Emanuela Ceva e Andrea Fracasso

SEEKING MUTUAL UNDERSTANDING

A DISCOURSE THEORETICAL ANALYSIS OF THE WTO DISPUTE SETTLEMENT SYSTEM

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L'idea alla base di questo approccio è che sia non solo desiderabile ma istituzionalmente possibile muovere verso forme di politica «civile», informate a quel «pluralismo ragionevole» che Rawls ha indicato come tratto caratterizzante del liberalismo politico. Identificare i contorni di questa nuova «politica civile» è particolarmente urgente e importante per il sistema politico italiano, che appare ancora scarsamente preparato ad affrontare le sfide emergenti in molti settori di policy, dalla riforma del welfare al governo dell'immigrazione, dai criteri di selezione nella scuola e nella pubblica amministrazione alla definizione di regole per le questioni eticamente sensibili.

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WTO, Jürgen Habermas, dispute settlement, discourse theory, trade controversies, mutual understanding

ABSTRACT

SEEKING MUTUAL UNDERSTANDING.
A DISCOURSE THEORETICAL ANALYSIS OF THE WTO DISPUTE SETTLEMENT SYSTEM

The Dispute Settlement System (DSS) of the World Trade Organisation (WTO) is a mechanism to settle international trade controversies by means of adversarial procedures. In this paper we aim to address the following question: why is the DSS adversarial in kind and articulated through such sophisticated procedures? We shall combine studies in the fields of politics, law and economics through philosophical analysis to look for a systemic answer to this question in the inherent qualities of the procedures through which the DSS is articulated. Specifically, we shall resort to Jürgen Habermas's discourse theory, as a hermeneutic device to disentangle the different kinds of "action orientations" DS procedures may have (compromise, consensus and understanding). We shall identify the reasons of the specific characterisation given to the DSS in the purposeful connections between its procedural features, the general aims pursued by the WTO and the disputes emerging within it.

SEEKING MUTUAL UNDERSTANDING.
A DISCOURSE THEORETICAL ANALYSIS OF THE WTO DISPUTE SETTLEMENT SYSTEM

0. INTRODUCTORY

The Dispute Settlement System (DSS) of the World Trade Organisation (WTO) is an interesting mechanism meant to settle international trade controversies by means of adversarial procedures. At least part of its interest may be accounted for on consideration that the WTO DSS is one of the few mandatory dispute settlement (DS) mechanisms applying to multilateral agreements. Moreover, a further element of interest lies in that, although unequal economic power relations hold between WTO Members, these have equal standing once they enter the DSS. What is more, the DSS is quite unique as it combines in an original way procedural rules belonging to the furniture of other international legal organisations and well-established DS methods (i.e. consultation, inquiry, mediation, arbitration and the like).

But, why is the DSS adversarial in kind and articulated through such sophisticated procedures? The answer for which we shall argue identifies the reason in the *sui generis* aims pursued by the WTO and the nature of the disputes with which it engages.

This kind of question is not new in the literature addressing institutional design problems.[1] However, most of the answers have looked into the matter from purely legal, political or economic perspectives, and have concentrated on specific substantive matters (e.g. the efficiency of the DSS, its capacity to deliver substantially fair outcomes or the effects of DS rulings on low income countries). This paper aims to combine studies in the fields of politics, law and economics through philosophical analysis to look for a systemic answer to the question above in the inherent qualities of the procedures through which the DSS is articulated. In order to make sense of the DSS specificity, we propose resorting to Jürgen Habermas's discourse theory, as a hermeneutic device to disentangle the different kinds of "action orientations" DS procedures may have (compromise, consensus and under-

We would like to thank Marco Dani, Marco Faillo, Maurizio Ferrera, Giorgio Fodor, Marco Pertile and Federico Zuolo for their comments and discussion of earlier drafts of this paper.

[1] See especially Horn and Mavroidis (2006) and Maggi and Staiger (2008).

standing). This procedural approach leaves aside the features of the contingent outcomes to which DS procedures may lead, and concentrates on the relationships which the procedures are capable of installing between the parties by shaping the orientation of their interaction. Such an approach has the advantage of being suitable for application across diverse contexts, independently of substantive contingencies.

The paper unfolds as follows. In section 1, we shall try to explain what makes the WTO an interesting case in which to study adversarial procedures to settle international trade controversies. Section 2 shall present and distinguish the classes of dispute to which the DSS applies. The WTO DS mechanism will be analytically described in section 3.

Section 4 will be devoted to explain why Habermas's discourse theory is suitable to capture the nature of disputes within the WTO and the specificity of the procedures to settle them. On this theoretical backdrop, adversarial procedures within the DSS will be distinguished according to whether they aim to put the parties in a condition to reach primarily compromise, consensus or mutual understanding (section 5). This analysis will allow us to show, in section 6, how different components of the DSS, displaying a different action orientation, serve the specific aims of the WTO presented in section 1, facing the classes of dispute identified in section 2. The conclusion of our analysis shall emphasise that a commitment to put the parties in a condition to reach mutual understanding seems to have priority over alternative procedural action orientations. In section 7, we shall briefly address some problems that may occur once DS procedures are translated from texts into practice.

We would like to emphasise that the analysis we shall thus offer has no specific normative ambition. It does not aim, in other words, to offer recommendations on how the WTO DSS should be to deliver "better" results (however one may want to qualify them). We intend, rather, to investigate how it has been devised, with a view to showing the purposeful relations between its procedural features and the WTO distinctive general aims.

Preliminary Qualifications

Before proceeding, and in order to restrict our area of concern, some qualifications are in order regarding **(i)** our reasons for adopting a procedural approach to the analysis of the DSS; **(ii)** the extent of our interest in Habermas's discourse theory and **(iii)** the scope of our considerations on the WTO.

On **(i)**, it is frequently thought that the only reason to resort to a procedural outlook is the impossibility of reaching an agreement on the inherent qualities of a just outcome. Although outcomes tend by their very nature to be controversial, it is argued that this does not necessarily apply to procedures. This is the account

of proceduralism advocated by Stuart Hampshire (1999), among others, as well as that discussed critically by John Rawls (1993) and Joshua Cohen (1994). However, as argued extensively elsewhere (Ceva 2007), once the scope for disagreement is acknowledged, there seems to be no reason to think that it should not extend to procedures. Accordingly, to make a long story short, the case for proceduralism lies not so much in the less controversial nature of procedures, as in their being more suitable for application across diverse contexts and issues of substance. The adjudication of these latter is better served if treated as a matter for case-by-case evaluation. This is because it is open to the influence of a number of contextual variables (e.g. preferences, interests, opportunities and values) which cannot be accommodated –in all their possible combinations– by normative provisions aspiring to be applicable across different contexts.

This seems to be precisely the aim of the DSS: providing rules and procedures to settle disputes across contexts and over time. What is more, assessing the inherent qualities of procedures is particularly important within the DSS as Members have renounced, as a consequence of the Uruguay Round, the provision on the acceptance by positive consensus of all adjudicating bodies' reports (more on this in section 3 below). As reports are currently adopted automatically, if not *rejected* by consensus, it is crucial that procedures are devised in a way to ensure that the parties have an active role and exercise some control throughout the whole DS process.[2]

As far as point **(ii)** is concerned, the idea of making sense of the specificity of the DSS through a Habermas-inspired discourse theoretical lens looks promising as the WTO agreements may be seen as a sort of "speech": a formalised context of interaction governed by mutually agreed norms. As discourse is triggered, in Habermas's view, as a normative tool to renew the background agreement, its function comes very close to that granted by the DSS within the WTO (more details in section 4).

However, as we shall signal at different stages, besides similarities, some significant differences may be found between Habermas's discourse and the WTO. We think it nonetheless promising to employ a *Habermasian* (although not, strictly speaking, *Habermas's*) conceptual framework because, as we shall endeavour to show, similarities outweigh differences by and large. Moreover, having no exegetical aspirations, the considerations we shall offer should not be read as an attempt to shed light on a Habermas-inspired approach to dispute settlement by way of an applied case study. They are rather meant to "plunder" Habermas's work in order to make sense of the DSS specificity.

Finally, on **(iii)**, we should like to emphasise that this is not a paper on the WTO as a whole, not one meant to assess the (either actual or intended) fairness of its

[2] It has been noticed that the concern with the properties of procedures looks particularly relevant for 'those WTO Members, including developing countries, which lack the political power or the resources to shape the outcome of a conflict to their advantage' (Panizzon 2007, 14).

procedures (both ordinary and those meant for settling disputes).[3] In particular, we shall not discuss those procedures regulating the negotiation of new agreements nor those devoted to "housekeeping" operations, or to set the WTO agenda. As stated, the aim of this paper is rather to disentangle the procedural qualities and orientations of the mechanism to settle trade disputes on issues covered by the WTO agreements.[4] To this end, we shall concentrate on the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (hereafter DSU), the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, and the *Working Procedures for Appellate Review* (hereafter AB Rules).[5]

1. THE WTO AS A *SUI GENERIS* LABORATORY TO STUDY THE SETTLEMENT OF INTERNATIONAL TRADE CONTROVERSIES

There is not much disagreement in the economic literature on the beneficial implications of free trade on the welfare of trading partners. Nonetheless, countries face a Prisoner's Dilemma in deciding to liberalise exchanges. Even though a cooperative solution of (at least) partial liberalisation is Pareto optimal, it would unlikely result out of individual uncoordinated decisions.

A cooperative trade agreement is a means to overcome this problem (see Bagwell and Staiger 2002). Parties agree to give market access to their partners in exchange of (a) mutual concessions and (b) a commitment to abide by certain rules. Mutual concessions ensure mainly that all parties gain from the agreement, prevent strategic liberalisation and strengthen the domestic political constituencies in favour of trade. The commitment to abide by rules provides national governments with international constraints on the actionable set of policies to which they can resort. Furthermore, governments value reciprocal concessions because, by negotiating foreign liberalisation, they can claim credit for the gains accruing to domestic exporters (see Ethier 2004).

Even so, parties may still have incentives to unilaterally deviate from what agreed. This reveals a problem of enforcement of international trade agreements (see Bagwell and Staiger 2002). In theory, if trade is mutually beneficial and international exchanges are repeated over time, the prospective threat of retaliation by

[3] Considerations on this point can be found, among others, in Brown and Stern (2007) and Panizzon (2007). For a wider discussion see Targetti and Fracasso (2008).

[4] It goes almost without saying that we do not claim that processes of negotiation and DS are uncorrelated. In fact, since the DSS serves to clarify the existing provisions, the decisions on specific disputes also help understanding the scope of current negotiations (see Petersmann 2005).

[5] The documents above are meant to provide general rules and procedures governing consultations and DS. Some covered agreements (see DSU Annex II) make special provisions on DS to which priority is accorded over what is generally established in the DSU. Although significant differences apply, we shall not take them into consideration for the purposes of the present analysis which, as stated, is motivated by an interest in the DSU alone.

the affected foreign partners (i.e. grim-trigger strategy) can be sufficient to render the agreement self-enforcing. In practice, however, tacit and self-enforcing trade agreements are hardly conceivable. Contract incompleteness and the presence of transaction costs require the establishment of institutions serving to clarify the scope of the agreements and to allow parties to deal with contingencies by means of temporary *ad hoc* deviations from some of their commitments.[6] Institutions are thus necessary to support efficiently market allocations, to promote the peaceful cooperation of states, to balance the different goals built in the agreements, and to boost compliance. Should this latter fail, institutions are also meant to facilitate the peaceful settlement of trade disputes.[7]

A DS mechanism can contribute to compliance in two ways: either boosting the enforceability or strengthening the enforcement capacity of the parties. The latter refers to the actual capacity of the complaining party to credibly *retaliate* against a damaging infringement of a relevant agreement. On the other hand, enforceability can be defined, following Keck and Schropp (2007), as the ability to *identify* a violation of the terms of the contract and is a function of the observability of contract infringements, of the independent verifiability of the legal basis of a claim, and of the quantifiability of damages incurred. Therefore, a DS procedure is part and parcel of any successful trade agreement: by facilitating their enforcement, it also makes agreements more likely, comprehensive and long lasting.

The WTO DSS and its specificity

The WTO is not just an example of institutions born to serve multilateral agreements, but a case in point. To start with, the WTO constitutes a distinctive and comprehensive community of parties entertaining stable, repeated and secure relationships. Cooperation between Members is not just a means of achieving some external goals –as is the case, say, in environmental accords (e.g. Kyoto Protocol)– but a goal in itself. Moreover, this community is grounded on politically, mutually recognised agreements, which provide for an overall balance of rights and obligations for its Members, and whose respect is ensured by a sophisticated DSS. Based on the DSU, encompassed in the package of agreements establishing the WTO in 1995, the DSS is one of few mandatory DS systems applying to multilateral agreements.[8]

[6] A contractual reading of DS mechanisms is proposed by Schwartz and Sykes (2002). For a discussion, see Srinivasan (2007).

[7] Even though alternative means to settle disputes at the international level were codified in the Hague Conventions (1899 and 1907) and reported in the article 33 of the UN Charter, the peaceful settlement of disputes can be better secured to the extent that 'agreed rule-making is supplemented by administrative rule-application and judicial rule-enforcement in the framework of national and international organisations' (Petersmann 2004, 5).

[8] Its jurisdiction is mandatory in that (a) the WTO law precludes Members to adopt other DS systems and (b) the decisions of the adjudicating bodies are *de facto* automatically adopted.

WTO DS procedures are geared to prevent that a dispute between few Members, and its ungoverned settlement, may corrupt the cooperative overall spirit of the agreements. For this reason, the DSS combines well-established procedural rules and methods of DS in an original "vertical" DS system to reach a certain, prompt, and acceptable settlement of controversies. Clearly, the specificity of the DSS lies not so much in the legal instruments it employs, as in the way in which these are combined to settle trade controversies in a way functional to the WTO general aims.

More precisely, the DSS serves to the following goals: (i) to provide 'security and predictability to the multilateral trading system' (DSU Art. 3.2); (ii) to 'preserve the rights and obligations of Members under the covered agreements' (DSU Art. 3.2), so that a 'proper balance between the rights and obligations of Members' is maintained (DSU Art. 3.3); (iii) to 'clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law' (DSU Art. 3.2); (iv) to guarantee rule-orientated rather than power-orientated DS procedures; (v) to ensure a positive and prompt settlement of disputes; and (vi) to foster the adoption of mutually acceptable solutions consistent with covered agreements (DSU Art. 3.7).

As we shall see in section 7, the presence of the DSS does not improve the *enforcement capacity* of the Members, as defined above, which remains inevitably dependant on their relative power and on the willingness of their counterparts to comply. Nonetheless, as Keck and Schropp maintain, it can 'contribute to successful enforcement by enhancing *enforceability*' (2007, 21), insofar as it establishes mutually acceptable and binding procedures to (i) confront claims and rebuttals; (ii) obtain and process information; and (iii) interpret the covered agreements. This characterisation strengthens the importance of distinguishing and analysing the procedural components of the DSS (see also Sacerdoti 2006).

2. A TYPOLOGY OF THE DISPUTES WITHIN THE WTO

In what follows we shall illustrate four classes of disputes that may occur between WTO Members. This presentation serves as a typology of the reasons and motivations that may drive Members to engage in disputes, and will turn out to be essential to disentangle the diverse action orientations of DS procedures. It goes without saying that actual disputes hardly fit into a single type entirely, but mixed cases are most likely to be found.

The first class regards disputes arising because of the existence of *gaps* in the text of the WTO agreements. As these are general and have an 'open-texture',[9] such

[9] Borrowing from Herbert L.A. Hart, the open-texture of legal agreements derives from the idea that: 'human legislators can have no knowledge of all the possible combinations of circumstances which the future may bring. This inability to anticipate brings with it a relative indeterminacy of aim' (Hart 1994, 135).

gaps are not rare. Any complex multilateral agreement is naturally incomplete in that it cannot possibly foresee all states of the world to which its provisions may contingently apply. In addition, Members often deliberately choose to leave the text silent on those issues on which they cannot reach an agreement.

The second class includes those disputes arising from controversial *interpretations* of rules and provisions ambiguously defined in the WTO agreements. Often procedural and substantive terms and rules carry with themselves an intrinsic vagueness.[10] Furthermore, the WTO agreements pursue multiple goals, some of which are subject to other international agreements, and whose conceptualisation has been internationally understood in different ways over time.[11] When interpretation-related problems occur, Members may take measures that end up impairing others' rights and benefits.

The third class of disputes refers to "sincere" disagreements among Members regarding the *conformity* of their national measures with WTO rules.[12] An example is when a trade restrictive measure is imposed by a Member in the conviction of being permitted to act in such a way by the numerous exceptions and safeguard clauses contained in the WTO agreements. This case differs from those above as the parties do not face a gap or vague terms, but disagree on whether a measure is actually justified by a right under the agreements and fulfils the established requirements.[13]

The fourth class of disputes encompasses those controversies in which parties act in an instrumental way, that is either knowingly adopting a forbidden measure, or strategically complaining against one that is in fact acceptable. Given that parties should enrol in the DS procedure in good faith, we cannot provide clear-cut examples of this class without arbitrarily allege the lack of good faith of certain countries. However, it is widely recognised that Members sometimes use the DSS to obtain those concessions that they failed to gain during the negotiation process. The disputes of this fourth class thus arise out of attempts to circumvent the political inability/reluctance to undertake a *multilateral* revision of the agreements.

[10] Such an intrinsic vagueness applies for instance to the following concepts: good faith, due process, serious injury, threat.

[11] For instance, the concept of development has greatly changed due to several UN resolutions and other international agreements (see Petersmann 2006). Moreover, the WTO agreements recognise the Members' right to use trade restricting measures to protect the environment, but do not elucidate where the balance between free trade and environment protection has to be drawn.

[12] We include in this class the non-violation complaints under GATT Art. XXIII.1(b). The disagreement regards the effects of a measure on the benefits reasonably expected to accrue to other Members. Therefore, it is not the conformity with a specific provision of an agreement to be at stake but that with a general WTO principle of non-impairment.

[13] Disputes of this sort often concern Members' rights, established to enable Members to respond to specific circumstances and needs without necessarily entering a renegotiation phase. Rights are often object of controversy because they are limited, conditional to the satisfaction of factual or procedural requirements, and subject to the condition that they cannot discriminatory reduce the rights of others (see Carmody 2008).

This constitutes an improper use of the DSS at odds with the WTO general aims.[14]

It could be argued that far from being specific to the WTO, most of the disputes arising between the parties bound by an international agreement would fall in either of these four classes. However, those occurring within the WTO are characterised further by the following features. In the first place, they invest the application and interpretation of provisions that are objects of *previously* established agreements between the Members. Second, they regard domestic national measures which affect other Members' benefits, not international actions which directly infringe upon the sovereignty of other Members, as it happens in many international disputes. Third, they must be settled –by the parties and adjudicating bodies– in a way compatible with the safeguard of the whole system, so as to preserve the balance of rights and obligations achieved by means of political negotiation.

3. THE WTO DISPUTE SETTLEMENT SYSTEM: AN OVERVIEW

The establishment of procedures of adversarial argumentation inspired by some commitment to a principle of procedural equality and fair hearing seems to be at the heart of the major processes of DS at a number of diverse levels. In a basic sense, these procedures pose a twofold condition: that all parties in a dispute (i) be granted an equal chance to have a say and (ii) be heard when making their case. Such a twofold condition may be summarised in the principle of due process.[15] However, this formal characterisation risks oversimplifying the nature of DS by cancelling out the different nuances its demands may take, especially when the parties are sovereign states.

In what follows, we shall offer a characterisation of the DSS aimed to underline its distinctive traits. The reader who is familiar with the provisions in the DSU could proceed to section 4.

Consultations between WTO Members under the DSS

When a WTO Member challenges the validity of a measure undertaken by another Member, and bilateral consultations have either failed or not occurred, it has formally to request DSS consultations in order to set the WTO DS procedure

[14] We shall offer some additional considerations on this class of disputes in section 7 below.

[15] Issues of due process may be seen to cover (at least some of) the following questions: 'does a complaining party has an opportunity to meet the case fully […]? Does a respondent have a full opportunity to meet the case which has been brought against it? Do both parties have the opportunity to put the necessary evidence before the panel? When evidence is adduced by one party, does the other have the opportunity to adequately test it?' (Thomas 1997, 45).

in motion.[16] The consultation request must be in writing, indicate the challenged measure and the legal basis of the complaint (DSU Art. 4.5), and be addressed to the Dispute Settlement Body (DSB). The DSB is one of the organs administering the DSS. All WTO Members are represented in it. The DSB establishes panels, adopts or rejects adjudicating bodies' reports, supervises implementation of its decisions and authorises remedies.

The DSU defines (Art. 4.3, 4.7 and 4.8) clear time limits for consultations, whose inception and outcomes must be notified to the DSB and other WTO bodies. Nonetheless, consultations are confidential and occur without prejudice to the rights of the parties in any further proceedings (DSU Art. 4.6). Other Members may join consultations as third parties if they have "substantial trade interests" and provided directly involved parties agree. If the latter do not, new bilateral consultations can be established *a latere*.

In line with provisions common to international DS mechanisms, if consultations do not settle the dispute, four cases are possible: (i) the complainant drops the case; (ii) the parties seek to resolve their differences through good offices, conciliation and mediation;[17] (iii) the parties agree to resort to the flexible arbitration procedure provided by Art. 25 of the DSU;[18] (iv) the complaining party requests the establishment of a panel to adjudicate the case (DSU Art. 4.7).

In what follows, we shall concentrate on case (iv), in the event of which the DSS is fully triggered.

Panels and the adjudication of disputes

If consultations are not successful, the complaining party may ask for the establishment of a panel, that is an *ad hoc* (non-standing) WTO adjudicating body. A panel consists of three to five members chosen among an indicative list of suitable qualified persons (DSU Art. 8.1) held by the WTO Secretariat (DSU Art. 8.4), although Members can select persons other than those in the list.[19] A panel's

[16] Parties are held to be judicious about invoking the DS procedures, considering in good faith whether this move would be fruitful and likely to secure a positive solution to the dispute (DSU Art. 3.7).

[17] Good offices, conciliation and mediation are disciplined by the DSU. They are voluntary (in fact, mandatory only in the case one party is a least developed country), require parties' agreement, and can start and end at any time. The WTO Director General often acts in one of these roles.

[18] Binding arbitration is an alternative procedure to settle expeditiously disputes to which parties may resort upon agreeing to do so. Parties are required to define the issue and to find an agreement on the procedural arrangements to address their dispute. As the other adjudicating bodies' reports, the arbitrator's award must be consistent with WTO agreements and the general balance of rights and obligations of Members. The conditions in which arbitration is actually viable hardly obtain as they presuppose a wide agreement of the parties on a large set of issues. Ordinary DSS procedures are meant to cover those, more frequent, cases in which the disagreement is more comprehensive.

[19] The composition must ensure experience and impartiality. The composition of a panel is often a burdensome procedure, ending up discriminating those Members who face technical and financial constraints to participation.

official aim is to assist the DSB by giving an objective assessment of facts and law. The DSB has the sole authority to make the final decision on the dispute by adopting or not the panels' findings.

In deciding upon the establishment of a panel and on the adoption of panel's findings, the DSB works under the principle of "reverse (or negative) consensus". In a nutshell, the DSB cannot refuse the establishment of a panel or the adoption of its findings unless there is a unanimous consensus to the contrary. These provisions, distinguishing the WTO rules from those of the GATT, are meant to reinforce the mandatory jurisdiction of the DSS and its rule-based nature, while making sure that the WTO politically representative body retains the exclusive right of making decisions which are binding on its Members.[20]

Panels do not work in void. They are required to regularly consult with the parties, to give them 'adequate opportunity to develop a mutually satisfactory solution', and 'to make such other findings as will assist the DSB in making the recommendations and in giving the rulings provided for in the agreements' (DSU Art. 11).

If a measure is contended by several parties, a single panel may be established (DSU Art. 9.1) provided that it takes the rights of all parties into consideration. In addition, when a WTO Member has a 'substantial interest' in an existing dispute, it can ask at any time to participate to the panel's works as a third party (DSU Art. 10).[21]

Parties' submissions and panel's deliberations are confidential. A panel can use (seek and receive) information provided by a third party and solicit 'information and technical advice from any individual or body it deems appropriate' (DSU Art. 13.1). It can also ask an advisory opinion from an expert review group on certain aspects of the matter (DSU Art. 13.2). However, panels cannot use their investigating power to "make the case for the complaining party".

Panels establish their own working procedures and a timetable for the various written submissions and the meetings with the parties. First written submissions most of the times are not simultaneous. Complainant's first submissions contain factual information regarding the disputed measure and the exposition of the legal theory underpinning the assessment of its inconsistency with WTO provisions. The respondent usually files its submissions later (either as a rebuttal, or as an affirmative defence) and exposes its factual view of the measure at issue. Second written submissions are, instead, usually simultaneous (DSU Art. 12.6). They take the form of rebuttal submissions to both the first submissions and the oral

[20] In fact, a reverse consensus principle on the establishment of panels was already set up with the "Montreal rules", decided at a Ministerial Meeting in 1988 and adopted by the Contracting Parties in Geneva in April 1989.

[21] Third parties may play an active role in the panel proceedings. However, they cannot make claims, nor appeal to a panel report.

statements at the first meeting. Additional submissions are possible in the form of answers to questions presented by the panel and by the other party. All submissions are made available to all parties (DSU Appendix 3, Art. 10).

At the second meeting, the parties provide rebuttal arguments and the panel may review any issue at will. This is the last opportunity for the parties to make their case, as much as for the panel to ask questions and demand additional information.[22]

After the written submissions and the oral hearings, the panel releases a *draft* report to the parties for comments, setting out the facts and the parties' arguments. An *interim* report follows. It contains the descriptive section and the panel's findings and conclusions (DSU Art. 15.1). The panel submits the *interim* report to the parties for comments. These latter may submit written requests to review specific parts, and require an additional meeting to review the issues identified in the requests (DSU Art. 15.2 and DSU Appendix 3, Art. 12). If no review is required, the *interim* report becomes final. If the parties have not reached a mutually satisfactory solution, the *final* report would be reasoned and detailed, explaining the basic rationale behind any findings and recommendations (DSU Art. 12.7).

To be binding, the *final* report must be adopted by the DSB. Should any Member (including the parties in dispute) have objections, they must give their reasons in writing before the DSB meets and discusses the relevant report. The report is "automatically" adopted by the DSB at a meeting occurring within 60 days of the circulation of the report, unless there is consensus on blocking its adoption or if a party notifies its intention to appeal (DSU Art. 16).[23]

Appellate review under the DSS

To counterbalance the automaticity of these procedures, the DSU provides for an appeal on points of law (DSU Art. 17.6). A permanent Appellate Body (AB) is established to perform the function of appellate review. It consists of seven individuals. In each appellate case three of them (a Division) are selected on the basis of a non-disclosed rotation.[24] The findings of the AB are submitted to the DSB, which "automatically" adopts them, unless negative consensus is reached.

[22] In the case of submission of new evidence referring to "fundamental changes" in the nature of the legal claims, however, a third round of written submissions can follow.

[23] In fact, if no party places the report for adoption on the DSB agenda, the panel report remains unadopted.

[24] The seven members of the AB are appointed by the DSB for a four-year term and can be confirmed only once. Requirements over independence, capacity, authority, lack of conflict on interests are dealt with in DSU Art. 17.3, and in the *Rules of Conduct*. The AB membership has to be representative of the membership of the WTO.

Only the original parties in dispute can appeal to the AB (DSU Art. 17.4). A party wishing to appeal has to notify the DSB in writing (DSU Art. 16.4) and file a Notice with the Secretariat (AB Rule 20.1) before a meeting of the DSB is held to adopt the panel report. This Notice must contain certain information among which a brief (but precise) statement of the nature of the appeal (AB Rule 20.2).

The AB follows its own *Working Procedures*. To ensure "collegiality", all AB members, not just those in the Division, receive the documents on every case (DSU Art. 17.3) and can express comments and exchange views before the AB report is circulated to the DSB (AB Rule 4.2 and 4.3).

The Appellant must file with the Secretariat its written submission and serve a copy to the other parties of the dispute and to third parties. The Appellant's submission must contain (AB Rule 21.2) all information necessary to determine the nature and scope of the appeal. Similarly, Appellees wishing to participate have to file a written Appellee's submission (AB Rule 22) containing detailed information.

According to AB Rules, an oral hearing is to be held in each appeal (AB Rule 27.1), and all participants are given the chance of an opening statement. Members of the Division may address questions and ask memoranda to all participants, to whom questions and responses are circulated.

Participants may withdraw from an appeal (AB Rule 30.1), in which case the appeal is dismissed. If the parties find a mutually agreed solution, this must be notified to the DSB and the AB, which would drop the case. Otherwise the AB has to draw a report with its findings and submit it to the DSB. The report is accepted unless the DSB decides by consensus to block its adoption (DSU Art. 17.4).

The implementation of recommendations and rulings

Clearly, the implementation of recommendations and rulings is crucial for the enforcement of the WTO agreements. The DSU contains provisions dealing with the implementation and the lack thereof. We shall describe them briefly since the next sections will mainly focus on the adjudicating phase.

Usually, panels and AB reports contain the recommendation that the Member concerned brings its behaviour into conformity with the agreements. With the adoption of a report, the DSB is in charge of the surveillance over the compliance with recommendations and rulings (DSU Art. 21).

If immediate and full implementation is not possible, and the Member cannot bring a measure into conformity with the covered agreements, it is given a 'reasonable period of time' to comply (DSU Art. 21.3).[25] If disputes arise on whether

[25] The length of such a period might be proposed by the Member concerned and approved by the DSB (by "positive consensus"). If the DSB does not approve the proposal, parties of the dispute

the measures taken to comply with the rulings are sufficient and/or consistent with the agreements, they must be resolved through panel adjudication (DSU Art. 21.5).

If a Member refuses or fails to comply with DSB recommendations and rulings it can resort to two temporary remedies to protect its interests: compensation and suspension of concessions (retaliation). Members failing to comply have the obligation to enter negotiations, if requested by any party having invoked the DS procedures, so as to reach an agreement on a 'mutually acceptable compensation' (DSU Art. 22.2). Compensation is a voluntary measure, upon which both parties have to agree.

If no compensation is agreed, the offended Member may ask the DSB the authorisation to suspend concessions or other obligations towards the Member concerned (DSU Art. 22.2). Any retaliatory measure must be temporary and authorised by the DSB, subject to the negative consensus rule, unless the responding Member requests arbitration.

The level of suspension of concessions must be equivalent to the level of transgression (DSU Art. 22.4). If a party objects to the level proposed (or to the fact that the measures proposed do not respect the principles of DSU Art. 22.3), the matter has to be solved via binding arbitration (DSU Art. 22.6 and 22.7).

4. For a Habermasian discourse theoretical interpretation of the WTO DSS

The description of the DSS in section 3 has characterised a highly sophisticated set of multi-layered procedures geared to secure the WTO objectives and promptly address the various kinds of dispute that may arise between WTO Members. The remainder of the paper tries to make sense of the DSS specificity, in a way consistent with the context sketched in sections 1 and 2 above. To this end, we propose to disentangle its different components with the aid of a philosophical analysis inspired by Jürgen Habermas's theory of discourse.[26]

Habermas's theory of discourse: basic ideas

In order to explain properly, albeit concisely, Habermas's discourse theory, this should be inserted in the broader context of his theory of communicative action. Communicative action is based on a shared grounding of basic norms and well-

may try to reach an agreement. Failing this, the period is determined through binding arbitration (DSU Art. 21.3(c)).

[26] For a reading of the problem of democratic legitimacy in the WTO from a Habermasian perspective, see Krajewski (2001).

known facts (Habermas 1995). When acting communicatively, in Habermas's view, social agents interact so as to get to a common interpretation of a situation and to harmonise their life plans.

Language is used to reach a mutual understanding. Every time a communicative statement is made, the speakers commit themselves to support their validity claims[27] with reasons –especially if they are to respond to a critique. The hearers are correspondingly required to sustain by reasons their positions. On this ground, communication is successful when one agent understands another and the implications of her request (see Habermas 1984 and 1998).

When disagreement arises and the shared basic context of interaction is questioned, communicative action is disrupted and may be restored only through discourse. Within a discourse setting, agents are assumed to be allowed equal chances to stand up and make their claims, having the freedom to say what they are willing to say and the duty to listen to the others. Equality here translates into two aspects: on the one hand, it implies the negative requirement that participants be given the chance and space to speak. On the other hand, agents are positively required to listen, respond and justify their positions to each other. This embodies the idea that the participants have something relevant to say and are thus worthy of respect. On this basis, a condition of fair play is also added to the invitation addressed to the agents to renounce behaving strategically, trying to persuade their partners by all means, including deception (see Habermas 1984 and 2005).

In sum, rules immunise discourse against coercion and inequality. Agents should convince their partners in communication only through rational persuasion, through what Habermas has called 'the unforced force of the better argument'. Such conditions should also represent a sort of warranty as to the possibility for all relevant information and arguments to be presented and have a chance to exercise some influence on the final outcome (see Habermas 1984).

Habermas is fully aware that conditions of full inclusion, equality and non-coercion can hardly be realised in practice. However, in line with the procedural take adopted also in this paper, they still do play an important role: outcomes (whatever their substance) may be considered acceptable if scrutiny of the process by which they were attained does not reveal obvious exclusions, coercion and suppression of arguments (see Habermas 2003 and 2005).

[27] Validity claims can be of three kinds: (i) claims to truth, when 'the speaker refers to something in the objective world'; (ii) claims to rightness, when reference is made to 'something in the shared social world'; (iii) claims to truthfulness, when they concern something in the speaker's own subjective world. See Habermas (1990, 58).

Discourse theory and the WTO

If, building on the characterisation above, one considers the WTO agreements as rules of communication (as they serve a function of action-coordination), the DSS may be assimilated (*mutatis mutandis*) to a sort of discourse, which enters the picture when disputes arise in order to restore harmony and compliance with the agreed norms on mutually acceptable grounds. As explained, the primary function of discourse is to protect agents from instrumental and coercive uses of unilateral power, granting a system of rules applicable across a range of diverse cases. This is certainly in line with the WTO commitment to transform a power-oriented DS mechanism (as under the GATT) into a rule-oriented system.[28]

More precisely, within the DSS the conditions of equality and inclusion are realised by the requirements that all Members (despite their unequal relative power): (i) are given an equal opportunity to resort to the DSS; (ii) share equal opportunities to make their voices heard as parties (or third parties) to a dispute and *qua* members of the DSB; and (iii) are bound by the same agreements and procedures.[29]

Moreover, non-coercion is ensured at different stages. As illustrated above, the main aim of the DSS is to assist the parties to find a mutually satisfactory solution. To this end, the DS adjudicating bodies should consult with the parties at all stages (DSU Art. 11, AB Rule 27.1), and these latter are encouraged to reach an agreement at any time (DSU Art. 3.7 and 12). The requirement that both cases made to the panel and appeals filed with the AB must be made in writing (DSU Art. 12 and AB Rule 21.2) contributes to remove, or limit, possible sources of distortion and manipulation in communication. The same rationale seems to lie beneath the provision that panels draft and interim reports be sent to the parties for comments, before being submitted to the DSB (DSU Art. 15).

The commitment to the creation of an unbiased setting for communication emerges also from consideration of the *Rules of Conduct*. These provide for a disclosure obligation, requiring such persons as members of panels, AB and Secretariat to reveal any information that may affect other member's impartiality and independence, and hint at possible conflicts of interest. In addition, provisions have also been made for a "challenge process". A party could thus ask for the disqualification of, say, a panel member, were there evidence to demonstrate that she had violated the *Rules of Conduct* in a way that may jeopardise the integrity, impartiality or confidentiality of the DSS itself (Rules of Conduct Art. VIII.1).[30]

[28] See Jackson (1997a). The point that the DSS has evolved in accordance with Habermas's principle of discourse ethics is made in passing also in Davis (2007).

[29] On this, see also Panizzon (2007, 3). For an account of the problems that may emerge in the passage from formal to substantial equality between Members, see section 7 below.

[30] Note that the challenge process itself is adversarial in kind, granting the contested person the right to have his say and be heard.

It should be noted that, through the years, Habermas has refined his theory, introducing a series of differentiations between types of discourse for which it is impossible to account in this paper. However, for our purposes, a relevant distinction holds between justificatory and practical discourse.[31] The latter is meant for dispute settlement and relaxes the conditions of unanimity (as a requirement for decision making) and universalisation that applies to the former.[32] Practical discourse is not expected to build up the basic rules of a society. It is rather meant to deal with situations of conflict within already structured contexts. This account suggests that the type of discourse which is relevant for the DSS is practical. It is meant to make up for disputes that may arise in the interpretation and application of agreed norms.

Moreover, in a later work (Habermas 1995), a distinction is also operated between discourses of justification and of application. Whereas the former are general in kind and meant to formulate and clarify the rules of interaction, the latter is primarily meant to establish the appropriateness of a norm to a specific situation, or of a given behaviour to a norm. Furthermore, the latter may also serve a "gap-filling" function facing unforeseeable consequences and situations.

This distinction presents some significant areas of overlap with the characterisation of the classes of dispute offered in section 2 above. "Conformity-related" disputes seem to belong to the realm of discourses of application, as they derive from a disagreement investing the specific features of a certain measure in a certain context. In "interpretation-related" cases, the problem lies instead in the very understanding of a certain WTO rule due to some ambiguities in the way the text is formulated and basic concepts employed. Although in this latter case parties are not called upon to *establish* a new rule through the DSS, this latter is intended to clarify the existing provision in order to make up for some inherent vagueness of its formulation. This latter task comes thus quite close to those belonging to the realm of discourses of justification. A mixed case is represented by issues of "gap-filling". In the WTO, gaps may be due either to the impossibility to make provisions for all possible future circumstances, or to the lack of agreement between the Members. In the former case, the DSS function resembles that of a discourse of application. In the latter, the DSS takes on a more "creative" role thus getting closer to discourses of justification.[33]

[31] For a discussion of this distinction see Chambers (1996, 98).

[32] According to the principle of universalisation, a norm is valid when '*all* affected can accept the consequences and the side effects its *general* observance can be anticipated to have for the satisfaction of *everyone's* interests' (Habermas 1990, 65). Habermas also operates a distinction between moral, ethical and pragmatic discourses (Habermas 1995). The first has to do with moral universal norms, the second with a person's values and identity, and the third with political and legal issues. All are governed by the above-mentioned rules of equality, non-coercion and inclusion. However, only moral discourse should lead to unanimity (for a discussion, see Chambers 1995). As the conditions of argumentation are the same, this distinction may be left in the background for our purposes.

[33] The extent to which the DSS is entitled to play a creative role is highly debated and has given rise to the so-called problem of judicialisation. More on this in section 7 below.

5. DISCOURSE THEORY AND PROCEDURAL 'ACTION ORIENTATIONS'

So much for the general consistency of a Habermas-inspired reading of the DSS. It is now time to introduce those specific aspects of Habermas's theory that may help us to understand how the different components of the DSS are coherent with, and meant to secure, the WTO general aims.

In the first volume of *The Theory of Communicative Action* (Habermas 1984), Habermas singles out three different types of action that correspond to three equally distinct action situations and three kinds of action orientation. (1) *Instrumental* action is the only non-social action, and it involves only objects. (2) *Strategic* action, instead, involves different subjects, who are oriented to success, i.e. to the promotion of their particular interests and claims. (3) *Communicative* action is also a form of social action, but of a different kind. Agents involved in communicative action cooperatively interact to reach a shared understanding of the context of their exchange, aiming at the joint realisation of their individual life plans.

Limiting ourselves to the domain of interpersonal interactions (thus excluding the scenario in 1), communicative action may be oriented either to consensus or understanding, whereas the appropriate action orientation for strategic action is compromise. In what follows we shall explain each of these concepts.

Compromise

In Habermas's view, compromise stems out of a fortunate coincidence of different interests, as the result of a bargaining process where contrasting claims are balanced. Accordingly, it does not imply any change either in the attitude or beliefs of the agents involved. These might accept a compromise simply because it maximises their interests, and may equally likely be ready to abandon it when it no longer serves to their purposes. In such a bargaining scenario, the balance of different powers leads to a compromise which is deemed equally advantageous for the different parties on the basis of their different and particular reasons.

Compromise, thus characterised, is not an appropriate action orientation within discourse, as it cannot immunise parties from coercive and manipulative strategies of persuasion, so that the 'unforced force of the better argument' is the only source of agreement. Compromise can at most be seen, in Habermasian terms, as a 'second-best alternative' to consensus, to which agents can turn 'when discourse has shown there to be no common interest' (McCarthy 1992, 59).

Consensus

The dialogical nature of Habermas's model makes it impossible to attain a permanent definitive closure to discourse: new issues may always arise in the interaction

between the different parties. Nevertheless, under ideal conditions, 'Habermas's concept of discourse seems to imply, in principle, the possibility of full consensus toward something like the correct answer' (Rehg and Bohman 2002, 33).

Consensus means a status of *full* substantive understanding between the different agents, who come to unanimously agree on something for the same reasons. It should be noted that it is not only confined to an ideal dimension. Consensus is conceived as an always potentially attainable result, whose possible realisation should be what makes discussion keep going.

Mutual understanding

Within Habermas's theory the notion of understanding plays a paramount role. It is not merely thought of as a possible end for a discursive interaction; it is, in fact, conceived of as 'the proper –and not only a derivative– mechanism for coordinating action' (Berger 1991, 166).

But what is then the focus of understanding? In essential terms, Habermas explains that the 'term "reaching understanding" means, at the minimum, that at least two speaking and acting subjects understand a linguistic expression in the same way' (Habermas 1984, 307). This may apply, in a basic sense, both (i) to the context in which the communication takes place and (ii) to the claims put forward by the parties.

Reaching understanding does not have to mean that agents need to find a substantive consensus, especially when what is at stake is a dispute featuring two opposed claims. For communication to be successful, they need primarily to understand the claims each other put forward against a shared background.

6. DISENTANGLING THE DSS COMPONENTS: PROCEDURAL ACTION ORIENTATIONS IN CONTEXT

Bearing in mind that our aim is neither exegetical nor interpretative of Habermas's own view, his characterisation of the three different kinds of action orientation shall be employed with two significant amendments: **(a)** we shall take in no consideration the "natural" priority of communicative action over strategic action; and **(b)** we shall regard the different kinds of action orientation as applicable to procedures rather than to participants in discourse.

On **(a)**, the decision is due to the non applicability to our considered context of Habermas's ideal conditions under which the priority of communicative over strategic action (and thus of understanding over other action orientations) holds. This is partly due to the fact that whereas Habermas's discourse theory applies

primarily to the formulation, justification and application of moral norms, the WTO scenario has no similar moral denotation. However, as we hope to have made clear in section 4, the similarities revealed above do outweigh such a difference of scope, provided that it is born in mind, so as not to interpret our considerations as a piece of Habermasian scholarship.

On **(b)**, consensus, compromise and understanding are not presented in what follows as goals parties in trade disputes should be expected to pursue. It is rather plausible to postulate that the parties are interested in persuading the opponents of the soundness of their claims (and may accordingly be seen as strategic actors in Habermas's terminology). However, it is the aim of the DSS to transform a strategic interaction (where power considerations apply, as it were) into a communicative one. Leaving aside Habermas's jargon, the DSS is meant to preserve a multilateral system of trade interaction between WTO Members that is not governed by coercive power, but oriented to shared agreement and an acceptable balance of rights and obligations. If this is accurate, it seems also plausible to argue that what is relevant for our purposes is not so much the parties' action orientation as that of the dispute settlement procedures.[34]

In what follows, we shall make use of the three action orientations presented above in turn as instruments for a philosophical analysis meant to making sense of the specificity of the different components of the DSS and of their purposeful connection to WTO aims.

Compromise, consultations and remedies

Prior to start the procedure for the establishment of a panel, the offended party may ask the offender to enter consultations. The aim of this phase is to find a 'satisfactory adjustment to the matter' (DSU Art. 4.5). This seems to leave open the action orientation of the procedure. In consultations, there seems to be no priority between consensus, understanding and compromise as what really matters at this stage is that the parties deem the solution, if any, satisfactory.

From a different angle, it seems equally plausible to argue that such a characterisation draws consultations rather close to what is known in international law as negotiation, central to which is the idea that all parties should find some satisfaction in the outcome. Since compromise is the appropriate action orientation for negotiation, one might think that this also applies to consultations within DSS.

However, the above-mentioned Art. 4 of the DSU reads: 'If a request for consultations is made pursuant to a covered agreement, the Member to which the request is made shall [...] enter into consultations in *good faith* [...] with a view to

[34] For a more extensive and general case in favour of the application of Habermas's typology of action orientations to procedures rather than to outcomes, see Ceva (2008, 125 ff.).

reaching a *mutually* satisfactory solution' (DSU Art. 4.3, emphasis added). This seems to reveal at least two points of departure from an action orientation to compromise, as defined in Habermas's discourse theory. More precisely, parties do not seem to be allowed to act as pure strategic actors (thus employing all means to persuade their opponents and win the game) as (i) they must be in good faith and (ii) their primary concern should be not so much that of finding a solution which maximises their expectations, as one that is *mutually* acceptable.

It seems, in other words, that a preoccupation to reach some sort of mutual understanding is very much vivid even at this preliminary stage. But why is this the case? To find an answer, we suggest looking back at the WTO very general aims. If WTO aims to keep peaceful and stable trade relations between Members and a certain politically agreed balance of rights and obligations, it becomes apparent why the logic of strategic action is extraneous to the procedures through which disputes are settled. Procedures oriented to compromise cannot secure stability and multilateral balance, which are instead key commitments of those oriented to mutual understanding.

Compromise seems to play a residual role in DSS procedures,[35] as it is unsuited for securing WTO general aims. In particular, (a) it cannot secure stability of the whole system and (b) it is too exposed to the relative power relations (especially in terms of bargaining power) of the parties to secure a rule-oriented (rather than power-oriented) settlement of disputes. Straightforward maximising negotiations may take place *before* entering this even preliminary stage of the DSS, hence are left outside the procedures governed by WTO bodies.

This hypothesis on the residual role of compromise seems to be reinforced by consideration of such remedial procedures as those leading to compensation (DSU Art. 22). Parties are allowed to try to reach a compromise on a satisfactory compensation, yet this is considered a sub-optimal and temporary alternative to the preferred solution: the 'full implementation of a recommendation to bring a measure into conformity with the covered agreements' (DSU Art. 22.1). Given the general commitment to the overall stability of the trading system, parties are not unleashed in striking a compromised agreement on compensation.[36] Art. 22.3 of the DSU outlines precise procedural conditions aimed to limit the systemic effects of the remedy and its duration.[37]

[35] An exception is represented by the special DS procedures in GATS. Art. XXI makes explicit reference to negotiation between the parties with a view to establish a compensatory adjustment which is mutually advantageous for all of them.

[36] This concern is central to the literature discussing the possibility for parties to "buy out" their legal obligations. See Bello (1996), Jackson (1997b and 2004), as well as Schwartz and Sykes (2002).

[37] A broader scope for compromise (*qua* action orientation for procedures aimed to establish compensation) may be found in relation to those disputes involving non-violation complaints (GATT Art. XXIII.1(b)). In this case, there is no disputed measure to withdraw but an impaired benefit needing compensation.

Consensus and DSB collegiality

An action orientation to consensus would reveal a concern with unanimity in dispute settlement. Although consensus used to occupy a more prominent position under the GATT, it still seems to play a role especially on consideration of the general WTO commitment to secure collegiality.[38] Unanimity by consensus plays a crucial role in the adoption of panels and AB reports. Although no explicit approval should be given, (reverse) consensus is demanded to reject them (DSU Art. 16.4 and 17.14).

This seems to accord to consensus an interstitial but still significant place. It is interstitial as, in line with the general aims of the DSS, replies to dispute must be prompt (so as to limit the potentially destabilising effects of disputes on the general stability of the system). Unanimous consensus at all stages would be too demanding an orientation for procedures that are devised to attain a certain degree of efficiency. Moreover, consensus would imply veto power for losing countries, which risks rendering the DSS ineffective and unpredictable. The role of consensus is still significant though as it allows to understand the importance of collegiality and of the idea that a dispute is not merely a matter for the directly concerned parties, but rather affecting the whole community.

This latter point may look overestimated as parties retain the right to drop a case if they reach a mutually accepted solution before adjudicating bodies have issued their reports. This is in fact consistent with (i) the aims of the DSS and (ii) the commitment to collegiality. On (i), if parties find an agreement between themselves, it must mean that their relationship is not compromised and their dispute does no longer represent a threat for the general trading system. On (ii), not literally *any* mutually agreed solution would do. The general balance of rights and obligations must be preserved, so as *no* Member will be deprived by the benefits acquired under the relevant agreements (see DSU Art. 3.4, 3.5 and 3.6). To ensure this, all agreed solutions must be notified to the DSB.

It should be noted, however, that the idea of consensus at work in the DSU is not as demanding as that favoured by Habermas. Article IX of the WTO Agreement provides that a WTO body 'shall be deemed to have decided by consensus on a matter for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision'.[39] Here the idea

[38] Before 1989, positive consensus of the GATT Contracting Parties was required for any decision to amend, modify or interpret the GATT. Under the DSU, positive consensus (of the DSB) still plays a role when complaints are based on the unspecified 'other situations' in GATT Art. XXIII, 1(c). In those rare cases, reports are governed by the "Montreal Rules". The unanimous consensus of all Members prevents abuses of this hazy provision. A further point at which positive consensus is sought concerns the DSB's approval of the reasonable period of time within which the losing Member should comply with the relevant recommendation(s) (DSU Art. 21). This is the case as it is the only way to ensure that the approval of the Member whose expected benefits are being impaired is granted.

[39] This provision seems to be quite burdensome in practice for developing countries. These face resource constraints which may impede their active participation in the DSB, thus excluding them *de facto* from the constituency from which consensus is sought.

that consensus should be unanimous and on matters of substance holds, but no mention is made of the fact that it should be reached by agents motivated by reasons they find convincing in the very same way.

Mutual understanding

Looking carefully at the DSS, the relevance of understanding emerges quite clearly as a priority action orientation for adversarial procedures. Since the very beginning of the process, when requests of consultations are submitted, every effort seems to be made to ensure that all relevant pieces of information are disclosed (according to different terms – see section 3 above) both to the parties in dispute and to the other Members.

As Palmeter and Mavroidis put it, consultations are meant to 'enable parties to gather relevant and correct information – both to assist them in reaching a mutually agreed solution or, failing that, to assist them in presenting accurate information to the panel' (Palmeter and Mavroidis 2004, 87). This is reinforced in the AB report on the *Mexico-Corn Syrup* (Art. 21.5-US) case:

> Through consultations parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of differences between them, and, in many cases, reach a mutually agreed solution in accordance with the explicit preference expressed in Article 3.7 of the DSU. Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define and delimit the scope of the dispute between them. Clearly, consultations afford many benefits to complaining and responding parties, as well as to third parties and to the dispute settlement system as a whole (par. 54).

The provision that proceedings of consultations be confidential is crucial to encourage the parties to be 'fully forthcoming' and try to disclose any relevant information in the guarantee that these will not be used against them, should they decide, at a later stage, to ask for mediation or good offices, or even resort to a panel (DSU Art. 4.6). This seems crucial to remove occasions for strategic behaviour aimed to dissimulate actions and responsibilities.[40]

A distinct element of the DSS, which is not to be found in Habermas's theorising, consists in the role of such independent adjudicating bodies as the panels and the AB. An orientation to understanding may be found in the procedures through which these bodies work.

The attempt to put the parties in a condition to reach an understanding by means of adversarial procedures is well evident in the case of the panel (DSU Art. 12).

[40] In fact one might regard at the guarantee of confidentiality as an occasion to behave strategically behind closed doors. However, as explained above, consultations under the DSS are limited by a requirement that the parties be in good faith and try to reach a mutually satisfactory solution.

Its main function is indeed to clarify the factual evidence and the nature of the dispute. This objective is pursued, in the first place, through procedures allowing continuous interactions (DSU Art. 11) between the panel and the parties by means of a series of subsequent submissions and hearings. Moreover, understanding is sought through submission of both the draft and interim reports to the parties to comment. In the second place, panels are entitled to seek information to clarify facts through addressing questions to the parties, by contacting external advisory experts and by taking into consideration third parties' input.[41] Mutual understanding on the specificity of the dispute is also strengthened by the non direct application of previous findings by a WTO adjudicating body on similar cases.

The pursuit of mutual understanding through such procedures is meant to facilitate the appraisal of the conformity of a given measure with WTO provisions, and to allow the interpretation of the contended legal basis of the claims. This provides a solid ground on which "conformity-related" disputes may be addressed (see disputes belonging to class 3 in section 2), in line with the WTO general aim to maintain the overall balance of rights and obligations, by contributing to clarify how a given measure may affect it.

The panel's procedures, however, may not be enough to actually secure full understanding. Parties may therefore resort to an appellate review aimed to clarify 'issues of law covered in the panel report and legal interpretations developed by the panel' (DSU Art. 17.6). AB procedures provide for a further occasion for the participants to interact and clarify their views through detailed submissions.[42] Note also that the AB is a standing body following a principle of collegiality (DSU Art. 17 and AB Rule 4). This ensures that its interpretations are coherent and consistent across rulings. This "jurisprudence" represents a common basis of knowledge guiding the ways in which Members interpret WTO provisions, thus reducing possible sources of misunderstanding.

AB procedures may thus be seen in line with the WTO general aim to secure the stability of the overall trading system. Their action orientation to understanding is apt to address what we have called "interpretation-related" disputes (see disputes belonging to class 2 in section 2), contributing to dissolve the vagueness inherent to the formulation of certain WTO provisions. In addition, the AB has come to exercise an, albeit controversial, "gap-filling" function as far as this contributes to clarify the scope of the agreements (see disputes belonging to class 1 in section 2).

[41] The fact that panels adopt the principle of judicial economy (i.e. avoidance of making legal rulings on the issues not necessary to settle the dispute) may cast a doubt on their orientation to put the parties in a position to reach full mutual understanding. However this should be seen as a by-product of a commitment to a prompt settlement of the dispute. More on this in section 7 below.

[42] The AB contribution to mutual understanding is affected by the lack of a remand procedure through which seeking from a panel pieces of information not provided because of judicial economy. Moreover, AB procedures do not provide for an interim report on which participants may comment before its circulation.

This characterisation is strikingly in line with Habermas's preoccupations in discourse. However, it should be remembered, to avoid over-enthusiastic simplifications, that Habermas's discourse is conceived as a time-limit free context. According to Habermas, communication should continue until all participants have reached a full understanding of the others' claims and of the situation that surrounds them. Although very precise time constraints are rather established by the DSU and allocated to different phases of the process, it should be noted that the parties are allowed at any stage to request a time extension, should they deem it necessary to reach a fuller understanding of the case and, ultimately, a mutually acceptable agreement.

7. BACK TO THE REAL WORLD AND FORWARD TO PRACTICE: SHORTCOMINGS IN THE ACTUAL IMPLEMENTATION OF WTO DSS PROCEDURES

As declared in the introduction, our primary aim has been to disentangle the purposeful connections between the procedural features of the DSS and the WTO distinctive general aims. Accordingly, we have concentrated on the textual analysis of the DSU and related documents (i.e. *Rules of Conduct* and *Working Procedures*). This strategy is consistent with our twofold concern with (i) the inherent qualities of DS procedures, rather than their contingent implementation, and (ii) issues of enforceability, rather than enforcement capacity (see section 1). However, moving from textual analysis to practice, **five main problematic conditions** may occur.

First, despite formal procedural provisions, some parties may be *de facto* excluded from active participation, either because of its costs or as a result of unequal power relations. This is often the case with developing countries either lacking legal and technical human resources and the financial means to support the costs of the proceedings, or afraid of challenging a more powerful state.

Second, despite their orientation, actual procedures may end up not being conducive to mutual understanding. The lack of transparency (often complained by certain Members and NGOs) and the absence of an effective control on the completeness of the information provided by the parties represent a serious obstacle to the actual attainment of a full understanding between them. Similarly, the presence of time constraints –meant to secure a prompt settlement of the dispute– risks limiting the scope and reach of the dialogical interaction between the parties and the adjudicating bodies.

Third, the ultimate implementation of WTO rulings depends on the losing party's willingness to comply, which depends in turn on the winning party's enforcement capacity. This latter is strongly correlated to the party's power to impose costs through retaliation. This emerges clearly on consideration of the time delays in compliance when the losing party is economically powerful and has a strong

interest in the matter. The enforcement capacity of the winning party is certainly not enhanced by the absence of both provisional and retrospective remedies, which factually allows for a sanction-free period of non-compliance.[43]

Fourth, although the DSU assigns the Appellate Body the task of clarifying the existing provisions of the agreements, the actual scope of its "interpretation-related" and "gap-filling" functions is far from clear. The AB is required to perform this task taking into account 'the basic principles and […] the objectives underlying this multilateral trading system' (as stated in the Preamble to the WTO Agreement), and without altering the rights and obligations of the WTO Members. However, the impact of rulings on the scope of WTO agreements has grown over time, giving rise to the so called "judicialisation" of the system (see Alben and Reif 2006, Petersmann 2006, Hughes 2006, Howse and Esserman 2006, Cottier 2006 and Matsushita et al. 2006). Even though any ruling is exclusively binding on the parties of the dispute, the balance between the law-making function of the political organs and the law-interpreting functions of the adjudicating ones is particularly delicate.

Finally, a further delicate issue relates to the fourth class of dispute introduced in section 2 above. As noted, some Members sometimes employ the DSS to obtain those concessions that their partners were not ready to provide in the multilateral negotiation process. As Richard Baldwin has recently pointed out, this trend is eroding the incentives of Members to abide by rules and comply with DSB rulings. This is likely to bring the WTO to a tipping point, that is 'a point beyond which expectations become unmoored and nations feel justified in ignoring WTO norms since everyone else does' (Baldwin 2008). This issue exceeds, however, the scope of the considerations offered in this paper. It does not regard, in fact, the action orientation of DS procedures but, rather, that of the Members employing them to circumvent political negotiations and expand their benefits.

These and other problems related to the practices regulated by the DSS have driven Members to undertake, with the Ministerial Declaration adopted by the 4th Ministerial Conference at Doha in 2001, a separate track of Doha negotiations on improvements and clarifications of the DSU.[44] It is worth noticing that any amendment would affect the action orientation of the DS procedures. For instance, several proposals regard the introduction of a remand procedure at the appellate stage. When panels adopt a strict "judicial economy" principle and do not decide an issue of law, the AB can either force the participants to start anew or

[43] Reform proposals addressing this point have included: (1) increased costs for non-compliance; (2) progressive withdrawals of some rights; (3) collective retaliation or joint/shared retaliation; (4) allowing third parties to join a dispute in the phase of implementation and enforcement without requiring them to take part since the beginning; (5) making compensation compulsory (see Hughes 2006).

[44] Even though such negotiations have not gone much further than a draft Chairman's text put forward in April 2003, the discussion and an increasing number of proposals have touched several sensitive issues (see Ortino and Petersmann 2004).

decide *de novo*.[45] The latter option, preferred in some cases, deprives the parties of the opportunity to participate in the analysis and discussion of the panel's merits and to appeal on the AB's findings. Members seem to have reached a consensus on the utility of a remand procedure of some kind, although disagreement remains on how to define it. The introduction of a remand procedure would enhance the orientation of DS procedures to understanding by giving the parties the opportunity to resume discussion on controversial facts and interpretations.

8. Conclusion

The characterisation offered in the paper has shown that the development of a structured but flexible DS mechanism is not a mere idiosyncrasy of the WTO. The formulation of a multi-layered adversarial mechanism including a complex system of procedures with diverse action orientations is, rather, the result of a purposeful adaptation of the GATT provisions to the WTO general aims and the nature of the disputes arising between its Members.[46]

Our Habermas-inspired procedural reading has meant to offer a method to evaluate and make sense of this specificity, alternative to the 'mere' reference to the capacity of DS procedures to produce outcomes embodying such substantive values as fairness, or equality. The proposed evaluation aims to go beyond such elements which depend considerably on contingencies very difficult to predict and incorporate in the design of a dispute settlement mechanism.

We have been rather committed to check whether DSS procedures have been devised with the appropriate action orientations so as to set the conditions under which the WTO general aims may be granted.

The analysis we have carried out has revealed that the DSS crucial procedural components have been devised with the primary orientation to put the parties in a condition to reach a mutual understanding, as a basis to find a mutually satisfactory agreement on the ground of which (i) inadvertent gaps in the agreements may be filled; (ii) interpretations of rules clarified; and (iii) the conformity of a measure with WTO provisions evaluated. This is important to secure the system's stability and predictability, as well as to keep smooth relationships between Members.

However, the very complexity of the system and the specificity of the WTO aims allow for other types of action orientations to enter the scene at different stages. In particular, some residual room for compromise and some interstitial though crucial space for consensus may be found.

[45] "Judicial economy" occurs when an adjudicator avoids making legal rulings on some issues in the dispute if the latter can be settled without addressing those issues.

[46] For an account of this evolution see Jackson (2008, 441-445).

The former is located in consultations and in the negotiations leading to the establishment of remedies. Notwithstanding its controversial actual occurrence, the sort of compromise allowed formally within the DSS is not open to the "brute" power relations between the parties. It is procedurally regulated and its object must be consistent with the general balance of rights and obligations of all Members. This is crucial to avoid that a single dispute destabilises the whole system.

Consensus, on the other hand, is present at all key stages in its reverse form. Although crucial, the role of consensus is interstitial with a view to secure that the DSS reply to disputes be prompt and certain. Positive consensus may be too demanding a goal to reach when time constraints apply and, attributing veto power to losing parties, it may expose the system to delays and uncertainties.

We hope that our discourse theoretical-inspired reading has succeeded to make sense of the DSS specificity and, in so doing, proved to be helpful from a twofold angle. At an applied level, in improving the understanding of the DSS, it may inform diplomats who are engaged in a separate track of Doha negotiations on improvements and clarifications of the DSU. At a theoretical level, it represents a qualified contribution to the recent interdisciplinary literature addressing institutional design problems.

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