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The WTO Dispute Settlement Procedures: A Preliminary Appraisal

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The Institutional Problems of the WTO

It is now obvious that the launch of the World Trade Organization (WTO) was quite successful. After coming into force on 1 January 1995, the WTO has 123 members (as of 31 July 1996), and the numbers are climbing: there are about 30 more nations negotiating for membership. The WTO and the Uruguay Round evolved from almost 50 years of history under the General Agreement on Tariffs and Trade (GATT), yet the arguably minimal change that this new WTO institutional framework represents does have profound implications (Jackson 1995a, 11-31; *House Doc. No. 316*). It embraces the so-called ''single package'' idea, which requires every nation to accept all agreements (or at least 95 percent of them; see note 1). This contrasts with prior rounds, such as the Tokyo Round, where nations could pick and choose among protocol agreements (a process called ''GATT (à la carte'').

Overall, the Uruguay Round is a huge package that many governments, including some of the most advanced and developed, most surely do not entirely understand. Certain texts involve new concepts for international treaty obligations, including novel obligations regarding trade in services and intellectual property. In addition, many of the clauses in the Uruguay Round, both in the new texts and in the revision of old texts, are quite general and ambiguous, a natural result of a large negotiation with so many participants. This suggests an even greater enhanced importance for dispute settlement, because it is through this process that many of these

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relatively ambiguous clauses will in fact be given meaning. Of course, that is a risk for the system. As the environmentalists put it, we run the risk of ''three faceless bureaucrats'' in Geneva setting rules for the world.

The two chapters in this volume on institutional aspects of the WTO—this one and that by Murray Smith on accession—by no means exhaust the list of institutional problems facing the WTO. Among those problems are how to continue to make it work, how to ensure the WTO has adequate resources—particularly secretariat resources, which arguably are in quite short supply given the magnitude of the tasks—and how to develop approaches to new issues in the system. That is, how do we incorporate these issues into this vast treaty complex? For instance, it is not clear how the results of the ministerial conference in Singapore, if such results were to occur, would be incorporated.[1]

This chapter will focus on one institutional issue: the dispute settlement process. In particular, it will explain four fundamental principles of WTO jurisprudence that could have profound significance for the way diplomacy is conducted under the WTO and in some cases stand in marked contrast to the process under the GATT. These are by no means the only problems or principles that have great significance, but they are among the most important.

Policy Basis of a Rule-Oriented Dispute Settlement Mechanism

At the outset, it should be noted that there are some strong policy underpinnings for an effective dispute settlement process that are often overlooked, or at least not often mentioned explicitly. Basically, the goal is a ''rule-oriented system'' (Jackson 1989, chapter 4)—that is, a system that gives guidance to millions of entrepreneurs around the world in the form of predictable and generally stable rules for acceptable conduct. Such guidance is necessary for investment decisions, market opening decisions, and technological decisions. In economists' terms, such a system reduces the ''risk premium'' for some of those decisions. And without going into that further at the moment, that is what is at stake.

Uruguay Round Results

The Uruguay Round, negotiated from 1986 to 1994, resulted in new treaty text on dispute settlement: the ''dispute settlement understanding,'' or

1. One possibility is to use the plurilateral agreements approach for introducing new subjects. Annex 4, unlike the other annexes to the WTO, includes four optional agreements on civil aviation, government procurement, dairy, and bovine meat. The annex is structured so that others can be added, but this requires the full consensus of the WTO, which will not be easy to get without elaborate negotiation and compromises.

DSU (WTO agreement, Annex 2). For the first time, there is substantial, binding treaty text with respect to dispute settlement in the GATT/WTO system. The GATT clauses were very brief—three paragraphs embellished at the end of the Tokyo Round in 1979 by a so-called ''understanding.'' The DSU, in contrast, contains about 40 pages. There are specific provisions in other Uruguay Round texts as well. The major change is the elimination of blocking of a final panel report. Blocking was a major defect of the previous system (Jackson 1990). Thus the DSU provides ''automaticity,'' whereby reports of a dispute settlement panel and the appellate panel (the final result of these processes) will almost always become binding in some sense, discussed below.

Some may ask what is the true relevance of ''binding treaty texts.'' Skeptics may say that treaties are difficult to enforce and can often be evaded anyway so that nonbinding treaty clauses, of the ''hortatory'' or ''policy guidance variety,'' would be just as substantial. However, there is extensive commentary by both scholars and those with considerable experience in international affairs that a binding treaty obligation under international law principles does have important additional effects (Henkin 1979).

In addition to the diplomatic advantages of being on the ''right side'' of international law, there are a number of potential domestic legal consequences of binding international law obligations compared with ''soft law,'' which is not binding. For example, in some legal systems a binding treaty may have a ''statute-like'' effect in domestic law (Jackson 1992, 310-40). Even in jurisdictions where such a direct effect does not occur, a binding treaty can influence the interpretation of statutes or other laws.

In addition to these considerations, the new dispute settlement procedure is now a unified one. The previous system was fragmented, with eight or ten dispute settlement processes. This change has very great implications, particularly for enhancing public understanding, including that of high government officials.

The GATT is related to the WTO by a very important clause in the WTO Charter, sometimes called the ''guidance clause.'' Article XVI, paragraph 1, of the charter says explicitly that the new organization and all its components shall be ''guided by'' GATT practice and decisions (see, e.g., Jackson 1969, 1989, 1995a and b). That significant clause carries over what legal scholars would call GATT ''jurisprudence'' as part of the underpinnings of a more stable, predictable system for the future in the WTO.

Statistics and the ''State of Play'' after 18 Months

In its first year and a half, the new dispute settlement system has faced hurdles. The first was the US-Japan controversy over automobiles, which

fortunately was settled. The second was the selection of the appellate body itself, a very interesting process that took half a year longer than expected but in the end worked out very well. The third was the first case, US Standards for Reformulated and Conventional Gasoline, which went all the way to the appellate body and now appears headed for a satisfactory resolution (WTO Doc. WT/DS2/9, 20 May 1996). The fourth hurdle, which cannot yet be said to have been cleared, is the question of resource allocation needed for the dispute settlement process. Although an encouraging amount of resources has been allocated to the dispute settlement process and the appellate body—within a secretariat that otherwise is very short of resources—projections suggest that the number of cases may well outstrip those resources before long.

As of 1 August 1996, 51 cases have been initiated, according to the WTO Secretariat. That is two to three times the normal rate of application for dispute settlements in the GATT. Perhaps it is a tribute to the new process. These 51 complaints involve 33 discrete cases (many complaints now have multiple complainants). Already, 11 cases seem settled, which is a very encouraging aspect. Indeed, the tendency toward settlement is partly influenced by the automaticity of the system, mentioned earlier.

Recently, there were 6 active panels operating, but there could within a very short time be as many as 12 active panels, which will push the limits of resources for that activity. One appeal has been completed. Because only one case already in the pipeline has any possibility of appeal, we can accurately predict there will be no more than one more appeal this calendar year—namely, the Japan Alcoholic Beverages case (appealed 9 August 1996). Two appeals for the first year is a relatively light load. Certainly in the future there may be many more. On the other hand, the first year has given the seven members of the appellate body a chance to study the processes and develop rules of procedure. Some of the members are not particularly expert yet in GATT/WTO law and jurisprudence, so this has worked out reasonably well.

Consultations are ongoing in the other disputes. The United States has brought 16 disputes—a really remarkable reliance on this new procedure that could represent the US government's confidence in it.[2] On the other hand, the United States is defending in seven of these cases. Of all the cases the United States has brought, there have been settlements in two and more are expected. The European Community has brought six and is defending in eight, and Japan has brought one, which has been settled, and is defending in six. But one of the most remarkable phenomena in this area is the fact that developing countries are using this process among themselves—that is, developing countries have complained against other developing countries. This was extraordinarily rare in the GATT history.

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2. See Ambassador Michael Kantor's testimony before the House Ways and Means Trade Subcommittee, 13 March 1996.

GATT and WTO Procedures: A Comparison

A few words of explanation of WTO dispute settlement procedures, with some comparisons to those of the GATT, might be useful (see also Jackson 1989, chapter 4; *GATT Focus Newsletter*, No. 107, May 1994, 12-14).

Despite the sparse treaty clauses of the old GATT, a relatively sophisticated set of procedures for dispute settlement came into being. This practice was largely embodied in a 1979 ''understanding'' resulting from the Tokyo Round (GATT 1979, 210). It included a shift in the late 1950s from the use of a ''working party'' to consider disputes to the use of a ''panel of experts.'' This signaled a shift to a more juridical, rather than negotiating, procedure. The experts on a dispute panel were acting in their own right and not as representatives of other governments. They had an obligation to be impartial and to apply careful reasoning to the cases brought before them.

In addition, the GATT language of dispute settlement focused on something called ''nullification or impairment,'' in the language of Article XXIII. This language did not necessarily require a breach of international law under the treaty, but merely a looser concept of ''nullification or impairment,'' which had been defined in some documents as a defeat of reasonable expectations for enhanced exports and trade.

In a 1962 case brought by Uruguay, the panel introduced the revolutionary concept of ''prima facie nullification or impairment.'' Under this concept, a breach of the GATT would be ''prima facie'' nullification or impairment, which, if established, would assign to the responding nation the burden of proof for showing that there was no nullification or impairment. If it failed to do so, the panel would make recommendations and findings that would require the responding nation to change its law or practice to bring it into conformity with its treaty obligations.

As time went on, GATT panels consistently cited the 1962 Uruguay case and relied upon it for this principle. The principle was also embodied in the 1979 understanding resulting from the Tokyo Round.

In the 1980s, as the procedures became more juridical, the idea developed that there were two types of cases in GATT: violation cases (based on the prima facie concept) and ''nonviolation cases,'' which did not involve a violation but nevertheless alleged ''nullification or impairment.'' In fact, nonviolation cases have been relatively rare in the history of the GATT. One group of scholars has indicated that there were only from three to eight of these cases (Jackson, Davey, and Sykes 1995a, 362). Nevertheless, some of them have been quite important (e.g., the 1990 EEC oilseeds case; see also Jackson, Davey, and Sykes 1995a, 357).

The GATT procedure was for the panel to make its report and deliver it to the council, which was a standing body of the GATT that met regularly and disposed of most of the business of GATT. (This body was not provided for in the GATT text, but arose through practice.) Practice then

became firmly established that if the council approved the report by consensus, it became ''binding.'' If it did not approve it, then the report would not have a binding status.

The problem was ''consensus.'' In effect, the procedure meant that the nation that ''lost'' in the panel and might otherwise be obligated to follow panel obligations could block the council action by refusing to participate in the consensus. In short, the losing party could avoid the consequences of its loss. This was deemed the most significant defect in the GATT process.

Thus it is clear that the Uruguay Round's DSU established several important reforms. For one, blocking is no longer possible. A panel report is deemed adopted unless there is a consensus *against* it. As a sort of quid pro quo for this automaticity, however, a new appeals process was established so that a dissatisfied party to the dispute could appeal to an appellate panel of three, drawn from a relatively permanent roster of seven. The result of this appeal is also a report made to the council (technically, to the dispute settlement body, which is the council acting as the DSB). Again, however, the report is deemed adopted unless there is a consensus against it. Therefore, whether by one step or two, depending on whether an appeal was taken, it will in the end be virtually automatic that the parties are by treaty law obligated to carry out the recommendations.

A series of new clauses in the 1994 DSU address the case in which a nation does not adequately fulfill its obligations after dispute settlement. The treaty text provides for ''compensatory measures,'' which some would describe as retaliation. There are limits on these, however. The amount must be tailored to approximate the trade effect that the violation caused, and only the country harmed can take the measures (GATT language on this point is looser).

The DSU has a separate set of procedures for nonviolation cases. This is the first time that treaty text has distinguished the separation between violation and nonviolation cases. Interestingly enough, under the DSU no obligation is imposed upon the losing party in a nonviolation case. This is logical, since they have not breached any obligation. However, they are obliged to negotiate in good faith some kind of compensatory measures. Thus, compensation becomes the prime remedy under nonviolation cases, but only a fall-back remedy under the violation cases.

Four Principles of WTO Jurisprudence

Each of the four general principles of jurisprudence to be discussed here is full of potential implications, but this chapter can only outline the broad aspects of these implications.

First, there is the question of the rule orientation of the system, as compared with an alternative hypothesis of what the system is about.

Second is a question of the legal effect of a panel report. Third, there is the ''standard of review'' question. The fourth question concerns philosophies of judicial activism or restraint, to borrow phrases from domestic jurisprudence.

Rule Orientation

From the GATT's beginning, there was a bifurcation in the thinking about dispute settlement (Jackson 1989). Was it merely a procedure to help parties settle their disputes and thus facilitate diplomatic maneuvering, sometimes called a power-oriented approach? Or was it to be more rule-oriented, arriving at just results in terms of the parties' real obligations under the negotiated treaty texts?

There were differing attitudes about the true goal of these procedures up to the close of GATT history at the end of 1995. Even in the WTO, there is still some lingering dispute. Nonetheless, it is clear that the GATT had been steadily evolving toward a more rule-oriented approach. This was manifest even in the 1950s, when the venue of disputes was shifted from working parties to panels, and then in the 1960s, when the general concept of prima facie nullification or impairment was developed to apply to all violations of treaty obligations. In the 1970s came the Tokyo Round understanding on dispute settlement, and in the 1980s the GATT moved strongly toward a rule-oriented approach in the actual practice of the dispute panels.

What approach does the new DSU take? There are clauses that arguably can be read both ways, but if you read the DSU carefully and inventory the clauses that relate to this issue, you can easily come to the conclusion that the DSU opts for the rule-oriented procedure.[3] After another year or two of appeals to an appellate body that obviously leans strongly in that direction, this will likely be even more definitive.

The first appellate body report, in the US reformulated gas case, is extraordinarily interesting, even apart from its substance—US environmental protection regulations and how they relate to at least three GATT clauses, most particularly Article XX. Among other things, the report specifies that the GATT and WTO are subject to general rules of international law. There has been some dispute as to whether the GATT might be a

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3. See, for example, DSU Article 3, para. 2, which in part reads:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.

Also see the speech of King Hassan II for the host government of the April 1994 Marrakesh ministerial meeting to conclude the Uruguay Round, where he said:

> By bringing into being the World Trade Organization today, we are enshrining the rule of law in international economic and trade relations, thus setting universal rules and disciplines over the temptations of unilateralism and the law of the jungle.

separate regime, sealed off from normal concepts of international law. But the appellate body explicitly states that the WTO is part of international law, and it goes on to engage international law principles of treaty interpretation, referring to the Vienna Convention on the Law of Treaties.[4] The appellate body report seems thus to embrace an even stronger endorsement of the rule-oriented concept than did the GATT panels.

The Legal Effect of a Dispute Panel Report

There are also contrary opinions on the legal effect of WTO panel reports (Jackson 1994). Furthermore, some statements by government officials on both sides of the Atlantic and elsewhere have been essentially wrong.

These are the alternatives: At the end of a procedure, after the first-level panel report or the appellate panel report, do the findings mean that the nation that has lost the case—that is, the nation to which the panel addresses its recommendations (usually recommending that the country concerned bring its practice into consistency with its international obligations under the Uruguay Round texts)—has an international legal obligation to conform its law to the recommendations? Or does it mean that such a nation has a choice either to perform the obligations or compensate the other nation? In other words, can you compensate and ''get off''? (The word ''compensation,'' incidentally, is also somewhat ambiguous.[5])

Government officials, including some in the United States who testified before Congress during 1994, said that all a report requires is compensation and that it does not create a legal obligation to perform. There are strong arguments that this is wrong. Unfortunately, the negotiators for the DSU did not quite nail that down explicitly. However, at least one of the negotiators said the DSU negotiators thought they had it nailed—they discussed it for hours—and the language was intended to mean that there was a legal obligation to perform. It turns out not to be quite that clear.

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4. The Vienna Convention on the Law of Treaties (1969) entered into force in 1980 (Article 31, para. 3[b]). The Vienna Convention is deemed to express the general rules of international customary law, even for many nations that have not technically accepted the convention itself. The convention clearly notes the obligation of *pacta sunt servanda*—namely, the treaties will be fulfilled. It also sets up a series of principles for interpreting treaties (Article 31), most notably the question of preparatory work, in a way that is often different from such treatment in national legal systems. In the case of all these principles, the appellate body's statement that GATT/WTO law is part of international law means that these general principles of international law apply to its work and to that of the WTO generally. This could have the most significance with respect to principles of interpretation of treaties.

5. The word appears particularly in DSU Article 22. Under GATT practice, compensation always meant trade measures and not any sort of liquid monetary compensation. It probably will be similarly interpreted under the WTO also, although there is some ambiguity on this point.

The DSU has at least 12 clauses that are relevant,[6] and all these add up to quite a strong propensity toward legal obligation. In addition, and perhaps most interesting, there is a clause (Article 22:8) that says that even if there is compensation, the matter remains on the agenda of the dispute settlement body until compliance occurs. The idea is that compensation is only a temporary measure, a fall-back, that must be understood in the context of the other clauses. These include a clause that expresses a distinct preference for bringing measures into consistency and an interesting clause in a separate procedure that governs nonviolation cases.

As mentioned earlier, in the nonviolation cases there is no obligation to perform (DSU Article 26). But by explicitly excluding it there, the article implies that there is such an obligation to perform in the violation cases.

Does this matter? Is compensation and/or retaliation the real underpinning of this system? I would suggest that the compensation/retaliation measures are not the core of dispute settlement and were not in the GATT. The heart of the process rests in the credibility of the judgment that is rendered, which then raises diplomatic hurdles for a country that tries to ignore them. Even the most powerful trading nations find it difficult diplomatically to ignore the results of the dispute settlement process, even though in some sense they could ''get away with it.''[7]

Standard of Review

The third issue to be discussed here is the standard of review. This section does not address appellate body standards when it reviews the first-level report. Instead, it addresses the degree to which the WTO dispute settlement process as a whole, at both panel levels, should second-guess national government administrative decisions as they relate to Uruguay Round treaty clauses.

National governments will inevitably be interpreting some of these broad clauses because of their ambiguity. To what degree, then, should the international dispute settlement bodies defer to those national decisions? This is the ''standard of review'' question. Croley and Jackson (1996) address this very question, discussing in particular some of the efforts by certain negotiators, mostly those of the United States, who tried to create a very restricted standard of review in the Uruguay Round, especially in the context of antidumping measures.

The US negotiators did not succeed entirely. They were trying (but failed) to translate the domestic US jurisprudence of the Chevron case

6. These are DSU 3:2, 3:7, 7:1, 11, 15:2, 15:3, 17:13, 21:1, 21:3, 22:1, 22:2, and 26:1(b).

7. The United States, for example, has complied with most GATT cases that found the United States in noncompliance.

into the international obligation in the treaties. There is, however, some curious language in the antidumping text about the degree of deference that a panel should give to national governments (Jackson, Davey, and Sykes 1995b, 194). Basically, it says that if an analysis, performed according to normal interpretation procedures under international law, results in ambiguity and if a government has chosen one of the permissible options for interpretation, then the international panel should allow the government to continue with that option. There are numerous other problems with that approach, but without going into these it can be noted that this language, found in Article 17, paragraph 6, of the antidumping text, applies only to antidumping decisions. It does not apply to the rest of the dispute settlement process. Therefore, regardless of what it means, perhaps a different approach can be expected in other areas.

However, the DSU text, as well as other provisions in the Uruguay Round text and resolutions of the Marrakesh meeting, provides several openings for applying the antidumping standard of review text more broadly. For one thing, a Marrakesh decision notes the possibility, but does not require, that countervailing duty decisions be consistent with and similar to antidumping decisions. In addition, a Marrakesh resolution provides for a review of this antidumping language at the end of five years (Jackson, Davey, and Sykes 1995b, 435).

This issue is important. It seems clear there should be some measure of deference to national decisions at the international dispute settlement level. There is support for that in other areas of international law, particularly in the European Convention of Human Rights (Macdonald, Matscher, and Petzold 1993, chapter 6). At the very end of the first appellate body report in 1996, the panel wrote: ''WTO members have a large measure of autonomy to determine their own policies on the environment, including its relationship with trade.'' (WTO Doc. WT/DS2/9, 30)

This appears to be a declaration of intent to give some latitude to national governments in this respect. That raises a host of other issues. How far should this go? What issues are more appropriately decided at the national level that at the international level? Europeans sometimes call this a ''subsidiarity'' principle.

Panel Restraint

The last fundamental principle of WTO jurisprudence to be discussed in this chapter is the question of how much judicial activism or restraint should be exercised by the international panel system. This question obviously relates to the standard of review, but there are other concepts and ideas involved as well. For instance, how far should an international body ''push the envelope'' of interpreting ambiguous clauses to suit certain policy preferences, possibly preferences of the panel alone or prefer-

ences that the panel ascertains are those of the negotiators or governments? Again, the DSU has interesting language on this:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

What does that mean? Arguably, it resonates in the direction of a caution to the panels to use judicial restraint and avoid being too activist. Of course, the US Congress feels quite strongly about that, and in the Dole Commission proposal,[8] the language ''rights or obligations'' is picked up again. It is also included, incidentally, in the WTO Charter. So this notion of restraining panels from making changes in the rights and obligations of the nation states is quite prevalent in the system.

The United States would likely be one of the most jealous in preserving judicial restraint, yet at the same time it appears to be pushing the envelope in some of its own complaints to the WTO. When, for instance, the United States or another country brings a case that does not involve a violation but instead targets competition policy, the Japanese *keiretsu*, or something else that current treaty texts do not cover, it is likely to be asking a panel to change ''rights and obligations.'' In other words, it is saying to a panel, ''We want you to interpret nullification or impairment to embrace some of these results that for policy reasons we would like to see in this case.'' That is risky—akin to doing with one hand what the other hand is trying to prevent. Obviously, this has fundamental long-term implications.

Conclusions

WTO members and their diplomats, as well as the Secretariat staff, seem to be trying to adjust to the new reality of the dispute settlement system and the treaty contexts. It is now much more clearly a rule-oriented system. This orientation influences the directions that governments take in working parties, for instance, and in their economic diplomacy. For example, their stances in negotiating new treaty texts are affected because

8. This proposal was part of a compromise between Senator Dole and President Clinton just before the Senate vote on the Uruguay Round on 1 December 1994. The agreement and the later bill introduced by Senator Dole (but not yet passed as of this writing) called for a special commission of US federal judges to review the panel report results of every WTO dispute settlement proceeding affecting the United States. The commission would give its advice to the Congress on the appropriateness of such reports in the light of four specified criteria in the Dole proposal (Senate 1995, S17872).

in many cases the treaty text is now ''for real.'' Yet, some habits are hard to change. Statements by officials are still misleading, and practices are not yet all exactly attuned to this new reality.

Despite the many issues raised, we can take great satisfaction with the trends in the use of the new procedures during the first year and a half of their application. The Singapore ministerial meeting in December 1996 will have to grapple (explicitly or implicitly) with a number of these and related issues. If it tries, for example, to formulate treaty text on competition policy, the WTO members will now need to bear in mind the real implications of the WTO dispute process, the effect of automaticity, the greater rigor in legal reasoning that the application of international law requires, and the risks of introducing new ambiguity.

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