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COMMENT

INTERPRETING THE WTO AGREEMENTS— A COMMENTARY ON PROFESSOR PAUWELYN'S APPROACH

INTRODUCTION

In his paper, Professor Pauwelyn argues that pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties (Vienna Convention),¹ the Appellate Body should consider other rules of international law in the interpretation of the WTO Agreements, when that law reflects the “common intentions” of the parties to the WTO. He argues that this does not mean that “all the parties to the WTO treaty must have formally and explicitly agreed, one after the other, to the new non-WTO rule; nor even that this rule must be otherwise legally bind all WTO members; but rather, that this new rule can be said to be at least implicitly accepted or tolerated by all WTO members, in the sense that it can reasonably be considered to express the *common intentions* or understanding of all members as to the meaning of the WTO term concerned.”²

This Comment is divided into three parts. The first part will analyze the Vienna Convention in order to determine whether it provides textual support for Professor Pauwelyn's approach. The second part will inquire into the systemic implications of his approach for the WTO, and for its connection with public international law. The final part will consider the implications of Professor Pauwelyn's approach for the legitimacy of the WTO, and conclude with some general observations on the relationship between the Vienna Convention and the WTO.

I. PROFESSOR PAUWELYN'S ARGUMENTS AND THE VIENNA CONVENTION

The Vienna Convention Article 31(3)(c) refers to applicable “rules of international law.” A rule of international law is only applicable to a State if it is legally bound by that rule. This understanding of when an international law rule applies for the purpose of Vienna Convention Article 31(3)(c) is confirmed by the Vienna Convention Article 2(1)(g), which

1. Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 31(3)(c), 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

2. Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535, 575–76 (2001) (emphasis added).

defines a “party” as “a State which has consented to be bound by the treaty and for which the treaty is in force.” This means that in the case of a WTO dispute, at a minimum, that the parties to the WTO dispute would also need to be parties to the treaty; legally bound by the rule of international law.

In contrast, Professor Pauwelyn argues that the Appellate Body can interpret the WTO Agreements by reference to other rules of international law when that rule represents the common intentions of all WTO members. Therefore, in order for his approach to remain consistent with Vienna Convention Article 31(3)(c), we need to interpret his approach as also requiring that the international law rule, at a minimum, be legally binding on the parties to a WTO dispute.

While the Vienna Convention Article 31(3)(c) requires that rules of international law be binding on the parties to the WTO dispute, there is nothing in the text that indicates that this is a sufficient as distinct from a necessary condition. It therefore remains an open question how many member States of the WTO, over and above those member states that are party to the WTO dispute, need to be legally bound by the rule of international law.

In order to answer this question we need to inquire into the meaning of the Vienna Convention’s qualification of the “rule of international law,” with the phrase that it be applicable “between the parties.”³ One approach is to consider how the phrase has been used in other articles of the Vienna Convention. The Appellate Body in *EC—Hormones* endorsed this method of treaty interpretation, when it stated that a treaty interpreter is not entitled to assume that the use of different words in different parts of the text was inadvertent.⁴ The necessary implication being that the use of the same words in different parts of a text indicate that these words should be given the same meaning.

The Vienna Convention Article 31 refers to “the parties” four times. The first reference is in Article 31(2)(a), which states that the context for the purpose of treaty interpretation includes “any agreement relating to the treaty which was made *between all the parties* in connection with the conclusion of the treaty.” (Emphasis added). In this Article, the word “all” qualifies the phrase “between the parties.” This suggests that the absence of the word “all” to qualify the phrase “between the parties” in Vienna Convention Article 31(3)(c) means that not all the parties to the WTO need to be parties to the rule of international law.

3. *Id.* at 575.

4. Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products*, WTO Doc. WT/DS26/AB/R, ¶ 164 (1998).

We are therefore left with the conclusion that the text of the Vienna Convention does not definitively answer how many States need to be legally bound by the rule of international law for the purposes of Article 31(3)(c). Instead, the Vienna Convention Article 31(3)(c) only bounds our inquiry. At a minimum we know that the parties to the WTO dispute must be legally bound by the rule of international law, and that it is not necessary for the rule of international law to be legally binding on all WTO members.

II. PROFESSOR PAUWELYN'S ARGUMENTS AND THEIR SYSTEMIC IMPLICATIONS

Professor Pauwelyn's approach fits within these boundaries outlined by Vienna Convention Article 31(3)(c). It is consistent with the minimal requirement that the international rule be binding on those WTO members who are parties to a WTO dispute, while requiring that the international law rules reflect the "common intentions" of the WTO membership suggests that the international law rule needs to be legally binding on some, but not all WTO members. In order to bring into relief the systemic implications for the WTO of Professor Pauwelyn's approach, this section will analyze the systemic implications of adopting either of these opposing interpretations of Article 31(3)(c) for the WTO.

A. *"Between the Parties" as all the Parties to the WTO*

Should the Vienna Convention Article 31(3)(c) be understood as referring to only those rules of international law that are legally binding on all WTO members, this would effectively preclude the Appellate Body from taking into account most rules of public international law when interpreting the WTO. This is because the WTO has a membership of one hundred and forty six States, which means that there are very few treaties that have been consented to by all WTO members.

One of the implications of this is that WTO law would become significantly less receptive to changes in public international law, and would instead need to rely on the member States to adopt interpretations of the WTO Agreements to reflect changes in international law. While this may not appear an undesirable result, according to the Marrakesh Agreement Establishing the World Trade Organization Article IX(2), the WTO membership cannot adopt an interpretation of the WTO Agreements unless there is a three-fourth majority. Therefore, in practice the WTO membership is limited in its ability to adopt interpretations of the WTO Agreements.

In his paper, Professor Pauwelyn's understanding of the WTO as firmly embedded within the system of public international law is part of the underlying rationale that drives his approach to Vienna Convention Article 31(3)(c). While an interpretation of the Vienna Convention Article 31(3)(c) as referring to all the parties to the WTO leaves intact the relationship of the WTO with public international law, the inability of the WTO to be interpreted by the Appellate Body to reflect those rules of international law that are widely accepted, if not consented to by all WTO members, severely limits the extent to which the WTO is able to reflect and respond to the larger body of public international law rules. The WTO as part of public international law would therefore be reduced to a mere formality and its jurisprudence would become devoid of the significance that Professor Pauwelyn desires.⁵

Finally, some writers have also observed that where the Appellate Body has interpreted the WTO in light of other rules of public international law, that this has added to its legitimacy by taking into account values that are widely accepted in the international community, and which are reflected in other international regimes.⁶ Further, it is clear that the mere fact that all WTO members have not consented to another treaty is not dispositive of that treaties international acceptance. For example, the United States has not consented to the Vienna Convention,⁷ yet the Convention has received such widespread acceptance by the international community that Vienna Convention Articles 31(1) and 32 have achieved the status of rules of customary international law.⁸ Therefore, to the extent that the Appellate Body is unable to interpret the WTO Agreements in light of other rules of international law because these rules are not legally binding on all WTO members, this will limit the sensitivity of the WTO to the diverse values that public international law embodies, thereby contributing to the perception that Appellate Body decisions lack legitimacy.⁹

5. See generally Pauwelyn, *supra* note 2.

6. Robert Howse, *The Legitimacy of the World Trade Organization*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 386 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

7. Note absence from official list of treaties in force at <http://www.state.gov/s/l/24224.htm> (last visited Oct. 5, 2004). See also Curtis A. Bradley, *U.S. Announces Intent Not to Ratify Int'l Criminal Court*, *AM. SOC'Y OF INT'L L.* (2002), at <http://www.asil.org/insights/insigh87.htm> (last visited May 9, 2004).

8. See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R, at 17 (1996).

9. See generally Daniel C. Esty, *The World Trade Organization's Legitimacy Crisis*, 1 *WORLD TRADE REVIEW* 7 (2002) (discussing the legitimacy problems facing the WTO as a whole).

B. "Between the Parties" as only the Parties
to the WTO Dispute

Pursuant to the Dispute Settlement Understanding Article 3.2, decisions of the Appellate Body do not create binding precedent.¹⁰ Nevertheless, the Appellate Body has held that adopted Panel reports create legitimate expectations among the parties to the dispute.¹¹ As a result, the Appellate Body and Panel rely on the reasoning and conclusions of previous Appellate Body reports to support their own conclusions. This has led the parties to a WTO dispute to frame their arguments in light of previous Appellate Body interpretations of the WTO agreements, and to legitimately expect either that Appellate Body decisions will follow the reasoning in previous Appellate Body decisions, or that reasoned explanations will be provided when this is not the case. This development of a *de facto* body of judicial precedence is also consistent with one of the goals of WTO dispute settlement, which, according to the Dispute Settlement Understanding Article 3.2, is to provide "... security and predictability to the multilateral trading system."

One of the consequences of the Appellate Body taking into account in its interpretation of the WTO Agreements only those rules of international law applicable between the parties to the dispute, is that this will effectively limit the relevance of its reasoning to the parties to the dispute. This will undermine the *de facto* precedential role that Appellate Body reports have come to play in the dispute settlement system. This would also make the outcomes of WTO disputes less predictable, as parties are less able to rely on previous Appellate Body decisions as guides on how it would approach a similar problem, which may ultimately discourage parties from resorting to the dispute settlement mechanism in the first place.

A final observation is that any interpretation of the WTO Agreements that undermines the precedence of Appellate Body reports will lead to a greater fragmentation of law within specialized organizations such as the WTO. Further, because Appellate Body decisions themselves form part of the corpus of international law, fragmentation of jurisprudence within the WTO will also translate to a greater fragmentation of public international law.

10. See DAVID PALMETER & PETROS C. MAVROIDIS, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION: PRACTICE AND PROCEDURE 38 (1999); see also Appellate Body Report, Japan—Taxes on Alcoholic Beverages, WTO Doc. WT/DS/8/AB/R at 13 (1996).

11. See *Japan—Alcohol*, *supra* note 10, at 13.

CONCLUSION

The approach advocated by Professor Pauwelyn regarding the application of Vienna Convention Article 31(3)(c) to the WTO tries to avoid some of the pitfalls associated with both of the interpretative approaches canvassed above. By arguing that the Appellate Body should interpret the WTO Agreements in light of those rules of international law that are not necessarily legally binding on all WTO members, but which reflect the "common intentions" of all the WTO members, he attempts to avoid the fact that there are very few treaties that have been consented to by all WTO members, while allowing the Appellate Body to refer to those rules of international law that have achieved wide spread support from the WTO membership. Further, by suggesting that international law should be binding on more than the parties to the WTO dispute, Professor Pauwelyn attempts to avoid the systemic implications that arise should the Appellate Body interpret the WTO Agreements by taking into account only those rules of international law that are only legally binding on the parties to the WTO dispute.

Nevertheless, the rules of international law that determine how States can be bound by international law constitute rules of recognition.¹² These rules are themselves normative, and compliance with them confers formal legitimacy on public international law.¹³ Therefore, any conclusion as to the systemic implications of Professor Pauwelyn's approach needs to weigh the value to the international system that formal legitimacy conveys on public international law, as against Professor Pauwelyn's results-orientated approach. This question is outside the scope of this paper, suffice for a preliminary observation, that a particularly strong and cogent alternative would be required to justify deviating from the international rules of recognition.

Finally, the limitations and uncertainties highlighted above with the two textual understandings of the Vienna Convention Article 31(3)(c), may point to a problem not with the rules of recognition but with the Vienna Convention rules on treaty interpretation. The Vienna Convention is forty-five years old and the International Law Commission produced draft rules on treaty interpretation as early as 1966.¹⁴ International law has come a long way since then, and as a result, the Vienna Conventions' articles on treaty interpretation may no longer provide adequate guid-

12. See THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 42 (1995).

13. See *id.* at 26; J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403, 2468 n. 186 (1991).

14. RALF GUNTER WETZEL, *THE VIENNA CONVENTION ON THE LAW OF TREATIES: TRAVAUX PRÉPARATOIRES* 239 (Dietrich Rauschning ed., 1978).

ance to the Appellate Body on how to deal with the interface between large multilateral treaty regimes and other international law rules.

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15. The views expressed in this Comment are those of the author and do not necessarily reflect the view of DFAT or the Australian Government.