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U.S. Trade Law and Policy Series **No. 24: Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits**

On April 15, 1994, trade ministers from over one hundred contracting parties of the General Agreement on Tariffs and Trade rallied in Marrakesh, Morocco, to sign the Uruguay Round Final Act. They agreed that the target date for entry into force of the sweeping new agreements would be January 1, 1995. By signing the Marrakesh documents, they pledged to seek the enactment of any domestic measures required to implement their new obligations.

For most nations, the executive decision to adhere to or ratify an international agreement assures the enactment of necessary implementing legislation. Under the U.S. constitutional system of checks and balances, however, the President's authority to negotiate does not include authority to change U.S. law in ways necessary to implement the agreements resulting from such negotiations. Therefore, the President submits a bill to the Congress to do so, under "fast track" procedures.¹

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The views expressed in this article do not necessarily represent those of Sidley & Austin or any clients of the firm.

1. Under fast track procedures, the House of Representatives and Senate tentatively pledge to consider the President's bill under time deadlines for action, free from unraveling amendments. Trade Act of 1974, §§ 151-154 (as amended at 19 U.S.C. §§ 2191-2194 (1988)). However, the

In the context of legislation to implement the Final Act, some members of Congress and the U.S. private sector have expressed concern about the new World Trade Organization (WTO) dispute settlement procedures. Following the enactment of implementing legislation and the entry into force of the Final Act, the U.S. government and the private sector will discern, dissect, and debate developments in the application of these new procedures. This article identifies the major concerns about these new procedures, and the reasons why the United States should benefit from them.

I. Background

In 1947 the United States and Great Britain were the principal architects of the Bretton Woods System, the tripod of which was the World Bank, the International Monetary Fund, and a proposed International Trade Organization (ITO). Chiefly in response to concerns of the U.S. Senate, the ITO was abandoned, leaving the General Agreement on Tariffs and Trade (GATT) as the surviving agreement of the original, stronger ITO.

From the outset, the GATT included dispute settlement procedures. Parties to a dispute were encouraged to consult bilaterally or otherwise as appropriate to seek a mutually satisfactory resolution. In the absence of such resolution, panels of experts could be convened on an ad hoc basis to review the submissions of interested parties and to hear their oral arguments. Panel rulings were submitted initially only to the interested parties, to afford another chance for an amicable resolution. Panel rulings acquired legal status and force only if adopted by the GATT Council, composed of all the contracting parties to the GATT.

The system functioned for several decades as more political than legalistic. The GATT was viewed by many as a forum for negotiating resolutions to disputes, rather than an adjudicatory body applying GATT law to particular facts. Powerful countries generally fared well in this system, except perhaps when the dispute arose between powerful countries. The dispute resolution procedures were generally slow but effective, except in major agricultural disputes, and then particularly when the disputants were the United States and the European Community.

Significant complaints about the system arose, however. The consultative phase could be unproductively long; the party whose measures were challenged could simply drag out the bilateral discussions. Even after parties agreed to the establishment of a panel, they encountered difficulties in agreeing on the terms of reference, panelists, and procedures for making submissions to the panel. The panel phase of the process was easily extended by fractious disputants or scheduling problems with the panelists. The credibility of the panelists as independent and objective

Constitution authorizes the House and Senate each to establish its own rules of proceedings. U.S. CONST. art. I, § 5. Therefore, either body may modify such rules without regard to statutory fast-track procedures.

was questioned, since nearly all were representatives of a contracting party to the GATT.

If the panel issued an unsound, unsupported report, the GATT had no mechanism for appealing it. Even if a panel finally issued a report, a single contracting party—including the disputant to whom it was adverse—could block its adoption by the GATT Council. Even if the GATT Council adopted a report, nothing could guarantee that the party whose measure was deemed to be inconsistent with the GATT would withdraw it or pay compensation to the adversely affected party or parties. Neither was there any guarantee that the GATT Council, as a last resort, would authorize the adversely affected party or parties to withdraw concessions of equivalent value, that is, retaliate. Finally, no procedure existed to ensure that the GATT Council would monitor the action or inaction of a party whose measures were found to be GATT-inconsistent, unless prompted by the initiative of the party that successfully challenged those measures.

For better or worse, the United States is surely one of the most litigious nations on earth, with a record or near record number of lawyers per capita. The nation was founded to establish a democracy based upon a Constitution and the rule of law. Our system is based upon majority rule, with protection of minority rights; our tripartite government is designed in part to prevent the abuse of power (by diffusing it through three branches, with checks and balances) and ensure that the laws enacted through such a complex legislative process are indeed enforced.

With America's historical and cultural background, it is not surprising that the United States viewed the GATT dispute settlement system with considerable misgivings. In the highly political context of GATT Council meetings and panelists who were normally representatives of GATT member governments, U.S. GATT experts—often, though not always, lawyers themselves—felt the United States would benefit from a more legalistic, more American, system of settling disputes. A more judicial approach to the resolution of GATT disputes would promote certainty in commercial trading relations and the international rule of law, of which the United States was the chief champion.

The United States' frustration with the GATT dispute settlement process was reflected in repeated congressional calls for reform. In the Omnibus Trade and Competitiveness Act of 1988, the first listed trade negotiating objective for the United States was "to provide for more effective and expeditious dispute settlement mechanisms and procedures . . . and enable better enforcement of United States rights."²

2. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1101(b)(1), 102 Stat. 1107 (codified at 19 U.S.C. § 2901(b)(1) (1988)). In the Senate Finance Committee's report on S. 490, the Omnibus Trade Act of 1987 (which led to the 1988 Act), the Committee stated, "dispute resolution is now a process that often takes several years to resolve, leaving uncertainty in trading relations with regard to the products and issues involved and undermining support for trade agreements." S. REP. NO. 71, 100th Cong., 1st Sess. 39 (1987).

In view of the decidedly different histories, cultures, governments, and legal systems of other GATT contracting parties, it should not be surprising that many other parties preferred the more political approach to resolving disputes. Many saw clarity, certainty, and the rule of law as not necessarily of more value than diplomacy, negotiations, and flexibility in view of changing conditions and circumstances. The United States, then, for many years was fairly isolated in advocating modifications to the GATT dispute settlement system that would enhance the rule of law and decrease the opportunity for a pragmatic political resolution.

The rules were changed in some useful, but relatively minor, respects beginning with the Tokyo Round. In addition to many other codes addressing nontariff barriers to trade, supplementary to the GATT itself, the Tokyo Round issued a "Framework Agreement" on GATT dispute settlement. Key changes were to try to enhance the prospect of a more timely resolution, and to stress that panelists could be drawn from sources other than GATT representatives of contracting parties stationed in Geneva.

The Tokyo Round was concluded and implemented into U.S. law in 1979. The United States began advocating the initiation of an eighth round of multilateral trade negotiations just three years later. However, not until a ministerial meeting in Punta del Este, Uruguay, in September 1986 did the GATT Secretariat and contracting parties agree to do so. Named after the site of that ministerial assembly, the Uruguay Round encompassed negotiations on an extremely broad range of trade-related issues, including how to improve the dispute settlement procedures.

Launched in 1986, the Uruguay Round was scheduled to conclude in 1990. To enhance the prospects of remaining on schedule, trade ministers convened in Montreal, Canada, in December 1988 for a Midterm Review. In most negotiating groups, the major achievement of the Midterm Review was simply to outline the procedures for further progress and identify the issues that needed to be addressed. The dispute settlement group, on the other hand, concluded an agreement on procedural reforms to the GATT process. At a follow-up ministerial meeting in Geneva in April 1989, contracting parties agreed to apply these reforms on an interim basis, pending the conclusion of the Uruguay Round overall. Thus, since April 1989, some of the timing problems have been resolved or mitigated.

The Midterm Review reforms, however, did not purport to confront, much less make, fundamental changes to the existing system. Those changes were finally accomplished in December 1991 and December 1993. In 1991, following the second failed attempt to conclude negotiations, the GATT Director-General, Arthur Dunkel, issued a Draft Final Act to crystallize issues and facilitate closure. Closure nonetheless eluded the negotiators in Geneva until December 15, 1993 (the last day on which the President could preserve eligibility for "fast track" treatment of legislation to implement the Round³).

3. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 103-49, § 1102(e), 107 Stat. 239 (codified at 19 U.S.C. § 2902(e) (1988)).

With respect to the dispute settlement rules, however, the final agreement departed only peripherally from the December 1991 "Dunkel text." The new rules make fundamental changes to the GATT dispute settlement process by providing for:

- automatic establishment of a panel and automatic adoption of a panel report (unless the Council, by consensus, decides to the contrary);
- an exceptional opportunity for appellate review of panel reports;
- rigorous surveillance of the implementation of adopted panel reports;
- compensation, or WTO authorization, for the suspension of concessions if a report is not implemented in a reasonable period of time;
- expeditious arbitration in the event of disputes about a reasonable period of time for implementation or the appropriate level of compensation or suspension; and
- recourse to these procedures for practices considered as violating the WTO, or nullifying or impairing WTO benefits.

As a result of these changes, the resolution of GATT disputes would become a far more legalistic than political process. The United States, the architect of these proposals, had prevailed over earlier doubts by many, if not most, contracting parties about the wisdom of such a transformation. How had the United States succeeded in overcoming earlier, overwhelming opposition?

The answer to that question is that the United States, through its so-called aggressive "unilateralism" of the late 1980s, converted the rest of the world to the benefits of a legalistic, rule-based dispute resolution process. Why? Because the rest of the world had developed a new-found appreciation of international legal procedures as a way to discipline the United States from acting unilaterally, perhaps in contravention of its multilateral obligations under the GATT.

By 1985 the U.S. trade deficit was skyrocketing. Alarmed members of Congress introduced over 300 protectionist trade bills by the fall of 1985. The Reagan administration, determined to avoid the enactment of protectionist legislation, initiated more aggressive measures to open foreign markets. The objectives: to restore support for freer trade; obtain better access abroad for U.S. exports of goods and services; and remain in control of the trade agenda.

Various trade actions pursued by the Reagan and Bush administrations have been summarized and analyzed earlier in this series of articles.⁴ The leverage for opening markets in the latter 1980s and early 1990s, other than through the slow-moving Uruguay Round, was provided principally by the credible threat of the use of U.S. sanctions. The engine for such a credible threat was section

4. Alan F. Holmer & Judith H. Bello, *The 1988 Trade Bill: Savior or Scourge of the International Trading System?*, 23 INT'L LAW. 523 (1989); Judith H. Bello & Alan F. Holmer, *Unilateral Action to Open Foreign Markets: The Mechanics of Retaliation Exercises*, 22 INT'L LAW. 1197 (1988); Judith H. Bello & Alan F. Holmer, *Significant Recent Developments in Section 301 Unfair Trade Cases*, 21 INT'L LAW. 211 (1987).

301 of the Trade Act of 1974, authorizing chiefly the imposition or increase in tariffs or imposition of quantitative restrictions, or both, in response to unfair, injurious trade practices by a foreign government. Section 301 authorized the President (and, after enactment of the Omnibus Trade and Competitiveness Act of 1988, the U.S. Trade Representative) to take such measures if a foreign government breached a trade agreement or otherwise acted so as to nullify or impair benefits of the United States under a trade agreement. To this extent, section 301 simply afforded the domestic legal basis for enforcing a trade agreement, principally the GATT.

However, section 301 further authorizes U.S. actions in response to foreign government acts, policies, or practices that are deemed unjustifiable, unreasonable, or discriminatory and that burden or restrict U.S. commerce. This aspect of section 301 provides domestic legal authority for U.S. sanctions, even in the absence of a violation of the GATT or nullification or impairment of U.S. GATT benefits.

The United States jump-started the use of section 301 authority in 1985. President Reagan self-initiated four section 301 investigations in the fall of 1985 of one Brazilian, one Japanese, and two Korean practices. He acted in five instances under section 301, even though the U.S. industry concerned had not requested such action and the U.S. Trade Representative had not conducted a formal investigation. The re-energized section 301 program improved market access or intellectual property protection in cases ranging from Japan (citrus, leather and leather footwear, tobacco products, semiconductors), Korea (intellectual property, insurance, cigarettes), and India (almonds) to Argentina (soybeans), the European Community (EC) (citrus, pasta, canned fruit, meat, agricultural products adversely affected by the EC's enlargement to include Spain and Portugal), Canada (fish), and Taiwan (customs valuation, beer, wine, tobacco products).⁵

Least important from a commercial perspective but probably most important from a political perspective, President Reagan imposed retaliatory duties under section 301. At the beginning of his second administration, following the failure of the GATT process to resolve a decades-old dispute over EC discriminatory tariffs on citrus imports, he increased duties on certain imports from the EC.⁶ (The EC promptly counter-retaliated against imports from the United States—specifically, imports principally from California.) In 1986 to 1987, in the context of the enlargement of the EC to include Spain and Portugal, President Reagan imposed quotas on certain EC products to mirror EC quotas imposed in Portugal and raised duties to 200 percent on other EC products in response to EC tariff

5. See generally Annual Report of the President of the United States on the Trade Agreements Program (1988).

6. Proclamation No. 5354, 50 Fed. Reg. 26,143 (1985); Proclamation No. 5363, 50 Fed. Reg. 33,711 (1985).

increases in Spain.⁷ He increased duties on other EC products in 1988 in response to an EC ban on imports of meat treated with growth hormones.⁸

President Reagan also temporarily imposed a 15 percent tax on imports of softwood lumber products from Canada.⁹ Further, Reagan is the only President of the United States ever to have taken section 301 action against Japan: he increased duties in 1986 on an estimated \$24 million of Japanese products (in connection with an agreement otherwise settling the U.S. complaint about Japanese quotas on leather and leather goods)¹⁰ and in 1987 increased duties to 100 percent on \$300 million worth of Japanese products in response to Japan's breach of the 1986 semiconductor agreement (negotiated in response to a section 301 petition).¹¹

The perceived success of the section 301 program in the second Reagan administration ensured its popularity with the U.S. Congress. Congress' response was the Omnibus Trade and Competitiveness Act of 1988, not only strengthening section 301,¹² but cloning it through Super 301,¹³ Special 301,¹⁴ a telecommunications section 301-style remedy,¹⁵ and a government procurement procedure based upon section 301.¹⁶

On the other hand, the perceived success of the section 301 program was not welcomed by trading partners of the United States. Although unable to agree on how to conclude the Uruguay Round, they were unanimous in their condemnation of U.S. unilateralism. Section 301's successful application by the United States induced foreign capitals around the world to see GATT dispute settlement procedures in a new light, as a way to discipline U.S. unilateralism.

Thus, the aggressive use of section 301 ultimately created the climate of widespread political support for the GATT dispute settlement proposals authored

7. Proclamation No. 5478, 51 Fed. Reg. 18,296 (1986); Proclamation No. 5601, 52 Fed. Reg. 2663 (1987).

8. Proclamation No. 5759, 52 Fed. Reg. 49,131 (1987).

9. Proclamation No. 5595, 52 Fed. Reg. 229 (1987).

10. Proclamation No. 5448, 51 Fed. Reg. 9435 (1986).

11. Proclamation No. 5631, 52 Fed. Reg. 13,412 (1987).

12. The major amendments to section 301 were the transfer of authority from the President to the U.S. Trade Representative, the requirement to retaliate in certain cases (subject to flexible exceptions), and the expansion of actionable "unreasonable" practices (to include certain worker rights, specified anticompetitive activity, and export targeting). Omnibus Trade and Competitiveness Act of 1988 Pub. L. No. 100-418, § 1301, 102 Stat. 1107, 1164; Judith H. Bello & Alan F. Holmer, *The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301*, 25 STAN. J. INT'L L. 1 (1988) [hereinafter *Section 301 Amendments*].

13. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1302, 102 Stat. 1107, 1176; *Section 301 Amendments*, *supra* note 12, at 30.

14. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1303, 102 Stat. 1107, 1179; *Section 301 Amendments*, *supra* note 12, at 40.

15. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 1371-1382 (Telecommunications Trade Act of 1988), 102 Stat. 1107, 1216.

16. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, title VII (Buy American Act of 1988), 102 Stat. 1107, 1545.

by the United States. Ironically, the United States, the chief champion of the international rule of law, succeeded in its advocacy for a stronger, more effective dispute settlement system, based upon the rule of law, because the United States itself was increasingly perceived as an international scofflaw, acting in its self-interest¹⁷ without regard to international law, rules, or agreements.

II. U.S. Domestic Concern about New Dispute Settlement Procedures

Now that the United States has succeeded in so dramatically improving the GATT dispute settlement procedures, some in the United States are expressing concern that the rules may prove disadvantageous to U.S. interests. While the United States remains a plaintiff in many GATT dispute settlement cases, over the last few years it has just as often been a defendant. The new rules are as much a bane for defendants as a boon for plaintiffs.¹⁸

Concern is even stronger, however, about the effects on continued U.S. efforts to open markets and improve the protection of intellectual property for the benefit of all, not just the United States. While these efforts are trade-liberalizing in motive and, when successful, in outcome, they are often fueled by foreign governments' fear of U.S. action under section 301 or a section 301-style remedy. Yet such fear may subside with the inauguration of the new and improved WTO dispute settlement procedures. Any action by the United States that would violate the WTO rules may be rapidly and effectively challenged by adversely affected trading partners. The expectation engendered by the new system—that little countries as well as big, powerful ones might be able to stand up to U.S. “bullying” under section 301—could undermine the credibility of the U.S. threat of unilateral action, and thus the success of section 301-type programs.

III. Net Benefits to the United States of an Effective Dispute Settlement System

While such concerns are understandable, they should not be permitted to distort the cost-benefit analysis of the new WTO dispute settlement procedures. Their advantages to the United States outweigh any disadvantages, for the following reasons.

First, the United States likely will continue to be a plaintiff in WTO dispute settlement proceedings at least as often as it proves to be a defendant. When the

17. In fact, U.S. actions under section 301 generally opened markets around the world on a most-favored-nation basis, thus benefitting producers and exporters elsewhere as well as in the United States, in addition to consumers in the country whose market was opened. Arguably section 301 did more to open markets in the period 1985-1992 than any other international governmental activity, including the Uruguay Round negotiations. In addition, the use of section 301 and section 301 clones arguably enabled the United States to achieve better rules in the Uruguay Round in general, and with regard to dispute settlement and intellectual property protection in particular.

18. Judith H. Bello & Alan F. Holmer, *GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301?*, 26 INT'L LAW. 795 (1992).

United States complains about trade barriers that breach the WTO rules or nullify or impair WTO benefits, it reasonably can expect an expeditious and favorable resolution.

Second, as the world's largest exporter, the United States has at least as much interest in the international trading system and the WTO as any other nation on earth. The WTO dispute settlement procedures will generate confidence that the WTO rules will be enforced fairly and expeditiously. Such confidence in turn will strengthen the WTO and increase its market-opening leverage.

Third, in any event, the United States, like all other WTO members, fully retains its national sovereignty. Even if the United States as a defendant loses some WTO dispute settlement cases, it is not required to change its law or practice to come into conformity with a WTO dispute settlement verdict. It has the option, in accordance with the WTO rules, instead to offer compensation to adversely affected trading partners or to suffer WTO-authorized countermeasures, that is, retaliation, against U.S. exports. Thus, the United States remains free to take measures that violate the WTO, but it is more likely in the future to have to pay a price for such action. The new dispute settlement process thus may yield a more informed cost-benefit analysis of protectionist actions generally.

Fourth, the prospect of WTO-authorized retaliation against U.S. exports looms far larger in theory than is likely to occur in practice. Imposing trade sanctions generally is shooting yourself in the foot: in a global economy, both consumers and industries that use the sanctioned imports are adversely affected.

Since 1947 insofar as we are aware, in only one GATT dispute settlement case did the GATT authorize retaliation against the losing party. In 1952 in response to a complaint by the Netherlands, the GATT Council adopted a dispute settlement panel determining that U.S. quantitative restrictions on dairy imports violated article XI of the GATT. Ultimately the GATT contracting parties authorized the Netherlands to retaliate against the United States for failure to bring its practices into conformity with its GATT obligations. Specifically, the Netherlands was authorized to impose a limit of 60,000 tons on imported wheat flour from the United States.

Yet the Netherlands declined to exercise this authority. Why? Because such action would have adversely affected the citizenry generally by likely resulting in higher prices for bread. The moral: generally everyone loses when a nation takes retaliatory action. Retaliation will never be the rule, only the exception to the rule. A single cycle of retaliation and counter-retaliation is enough to demonstrate an administration's political resolve, but also to incur substantial economic harm.

IV. Conclusion

Like most nations, the United States tends to be schizophrenic; it wants the benefits of free trade, but also the freedom to act on its own without regard to

international restraints. It remains the chief champion and cheerleader for the international rule of law, yet it prizes the sovereign right to act in disregard of such law in exceptional circumstances.

With these conflicting objectives, the United States will remain uneasy about the newly effective WTO dispute settlement rules. Yet U.S. national economic interests benefit substantially from the new system.