessarily give positivists pause.<sup>106</sup>

Third, in the context of the World Trade Organisation, the identification of object and purpose is generally a fraught exercise. For public international lawyers, preambles are a standard source of guidance as to the object and purpose of agreements. However, a number of WTO agreements lack any preamble, while others have preambles that are singularly unilluminating, frequently saying little more than 'the purpose of this agreement is to provide rules on the topics governed by this agreement'. Further, this is not simply a matter of incomplete evidence. Rather, at key points, the WTO agreements constitute difficult compromises between fundamentally opposed views.<sup>107</sup> This is perhaps clearest in the context of trade remedies. Thus, the Safeguards Agreement can be understood either as an attempt to discipline unilateral recourse to protectionism; or an attempt to discourage other 'grey area' measures, by making recourse to safeguards easier.<sup>108</sup> The Subsidies and Countervailing Measures Agreement is about restraining states' use of subsidies; but also restraining states' recourse to unilateral measures to respond to subsidies.<sup>109</sup> And the Anti-dumping Agreement is about restraining, while also licensing, anti-dumping.<sup>110</sup> In no case do we get a clear sense of the problem members saw themselves as trying to solve, of what was objectionable about the underlying practices to which these agreements apply, or of the principles underpinning the solutions adopted. The upshot is that, if we understand object and purpose as referring to the actual goals of actual states at the time the agreements were entered into (which we must if we retain the positivist emphasis on social facts), then there simply is no object and purpose behind many of these agreements, and any reference thereto must involve an exercise of judicial discretion.<sup>111</sup> Indeed, these difficulties may explain why the

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<sup>106</sup> This possibility is acknowledged, albeit with reservations, in: Raz (2009), note 105 above, 285, 291-4 The limited role accorded to preparatory work in Article 32 VCLT suggests such positivist object and purpose should play a minimal role in international law.

<sup>107</sup> Howse, (2016), note 32 above, 70. For this reason, other sources sometimes used to identify object and purpose, including in particular negotiating history, may offer little assistance in the context of contested WTO provisions, a point the Appellate Body has acknowledged in the context of zeroing: WT/DS464/AR/R *US – Washing Machines*, Appellate Body Report, para 5.168

<sup>108</sup> On the conflicting goals of the Safeguards Agreement: AO Sykes, 'The Safeguards Mess: A Critique of WTO Jurisprudence', (2003) 2:3 *World Trade Review*, 261; K Jones, 'The Safeguards Mess Revisited: The Fundamental Problem', (2004), 3:1 *World Trade Review*, 83; AO Sykes, 'The 'safeguards mess' revisited – a reply to Professor Jones', (2004) 3:1 *World Trade Review*, 93.

<sup>109</sup> WT/DS213/AB/R *US – Carbon Steel*, Appellate Body Report, para 73

<sup>110</sup> Greenwald (2003), note 3 above, 117. On the challenges of identifying an object and purpose behind the trade remedies agreements: Qureshi (2015), note 8 above, 276-294.

<sup>111</sup> As Van Damme observes, "Interpretation is about finding the intentions of the parties; that is undisputed. But this gives little or no answer to questions such as whose intention, what was intended, and at what time that intention matters." Van Damme, (2010) note 96 above, 618. For discussion of the extent to which enquiries into object and purpose are frequently quite far removed from seeking that actual objects of actual agents: V Crnic-Grotic, 'Object

Appellate Body has been, in general, quite slow to rely on object and purpose as a prominent element in its interpretive approach.

Readers might worry that the degree of uncertainty suggested by the previous paragraphs does not reflect our experience of treaty interpretation in general, or WTO treaty interpretation in particular. There have been and continue to be prominent points of interpretive disagreement among WTO lawyers. However, across much of WTO law, there is substantial agreement on many points. We are not lost in a sea of subjectivity or indeterminacy. To the extent this is the case, the above points suggest that there is more going on than the analytical positivist assumes: the very fact that we do agree about so much suggests that our understanding is built on more than just social facts.<sup>112</sup> Rather, it reflects shared assumptions about the values that the law should be pursuing; and it is only where those shared assumptions break down that interpretive disagreements become both prominent and entrenched.

#### ***D. Constructing Object and Purpose***

The implication, then, is that in so far as we find WTO treaty interpretation relatively unproblematic, we must be drawing, whether explicitly or implicitly, on anti-positivist elements; and conversely, that if we insist on adopting a strictly positivist account of WTO law, then we risk undermining much of that certainty, replacing legal interpretation with political choice.

To make what is implicit explicit, this section examines in more detail what is involved in identifying the intention behind a treaty text, where this is not expressly stated. The goal is to demonstrate how far that exercise, whether addressed to text, context or object and purpose, requires making substantive value judgments incompatible with the positivist account of law. The point here is not limited to the WTO, applying (at least) to multilateral treaties in general. However, it is particularly evident in this context, and particularly problematic, given the constraints on Appellate Body discretion noted above.

Some readers may find the discussion here unhelpfully abstract. Certainly, it does not seek to reflect the ways adjudicators describe their reasoning in their decisions, or even the conscious steps by which they proceed. Rather, it describes what we must be doing when we seek the intention behind another's act. It is the explanation that results if we repeatedly ask, of our shorthand ascriptions of intent, "yes, but how do you know?". It is therefore an effort to describe "what is really going on" when we talk about the intention behind a treaty, including its object and purpose. The answer it points us towards is a firmly anti-positivist one.

If we cannot find direct evidence of the object and purpose of the WTO Agreements, in the form of preambular or other statements, then we might instead hope to deduce these from the agreements themselves. Indeed, this is a standard approach adopted not only by the WTO Appellate Body, but by public international lawyers more generally, in

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and Purpose of Treaties in the Vienna Convention on the Law of Treaties', (1997) 7 *Asian Yearbook of International Law* 141

<sup>112</sup> For this point more generally, M Greenberg, 'How facts make law', (2004) 10 *Legal Theory* 157, 184-5

seeking the object and purpose of agreements and indeed of individual provisions. We examine the relevant provisions, in their relevant context, and we ask “what are these provisions seeking to achieve?”. Once we have an answer to this question, we can in turn apply it in interpreting the relevant provision.<sup>113</sup>

However, identifying the object and purpose of an agreement from the agreement itself cannot be a wholly positive inquiry. We cannot deduce a unique purpose by simply applying logic to text: there will always be multiple explanations – of admittedly varying plausibility – that can be offered for why negotiators adopted a particular text. It is only by importing assumptions about the kinds of agents whose object and purpose is being sought that we can hope to choose between these – that we can evaluate their plausibility – and thus move from text to purpose.<sup>114</sup>

The point here is very general, and not limited to treaties, or even to legal instruments. To attach a purpose to an action, we need to know something about the kinds of goals and purposes agents of the relevant kind have. If I observe a person scratch their head, I might conclude their purpose was to relieve an itchy scalp. That conclusion follows not simply from the observed behaviour, but also from my knowledge that humans occasionally have itchy scalps, and are inclined to try to relieve them. I identify the purpose by examining the action together with assumptions about the motivations agents of the relevant kind have.

In the case of persons, the assumptions required are not necessarily normative. Rather, they are psychological assumptions, which are at least potentially subject to empirical examination. However, states are not the sorts of agents about whom there are psychological facts. Individual negotiators may have actual intentions, and these may even be shared amongst negotiating teams. However, once we shift our focus to collective agents, including states, it becomes much harder to identify the “hard facts” on which statements about intention supervene. Rather, the attribution of purposes to states is always metaphorical.<sup>115</sup>

Further, even if we could attribute concrete purposes to individual states, interpreting treaties is a step further removed from psychological facts about individuals, requiring that we identify the *shared* object and purpose of the parties to the relevant agreement,

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<sup>113</sup> On the iterative nature of this inquiry, Jonas and Saunders, (2010), note 103 above, 581-2

<sup>114</sup> The point here is perhaps clearest in respect of object and purpose, but also applies – albeit less visibly – when seeking the ‘ordinary meaning’ of a text. Words can carry different meanings, and we know which is the relevant ‘ordinary meaning’ by asking – explicitly or implicitly – what would be a sensible meaning given what we know about the speaker, the context in which they are speaking, and their relevant goals. On the context-sensitive nature of ordinary meaning in respect of likeness, R Howse and D Regan, ‘The Product/Process Distinction – An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy’, (2000) 11:2 *EJIL*, 249, 260-262 Cf. Linderfalk, U., ‘Is Treaty Interpretation an Art of a Science? International Law and Rational Decision Making’, (2015) 26:1 *EJIL*, 169, 172-3; Greenberg (2004), note 112 above, 175; Dworkin (2006), note 105 above.

<sup>115</sup> For a detailed discussion of the difficulties of attributing intentions to collective agents: R Ekins, *The Nature of Legislative Intent*, (2016), Oxford University Press

rather than simply the disparate purposes of each.<sup>116</sup> Where a treaty explicitly states such a purpose, we might read this as being adopted by the members as a whole; but – as noted above – statements of purpose in the WTO agreements are rarely especially illuminating, where they appear at all. Absent such statements, it is hard to imagine what physical, social or psychological facts claims about shared objects and purposes pick out.<sup>117</sup>

Where an object and purpose is not explicitly stated, then, it will always be the case that interpreters are constructing one, based on assumptions or metaphorical ascriptions of particular motivations to the states parties thereto. How should that ascription be made?

One option is to ascribe to the states the actual motivations of the politicians and diplomats responsible for negotiating on their behalf. In the context of trade agreements these will in turn reflect, at least to some degree, the various interest groups lobbying for particular provisions, as well as the wider political and social trends at the time an agreement is reached. They will also include, in the case of the WTO agreements, the distinctive 'GATT-think' which various scholars have highlighted as playing an important role in maintaining and advancing the trade regime.<sup>118</sup> The *telos* of the covered agreements, on this view, is likely to be read in neo-liberal terms, hostile to trade barriers and market interventions, and relatively unconcerned with issues of regulatory sovereignty or distributive impacts, whether local or global.<sup>119</sup>

Alternatively, we might ascribe motivations reflecting current political trends and preferences in leading members. While not articulated in these terms, this seems to be the approach that Howse attributes to the Appellate Body. In the earliest years of the WTO era, the Appellate Body recognised that the originalist *telos*, shared among trade 'insiders' and political elites in powerful states in the early 1990s, was significantly in retreat across much of the developed world, and probably never enjoyed much support among developing country members. Their response was – following a number of years of cautious, textualist, and in consequence often unconvincing reasoning, to embrace the much older *telos* of embedded liberalism, policing the more egregious cases of protectionism, but allowing significant autonomy to members to pursue their own domestic regulatory and economic policies.<sup>120</sup>

Unfortunately neither alternative, whatever their merits, solves the problem of plural objectives across states. There may be individual negotiators and policy-makers whose

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<sup>116</sup> This is a point the Appellate Body has emphasised. See: WT/DS62/AB/R EC – Computer Equipment, Appellate Body Report, para 80-82. Cf. WT/DS464/AR/R US – *Washing Machines*, Appellate Body Report, para 5.168

<sup>117</sup> On the problems of attributing shared intentions across individuals with diverse purposes: Dworkin, (1986), note 17 above, 313-327; J Waldron, *Law and Disagreement* (1999), Oxford University Press, Ch. 6. Cf. the discussion of political constraints, and their limits as guides, in Section I.D above.

<sup>118</sup> See e.g. Howse, (2002), note 4 above, 98-101.

<sup>119</sup> Although Regan notes that the attribution of negotiators' goals to states will, to be normatively plausible, require an element of filtering, to ensure that "whatever we consider as a possible purpose of the agreement must be something that could in principle be regarded as the *countries'* purpose.": Regan (2006), note 10 above, 965.

<sup>120</sup> Howse (2016), note 32 above.

particular intentions can be attributed to the states they represent. There may even be shared objectives that we can attribute on an ongoing basis to particular polities. However, the intent that we seek is one that can be attributed to all 166 WTO members. Given clear divergences on key points – evidenced *inter alia* by the fact of recurring interpretive disputes – it seems clear that focusing on actual intentions, whether historical or contemporary, cannot provide the required answers.<sup>121</sup>

Instead, absent a clear statement in an agreement, any normatively plausible account of object and purpose must rely on a hypothetical account of the interests and motivations of the states involved. Instead of asking ‘what did these particular states seek to achieve through this agreement?’, we ask ‘*what would appropriately motivated states, entering into an agreement of the relevant kind, in the relevant circumstances, have intended to achieve by it?*’. The important question then becomes how we should understand ‘appropriately motivated’.

We might, for example, adopt a materialist and egoist account of state motivation. States, on this view, are concerned to advance their own interests, understood in terms of the material wellbeing of their citizens. This fits well with standard economic readings of the WTO Agreements.<sup>122</sup> States enter into these agreements because they hope to make themselves materially better off as a result. Where there is disagreement about the correct interpretation of a particular provision, we should adopt the interpretation that seems best fitted to realise that goal.

If instead we model states as concerned to protect their prerogatives as sovereign and independent, we will attribute a very different object and purpose to the agreements, addressing specific mutually harmful and destabilising policies while respecting states’ autonomy over regulation and domestic economic policies.<sup>123</sup> Many contestable interpretive questions, that on the first view we might read as disciplining state action to eliminate inefficiencies, will now be read as permitting a greater degree of freedom to states. It is only the most egregious protectionism and other mutually harmful policies that should be disciplined on this view.

Nor are these the only plausible ways we can model states motivations. If we model states as materialist, but replace egoism with altruism, we get something closer to a global utilitarian interpretation, in which provisions are understood as advancing global, as

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<sup>121</sup> For example, as Mavroidis observes, “the overwhelming majority of historical accounts [of the original GATT] focus on the US and UK negotiating positions”, which were substantially determinative of the outcome. If our goal was simply the explanatory one of understanding why the agreements are as they are, such a strategy might seem reasonable. However, given that the relevant object and purpose is to be attributed to the members as a whole, and to form a basis for interpreting each of their obligations, such a narrow focus seems unjustifiable. P Mavroidis, *Trade in Goods*, 2<sup>nd</sup> ed., (2012), Oxford University Press, p. 9.

<sup>122</sup> See e.g. Regan (2006), note 10 above. Integrating political economy concerns lead to somewhat different interpretations: K Bagwell and R Staiger, *The Economics of the World Trading System*, (2002), MIT Press.

<sup>123</sup> This is the perspective adopted by contemporary exponents of the embedded liberalism perspective. E.g. Howse & Nicolaidis (2001), note 11 above; Howse (2016), note 32 above, 44-45.



opposed to national, welfare. If we model states as concerned to be the authors of their own destinies, we will emphasise those features of the agreements that instantiate some form of market fairness.<sup>124</sup> If we model them as security-seeking positionalists, we will emphasise provisions that allow states to preserve relative gains by challenging others' policies, even at significant cost to themselves.<sup>125</sup>

### ***E. Choosing Assumptions***

It seems, then, that how we interpret the agreements turns unavoidably on assumptions about the appropriate motivations of parties thereto. This is not just one among many ways to approach the agreements. It is an implicit requirement of any attempt to attribute a purpose to the words therein, and thereby answer interpretive questions. The previous section highlighted how different assumptions will point towards quite different objects and purposes, and in turn quite different interpretations of the agreements themselves. I will not attempt here to identify which assumptions are appropriate. Rather, let me suggest three strategies for selecting amongst them, which we might label the explanatory, the moral and the political. There may be others, but these seem the most plausible. Significantly, for our purposes, none rescues the analytical positivist aspiration to find WTO law by exclusive reference to social facts.

The explanatory strategy works from assumptions that as far as possible reflect the observed behaviours of relevant agents. Following theoretically inclined social scientists, we seek motivational assumptions that can support reliable predictions about agents' behaviour or interactions. Examples include the realist image of states as security-seeking positionalists, and the economist's image of persons as rational utility maximisers. Neither necessarily claims to describe how agents of the relevant kind should be, or indeed are, motivated. Rather, they claim that assuming these motivations allows us to explain and predict relevant behaviours.<sup>126</sup>

The moral strategy works from an account of how agents of the relevant kind *should* be motivated. While recognising that states – or rather the individuals who determine state behaviour – are frequently motivated by various base motives, it models their behaviour as though they were appropriately motivated. A wide variety of different moral motivations might be proposed, from the nationally egoistic to the wholly other-regarding.<sup>127</sup> They might include (amongst many others) the promotion of national economic welfare, the advancement of national projects, the preservation of international peace and cooperation, the promotion of global equality, the maximisation

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<sup>124</sup> There are elements of this agenda in Rawls' characterisation of states as concerned to secure their "proper self-respect of themselves as a people": J Rawls, *The Law of Peoples* (1999) Harvard University Press, 34. For an example of this approach at the level of persons: J Tomasi, *Free Market Fairness*, (2012), Princeton University Press

<sup>125</sup> The priority of relative gains for positionalists is highlighted in realist scholarship on international cooperation. E.g. J Mearsheimer, *The Tragedy of Great Power Politics, Updated Edition*, (2014), Norton, 51-53

<sup>126</sup> K Waltz, *Theory of International Politics*, (1979) McGraw-Hill, 5-6

<sup>127</sup> The moral imperative towards national self-interest is expressed in much realist thought. See e.g. GF Kennan, 'Morality and Foreign Policy', (1985) 64:2 *Foreign Affairs*, 205

of global wellbeing. The motivation we assume depends on the substantive moral theory we endorse.

The political strategy, like the moral one, focuses on the ways states should be motivated, rather than the ways they actually are. However, unlike the moral strategy, it does not answer this question by reference to a comprehensive moral view. Rather, it looks to the shared understandings that are present in the public political culture of the international system. This is Rawls' move in his later work, in search of a theory that is 'political not metaphysical'.<sup>128</sup> Like the first two strategies, adopting the political strategy is not the end of the argument: there will be various plausible interpretations of the conception of the state and its motivations expressed in the international public political culture. However, the disagreement on this view is one of cultural interpretation rather than social or moral theory.

Arguments can be made for each of these strategies. For the present, it suffices to note that the choice among them, just like the choice of a particular conception of state motivation, cannot be made exclusively, or even predominantly, by reference to 'hard' physical, social or psychological facts. Rather, it will be made and defended by reference to the function that judgments of object and purpose play in legal interpretation and, more generally, to the function of legal interpretation itself. Different answers will yield different understandings of what legal interpretation is, and what values it realises. The upshot seems to be that, given the constraints on discretionary decision-making by the Appellate Body, giving intention in general, and object and purpose in particular, a role in WTO law renders it an unavoidably anti-positivist enterprise. Or rather – putting the same point in different terms – the only sense that analytical positivism can make of references to intention in the context of WTO law is as exercises in extra-legal judicial discretion, of a kind that the WTO Appellate Body is both doctrinally and politically precluded from making.

### **III. Towards Anti-Positivism**

It seems, then, that there is little prospect of making sense of WTO law in exclusively positivist terms. The prominent role positivists accord to extra-legal discretion in adjudication is incompatible with the explicit mandate of the WTO Disputes Settlement System, with the delicate political position of the Appellate Body, and with the latter's judicial self-presentation. The lack of a clearly articulated purpose behind a number of agreements, and their historical status as compromises between mutually conflicting goals, further limits the scope for positivist reasoning to clarify their meaning without recourse to inadmissible judicial discretion. And approaching the agreements in search of underlying goals, including in particular through their object and purpose, seems necessarily to invoke hypothetical accounts of states and their motivations, giving values a central, if not always explicit, role.

What, then, might a non-positivist account of WTO law look like?

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<sup>128</sup> For this approach generally: J Rawls, 'Justice as Fairness: Political not Metaphysical', (1985) 14:3 *Philosophy & Public Affairs*, 223. For its application in the international context: Rawls (1999), note 124 above, *passim*.

The argument so far has drawn on insights closely associated with Ronald Dworkin's interpretivist account to law.<sup>129</sup> At his most general, Dworkin claims that legal reasoning is concerned with making normative sense of our existing practices. The truth of legal propositions depends, not simply on their relation to social facts, but on the extent to which they justify those facts, showing our practices in their best light. Reasoning about law thus involves – whether explicitly or implicitly – asking what the law is for, not from the perspective of its actual authors – their perspective is unavailable to us – but from our own perspective, as responsible moral agents acting in the world. We ask what purpose the law can serve *for us*. Once we have an account of what the law is for, this can in turn ground a *constructive interpretation* of that law, informing answers to specific questions of doctrine and practice that the positivist social-fact view characterised as unclear and hence discretionary.

The move to anti-positivism and Dworkinian constructive interpretation both complicates and simplifies the task of legal reasoning.

It complicates it by problematising the assumption that social fact sources, on their own, will be enough to answer legal questions, even in many 'standard' cases. In emphasising the unavoidable normative component in linguistic interpretation, it foregrounds the (often unstated) moral assumptions underpinning much ostensibly source-based legal reasoning. This in turn challenges us to recognise, to problematise and to reconstruct those assumptions, breaking down the artificial boundaries between legal reasoning and moral and political theory. (This is clearly reflected in the discussion of intent in Section II.D and E above.)

At the same time, it simplifies legal reasoning by rejecting the 'two-step' structure of positivist reasoning. If – as the anti-positivist claims – values are necessarily implicated in legal reasoning 'all the way down', then we need no longer think of hard cases as involving 'extra-legal' discretion. Instead, we can recognise a continuity, with source-based and values-based reasoning operating in all cases, albeit their prominence may vary. Because values are necessary to source-based reasoning, their engagement cannot mean that adjudicators have gone 'beyond' the law. Rather, the values-based reasoning in which adjudicators explicitly or implicitly engage in hard cases is itself legal reasoning. This more capacious conception of law thus implies that, even in hard cases, law might yet yield one right answer, albeit not one that is above controversy.

### ***A. From Positivist Moral Revision to Anti-positivist Moral Reading***

If law is only sources, as the positivist asserts, then WTO adjudicators must be doing something more than finding law, in ways incompatible with their doctrinal and

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<sup>129</sup> See generally Dworkin (1986), note 17 above. The approach sketched in these subsequent sections draws on Dworkin's insights and methods. However it is not strictly Dworkin's approach, both because the specific version of interpretivism that Dworkin advances, *law as integrity*, is itself a poor fit in the international context, and because Dworkin himself in a posthumously published paper advanced a somewhat different theory of international law: R Dworkin, 'A New Philosophy of International Law', (2013) 41:1 *Philosophy and Public Affairs*, 2-30. My goal in this paper is to illuminate WTO law, rather than to engage in Dworkinian exegesis, so I will set aside these points for another day.

institutional role. If, on the other hand, law is a more capacious phenomenon, then adjudication can in turn become a wholly legal enterprise, but at the expense of rejection analytical positivism. Adopting an anti-positivist approach thus makes possible the reconciliation of linguistic uncertainty with the Dispute Settlement Understanding's demands for legal completeness. However, it also imposes quite specific requirements for the kinds of values and principles to which WTO law must have recourse.

Recall, the positivist sees the judge operating across distinct domains of law and non-law, applying distinct modes of reasoning in each. While in the domain of law, Hart's core, the judge applies rules to facts, and reaches conclusions that are prescribed by those rules. In the penumbra, where the law 'runs out', the judge adopts a non-legal mode of reasoning, in which she has recourse to moral, prudential or other values to reach a decision. There are reasons (of administrative efficiency, for example) why her extra-legal conclusions should be consistent with those prescribed by settled rules. Particularly where judicial decisions carry precedential weight, today's discretionary choices constitute tomorrow's legal rules. To the extent the judge can give an account of her reasoning and conclusions that renders law and non-law continuous, she provides a guide that can be readily applied by her successors.<sup>130</sup> However, such concerns aside, the goal of the judge when not constrained by law will be simply to produce the 'best' decision possible, both as between the disputing parties, and having regard to the wider implications of her decision.<sup>131</sup>

It is not necessary, in doing this, that the judge endorse or justify those legal rules that constrain her reasoning. The legal rules are fixed points, defining the area of discretion within which she has recourse to the moral and the prudential. If those rules are, or appear to her, irrational, unjust or ill advised, this need not pose a problem: she follows the rules to the extent the rules require, and seeks to realise justice (or whatever value she thinks adjudication should pursue) within the space left to her. A utilitarian judge, applying libertarian laws, might regret that she is in many cases constrained by rules she cannot endorse: but within the area of discretion afforded to her, she can choose the interpretations that best meet her utilitarian standards.<sup>132</sup>

For the anti-positivist, by contrast, law and morality are linked 'all the way down'. There are few straightforward questions that are resolved through the mechanical application of rules found through scientific examination of social fact sources.<sup>133</sup> Rather, legal interpretation is a matter of identifying those principles that best fit and justify the existing practice, and working from these principles both forwards, towards answers to hard cases, but also backwards, to potentially re-evaluate what initially seemed like relatively uncontroversial cases falling under established rules. The upshot is that the values invoked to support anti-positivist interpretation must not only suggest solutions to the novel questions, but also make sense of the mass of existing rules and principles,

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<sup>130</sup> On the ways concerns for formal justice motivate such concerns: MacCormick (1979), note 100 above, Ch. IV

<sup>131</sup> See generally: Raz, (1992), note 17 above, 307-309

<sup>132</sup> For a positivist model of reasoning along these lines, including in particular the distinction between rule-bound and discretionary/moral/consequential reasoning, MacCormick (1979), note 100 above

<sup>133</sup> Cf. Fuller (1958), note 100 above.

which the positivist regards as legally fixed points. The utilitarian anti-positivist cannot simply apply utility maximisation in a legal system built on libertarian lines, because that approach cannot make sense of the existing practice: it would not constitute a plausible interpretation of the purpose of that practice. Rather, to make progress in resolving hard cases, she will need to relax her utilitarian commitments, and ask whether there is some principle or set of principles that can make sense of that existing practice, but that at the same time is able to show it in its best moral light.

Reasoning about law in the anti-positivist mode is therefore a two-way, iterative process. Rather than simply applying an independently motivated moral view to criticise the existing law and to provide answers to questions in those areas where the law is silent, we seek a set of principles that both fit and justify the existing practice. A view that fits the existing practice closely, but is morally defective, requires to be rejected in favour of one that fits marginally less well, but is morally preferable. But equally a view that is morally sound, but fails to make sense of large parts of the existing practice must be rejected in favour of one that, while otherwise morally inferior, does significantly better at making sense of the existing practice.<sup>134</sup> (The parallels with the discussion of object and purpose above will hopefully be clear.)

The move to anti-positivism thus imposes new constraints on the values that can plausibly inform legal interpretation. Whether approached from a positivist or anti-positivist perspective, values, to be helpful, must suggest answers to questions adjudicators face: if they are indifferent between alternatives they offer no guidance. However, subject to this relatively minimal constraint, many values may be capable of guiding adjudicators who understand their role in positivist terms. For the anti-positivist, by contrast, relevant values must explain existing practice, as well as guiding innovation. The criterion applied here is a flexible one, as we seek to jointly optimise two aspects, fit and justification, which may lead us to accept a relatively lower value on one for a higher value for the other. However, it remains a significant constraint, which will rule out at least some views.

### ***B. Anti-positivism, economics and international fairness***

Anti-positivism emphasises the role of values in law, suggesting that we can say very little about the law without engaging in straightforward moral reasoning. However, it also emphasizes the differences between moral reasoning in the presence and the absence of law. The next question is therefore what counts as good moral reasoning in the context of WTO law? Which schemes of values are plausible candidates to inform an anti-positivist reading of WTO law?

Amongst candidates that might otherwise be attractive, globally egalitarian views are the most obvious casualties of the requirement that principles fit existing practices. While there are egalitarian elements within the trade regime, including most obviously

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<sup>134</sup> It is thus not the case that we can simplistically interpret the law to be 'more moral'. Rather, as Greenberg observes, there are good moral reasons why might want to respect the existing practices through which a society makes law, and the laws that it has sought to make. Greenberg, (2004), note 112 above, 193 et seq. Contrast, from a positivist perspective: Raz (1994), note 16 above, 332-3.

provision for Special and Differential Treatment for Developing Countries, these represent a relatively limited exception within a regime that otherwise places little emphasis on global economic equality.<sup>135</sup> While arguments can be (and are) made for the pro-development potential of international trade liberalisation, WTO law accepts too much international inequality, and too many of the institutional structures that maintain it, for this to plausibly constitute the organising principle of the trade regime.<sup>136</sup>

Perhaps more surprisingly, international egoist views also struggle to inform an anti-positivist reading. By egoist here I mean views that see states as primarily self-interested and deny they owe natural duties of economic justice to those outside their borders.<sup>137</sup> Economic duties to outsiders, on this view, are limited to those affirmatively accepted through agreement.<sup>138</sup> Without more, such views are of little use in either positivist or anti-positivist terms. By emphasising agreement as the exclusive source of obligation, they become circular – and in consequence mute – when invoked to guide interpretation of agreements. Beyond motivating anti-avoidance provisions,<sup>139</sup> we do not help an interpreter by telling them to interpret an agreement by reference to the obligations that states have taken on under that agreement.<sup>140</sup>

Egoist views become more useful interpretive guides when they are complemented with an account of the interests of relevant agents. *Homo economicus* is an example of such an expanded egoist view, assuming that agents seek to advance their interests, and that those interests track either the aggregate economic welfare of national populations, or that of politically influential groups. Both provide plausible explanations of many of the

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<sup>135</sup> For an effort to read WTO law from a strongly egalitarian perspective: F Garcia, *Trade, Inequality and Justice: Towards a Liberal Theory of Just Trade Law*, (2003) Brill.

<sup>136</sup> See e.g. D Moellendorf, 'The World Trade Organization and Egalitarian Justice', (2005) 36:1-2 *Metaphilosophy*, 145-162; T Brode, 'The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO' (2006) 45 *Colum J. Transnat'l Law* 221.

<sup>137</sup> While not strictly egoist, views that recognise minimal anti-poverty duties will also struggle here.

<sup>138</sup> A prominent example of such a view is Nagel (2005), note 32 above. Cf. Kennan (1985), note 127 above.

<sup>139</sup> Given the prominence of such egoist assumptions, and their relation to the international legal positivism which the AB has endorsed, it is perhaps unsurprising that the AB commonly invokes object and purpose to motivate such anti-avoidance interpretations. See e.g. WT/DS98 *Korea – Dairy*, Appellate Body Report, para 111; WT/DS139 *Canada – Autos*, Appellate Body Report, para 142; WT/DS257 *US – Softwood Lumber IV*, Appellate Body Report, para 64; WT/DS320 *US – Continued Suspension*, Appellate Body Report, para 308.

<sup>140</sup> The concern here relates to the interpretive contribution, as opposed to the legitimising capacity, of state consent. We need not deny that state consent provides an adequate justification for WTO law to identify its defects as an interpretive guide. Contrast: EU Petersmann, 'Between 'Member-Driven' WTO Governance and 'Constitutional Justice': Judicial Dilemmas in GATT/WTO Dispute Settlement', (2018), 21 *Journal of International Economic Law*, 103, 114; 'Why Treaty Interpretation and Adjudication Require 'Constitutional Mind-Sets'', (2016) 19 *Journal of International Economic Law*, 389

key liberalisation and anti-discrimination disciplines in the trade regime.<sup>141</sup> National welfare accounts also provide a plausible justification of those disciplines as advancing the material wellbeing of persons.

However, economically informed egoist views struggle to explain large sections of the trade regime. Most prominently, the trade remedies disciplines, which constitute some of the most litigated WTO agreements, make little sense in economic terms.<sup>142</sup> The subsidies rules discipline an overbroad category of measures, many of which are likely to advance both national and global welfare, while permitting recourse to countervailing duties which harm national welfare of both the country imposing them, and the country whose exports are targeted. The existence of safeguards rules is explicable in political economy terms, as facilitating a limited return to protectionism where political opposition would otherwise undermine the trade liberalisation bargain; but nothing in this explanation makes sense of the specific rules governing when such measures are and are not permissible. And anti-dumping, despite its increasing use by members, is universally criticised by economists as incoherent 'ordinary protection, albeit with a good public relations program'.<sup>143</sup> As noted above, the requirement of fit is a flexible one, so the fact that a view cannot explain some elements of the trade regime need not be fatal. However, the significance of the trade remedies rules in WTO practice, and their political prominence in contemporary challenges to that regime, mean a view that cannot make sense of them is significantly undermined.

This imperfect fit between economic approaches and positive law is reflected in the varying extent to which the Appellate Body has felt able to engage in constructive interpretation across different areas of the trade regime.

The AB's clearest invocations of a substantive object and purpose to guide interpretation have been in the context of border liberalisation and non-discrimination, where economic views fit best.<sup>144</sup> Here, even absent clear textual support, it has been willing to

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<sup>141</sup> Regan, (2006), note 10 above. Embedded liberalism explanations are similarly built on broadly egoistic premises, but emphasising concerns for regulatory sovereignty and social protection over wealth maximisation.

<sup>142</sup> On the weaknesses of economic accounts of the trade remedies disciplines: Suttle (2018), note 13 above, Ch. 8. Cf. Howse (2016), note 32 above, 69-70

<sup>143</sup> JM Finger, 'The origins and Evolution of Antidumping Regulation' in JM Finger and NT Artis (eds.), *Antidumping: How it Works and Who Gets Hurt*, (1993) University of Michigan Press.

<sup>144</sup> See, for example WT/DS27/AB/R, *EC – Bananas*, Appellate Body Report, para 190; WT/DS56/AB/R, *Argentina – Textiles and Apparel*, Appellate Body Report, para 47, WT/DS75/AB/R, *Korea – Alcohol*, Appellate Body Report, para 432 et seq. WT/DS139/AB/R, *Canada – Autos*, Appellate Body Report, para 84. This willingness to engage in purposive reasoning has not prevented the Appellate Body recognising the need to balance competing interests – a principled interpretation can also recognise its own limits. See e.g. WT/DS58/AB/R *US – Shrimp*, Appellate Body Report, para 116; WT/DS27/AB/RW2/ECU *EC – Bananas (Ecuador, 2<sup>nd</sup> Art 21.5 Reference)*, Appellate Body Report, para 431-435, WT/DS62/AB/R *EC – Computer Equipment*, Appellate Body Report, para 80-84; WT/DS103/AD/R *Canada – Dairy*, Appellate Body Report, para 137; WT/DS276/AB/R *Canada – Wheat Exports*, Appellate Body Report, para 95-97.

identify the purpose of relevant provisions, and to interpret them having regard to that purpose, even to the point of disregarding significant differences in text.<sup>145</sup> In the context of development provisions, object and purpose has also played a role, albeit in managing the tension between identified pro-development and anti-discrimination goals.<sup>146</sup> The key point, for our purposes, is that these are areas where the relevant rules make economic sense, with the upshot that economic reasoning can help us understand what the rules are for, how they should be interpreted, and what they should admit or exclude. They are cases where the Appellate Body's reasoning seems most clearly to exhibit a direct engagement with underlying values, but where that reasoning has also generally been broadly accepted by members.

By contrast, in the context of trade remedies the invocation of object and purpose has been largely limited to effectiveness and anti-avoidance interpretations, excluding reference to the underlying goals of the relevant provisions.<sup>147</sup> Indeed, in a number of cases the Appellate Body has criticised panels for engaging in such teleological interpretation in the context of trade remedies cases.<sup>148</sup> While economically-informed

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<sup>145</sup> *WT/DS400/AB/R EC – Seal Products*, Appellate Body Report, para 5.129; *WT/DS406/AB/R US – Clove Cigarettes*, Appellate Body Report, *passim*, particularly para 84-102. Object and purpose also plays a significant role in a number of key domestic regulation cases, motivating reflection on the balancing of competing values, including trade liberalisation, human health, transparency and regulatory autonomy. E.g. *WT/DS26/AB/R EC – Hormones*, Appellate Body Report, para 177, 189-190, 205-206. Cf. *WT/DS231/AB/R, EC – Sardines*, Appellate Body Report para 214-215; *WT/DS381/AB/R US – Tuna II*, Appellate Body Report, para 379.

<sup>146</sup> *WT/DS246/AB/R EC – Tariffs Preferences*, Appellate Body Report, para 91-97, 152-176 (recognising the competing goals of promoting developing country trade, eliminating discrimination and rationalising preference schemes, but disagreeing with the panel on the appropriate balance between them).

<sup>147</sup> This point is clear from efforts by the Appellate Body to articulate the object and purpose of the relevant agreements, which rarely extends beyond 'having rules about the relevant issue'. See e.g. *WT/DS473/AB/R EU - Biodiesel*, Appellate Body Report, para 6.25, *WT/DS213/AB/R US – Carbon Steel*, Appellate Body Report, para 73, *WT/DS257/AB/R US – Softwood Lumber IV*, Appellate Body Report, para 95. Cf. *WT/DS46/AB/R Brazil – Aircraft*, Appellate Body Report, para 173. Although contrast *WT/DS202/AB/R, US – Line Pipe*, Appellate Body Report, para 82-83. The Appellate Body has invoked object and purpose on a number of occasions to emphasise the differing standards applicable to remedies for 'fair' (safeguards) and 'unfair' (subsidies and dumping) trade. A different balance is, we are told, expressed in the different agreements. However, unlike the balancing of competing objectives under the GATT and Regulation Agreements, we get little guidance on what exactly the values being balanced are, or how the relevant balance is to be struck. See e.g. *WT/DS98/AB/R Korea – Dairy*, Appellate Body, para 87-88; *WT/DS121/AB/R Argentina – Footwear*, Appellate Body Report, para 93-95; *WT/DS178/AB/R; US – Lamb*, Appellate Body Report, para 124. Cf. *WT/DS202/AB/R US – Line Pipe*, Appellate Body Report, para 257; *WT/DS296/AB/R US – Countervailing Duty Investigation on DRAMs*, Appellate Body Report, para 115; *WT/DS399/AB/R US – Tyres (China)*, Appellate Body Report, para 183-5.

<sup>148</sup> See e.g. *WT/DS234/AB/R United States – Offset Act (Byrd Amendment)*, para 281-294; *WT/DS213 US – Carbon Steel*, Appellate Body Report, para 83



constructive interpretation appears possible elsewhere in the trade regime, trade remedies interpretation has remained stubbornly formalist.<sup>149</sup>

The problem is one of fit rather than justification. Economic approaches emphasise a value, national economic welfare, that has obvious attractions from various perspectives. However, they cannot make sense of the most prominent features of the trade remedies rules, and so cannot guide or legitimise interpretation of those rules. The upshot has been that some of the most controversial and heavily criticised AB decisions have been in this area. These have included decisions requiring that members demonstrate both unforeseen circumstances, and an increase in imports, that is 'recent enough, sudden enough, sharp enough and significant enough', before applying safeguards, making recourse to such measure significantly more difficult.<sup>150</sup> They have also included a long line of cases on zeroing, a price comparison methodology in antidumping cases that has been consistently rejected by the Appellate Body over significant resistance from the United States in particular.<sup>151</sup> In the latter context, they have included cases disputing the requirement in Article 2.4 that members make a fair comparison between prices, as clear an invitation to normative reasoning as could be imagined.<sup>152</sup> In each case, economic approaches can justify imposing the relevant requirements and/or rejecting the criticised practices. However, the Appellate Body has not been able to invoke these, as those same approaches would condemn many other features of the relevant rules, making them implausible as standards for guiding and legitimising interpretation. Instead, in the cases,

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<sup>149</sup> This formalism extends to the Appellate Body's identification of parallels between the trade remedies agreements, reflecting their use of similar techniques (injury, causation), without serious reflection on the different purposes to which these techniques are put. See e.g. WT/DS184 *US – Hot Rolled Steel*, Appellate Body Report, para 229-230; WT/DS202; *US – Line Pipe*, Appellate Body Report, para 212-214; WT/DS414 *China – GOES*, Appellate Body Report, 133-154, esp. 153.

<sup>150</sup> WT/DS121/AB/R *Argentina – Footwear*, Appellate Body Report, para 91-98, 131. For the problems this interpretation poses, Sykes, (2003), note 102 above. For the challenge that it is unmotivated: Greenwald, (2003), note 3 above.

<sup>151</sup> For discussion, RP Alford, (2006), 'Reflections on US – Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body', 45 *Columbia Journal of Transnational Law* 196; T Voon, (2007), 'The End of Zeroing? Reflections Following the WTO Appellate Body's Latest Missive', 34(3) *Legal Issues in Economic Integration* 211-230; C Bown and AO Sykes, (2008) 'The Zeroing Issue: A Critical Analysis of *Softwood V*', in H Horn and P Mavroidis (eds.), *The WTO Case Law of 2004-5: Legal and Economic Analysis*, Cambridge University Press.

<sup>152</sup> While the Appellate Body has placed weight on the requirement of fair comparison, it has failed plausibly to articulate what is unfair about zeroing. Zeroing, it has argued, leads to unfair inflated margins. WT/DS264/AB/RW *US – Softwood Lumber V (Art 21.5)*, Appellate Body Report, para 138-142. Yet, as United States argued and the panel agreed in that case, this argument is question-begging unless accompanied by an explanation of why one standard or another should have priority. The Appellate Body only avoids this objection by invoking the incompatibility of zeroing with other provisions of the agreement, effectively draining the fair comparison requirement of any independent content. *Ibid*, para 143-146.

we find a rigid textualism in the Appellate Body's self-presentation, which has in turn inspired significant criticism from unsuccessful parties.<sup>153</sup>

This points towards the need for an alternative approach that both fits and justifies the existing rules. If those rules are not explicable in exclusively economic terms, then the required approach must similarly go beyond narrow economic rationality. In particular, it will need to take seriously the idea of fairness that is a recurrent feature of discourse around trade remedies in particular, and trade regulation more generally. I have in other work sought to do just this, elaborating in some detail an account of global distributive justice that, I argue, can be applied to international trade regulation, and that generates a set of prescriptions sufficiently familiar to trade lawyers that they can serve to explain, justify and critique the positive law of the WTO. By beginning with the ideas of persons and peoples as free and equal, rational and reasonable, and emphasising the need to justify coercion to those over whom it is exercised, I derive principles for the justification of various categories of measures, and show how these can be applied to make sense of familiar disciplines on border measures, discrimination, trade remedies and domestic regulation, and to improve in various ways on the explanations generated by standard economic approaches.<sup>154</sup> Whether that particular view is endorsed or not, giving space to fairness requires going beyond narrowly egoistic views, to acknowledge and accommodate the possibility of natural duties of economic justice that are owed across borders. These may, but need not, be concerned with economic inequality: views focussed on the competitive process may in fact fit better than those concerned with outcomes.<sup>155</sup> However, even such competitive fairness views, in so far as they acknowledge the claims of outsiders to particular conditions of competition, or exclude particular market interventions, not on grounds of efficiency but because they constitute wrongs to competitors, involve a significant 'thickening' of the moral backdrop against which international economic law is interpreted.

#### **IV. Conclusion**

I have argued for three broad claims in this paper. First, that there is nothing about the WTO legal system that should lead us to exclude values in interpreting, applying and evaluating WTO law. Second, that the particular institutional context of the WTO Appellate Body means that we cannot understand the role of values in exclusively positivist terms, rather requiring an interpretivist approach. And third, that the standard

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<sup>153</sup> On the limits of economic approaches in guiding trade remedies adjudication: Suttle, (2018), note 13 above, Ch. 8. It is worth noting that the specific examples cited by the United States in criticising the Appellate Body's interpretive approach are almost universally drawn from the trade remedies. See USTR, note 1 above.

<sup>154</sup> See in particular Suttle (2018), note 13 above.

<sup>155</sup> See, for a promising development in this direction, Tomasi (2012), note 124 above. In other ongoing work I seek to develop such a view with specific reference to international economic law: 'The Puzzle of Competitive Fairness', unpublished manuscript on file with the author. Views emphasising economic liberty rights might also fit well here. See e.g. Petersmann, E.U., (2002) 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', 13:3 *European Journal of International Law*, 621-650

normative approaches assumed by many trade practitioners, comprising some combination of international moral egoism and economic efficiency, cannot serve as a basis for the required interpretivist approach, given their failure to fit the existing rules of the trade regime. Rather, what is required is a 'thicker' international political morality, which recognises natural duties of economic justice to outsiders, without implying a global egalitarianism radically incompatible with the existing trade regime. I have not tried to elaborate such a view here, beyond pointing out this minimal requirement. However, if the argument above holds, then elaborating and defending such views is necessary to effectively ground and legitimise the Appellate Body's interpretive task.