

EDITORIAL COMMENT

THE WTO DISPUTE SETTLEMENT UNDERSTANDING: LESS IS MORE

The Agreement Establishing the World Trade Organization (WTO Agreement) dramatically expands and improves the trade rules of the predecessor General Agreement on Tariffs and Trade (GATT), thereby facilitating trade, economic growth and jobs in the increasingly interdependent global economy. Supporters of trade liberalization generally welcome these new rules, including in particular the dramatically improved procedures for settling disputes.¹

However, some environmental and labor groups have expressed concerns as to whether the new dispute settlement rules subordinate or diminish non-trade-policy objectives. These concerns have echoed loudly in sound-bite denunciations of the WTO by some American politicians advocating economic nationalism. Some claim that faceless, unelected, unaccountable bureaucrats in Geneva have usurped U.S. sovereignty by writing rules for Americans that should be determined only by Americans. In his campaign for the presidency, for example, Patrick Buchanan took up the chorus most recently popularized by Ross Perot in his opposition in 1992 to the North American Free Trade Agreement. Buchanan's success in early primaries provoked numerous polls and extensive commentary analyzing whether support for trade liberalization had diminished.

In fact, such support has diminished among some key constituencies.² Many environmental groups, for example, were aghast when GATT panels ruled that access to the U.S. market could not be used consistently with GATT obligations as leverage for some U.S. environmental objectives. Specifically, these panels ruled that U.S. primary boycotts of tuna imports to punish countries that use porpoise-unfriendly fishing methods, and U.S. secondary boycotts to punish third countries that do not likewise employ such primary boycotts, are inconsistent with the GATT prohibition on embargoes and are not justified under limited GATT exceptions.

Another powerful constituency that grew concerned about the application of GATT rules and rulings to their interests were state and local governments. A series of GATT panels examined several complaints about the tax measures of several contracting parties affecting imports of alcoholic beverages. Canada filed such a complaint against the United States focused not on federal, but on state and local government tax measures, some of which discriminated against imports in contravention of obligations under the GATT binding on subfederal as well as federal authorities. These rulings had revenue implications for the states concerned and provoked widespread concern among the states about the application of the GATT to subfederal governments.

In view of the heat, if not light, being generated by economic nationalists in general, and the specific concerns resulting from some GATT dispute settlement rulings in particular, a review of WTO/GATT dispute settlement rules is overdue. Like the GATT rules that preceded them, the WTO rules are simply not "binding" in the traditional

¹ See generally Stephen P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AJIL 193 (1996).

² Until recently, polls showed broad support for trade liberalization. *E.g.*, CHICAGO COUNCIL ON FOREIGN RELATIONS, AMERICAN PUBLIC OPINION AND U.S. FOREIGN POLICY 1995, at 28–30 (1995). Some recent polls, however, show a significant decline in such support. *E.g.*, EPIC-MRA/Mitchell poll, reported in J. COM., Nov. 14, 1995, at 1A, 8A; Peter Hart Research poll, reported in DAILY REP. FOR EXECUTIVES (BNA), Mar. 25, 1996, at A–11. For a thoughtful analysis of the reasons for this decline, see Marc Levinson, *Kantor's Cant*, FOREIGN AFF., Mar.–Apr. 1996, at 2.

sense. When a panel established under the WTO Dispute Settlement Understanding issues a ruling adverse to a member, there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement. The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas.

Rather, the WTO—essentially a confederation of sovereign national governments—relies upon voluntary compliance. The genius of the GATT/WTO system is the flexibility with which it accommodates the national exercise of sovereignty, yet promotes compliance with its trade rules through incentives.

This flexibility was built into the cornerstones of the GATT. Article II of the GATT prohibits member governments from imposing tariffs beyond rates agreed in trade negotiations. The first six rounds of GATT trade negotiations between 1947 and 1975 were devoted exclusively to reducing tariffs. Yet, despite the central import of tariff levels to the GATT's success before 1980, Article XXVIII authorized trading partners to renegotiate tariff levels when local politics or a change in the domestic economy required it. The only sacred, inviolable aspect of the GATT was the overall balance of rights and obligations, of benefits and burdens, achieved among members through negotiations.

To put it simply, a government could renege on its negotiated commitment not to exceed a specified tariff on an item, provided it restored the overall balance of GATT concessions through compensatory reductions in tariffs on other items. That is, a government could change its mind about and raise a particular tariff, provided it offset such "nullification or impairment" of the delicate GATT balance through compensatory tariff reductions.

The WTO substantially improved the GATT rules for settling disputes but did not alter the fundamental nature of the negotiated bargain among sovereign member states. Compliance with the WTO, as interpreted through dispute settlement panels, remains elective. If its law or measure is successfully challenged, a member enjoys three choices. First, it may (and preferably would) come into compliance with the ruling by withdrawing the offending measure or rectifying the relevant omission. Second, it may maintain the offending measure or determine not to rectify the relevant omission but, instead, provide compensatory benefits to restore the balance of negotiated concessions disturbed by the noncomplying law or measure. Third, it may choose to make no change in its law or measures and decline to provide compensation, and, instead, suffer likely retaliation against its exports authorized by the WTO for the purpose of restoring the balance of negotiated concessions. The only sacred WTO imperative is to maintain that balance so as to maintain political support for the WTO Agreement by members.

Sovereign nations choose to cooperate across borders because, without such cooperation, in the interdependent global economy they are helpless to promote economic growth and prosperity most effectively. Yet sovereign nations do not relinquish their sovereignty by virtue of their membership in the WTO, including its dispute settlement proceedings. If the local politics *du jour* or changing economics require or merit it, any WTO member may exercise its sovereignty and take action inconsistent with the WTO Agreement, provided only that it compensates adversely affected trading partners or suffers offsetting retaliation.

On the other hand, a member may restrain its exercise of sovereignty and choose to comply with the WTO rules and dispute settlement rulings because it (1) benefits when other members do likewise; (2) loses international credibility and clout through scofflaw conduct; (3) self-inflicts or invites inflicted damage to its economic interests through compensation or retaliation; and/or (4) jeopardizes international cooperation on other issues (e.g., illicit drug trafficking, illegal immigration, arms control, environmental protection, promotion of human rights, population control, rights of women and minority groups, the welfare of children) by failing to meet its responsibilities in the WTO.

Thus, the fundamental nature of WTO dispute settlement is either misunderstood or mischaracterized by its detractors. From the viewpoint of economic nationalists, the good news is that the United States is not required to comply with a WTO dispute settlement ruling adverse to the United States. (The correspondingly bad news is that neither is any other member.) Instead, the United States (and any other member) may choose to comply, to compensate, or to stonewall and suffer retaliation against its exports.

Why, then, do some complain so loudly against this system, which flexibly accommodates the political needs and ever-changing economies of sovereign members? Because they oppose the light it sheds on the costs of economic protectionism and of subordinating trade objectives and obligations to nontrade objectives. Yes, for example, the United States may impose primary and even secondary embargoes of imports for environmental or other nontrade purposes—but not necessarily for free. If a member's measure is inconsistent with the WTO, a specific, identifiable price will be paid, either directly through compensation (which reduces U.S. revenues and thereby adversely affects the budget) or indirectly through retaliation against U.S. exports. Some special interest groups would prefer to keep such costs hidden, since their publication is likely to reduce political support for using trade tactics for nontrade objectives.

To take another example, the United States may raise tariffs to protect a particular industry against import competition, even if such action is not permitted under Article II of the GATT (prohibiting tariff increases beyond agreed rates). However, the protected industry is unlikely to favor widespread knowledge about the costs of protectionism because it would facilitate a rational cost-benefit analysis of its protection. Generally, the total costs of protectionism well exceed its total benefits. When this is understood, political support for protectionism beyond the protected industry usually evaporates.

In conclusion, complaints about the WTO's usurpation of U.S. sovereignty misapprehend the WTO dispute settlement system and the flexibility with which it accommodates national sovereignty. The only truly binding WTO obligation is to maintain the balance of concessions negotiated among members. This duty is accorded the highest priority by the WTO to preserve the maximum incentive for all members to remain members, to cooperate, and to voluntarily comply with the rules at least most of the time. While the WTO establishes many, many other rules and compliance by all members is preferable, the fundamental structure allows for departures from those rules and thus notably fails to diminish any member's sovereignty.

The less binding the individual rules of the WTO Agreement, the more the WTO accommodates the demands of national sovereignty. The less the WTO requires any real transfer of power from national governments to the Geneva secretariat, the more effectively it encourages international economic cooperation while preserving democratic accountability. With respect to WTO dispute settlement, less is generally more.

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