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EDITORIAL COMMENT

INTERNATIONAL LAW STATUS OF WTO DISPUTE SETTLEMENT REPORTS: OBLIGATION TO COMPLY OR OPTION TO "BUY OUT"?

I. BACKGROUND AND CONTEXT

In a stimulating Editorial Comment in the July 1996 issue of the *American Journal of International Law*, Judith Bello articulated a view regarding the rules of the World Trade Organization (WTO) as follows:

> [T]he 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.
>
> Rather, the WTO—essentially a confederation of sovereign national governments—relies upon voluntary compliance.[1]

As a critique of and response to Bello's argument, I wrote an Editorial Comment that appeared in the January 1997 issue of this *Journal*, which I partly titled *Misunderstandings on the Nature of Legal Obligation.*[2] In that brief (four-page) essay, I acknowledged the ambiguity of the treaty text (Dispute Settlement Understanding, or DSU[3]) but argued 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, the "compensation" (or retaliation) approach is only a fallback in the event of noncompliance.[4]

Subsequently, one or both of these brief comments were cited, sometimes selectively to support alternative views on their subject. Later, Judith Bello graciously clarified her view in a book review:

> Personally, I am pleased to have provided Jackson with an occasion to clarify the nature of legal obligations under the WTO agreements, including the DSU. In this *Journal*, I authored a 1996 editorial supporting the WTO and future "fast track" (now called trade promotion) authority for new trade negotiations. For this purpose, I sought to counter the complaint by some nongovernmental organizations that U.S. sovereignty and decision-making authority would thereby be delegated wholesale to "faceless bureaucrats" in Geneva not accountable to the American people. Jackson courteously and fairly wrote a reply . . . to clarify that the previous GATT and now WTO obligations are binding as a matter of

[1] Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AJIL 416, 416–17 (1996).

[2] John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AJIL 60 (1997) [hereinafter Jackson, *Misunderstandings*]. Interested readers may also wish to see the following works of this author, THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE 81 (Chatham House Papers, Royal Inst. Int'l Aff., 1998); THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 126 (2d ed. 1997).

[3] Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU], Annex 2 to Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, *in* WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 354 (1999).

[4] Jackson, *Misunderstandings*, *supra* note 2, at 60–61.

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> law, even when they cannot be enforced. That is, while a WTO member may choose not to come into compliance with a panel decision—preferring, instead, to provide compensation or suffer WTO-authorized retaliation—that member is not satisfying its legal obligation but, in a WTO-prescribed manner, is mitigating the effects of the imbalance in WTO rights and obligations resulting from noncompliance. In fact, I share Jackson's view that the WTO establishes binding obligations, although I continue to regard favorably the GATT/WTO's realistic recognition that it cannot enforce specific compliance. In my view, the DSU therefore provides the two fallback outcomes that, although second best, have the effect of encouraging compliance, discouraging free riders, and, in cases of noncompliance, restoring the overarching balance of rights and obligations that serves as an incentive and reward for continued WTO membership despite imperfect compliance by WTO members.[5]

More recently, various other published works have cited some of these comments, and in January of 2002, an article jointly authored by Professors Warren F. Schwartz and Alan O. Sykes[6] again addressed this problem, this time in the context of an argument drawing an analogy from United States domestic contract law, that economic efficiency is better enhanced by an "efficient breach" theory of contract (and, therefore, also of treaties). These authors argue that the concept of "efficient breach" is a "central feature" of the WTO dispute settlement (DS) system, and that "the WTO provisions respecting renegotiation and the settlement of disputes over breach of obligations are carefully designed to facilitate efficient adjustments to unanticipated circumstances. We also conclude that formal sanctions in the WTO system are relatively unimportant to the other goal of contract remedies—the deterrence of inefficient breach."[7]

The Schwartz and Sykes article explicitly refers to my Editorial Comment,[8] but does not mention Bello's later clarification and explicitly refutes the "Jackson view." The authors additionally state:

> Jackson does not base his conclusion on policy or on any articulation of why he believes that strict compliance with all obligations at all points in time should be the preferred outcome for the WTO membership. Rather, he cites 11 textual provisions of the WTO in support of his position.[9]

Schwartz and Sykes acknowledge that these eleven provisions provide reasonable support for the conclusion that WTO members are so obligated but assert that "[n]evertheless, we disagree with that proposition, both as a matter of textual interpretation and for policy reasons implicit in our discussion to this point."[10]

Since the issue may have considerable bearing on the future of the WTO dispute settlement system, and since my original four-page comment was intended to be only a very brief refutation of the original Bello argument, I feel under some obligation to present a fuller analysis and explanation of my position. I would preliminarily note that my prior Editorial Comment did indeed mention (albeit very briefly) some policy bases for my view, observing that the different approach on "international law bindingness" can result in important domestic law implications in some (but not all) countries. However, much stronger policy bases support my view than I was able to express in that short comment, and I will set them forth below.

[5] Judith Hippler Bello, Book Review, 95 AJIL 984, 986–87 (2001) (reviewing JOHN H. JACKSON, THE JURISPRUDENCE OF GATT & THE WTO) (footnotes omitted).

[6] Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. S179 (2002).

[7] *Id.* at S181. See *infra* p. 122 for an explanation of "efficient breach."

[8] Schwartz & Sykes, *supra* note 6, at S190.

[9] *Id.*

[10] *Id.*

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I would also mention preliminarily the dangers of drawing analogies from domestic law jurisprudence to be incorporated into international law, where the real parties in interest, as well as the institutional settings, are usually so fundamentally different.

In four further parts of this comment, I undertake to fulfill my "obligation" to present a more thorough analysis. In part II, I briefly introduce some of the different elements that would go into normal treaty interpretation related to the issue in question, such as which text should be part of the analysis and whether "preparatory work" or intent of the parties, including statements by some nation-state governmental officials made contemporaneously with the drafting of the treaty, should be considered. Likewise, I mention the importance of the forty-seven years of GATT practice to the interpretive process, and I note that one way to sharpen the focus of treaty interpretation is to assess the relevance of a prediction of what the WTO Appellate Body would decide if the issue came before it. In part III, I take a detailed look at the various treaty text provisions. The texts themselves are contained in an appendix so that the reader can examine them in context, if he or she wishes. In part IV, I outline several of the important policies that support the view I am taking and that I believe to be enormously significant in suggesting that the Schwartz and Sykes approach is markedly deficient. Finally, in part V, I briefly summarize my conclusions and perceptions.

II. Overview of the Treaty Interpretation Process

International lawyers are generally very knowledgeable about the traditional rules of treaty interpretation, which are widely deemed to be well expressed in the Vienna Convention on the Law of Treaties,[11] particularly Articles 31 and 32. This approach is reinforced by the treaty text of the DSU, which indicates that the goals of the DS system include "clarify[ing] the existing provisions" of the WTO Agreements "in accordance with customary rules of interpretation of public international law."[12]

The approach of the Vienna Convention is often described as very "textually oriented," and the WTO Appellate Body has, for this and other reasons,[13] relied heavily on text. But the Vienna Convention also notes that the text is to be considered in the context of the object and purpose of the treaty, subsequent practice in the application of the treaty, and the context of the treaty clause. Many people feel that the intent of the drafters or treaty makers, usually described as "preparatory work," is accorded a lesser role, as articulated in Article 32 of the Convention, noting recourse to "supplementary means of interpretation, including the preparatory work."

There are important criticisms of the principles on treaty interpretation in the Vienna Convention, including the role of preparatory work, but they do not significantly affect the conclusions in this comment, and are better addressed in other works, although some reference to them will be made below.

Working within this framework, therefore, I take up each of these elements of treaty interpretation, namely, text, context, drafters' intent, and practice under the agreement, in that

[11] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 UNTS 331. Note that not all members of the WTO have ratified, and thus accepted, the Vienna Convention (e.g., Brazil, France, and the United States), but there is still general agreement that the Vienna Convention clauses on treaty interpretation (Arts. 31, 32) articulate the customary international law on the subject. The Convention's approach to treaty interpretation can of course be criticized as unable to cope with certain problems currently facing world international institutions (but that is a subject for a different article).

[12] DSU, *supra* note 3, Art. 3.2.

[13] United States—Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996); Japan—Taxes on Alcoholic Beverages, WTO Docs. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996) (Appellate Body reports are distinguished by "AB" in the document number); *see also* Claus-Dieter Ehlermann, *Six Years on the Bench of the "World Trade Court": Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 36 J. WORLD TRADE 605 (2002); Claus-Dieter Ehlermann, *Reflections on the Appellate Body of the World Trade Organization (WTO)*, 97 ASIL PROC. 77 (2003) (indicating the reasons for a textual approach, including objectivity and nonpoliticization).

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order, and conclude this part with a reflection on predictions as to the Appellate Body's probable action.

Text. The extraordinarily extensive Uruguay Round treaty contains numerous textual provisions. The DSU itself has many relevant clauses, but I will discuss most of those in part III below. Here, I merely flag several priority clauses, both in the Agreement Establishing the World Trade Organization, which is often called the "Charter,"[14] and in the DSU. I also want to note a rather remarkable omission, which gives rise to the whole puzzle addressed by this comment.

The DSU delineates what many people, including this author, consider the most important "central element" of the policy purposes of the document, namely, "providing security and predictability to the multilateral trading system."[15] In a later section, I indicate how this policy is not supported generally by an "efficient breach" approach, and really focuses on different sets of parties than one might find in a domestic contractual situation. In fact, the DSU explicitly mentions another goal, particularly when it says that the rulings or recommendations "shall be aimed at achieving a satisfactory settlement of the matter."[16] This goal could arguably be construed as conflicting with the goals of security and predictability, in that the latter might imply the need for elaborate, careful reasoning articulated in objective findings of the DS panels and appellate proceedings, on the one hand, while the "satisfactory settlement" might look more toward relatively quick and efficient settlements, which, in some circumstances, could actually reduce the quality of security and predictability. The time limits imposed by the DSU for the whole DS system are extremely severe,[17] and it can be argued that they may compromise the findings needed for better "security and predictability." This author, however, can only express admiration for the more than twenty-two thousand pages of jurisprudence that have been produced in the eight and a half years of the WTO DS system.

In seeking relevant text for this comment, the WTO Charter must be examined. Paragraph 1 of Article XVI is particularly important, stipulating that, under this Agreement, "the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947." This "Guidance Clause" helps maintain continuity between the jurisprudence and practice of the GATT, and that of the new WTO.

In addition, paragraph 4 of Article XVI states, "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements." That sentence in particular can serve as an important basis for the notion that the result of the DS procedure is to establish an international law obligation to comply with the results of the interpretations and applications made in the DS process.

These texts can be contrasted with corresponding provisions regarding the International Court of Justice. Article 94 of the Charter of the United Nations explicitly provides that "[e]ach 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." Article 59 of the Statute of the International Court of Justice, which lays down the framework of the Court's activity and procedures, states that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case." Thus, the treaty texts establishing the World Court stipulate that there is an international law obligation to obey the result.

No such explicit treaty clauses on this issue can be found in the DSU or the WTO Charter. Therein lies the basis of the dispute over the existence of an obligation to comply as a matter of binding international law. Thus, it becomes essential to look more broadly into the many

[14] The word "charter" is an informal term, and is not used in the treaty itself. *See* Marrakesh Agreement Establishing the World Trade Organization, *in* THE LEGAL TEXTS, *supra* note 3, at 3.

[15] DSU, *supra* note 3, Art. 3.2.

[16] *Id.*, Art. 3.4.

[17] *Id.*, Arts. 12, 17, & app. 3, "Working Procedures."

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clauses of the DSU in the context of the WTO Charter and, indeed, in the context of other parts of the Agreement and other facets of treaty interpretation. Such an analysis is undertaken in part III below.

Context. Article 31 of the Vienna Convention notes that the text should be examined in the "context" in which it occurs. Analyzing the legal problem of obligation to comply therefore entails looking at the total framework of the DSU, to try to establish what the context is and the meaning of some of the specific clauses when viewed in that total context. That undertaking is also pursued in part III.

Intent or "Preparatory Work." Despite the widespread attribution of a secondary or "supplementary" role to preparatory work in treaty interpretation, there are opinions to the contrary and much GATT practice that relies rather easily on preparatory work of the General Agreement.[18] In addition, the Vienna Convention itself, in Article 31 (the "priority interpretation rules"), describes contexts "in the light of . . . object and purpose." But this prescription raises the question of how one ascertains object and purpose. Moreover, it can be argued that object and purpose can be discerned somewhat in the intent of the treaty makers (and to a larger extent in the preamble or other relevant statements). In some opinions of the WTO Appellate Body, one can detect a rather cursory and easy reference to preparatory work or intent of the drafters, under the rubric of searching for "object and purpose."[19]

There are some important policy reasons, however, why preparatory work should be given a subordinate role. One of them is the frequent dearth of creditable and definitive records of preparatory work. Indeed, in several of the major negotiating rounds of the GATT, the contracting parties made it fairly explicit that they did not want to leave a definitive record of the preparatory work. The fact that it does not exist for most of the last few rounds also suggests that the negotiating personnel deliberately failed to make such a record, or at least to make one available. Of course, the WTO archives contain many documents that encompass a great deal of information about the negotiating processes of the various rounds, but for the most part these documents are restricted and, in any event, they are difficult to navigate.

In addition, nation-states that join an agreement well after the negotiations have ended should be able to rely primarily, if not exclusively, on the text of the treaty concerned, and not have to do an elaborate search of what can amount to tens of thousands of pages of negotiating history. This factor would apply particularly to smaller and less affluent countries that might not have the manpower or ability to hire the required assistance in considering whether to accede to the treaty.

Furthermore, negotiators who have left government for private practice or advisory roles have been known to make assertions about the intent of the treaty drafters regarding specific clauses. When one begins to pin the source down, however, one may find that his or her view is based on discussions between a very small subset of the negotiators involved. Thus, six or eight persons, who met in the middle of the night and struggled to achieve a compromise that would then be floated to the larger group, may be the only participants to grasp the full extent of the "preparatory work" or intent of the drafters at the time of approval of the very large text.

Sometimes statements by national government officials made contemporaneously with the drafting of the treaty (such as the WTO and the DSU) are referred to. But such statements may have been made in the context of advocacy before parliaments or even special interest

[18] Readers can find numerous references in GATT documents, including panel reports, to preparatory work in the 1947 and 1948 conferences on drafting the GATT. Many of these documents are collected in the important GATT document, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE (6th ed. 1995).

[19] A prime example is *Japan—Taxes on Alcoholic Beverages, supra* note 13, where the Appellate Body, in footnote 39, cites for object and purpose the EPCT documents (documents of the Preparatory Committee of the United Nations International Conference on Trade and Employment, denoted by the symbol E/PC/T), which are the documents of the GATT preparatory work.

groups[20] and may contrast with statements made by other persons in other countries at different times.

Clearly, resort to preparatory work presents various problems, although the more than twenty volumes of the 1947–1948 United Nations documents in the EPCT series constitute a remarkably coherent and definitive set of preparatory materials for the original GATT and the ill-fated Havana Charter for an International Trade Organization (ITO). Consequently, numerous EPCT documents have been consistently cited, and many of those are relatively easy to find in the *Analytical Index* of article-by-article exegesis that was produced by the GATT Secretariat up to the end of the GATT period.[21]

Some of this early history suggests a rather ambiguous origin for the DS clauses of the GATT, particularly Article XXIII. In earlier drafts, Article XIV, providing for an "escape clause," or one of the "rebalancing" provisions, may have been mixed in with provisions that were later separated to become Article XXIII, which is the essential GATT article relating to dispute settlement. Of course, this situation took shape in the context of the original thought that the elaborate DS provisions of the ITO charter (which never came into force) would govern a DS process. Only when the ITO failed did GATT Article XXIII begin to be the essential reference point for DS procedures.[22]

Practice. Even if "original intent" could be ascertained in the face of all the difficulties mentioned above, it can be strongly argued that such intent has to be evaluated not only in the context of other language in the treaty text itself, but particularly in light of decades of practice of the institution and treaty concerned. In the case of the GATT, we have forty-seven years of practice, and that practice definitively demonstrates, beginning, at the latest, about halfway through its life span, that the organization viewed the results of the DS process, when the panel report was "adopted" by the GATT council, to be binding on the contracting parties concerned.[23] Indeed, in later years, the consensus rule for the adoption of GATT panel reports began to run into difficulties because losing parties would "block" their adoption (i.e., block the "consensus" required for adoption). The real tugs-of-war going on in that process (which eventually led to new language under the WTO and DSU that prevented such blockage) reflected the worries of disputing nations that they would be bound under international law to implement panel results that they did not like. The new procedures under the DSU, which eliminate the blocking possibility through a quirky procedure known as "reverse consensus,"[24] have resulted in a very strong sense that a great amount of power is given to the DS system and the Appellate Body, and this sense of power in the WTO DS system would not be consistent with the notion that any country could "buy out" of the decision in the case.

Predicting what the Appellate Body would do. In concluding this part, I focus on the potential importance of predicting what the Appellate Body would do if the issue posed in this Editorial Comment came before it. Justice Oliver Wendell Holmes, of the United States Supreme Court, wrote that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[25] It is not unreasonable, therefore, to observe that in

[20] Implications of the "buy-out" approach might be inferred, although not without ambiguity, from the testimony of high U.S. officials in the 1994 congressional hearings, where the officials were urging approval of the Uruguay Round negotiated trade agreements. Uruguay Round GATT Agreement: Testimony of Ambassador Michael Kantor, U.S. Trade Representative, Before the House Committee on Agriculture (Mar. 16, 1994); Ambassador Rufus Yerxa, Deputy United States Trade Representative, The World Trade Organization and U.S. Sovereignty: Prepared Testimony Before the Senate Foreign Relations Committee (June 14, 1994), *both available in* LEXIS, Legis Library, Hearing File.

[21] ANALYTICAL INDEX, *supra* note 18.

[22] JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 170 (1969); JOHN H. JACKSON, THE JURISPRUDENCE OF THE GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS 118 (2000) (on rule orientation).

[23] John H. Jackson, *The Legal Meaning of a GATT DS Report: Some Reflections, in* 1 TOWARDS MORE EFFECTIVE SUPERVISION BY INTERNATIONAL ORGANIZATIONS 149 (Niels Blokker & Sam Muller eds., 1994).

[24] JACKSON, THE WORLD TRADING SYSTEM, *supra* note 2, at 125.

[25] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

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the case of the WTO, under the current institutional structure of that organization, a prediction of what the Appellate Body would do with respect to a particular legal issue is at least relevant, and probably very significant, in terms of evaluating the advocated interpretation. In this connection, I would argue that if the issue of obligation to comply were to come to the Appellate Body, it would be most likely to adopt my position. Language in at least one Appellate Body report clearly suggests that result.[26] In arriving at that prediction, however, not only would the elements suggested in this part play a role, but so would the analysis in parts III and IV, to follow, and it would definitely be important.

III. TEXTUAL ANALYSIS OF THE WTO CHARTER AND THE DSU

The WTO DSU establishes, for the first time in GATT/WTO history, an elaborate, explicit treaty text on implementation of the results of the DS system reports.[27] This procedure includes measures for possible "compensation" or "suspension of obligations" (sometimes informally called "retaliation"). As noted above, this possibility has led to arguments that the text gives members (nation-states) an option either to comply with and conform to the "findings, rulings, and compliance recommendations" of the panel/appellate reports or, in the alternative, to provide "compensation" (which requires agreement between the parties) or tolerate "suspension of obligations." In other words, it is argued that a party losing a dispute can "buy out" of its obligations to conform, by putting up with the suspension of obligations to it or providing "compensation" by agreement. It is this opting-out conclusion that I believe is not supported by the text of the DSU. A certain element of opting out may be found in a "settlement" that the parties mutually agree to, which could include compensation. But even in that case, the language of the DSU clearly requires that settlements be *consistent* with the obligations of the covered agreements.[28]

There are more than a dozen relevant treaty clauses, including at least two in the WTO Charter, as mentioned in part II above, and at least twelve in the DSU. This discussion focuses on the DSU and presents a detailed textual analysis to support my argument on compliance. The appendix reproduces all the clauses analyzed here, in their context, and highlights the specific language so that the reader can easily concentrate on that language and its impact, not only in the context of the paragraphs involved, but also in the overall context of the DSU.

In my view, these clauses overwhelmingly imply, in the light of the practices of GATT, that the legal effect of an adopted panel report is the international law obligation to perform the recommendation or to comply with the "rulings" of the panel or appellate report.

To summarize the following argument: The DSU text clearly establishes a preference for the obligation to perform and notes that the matter will be kept under surveillance until performance has occurred. It also expresses a strong preference for the immediate withdrawal of the measure found inconsistent with obligations and indicates that compensation and suspension are only fallback measures, mentioning in several clauses that either alternative is "temporary." In addition, for the special category of "nonviolation" cases, there is "no obligation to withdraw the measure," which makes perfectly good sense since no violation has occurred (merely "nullification or impairment"). But this statement of the lack of an obligation to withdraw for the nonviolation cases suggests that the preceding DSU text assumes that there is an obligation to conform for *violation* cases.

To elaborate on that brief overview, I now offer a series of arguments in support of an international law obligation, flagging specific textual clauses and even quoting small portions of the fuller paragraphs set forth in the appendix.

[26] Japan—Taxes on Alcoholic Beverages, *supra* note 13, pt. E, "Status of Adopted Panel Reports," 3d & 6th paras. (including the statement referring to adopted GATT panel reports as "not binding, except with respect to resolving the particular dispute between the parties to that dispute"; *id.*, text at n.30).

[27] DSU, *supra* note 3, Arts. 21–26.

[28] *Id.*, Art. 3.5.

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(1) Article XVI, paragraph 1 of the WTO Charter provides that the WTO shall be guided by the jurisprudence of GATT. GATT practice demonstrates the assumption, at least in the last few decades, that once the General Council adopted a panel report, there was an international law obligation to conform. The WTO is to be guided by this approach, and that practice certainly colors the interpretation of the newer language in the DSU (some of which is adapted from a 1979 "understanding" on the GATT DS system,[29] which had been accepted by consensus under the GATT).

(2) The WTO Charter, in Article XVI, paragraph 4, stipulates that each member "shall ensure the conformity of its laws, regulations and administrative procedures with its obligations." This general obligation runs through all of the WTO Charter and the annexed texts, and is not targeted only at the DSU but is clearly applicable.

(3) DSU Article 3, paragraph 2 states that a central element of the WTO is "providing security and predictability to the multilateral trading system." This provision clearly refers to the desirability of having the DS system support a "rule-oriented" or "rule-based" design. The DS system is supposed to "clarify" the provisions of the covered agreements and to "preserve the rights and obligations" therein. This objective obviously supports the notion of the desirability of developing a jurisprudence that not only would accord particular disputants some predictability and reliability, but also would be available to all government members of the WTO. Indeed, as expressed in important language in the *Section 301* case, the jurisprudence should be designed to provide guidance to millions of entrepreneurs or traders, not just to governments or a particular set of disputants.[30]

(4) The DSU text encourages settlements but mandates that the settlements, and all solutions to matters in a case, "shall be consistent with" the covered agreements of the WTO.[31]

(5) The DSU text clearly indicates a strong preference for compliance, stating that "the first objective . . . is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent" with covered agreements.[32] The DSU also says that "neither compensation nor the suspension of concessions or obligations is preferred to full implementation of a recommendation."[33]

(6) The functions of the panels and the Appellate Body include giving "rulings" and reaching conclusions on whether "a measure is inconsistent with a covered agreement." This task suggests a goal of providing a ruling or finding regarding treaty consistency and can lend support to the notion of a rule-oriented and compliance objective for the system.

(7) A very telling provision states that the Dispute Settlement Body (or DSB, the supervising body of the DS system) shall "keep under surveillance the implementation of adopted recommendations" and that these matters shall "remain on the DSB's agenda until the issue is resolved." The same article provides that "prompt compliance with recommendations . . . is essential."[34]

(8) The language of the DSU clearly specifies that the alternatives of compensation and suspension are "temporary," adding that "neither compensation nor the suspension of concessions or other obligations is preferred to full implementation." It further states that suspension "shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed."[35]

(9) The DSU article regarding the special category of nonviolation cases provides that even if a panel or the Appellate Body makes a finding of nullification or impairment (but

[29] Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 210 (1980).

[30] United States—Sections 301–310 of the Trade Act of 1974, WTO Doc. WT/DS152/R, paras. 7.73, 7.75–7.77 (adopted Jan. 27, 2000).

[31] DSU, *supra* note 3, Art. 3.4, .5.

[32] *Id.*, Art. 3.7.

[33] *Id.*, Art. 22.1.

[34] *Id.*, Art. 21.6, .1, respectively.

[35] *Id.*, Art. 22.2, .1, .8.

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not a violation), there "is no obligation to withdraw the measure."[36] This expression of "nonobligation" for nonviolation cases is quite revealing and, arguably, strongly suggests that there is such an obligation for violation cases.

Of course, once the "binding" international law obligation to follow a panel or appellate report has been established, international law is not always efficient or effective in inducing compliance. However, international law commands a variety of ways of dealing with breaches of such an obligation, and some of the practical implications of "bindingness" will assist the general membership of an organization in encouraging the country to comply. Sometimes the implications of the legal effect within domestic systems will be involved; and sometimes subtler diplomatic and other pressures, such as have been outlined in international relations literature,[37] will gain additional help through the concept of "binding obligation."

IV. ANALYSIS OF POLICIES SUPPORTING THE OBLIGATORY EFFECT OF WTO DISPUTE SETTLEMENT RESULTS

I now examine some of the policies that may be involved in the DS process of the WTO, with regard to various approaches to whether compliance with the panel/appellate report is obligatory. To begin with, I should note that a large number of policies can be used to support various types and formulations of international dispute settlement. Elsewhere I list twelve or more such policies, although only a subset of maybe half or a bit more of them would be deemed applicable to the WTO system.[38] For example, one policy that could be tied to international (or national) DS systems is that of redressing past harms. This policy obviously does *not* fall within the tradition or the treaty text that established the WTO DS system.

On the other hand, some important policies are integral to the WTO DS system. As regards the WTO Charter, policies must be considered in the light of the Article XVI provisions discussed above, particularly the notion that "guidance" for the WTO is to be derived from the practice, procedures, decisions, and thus the "jurisprudence" of the GATT; and also the obligation of members to "ensure conformity" of their laws with the WTO covered agreements.

In the DSU, the only clearly stated policies regarding the rationale for the DS system are those contained in paragraphs 2 and 4 of Article 3. The first, as we have seen, is the goal of providing "security and predictability to the multilateral trading system." This is probably the most important and central policy of the whole system, and I will discuss it further below.

In addition, the policy in paragraph 4 of Article 3 is expressed as the aim of "achieving a satisfactory settlement" of the matter. If *satisfactory settlement* means settlement consistent with all obligations under the covered agreements (as mentioned in paragraph 5 of Article 3), this aim is arguably consistent with the "security and predictability" obligation. If, on the other hand, *satisfactory settlement* is intended to mean an efficient or relatively inexpensive settlement process, one could see that there might be tension between that goal and the goal of "security and predictability."

From the DSU, one can glean other relatively explicit or implied cues to promote the goal of "compliance" through credibility and trust in the DS system, as well as through the reverse implications of the provision on nonviolation cases, which does not include an obligation to "withdraw a measure" or to make measures consistent with the covered agreements.

A goal that is closely related to the basic "security and predictability" goal is one that is often present in any DS system designed to be creditable, objective, and apolitical (not biased),

[36] *Id.*, Art. 26.1(b).

[37] ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY (1995).

[38] John H. Jackson, oral presentation at the Third Annual WTO Conference, Dispute Resolution—At the Crossroads, London (May 14, 2003) (sponsored by the British Institute of International & Comparative Law, the *Journal of International Economic Law*, and the Institute of International Economic Law). This presentation is currently being prepared for publication.

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namely, to redress asymmetries of power. This goal stems from the desire to provide opportunities for small or relatively powerless entities (such as small countries, nonindustrial countries, and individuals) to gain access to a system that will protect their interests (stakes promised by the system) in a way that they can depend upon. To some extent, this is a concept of "justice." It may also be essential to the credibility, and therefore to the efficiency, of any DS system. An important ambition of those wishing to redress asymmetries of power is to restrain the "unilateralism" of big powers, and the history of the Uruguay Round text strongly suggests such a desire.[39] To allow a "buy-out" possibility favors the rich countries in a way that undercuts some of these goals.

Some have suggested that two other policies are important to the WTO DS system: the "rebalancing" of concessions and "efficient breach." I argue below that neither policy is, or should be, central or even operative in the normal DS processes (although some elements of these policies might apply in certain "settlements" between disputants). An idea that is not always explicit, but may be fundamental to some extent to the notions of rebalancing and efficient breach, is that there needs to be some kind of "escape valve" for governments that find the obligations to conform to the WTO treaty, to withdraw inconsistent measures, and to otherwise bring their laws into consistency to be so onerous as to lead them (particularly if they are powerful nations) to ignore the results of the dispute settlement system. Some worries and tensions are currently developing about the trend of WTO jurisprudence, particularly the apparent fact that the dispute settlement system is proving to be very powerful, while the "legislative function" of diplomacy and negotiation has been very weak, or even paralyzed (partly because of the consensus rule[40]). Something could certainly be said for the provision of some kind of breathing space, but if it developed into a rule that undermined the credibility and rule orientation of the other policies of the DS system, that would seriously undermine the longer-range goals of "security and predictability."

I now elaborate on the ideas that I have just presented in the overview of the various policies, beginning with "security and predictability."

When read together with the WTO Charter and the Article XVI clauses discussed above, and appraised in the context of the total thrust of the DSU, including the addition of the unique appellate process, the provision in Article 3, paragraph 2 on "security and predictability" clearly seems designed to foster the development of a creditable, objective, and nonpolitical procedure that would result in findings, rulings, and, more important, deeply analytical reasoning so as to assure members of the predictability and a sense of security that come from stability over time in the application of the rules. This feature is important to every type of juridical system, whether international or national. Such a policy implies certain other "subpolicies" that would enhance the feasibility of the main policy. For one thing, it requires a set of genuinely creditable procedures, which give the participants and the potential beneficiaries (not necessarily the participating disputants) reason to trust and support the overall process. The history of GATT and the WTO, as well as the Uruguay Round negotiations, strongly suggests that this is a central thrust of the DSU. Article 3 itself says it is a "central element."

One of the reasons why analogies from private contracts in domestic law do not translate well to the international level is that the participant/beneficiary analysis differs at the two levels. For example, in a domestic contract case, at least in most commercial contract situations, the disputants and the beneficiaries are likely to be the same. The parties can "make

[39] In particular, there were strong feelings about the need to "rein in" United States unilateralism. This was a fairly explicit goal of the European Community, sparked heavily by attitudes of the French, in the Uruguay Round, and it resulted basically in a 180-degree shift in attitude toward the need for a more rigorous DS system, compared to the position of the Europeans in the Tokyo Round of the 1970s, when they opposed improving or adding rigor to the DS system under the GATT.

[40] John H. Jackson, *The WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited*, 4 J. INT'L ECON. L. 67 (2001) (addressing "mantras" related to the WTO, including the consensus rule).

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their deal" in monetary compensation because the compensation will flow to the parties that have real interests at stake.

By contrast, at the international level (particularly that of the WTO), the disputants are governments (only governments may be disputants under the WTO DS procedure), whereas the potential beneficiaries may be traders and commercial entities as well as individuals, who, in some situations, are accorded little opportunity for input into the DS process. Of course, governments may heed those interests, but large governments in particular will also trade them off at the nation-state level. Furthermore, in the context of coming to grips with how a case will be settled or otherwise ended, a government may have much broader interests in mind than simply those expressed in the instant case.

In fact, the status of nongovernmental entities as major beneficiaries of the system is a significant part of the policy framework of the WTO, and particularly its DS system. The major importance of the GATT, and now the WTO, rules, especially in market-oriented economies, to the efficient decisions of millions of private entrepreneurs is reflected in both the GATT and the WTO jurisprudence. A key GATT decision in this regard is the 1987 *Oil Fee* panel report,[41] which articulated this point in interpreting the national treatment protection of Article III of the GATT. The panel said that Article III "cannot be interpreted to protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products." The panel concluded, therefore, that the normal presumption of a "prima facie nullification or impairment"[42] in practice operated as an "irrefutable presumption," because the article and clause "oblige[] contracting parties to establish certain *competitive conditions* for imported products in relation to domestic products."[43] The implication, obviously, is that the beneficiaries of the obligations of Article III are the traders, not only in their evaluation of current conditions of competition, but also in their predictions of future conditions of competition on the basis of expected reasonable compliance with the Article III national treatment obligation.

An even more interesting explanation of some of these concepts was elaborated in the WTO *United States—Section 301* case.[44] This case was brought by the European Community to challenge the procedures under section 301 of the U.S. Trade Act, which were structured to allow private parties to bring cases to the attention of the United States trade office, and thereafter to encourage the trade office to bring a case against a foreign country before the GATT/WTO. The first-level panel held that there was something of a presumption that the wording of the U.S. statute concerned could lead to the conclusion that the law was not consistent with U.S. obligations under the GATT and WTO. However, the panel held that the United States had, in a sense, "rectified" or neutralized that statutory effect by administrative actions and legitimate and binding official statements during the panel procedure that the United States would administer the Trade Act in a way that would avoid the alleged inconsistency.[45] The panel's language is extraordinarily interesting (the case was not appealed) for its articulation of the importance of certain beneficiaries of the GATT/WTO rules. For example, the panel states that "the object and purposes of the DSU, and the WTO more generally," are most relevant when they "relate to the creation of market conditions conducive to individual economic

[41] United States—Taxes on Petroleum and Certain Imported Substances, GATT B.I.S.D. (34th Supp.) at 136 (1988) (adopted June 17, 1987).

[42] *Id.*, paras. 5.1.9, 5.1.12. This concept, which originated in 1962, provides that if a complainant establishes a breach (violation) of the treaty obligation (GATT or WTO), it amounts to a "prima facie" nullification or impairment, so that the burden of nullification or impairment is placed on the respondent. JACKSON, THE WORLD TRADING SYSTEM, *supra* note 2, ch. 4.

[43] United States—Taxes on Petroleum and Certain Imported Substances, *supra* note 41, paras. 5.1.7, 5.1.9.

[44] United States—Sections 301–310 of the Trade Act of 1974, *supra* note 30.

[45] This case was not appealed by either side, and has been construed as an interesting approach to giving certain advantages and linguistic assurances to both the complainants and the respondents in a way that enabled both to claim victory.

activity in national and global markets and to the provision of a secure and predictable multilateral trading system."[46] The panel continued:

> [I]t would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish.[47]

Other WTO cases have touched on the same idea,[48] and it was confirmed by a number of GATT cases and practices listed by the panel in the *Section 301* case.[49]

Thus, the notion that there are beneficiaries other than the disputants in a particular case under the WTO DS system is proving to be fundamental, and is certainly consistent with the decades-long practice of the GATT and the early history of the WTO. It undoubtedly has cogent implications for the interpretation of the DSU and its basic policy underpinnings.

That the WTO DS system is viewed by WTO members as something more than just a way for two or more disputing parties to settle their differences is also evidenced by the practice of multiple complainants in some cases, as well as the more frequent practice of successful petitions by WTO members for "third-party status" under the DSU.[50] Third-party status gives members somewhat more limited privileges and access to information about a given case than disputant status but does allow them to monitor a case and to present some ideas and arguments in it.[51] In some cases, a large number of third parties are accorded that status. Some large and powerful members of the WTO, particularly the United States, but also the European Union in some cases, make it a general practice to take third-party status as a way to continue monitoring and offering input into the direction of WTO jurisprudence. These practices manifest a view among WTO members that the dispute settlement process is potentially significant to all members because of the way the jurisprudence will affect their future trade relations, as well as the security and predictability of the rules, which could benefit constituencies in those countries where world trade and investment flows are factors in their decision-making process.

A less explicit policy objective of the DS system that immediately comes to mind is the goal of "leveling the playing field" between large, powerful states and small or relatively weak states. For the system to be creditable, it must remedy the asymmetries of power between WTO members so as to give every one—large, small, weak, or powerful—its "day in court" and the expectation of receiving adequate redress for harms attributed to measures that are inconsistent with the obligations of the WTO system. If everybody believed that the rich and powerful countries could avoid their obligations to conform to the rules upon which traders rely for a measure of predictability and security by simply "buying out" of those obligations through compensation or sustaining suspended obligations, then a considerable degree of

[46] United States—Sections 301–310 of the Trade Act of 1974, *supra* note 30, para. 7.71.

[47] *Id.*, para. 7.73.

[48] United States—Anti-Dumping Act of 1916, WTO Doc. WT/DS136/AB/R (adopted Sept. 26, 2000). An interesting possible parallel question occurs in the human rights jurisprudence, particularly that of the European Court of Human Rights, as argued in Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUR. J. INT'L L. 529 (2003) (maintaining that restrictive interpretations are not appropriate for the conventions on human rights because of the *erga omnes* nature of the obligations and the concept that the object and purpose of the conventions is not the exchange of reciprocal rights, but the protection of the human rights of all individuals within the ambit of the convention).

[49] United States—Sections 301–310 of the Trade Act of 1974, *supra* note 30, para. 7.75 n.663.

[50] DSU, *supra* note 3, Art. 10.

[51] *See, e.g.*, United States—Definitive Safeguard Measures on Imports of Certain Steel Products, WTO Doc. WT/DS248/R (circulated July 11, 2003) (eight complainants); United States—Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) (sixteen third parties).

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credibility and fairness of the system would be diminished or lost. Both small countries and developing countries could then say that the DS system is of no interest to them because they do not have the power to "buy out," but the "big guys" do have that power, and if they exercised it regularly, they would undermine the predictability and security of the rules as they might apply to enterprises or individual entrepreneurs from small countries. This consideration may be one of the most important policy bases for opposing some of the other advocated approaches to the DS system.

Turning to these other approaches, which are supported by various interests, including, unfortunately, some relatively powerful private interests in industrial countries such as the United States that see an advantage in diminishing or undermining the power and effectiveness of the WTO dispute settlement system, one can address two particular ideas: rebalancing and efficient breach.

With respect to "rebalancing," its advocates hold that the WTO DS system should be looked upon principally as a technique for governments to rebalance their overall trade "concessions," or binding obligations. Thus, they urge members to favor either compensation or suspension of obligations as a "rebalancing" concept. As mentioned above, the preparatory work of the GATT suggests that the original GATT dispute settlement article (Article XXIII) was entangled or merged with what is now the escape clause (Article XIX). However, the two concepts were distinctly separated in the drafting process, and during the course of more than four decades of GATT history, the DS procedures evolved rather consistently and persistently toward a more juridical, rigorous, and creditable system, albeit one that is flawed by the GATT "birth defects" (which to some extent have been corrected by the WTO DSU).[52] This lengthy practice thus carries us a long way from any incipient ideas of "rebalancing" and toward the more juridical notions of security and predictability, i.e., "rule orientation," or "rule-based" jurisprudence.

The argument in this vein is enhanced by the availability of other rebalancing techniques in the GATT, most notably the escape clause provisions in Article XIX and the renegotiation provisions in Article XXVIII. Of course, those provisions can be criticized, and some would argue that they are inadequate.[53] But those other provisions, even if inadequate, are clearly what was intended for the rebalancing process, insofar as it makes sense to have rebalancing.

Another fundamental problem with rebalancing, one that inheres in general notions of "reciprocity," is the problem of quantifying the "value" of reciprocal or rebalancing concessions. When the principal subject matter of the GATT system consisted of tariff bindings, it was somewhat easier to develop quantifiable measures of the tariff concessions, although even those could involve considerable differences in approach and thus result in different quantified levels.[54] After the 1960s, however, the whole GATT system turned its attention away from tariffs and more toward nontariff barriers and so-called rules. Often, it is virtually impossible to quantify the effect of the breach of a rule on future potential trade. Even the national treatment and most-favored-nation obligations can sometimes be very difficult to quantify, but when one looks at other measures, such as a wide variety of economic regulatory devices, including environmental protection and food safety, it is often impossible to assign any justifiable, quantifiable measure to their impact. The gravitation of the whole system toward rules suggests that rebalancing has less and less of a role to play in the WTO context. This tendency is accentuated when the treaty norm involved is largely procedural, such as measures in the DSU and some of the provisions in the WTO Charter. What is the quantifiable trade impact of safeguards rules, for example, involving the *causal relationship* between increased imports and the serious injury to an industry sector? Likewise, how does one quantify a breach

[52] Particularly the defect of "blocking," *see, e.g.*, JACKSON, THE WORLD TRADING SYSTEM, *supra* note 2, ch. 4.

[53] Schwartz & Sykes, *supra* note 6.

[54] JACKSON, THE WORLD TRADING SYSTEM, *supra* note 2, at 147–49.

of a DSU norm? Rebalancing in any objective and meaningful way seems to be a fallacy in the light of the shifting perspective of the GATT/WTO system away from more quantifiable norms, such as tariff bindings, toward broader rules that should arguably be shaped so as to provide benefits to all sides, not just a reciprocal "swap."

In considering the question of "efficient breach," one finds many of the same policy objections. According to the concept of "efficient breach" of contract in domestic commercial law (especially in the United States), in general, a contract breach allows the breaching party to pay damages to redress the harm (loss of profit, etc.) without performing its obligations under the contract. In most cases, the nonbreaching party will be made "whole" and, in some cases, even better-off. Thus, the breaching party has the option of refusing further performance if its compensation fully protects the nonbreaching party's reasonable economic expectations from performance of the contract.[55]

Despite the claim by Schwartz and Sykes that the language of the DSU and of the WTO agreements provides a basis for assuming that efficient breach is a major policy underpinning the DS system, there are several reasons to challenge that assumption. No language in the DSU explicitly ties it to the concept of efficient breach, and references in Schwartz and Sykes to a tie to some of the language in some of the cases is tenuous, if not erroneous.[56] The notion that if WTO members had really wanted to make compliance with findings mandatory, they would have imposed some "greater penalty for noncompliance" rather than the equilibrating idea that is now contained in the DSU is purely conjectural.[57] Another, more logical and more likely (in terms of the history of the system) explanation for the limitation on compensation or suspension actions that was introduced in the DSU is that the sovereign nations that make up the organization were trying to limit the overall power and to prevent punitive overreaching by some international juridical body that might be tempted to utilize "penalizing approaches." Even if an equilibrating or rebalancing concept were at play, one would have to recognize the many references in the DSU to compensation and suspension as being only "temporary."

Clearly, neither a fundamental rebalancing approach nor an efficient breach approach would adequately promote the broader policy goals inherent in paragraph 2 of DSU Article 3, "security and predictability." In connection with either of those concepts, one would have to ask what type of rebalancing would afford predictability and security to nondisputing parties, including third parties, to say nothing of the nongovernmental beneficiaries (individuals and entrepreneurs). Even when one considers that both rebalancing and efficient breach contemplate some mutual agreement between disputing parties, participation in such an agreement is still denied to third-party governments and the nongovernmental beneficiaries of the whole system, especially with regard to their ability to predict an impact on commercial decisions. Add to that the difficulty of quantifying, and one can see how damaging these concepts really are to the broader goals of the DS system.

Yet there is a germ of an idea that may be significant in some of the discourse on the subjects of this comment. That idea could be expressed as the need for an "escape valve" to enable governments that lose a case to improve their management of a situation that is politically thorny in their domestic legal and governmental context. Arguably, the DSU does handle that rather well, by affording a measure of additional time, "temporary time" to be sure, during which compensation and suspension can fend off some of the pressures of full compliance. But the ultimate idea that full compliance is an international law obligation can still be crucial to the notion of a rule-oriented system that is objective and creditable and provides a basis of security and predictability for all members of the organization, as well as nongovernmental beneficiaries of the system.

[55] Schwartz & Sykes, *supra* note 6, at S181.

[56] *Id.* at S189.

[57] *Id.* at S191.

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V. CONCLUSION

After carefully and thoroughly examining the WTO text as found in Article XVI of the WTO Charter and in twelve or more clauses of the DSU, I would argue that there is overwhelming support for the view that the result of a WTO dispute in a panel or (sometimes) appellate report that rules that the laws or other measures of a respondent nation are inconsistent with its WTO obligations is to create an international law obligation to comply with that report (when it is adopted, as they almost always are). Furthermore, in using other standard treaty interpretation techniques, this conclusion is reinforced by the text, object and purpose, context, and practice of the GATT and WTO over more than five decades.

In addition, an analysis of the most central policy goals of the DS system strongly supports the same conclusion, and argues against some of the alternative approaches to the question of the binding international law quality of DS results.

This conclusion and these considerations do not mean that the WTO DS system is perfect, or could not be improved, as some diplomatic activity is attempting to do.[58] In many ways, the DSU provisions on remedies, especially the temporary measures of compensation and suspension, are deeply flawed, and even dysfunctional. WTO members are questioning whether they really contribute to the effectiveness of the DS system, especially as regards their usefulness in promoting the critical and central goal of compliance, which maximizes the broader "security and predictability" goals of the institution.[59]

Basically, however, this author predicts that if the issue of the obligation to comply with dispute settlement reports explicitly comes before the WTO DS system, the Appellate Body (or the panel if its report is not appealed) will likely rule that an international law obligation to carry out those reports does exist.

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APPENDIX

UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

Article 3
General Provisions

2. *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.

4. Recommendations or rulings made by the DSB shall be aimed at achieving a *satisfactory settlement* of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

5. *All solutions* to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be *consistent with those agreements and shall not nullify or impair benefits* accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.

7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The *aim* of the dispute settlement mechanism is

[58] See the WTO document series TN/DS/. . . (2002–03).

[59] *See, e.g.,* Contribution of Brazil to the Improvement of the WTO Dispute Settlement Understanding—Revision, WTO Doc. TN/DS/W/45/Rev.1 (2003).

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to secure a *positive solution to a dispute.* A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the *first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent* with the provisions of any of the covered agreements. The provision of *compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal* of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of *suspending the application of concessions* or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.

Article 11
Function of Panels

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other *findings as will assist the DSB in making the recommendations or in giving the rulings* provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

Article 19
Panel and Appellate Body Recommendations

1. Where a panel or the Appellate Body concludes that a *measure is inconsistent* with a covered agreement, it shall *recommend that the Member concerned*[60] *bring the measure into conformity* with that agreement.[61] In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

Article 21
Surveillance of Implementation of Recommendations and Rulings

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.

6. The DSB shall *keep under surveillance the implementation of adopted recommendations or rulings.* The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall *remain on the DSB's agenda until the issue is resolved.* At least 10 days prior to each such DSB meeting, the Member concerned shall provide the DSB with a status report in writing of its progress in the implementation of the recommendations or rulings.

Article 22
Compensation and the Suspension of Concessions

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

[60] The "Member concerned" is the party to the dispute to which the panel or Appellate Body recommendations are directed. [*Editor's note:* This is DSU note 9.]

[61] With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26. [*Editor's note:* This is DSU note 10.]

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conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures *may request authorization from the DSB to suspend* the application to the Member concerned of concessions or other obligations under the covered agreements.

8. The *suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed,* or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

Article 26

1. *Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994*

Where the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded as a result of the application by a Member of any measure, whether or not it conflicts with the provisions of that Agreement. Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:

(b) *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.* However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment.

AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

Article XVI

Miscellaneous Provisions

1. Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the *WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947* and the bodies established in the framework of GATT 1947.

4. *Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations* as provided in the annexed Agreements.

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