ROUNDTABLE SUMMARY AND LOOKING TO THE FUTURE

Reflections on WTO Dispute Settlement

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I. Overview

In the year 2000, by Act of Congress, the United States will review its participation in the World Trade Organization (WTO), and may through expedited legislative procedures, consider withdrawal if, on balance, the determination is made that the costs of membership outweigh the benefits.

The jewel in the crown of the WTO, for the United States—and perhaps many foreign—negotiators was the new Dispute Settlement Understanding (DSU). Undoubtedly a key factor in the political sustainability of the WTO in the United States will be an assessment of the performance of the dispute settlement system.

There are several tests that Americans should apply in evaluating the system. These fall into three general categories:

(a) *U.S. National Commercial and Other Interests*. The first test, which lawyers, but not members of Congress, might overlook, is whether WTO dispute settlement is serving American interests. This is not just a question of law.

Does dispute settlement lead to the opening of foreign markets in fact? This is not a calculation of numbers of cases won or lost, but what happened to trade flows. This is a practical, real world test. If a case brought by the United States was "won", did market access follow? Although unusual, if the United States lost a case it brought, it will still be asked whether market access was in any event achieved?

Where the United States is a defendant, or might become one, does the WTO dispute settlement mechanism interfere with U.S. freedom of action in an unacceptable way. This question may arise most often in form of challenges to U.S. trade restrictions imposed in the name of environmental concerns. It may occur

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in the form of challenges to the deployment of U.S. trade remedies. Where a decision was made not to invoke a trade remedy, the question must be asked whether U.S. leverage was diminished to an unacceptable degree, where in the absence of the DSU, the United States would have had alternative means to pry open foreign markets—through diplomacy and unilateral action.

(b) *The Effectiveness of the Existing System.* There will also be tests which are internal to the system:

(1) Are disputes being resolved in full consistency with established substantive rules? Have the substantive results been everything that was bargained for? At the other extreme, did the results go beyond what member nations bargained for?
(2) Is the dispute settlement process itself demonstrably fair and impartial? Is the process balanced—do plaintiffs and defendants bear appropriate burdens?
(3) Are the decision-makers—the panelists—adequate to the job at hand?
(4) Is the system efficiently managed and adequately and impartially staffed?
(5) Do interested third countries and the private parties at interest, have sufficient access to the process?
(6) Does the United States staff its litigation effort adequately and manage it well?
(7) Is appellate review adequate?
(8) Does the public at large receive adequate and timely information?

(c) *The Need for Negotiation of New Substantive Rules, Institutions and Procedures.* The third and last set of questions involves whether, in order to increase the value to the United States and the world trading system of the dispute settlement system, changes are needed. These changes might have to come primarily through negotiation, to expand the coverage of the substantive rules, the membership of the WTO, and reform the dispute settlement process, in order to remedy defects found under the first two sets of questions.

II. Discussion

Americans have a natural and long affinity for seeking to introduce judicial process into international trade disputes. This seems natural to a group of lawyers, but it is relatively unusual in America's approach to international relations in the political sphere. We do not, as a nation, accept as many legal constraints in international politics. We place embargoes on transgressors, be they Cuba or Iraq. While we seek international approval, in matters of international politics, we generally do not seek international adjudication. We would not accept putting to an independent arbitral panel a binding decision as to whether the seventh fleet should occupy the Taiwan Straits, or the sixth fleet the Indian Ocean. But this is exactly what the United States did in the 1994 Uruguay Round with respect to our commercial interests.

The United States bound itself under the DSU of the WTO: (1) not to make an independent national finding of whether U.S. rights had been violated under the WTO accords, (2) not to block the constitution of a panel nor (3) the adoption of its report, and (4) to subject itself to a binding panel process that would quickly find the United States in violation of the WTO if it acted to apply sanctions without approval of the WTO. In short, the United States gave up its Big Power advantage. Size and influence were no longer to count. The outcomes of disputes were not to be influenced by America's relative standing in the hierarchy of nations. The DSU, not the six-shooter (known to our trading partners as "section 301"), was to be the great equalizer.

Whether, on balance, this is wholly good for the United States or the world trading system will become apparent only with the passage of time. During the Uruguay Round negotiation, some, including this author, felt that trade diplomacy should not be done away with in the favor of substituting litigation as a stand-alone tool for addressing trade disputes. It is true that there were defects with the status quo. The United States was most often plaintiff, not defendant. As it considered its market to be more open than those of its trading partners, it felt that this was likely to be its continuing dominant interest in litigation. The ability of a defendant, having lost before a panel, to prevent the adoption of that panel's report was frustrating, and has occurred in prior important cases. Moreover, USTR's lawyers argued that the new system would be legally indistinguishable from the old, because acting (applying sanctions) without GATT approval had always been a violation of U.S. international obligations. This was technically true, but America's trading partners knew that the United States did in fact, on occasion, act. The sixth fleet might sail with or without a United Nations resolution of approval.

Moreover, the litigative approach made some sense in the cases that most troubled trade negotiators in the 1980s, involving European agriculture. Europe's Common Agricultural Policy, since the Chicken War in the 1960s, had been largely impervious to either threats or diplomacy. Litigation made good sense when facing trade problems with a relatively large foreign power that employed transparent forms of protection. But it was equally obvious to both those who had negotiated for decades with Japan, and the Japanese bureaucrats themselves, that a litigation system would probably not work where the United States sought to attack opaque protectionist systems, such as those employed by Japan, or in the case of China, when it becomes relevant, in the case of state-invested enterprises. (Nor would binding dispute settlement necessarily work to America's liking when its trade remedy laws, or special measures, such as Helms-Burton, were subjected to international review.)

Although appealing to the lawyer in us, the new system played immediate havoc with U.S. trade relations with Japan. Japan could simply reject diplomacy as no longer part of the bilateral relationship. In part, this was in reaction to the high profile auto case. The United States and Japan had gone to the brink over the largest element of the U.S. trade deficit with Japan—autos and auto parts,

threatening $6 billion in trade retaliation. After a time, the American negotiators declared the issue settled and wished to stand down from a trade-war footing. Threats of massive retaliation have been made and would not be made again soon. When the next U.S.-Japan trade issues arose, Japanese authorities affected an air of moral superiority, and refused to talk. This policy of not answering a knock at the gate—*monzenbarai*—worked. America's negotiators stood there, frustrated and fuming. But unless a gunboat could be called into action, as the Federal Maritime Commission demonstrated in the ports negotiation, or there was something Japan wanted, as in the civil air talks after the autos confrontation and the adoption of binding dispute settlement, progress through bilateral trade talks on manufactured goods issues ceased.

A further limitation on dispute settlement is that there must be applicable substantive rules in place before a market access suit can be successfully brought. A major hole in the WTO is that private restraints of trade are not actionable under the WTO, although they can be made the subject of a domestic section 301 action. With (a) an inability to negotiate, (b) a seeming inability to retaliate, (c) no possibility of litigating, and (d) without comprehensive substantive rules in place, the United States had constructed a fundamentally defective system. It worked well for some kinds of cases. For complex, large cases afflicted with imbeddded systems of protection, U.S. trade policy was effectively neutered. The system seemed to be created to resolve clear-cut, less complex cases.

Of course there are solutions to these larger trade problems. The first and best solution would appear to be, if they prove negotiable, new substantive rules governing market-restricting behavior that would extend the WTO beyond its current limitations. Short of achieving new disciplines on market-restricting behavior, there are a number of procedural reforms which suggest themselves.

III. Needed Reforms

A. Transparency

To build confidence, the panel process must be made more open. Confusion apparently still exists in Geneva as to the panel's function. Were the panel performing a mediating function, it might well make sense for it to hold its proceedings *in camera*. It might make sense to keep all submissions confidential. Under current WTO procedures, a panel's interim report is not even made available to countries that have intervened in the case as interested third parties.

To Mickey Kantor's credit, the United States has pledged to do what it can to bring greater openness into the system. The United States makes public its own submissions. There is no good and sufficient reason not to open the entire process, not only to other interested nations, but to the public, and to those whose interests are really at stake—workers, firms, industries, and non-governmental organizations—in short, those whose abilities to function are directly affected by WTO panel rulings. It should be remembered that governments' interests are

only derivative—unless in the extremely rare circumstance where the activities of a government monopoly is the subject of the suit.

There is no compelling justification for Geneva's affinity for secrecy. It is a disservice to the WTO, depriving it of public support. Openness would be the best defense against attacks on the institution that it must be hiding something. Secrecy feeds concerns that the WTO may be engaging in unwarranted assaults on national sovereignty, or that it is masking bias, incompetence, or worse.

B. A Standing Judiciary

The current panel system, which draws panel members from a roster of individuals—mainly, but not exclusively, former trade negotiators—is a holdover from the era of conciliation and mediation. This cozy, earlier era when the GATT was small and members of the club might come up with some helpful suggestions on resolving a dispute, rather than adjudicating it, is over.

The new juridical functions need a judiciary. Questions of procedure, interpretations of agreements, and establishment of doctrines (such as judicial restraint) requires an independent, standing judiciary that is free from undue bias, has the time to devote to complex matters, and is not subject to claims that they may have conflicts of interest. The word "independent" deserves to be stressed. The judges should neither be beholden to WTO member governments nor dominated by an international bureaucracy, as is now the case. The new judges will also require the assistance of qualified law clerks of their own choosing.

C. Private Sector Participation—Adequate National Staffing

No government will be able to staff adequately the prosecution and defense of many cases simultaneously. Small country delegations cannot even make the pretense of doing so. Inadequate staffing in part stems from the confusion that diplomacy is what is taking place under the DSU, rather than adjudication. In the Anglo-Saxon tradition—and it is this tradition that must accept the responsibility for the DSU—truth and the right result in any controversy will arise from the process of issues being contested. For an adversarial system to work at all well, the adversaries must be both skilled and well prepared. Neither the small WTO members' hard-pressed delegation, nor the larger WTO members' broader sweep of interests and number of cases in which they are involved, will allow the proper preparation for presentations of consistent quality necessary to serve the international dispute settlement system.

It should be increasingly clear that for a variety of reasons private counsel should be permitted to serve as members of WTO dispute settlement delegations. In any case brought against a foreign government's measures, and all cases are, there is a fundamental imbalance in favor of those who are denying market access—the officials of the country maintaining the measure complained of. They have full information at hand, as to the nature of the restrictions they created.

On its side of the room, those who administer the system protection can sit in serried rows, while the thin ranks of the complaining government may well be outgunned and outmaneuvered.

This is also a question of resources. No WTO member will ever devote the necessary numbers of legal and economic experts to prosecute or defend *all* their cases well. There is the simple practical matter that private counsel to private parties at interest may often be steeped for a number of years in the facts affecting a given goods or service industry, or agricultural sector, that generalist civil servants cannot be expected to master within any relevant time frame, given their extensive responsibilities. Private counsel will have to be sworn to represent the WTO member's government that is party to the dispute, until independent representation and argument are allowed for the parties with economic interest.

D. Systematic National Review

When the Uruguay Round was approved by Congress in 1995, the Senate Majority Leader proposed, and the President accepted, a plan for an independent judicial panel (made up of senior judges) to review certain WTO decisions. The domestic judicial commission was to determine and report on whether a WTO panel, in a case defended by the United States and lost by it, erred in applying applicable international standards or process. This proposal should be revived and enacted into law. It would provide Congress, the Executive, and the American people, greater assurance that the international dispute settlement mechanism was indeed working.

E. What Is The Record To Date?

The system appears to be working more or less as one might anticipate. In the most straightforward cases (e.g. Japan copyright protection), where there is no defense and none is offered, settlement of the dispute occurs without the litigation proceeding to a panel. In the most highly-charged political case (e.g. the EU putting the United States in the dock over Cuban sanctions (Helms-Burton)) to date, the system has not been tested because this is not a subject that the parties feel (at this stage) can be resolved by a panel. At least they are talking to each other. The threat of this litigation, and the destructive effect that it might well have on the WTO itself if pursued, apparently brings leverage to bear for use in attempting to find a diplomatic solution.

In the most complex case dealing with manufacturing, the Japan film case, dispute settlement may have served an unexpected, positive purpose. The WTO panel was not able to find that the United States made its case. This occurred despite the fact that the U.S. position was supported by the European Union, and twenty thousand pages of original Japanese-source documents were placed in evidence. Whether the panel discharged its responsibilities will be the subject of much scholarly analysis and comment once the report emerges from Geneva's

secrecy in a few months time. For the United States, the most extraordinary development was that the Government of Japan, in the process of defending itself, made an extensive series of remarkable statements. On the record, before an international tribunal, Japan described in some detail how its laws would be enforced, to promote and protect free competition in its market. It would provide full national treatment, it said, and enforce a number of domestic measures that would assure that imports received fair, even favorable, treatment.

These statements of the Government of Japan, if implemented, promise to deliver the market-opening results sought by the United States in bringing the case. Thus, ironically, in the most publicized American "loss" before the WTO, it is too early to judge the matter truly a "loss" for the United States. Indeed, if this does become a "win" for the United States and the European Union, it would still not be ultimately a loss for Japan. Much editorial comment during the pendency of this case focussed on the need for Japan to liberalize its market, for its own sake—for the efficiency of its economy and for the benefit of its consumers. Thus, the results which may be reached in the market place may ultimately be the right ones. Nevertheless, it will be hard for most observers to conclude that "this was WTO dispute settlement at its best".

IV. Conclusions

It is vital that WTO dispute settlement be expeditious, predictable, and widely seen as fair and impartial. It must be judged relevant to the commercial issues that most concern this era of deeper international economic integration. It must serve to resolve effectively the problems of the next fifty years, rather than the last fifty.

The WTO is not a supra-national body, it is an international one whose members have contracted among themselves to be bound only to the extent of their agreements. Americans should not, therefore, expect the panel process to replicate exactly their own domestic judicial system. But the two should have much more in common than they do today. New negotiations will be needed to deliver commitments that member governments will provide functioning markets for goods that have crossed their borders from other members. Once the new substantive rules are in place, however, a sophisticated judiciary will be essential to protect those new hard-won rights. It is not too early to put into place the reforms in the dispute settlement process needed to deliver on the promise of the existing WTO commitments, as well as those that will be necessary for the more sophisticated rules and codes that will be agreed upon in the coming decades.

How good is the DSU? This leaves unanswered a profound question for American industry, trade practitioners, and our government. In the wake of the film case, where an American industry finds access for its products denied abroad by a complex web of private and government measures, and there is neither a clear multilateral remedy nor a bilateral agreement that covers, what options

exist? There are options, but they do not lie in WTO dispute settlement at present. Especially in view of the prospect of China's entry into the WTO, what has been known as "The Japan Question" is likely to be joined by a "China Question". Put succinctly, the challenge is the attempt to encompass within the WTO rules-based system, economies that are not primarily rules-based, nor transparent.

These are the larger questions for the new WTO. In the near term, the WTO must wrestle with what will increasingly be factually complicated cases that could and should be within its purview. This is what the 1950 Australian fertilizer subsidy case was all about in the first years of the GATT—coming to grips with new methods of undermining the existing trading rules. The pressures to circumvent the rules designed to liberalize trade are ever present. The dispute settlement process can and should be reformed, but it should also evolve to ensure that the WTO's substantive rules are made as effective as the WTO signatories intended them to be.