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POWER, RULES, AND THE WTO

FIONA SMITH*

Abstract: Using Martti Koskenniemi's theory about international law as a starting point, this Article examines how the interpretive heritage of the World Trade Organization (WTO) constrains the interpretive options available for understanding the WTO rules. First, this Article describes Koskenniemi's critique of international law as being in permanent conflict between visions of international law as utopia and as apology. It then examines how Koskenniemi's theory, which was originally published before the WTO's creation, would apply to the WTO. Finally, it concludes that, in the context of the WTO, the WTO's interpretive culture restrains the slide between visions of utopia and apology that Koskenniemi claimed.

Power in international politics is like the weather. Everyone talks about it, but few understand it.

—Joseph S. Nye, Jr.¹

INTRODUCTION

As Joseph Nye's quotation reveals, it is easy to talk about legitimate power in international politics without really understanding it.² Defin-

* © 2013, Fiona Smith, Faculty of Laws, University College London. This Article is based on a paper presented at Boston College Law School's Symposium, *Filling Power Vacuums in the New Global Legal Order*, on October 12, 2012, where Professor Anne-Marie Slaughter gave the keynote address. The author would like to thank Sean Coyle and all those at the Symposium for their comments on this paper, especially Professor Frank Garcia.

¹ Joseph S. Nye, Jr., *The Changing Nature of World Power*, 105 POL. SCI. Q. 177, 177 (1990). In 1995, the World Trade Organization (WTO) replaced the General Agreement on Tariffs and Trade (GATT) as the organization overseeing the multilateral trading system. *The 128 Countries That Had Signed GATT by 1994*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/gattmem_e.htm (last visited Apr. 2, 2013). The WTO comprises 159 member countries and provides a forum for its members to negotiate trade agreements and to settle trade disputes. *Understanding the WTO: Who We Are*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm (last visited Apr. 2, 2013).

² See *id.* Power is a highly controversial and contested concept. Nye famously divided the analysis into "hard power" (i.e., the ability to wield military power), "soft power" (i.e., the ability to influence states' behavior through other means like export of culture and democracy), and "smart power" (i.e., the combination of hard and soft power into strategies to wield influence). See JOSEPH S. NYE, JR., *THE FUTURE OF POWER*, at xiii–xiv (2011) [hereinafter NYE, *THE FUTURE OF POWER*]; JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS*, at xiii (2004) (describing the concept of "smart power"); Richard L. Armitage & Joseph S. Nye, Jr., *Introduction* to CSIS COMMISSION ON SMART

ing what power is in the World Trade Organization (WTO) is especially challenging because the WTO is a highly complex and developed institutional response to the coordination of international political relationships between states in the context of trade.

As an academic specializing in doctrinal analysis of the WTO's rules, I am interested in what place rules could occupy in a theory of legitimate power for the WTO.³ This Article does not claim to resolve this question. Instead, as a first step toward deeper reflection in later work, it tries to tease out how the rules work when they are interpreted by the panels and Appellate Body in WTO dispute settlement proceedings. Specifically, this Article examines the dynamic, almost autonomous, character of the WTO rules. To do this, the analysis focuses on one of the leading accounts of public international law to give an account of rules and their interaction with state power in international politics, Martti Koskenniemi's *From Apology to Utopia*.⁴ Koskenniemi's theory attempts to give concrete expression to legal practitioners' intuitive sense that the rules of international law actively inhibit states' use of power in this context.⁵ He recognizes that the ability to inhibit is connected to the fact that rules must be interpreted by an adjudicator in a dispute to bring them into play so that penalties can be imposed for any violation.⁶ Yet he denies that the power to decide on meaning rests with the adjudicator guided solely by canons of treaty interpreta-

POWER, A SMARTER, MORE SECURE AMERICA 5, 6–7 (2007), available at http://csis.org/files/media/csis/pubs/071106_csissmartpowerreport.pdf; Joseph S. Nye, Jr., *Soft Power*, FOREIGN POL'Y, Fall 1990, at 153, 166. Other scholars have contributed seminal discussions on power. See generally ROBERT A. DAHL, WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY (1961) (examining the location of political power in American cities using New Haven, Connecticut as a case study); MATTHEW EAGLETON-PIERCE, SYMBOLIC POWER IN THE WORLD TRADE ORGANIZATION (2013) (providing an interesting take on power in the WTO); STEVEN LUKES, POWER: A RADICAL VIEW (1974) (arguing that there are three dimensions of power: decisionmaking, non-decisionmaking, and ideological); Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947 (1962) (proposing that studies of power consider both influentiaity and decisionmaking).

³ See Angelika Bammer, *Vulnerable Writing* 4–14 (Sept. 14–15, 2012) (unpublished manuscript) (on file with author) (discussing the challenges faced in academic writing centered around questions and normative claims).

⁴ See generally MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (Cambridge Univ. Press 2005) (1989) (demonstrating how every valid legal argument in international law can be critiqued as being either an irrelevant utopian vision or a powerless and merely descriptive apology for the way states behave). Note, of course, that it is not only Koskenniemi that explores such an interesting and diverse question. See generally DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987) (exploring the rhetorical structure of cases and arguments in public international law).

⁵ See KOSKENNIEMI, *supra* note 4, at 17–20.

⁶ See *id.* at 333–39, 551.

tion.⁷ Rather, he reaches for the elusive intuition that something else about the rules is shaping which meanings the adjudicator can find when she uses canons of treaty interpretation.⁸

Ultimately Koskenniemi did not satisfactorily elaborate what that elusive “something else” was to his critics’ satisfaction.⁹ Indeed, his theory was criticized as a deconstructivist account of public international law because he presented a vision of rules as either tethered to states’ power or wholly distinct from it, with the result that the rules appeared to lack any inherent, independent character of their own.¹⁰ In an explanatory epilogue to the 2005 reprinted edition of his theory, Koskenniemi disputed this deconstructivist interpretation of his ideas, insisting that he did in fact give expression to the independent character of rules.¹¹ Such advocacy for his ideas, in the face of criticism to the contrary, merely underscores how difficult it is to explicate precisely what phenomenon practitioners perceive when they work with rules.

The aim in choosing Koskenniemi’s theory from a plethora of work on power, rules, and law in international politics is not to argue definitively whether it correctly identifies rules’ character so that this theory can be extrapolated straight to the WTO to the exclusion of other theories. Nor is this Article’s aim to reject the published criticisms and offer this Article as the definitive work in an ever-growing and complex area of scholarship. Rather, this Article uses Koskenniemi’s theory as a way of inching ever closer to the elusive character of rules—that “something else” about the rules that is intuitively recognized by legal practitioners.

Thus, this Article argues that the language of the WTO rules plays a dynamic role in entrenching the meaning of the rules and that the inherited intellectual tradition of the WTO protects the rules from succumbing to the permanent slide between apology and utopia that Koskenniemi claimed. Part I reviews Koskenniemi’s critique of international law.¹² Part II examines how Koskenniemi’s theory, which was

⁷ See *id.* at 339.

⁸ See *id.* at 563 (“I felt that none of the standard academic treatments really captured or transmitted the simultaneous sense of rigorous formalism and substantive or political open-endedness of argument about international law that seemed so striking to me.”).

⁹ See, e.g., Iain Scobbie, *Towards the Elimination of International Law: Some Radical Scepticism About Sceptical Radicalism*, 61 BRIT. YEARBOOK INT’L L. 339, 352 (1990) (arguing that even if “Koskenniemi’s desired meta-position were available, his book sets out neither the epistemic nor the ontological aspects of that position, and so his thesis begs more questions than it can attempt to answer because it can give no basis for the conclusion it offers”).

¹⁰ See *id.* at 346, 352.

¹¹ See KOSKENNIEMI, *supra* note 4, at 603–16.

¹² See *infra* notes 15–44 and accompanying text.

originally crafted before the WTO's creation, would apply to the WTO.¹³ Part III then explores how interpretation of WTO rules works in practice by tracing the influence of the WTO's interpretive heritage.¹⁴

I. KOSKENNIEMI'S CRITIQUE OF INTERNATIONAL LAW

In *From Apology to Utopia*, Koskenniemi argued that there is a permanent tension in public international law because it is either viewed as a "utopia" or as an "apology."¹⁵ Under the view of international law as utopia, the law is a series of "formal patterns" and structures wholly unconnected to the practice of states in their international affairs.¹⁶ Alternatively, under the view of law as apology, international law is simply a series of practices that protect a range of vested interests or power of states.¹⁷

In the view of law as utopia, under which law is understood as formal structures (i.e., cases, treaties, and sources), Koskenniemi found existing scholarship discussed such structures "as if the[y] were unconnected with the ways of using them in argument in the institutional contexts in which international lawyers worked."¹⁸ On this view, the scholarship suggested a readily discernible and stable relationship among the rules, the sources, the institutional structures, and the power relationships between states where international law operated.¹⁹ Interpretation of the rules in this vision of public international law was generally regarded as a process of trying to fix permanent meanings to rules, principles and institutions to offset the abuse of power by states.²⁰ This method of establishing the laws' meaning (generally), Koskenniemi argued, did not recognize the dynamic nature of public international law in international politics and did not appreciate that the ever-changing political context within which the law was operating would create new interpretations of the rules and new paradigms.²¹

¹³ See *infra* notes 45–73 and accompanying text.

¹⁴ See *infra* notes 74–113 and accompanying text.

¹⁵ See KOSKENNIEMI, *supra* note 4, at 17, 342.

¹⁶ See *id.* at 17, 564, 584 ("A law which would base itself on principles which are unrelated to State behaviour, will or interest would seem utopian, incapable of demonstrating its own content in any reliable way.")

¹⁷ See *id.* at 17, 171–72 ("A law which would lack distance from State behaviour would amount to a non-normative apology, a mere sociological description.")

¹⁸ *Id.* at 564.

¹⁹ See *id.*

²⁰ See *id.*

²¹ See KOSKENNIEMI, *supra* note 4, at 564.

In the view of law as apology, the existing scholarship understood public international law only as an instrument of vested interests of states.²² Hence, public international law's significance only ever lay in its ability to make all states "behave" in a certain set of circumstances.²³ Therefore, law could only ever be explained in terms of politics and did not have any formal content that could be understood in its own terms.²⁴ The law's meaning in this case was highly unstable, moving around in tune with state practice at any one time.²⁵ The act of interpretation of rules could then only be explained as the adjudicators simply attuning the rules to that practice, rather than trying to establish any fixed meanings for the rules as distinct from the Realpolitik environment in which they were designed to operate.²⁶

Like the view of law as utopia, Koskenniemi felt the view of law as apology was also an untrue account of the nature of public international law because, as he noted in his 2005 epilogue, the government officials he advised on aspects of public international law would have been very surprised if his advice to them was simply: the law is all about what governments want to do.²⁷ The officials were clearly expecting the law to impose some greater independent curb on the exercise of state power rather than simply legitimating the activities of whichever states were the most dominant in the international arena at the time. Koskenniemi felt the true explanation of the nature of public international law as witnessed in its interpretation by adjudicators and others interacting with the rules (e.g., states) was that there would always be permanent slide between ways of conceptualizing the law as either utopia or apology.²⁸ State practice will either always determine what the law is (apology), or the normative content of the law will always override the state practice (utopianism).²⁹ For Koskenniemi, there is no middle ground.³⁰ Therefore, Koskenniemi argued:

²² *See id.* at 45, 565.

²³ *See id.* at 565.

²⁴ *See id.*

²⁵ *See id.*

²⁶ *See id.* at 522.

²⁷ *See* KOSKENNIEMI, *supra* note 4, at 564.

²⁸ *See id.* at 565 (describing the "oscillation" between utopia and apology that defines international law).

²⁹ *Id.* at 17; *see* Scobbie, *supra* note 9, at 341 ("Koskenniemi's central argument is that international law is irredeemably indeterminate because it is predicated on the conceptual opposition of apology and utopia.").

³⁰ *See* KOSKENNIEMI, *supra* note 4, at 59; Scobbie, *supra* note 9, at 341.

[R]ules are not automatically applicable. They need interpretation and interpretation seems subjective. This is not merely a “practical” difficulty of interpretation. The doctrine of sovereign equality makes it impossible to decide between competing interpretations. . . . [T]here is no other basis to make the [interpretative] choice than either by referring to a theory of justice or to the identities of the States involved: one interpretation is better either because it is more just or because it is produced by this, and not that, State. And the former solution is utopian, the latter violates sovereign equality. Both seem purely political.³¹

Thus, for Koskenniemi there was a permanent tension in public international law practice (and scholarship) between understanding law as apology and law as utopia, which then drives how that law in a specific instance will be interpreted.³² When international actors are interpreting public international law rules, the justification for fixing on one meaning of a rule rather than another, can, on this view, only ever be grounded in one idea of what the relationship is between the law and the actors who are called upon to give the law “life.”³³ This group of actors would clearly encompass the states that agree how to draft the rules in the first instance, but equally, it would also include those interpreting the rules, such as government ministers who determine the rules’ application, or adjudicators who apply the law in dispute settlement proceedings, or even nongovernmental organizations that determine rules’ meaning as part of their own issue campaigns. For Koskenniemi, there was no other way to re-imagine the problem.³⁴

Can Koskenniemi’s theory of the nature of public international law help to explain the way WTO law works? Does it adequately reveal that elusive characteristic practitioners feel when they work with WTO law? As Koskenniemi himself found, it is very difficult to get to the precise way public international law works in international relations.³⁵ Koskenniemi tried to illuminate this elusive nature by working across many aspects, spanning doctrinal history, state sovereignty, sources, custom, and

³¹ KOSKENNIEMI, *supra* note 4, at 282.

³² *See id.* at 17–20, 65, 573–76.

³³ *See id.* at 65 (describing reconciliation between two sets of arguments as impossible); *see also id.* at 365–85 (providing examples of international law interpretation).

³⁴ *See id.* at 386–87.

³⁵ *See id.* at 562–66.

the nature of legal argument, among others.³⁶ Yet his prime focus remained on the interpretation of public international law in each instance. For, he believed, interpretation revealed the indeterminate nature of the language of the rules.³⁷ Language's inherent nature guaranteed interpreters could not fix a permanent meaning onto those rules, so inevitably it was always open to an interpreter to make political choices on the rules' meaning in every instance.³⁸ This led Koskenniemi to his apology-utopian conception of public international law's character.³⁹ For Koskenniemi, interpretation held the key to unlocking the true nature of public international law.⁴⁰ This focus on interpretation in Koskenniemi's theory at least did not receive stringent criticism.⁴¹

Accepting Koskenniemi's insight that understanding interpretation is the key to unlocking the elusive character of public international law, the discussion now turns to reflect further on the nature of WTO law by concentrating on its interpretation by the panels and Appellate Body in dispute settlement proceedings.⁴² This Article argues that the language in which the WTO rules are expressed plays a dynamic role in entrenching the rules' meaning when they are interpreted by the panels and Appellate Body in disputes.⁴³ This dynamic role does not seem to be attributed simply to the working of a kind of doctrine of precedent—an external constraint imposed on the interpreter to follow pre-

³⁶ See *id.* at 71–157 (doctrinal history); *id.* at 224–302 (state sovereignty); *id.* at 303–87 (sources); *id.* at 388–473 (custom); *id.* at 474–512 (structure of international legal argument).

³⁷ See KOSKENNIEMI, *supra* note 4, at 63–64, 333.

³⁸ See *id.* at 474–75.

³⁹ See *id.*

⁴⁰ See *id.* at 63–64.

⁴¹ For example, Iain Scobbie was more interested in rejecting the theoretical basis of Koskenniemi's book, specifically its emphasis on deconstruction. See Scobbie, *supra* note 9, at 340–49.

⁴² The substantive rules of the WTO are contained in Annexes to the Marrakesh Agreement Establishing the World Trade Organization. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement]. These substantive rules are made effective through Article XVI:4 of the Marrakesh Agreement, which requires members to ensure their “laws, regulations and administrative procedures” conform to the rules contained in the Annexes to the Marrakesh Agreement. See *id.* art. XVI, ¶ 4. Note also that there are additional Ministerial Declarations and Decisions, which are in many cases indications of best practice. See, e.g., Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net-Food Importing Developing Countries, Apr. 15, 1994, Marrakesh Agreement, 1867 U.N.T.S. 60 (entered into force Jan. 1, 1995) (granting special consideration to certain countries based on the anticipated negative consequences of a reduction in agricultural subsidies).

⁴³ See *infra* notes 74–113 and accompanying text.

vious decisions.⁴⁴ Instead, it appears to be a characteristic of the rules' language itself.

II. KOSKENNIEMI'S THEORY AND WTO RULES IN DISPUTE SETTLEMENT PROCEEDINGS

The prevailing view in WTO scholarship is that the canons of interpretation from the Vienna Convention on the Law of Treaties (the "Vienna Convention") *alone* enable the panelists and Appellate Body to "find" the rules' meaning, which they then apply to the measure in the dispute.⁴⁵ Article 3.2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (the "Dispute Settlement Understanding" or "DSU") governs interpretation of the WTO Agreements.⁴⁶ It gives the panels and Appellate Body the power to adjudicate disputes between Members, but only to

*preserve the rights and obligations of Members under the Covered Agreements, . . . and to clarify the existing provisions of those agreements in accordance with the customary rules of interpretation of public international law. Recommendations and Rulings of the DSB [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements.*⁴⁷

⁴⁴ The Appellate Body has endorsed a quasi-precedent type doctrine: the doctrine of "legitimate expectations," which encourages panels to follow previous decisions where possible. See Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, 14, WT/DS8/AB/R (Oct. 4, 1996) ("Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."). There has been a trenchant battle over the controversial "zeroing" method for calculating anti-dumping duties where the panel tried to reject the "precedent" effect of the Appellate Body's findings in earlier cases. Compare Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶¶ 145–162, WT/DS344/AB/R (Apr. 30, 2008) [hereinafter U.S.—Stainless Steel (Mexico) Appellate Body Report] (expressing concern over the panel's disregard of Appellate Body jurisprudence), with Panel Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶¶ 7.98–148, WT/DS344/R (Dec. 20, 2007) (consciously disagreeing with the Appellate Body's line of reasoning on the matter).

⁴⁵ See ISABELLE VAN DAMME, TREATY INTERPRETATION BY THE WTO APPELLATE BODY 56–72 (2009); see also Gregory C. Schaffer & Mark A. Pollack, *Hard Versus Soft Power in International Security*, 52 B.C. L. REV. 1147, 1160–61 (2011) ("Without a third-party interpreting the legal provisions which govern a dispute, the parties to the dispute can discursively justify their acts more easily in legalistic terms, and with less consequence, whether in terms of reputational costs or other sanctions.").

⁴⁶ Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3.2, Apr. 15, 1994, Marrakesh Agreement, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

⁴⁷ *Id.* (emphasis added).

The customary rules of interpretation used by the panels and Appellate Body to interpret the WTO's basic rules are those that are set forth in Articles 31 to 33 of the Vienna Convention.⁴⁸ The panels and Appellate Body must start by ascertaining the "ordinary meaning" of the rules' text in light of the object and purpose of the rule itself.⁴⁹ Then, if that process does not yield an unequivocal or conclusive result, or if the panel and Appellate Body merely want to double-check the meaning they "found" using the first part of the process, they should go on and consider the text's meaning in light of the object and purpose of the treaty text as a whole.⁵⁰

Koskenniemi's theory challenges the view that the only guides for the WTO panels and Appellate Body are the interpretive canons of the Vienna Convention.⁵¹ He would argue that there is an additional dimension to the "finding" of rules' meaning that influences which precise meaning the panels and Appellate Body will settle on when they are using the Vienna Convention.⁵² Further, he would argue that adjudicators always lean in favor of a particular meaning of the rules because they are influenced by either a utopian or apologetic vision of what the meaning of the rule should be.⁵³

For Koskenniemi there is always a permanent tension in public international law because there is an inevitable slide backward and for-

⁴⁸ Vienna Convention on the Law of Treaties art. 31–33, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 17, WT/DS2/AB/R (Apr. 29, 1996) [hereinafter U.S.—Reformulated Gasoline Appellate Body Report] (applying the rules of interpretation set forth in Article 31 of the Vienna Convention). The Appellate Body particularly has also used the customary rules of interpretation as a way of implicitly bringing in other customary rules of public international law primarily through the "back door" by using the notion of context and Article 31.3. See Appellate Body Report, *Korea—Measures Affecting Government Procurement*, ¶ 7.96, WT/DS163/R (May 1, 2000) ("Customary international law applies generally to the economic relations between the WTO members. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it." Not all academics agree with this, however. See ANDREW D. MITCHELL, LEGAL PRINCIPLES IN WTO DISPUTES 81–84, 88–103 (2008).

⁴⁹ See Vienna Convention, *supra* note 48, art. 31.1 ("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.")

⁵⁰ See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 114, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter U.S.—Shrimp Appellate Body Report] (describing the necessary steps to treaty interpretation).

⁵¹ See KOSKENNIEMI, *supra* note 4, at 334–35.

⁵² See *id.* Koskenniemi originally published his theory in 1990, five years before the Marrakesh Agreement that established the WTO. See Marrakesh Agreement, *supra* note 42. Thus, he did not specifically apply his theory to the WTO.

⁵³ See KOSKENNIEMI, *supra* note 4, at 335–37.

ward between visions of law as apology or as utopia.⁵⁴ He argues that interpretation of public international law rules can only ever be subjective, and therefore the justification for choosing one meaning of a rule over another must be grounded in a particular vision of the relationship between law and the state, irrespective of any canons of interpretation that the adjudicators use to reach their conclusions.⁵⁵ That is, state behavior either always controls law (and thus the law is only ever an apology because the meaning imposed on the rules simply reiterates state practice), or law will always override the behavior of the state (and thus any interpretation of the law is only a utopian vision of what states should do, but do not).⁵⁶

In Koskenniemi's terms then, the WTO's rules might be thought to be either a series of formal structures *or* a series of instruments that capture states' vested interests in trade.⁵⁷ Accounts of WTO law would therefore be thought to "oscillate" between two poles.⁵⁸ On the one hand, utopian accounts would try to perfect the normative content of WTO law so that the rules work more efficiently when measured against some internal criteria of perfection.⁵⁹ In such an account the law always overrides the actions of the Members without taking into account the dynamics of state practice—that is, the law always overrides the behavior of the state.⁶⁰ On the other hand, in an apologetic account, WTO law focuses on how the rules reflect the vested interests of the Members, where the inherent legal nature of rules as instruments to compel state behavior plays little role.⁶¹

⁵⁴ See *id.* at 17, 65, 342 (“[D]octrine is forced to maintain itself *in constant movement from emphasizing concreteness to emphasizing normativity and vice-versa* without being able to establish itself permanently in either position.”).

⁵⁵ See *id.* at 61–69, 309.

⁵⁶ See *id.* at 65 (“The dynamics of international legal argument is provided by the contradiction between the ascending and descending patterns of argument and the inability to prefer either. Reconciliatory doctrines will reveal themselves as either incoherent or making a silent preference.”).

⁵⁷ See *id.* at 171–72, 564, 584.

⁵⁸ See *id.* at 65, 565.

⁵⁹ See KOSKENNIEMI, *supra* note 4, at 17.

⁶⁰ For example, consider the rejection of the United States' "zeroing" methodology for the assessment of dumping in the context of the Anti-Dumping Agreement. Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology*, ¶¶ 220–236, 395, WT/DS350/AB/R (Feb. 4, 2009) (using a highly textualist approach without regard to state practice).

⁶¹ KOSKENNIEMI, *supra* note 4, at 342. For example, the rules on international agricultural trade in the WTO mirrored the United States' and the European Union's domestic agricultural policies at the conclusion of the Uruguay Round. See TIMOTHY JOSLING, *AGRICULTURAL TRADE POLICY: COMPLETING THE REFORM* 26–27 (1998); Stefan Tangermann,

Interpreting WTO obligations within these two competing conceptions of WTO law is thus, in Koskenniemi's terms, a political choice by the panels and Appellate Body about which understanding of the rules is best.⁶² This choice arises because there is no independent ground on which to fix the meaning of the rules in Koskenniemi's theory.⁶³ Thus, either one interpretation of the rules is better because it produces a more balanced outcome that respects the stated fundamental premise on which the WTO rules are based or the other interpretation is better because it supports the power interests of the state being advised. Either way, both choices are political, but the justification for choosing one meaning over another is always grounded in a particular vision of the relationship between WTO law and the WTO's Members.

On this view of the nature of WTO law, Koskenniemi's theory would suggest that the Vienna Convention's canons of interpretation are merely a tool to enable the panels and Appellate Body to reach a conclusion on a rule's meaning.⁶⁴ Like any tool, however, these canons of interpretation do not possess autonomous power in their own right to direct the panels and Appellate Body to a specific meaning in an almost scientific way, but do themselves need interpreting. Koskenniemi's theory would suggest that the *way* the panels and Appellate Body use the Vienna Convention's canons of interpretation is very much driven by their own views about whether WTO law should be utopian and divorced from state practice, or whether WTO law should represent state practice (law as apology).⁶⁵ In other words, it is the panels' and Appellate Body's views of the underlying rationale of WTO law that enables them to see particular meanings of the rules as correct. In the context of a general theory on power in the WTO, this would seem to suggest that the power to attribute meaning to the language of the rules lies with the panels and Appellate Body, and the Vienna Convention is simply a tool to help them do this; the language of the rules has no distinct power in its own right.⁶⁶

Nonetheless, the act of interpretation in WTO dispute settlement proceedings is multifaceted. The panels and Appellate Body appear to use the Vienna Convention's canons of interpretation to enable them

An Ex-Post Review of the 1992 MacSharry Reform, in THE REFORM OF THE COMMON AGRICULTURAL POLICY 12, 20–21 (K.A. Ingersent et al., 1998).

⁶² See KOSKENNIEMI, *supra* note 4, at 342–45.

⁶³ See *id.*

⁶⁴ See *id.* at 334–35.

⁶⁵ See *id.*

⁶⁶ See *id.* at 335 (“Normal meaning has no independently normative character.”).

to develop an understanding of the rules. As an observer, however, the process does appear to go beyond mere use of the canons of interpretation. And it is here that the work of Koskenniemi's theory does not carry us far enough. Koskenniemi's conceptualization still places considerable power with the panels and Appellate Body to elucidate meaning from the rules (albeit driven by the utopian and apologetic rationales), but says little about the elusive character of rules that Koskenniemi indicated that practitioners observe.⁶⁷

Where Koskenniemi's theory leaves off, however, James Boyd White's argument for a "literary interpretation of law" may provide the next step in helping to elucidate the full character of the WTO rules.⁶⁸ Under such an interpretation, law's true essence is uncovered by focusing solely on the language of the law: the words, the grammar, the sentence length, and the style of writing in cases, legislation, and the U.S. Constitution.⁶⁹ Even though White discusses U.S. domestic law, his work is highly attractive to explicating the nature of WTO law because he exposes the full complexity of how doctrinal lawyers' power to interpret rules is constrained by actual judicial decisions and other legislative and constitutional constraints. Additionally, he describes how lawyers use their understanding of those decisions to advise on what the law is in the dispute before them.⁷⁰ He works from the *actual* rules to reveal how interpretation works, rather than from hypothetical examples or from a meta-theory of the nature of law. The appeal of White's theory is partly that he was not theorizing about the nature of law in the abstract, but was instead trying to teach his new law students how legal reasoning works in the U.S. legal system as part of their basic legal training.⁷¹

⁶⁷ See *id.* at 342–45, 563.

⁶⁸ See generally JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (1990) (examining a set of U.S. Supreme Court opinions as cultural and rhetorical texts and critiquing them from that perspective). Yet White's argument is not without its critics. See RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 325–26, 467–70 (3d ed. 1988). Moreover, there are various ways that law and literature might be juxtaposed and diverse ways to evaluate the relationship between law and language. See generally 2 MICHAEL FREEMAN & ANDREW LEWIS, LAW AND LITERATURE: CURRENT LEGAL ISSUES (1999) (collecting essays on the various relationships of law to literature, including the law of literature, law as literature, legal and literary hermeneutics, and law in literature); THE OXFORD HANDBOOK OF LANGUAGE AND LAW (Peter M. Tiersma & Lawrence M. Solan eds., 2012) (compiling essays that explore and critically analyze various relationships of language and law).

⁶⁹ See WHITE, *supra* note 68, at xiv.

⁷⁰ See *id.* at xiii, xiv.

⁷¹ See JAMES BOYD WHITE, THE LEGAL IMAGINATION, at xi (abr. ed. 1985).

Placing the power to decide which meaning to adopt and how meaning should evolve in the hands of an interpreter, who is wholly cognizant of the restraints put on them by “precedent” or by the other rules in the WTO, is also akin to Ronald Dworkin’s “chain novel” idea.⁷² Dworkin, however, seems to suggest that the interpreter is fully cognizant of the restraint placed on her during this process, whereas White’s explanation gives a sense of both a voluntary and involuntary aspect to interpretation.⁷³ Rather than elaborating on the relationship between Dworkin and White’s ideas, this Article focuses on drawing from White’s approach to describe how the WTO’s unique interpretive heritage operates as an independent constraint on interpretation beyond the limits provided in the specific language of the rules themselves.

III. BEYOND KOSKENNIEMI: INTERPRETATION AND THE ELUSIVE CHARACTER OF WTO LAW IN PRACTICE

The WTO’s interpretive culture prevents it from experiencing the full extremes of the permanent slide between apology and utopian visions of law that Koskenniemi claims.⁷⁴ Section A of this Part reviews the role that the expectations of the signatories to the General Agreement on Tariffs and Trade (GATT) and WTO Agreement play in WTO rules interpretation.⁷⁵ Section B examines the history of the GATT and WTO that led to this unique interpretive culture.⁷⁶ Finally, Section C concludes that this unique interpretive culture acts as a constraint on interpretation and thus restricts the applicability of Koskenniemi’s theory in the context of the WTO.⁷⁷

A. *The Role of the GATT and WTO Agreement Signatories’ Expectations in Interpretation*

The WTO’s view of interpretation aligns with the Vienna Convention, which holds that the language in which the rules are expressed does not have any autonomous power in its own right.⁷⁸ Instead, the

⁷² See RONALD DWORKIN, *LAW’S EMPIRE* 228–38 (2006) (arguing that judges are like chain novelists in that they must follow and add to the precedent before them).

⁷³ See *id.* at 228.

⁷⁴ See KOSKENNIEMI, *supra* note 4, at 17, 342.

⁷⁵ See *infra* notes 78–91 and accompanying text.

⁷⁶ See *infra* notes 92–104 and accompanying text.

⁷⁷ See *infra* notes 105–113 and accompanying text.

⁷⁸ See Vienna Convention, *supra* note 48, art. 31–33. Sociologist Stewart Clegg has argued that language can have autonomous power in certain instances, although his point relates to

language is only the container for the transmission of messages from the trade negotiators who drafted the WTO Agreement to those who are going to interpret the rules.⁷⁹ This is not to say that the point of interpretation, on this view, would be to try to fix the meaning of the language at the point when the WTO rules were drafted in some originalist sense,⁸⁰ but, rather, the purpose is to unlock precisely what the evolution of that meaning should be so that the WTO rules still regulate trade in the way that was envisioned when the rules were finalized in the mid-1990s. On this view, the decision, or power, to determine which interpretation to adopt very much lies with the panels and Appellate Body.⁸¹

Certainly the WTO Appellate Body, in the 1998 *United States—Import Prohibition of Shrimp and Certain Shrimp Products* (“U.S.—Shrimp”) dispute, seemed to believe it had the power to consider whether the WTO rules’ meaning should evolve, but it equally acknowledged that this power to alter the rules’ meaning subtly was to be undertaken against the backdrop of the settled and publically expressed expectations of the WTO’s Members.⁸² In *U.S.—Shrimp*, the Appellate Body addressed whether the United States’ import prohibition of shrimp caught using fishing methods that coincidentally trapped scarce blue-fin tuna was exempt under Article XX(g) of the GATT because it was a measure “relating to the conservation of exhaustible natural resources.”⁸³ The Appellate Body stated:

129. The words of Article XX(g), “exhaustible natural resources”, were actually crafted more than 50 years ago. *They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations* about the protection and con-

the power of speech and ways of talking in the context of labor disputes. See STEWART CLEGG, *POWER, RULE AND DOMINATION: A CRITICAL AND EMPIRICAL UNDERSTANDING OF POWER IN SOCIOLOGICAL THEORY AND ORGANIZATIONAL LIFE* 154 (1975).

⁷⁹ See WHITE, *supra* note 68, at ix; N.E. Simmonds, *The Changing Face of Private Law: Doctrinal Categories and the Regulatory State*, 2 *LEGAL STUD.* 257, 257–58 (1982).

⁸⁰ See generally Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law & Legal Theory Research Paper Series, Paper No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244> (discussing originalism in the context of the U.S. Constitution).

⁸¹ See WHITE, *supra* note 68, at xv.

⁸² See U.S.—Shrimp Appellate Body Report, *supra* note 50, ¶ 114.

⁸³ General Agreement on Tariffs and Trade art. XX(g), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. Article XX of the GATT provides exceptions to the general “most-favored nation” rule of the GATT. *Id.* It provides, “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . (g) relating to the conservation of exhaustible resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.” *Id.*

ervation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the *WTO Agreement* shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. . . .

130. From the perspective embodied in the preamble of the *WTO Agreement*, we note that the generic term “natural resources” in Article XX(g) is not “static” in its content or reference but is rather “by definition, evolutionary”. It is, therefore, pertinent to note that modern international conventions and declarations make frequent references to natural resources as embracing both living and non-living resources.⁸⁴

Thus, because the WTO is a Member-driven treaty, interpreting the rules is, on this understanding of the language of the rules, as much a process of uncovering the thought processes and intentions of the Members as it is a process of imposing a meaning on the words themselves. Thus, the interpretation imposed on a rule must try to align with the original negotiating parties’ expectation of the degree to which the obligations in the WTO rules should evolve and change over time.⁸⁵ The success or failure of the panels’ and Appellate Body’s interpretation of those rules should, therefore, be assessed as successful depending solely on the degree to which they have accurately “unlocked” that intention.

Though important, this way of thinking about the language of the WTO rules as a vessel for the drafters’ intent suggests that the rules’ language is passive throughout the process of interpretation—that it neither has anything to add to the way rules control, or should control, Members’ behavior, nor plays any role in the way in which the panels and Appellate Body elucidate meaning from the text. There is also a sense, with this traditional view, that it would not matter whether we were discussing the rules’ scope in English, or the other official languages of the WTO, because however we understand them, the problems the rules are trying to address remain largely the same in any language. Under this view, such linguistic difficulty only lies in the detail of

⁸⁴ U.S.—Shrimp Appellate Body Report, *supra* note 50, ¶¶ 129–130 (emphasis added) (footnotes omitted).

⁸⁵ See U.S.—Reformulated Gasoline Appellate Body Report, *supra* note 48, at 18 (focusing on the presumed intent of reasonable WTO members in interpreting Article XX of the GATT).

accurate translation from the language of negotiations to the language of the definitive texts. Once the true intentions of the trade negotiators have been extracted from the rules (for good or bad), the rules themselves, or more specifically the language of the rules, cease to be important.⁸⁶

In 1958 in *Italian Discrimination Against Imported Agricultural Machinery*, an early GATT panel hinted that this conventional view of the way meaning should be elicited from multiple translations of the language in which the rules are expressed was too simplistic.⁸⁷ The panel implied that imposing a single meaning on the language in which the rules were expressed was inevitably difficult because there were in fact three official languages (Spanish, English, and French), all of which were simultaneously equally authentic versions of the text.⁸⁸ The panel acknowledged that Italy's defense of a trade measure that offered preferential credit facilities to some domestic farmers in violation of Article III of the GATT was based on an different and erroneous understanding of the French translation of Article III:4 of the GATT.⁸⁹ So even before the creation of the WTO dispute settlement system, it seems panelists were aware that the act of interpretation was not as straightforward as merely trying to guess the Contracting Parties' expectations of the precise time and extent that the meaning would evolve in each authentic text.⁹⁰ This realization opens the possibility that there may be an-

⁸⁶ See WHITE, *supra* note 68, at x–xi.

⁸⁷ Report of the Panel, *Italian Discrimination Against Imported Agricultural Machinery*, ¶¶ 11–16, L/833 (July 15, 1958), GATT B.I.S.D. (7th Supp.) at 60, 63–65 (1959) [hereinafter *Italian Agricultural Machinery*].

⁸⁸ See *id.* ¶ 11; see also Vienna Convention, *supra* note 48, art. 33.1 (“When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.”); art. 33.3 (“The terms of the treaty are presumed to have the same meaning in each authentic text.”).

⁸⁹ See *Italian Agricultural Machinery*, *supra* note 87, ¶¶ 11–12. The Panel reasoned:

The French text which had been submitted to the Italian Parliament for approval provided that the imported products *ne seront pas soumis à un traitement moins favorable* whereas the English text read “the imported product shall be accorded treatment no less favourable.” It was clear from the English text that any favourable treatment granted to domestic products would have to be granted to like imported products and the fact that the particular law in question did not specifically prescribe conditions of sale or purchase appeared irrelevant in the light of the English text.

Id. ¶ 11.

⁹⁰ See *id.* ¶¶ 11–16. Note that at the time of the GATT, signatory states were referred to as “Contracting Parties” and not “Members” of the GATT. This changed following the creation of the WTO, when the WTO obtained legal personality. See Marrakesh Agreement,

other way to understand the interaction between the panel, the Appellate Body, and the language in which the rules are expressed when rules are interpreted in a dispute.

There are many ways to understand the nature of law and how law works. This Article does not attempt to engage with all these ways, as this would unnecessarily complicate the argument presented. What the discussion will now present is instead a first step to thinking more conceptually about WTO law as a way to encourage others better versed in jurisprudence to reflect on these issues at a deeper level.⁹¹

B. *The WTO's Unique Interpretive History*

Interpreting the WTO's rules is not simply a process of uncovering the hidden intentions of the Uruguay Round trade negotiators with a view to compelling WTO members to adhere to obligations they had agreed to (or acceded to). Instead, the process is much more complex. When the panels and Appellate Body interpret the WTO rules in a given dispute between members, they bring their knowledge and understanding of the way the WTO "works" to restrict Members' power over the measures they use in their trade policies because the panelists and Appellate Body are experts in WTO law.⁹² The panels and Appellate Body then use that expertise to create an interface between their understanding of the rules and the arguments about the meaning of the text put forward by the various parties to the dispute as a method of

supra note 42, art. VIII. As each text is authentic, clearly each one should reflect the same intent as the other. Whether it is so easy to allow the meaning to evolve simultaneously in this way is a more complex question. See Karen McAuliffe, *Precedent at the ECJ: The Linguistic Aspect*, in 15 *LAW AND LANGUAGE: CURRENT LEGAL ISSUES* 483 (Michael Freeman & Fiona Smith eds., forthcoming 2013) (discussing the problems found in addressing this issue in the European Court of Justice).

⁹¹ Other scholars offer a first move toward this in the context of public international law. See generally *THE PHILOSOPHY OF INTERNATIONAL LAW* (Samantha Besson & John Tasioulas eds., 2010) (collecting essays on a broad range of topics regarding the philosophy of international law). Donald Regan in particular theorizes WTO law by drawing on positivist conceptions of law. See generally Donald Regan, *International Adjudication: A Response to Paulus—Courts, Custom, Treaties, Regimes and the WTO*, in *THE PHILOSOPHY OF INTERNATIONAL LAW*, *supra*, at 225 (discussing liberal, post-modern, and functionalist approaches to international law).

⁹² See DSU, *supra* note 46, art. 17.3 ("The Appellate Body shall comprise persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. . . . All persons serving on the Appellate Body . . . shall stay abreast of dispute settlement activities and other relevant activities of the WTO.").

engaging with the various ways in which the text can be understood.⁹³ For example, in 2008 in *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, the Appellate Body members used their understanding of the rules on anti-dumping contained in the WTO Agreement on Implementation of Article VI of the GATT as a way to understand the United States' argument that its method of calculating the extent (or margin) of dumping of products into the U.S. domestic market was in fact correct.⁹⁴ This process of understanding the United States' arguments on the calculation of dumping might be described as one of translation, where the parties' arguments are transformed out of their own interpretations of the text that largely support their own domestic trade policies and into the formal structures of international trade law so that the meaning of the text in the dispute can be found by the panel and Appellate Body.⁹⁵

To fully determine the meaning of the text and how it applies in a dispute, however, the panels and Appellate Body have to appreciate that the WTO rules were designed to be part of an inherited intellectual tradition. This tradition contemplates that the *way* international trade should be regulated works in concert with the social context in which the rules operate.⁹⁶ This specific conception of practical reason might be termed “the inherited interpretative culture of the rules.”

When the WTO rules were agreed upon by the Uruguay Round trade negotiators, the rules were designed to be understood by a particular group of people, namely, the trade negotiators themselves and also those government officials and lawyers who would be responsible for ensuring that states' domestic trade policies conformed to the rules.⁹⁷ The language used in the rules had to be the language of the trade law and policy audience to whom the trade rules would be addressed. This is an audience who understands that terms like “comparative advantage” are synonymous with “giving all Members equality of

⁹³ See *Understanding the WTO: Settling Disputes*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Apr. 2, 2013).

⁹⁴ U.S.—Stainless Steel (Mexico) Appellate Body Report, *supra* note 44, ¶¶ 97–99.

⁹⁵ See WHITE, *supra* note 68, at xvi.

⁹⁶ See Fiona Smith, *Law, Language and International Trade Regulation in the WTO*, in 63 CURRENT LEGAL PROBS. 448, 456 (George Letsas & Colm O'Connell eds., 2010). See generally HANS-GEORG GADAMER, TRUTH AND METHOD, at xxi–xxv (Joel Weinsheimer & Donald G. Marshall, trans., 2d ed. 2004) (arguing that social context informs the meaning of the language in a text); CHRIS LAWN, WITTGENSTEIN AND GADAMER: TOWARDS A POST-ANALYTIC PHILOSOPHY OF LANGUAGE 1–40 (2004) (exploring an interesting distinction between semantics and hermeneutics).

⁹⁷ See Smith, *supra* note 96, at 457.

opportunity in international trade”; that “protectionism” is a pejorative term identifying unacceptable trade measures used by Members to insulate their domestic industries from cheap imports; and that “liberalization” means a utopian vision where all resources are distributed equally between Members by the operation of a “free market” in goods and services and where economically powerful Members provide equal access to their domestic markets for weaker, less economically powerful Members.⁹⁸

This language of trade lawyers, policymakers, and the existing rules in the GATT showed the Uruguay Round trade negotiators the way the WTO rules must be expressed. This language demonstrated what the rules could say and the way the rules should say it if they were to convince the trade negotiators, subsequent trade ministers, and all those subject to the rules, that the rules as drafted were a legitimate way of regulating international trade. The language of trade lawyers, policymakers, and the GATT dictated how the appropriate delimitation of the rules would be drawn and how the rules would establish guidelines as to when Members’ power to conduct domestic trade policies without regard to the impact on other Members would be restricted and when it would not. Finally, this language also demonstrated how to construct each rule within the required parameters so that it made sense to those who would be working with and subject to the rules.⁹⁹

The Uruguay Round trade negotiators were able to include new words and phrases to more effectively control international trade than the GATT had.¹⁰⁰ Although not from the language of the GATT, such phrases are legitimate linguistic means to control international trade because the way words are used, particularly how they take on meaning, how that meaning is fixed and then changed over time, is all established by the inherited interpretative culture in which they exist. The trade negotiators responsible for agreeing to the WTO rules therefore could not simply create the rules out of nothing using *any* linguistic construction that they chose; they had to work within the parameters already set by the language in which they were operating. The language itself was channeling what could be said and what could not be said in the rules, and how it should be said. It dictated what new sense could be attributed to the particular terms in the rules, like whether there

⁹⁸ See MICHAEL TREBILCOCK ET AL., *THE REGULATION OF INTERNATIONAL TRADE* 1–20 (4th ed. 2013) (providing a classic reiteration of the rationale for free trade liberalization).

⁹⁹ This Section draws inspiration from WHITE, *supra* note 68, at xvi.

¹⁰⁰ See Smith, *supra* note 96, at 457 (describing such new words and phrases in the agricultural context).

could be an evolutionary meaning to “exhaustible” in the text of “conservation of *exhaustible* natural resources,”¹⁰¹ or what domestic trade policies and state behavior in response to the rules would be regarded as legitimate or illegitimate, or in what ways the rules could be critically evaluated to make them “better” than the weaker provisions from the earlier GATT rules.

In other words, the WTO rules significantly modify and add to the obligations of the GATT, but they are built on the existing rules and the pro-trade liberalization interpretative tradition of the GATT.¹⁰² This interpretative tradition has its own language; way of speaking, expressing ideas, and defining problems and solutions; and way of embracing and excluding new ideas and meanings for the rules. Thus, WTO law has its own inherited interpretative culture—its own approach to reasoning with rules. This approach is created, delineated, and modified by language. The language of the WTO creates the inherited interpretative culture in which it operates and controls what can be said and what cannot be said about it. It creates a “world of shared meanings.”¹⁰³ Thus, we should not be surprised in this “world” that ideas from outsiders, like human rights and environmental scholars, about how WTO law should be regulated are often rejected as “wrong” or misguided by trade lawyers and policymakers. These ideas often place the individual at the heart of the analysis and address her diverse and complex needs in ways that simply do not translate readily into the language of comparative advantage and trade liberalization. We should not really be surprised therefore when trade experts dismiss them as wrong or misguided, or when such ideas are castigated as “protectionist” —the most dismissive of trade lawyers’ insults.¹⁰⁴

¹⁰¹ See U.S.—Shrimp Appellate Body Report, *supra* note 50, ¶¶ 113–114 (emphasis added); *supra* notes 82–85 and accompanying text (discussing the interpretation of GATT Article XX(g) in the U.S.—Shrimp dispute).

¹⁰² See generally PETROS C. MAVROIDIS, *THE GENERAL AGREEMENT ON TARIFFS AND TRADE* (2005) (describing the GATT’s core obligations and examining remaining GATT obligations in light of the advent of the WTO).

¹⁰³ See JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANINGS: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* 7 (1984).

¹⁰⁴ For example, protectionism was a theme in the famous Petersmann/Alston debate. Compare Ernst-Ulrich Petersmann, *Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT’L L. 621, 624 (2002) (calling for organizations like the WTO to incorporate recognized human rights law into their law and practice), with Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 EUR. J. INT’L L. 815, 816 (2002) (rejecting Petersmann’s proposal to enforce human rights through the WTO). See also Ernst-Ulrich Petersmann, *Taking Human Dignity, Poverty and Empowerment of*

C. *The WTO's Unique Interpretive Heritage as a Constraint on Interpretation*

To find the meaning of the rules in any instance, the panel and Appellate Body members must situate their own interpretation of the text within a world of shared meanings. They must express their interpretation in the same linguistic way the WTO Members' expert legal representatives, policymakers, and academic commentators express their own ideas about the text and they must understand the language of the rules the way those legal advisers, policy officials, and academic commentators do. If the panels and Appellate Body do not talk about the rules as the other stakeholders do, understand the rules as they do, and phrase their interpretations of the meaning of WTO obligations as they do, the panels and Appellate Body lose the ability to talk about the rules: their words literally lose their meaning and have no sense in the culture of the WTO rules. In reality, this means their interpretation is declared wrong, misguided, or inappropriate, or they are thought to misunderstand the nature of the legal obligations or the task before them. For example, in 2008 in the *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico* dispute, the Appellate Body castigated the lower panel for refusing to follow the Appellate Body's previous rulings on the definition of "zeroing," and thus not performing the panel's legal obligations under the DSU.¹⁰⁵ The decision highlights that deviation from the interpretive culture of the rules can be deemed a misapplication or violation of the rules themselves.

For the panel or Appellate Body's interpretation of the rules in any instance to be regarded as legitimate, the panels and Appellate Body must fully embrace the inherited interpretive culture of the rules. They must express their interpretation of the rules' meaning in line with the specific conception of practical reasoning under the WTO rules as a way of fully engaging with them. Understood in this way, interpretation is a dynamic process: the panels and Appellate Body are always mediating between the contemporary practices of states and the inherited intellectual tradition of the text as they grapple to give effect to the rules in any given instance. This process of mediation is one centered around language (not political expediency) as the panels and Appellate Body, and the Members, must find some common way of un-

Individuals More Seriously: Rejoinder to Alston, 13 EUR. J. INT'L L. 845, 845 (2002) (responding to Alston's characterizations of Petersmann's arguments).

¹⁰⁵ U.S.—Stainless Steel (Mexico) Appellate Body Report, *supra* note 44, ¶ 161–162 (“We are deeply concerned about the Panel’s decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues.”).

derstanding one another.¹⁰⁶ The result of this mediation is a new reality. That is, there is a gradual and subtle enrichment of the inherited intellectual tradition of international trade law and, as a corollary, of the meaning which can be discerned in the rules. Hence, there is a growing and evolving linguistic space in the rules to accommodate Members' contemporary domestic policies while maintaining the inherited intellectual culture of the WTO rules.¹⁰⁷

Thus, interpretation of the language in which WTO rules are expressed is not simply a task of using the canons of construction of the Vienna Convention to find a meaning in the text and then fix an understanding of the WTO rules. Such an approach takes a view of the law as a formal structure with embedded meanings that can be readily extracted, thus aligning with the utopian view of the law that Koskenniemi describes.¹⁰⁸ Likewise, interpretation of the language of the WTO rules is not a question of attuning the rules' meaning into the needs of Members in their trade policies, as this would only give effect to the vested interests of its Members. Interpretation of WTO law in this case would be volatile and highly unstable, vacillating between whichever Member was the most economically powerful protagonist. Such a view would undermine the critical value of rules as an ameliorating influence on the exercise of illegitimate power in a world where Members possess different advantages and disadvantages in their international politics. In the current Doha Round of multilateral trade,¹⁰⁹ developing countries' needs in international trade are more important, so it is very clear that allowing the rules merely to reflect the needs of the economically dominant Members is out of line with the current ambitions for international trade regulation.¹¹⁰ State behavior, especially abusive

¹⁰⁶ Cf. KOSKENNIEMI, *supra* note 4, at 474–75 (examining the way the language of international law reflects present international society and the aims of international law).

¹⁰⁷ See U.S. Shrimp Appellate Body Report, *supra* note 50, ¶¶ 129–130 (“The words of Article XX(g), “exhaustible natural resources”, . . . must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.”). Precisely when and how this evolution in meaning might occur is beyond the scope of the current Article. This Article uses White’s literary theory of law to elucidate law’s character. See WHITE, *supra* note 68, at 97–102. White’s literary theory concentrates more on illuminating how meaning *was* imposed on rules in actual disputes and what this reveals about the nature of law, rather than trying to predict how that evolution might occur. See WHITE, *supra* note 68, at xiv.

¹⁰⁸ See KOSKENNIEMI, *supra* note 4, at 564, 584.

¹⁰⁹ *The Doha Round*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Apr. 2, 2013).

¹¹⁰ For a detailed analysis of the specific issues encountered by developing countries in international trade and the issues they wish to confront in the Doha Development Round negotiations, see generally Comm. on Trade & Dev., *Note by the Secretariat: Developmental Aspects*

behavior by economically powerful states, cannot (and should not) always determine the content of WTO law.¹¹¹ Thus, interpretation of WTO law should not descend into an apology.¹¹²

For Koskenniemi, public international law is destined to slide between two opposing points: apology and utopia.¹¹³ WTO law has many roots in public international law and has certainly been enriched by much scholarship grounded in public international law. Therefore, on Koskenniemi's theory, it would seem that WTO law, specifically the normative question of what should be the basis in which the language of the WTO rules should be interpreted, also would be prone to forever sliding between an apologetic notion of the WTO's rules and a utopian vision.

Yet, WTO law appears to have an inherited intellectual culture—a way of reasoning with rules—that shapes and limits interpretation of the international trade rules by grounding meaning firmly in the rules' language, rather than political expediency, as Koskenniemi claimed. This culture of the rules is like sticky toffee: although it allows for some pull between the apology and utopian visions of law Koskenniemi powerfully charted, its stickiness prevents the permanent slide from one extreme to another. The language of the rules has its own character that shapes what can be said about the rules and the way it can be said. This language is not a means of communication over which the panels and Appellate Body retain full power. Instead, the language seems to possess its own dynamic existence that all the actors in international trade relations in the WTO—the panels, the Appellate Body, the policymakers, corporations, and nongovernmental organizations—are all part of, and at the same time, contribute to. It does not appear possible to remain “outside” and unconnected from the language of the rules as though it were possible to reach for the toolbox of the rules of the Vienna Convention's canons of construction and then apply those tools to the interpretation of the language in the WTO rules in any way be-

of the Doha Round of Negotiations, WT/COMTD/W/143/Rev.5 (Oct. 28, 2010) (analyzing the specific issues encountered by developing countries in international trade and the issues that WTO Members wish to confront in the Doha Development Round negotiations); World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) (outlining the scope of the Doha multilateral trade talks).

¹¹¹ Nye argues that it is critical to ameliorate the abuse of economic power imbalances between states. *See* NYE, *THE FUTURE OF POWER*, *supra* note 2, at 51–80. He argues for the greater use of “smart power” (i.e., reliance on soft power values of culture, democracy and other values) in a positive way to correct this imbalance. *See id.*

¹¹² *See* KOSKENNIEMI, *supra* note 4, at 17.

¹¹³ *See id.* at 17, 342.

lied to be appropriate. Thinking about how to apply rules or theorizing about them is always done in language. The rules' language appears to create its own normative universe by driving what can be said and how it might be said.

CONCLUSION

As a commentator on doctrinal WTO law, rather than a theorist, there is something elusive about the way law works that I observe when I analyze how the panels and Appellate Body interpret the rules and apply them to the measures at issue in various dispute settlement proceedings. In this Article, I have tried to give voice to that elusive quality of WTO law. The account here is inevitably limited and more work must be done on other theories on power to see whether they address the issue. Yet, even with this substantial caveat, several interesting questions already arise: if I am right and WTO law does have this distinct character, is its character relevant to any broader theory of power in the context of the WTO, or is it instead merely a phenomenon of the practice of law? Is it just a consequence of the coercive power of a vertically integrated network of states and therefore nothing more than what we should expect when thinking about international relations between states? Or is it a phenomenon of a state/dispute settlement dynamic and therefore of no relevance to other important actors in WTO law at all? But what if it is critical to a power analysis? What weight should we even attribute to it? Can it even be captured in a theory? Can we even answer these questions at all?

Despite these remaining questions, it is suggested that an accurate account of the nature of WTO law could help to further illuminate why the WTO so successfully curbs the abuse of power by economically dominant Members. And, more broadly, a full account of law seems to be particularly important for theories that rely on law to distinguish between the legitimate and illegitimate use of state power in international relations.