

2013

Present at the Creation

Thomas R. Graham
World Trade Organization

Follow this and additional works at: <https://scholarlycommons.law.hofstra.edu/jibl>



Part of the [Law Commons](#)

Recommended Citation

Graham, Thomas R. (2013) "Present at the Creation," *Journal of International Business and Law*: Vol. 12 : Iss. 2 , Article 14.
Available at: <https://scholarlycommons.law.hofstra.edu/jibl/vol12/iss2/14>

This Visiting Scholar Lecture is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in *Journal of International Business and Law* by an authorized editor of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

PRESENT AT THE CREATION

*Thomas R. Graham**

Maurice A. Deane School of Law
February 6, 2013

Thank you Professor Ku, Dean Lane, members of the faculty, students, and assembled friends.

I'm proud to be invited to be your speaker, and I'm very pleased to be here at Hofstra. I've had a very enjoyable couple of days visiting Professor Ku's class and spending time with students and faculty. I look forward to any questions or comments you may have today.

A Presidential debate is a tough act to follow. And so I gave this lecture a rather grandiose title: "Present at the Creation."

I realize now – after the publicity has gone out and it's too late to change the title – that I should have called it, "Present at the *Implementation*."

Some of you may recognize both as plays on the title of the memoir of Dean Acheson, the great U.S. Secretary of State. Acheson truly was present at the creation, in the late 1940's, of post-war U.S. Foreign policy, of the United Nations, and of international economic institutions such as the World Bank and the IMF.

There was to have been a third international economic institution: the International Trade Organization. But the ITO was stillborn. It never got off the ground. For 30 years the rudimentary international trade rules that the ITO was to have overseen limped along, almost orphaned, propped up by a small secretariat called the General Agreement on Tariffs and Trade.

And then it was my great good luck to be a young guy at the White House trade office – now called the Office of the U.S. Trade Representative – in the late 1970's ... when we and our counterparts around the world began transforming the GATT into the World Trade Organization that exists today: finally implementing that vision of Dean Acheson and the other creators of the pillars for economic stability in the post-war world.

Today, the WTO has 158 member countries – almost every country in the world. More than 20 WTO agreements make up an extensive body of international law bringing stability, predictability, and a degree of openness and fairness to global trade.

* Member of the Appellate Body, World Trade Organization.

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

I'm proud to have helped negotiate some of those agreements. And now it's again my good luck – or punishment – to try to make sense of what they mean, and how they should be applied, in real-world circumstances. For I'm in the business of judging disputes between governments over the application of the WTO rules.

There are seven of us – Members of the WTO Appellate Body. We come from Mexico, South Africa, China, Belgium, India, the United States, and South Korea. We may come from different legal traditions, but we share a sense of responsibility and a commitment to get our decisions right.

For although they don't call us that, we are in effect judges, on what is in effect the highest appeals court for the rules of global trade. As a practical matter, we have the final word not only in deciding cases but also in creating a body of jurisprudence for this global trade institution that is still new in the sense of the usual timeframe for creating international law.

To paraphrase Harry Truman, for the rules of the World Trade Organization, the buck stops with us.

This would be a challenging task even in calm times. For to paraphrase President Obama in his second Inaugural Address, principles may be self-evident, but they are never self-executing.

And in the trade world, these times are not calm.

For one thing, the sheer volume and complexity of traditional trade – that is, exchanges of goods and services across national borders – is increasing, and that brings an increase of normal conflicts.

In addition to the sheer volume of trade, the subject matter of international trade disputes has grown broader, subtler, and more complex. More than ever before, a lot of policies that previously might have been considered purely national matters are recognized now to affect international competition.

Whether the subject is environmental protection, green energy production, health or safety regulations, consumer protection, or unfair trade rules – globalization has made us increasingly aware that national policies can – intentionally or unwittingly – tilt the playing field: to favor domestic products over imports, or to favor one country's products over another's.

Our job in such cases is not to assert trade interests over worthy social interests – as our critics sometimes say – it is to keep governments honest or at least make them live up to standards of fairness that they agreed to – in the ways they implement those social interests.

PRESENT AT THE CREATION

That's why we said the United States violated non-discrimination rules when it banned clove cigarettes imported from Indonesia but did not ban menthol cigarettes in the United States.

It's why a WTO dispute-settlement panel said the European Union violated its WTO trade commitments when France and Belgium banned imported GMO food without having a sound scientific basis for doing so.

And finally, among those things that have grown more complex in the world of trade, the range of economic and political philosophies represented in the WTO has widened. That is good. The cliché would be, "the more the merrier."

The expanding growth and complexity of trade relations make it especially difficult to apply neutrally, consistently, and correctly a system of rules that was first developed 66 years ago – in 1947 – by 23 mostly like-minded governments, and that was last updated in 1995.

We all try very hard to do that. The respect for the institution of the Appellate Body; the sense of responsibility of everyone involved – Members and staff; and the shared commitment to get it right, have been the most impressive things I've seen in my first year as a member of the Appellate Body.

But what *is* getting it right? And what happens if we don't?

This requires a bit of background, for those who haven't – yet anyway – made a specialty of this.

In the old, pre-1995 GATT system, disputes were decided by ad hoc panels of experts – mostly Geneva-based representatives of governments that weren't parties to the particular dispute. There was no appellate review, and the losing country could veto an adverse panel decision simply by opposing it. The system worked by consensus. Disputes were resolved, if at all, by negotiation, and a decision by a dispute-settlement panel was merely a factor in any negotiated settlement.

Then the 1995 changes, which created the WTO, also created a dispute settlement system with real teeth.

Losing parties can no longer block dispute settlement decisions. It takes a consensus of the 158 member governments to do that.

Because WTO dispute settlement decisions now were to have teeth, the 1995 changes also created the Appellate Body, to which decisions by panels could be appealed – in other words, a second level of appellate review.

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

Members of the Appellate Body serve four-year terms, which may be renewed for one additional four-year term. We gather frequently in Geneva to hear and decide cases, and to deal with other matters related to our operation.

Some of the Members are also professors, others are in private practice. We call the role a part-time job but a full-time commitment, in that we all are committed both contractually and in fact to giving the Appellate Body our highest priority, and to being on call at any time.

The Appellate Body has its own staff: an outstanding group of young lawyers and assistants from all over the world. The staff serves the Appellate Body as a whole – that is, Members don't have their own law clerks – which contributes to the sense of group commitment and collegiality that is part of our tradition.

Three of us – designated at random – hear and decide any one case. But all seven of us discuss together every case before it is decided.

Parties to a dispute can choose to appeal a panel decision to the Appellate Body – or not. When a party – which could be a loser at the panel level, a winner, or both – appeals to us, our formal role is to review the panel's interpretation of the law, and perhaps the panel's application of the law to the facts as found by the panel.

We work under very tight – sometimes impossible – time limits.

The rules require us to issue our reports not later than 90 days after an appeal is filed. The last 20 of those 90 days are taken up with translation into the other official languages of the WTO, so in reality we have 70 days to:

- Master hundreds of pages of filings by the governments that are parties to the dispute, by third parties (governments that are not parties to the dispute but that also file briefs);
- Relate the arguments made in those filings to the panel report – that is, the decision below, which may run to hundreds of pages of complex factual and legal findings;
- Review our own relevant case law and figure out whether to uphold, modify, or reverse the panel's several interpretations and applications of the law to facts that usually are very complex;
- Prepare for and hold a public hearing that usually lasts two or more days;
- Study the transcript of the public hearing;
- For three Appellate Body Members who comprise the "Division" deciding the particular case, meet for several days to make preliminary decisions;

PRESENT AT THE CREATION

- For all seven Members, meet for several more days to discuss the case and preliminary decisions of the three Members who make up the Division;
- For the three on the Division, meet for several more days to work on preliminary drafting of the report containing the decision; and
- For the three on the Division deciding the case, meet again to review and put into final form the Appellate Body's report on the case.

Oh, and the rules also require us to address every issue raised by the parties to the dispute.

And the dispute might be as complicated as the recent Boeing – Airbus cases, in which the United States claimed that European Union member countries were in dozens of ways subsidizing Airbus production and exports, in violation of the WTO rules on subsidies; and the EU claimed that the U.S. government was doing essentially the same thing for Boeing.

And we might have three or more of these cases going on at the same time.

A part-time job, but a full-time commitment...

Independence from our governments, dedication to the institution and task of the Appellate Body, and confidentiality of our deliberations, are our watchwords.

Our unspoken mission is to get it right: to interpret and apply the WTO rules correctly. For, as I said, in the current WTO system we are the final arbiters of what the rules of international trade mean.

No decision of the Appellate Body has ever been overturned by the WTO Dispute Settlement Body – the committee of the whole WTO membership that oversees us.

Losing governments have complied with all but a very small handful of our decisions in some 110 cases over the 18-year history of the Appellate Body.

In terms of the percentage of disputes resolved successfully and the record of compliance, this is perhaps the most successful international dispute settlement system in the history of the world.

Why is that? And what can we do to keep it so?

For most WTO members, including the United States, WTO dispute settlement decisions do not have automatic legal effect. That is, governments have to take actions – sometimes unpopular, politically difficult, costly actions – to comply with our decisions.

Why do they do it?

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

We don't have the power of court orders. We don't have a sheriff to execute warrants. We can't put a lien on their tax revenues or attach their property.

And after all, sovereign governments' most basic duty is to act in their own country's interest. Long or short term, enlightened or misguided, their duty is to act in what they perceive to be in their country's interest.

Why do they comply with our decisions?

One set of answers goes like this:

- The losing party must comply or face the prospect of authorized trade retaliation by the winning party. For example, if the losing country does not come into compliance in a reasonable period of time, then the winning country can ask the WTO to authorize trade retaliation – such as restrictions on imports from the losing country, equal in value to the harm the winning country has incurred. And winning countries have a mischievous way of choosing for retaliation products of special political or economic interest to the losing country – so as to put maximum political pressure on the loser to comply.
- Besides – so goes the conventional answer to why countries comply with our decisions – today's loser knows that it may be tomorrow's winner. And for that it needs the system to work.
- And finally, clear, viable WTO rules give governments an excuse for resisting their own protectionist pressures and thus for doing the right thing.

That is where most commentators stop.

But as one who has felt – I believe, along with my colleagues – the weight of what we do, I would suggest there is a more fundamental reason why governments comply with Appellate Body decisions:

Because our decisions are respected.

Countries fear retaliation, or see themselves as tomorrow's winners, or point to those WTO rules to justify good policy decisions, because, at bottom, the rules of international trade, which depend for their meaning on our decisions, are respected.

Will that always be so?

If our decisions are respected, then the whole WTO system can continue to function pretty well for a long time even in a changing world and even without the negotiation of new and updated rules.

PRESENT AT THE CREATION

But without that respect, there may be a risk of the emperor's having no clothes: of insufficient disincentives to prevent first one sovereign government, and then perhaps another, and another, from deciding not to comply with dispute settlement decisions.

How bad would that be? It's hard to say. But it's probably better not to find out.

Can we keep that respect in a rapidly globalizing world in which one country coughs and another catches a cold, and in which not only the levels of development of WTO members, but also the range of their economic and political philosophies, is vastly wider than was the case in 1947 and even in 1995?

To do so, what should guide us?

We wrestle with that, in honest and serious debate, either explicitly or implicitly, all the time.

Are the 22 agreements that form our body of statutory law akin to a constitution for WTO law – to be interpreted broadly considering changing circumstances – or are they a contract between the member governments – which are formally called the Contracting Parties – to be interpreted narrowly and (as nearly as possible) literally?

What about gaps and ambiguities, especially as we confront issues of national policy versus WTO rules, or of meshing different economic and political systems under WTO rules?

In some cases were those gaps or ambiguities intentional, to cover the inability of the negotiators to reach agreement, even in the simpler world of decades ago?

In other cases do gaps or ambiguities result because the rules are being applied to subjects that the negotiators did not anticipate 18 years ago?

In some cases is it simply poor drafting?

If the text is unclear, does the reason matter?

If the text is unclear, must we always find a meaning? Or should we sometimes leave matters undecided? Or decide by default: that is, the party asserting a meaning loses if on examination the text remains unclear?

Our guiding rules on such things, in Article 3.2 of the WTO Dispute Settlement Understanding, are balance – so much so, in fact, that they offer only limited help in specific circumstances. They say our role is:

“...to clarify the existing provisions of those governments in accordance with customary rules of interpretation of public international law.”

But that we are not to:

THE JOURNAL OF INTERNATIONAL BUSINESS & LAW

“...add to or diminish the rights and obligations provided in the covered agreements.”

“To clarify...in accordance with customary rules of interpretation of public international law...” For our purposes that means the Vienna Convention on the Law of Treaties. How much help does that give us?

Article 31(1) of the Vienna Convention says:

“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.”

O...kay...

“Ordinary meaning” has, well, a pretty clear ordinary meaning. The same should be the case for interpreting terms “in their context:” I suppose that means that if the agreement provision in question is talking about dumping as unfair pricing in international trade, you don’t assume “dumping” means something else...

But about “object and purpose:” Interpret in light of an agreement’s “object and purpose.”

Is there a lot of subjectivity – of wiggle room – in determining the “object and purpose: of an agreement on Antidumping, on Subsidies and Countervailing Duties, on Technical Barriers to Trade, or on Sanitary and Phytosanitary Standards, as it applies to a novel or complicated set of facts?

How certain should we be, before resorting to “object and purpose” to elaborate the ordinary meaning of the terms of a multinational agreement?

And after we’ve tried to interpret an agreement in accordance with the ordinary meaning of its terms in their context and in light of the agreement’s object and purpose – as we see them – then Article 32 of the Vienna Convention provides a second step for interpretation, that is sometimes overlooked:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

A helpful record of preparatory work often may not be available. So what help are the “circumstances of its conclusion” for checking or confirming an interpretation that we’ve given to a WTO agreement?

PRESENT AT THE CREATION

What were those circumstances, and which are relevant?

Can we ever assume negotiators left some things unsaid or ambiguous? Because they intended to? Because they resorted to “creative ambiguity” when they couldn’t reach agreement on something?

Did they intend to leave it to us? We, who are commanded not to “add to or diminish the rights and obligations provided in the covered agreements?”

(Facetiously) Is it relevant that the negotiators were tired and under pressure from their capitals to conclude the whole thing – as surely they sometimes were?

(Less facetiously) Sitting there over coffee or beer in the WTO lounge, did they trust in the admonition they had all agreed upon, that the dispute settlement process – capped by the Appellate Body they were creating – was not to add to or detract from the specific obligations of the agreements?

These are some questions of balance that – explicitly or implicitly – we work constantly to get right.

If we don’t get that balance right – if we interpret the words too broadly or go too far in filling a gap or resolving an ambiguity that may have been intentional – do we not only risk that invaluable commodity of respect but also do a disservice to the truly extraordinary negotiating feat the agreements represent – and worse, do we make it harder for negotiators to come to agreement in the future, if they fear they must cross every “t” and dot every “i” to prevent unintended interpretations?

Again, these are examples of the kind of tightrope we walk as we try to maintain the respect our predecessors built for the Appellate Body and for WTO rules, in a changing world.

In conclusion – *(and I might point out that a young Bill Clinton got a standing ovation for saying that, in a long-winded speech introducing the nominee, Michael Dukakas at the 1988 Democratic Convention...)* – in conclusion, I would like to say, on the completion of my first year as a Member of the Appellate Body, that the sense of responsibility and dedication to the institution of my fellow Members have been enormously impressive, as has been the extraordinary ability and dedication of our truly great multinational staff.

For we are not policymakers, and we are not negotiators. We are judges, apply a legal craft. It is as craftsmen – not statesmen – that we work together to try to get it right.

For as an old friend, an eminent economist, once said about international trade theory: “There are not statesmen in this business. Trade is about whose hand is in whose pocket. And who should take it out.

Thank you.

