

THE WTO'S EMPHASIS ON ADJUDICATED DISPUTE SETTLEMENT MAY BE MORE DRAG THAN LIFT

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With its emphasis on adjudicated dispute resolution, the World Trade Organization (WTO) has changed the nature of the international trading system. The rules governing trade, which are much more detailed than ever before and now extend to new areas such as intellectual property protection and trade-in-services, but which are not uniform in their application, are enforced by a system of panel and Appellate Body review of complaints brought by WTO Members that guarantee a ruling on the applicable WTO law that is in principle impartial.¹ The consensus among supporters of an open international trading system seems to be that the change is much for the better²—but it is not at all clear that the consensus viewpoint is right. In brief, there are reasons to conclude that, on balance, the way the trading system was managed under the General Agreement on Tariffs and Trade (GATT) is better designed to deal with today's major trade policy challenges (and those on the horizon) than the WTO model.

A. Key Dispute Settlement Differences Between the GATT and WTO Systems

Notwithstanding the evolution of the GATT towards more of a rules-based system, there were still significant limits on the GATT's ability to adjudicate trade disputes when the WTO was established in 1994. Most important of these was the GATT's tradition of decision-making by consensus, which

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1. *See generally* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) [hereinafter DSU]. One can debate the degree to which panel and Appellate Body rulings are, in fact, impartial. Statistically, the complainant wins in the vast majority of cases and there appears to be a clear "free trade" bias in some of the decisions, particularly those challenging trade remedy measures. *See, e.g.*, John Greenwald, *WTO Dispute Settlement: An Exercise in Trade Law Legislation?*, 6 J. INT'L ECON. L. 113 (2003).

2. *See, e.g.*, William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17.

allowed a losing party to block the adoption of an unfavorable panel report.³ In practice, this meant that the winning Contracting Party could use a favorable panel decision as leverage to press for a satisfactory resolution to the dispute, but could not count on it as having the force of a binding legal decision. This, in turn, put pressure on all sides to the dispute to work for a political solution to the problem through negotiation. By contrast, the WTO's emphasis on enforcement of the existing rules through decision-making guided by binding panel and Appellate Body decisions provides a harder-edged rule of international trade law. While enforcement of a panel decision can still be a problem,⁴ a binding panel report that sets out the governing law and is adopted by the WTO encourages the winning party to take a harder line in insisting on its WTO rights.

A second consequence of the transition from the GATT to the WTO has been a de-emphasis of issues relating to the balance of WTO benefits that are not tied to the enforcement of the existing rules. Under the GATT system, a Contracting Party could take to the GATT an issue of "nullification and impairment" of GATT benefits, or "impedance of any GATT objective," that arose from a "situation" not involving a rules violation in exactly the same way as it could complain about a rules violation.⁵ This is no longer the case. The WTO has a separate set of procedures for "nonviolation" cases, which effectively removes from the dispute settlement process major policy issues (e.g., currency manipulation, informal government guidance that limits imports, regulated capital markets that tolerate low returns on export sales, agreements among enterprises to source domestically) that contribute to massive trade imbalances.⁶

B. The WTO Dispute Settlement System Is Designed to Resolve Narrow Well-Defined Disputes – But Complicates Efforts to Address Major Trade Policy Problems

The wisdom of shifting from the GATT model to the WTO model of rules-based international trade regulation will, in the end, depend on whether it facilitates or complicates efforts to address today's and tomorrow's major trade policy challenges. In this regard, it is important to distinguish between the sorts of

3. See, e.g., John H. Jackson, *The WTO Dispute Settlement Procedures: A Preliminary Appraisal*, in *THE WORLD TRADING SYSTEM: CHALLENGES AHEAD* 153, 157 (Jeffrey J. Schott ed., Inst. for Int'l Econ. 1996), available at http://www.iie.com/publications/chapters_preview/66/9iie2350.pdf.

4. See Davey, *supra* note 2, at 47-48.

5. General Agreement on Tariffs and Trade art. XXIII:1(c), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

6. DSU, *supra* note 1, art. 26.

well-defined, fact-specific disputes that are suited to adjudication and broader trade policy problems that are not.

It is difficult to quarrel with the proposition that the WTO system provides a better set of procedures than the GATT for applying existing trade law to narrow disputes for which the available evidence is sufficient to prove the claim under review.⁷ This is a distinct advantage; WTO dispute adjudication can be effective even where the trade at issue is substantial and the subject matter is politically charged. The key question, however, is not whether the WTO system is better at dealing with these types of disputes, but whether the costs of judicializing the dispute settlement process outweigh the benefits because the dispute settlement system compromises the ability of the WTO to cope with bigger issues.

The fundamental trade policy challenges that, sooner or later, must be addressed raise broad and complicated issues that are not well suited for adjudication under the rules of the WTO or, for that matter, any other set of "binding" dispute settlement procedures. Among them are:

- How to conclude agreements that significantly liberalize trade in agriculture without seriously eroding political support for the trading system.
- How to persuade countries with high export-led growth that still maintain a variety of significant formal and informal barriers to imports to substantially reduce or eliminate those barriers.
- How to strengthen the rules that govern the trade effects of product standards and other regulatory measures, intellectual property protection, trade-in-services, and investment and extend them to emerging high-growth countries.
- How to persuade industrialized countries that remain resistant to imports of manufactured goods to open their markets.

7. Most WTO disputes fall into this category. Of the forty-seven proceedings initiated over the past three years, the complaint in twenty-seven (i.e., 57%) is directed at actions by national authorities in a trade remedy (i.e., antidumping, countervailing duty, or escape clause) proceeding. Another four challenge specific subsidy programs. Some of these cases are significant, both for the trade at issue and their political sensitivity, but they all address narrow issues of fact and law.

- How to negotiate a framework for dealing with structural imbalances in trade flows that, if they continue, could trigger a serious global economic crisis.

For a number of reasons, judicialization of dispute settlement complicates the search for solutions to these problems. The only way of addressing the major policy issues listed above is through negotiation; in fact, several of them are under negotiation in the Doha Round. The Doha Round negotiations are, however, presently suspended⁸ and, even if they resume, the prospects for a set of agreements that tackles key issues in a meaningful way are slim. WTO's emphasis on enforcement of *existing* rules is part of the problem.

1. Where Existing Rules Are Incomplete or Applied Unevenly, a Dispute Settlement System That Emphasizes Their Enforcement Acts as a Brake on Change

A dispute settlement system that focuses on the enforcement of existing rules works well where the existing rules are comprehensive and apply more or less equally to all. Where, however, the existing rules are incomplete and/or are applied unevenly, a dispute settlement system that emphasizes their enforcement acts as a brake on change. In the WTO context, a Member that believes it is advantaged by the rules as they now stand compared to a new set of rules that would impose relatively greater discipline on its own behavior has little incentive to agree to the new rules. Thus, as long as India, for example, believes that it can adequately protect its interests by enforcing the rules as they now exist, it has little incentive to agree to a broad package of trade liberalizing agreements that would extend the reach of WTO discipline. The same can be said for scores of other countries that are not now subject to the same degree of WTO discipline as the United States and many other original GATT signatories.⁹

In other words, by adopting a juridical approach to the settlement of disputes under existing WTO agreements, which are very uneven in scope, the WTO system has limited the leverage of Members that have already substantially

8. See WTO Doha Round Bulletin – Special Edition, Doha Round Suspended (July 31, 2006), http://www.dfat.gov.au/trade/negotiations/wto_bulletin/2006/wto_bulletin_060731_special_ed.html.

9. Differences in the application of WTO disciplines to different countries are a function of (1) differences in the degree to which overt trade barriers (i.e., tariffs and quotas) have been lowered in past negotiations (India and Brazil, for example, maintain steep tariffs on a wide range of products), and (2) the extent to which non-tariff barriers continue to limit imports (e.g., the practical difficulty of importing into China products that China produces or wants to produce domestically).

opened their markets to negotiate meaningful concessions from other Members and/or the expansion of WTO rules to new areas. And if the United States and Europe are unable to negotiate meaningful concessions from India, Brazil, China and others on tariffs and non-tariff barriers, trade-in-services, and/or intellectual property rights, it is very difficult for them to agree to the politically sensitive concessions they are being asked to make on their agricultural policies.

For decades, this was not a major problem. But with globalization and the emergence of China, Korea, Brazil, India, Taiwan, and other rapidly developing countries as major exporters, the imbalance in the distribution of WTO benefits matters far more than it used to. Under the GATT, a Contracting Party could credibly threaten unilateral trade measures to restore an acceptable balance of rights and obligations. And because, unlike the WTO, the GATT allowed a Contracting Party to press a non-violation claim—i.e., that the system is not working in the sense that the distribution of benefits is skewed even if the source of the problem is not a violation of the rules—it gave a party that sought adjustment to the balance of benefits a better platform for complaint. Thus, while the threat of unilateral measures was invariably loud, messy, and, to the country on the receiving end, offensive, it was also real and, therefore, attention-getting.

Further, because GATT decision-making depended on consensus, there was a strong incentive on all sides to negotiate solutions to real problems. Under the WTO system, by contrast, complaints are only credible if they concern violations of the rules. Now, trade liberalization outside the context of narrowly drawn dispute settlement proceedings depends much more than used to be the case on enlightened self-interest—and there is little reason to conclude that this alone will provide sufficient incentive for major change.

2. Judicialization of Dispute Settlement Makes Negotiations of New Agreements More Difficult

The judicialization of the dispute settlement process also complicates trade negotiations because it limits the ability of negotiators to rely on deliberate ambiguity to resolve negotiating differences. WTO panels and the Appellate Body have taken an activist approach to deciding cases. That is, rather than deferring to the interpretation of national authorities where the language of an agreement has been left deliberately ambiguous, they have imposed their “correct” interpretation of the agreement on the parties.¹⁰ As a result, WTO Members have

10. See, e.g., Judith L. Goldstein & Richard H. Steinberg, Delegation to the WTO: Liberalizing Through Legislation or Litigation 10, Paper Prepared for Duke University Workshop Delegating Sovereignty: Constitutional and Political Perspectives (Mar. 3-4, 2006), available at <http://www.law.duke.edu/publiclaw/pdf/workshop06sp/goldsteinsteinberg.pdf> (“Third, in a number of instances, the Appellate Body has given

found themselves bound by obligations that they did not knowingly agree to.¹¹ The lesson a good negotiator has to take away from the dispute settlement experience under the WTO is that clarity in negotiated agreements is essential—even if the consequence of clarity is to make the bridging of negotiating differences much more difficult.

Champions of the WTO dispute settlement system recognize the problem, but seem unconcerned about it.¹² There may be the sense that if a WTO agreement is not clear, it is of little use. However, the most significant value of the international trading rules is that they are generally respected as a matter of course; the trade that is subject to dispute settlement proceedings is a tiny fraction of global trade. If, therefore, it is true that the WTO dispute settlement system has complicated negotiating efforts to expand the reach of the WTO rules, it is a steep price to pay for better adjudication of narrowly drawn disputes.

3. The WTO Dispute Settlement System Has Complicated the Effort to Strengthen Political Support for the International Trading System

Lastly, at the same time as the WTO system has complicated trade barrier reduction through trade negotiations, it has also limited the ability of the industrialized countries that are already subject to effective WTO discipline to take discrete WTO legal measures to diffuse domestic political opposition to open trade. When, because of a WTO panel decision, a WTO Member modifies environmental, health, or social welfare regulations, or retracts a safeguard measure, political opposition to the WTO grows.¹³ Under the GATT system,

precise and narrow meaning to language that was intentionally left vague by negotiators, either because they could not agree on more specific language, or in order to permit a range of alternative behaviors or national practices.”).

11. The United States, for example, believed that it had negotiated a degree of deference on the part of panels and the Appellate Body reviewing U.S. antidumping decisions similar to the *Chevron* deference accorded U.S. agencies by their reviewing courts. WTO panels and the Appellate Body, however, refused to interpret the standard of review in the WTO Antidumping Agreement this way. See, e.g., Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Antidumping Decisions*, LAW & POL’Y INT’L BUS., Fall 2002, at 109.

12. Jackson, *supra* note 3, at 163-64 (“It is now much more clearly a rule-oriented system. This orientation influences the directions that governments take . . . in their economic diplomacy. For example, their stances in negotiating new treaty texts are affected because in many cases the treaty text is now ‘for real.’”).

13. As noted, the majority of WTO complaints challenge trade remedy measures. See *supra* note 7. Import-sensitive U.S. industries (e.g., steel) and their congressional supporters have been, for example, dismayed about the WTO’s record of regularly

there was more room for exceptions to the rules that gave governments the means to resist pressure to retreat generally from their commitments to the GATT rules. The WTO is less flexible both in its substantive rules (e.g., in areas like safeguards) and in its dispute settlement process.

An additional downside here is that because political realities still limit a government's abilities to impose WTO decisions on its electorate, the record of implementation of WTO panel and Appellate Body rulings is not much different than the record of implementing GATT panel decisions.¹⁴ A dispute settlement process that issues "binding" decisions which are then ignored cannot long retain its credibility. It may well be better to have a system that is flexible enough to allow Members to work within it than to have a system that forces Members to ignore its rulings on particularly sensitive issues.

C. The Core Problem Is That the WTO System May Now Be Too Rigid to Manage an International Trade Crisis

If all that were at issue were a set of sector-specific or issue-specific problems, the differences between the WTO's and GATT's approach to managing the international trading system probably would not matter very much; efforts to resolve bilateral differences, to continue the process of opening markets, and to limit protectionist pressures would go forward with more or less friction, but with no real threat to the system as such. There is, however, at least a possibility that much more than a set of containable trade problems is at issue.

The most significant challenge to the trading system comes from the structural imbalances in trade flows that have been growing since the 1970s—i.e., the massive U.S. deficit and the very large surpluses that export-led growth policies produce in China, Japan, Korea and a host of other countries. The concern here is that (1) the U.S. trade deficit is not sustainable for much longer,¹⁵ (2) countries that have long relied on export-led growth and/or have resisted pressure to reduce their disincentives to imports of goods and/or services (e.g., China, Japan, Korea, Taiwan, Germany) will resist change,¹⁶ (3) the United States

overturning decisions of U.S. authorities in investigations and reviews under U.S. antidumping and countervailing duty law.

14. See Davey, *supra* note 2, at 48.

15. See, e.g., Joseph Stiglitz, *How to Fix the Global Economy*, N.Y. TIMES, Oct. 3, 2006, at A27 ("For how long can the global economy endure America's enormous trade deficits—the United States borrows close to \$3 billion a day—or China's growing trade surplus of almost \$500 million a day? These imbalances simply cannot go on forever.").

16. Most mainstream economists appear to believe that the U.S. trade deficit is primarily a function of U.S. economic policies which produce a negligible U.S. savings rate and/or a chronic U.S. budget deficit. See, e.g., *id.* The fact is, however, that there has been a twenty-five-year-plus upward trend in the size of the U.S. deficit that has occurred despite

will not have the trade policy leverage to “encourage” such change, (4) no other country or group of countries will emerge as a substitute for the U.S. market, and (5) instead of a process of negotiation and accommodation, there will be a global economic crisis triggered by, for example, a sudden, radical devaluation of the dollar.

None of this may come to pass. The WTO system may prove capable of dealing with structural imbalances in trade flows or the structural imbalances may not prove to be a particularly serious issue (e.g., they could go on for decades and/or correct themselves gradually). If, however, it turns out that there is a crisis looming that will put significant strain on the WTO, there is a legitimate question regarding the adequacy of the trade policy tools available to address the problem. The decision to judicialize WTO enforcement of existing obligations has been, whether consciously or not, a decision to limit the trading system’s ability to avert a crisis.



drops in the U.S. budget deficit (and surpluses during the Clinton years), periodic falls in the value of the U.S. dollar relative to the euro, the yen, and many other currencies, and occasional improvement in the U.S. savings rate.

The notion that the sole source of the problem is U.S. policy discounts the probability that structural surplus countries run their structural surpluses because that is what their economies are structured to do. The data on point are sobering. In 1985, the value of the Japanese yen was ¥238/US\$. By 1995, the yen was worth more than 2.5 times its 1985 value (i.e., ¥94/US\$), but Japanese trade surplus denominated in yen, which was ¥10.8 trillion in 1985, had hardly budged (it was ¥10 trillion in 1995)—and in U.S. dollars, Japan’s surplus had jumped from \$45.3 billion in 1985 to \$106.4 billion in 1995. On these numbers, it is very difficult to conclude either that Japan’s economy was open to imports or that it did not promote export-led growth. Korea, China and other countries have followed Japan’s export-led growth policy lead.