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Process and Procedure in WTO Dispute Settlement[†]

John H. Jackson^{††}

Well, thank you very much, Professor Barceló. It is indeed a pleasure and a privilege to come here, not only to see Cornell and the premises, as splendid as they are, but also to see all these very high-powered experts here in the room that are, I am sure, just waiting to cut me to pieces on anything I have to say. But, it is really great to have exchanges of this type. I want to also say I am just very pleased that we are honoring Professor and Doctor Yasuhei Taniguchi.¹ He and I have been friends for, I think, forty years (he counted one time for me). It is always a pleasure to listen to him, and he touched on some things this morning that I have been struggling with also.² I felt he “pressed the right buttons,” so I am hopefully going to build a little bit on what he has said. Among other things, I think that what he is saying is that there are some important weaknesses in the World

[†] This Comment is based on a presentation that the author delivered at Cornell University Law School during the Berger/*Cornell International Law Journal* Symposium.

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1. For background information on Professor Taniguchi, see Keynote Speaker: Yasuhei Taniguchi, <http://www.lawschool.cornell.edu/newsevents/Berger-ILJ-Symposium/Keynote-Speaker.cfm> (last visited Sept. 27, 2009); Yasuhei Taniguchi—Lawyer Profile, <http://www.martindale.com/Yasuhei-Taniguchi/1233487-lawyer.htm> (last visited Sept. 27, 2009).

2. See Yasuhei Taniguchi, *The WTO Dispute Settlement as Seen by a Proceduralist*, 42 CORNELL INT'L L.J. 1 (2009) (discussing the structure and function of the WTO dispute settlement system).

42 CORNELL INT'L L.J. 233 (2009)

Trade Organization (WTO) Dispute Settlement (DS) system.³ On this, I fully agree.

The WTO DS system is probably the single most powerful juridical-type institution at the international law level, assuming you do not count something like the European Community—which I think now is no longer international, but more like a national system—or the Roman Empire. I think the WTO DS system is enormously powerful, and it has some very important interrelationships with the international system. Those interrelationships are something that a lot of us, including Georges Abi-Saab,⁴ have had to struggle with, because there is a certain interplay that goes on.

First of all, I want to deal with the overall picture of international law. Secondly, I want to take up one particular issue, namely the question of the use of precedent.

Let me talk first about some general perspectives of international law which have some effects on the WTO. My comments stem, incidentally, from my book that was published by Cambridge University Press two years ago—*Sovereignty, The WTO and Changing Fundamentals of International Law*.⁵ In that book, I took up a series of jurisprudential issues that I encapsulated in short, succinct portions.⁶ Now some of my work has gone beyond that, using that book as a jump-off point. Of course, the precedent issue is one of about a dozen of those issues that can be taken out somewhat more in depth. So, indeed, that means that this is in a sense a work in progress. The book is finished, but this is a work in progress of the next phase.

Now I will start with the notion that when you really get under the skin of international law, the logic of international law is really very defective. This is provocative, I know, and again, I am somewhat tentative in saying this, but I am beginning to be more and more certain.

There are a number of different reasons that support my growing certainty, the crux of which is what is really customary international law. How should we treat treaties? Should treaties all be treated the same way or should some treaties be treated differently, such as a so-called “constitutional” treaty? Some treaties have huge memberships, including the WTO,⁷ and they are virtually impossible to amend.⁸ And so we have treaty rigidity, which really raises a series of questions of how matters in a juridi-

3. For information on the WTO DS system, see generally ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* (1997).

4. See, e.g., Georges Abi-Saab, *The WTO Dispute Settlement and General International Law*, in *KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS 7* (Rufus Yerxa & Bruce Wilson eds., 2005).

5. JOHN H. JACKSON, *SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW* (2006).

6. See generally *id.*

7. As of July 23, 2008 the WTO has 153 members. See *Understanding the WTO: The Organization—Members and Observers*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Sept. 27, 2009).

8. See, e.g., Sital Kalantry, *The Intent-to-Benefit: Individually Enforceable Rights Under International Treaties*, 44 *STAN. J. INT'L L.* 63, 81 (2008).

cal institution associated with the treaty should proceed, and that might mean different ways of going about the interpretation.

Now there are several conundrums that I will just mention very rapidly, and each one of them is provocative. In particular, I think there are three worrisome issues or conundrums that have enormous implications for general international law, but also some risks and dangers. The first one is the shift in attitudes about sovereignty. What is sovereignty? Sovereignty has been described as organized hypocrisy.⁹

Secondly, there are various ideas about the legitimacy of international law norms. What does it stem from? What is the basis? Is it truly consent of sovereigns? If you think that sovereignty is being challenged, then the consent of sovereigns idea as a base of international law is enormously weakened, and so we really have to think about that. Now, Oscar Schachter¹⁰ and Louis Henkin¹¹ have both been great inspirations for me in my work. Oscar Schachter, who is now deceased, had written in one passage that I have often used that there are thirteen different basic sources of international law, and he goes through all thirteen—a “baker’s dozen,” if you will.¹² Thirdly, there is the question of the role of treaties in municipal law and domestic law. So you can see that if you have struggled with any of these issues, and I imagine that almost everyone here has struggled with them, that there really are many things that we could spend hours on individually.

Now the WTO in a sense is a case study, a very important case study of how some of the “devil in the detail” is going to play itself out in these matters. There is a tremendous amount of experience involved already in the eleven or so years that the WTO and its dispute settlement system has existed. Incidentally, for the dispute settlement system, I use the word “juridical,” because we are not supposed to use the word “court” or “tribunal.” So I use the word juridical, but the WTO is an extraordinary juridical process, and there have been many cases brought before the WTO DS system.

In addition, I will add, we have something like 35,000 pages of jurisprudence from that effort now. When you compare that to other international juridical institutions, that is really quite an extraordinary output. I would claim, and I have claimed in print, that it is extraordinarily high

9. See, e.g., STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 42 (1999).

10. For background information on Professor Schachter, see generally Lori Fisler Damrosch, *Oscar Schachter (1915-2003)*, 98 AM. J. INT’L L. 35 (2004); Richard N. Gardner, *Remembering Oscar Schachter*, 43 COLUM. J. TRANSNAT’L L. 663 (2005).

11. For background information on Professor Henkin, see generally Harold Hongju Koh, *The Future of Lou Henkin’s Human Rights Movement*, 38 COLUM. HUM. RTS. L. REV. 487 (2007); José E. Alvarez, President, Am. Soc’y of Int’l Law, Address at Columbia Law School on Louis Henkin’s 50th Anniversary in the Academy (Sept. 21, 2006), available at <http://www.asil.org/pdfs/presremarks060928.pdf>.

12. Oscar Schachter, *Towards a Theory of International Obligation*, in THE EFFECTIVENESS OF INTERNATIONAL DECISIONS 9, 9-12, 30-31 (Stephen M. Schwebel ed., 1971).

quality overall.¹³ This does not mean that there are not some things that we might differ on, or that I might not criticize in other contexts. I said this once in the presence of the then-Appellate Body membership about ten or fifteen years ago, and then at the lunch that followed, a member asked me, "Would you tell me which one of those you think are the wrong decisions?" I replied, "I won't touch that with a ten foot pole." But, anyway, he is still around; and we will probably tangle some more on those things.

Now, looking at some of the international law theory weaknesses, there are four problems that really have engaged some of my attention at least, and I want to mention them to show the scope of the problems that we have to face. One question is: Is there an obligation on the part of the nation-state to perform as suggested in a report of the Appellate Body or of a panel? Now you think that answer would be absolutely certain, but the answer has been fought over in the literature.¹⁴ I have been an active participant in that literature.¹⁵ I have come to the conclusion that there is an international law obligation to perform, but that it had to be, and may still have to be, worked over.¹⁶

Secondly, there is a question of the role of precedent. Thirdly, there is a question of the effects of precedent and its role in municipal law. Those two questions are linked, and I will show you how. Fourthly, there is a question of the degree of deference that the international system in the WTO generally should take toward the nation-state, and the troubles and difficulties that it has. Now some of those issues begin to point to the treaty process and particularly the question of interpretation. The basis of most discussion on the interpretation of treaties in international law has been the Vienna Convention on the Law of Treaties¹⁷ (VCLT).¹⁸ I do think there is very good reason to question that; we really have to release ourselves from some of the constraints that some people seem to read into that Convention.

We have to understand that in the WTO context, the Vienna Convention is not operating as a treaty, because more than sixty members of the WTO have not ratified the Convention.¹⁹ That includes such countries as

13. John H. Jackson, *The Role and Effectiveness of the WTO Dispute Settlement Mechanism*, 2000 BROOKINGS TRADE F. 179, 179-80.

14. Compare JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 126-27 (2d ed. 1997) [hereinafter *WORLD TRADING SYSTEM*], with Eyal Benvenisti, *Judicial Misgiving Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EUR. J. INT'L L. 159, 166 (1993) (stating that there is no international obligation to perform).

15. JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 81-89 (1998) [hereinafter *TRADE ORGANIZATION*]; *WORLD TRADING SYSTEM*, *supra* note 14, at 126-27.

16. *TRADE ORGANIZATION*, *supra* note 15, at 94.

17. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

18. See, e.g., *TRADE ORGANIZATION*, *supra* note 15, at 94.

19. See Barry Cohen, Comment, *The Diplomatic Relations Act of 1978*, 28 CATH. U. L. REV. 797, 813 n.97 (1979).

Brazil,²⁰ France,²¹ the United States,²² and Indonesia.²³ And so, the issue is not the language of the treaty itself, but it is the argument that that language embodies customary international law, and that gets you into a whole series of questions. One question is do we really need to adhere to the VCLT so compliantly? In fact, it has not always been done. I think the WTO Appellate Body has been pretty nuanced in that. But what I am suggesting is that we have to adopt the somewhat more liberal idea of potential interpretive mechanisms. Now, what are some of the interpretative techniques that might be looked at that do not seem to have strong grounding in the Vienna Convention? One is so-called “purposive,” that is, looking at policy goals and policy directions, sometimes called the teleological technique.

Second, the way preparatory work is utilized can be disputed. I think the notion that it is only supplementary is wrong and does not get to some of the essential needs of treaty interpretation. There is also a question of “evolutionary” interpretation. The question of deference to the nation-state I mentioned already; the question of precedent that I also mentioned; and also underlying all this, the question of whether the process is often one of balancing, proportionality, and not just a particular rule that has to be applied. In particular, I have criticized—in print and otherwise—rules such as *in dubio mitius*,²⁴ which I think can undermine a good interpretation.

Now let me turn to the precedent question. My basic starting proposition is that the concept of precedent in international tribunal usage needs some important attention in international law discussions and analysis. The word precedent needs to be differentiated from the phrase *stare decisis* and analyzed for what it is. In my view, precedent is not a binary concept—that is, not a yes or no. It is a multilayered concept, or a ladder of concepts, which must be carefully used, and, incidentally, I am not the only one that says this. Professor John Barceló, in fact, is an author of a chapter in a book that has been very useful in some of my thinking on

20. Guido F.S. Soares, *The Treaty-Making Process Under the 1988 Federal Constitution of Brazil*, 67 CHI-KENT L. REV. 495, 496 (1991) (stating Brazil has not yet ratified the Convention).

21. Salvatore Zappalà, *Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation*, 12 EUR. J. INT'L L. 595, 602 n.40 (2001) (stating France has not ratified the Convention).

22. Durval de Noronha Goyos, *Reflections on Certain U.S. Law Specificities that Constitute Obstacles to the Free Trade Area of the Americas: A Brazilian Perspective*, 28 U. MIAMI INTER-AM. L. REV. 543, 556 (1997) (stating the United States has not ratified the Convention).

23. Garrie J. Moloney, *Australian-Indonesian Timor Gap Zone of Cooperation Treaty: A New Offshore Petroleum Regime*, 8 J. ENERGY NAT. RESOURCES L. 128, 136 n.67 (1990) (stating Indonesia has not ratified the Convention).

24. John H. Jackson, *The Varied Policies of International Juridical Bodies—Reflections on Theory and Practice*, 25 MICH. J. INT'L L. 869, 873-74 (2004) (*in dubio mitius* expounds the idea “that if there is any doubt about an interpretation at all, the government that has signed on to it and is now the actor taking a certain interpretation has not consented to anything else”).

precedent, and he knows indeed about what I am talking about.²⁵

Precedent has some very strong policy underpinnings. I will give you a hypothetical here; I am not sure how far I can get into this, but let me take a stab at it. To make matters a little more concrete, let me suggest the following as to the question “what is international law?” This discussion has some important relevance to domestic law and the jurisprudential policy of the United States. Unfortunately we all recognize that just prior to 2009, the current U.S. government has not been exactly friendly towards international law, so the matter I am raising has some poignancy and implications of some importance to world order, peace, and good policy. My hypothetical also illustrates the troubled landscape of how international law is applied in domestic nation-state systems: our municipal law.

Suppose a nation such as the United States does not directly apply a treaty measure, that is, does not give it self-executing status, or what I have termed in some of my writing, “statute-like” treatment.²⁶ Nevertheless, despite such a dualist approach, a treaty, even when not given direct effect, most certainly does have *some* effects upon the domestic law. One such effect is the rule of consistency, which we sometimes in U.S. jurisprudence call “The Charming Betsy” case.²⁷ Suppose a national court is interpreting what international law is and, in light of statutory interpretations, has several choices. If only one of those choices is consistent with international law, then the court is supposed to take that approach. This has been somewhat controversial.²⁸ Suppose a court in the United States is interpreting a U.S. statute, and there is a claim that the U.S. statute is in conflict with a treaty phrase in the WTO. Suppose there is advocacy on both sides of this, and so the judge rightly says, “Where do I go? Where should I look?”

Key question: should he look at the WTO Appellate Body opinions and what should he make of them? He goes to the WTO Appellate Body opinions and suppose, hypothetically again, that the WTO Appellate Body reports ruled in a certain way on the question. Now suppose at the nation-state level (e.g., the U.S. court), you have advocates on both sides, and what do they seem to be arguing in this context? One of the things that they argue is no, the Appellate Body ruling is *not* law. Then they usually refer to the language that parallels Article 59 of the Statute of the International Court of Justice, which I quote, “[t]he decision of the court has no binding force except between the parties and in respect of that particular case.”²⁹

25. See John J. Barceló, *Precedent in European Community Law*, in INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 407-36 (D. Neil MacCormick & Robert S. Summers eds., 1997).

26. See, e.g., John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 310 (1992).

27. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress . . . can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in [the United States].”).

28. See, e.g., *Sampson v. Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001).

29. Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

Now that is devastating, you would think, to the idea of precedent. It really undercuts the notion—it certainly means there is no *stare decisis*, but that is not what we are talking about. Remember, I am talking about a laddered layer of different concepts and precedent from the top—*stare decisis*—to something less weighty with burdens of proof, and then all the way down to the case where we do not pay any attention to it except for its titillating effect. So, you have this possibility at that point. But in practice, various tribunals of the world, including nation-state tribunals that arguably do not use a common law *stare decisis* method, do follow precedent. The European Community Court of Justice in Luxembourg is a very good example.

It is more of a continental court system than it is common law.³⁰ It has used reference to prior cases in its operations.³¹ Now it does accommodate somewhat better than *stare decisis* would, the opportunity to ask for a change, to reason there should be a change. The ICJ to some extent does this, and scholars have noted that even in continental countries, which some would argue are not following precedent or would not have to follow precedent,³² we do see precedent operating. In the book that I mentioned is one example, and there are many others. I also have colleagues in Europe who elaborate on that,³³ so European countries are constantly using precedent. Now, in the WTO, we see precedent being used, no matter how you call it.

Furthermore, there might be special reasons in the WTO for this activity to continue. I do not like to push this idea that the WTO is a separate juridical system, but here is an area where it might be said to be. In the Dispute Settlement Understanding,³⁴ there is a stress that the most central element in the dispute settlement process is “security and predictability.”³⁵ Now for things to be secure—stable, in other words—and predictable, you really have to have some precedential effect, and when you look at what is happening in the cases, you see that. For instance, in *US–Steel Safeguards*, the WTO panel came out with a 1000 page report that had 5800 footnotes, almost all of which were to prior cases in the WTO jurisprudence.³⁶ So

30. See COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, *SELECTED INSTRUMENTS RELATING TO THE ORGANIZATION, JURISDICTION AND PROCEDURE OF THE COURT* (1975) (1963).

31. See, e.g., Case C-127/08, *Metock v. Minister for Justice, Equal. & Law Reform*, 3 C.M.L.R. 39 (2008).

32. JACKSON, *supra* note 5, at 173-77; see also KONRAD ZWEIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 259-65 (Tony Weir trans., 3d ed. 1998).

33. Carl Baudenbacher, *Some Remarks on the Method of Civil Law*, 34 *TEX. INT'L L.J.* 333, 349-54 (1999); Louis F. Del Duca, *Developing Global Transnational Harmonization Procedures for the Twenty-First Century: The Accelerating Pace of Common and Civil Law Convergence*, 42 *TEX. INT'L L.J.* 625, 641-48 (2007).

34. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 *I.L.M.* 1125 (1994).

35. *Id.* art. 3.2.

36. Panel Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R (July 11, 2003).

there we have precedent in practice—at least some sort of precedent.

That is most of my argument, but not all of my argument. We really do need to be thinking constructively about what precedent means generally in international law, but particularly in the WTO context. I think it does not mean that a domestic U.S. court, for instance, should ignore what the WTO Appellate Body has said. I think not only should a domestic U.S. court not ignore it, but rather the U.S. court should give what the Appellate Body said great weight. And there has to be a reasoned argument given if some departure from that is going to happen. That reason should not be just about someone having a different view, but that there really is some reason why we should not part from the precedent area.

Now where does all this take us? I have to admit that my criticism is dangerous in the minds of some people, because if we release ourselves from the disciplines of the Vienna Convention, or certain other concepts that have been deemed to be embedded in international law, doesn't that raise the danger, the "horror" that people express of judicial activism? The answer is yes, it does that, but we have to be more sophisticated.

Just like using the word "sovereignty" as a mantra to scare people off something that is mainly proposed to coordinate internationally, judicial activism is also a dangerous mantra. So, what could you say if, however, you are trying to justify that approach as to what is international law? I will use a phrase from Justice Oliver Wendell Holmes from more than a century ago. He said we have to recognize the possibility for a concept of a ruling of the past to be considered.³⁷ But, he says basically that a prediction of what the courts will do "is nothing more or less" what it deems to be the law.³⁸ So maybe a prediction of what the Appellate Body would do in the light of what they have done in their practice for eleven or twelve years and these one hundred plus cases is indeed law, if we view law in that broader context.

37. See generally Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

38. Francis D. Wormuth, *The Dilemma of Jurisprudence*, 35 AM. POL. SCI. REV. 44, 46 (1941).