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Do World Trade Organization Dispute Settlement Reports Affect the Obligations of Non-Parties?—Response to McNelis

Donald H. Regan*

I. INTRODUCTION

In the June 2003 issue of this Journal, Natalie McNelis argued that when a World Trade Organization (WTO) dispute is settled by a Dispute Settlement Body (DSB) report, even Members who are not parties to the dispute have an obligation to conform their behavior to legal principles laid down in the report.1 Although I am generally sympathetic to McNelis’s conclusion—and although I think she does a great service by directing our attention to the question of how Members, as opposed to later tribunals, should respond to DSB reports—I think her argument cannot stand as she presents it. After explaining my dissatisfaction with her argument, I shall offer an alternative argument that is more grounded in the texts of the WTO agreements. Along the way I shall also suggest that we can make McNelis’s conclusion somewhat more palatable to doubters by a more nuanced statement than she provides of just what is the obligation of non-party Members (hereafter simply “non-parties”).

For convenience, I shall refer to the view that DSB reports affect the obligations of non-parties as the “broad effects view” or simply the “broad view”, and I shall refer to the contrary view, that DSB reports affect only the obligations of parties, as the “narrow effects view” or the “narrow view”. It is tempting to refer to these two views as the “common-law view” and the “civil-law view”, since it is plain that the broad view is generally more congenial to lawyers trained in common-law systems and the narrow view to lawyers trained in civil-law systems. I eschew these terms for at least two reasons: First, I do not want to discuss thorny questions about what the civil-law and common-law approaches to this question really are, and whether they are really different. Second, the primary locus of the civil-law/common-law dispute is about the significance of judicial decisions as precedent for later judicial decision-makers. McNelis and I are asking about the significance of DSB decisions for the obligations of

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1 Natalie McNelis, What Obligations Are Created by WTO Dispute Settlement Reports?, 37 J.W.T. 3 (June 2003), 647. In addition to discussing the effect of DSB reports on non-parties, McNelis also discusses a number of issues about the effect on the obligations of the parties that I am going to ignore, for example, whether a Member whose measure has been held illegal is bound to eliminate it vis-à-vis Members other than the original challenger (in this connection see the Brazilian proposal for a “fast-track” remedy, “Contribution of Brazil to the Improvement of the WTO Dispute Settlement Understanding”, TN/DS/W/45 (11 February 2003)) or whether a Member whose anti-dumping procedure has been held illegal is bound to reopen anti-dumping orders that are already final.
non-judicial actors (WTO Members) who were not parties. Hence I shall speak of the "broad view" and the "narrow view", stipulatively defined as above. (Not surprisingly, I think my central arguments in favour of the broad view in Section IV have some bearing on the question of how far DSB decisions must be followed by later tribunals; but to keep this comment comment-size, I shall not address that issue directly.)

Notice that even the broad view does not say that DSB reports have the same effect on non-parties as on parties. A party who is the addressee of a final order from a judicial tribunal with jurisdiction is subject to an obligation to obey that order that has no equal in the legal system for specificity and peremptoriness. And by the same token, there is no question of imposing sanctions on any supposed delinquent (leaving aside unusual instances of authorized self-help) until the delinquency has been confirmed by a specific judicial order. But the broad view does not deny either of these truisms. Conversely, the truisms leave room for the possibility that even though the primary effect of judicial orders is on the parties to the dispute, and even though the effects on the parties are distinctive, there is still some effect on the obligations of non-parties as well. That is what the broad view affirms and the narrow view denies.

The Appellate Body famously said in Japan—Alcohol that adopted Panel reports (and by extension adopted Appellate Body reports) "are not binding, except with respect to resolving the particular dispute between the parties to that dispute". But I see no reason to take this as stating more than the two truisms above (and perhaps the additional point that in the WTO context, only a winning party is entitled to sanctions). We need not read the Appellate Body as asserting the narrow effects view, which we have seen is not entailed by the truisms. Indeed, the Appellate Body seems to assert something akin to the broad effects view when it says that adopted Panel reports, and by extension adopted Appellate Body reports, "create legitimate expectations".

Notice that anyone who tried to rely on the Appellate Body statement about non-bindingness as authoritative support for the narrow effects view would be involved in a pragmatic contradiction. It could be that the Appellate Body meant to assert the narrow view (though I doubt it); and it could be that the narrow view is correct (though I doubt that too); but it could not be that the Appellate Body’s asserting the narrow view constitutes any authoritative reason for believing it. The proposition one is putatively led to believe—that adopted reports have no effect at all beyond the dispute—would undermine any possible force of the Appellate Body’s assertion as a reason. In contrast, the Appellate Body’s assertion (noted above) of something like the broad view can be a reason for believing what they assert, although there is still the mild paradox that the Appellate Body’s assertion cannot be the only reason. There must be some independent reason to credit the Appellate Body’s pronouncements with force beyond the dispute, else we are allowing them to create their own authority, raising themselves up,

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2 Japan—Taxes on Alcoholic Beverages, WT/DS8 and DS10 and DS11/AB/R (4 October 1996), ¶E.
3 Dispute Settlement Understanding (DSU) 22.2.
4 Japan—Alcohol, ¶E.
Münchhausen-like, by their bootstraps. The lesson is, we cannot look just to the Appellate Body to settle the significance of Appellate Body reports.\footnote{In the passage under discussion from Japan—Alcohol, the Appellate Body also discusses both Article IX:2 of the WTO Agreement and Article 3.9 of the DSU. I return to these in Section IV.}

II. McNelis’s Argument, and Why It Proves Too Little or Too Much

McNelis’s argument for the broad effects view is simple and straightforward. She imagines a case in which a Member is engaged in some practice which has been held illegal in a previous DSB proceeding to which the Member was not a party; and she argues that if the Member’s practice is challenged, it should not insist on relitigating the issue. She observes first that there is an obligation of good faith in treaty-related behaviour;\footnote{See the Vienna Convention on the Law of Treaties, Article 26 (treaties must be "performed ... in good faith") and Article 31 (treaties shall be "interpreted in good faith").} she points out that once the DSB has decided some legal issue (especially by adopting an Appellate Body report), there is strong reason to expect that they will decide the same issue the same way in future cases; and she suggests that good faith requires that a Member whose practice is challenged should not insist on relitigating the legality of the practice when the Member should reasonably expect it will lose.\footnote{McNelis, note 1 above.} (She later makes the closely related suggestion that to insist on relitigation would be an \textit{abus de droit}.\footnote{Id.}) So, for example, once the DSB has decided that “zeroing” is not permitted in certain kinds of cases under the Anti-dumping Agreement, then even non-parties to the dispute in which that rule was announced know that they will lose in any future challenge to their zeroing in such cases; hence they have an obligation of good faith to stop zeroing in such cases—presumably without even waiting to be challenged and certainly without waiting for a DSB ruling against themselves.

Now, I think McNelis is absolutely right to give a central place to the obligation of good faith; indeed, for reasons I shall come back to, I think good faith plays a larger role in establishing the precise content of the obligation than she recognizes. But I do not think her argument for an obligation of non-parties is sufficient as it stands. To see why, let us begin with a hypothetical case in which the DSB has not ruled at all. Suppose there is disagreement among the Members—good faith disagreement, not just posturing—about whether zeroing violates Article 2.4.2 of the Ant-dumping Agreement, properly interpreted. Suppose, however, that it is universally known how the Appellate Body will decide this question; they will decide against zeroing. This situation may be unlikely, but it is possible; perhaps the particular people on the Appellate Body published articles, or made statements, before their appointment, which make their views clear and fully predictable. Is there an obligation of all Members to abandon zeroing at this point? Surely not? Whatever the force of Appellate Body decisions in creating obligations, the dispositions of Appellate Body members to...
decide one way or another do not create obligations, no matter how definitely they are known. That is a proposition on which civil lawyers and common lawyers can surely agree.

It might be suggested that the Member that continues zeroing, knowing it will lose, is causing a waste of resources. And is not that a violation of good faith? Insofar as this suggestion requires a response, I would say that the Member that honestly believes the members of the Appellate Body are wrongly disposed—the Member that honestly believes that if and when it loses a zeroing case it will be being deprived of a freedom reserved to it by the Agreement—that Member is entitled in good faith to insist that it will give up the freedom only to a challenger that cares enough to support the cost of litigation. But in truth, the real point is just the intuition I have already stated, and which I expect to be universally shared: the mere dispositions of Appellate Body members to decide one way or another do not create obligations, period. It might be generous, or even expedient, for the Member that knows it is going to lose to abandon the cause without a fight. But if there is room for good-faith disagreement about the meaning of the treaty texts, there is no obligation to bow in advance to what the Appellate Body has not yet said.9

But now consider the situation where the Appellate Body has already ruled against zeroing in some particular context. McNelis thinks the ruling changes the obligations of non-parties, but how exactly is this supposed to happen? Let us focus on a non-party Member that still believes the Appellate Body is wrong. The Member knows that when it is challenged on zeroing (in that same context), if it insists on litigating the case, it will almost certainly lose. But that was true also in our hypothetical above, and it was not enough to ground an obligation of good faith to stop zeroing. The point is that, considered simply as evidence regarding the Appellate Body's future behaviour, an Appellate Body decision is not essentially different from other kinds of evidence that we have seen are inadequate to create an obligation. McNelis's claim must be that there is something special about evidence which takes the form of a decision; and since there is no way in which the decision is necessarily better as evidence, the claim must be that the mere fact of a decision makes a difference. But to rely on that claim as a premise of the argument is to beg the precise question in issue, which is whether the mere fact of a DSB decision changes non-parties' obligations.

Another way to make my present point is to observe that if McNelis's argument were valid, then it would apply to any system with a standing high court and an obligation of good faith. McNelis's argument would show that in any such system, the view that judicial decisions affect only the obligations of parties to the dispute—what I

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9 To be absolutely clear, notice I am not suggesting in any way that a Member never has any obligation under a provision of the agreements until it has lost a dispute settlement proceeding involving that provision. There is a general obligation of good faith to conform one's behaviour to the agreements. In any case where the Member has no good faith argument that it is not covered by some provision (and a fortiori in any case where no Member could believe in good faith that it was not covered, if such cases exist), the Member has an obligation to conform in advance of any dispute proceedings.
have called the "narrow view"—is incoherent. But surely the narrow view, which is often said to be a distinguishing feature of the civil-law approach, is not incoherent. It may or may not be the right view about the WTO, but it is a possible view. To decide whether it is the right view about any particular system, including the WTO, we need an argument that is specifically about that system.¹⁰

III. INTERLUDE: ASSUMING NON-PARTIES HAVE AN OBLIGATION, WHAT IS ITS CONTENT?

In Section IV I explain why I think the best reading of the WTO texts supports McNelis's general conclusion that DSB reports affect the obligations of non-parties. But it may be easier for some readers to accept that conclusion—and the significance of my arguments will in any event be clearer—if we pause for a moment over the question of what precisely the effect of DSB reports on non-party obligations might be. I have already said that I think McNelis is right to bring into the discussion the general treaty obligation to act in good faith. But to my mind, she does not go far enough in exploiting the notion of good faith. McNelis suggests in effect that Members, even non-party Members, have a good faith obligation to follow the legal principles laid down in Appellate Body rulings. I would suggest instead that Members' obligation is to approach the question how to respond to Appellate Body rulings with a good faith concern for the integrity of the system as a whole, and to act accordingly. McNelis's obligation is grounded in good faith, but the content of the obligation can be stated without any reference at all to good faith. The content of the obligation as she describes it is just to follow the principles laid down by the Appellate Body, which is not so very different from the obligation to obey rules like the rule that forbids tariffs in excess of one's bindings. In my view, in contrast, the content of the obligation can only be stated as an obligation to respond in good faith to the Appellate Body's decisions.

Let us have an example. Consider once again the Member that believes in good faith that zeroing is permitted (in some context) by the Anti-dumping Agreement, and suppose the Appellate Body has just decided, in a case involving a different respondent, that zeroing (in that context) is illegal. Must the Member immediately give up zeroing?

¹⁰ At one point, McNelis adds rhetorical force to her argument by pointing out that if we adopt the narrow effects view, then in order to eliminate some illegal practice across the board, we might need a long series of cases, against every Member who engages in the practice. McNelis, as note 1 above. But even if this seems like a practical disaster, it is not a logical disaster. The proponent of the narrow view could point out that if each user of the practice initially believes in good faith that the practice is legal (and if they do not believe that, they are violating an obligation more basic than any created by a DSB ruling), then they can continue to hold that belief in the face of one or two or any number of contrary DSB decisions. On the narrow effects view, there is no obligation for a Member to revise its good faith view of the meaning of the Agreements under the influence of DSB reports. So any Member that genuinely disagrees with the Appellate Body can hold out in perfect good faith for a ruling addressed to itself. (As I explained in the previous footnote, this is not to say there is never any obligation without a DSB report.) If that threatens a practical disaster (and it is surely specially problematic in a system with weak or no retrospective remedies), then we have a policy argument for adopting the broad effects view. But the question before us now is not which view, broad or narrow, is desirable, but which is embodied in the WTO agreements as they stand. The primary source for answering that question must be, not our policy preference, but the texts.
Not necessarily, I would say. Courts have been known to reverse themselves. Indeed, as has been pointed out specifically with reference to the WTO, where the “political” branches of the system can revise a decision of the Appellate Body only with the greatest difficulty, it may be specially necessary for the Appellate Body to stand ready to reverse itself when it has erred. But of course, the Appellate Body will have no chance to reverse itself unless the issue is presented to it again. So the Member that ignores the first decision and gives the Appellate Body a second chance may be doing a public service.

Does it follow that the disagreeing Member should always feel free to make the Appellate Body, after it has announced a rule, confirm it in a second case? No, that would be going too far in the other direction. Whether the Member can ignore the first decision is a delicate question, which cannot be answered by any purely mechanical process of reasoning. It depends on the strength of the argument that the Appellate Body was in error; on the reasons the Member has for thinking it would defend its position more effectively than did the previous respondent, perhaps even raising arguments that were not made at all the first time around; it depends on how many other Members share the Member’s objection to the Appellate Body ruling; on the extent to which the Member is aiming at the purity of the law rather than merely at its own advantage; on the urgency of having a final answer to the underlying issue immediately; on the costs to a challenging party of new litigation; and so on. All we can say is that sometimes the Member should bring its own behaviour into accord with the Appellate Body ruling immediately; and sometimes it may, consistently with a good faith commitment to the integrity of the system as a whole, decline to do so. Nothing is definite but the obligation to act in good faith.

This illustrates and confirms my point that the reference to “good faith” is essential to specifying the content of the obligation. The obligation of a non-party vis-à-vis an Appellate Body ruling is not like the “good faith” obligation not to impose a tariff above the bound level. Rather, the non-party’s obligation of fidelity to Appellate Body rulings is an obligation of good faith through and through. There is no way to specify how the non-party must respond, except by saying that it must be guided by a good faith concern for the integrity of the system. That will often require immediate acceptance of the Appellate Body ruling—probably more often than not—but not always. Of course, if a Member does force relitigation of a previously decided issue, and if the Appellate Body decides the same way a second time, it is even less likely that any Member would be justified in forcing a third relitigation. We need not worry about the spectre of an endless series of cases relitigating the same issue. And even more

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12 McNelis, note 1 above, at nn. 44 and 55, does acknowledge somewhat grudgingly in two footnotes that the obligation may be shaded towards my version of it. But she does not comment on how this changes the nature of the obligation.
emphatically, nothing I have said entails that a Member can always refuse to comply, without being in bad faith, until there is a ruling specifically against it.

There is another way in which good faith is part of the content of the obligation. In the preceding discussion, I assumed implicitly that the recusant non-party Member's situation was identical to the situation of the losing party in the previous case; and I suggested that even so, the Member might be justified in a bit of resistance if it thought resistance was for the good of the system. But sometimes, of course, the Member may think that its situation is factually distinguishable—even if other Members regard the claimed distinction as captious. Once again, I think the obligation of the Member can only be described in terms of good faith. Not just any factual difference between the Member's situation and the previously adjudicated situation will justify the Member in resisting a challenge to its practice. Some distinctions are captious. But if the Member believes in good faith that the relevant Agreement, under the best interpretation, treats its case differently from the decided case, then the Member has no good faith obligation to abandon that belief in advance of a decision on its specific situation.

I have now explained the version of the broad effects view that I think is embodied in the WTO texts. The sceptical reader may suspect that my preference for the broad view merely reflects my common-law background. My principal defence against such an accusation must be the textual exegesis in the next section. But let me also remind the reader that my position is itself something of a compromise, at least between extreme versions of the "common law" and "civil law" views. I claim that DSB reports have some effect on the obligations of non-parties. But I have acknowledged (as any lawyer of any background must) that DSB reports do not have the same effect on non-parties as on parties. I shall not be arguing for an absolute, immediate obligation of non-parties to accept and follow the pronouncements of the DSB. With regard to non-parties, my claim is only that they must give appropriate weight in their own deliberations to interpretations of the Agreements in DSB reports.

IV. THE TEXTUAL ARGUMENT FOR THE BROAD EFFECTS VIEW

My argument for the broad effects view will be single-mindedly text-based. That may call for a brief apologia. I do not claim there was a perfect meeting of minds between the Members concerning the effects of DSB reports on non-parties' obligations; probably there was not. But one object of negotiating and then hammering out an agreed text is to give us a text that we are licensed to read as if it reflected convergent intentions, even though we know that the actual convergence was imperfect. Subject no doubt to some limitations, the existence of an agreed text authorizes the fiction that convergence was achieved and that the text, interpreted according to the appropriate canons, embodies the convergent intentions. If the message of the text is tolerably clear, as I think it is in this case, there is a substantial burden of proof on anyone who argues that Members need not be guided by that message.
Now to the argument. The obvious place to look for support for the broad view is Article 3.2 of the Dispute Settlement Understanding, and the supporting text most often mentioned seems to be the first sentence: “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.” This sentence does offer some support for the broad view: if we adopt the broad view, obligation will propagate through the system faster than on the narrow view (though still not instantaneously, as I have explained), and that will increase security and predictability. However, I think that the sentence is not such strong support as it seems at first. The reason is that the sentence is completely consistent with the narrow view. Even if it were universally agreed that DSB reports had force only for the particular dispute, the existence of the dispute settlement system would still promote security and predictability: by providing for definitive adjudication of particular disputes; by providing for sanctions when a measure found to be illegal is not withdrawn or adequate compensation provided; and, as the Section 301 Panel reminded us, by requiring that challengers of disputed measures do not apply sanctions except through the dispute settlement process. All of these valuable consequences are completely consistent with the narrow view of the force of DSB reports. So even on the narrow view, the dispute settlement system would be “a central element in providing security and predictability to the multilateral trading system”. But if the sentence makes perfect sense even in conjunction with the narrow view, it cannot provide conclusive support, or even very strong support, for the broad view.

It is true, of course, that on the broad view, the dispute settlement system would do even more to provide security and predictability. But it is not a sound principle of interpretation that, if the text says the dispute settlement system provides some good, we must answer all fairly debatable questions about the structure of the system in the way that will maximize the achievement of this good. That would be teleology run wild. Certainly we must understand the system in such a way that any statement in the text (in this case, the statement that the system provides security and predictability) is true and significant. But as I have argued, that statement will be true—and it will be a significant truth, not just a marginal truth—however we answer the question about the effects of DSB decisions on non-parties.

To my mind, there is much stronger support for the broad view in the next sentence of DSU 3.2: “The Members recognize that ... to clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law.” For a start, there is an explicit recognition here that the covered agreements may be unclear in certain respects, and that something must be done about it. Interpretation is required, and interpretation is part of the function of the dispute settlement tribunals. But this of course could still just be interpretation in each case independently, to resolve the

dispute between the parties, and no more. However, the text does more than to call for interpretation; it also uses the word “clarify”. The dispute settlement system serves “to clarify the existing provisions” (emphasis added). What I want to argue is that if DSB decisions had no force beyond the immediate dispute in which they were rendered, the DSB’s decisions would not be properly described as “clarifying the provisions of the agreements”. In such a system, DSB decisions would reveal the beliefs and dispositions of panellists and Appellate Body members, and they would therefore affect Members’ rational expectations regarding the outcomes of future cases. But that is not the same as legitimating expectations (as the Appellate Body has said DSB reports do), and it would not amount to clarifying the agreements, as opposed to the interpreters’ dispositions.

My argument about the significance of “clarify” is based on two subsidiary propositions: (1) “clarification” of the provisions is an operation on the meaning of the provisions, and (2) the meaning of the provisions is something that exists in a public space shared by all the Members. As to the first point, a somewhat delicate statement is required. It would invite misunderstanding to say simply that clarification changes the meaning of a provision; but clarification does change something about the meaning. Clarification is only possible if there is some uncertainty about the meaning; and what clarification involves is narrowing down the range of uncertainty—either by fixing on one particular meaning within the range of possibilities (which would be full clarification), or just by eliminating some of the possibilities without fixing on one (which would be partial clarification). In either case, our understanding of the meaning is changed; and the “meaning” is changed if we think of the meaning before clarification as being the range of possible meanings. But the meaning is not changed in the sense that any new possibility not within the original range of uncertainty is established, or even added to the possibilities. This is why I say clarification changes something about the meaning, but does not “change the meaning” in the crudest sense.

The second point is even simpler; the meaning of the provision, as I have said, is something in the common space. It is something that exists equally and with the same force for all Members at any given time. That is not to say there cannot be disagreement about the meaning; if there were no disagreement, there would be no call for interpretation. But even where there is disagreement, what each competing view makes a claim about is an asserted meaning for all Members. If a DSB decision affects the meaning of a provision, then its effect cannot be limited to the parties to the dispute. The decision has an effect on something that is the common property of all the Members and that all the Members have a good faith obligation to respect.

In sum, the notion that DSB decisions “clarify the provisions of the agreements” entails that DSB decisions affect the good faith obligation of all Members, including non-parties. “Clarification” affects meaning; and the meaning is something common to

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14 Japan—Alcohol, §E.
all Members. This is consistent with my argument in Section III that Members may not be required by good faith to obey immediately; it may take more than one DSB decision to definitively achieve clarification (even partial clarification). But still, the good faith obligation of all Members in regard to their deliberating is different after a DSB decision is rendered from what it was before. “Attention must be paid.”

It may seem that I am putting a lot of weight on a single word, “clarify”. I plead guilty. There are few enough words in the texts that bear on the present very important question; we must weigh those we have carefully. And this word is particularly pregnant. A proponent of the narrow view might try to insist that any “clarification” in a particular case is for that case or for those parties only. But this does violence to the ordinary meaning of “clarify”. There is all the difference in the world between a dispute settlement system that merely interprets the agreements as necessary to decide each new dispute (starting in principle with a clean slate on every occasion), and a system that clarifies the provisions of the agreements by its activity.  

Turning to the texts that are thought to weigh against the broad effect view, what most requires discussion is Article IX:2 of the WTO Agreement, but let us first get a few other provisions out of the way. DSU 19.1 says that when a Panel or the Appellate Body finds a violation, it shall recommend that “the Member concerned” bring the measure into conformity. DSU 17.14 says that an adopted Appellate Body report shall be “unconditionally accepted by the parties to the dispute”. DSU 22.2 gives only a “party having invoked the dispute settlement procedures” a right to compensation or to authorization to suspend concessions. All of these provisions may seem to limit the effect of DSB reports to the parties to the dispute, but to my mind they reflect only the truisms we identified in Section I about how the effects on parties are distinctive. As we have noted before, to say the effects on the parties are distinctive is not to say there are no effects on non-parties, and I see nothing in these provisions that suggests that narrow effect view.

Somewhat more interesting is the final sentence of DSU 3.2: “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” We cannot read these words too strictly. Any interpretation of a controverted provision, even if it is thought to affect only the parties before the tribunal, “add[s] to or diminish[es]” rights and obligations in a natural, pragmatic sense. The winning party has a definite right, whereas before it had only a claim of right; the losing party, if the challenged regulation is invalidated, has a definite obligation where it could previously claim to have none. So, what the prohibition on adding to or diminishing rights or obligations plainly means is that the dispute settlement tribunals

15 Another text that is sometimes cited in favour of the broad view is Article XVI:4 of the WTO Agreement, which says that “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements”. But to rely on this as support for the broad view is to beg the question, which is precisely what each Member’s “obligations” are, and how they are affected by DSB reports. XVI:4 is neutral on the choice between the broad and narrow views. Someone might even suggest that XVI:4 supports the narrow view, since it refers to obligations “as provided in the annexed Agreements’, and not to obligations as interpreted by the Appellate Body. The answer to this is that one of the annexed Agreements is the DSU, so whatever the DSU says about the effect of DSB reports on Members’ obligations can be read into XVI:4.
should not be “activist”. They should stick to the texts, interpreting them in accordance with customary rules of interpretation. But this injunction to stick to the texts says nothing about whether a decision once rendered has force only for the parties or for all Members. On the one hand, an Appellate Body that claimed each decision affected only the parties but that was zealously activist in its substantive interpretations would be violating the stricture against altering rights and obligations. On the other hand, if a decision is sufficiently faithful to the texts so that it does not add to or diminish the rights or obligations of the parties to the dispute, then extending the legal principles of the decision to cover similarly situated non-parties would not add to or diminish their rights or obligations either. The issue about activism and the issue about broad or narrow effect are distinct.

To be sure, if the Members, when they wrote the WTO agreements, thoroughly distrusted the new tribunals, doubting their willingness or ability to avoid activism, they might have decided to cabin the effect of the activism they anticipated by stipulating that DSB decisions had no effect beyond the particular case. But the actual sentence in DSU 3.2 about not “adding to or diminishing rights or obligations” would not be a natural vehicle for expressing that decision. On the most natural reading, the sentence is simply an injunction against judicial activism, with no bearing on our present problem. (To reason that the Members wanted to discourage activism, so we must read the text to include every imaginable constraint on activism, would be another example of teleology run wild.)

That brings us to Article IX:2 of the WTO Agreement, which says that “The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.” Probably the commonest textual argument against the broad effects view is that if DSB decisions had effects beyond the parties, then they would count as “adopting interpretations”, which the DSB is not authorized to do. Obviously, I reject this argument, but even so, I agree with one of its presuppositions: the word “adopt” is of crucial importance. It is clear from the start that “adopting an interpretation” of the agreements cannot be just the same thing as “interpreting” the agreements. DSU 3.2 explicitly gives the DSB the authority to interpret the agreements (specifically, to clarify them according to “customary rules of interpretation”), and if the DSB has the authority to interpret the agreements, then the simple authority to interpret cannot be what the Ministerial Conference and the General Council [hereafter MC/GC] have exclusively.

So, how is “adopting an interpretation” different from “interpreting”? As I said, proponents of the narrow view claim that “adopting an interpretation” is formulating an interpretation which will affect the obligations of all Members, whereas “interpreting” is formulating an interpretation which has force only for a specific

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16 That is why it makes sense to repeat the injunction of DSU 3.2 in DSU 19.2, following on 19.1, which is specifically about how a Panel or the Appellate Body shall treat parties.

17 Simon Lester, WTO Panel and Appellate Body Interpretations of the WTO Agreement in US Law, 35 J.W.T. 3 (June 2001), 521-543, at 528, points out also that DSU 17.6 refers to the Appellate Body reviewing “legal interpretations” by the Panel.
dispute. If this claim is right, then IX:2 directly announces the narrow effect view. But the claim is not linguistically plausible. The DSB is doing the same thing in any particular case—it is “interpreting” the provisions of the agreements—whether or not its decision has force for non-parties. The question whether DSB decisions have force for non-parties is a genuine and serious question; but it is a question about the effect of what are in either case DSB interpretations. It is not naturally formulated as a question about whether the DSB is allowed to “adopt interpretations” or merely to “interpret”.

Of course, even a forced reading of IX:2, and in particular of the word “adopt”, must be accepted unless there is a more natural reading that coheres with the rest of the texts. I think there is such a reading. I suggest that what the word “adopt” points to is not just the broad force of an MC/GC interpretation, but rather to its legislative, or quasi-legislative, quality. The word “adopt” suggests an exercise of the will of the agency that does the adopting—that is what I refer to as the legislative quality. Actually, there is some internal tension just in the phrase “adopt interpretations”. “Interpretation” suggests guidance entirely by the text and its background, at least ideally; the interpreter must exercise judgment about what the text means, but this exercise of judgment is not an exercise of the interpreter’s will. In contrast, “adopt” suggests a contribution from the will of the “interpreter” in choosing between possible interpretations. The reason we have a phrase with this internal tension is that the “legislative” exercise of will by the MC/GC is limited; the power to adopt interpretations is not to be used “in a manner that would undermine the amendment provisions in Article X”. In other words, the exercise of legislative will is limited to choosing between what can plausibly be viewed as possible “interpretations”. Still, choosing by an act of will from the range of meanings that could possibly be regarded as interpretations is not the same as interpreting.

Paying attention to the legislative flavour of the word “adopt” is the key to making conjoint sense of WTO Agreement IX:2 (giving the MC/GC exclusive authority to “adopt” interpretations) and DSU 3.2 (giving the DSB authority to “interpret” and to “clarify”). To see how the authority of the MC/GC is “legislative”, and the authority of the DSB is not, even on the broad view of the effects of DSB decisions, consider some crucial differences between what the DSB does and what the MC/GC can do. (1) The DSB can only announce an interpretation in the context of a case; it must wait for an issue to be presented to it.18 In contrast, the MC/GC can reach out to decide any interpretive question sua sponte whenever it wants.19 (2) I have argued that a decision by the DSB, even if it affects the obligations of non-parties, does not always “bind” them in good faith immediately. In contrast, I assume an interpretation by the MC/GC does bind all Members immediately. A Member could only ignore such an interpretation if it

18 See Claus-Dieter Ehlermann, Six Years on the Bench of the “World Trade Court”—Some Personal Experiences as Member of the Appellate Body of the WTO, 36 J.W.T. 4 (August 2002), 605–639, at 629, “Regrettably, until now, no appeal has given [the Appellate Body] the opportunity to ... [contribute to the interpretation of] the dividing line between Article III:4 and Article XI.”

19 If the MC/GC wants to act on an Annex 1 Agreement, the required recommendation from the relevant Council can presumably be arranged.
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could argue in good faith that it was not an "interpretation" at all but a forbidden evasion of the amendment procedures of Article X. (3) Finally, the DSB itself is bound by interpretations adopted by the MC/GC, but the reverse is not true. Even if the DSB has acted first, the MC/GC can use its interpretive power to overturn a decision of the DSB.20 Indeed, if the MC/GC were somehow able to overcome its political paralysis and actually use its power to overturn decisions of the DSB, that would take some pressure off the Appellate Body; it would allow the Appellate Body, not to be "activist", but to be less self-consciously literalist in its opinions than it now is, seemingly out of reluctance to give any appearance of activism.21 These very significant distinctions all reflect the essentially legislative power of the MC/GC—much more legislative than judicial even though the scope of the power is limited to choosing among possible interpretations. And I emphasize again, the distinctions are all there even if we accept the broad view of the force of DSB decisions.22

In line with the suggestion that "adopt" points to an essentially legislative function, notice that there is nothing in IX:2 to suggest it is particularly concerned to reserve interpretive power to the MC/GC as opposed to the DSB. On its face, and considering its context, it seems to be primarily about reserving interpretive power to the MC/GC as opposed to the Director-General, or the Secretariat, or the Agreement Councils, or the various Committees. To be sure, whatever IX:2 reserves exclusively to the MC/GC it denies to the DSB, inter alia. But even so, the natural focus of the provision is relevant to thinking about what the provision exclusively reserves; and here the natural focus suggests that what it reserves is a legislative power.23

20 This is confirmed by DSU 3.9, preserving the right of Members to seek "authoritative interpretation" through "decision-making", but it seems to me it would be the correct understanding even without 3.9.
21 Ehlermann, as note 18 above, also suggests (not on the same grounds I have given) that it would help the dispute settlement tribunals if the political organs were more active. He observes that "The judge's job becomes much more delicate, if the political decision-making process is slow or—as in the case of the WTO—practically blocked" (p. 632), and he would "congratulate the WTO if its political organs were able to use Articles IX and X of the Marrakesh Agreement to react to an interpretation of a covered agreement, given by a Panel or the Appellate Body, with which these political organs disagree" (p. 636).
22 It is worth mentioning that when the Appellate Body discusses Article IX:2 in Japan—Alcohol, §E, it is explaining why an adopted Panel report does not, and an MC/GC interpretation does, constitute a "definitive interpretation". The notion of a "definitive interpretation" suggests the second and third "legislative" aspects of MC/GC interpretations that I have discussed in the text. The same can be said of the phrase "authoritative interpretation" in DSU 3.9.
23 If we put so much weight on the word "adopt", what should we make of the fact that the DSB also "adopts" Appellate Body reports and Panel reports (if unappealed, or as modified)? See DSU 16 and 17.14. The answer, I think, is "Nothing". The phenomena the word "adopt" refers to in these two usages are so utterly different that there is not even any pressure to try to make the usages parallel. When the MC/GC "adopt" an interpretation, they are acting. They are making their own distinctive contribution to the state of the law, and they are doing so as the expression of a corporate intention constructed out of at least largely convergent intentions of the Members. In contrast, when the DSB "adopts" a Panel or Appellate Body report, it does not really act at all. It makes no contribution of its own to the state of the law, and its "adoption" need not represent any corporate intention. A chaotically divergent and conflicting array of Member positions on the report will result in adoption, under the negative consensus rule. We could eliminate the concept of DSB "adoption" from the Dispute Settlement Understanding if we just said straightforwardly that Appellate Body reports and unappealed Panel reports enter into force unless they are rejected by the DSB. There is obviously no comparable way to eliminate the concept of MC/GC "adoption". Considered in the abstract, the word "adopt" seems a peculiar choice for referring to what the DSB does when it adopts a report. The explanation, of course, is that the word is taken over from pre-WTO GATT practice, when the adoption of a report by the Contracting Parties was by positive consensus and was a significant act.
To summarize this section: The primary argument that DSB decisions have broad
effect is based on the phrase "clarify the existing provisions" in DSU 3.2. Broad effect is
absolutely necessary to make sense of the idea that DSB decisions "clarify" the
provisions of the Agreements. "Clarification" is an operation on the meaning of the
provisions, and the meaning is the common concern of all Members, parties to the
dispute or not. There is a further argument for broad effect based on the statement that
the dispute settlement system "provid[es] security and predictability"; this argument is
not strong enough to play a leading part, but it can take a supporting role. The primary
argument against broad effect is the argument from WTO IX:2, reserving to the MC/
GC "the exclusive authority to adopt interpretations". But we have seen that it is easy
to make sense of IX:2, while accepting broad effect; the crucial point here is the
legislative quality of "adopt". There is another possible argument against broad effect,
which appeals to the prohibition in DSU 3.2 on "adding to or diminishing the rights
and obligations", but the argument does not stand up to analysis; this prohibition on
"adding or diminishing" is a stricture against activism, and the issues of activism and of
broad or narrow effect are orthogonal. As I have said, we want to find a reading that
makes sense of all the texts together. The only reading that does that points to broad
effect for DSB reports.24

V. CONCLUSION

DSB reports affect the good faith obligations of non-parties to the disputes. The
obligations in question are not merely founded on the principle of good faith; rather,
their content is specifiable only in terms of good faith. DSB reports do not necessarily
require instant acceptance and obedience; what they require of a Member acting in
good faith depends on the circumstances. In the long run, of course, decisions of the
DSB will "clarify the provisions" of the agreements, and issues on which good faith
disagreement used to be possible will become issues on which a recalcitrant position
manifests bad faith. But there will always be an area at the boundaries of what has been
clarified up to that point, where Members have obligations that cannot be specified
except as obligations to pay attention to what the DSB has said, and to be guided by a
good faith concern for the integrity of the system as a whole.

24 In a broadly similar discussion of the effects of DSB reports, Simon Lester, as note 17 above, also gives
special attention to the words "clarify" and "adopt". His argument is less elaborated, and there is one point I
disagree with. Towards the end, Lester suggests that it matters little whether we rely on the idea that the dispute
settlement process "clarifies" the provisions of the agreements or just on the idea that it provides "legal
interpretations" of them (p. 531). I do not say I would change my ultimate view about broad and narrow effect if
the word "clarify" were not there, but I definitely think its presence matters. "Clarify" strongly suggests a future-
oriented operation on meaning and thus requires the broad effects view, whereas "interpret" is equally consistent
with either view, broad or narrow.