Comments

AMBASSADOR IRA SHAPIRO*, S. BRUCE WILSON**, D.G. WADDELL***, AND BERND LANGEHEINE****

AMBASSADOR IRA SHAPIRO: Ambassador Shapiro stated that from the perspective of the United States, the WTO dispute settlement mechanism has been largely successful. He recalled that in 1994, at the time of consideration of the WTO Agreements by Congress, there had been serious concerns about loss of sovereignty, which led to the "Dole proposal." But, in the end, Congress supported the WTO, including the dispute settlement system. Three years later, we learn that we were correct in determining that the system would be beneficial to us. Under GATT, the ability of the losing party to block decisions had been very frustrating to the United States. The value of binding dispute settlement has been borne out.

The United States has been the most active user of the dispute settlement system, bringing over thirty-five cases. On balance, the United States has had more victories than losses. Some of the victories have been against major trading partners, as in *EU—Beef Hormones, EU—Bananas, Canada—Split Run Magazines, and Japan—Alcoholic Beverages*. This is important, because inability to get concessions from major trading partners was precisely what prompted the United States to opt for binding dispute resolution. U.S. losses have been relatively modest. In cases brought by the United States, the U.S. record is something like seventeen and one. In some cases, such as *Japan—Sound Recordings*, merely

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bringing the case to the WTO prompted settlement. Shapiro noted that the United States has not pursued the Dole proposal for domestic review of WTO dispute settlement decisions, and that is probably for the best.

However, Shapiro stated that there have been some unfortunate decisions. One of these was the *Japan—Film* case. That case illustrated the point that hard cases make bad law. The panel in that case focused excessively on individual measures and not enough on the overall picture. As Ambassador Barshefsky observed in the wake of the panel report in *Japan—Film*, the panel "showed an instinct for the capillary." *Japan—Film* may show the limits of WTO panels' ability to deal with subtle forms of trade discrimination. The WTO should have lent its weight to the position that the Japanese film distribution system is not open. Nevertheless, some progress was made. Despite the formal outcome of the panel proceeding, Japan did feel, owing to the pendency of the case and the spotlight it shone on Japanese government and private sector practices, the need to reform its distribution system. For instance, Japan made changes to its Large-Scale Retail Stores law and took film out of the 1995 Business Reform Law. In the United States, Congress and the public should look at the *Japan—Film* case in context, and they probably will.

Next, Shapiro emphasized that under the WTO dispute settlement system, litigation does not replace negotiation. There is still a role for negotiation. He cited *Japan—Sound Recordings* and *Brazil—Automobiles* as cases in which negotiation played a significant role following the threat of litigation. Even if a party succeeds in litigation, it still must negotiate with its adversary to devise an appropriate remedy. *Japan—Alcoholic Beverages* is an example of substantial negotiation over a remedy following affirmative decisions by the panel and Appellate Body.

Referring to Ambassador Yerxa's paper, Shapiro highlighted several problems for the dispute settlement system that are on the horizon. One problem is the general hostility to the U.S. antidumping law. The U.S. antidumping law will be challenged in the future, and we can't be certain of its ultimate fate. A second problem will be the use of trade sanctions to pursue foreign policy goals, as in the case of the Helms-Burton Act and sanctions imposed by Massachusetts on companies that invest in Burma. Shapiro expressed his hope that such matters will remain in the realm of diplomacy, rather than entering the realm of trade dispute settlement. These are essentially foreign policy matters, not trade protection matters. Further, the United States has undertaken an evaluation of these policies in light of opposition from allies, and over time, these issues will sort themselves out. A third problem on the horizon is the linkages between trade and the environment, which will test the limits of Article XX of the GATT 1994. Shapiro encouraged negotiation over such issues, as was done in the *United States—Tuna-Dolphin* case and the *EU—Leghold Traps* case.

Finally, Shapiro observed once again that the United States has benefited a great deal from the WTO's dispute settlement system. The United States has managed to use the dispute settlement tools created by the WTO very effectively.

The questions were posed as to how one can distinguish legitimate motives from

illegitimate motives in cases such as the Helms-Burton Act and the Massachusetts legislation concerning investment in Burma, and why a policy should be treated differently in dispute settlement simply because it was prompted by a foreign policy motive.

Shapiro responded that in the *Helms-Burton* and *Massachusetts/Burma* cases, the motivations of the legislators influenced his judgment that these were foreign policy matters and not trade matters. Also, the volume of trade affected and the legislative history influenced his judgment. He noted that there have been diplomatic consequences for the United States in these two cases, and they weigh in the balance in evaluating those policies.

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S. Bruce Wilson: Wilson commented that the dispute settlement system is a work in progress. So far, the record of its performance has been very positive, but Congress is watching closely. However, the key year, from the perspective of the U.S. Congress, is not 1998 but 2000. Under section 125 of the Uruguay Round Agreements Act—the so-called Gingrich "sovereignty provision"—every five years Congress may consider, pursuant to a privileged resolution introduced by any Member of Congress, whether or not the United States should remain in the WTO. So, 2000 is when the political debate in Congress on the performance of the WTO could lead to some legislative response.

Several controversial, as-yet-unresolved cases could trigger the political debate. These include cases which the United States is the plaintiff—*U.S.—Helms-Burton, U.S.-Massachusetts—Burma Investments*, and *EU—Shrimp-Turtle*—as well as cases in which the United States was the complaining party, such as *EU—Bananas, EU—Beef Hormones*, and *Japan—Film*. The key in *EU—Beef Hormones* and *EU—Bananas* will be whether there has been effective implementation by the EU. The jury is still out on how the European Union will implement the decisions in those cases. In the *Japan—Film* case, we still must wait to see what the practical outcome will be under the Administration's new monitoring initiative, in terms of impact on opening of the Japanese market. Satisfactory implementation still must be devised in many cases in which the United States has prevailed on the complaining party, and politicians will be watching closely.

Wilson also commented that U.S. antidumping legislation will be another topic in the political debate about continued U.S. participation in the WTO dispute settlement system. A concerted effort was made to draft amendments to the U.S. antidumping law to ensure compliance with WTO obligations. The U.S. antidumping law probably will be challenged. However, other countries are more vulnerable than the United States in this area. There may be a proliferation of challenges to antidumping laws in the WTO, but they may not necessarily be against the United States. One key in how the WTO antidumping agreement will be evaluated, both domestically and internationally, is the outcome of sunset reviews under U.S. law.

In conclusion, Wilson commented that, over time, the United States should learn to live comfortably within the WTO dispute settlement system. However, we still need to see what happens pursuant to section 125 reviews in Congress as the WTO system evolves in the future.

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D.G. WADDELL: From a Canadian perspective, and as one of the more frequent users of the system, the new WTO dispute settlement system has worked, and is working, extremely well since its inception just over three years ago. Canada is third, after the United States and European Union, in the number of consultations requested.

Panel and appellate body decisions have been timely, well reasoned, and established important guidance to interpreting WTO obligations. I would emphasize in particular the fact that once the panel and appellate body reports have been adopted, unsuccessful defendants have committed to implement the DSB recommendations. So far, this has strengthened overall discipline within the trading system. Canada, for its part, has indicated its intention to implement the panel findings on magazines within 15 months, by the end of next October. Make no mistake, the panel outcome is not popular in Canada. But, the Canadian government has made clear that Canada will respect the decision, and live up to its obligations. But Canada will also provide support for publishers of Canadian magazines, consistent with trade obligations.

I will confine myself to three observations based on the excellent paper prepared by Ambassador Yerxa and Mr. Marantis. First, a fair assessment of the new system from a trade policy, if not a legal practitioners' perspective, must look beyond a simple accounting of the outcome of disputes for which there has been a panel decision. The rigour of the dispute settlement system has encouraged members to reach mutually agreed solutions prior to reaching the litigation stage of the process. This has resulted in improved market access for Canadian products.

Canada has made nine requests for consultations—seven of these have been resolved satisfactorily—five through negotiations and two as a result of panel decisions; two remain outstanding: one at the panel stage and the other at the consultation stage. The U.S, too, can point to similar positive results resolving disputes and improving access for U.S. goods and services.

My second observation relates to the U.S./Japan film dispute. Since the panel's findings in this matter have not yet been circulated to Members of the WTO, Canadian legal and trade policy experts have not yet had an opportunity to examine the rationale in support of the findings. The findings are understandably a disappointment to the United States. However, this should not lead to the conclusion that the panel was at fault, that the system is not functioning effectively, or that it is operating against the United States' interests. Non-violation arguments are difficult to make. Canada, at least, subscribes to the position that panels are not to make new rules but to apply the existing rules, a view that the United States

has shared in the past. We will all want to study the full report carefully and assess its implications.

Does it mean that the dispute settlement system has fallen short of expectations, as suggested by Ambassador Yerxa? Or, does it lead to a conclusion that there is a problem with the disciplines? If so, it is for Members to strengthen the disciplines through negotiation.

Alternatively, it may be that there is nothing wrong with the rules, but the WTO dispute settlement system is not adequately equipped to make determinations of the facts applicable in a particular case. We all like to win. We understand the political imperatives of a win/lose score card. However, losing does not mean that the system is not working. It is in all members' interest to have a strong rules based system. Ensuring predictability and stability in the application of the rules is so important for traders.

My third observation relates to the risks of invoking the national security exception in a dispute. Just as the United States was disappointed with the outcome of the film dispute, Canada has been disappointed and concerned by the U.S. response to the possibility that a panel might be asked to examine the consistency with the rules of measures under Helms-Burton, measures that have an impact on Canadian investors and traders. Mr. Yerxa's paper raises the right questions. I would underscore one question that goes well beyond the specifics of the Helms-Burton dispute. If one subscribes to the view that the national security exception is an entirely self-justifying provision which, once invoked, offers blanket protection, is there not a risk that others might claim national security exemptions on matters fundamental to their national and political interests, broadly defined, when the rules do not suit?

There have been assertions that Helms/Burton measures are "political" and that Canada and the EU should exercise restraint in exercising trade agreement rights and seek solutions through consultations. The burden of exercising restraint should not rest exclusively on Canadian and European shoulders.

To conclude, Canada is very pleased with the efficient functioning of the WTO dispute settlement system. We recognize the system is not perfect and we have had to deal with some procedural and technical difficulties over the last three years. Our experience with dispute settlement in the NAFTA context has made us conscious of various options, some of which might improve the process, and some of which highlight the advantages of the WTO standard of appeal and the efficiency of panel selection.

However, Members have worked around the procedural and technical difficulties when using the dispute settlement system. In the discussions that will be held this year regarding the review of the dispute settlement understanding, we must keep in mind that the system is still a new one despite its extensive use: a work in progress. It may well be in the interests of all Members to have a thorough exchange of views on a number of issues but to let the system evolve a little bit longer before proposing changes and/or amendments. What we do not want are

the changes, or even the review process itself, to jeopardize the present efficient functioning of this valuable dispute settlement mechanism: the jewel in the crown, which preserves a strong rules-based multilateral trading system.

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BERND LANGEHEINE: Langeheine commented that the European Union generally has been satisfied with the dispute settlement system. He observed that sovereignty concerns have been less significant for the EU Member states than for the United States, because EU members were already used to living with the European Court of Justice by the time WTO dispute settlement came along. Like the United States, the EU has been a major user of the dispute settlement system. It was involved as a complaining or defending party, or third party, in sixty-six out of the first one hundred cases. Most cases involving the EU have concerned agriculture and fisheries.

The dispute settlement system has been relatively efficient. The binding aspect of the system has encouraged early settlement, but only when the issues have been clear cut and not emotionally charged.

Langeheine expressed skepticism at Ambassador Shapiro's remark that cases should be kept out of the WTO dispute settlement system simply because they concern measures that were not motivated by a trade discriminatory animus. Motivation for a measure that affects trade can be difficult to discern. He also expressed skepticism at the suggestion that some commentors have made that the approach of the Appellate Body vis-à-vis panel reports has been to "sweeten the loss." A case in which the Appellate Body decision did not involve marginal corrections in order to sweeten the loss was *EU—Beef Hormones*, which involved very delicate issues about a country's ability to provide its own level of regulatory protection, as did the *U.S.—Reformulated Gasoline* case.

Next, Langeheine observed that no party has yet rejected a panel's findings. He is particularly encouraged by the reaction of the U.S. Trade Representative to the report in the *Japan-Film* case. He added that the outcome of that case counsels development of rules to deal with competition policy, a proposal which the European Union supports. Responding to Wilson's comments, he noted that the European Union fully intends to implement any changes made necessary by the decisions in *EU—Beef Hormones* and *EU—Bananas*.

Finally, on the subject of reforming the system, Langeheine stated that there have been discussions within the European Union concerning development of professional panels and enhancing transparency in the dispute settlement system. He also commented that, in the long run, there is a need to develop rules to deal with the relationship between trade and the environment. The absence of such rules puts too much of a burden on panels and the Appellate Body by leaving them with difficult policy decisions that should be made by the WTO Members instead.