EDITORIAL COMMENTS

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THE WTO DISPUTE SETTLEMENT UNDERSTANDING—MISUNDERSTANDINGS ON THE NATURE OF LEGAL OBLIGATION

The new World Trade Organization (WTO) has now been operating for two years, and there is little doubt that it has had a very successful launch. It has fortunately avoided two or three potholes in its roadway and is recognized to have a very large potential for future, but not trouble-free, development. One of the more interesting current aspects of the WTO is the focus on the new dispute settlement rules as established by the new Dispute Settlement Understanding (DSU), which is part of the extraordinarily broad agreement embodying the results of the Uruguay Round. Because of the implications of many of the legal obligations in the Uruguay Round texts, and because they were negotiated among more than 120 participating national governments, it is not surprising that one can find ambiguities, omissions and other troublesome interpretive problems in this vast treaty. For this reason, the dispute settlement process becomes crucial, since it is one of the principal means for resolving the inevitable differences that arise about the various legal obligations of the world trading system.

In an interesting and perceptive Editorial Comment in the July 1996 issue of this *Journal*,[1] Judith H. Bello brings to bear not only her intellectual acumen, but her extensive experience both in and out of government concerning trade matters and subjects central to the new WTO, including its dispute settlement procedure. However, in my view, at one point in this Editorial Comment she makes a statement that is wrong, or at least misleading. This may have been largely inadvertent in the context of her general message, but I wish to suggest an alternative viewpoint concerning a very vital problem of the new dispute settlement procedure, a problem that has been getting increasing attention in diplomatic, political and academic circles.

This problem is part of the broader question of the legal effect of a final ruling of the dispute settlement process (that is, a report of a dispute settlement panel, or of the appellate panel that judges an appeal from the first-level dispute settlement report). There is some controversy about the legal status of such a report when adopted (as it will almost automatically be under the new WTO procedures). The specific question here is whether the international law obligation deriving from such a report gives the option either to compensate with trade or other measures, or to fulfill the recommendation of the report mandating that the member bring its practices or law into consistency with the texts of the annexes to the WTO Agreement. In other words, does it give the choice to "compensate" or obey? There has been some confusion about this, and some important leaders of major trading entities in the WTO have made statements that indicate this confusion or are misleading, and in some cases flatly wrong.

The alternative interpretation is that an adopted dispute settlement report establishes an international law obligation upon the member in question to change its practice to make it consistent with the rules of the WTO Agreement and its annexes. In this view,

[1] Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AJIL 416 (1996).

the "compensation" (or retaliation) approach is only a fallback in the event of noncompliance. This latter approach to the question I have posed above, I believe, is correct.

Mrs. Bello, in her Editorial Comment, states the following:

> In view of the heat, if not light, being generated by economic nationalists in general, and the specific concerns resulting from some GATT dispute settlement rulings in particular, a review of WTO/GATT dispute settlement rules is overdue. Like the GATT rules that preceded them, the WTO rules are simply not "binding" in the traditional sense. When a panel established under the WTO Dispute Settlement Understanding issues a ruling adverse to a member, there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement. The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas.
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> Rather, the WTO—essentially a confederation of sovereign national governments—relies upon voluntary compliance. The genius of the GATT/WTO system is the flexibility with which it accommodates the national exercise of sovereignty, yet promotes compliance with its trade rules through incentives.[2]

Although I agree with portions of the quoted text above (and also other parts of her Editorial Comment), I believe that the second sentence is particularly misleading and wrong as phrased. Of course, Mrs. Bello is trying to look at the "realpolitik" of the situation. But I think she is overlooking the traditional and historical meaning of general international law obligations and, in particular, obligations connected with trade rules. An international law obligation generally has some of the weaknesses that she mentions—no jailhouse, bail bondsmen, blue helmets, truncheons or tear gas. In other words, international law, as we all know and have struggled with, does not enjoy the kind of monopoly of force that many (but not all) of the "sovereign" states of the world enjoy.

International law, however, has very important real effects. In particular, the difference between the two approaches to the legal effect of a dispute settlement process in the WTO can have some important impacts. In some legal systems, the legal obligation may actually have "direct application," or at least fairly direct effects on the legal system. It is true that in other major jurisdictions, including the United States and the Commonwealth countries, this effect is much different. Arguably, in these latter places there is no "direct application" or "self-executing" effect; nevertheless, under long-established U.S. court precedents[3] a court is bound to utilize international law obligations in its interpretation of national law (statutes, etc.). Likewise, if there is an international legal obligation upon a member state and that state refuses to comply with it, this has a number of "diplomatic ripples." Various responses, albeit often inadequate, are permitted under international law. In addition, there are informal pressures that can be applied. The United States, for example, found in the 1970s, when it refused to follow the results of the GATT *DISC* (Domestic International Sales Corp.) case relating to the subsidy rules, that it was having trouble capturing meaningful attention from other major trading entities with regard to their own subsidy rules, which the United States felt were quite inadequate. Other trading entities would simply note that the United States was not complying with its obligations, so why should they take U.S. complaints against them seriously? This matter was finally resolved by an uneasy, complex and somewhat contradictory settlement, but the point had nevertheless been made to the United States.[4] In another context, the Court of Justice of the European Communities (Luxembourg) has

[2] *Id.* at 416–17.

[3] See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, ch. 2, especially §114 (1987).

[4] GATT B.I.S.D. (28th Supp.) at 114 (1982); JOHN H. JACKSON, WILLIAM DAVEY & ALAN O. SYKES, INTERNATIONAL ECONOMIC RELATIONS 777 (3d ed. 1995).

struggled with different questions concerning the GATT and its domestic application. If one concludes that under the WTO the result of a dispute settlement is not "binding," this will likely have an important effect on the jurisprudence of that Court.

Now what is the situation with respect to panel reports, under both the GATT and the WTO DSU? Under the GATT, the language of the dispute settlement provisions was very minimal and quite ambiguous on this (and other) points.[5] At the outset of the GATT, there were various conflicting viewpoints about the appropriate direction and procedure of the dispute settlement process. However, as time passed, the GATT developed in the direction of "rule orientation," or a more "juridical" approach.[6] This development in itself, of course, does not resolve the interpretive question of the legal effect of a panel report. However, by the last two decades of the GATT's history, it seems quite clear to virtually any perceptive and close observer of GATT practice, the GATT contracting parties were treating the results of an adopted panel report as legally binding. These reports often "recommended" that a nation bring its practice into conformity with its legal obligations under the GATT. Indeed, the Tokyo Round "Understanding" on the dispute settlement process makes this somewhat clear.[7] When adopted, a panel report was treated as binding. A basic problem with the GATT procedure was the opportunity for nations to "block" a consensus vote on adoption, and thus keep a panel report in "legal limbo." It was generally agreed that an *unadopted* report did not have legally binding effect. The practice of the GATT is quite strong in this regard, and of course we all know that, under both customary international law and the Vienna Convention on the Law of Treaties, *"practice under the agreement" is important interpretive material.*[8]

What can we say about the new DSU? Unfortunately, the language of the DSU does not solidly "nail down" this issue. For example and contrast, Article 94 of the United Nations Charter states: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." Similarly, the Statute of the International Court of Justice, in Article 59, implies such an obligation, stating: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

Some sort of comparable language for the WTO Agreement[9] and/or the DSU would have been welcome. Oddly enough, some diplomats who assisted in the negotiation of the DSU told me that they thought they *had* nailed it down. But one does not find language of the UN-ICJ type in the DSU.

It is also true that the DSU for the first time explicitly establishes in a treaty text an implementing procedure for the result of panel reports. This procedure includes measures for possible "compensation" or retaliation. Thus, some people have argued that this is an option available to members as an alternative to obeying the mandate of the panel report. As I have indicated, however, several arguments point to a contrary view.

So what does the DSU language itself say? Here we can examine a good number of clauses, and I would suggest that the overall gist of those clauses, in the light of the

[5] General Agreement on Tariffs and Trade [GATT], Oct. 30, 1947, Art. XXIII, TIAS No. 1700, at 60, 55 UNTS 188, 266. *See also* JOHN H. JACKSON, THE WORLD TRADING SYSTEM, ch. 4 (1989).

[6] JACKSON, *supra* note 5, at 85.

[7] Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 210 (1980). See especially paras. 16, 21, 22; and Annex, para. 5.

[8] Vienna Convention on the Law of Treaties, May 23, 1969, Art. 31, para. 3(*b*), 1155 UNTS 331, 340.

[9] The WTO Agreement includes the following language, which could be relevant: "4. Each member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." Agreement Establishing the World Trade Organization, *in* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations [hereinafter Final Act], Apr. 15, 1994, Art. XVI:4, 33 ILM 1125, 1152 (1994). However, this language appears to beg the question, since it depends on a determination as to what the provided obligations *are*.

practice of GATT, and perhaps supplemented by the preparatory work of the negotiators (unfortunately not well documented), strongly suggests that the legal effect of an adopted panel report[10] is the international law obligation to perform the recommendation of the panel report.

At least eleven of the DSU clauses are relevant (listed in the footnote).[11] In particular, it should be noted that the DSU clauses provide, inter alia:

- "[T]he first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned . . . . [C]ompensation should be resorted to only if the immediate withdrawal . . . is impracticable . . . . " (Art. 3:7)

- "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement." (Art. 19:1)

- "Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members." (Art. 21:1)

- "Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements." (Art. 22:1)

- "The suspension of concessions or other obligations shall be temporary . . . . [T]he DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, . . . [while] the recommendations to bring a measure into conformity with the covered agreements have not been implemented." (Art. 22:8)

- For "non-violation complaints," the DSU specifies: "where a measure has been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure." (Art. 26:1(b))

Thus, the DSU clearly establishes a preference for an *obligation to perform* the recommendation; notes that the matter shall be kept under surveillance until performance has occurred; indicates that compensation shall be resorted to only if the *immediate* withdrawal of the measure is impracticable; and provides that in *nonviolation* cases, there is *no* obligation to withdraw an offending measure, which strongly implies that in *violation* cases there *is* an obligation to perform.

It is true that once the "binding" international law obligation to follow the recommendation of a panel report has been established, international law has a variety of ways of dealing with a breach of that obligation, and that, understandably, those methods are not always very effective.[12] However, that is a different issue from the question of whether the "WTO rules are . . . 'binding' in the traditional sense." Certainly they are binding in the traditional *international law* sense. In fact, for many national legal systems, they

[10] Remember that under the new procedures there can be no blocking and therefore adoption is virtually automatic. Also remember that the report will almost always specify an obligation to bring the national practices and law into consistency with the international treaty clauses.

[11] See particularly the following articles and paragraphs of the Dispute Settlement Understanding, Ann. 2 to the WTO Agreement, *in* Final Act, *supra* note 9, 33 ILM at 1226: Arts. 3:4, 3:5, 3:7, 11, 19:1, 21:1, 21:6, 22:1, 22:2, 22:8, 26:1(b).

[12] I do not here address another interesting legal question of the WTO and the DSU; namely, whether the new text of the DSU imposes an obligation on states to refrain from all international law remedies for redress of a complaint other than those provided in the DSU.

are also binding in the "traditional sense" domestically, although not always in a "statutelike" sense. In the United States, it can be argued (and this author has so argued), the WTO rules, and certainly therefore the results of a dispute settlement panel, do not "ipso facto" become part of the domestic jurisprudence that courts are bound to follow as a matter of judicial notice, etc. However, the international law "bindingness" of a report certainly can and should have an important effect in domestic U.S. jurisprudence, as in the jurisprudence of many other nation-states.

JOHN H. JACKSON

NUCLEAR WEAPONS, INTERNATIONAL LAW AND THE WORLD COURT: A HISTORIC ENCOUNTER

The International Court of Justice has issued an advisory opinion of great weight on the legality of nuclear weaponry.[1] It is the first time ever that an international tribunal has directly addressed this gravest, unresolved threat to the future of humanity. The case divided the judges jurisprudentially and doctrinally in fundamental ways, with a narrow majority (that depended on a second casting vote by the President of the Court, Judge Mohammed Bedjaoui of Algeria[2]) forging a consensus that lends strong, yet partial and somewhat ambiguous, support to the view that nuclear weapons are of dubious legality.

In an important sense the narrowness of the majority is misleading, as three of the six dissenting judges refused to support the decision because it failed to find that existing international law supported a categorical prohibition on the threat or use of nuclear weapons. In another sense, the absence of a clear majority reflects the Court's failure fully to resolve the legal status of nuclear weapons. In fact, those judges that favored a stronger legal condemnation of nuclear weaponry appear to have regarded the majority decision as, if anything, a step backward, undermining the claims of scholars and others who had previously maintained that any threat or use of nuclear weaponry was illegal *as such*, without any consideration of context. What does seem definite, however, is that a fair reading of the decision represents a serious setback for the legal rationale relied upon by the nuclear weapons states, and their academic supporters.

The most crucial aspect of the *dispositif* on the core issue of legality reached a result that surprised those who had anticipated an either/or outcome, the Court having created some new doctrinal terrain by deciding that the threat or use of nuclear weapons is prohibited by international law, subject to a *possible* exception for legal reliance on such weapons, but only in extreme circumstances of self-defense in which the survival of a state is at stake.

It seems helpful to distinguish the common ground that united the Court as a whole from the narrowly crafted majority that (arguably) accentuates the uncertainty surrounding the applicability of international law and from the various minority positions that gave rise to a series of dissenting opinions. An impression of the dispersion of views, as well as the importance attached to the case by the Court's members, is confirmed by the fact that all fourteen participating judges saw fit to write an opinion or statement of some kind that set forth their individual views.

[1] Legality of the Threat or Use of Nuclear Weapons, General List No. 95 (Advisory Opinion of July 8, 1996) [hereinafter Nuclear Weapons].

[2] *See* INTERNATIONAL COURT OF JUSTICE STATUTE Art. 55(2).