

SHOULD THE RELATIONSHIP OF WTO OBLIGATIONS TO U.S. LAW BE REINVENTED?

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I. INTRODUCTION

The blurb in your program brochure asks, “Should the U.S. adopt a new procedure for implementing adverse World Trade Organization (WTO) decisions, possibly including an active role for U.S. courts?” In other words, should WTO dispute settlement decisions be given some sort of official status in the U.S. legal system? The topic is a timely one. There is a debate now going on and likely to intensify soon about Trade Promotion Authority (TPA)—a political arrangement designed to facilitate cooperation between the two political branches of the Federal Government with authority in the field of international economic relations. But in order to lead anywhere really productive, the debate should step back a few paces and look more broadly at our front-loaded system for achieving conformity with international obligations undertaken in the trade field.

What do I mean by a front-loaded approach? The basic idea is that we seek to make the changes necessary to implement new trade obligations all at once, through an implementing bill enacted after a pact’s signature and before its entry into force. Thereafter, we worry mainly about complying with U.S.

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law as revised, rather than focusing directly on international obligations. This is implicit in our TPA system—a system that aims to resolve a constitutional conundrum—to enable us to participate as a credible partner in trade initiatives, and to assign an appropriate implementing role to all three branches of government. In the case of the judicial branch, the assigned role is basically zero. We maintain a membrane between our legal system and the international obligations, and we sideline judges by denying them any real role in policing the government's conformity with international rules. They have to apply domestic law in the cases that come before them, even if they think that domestic law implements (transposes) international obligations incorrectly.

This situation strikes many lawyers, especially those from other jurisdictions, as unsettling. And objectively speaking, the premise that we can do all of our implementing up-front is starting to look more and more like a conceit. According to one recent count published by the Office of the U.S. Trade Representative, there have been thirty three WTO dispute settlement cases against the United States that succeeded on core issues, with U.S. measures found to violate WTO obligations.¹ The U.S. implementing legislation for the WTO agreements, known as the Uruguay Round Agreements Act (URAA), was enacted in 1994 and took full effect along with the WTO agreements themselves on January 1, 1995. Even subtracting cases involving measures put in place after January 1, 1995, a few of which have been challenged at the WTO, thirty-three losses means there were a lot of errors in the URAA—mainly, a lot of measures we didn't think we needed to amend or repeal in 1994, but were later told we did. Such adverse rulings are hard to swallow, since they reflect a stark difference of opinion (between the U.S. implementers and the WTO adjudicators) over what the United States really agreed to. When told that our implementers made dozens of serious errors, some of us suspect that the problem may often lie with the adjudicators. The front-loaded approach is also poorly-suited to ensuring conformity over time with certain kinds of obligations, such as the obligation not to harm trading partners through subsidization.

II. RESPONDING TO ADVERSE WTO DECISIONS—THE CURRENT SITUATION

Concerning the U.S. response when presented with adverse WTO dispute settlement decisions, the situation at present is basically as follows:

1. OFFICE OF THE U.S. TRADE REPRESENTATIVE, SNAPSHOT OF WTO CASES INVOLVING THE U.S. (2006), available at www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Section_Index.html (follow "Snapshot of WTO Cases Involving the United States" hyperlink) (last visited Mar. 17, 2007).

- 1) The Executive Branch, speaking for the United States, always promptly declares an intention to bring measures found WTO inconsistent into conformity, and normally requests a “reasonable period of time” in which to do so. The Executive Branch does not always have a clear sense of how the measures will be revised to achieve conformity, or a clear plan for securing Congressional approval where this is needed, but it always announces an intention to comply. There were rumors that the Internet Gambling case would break this pattern, and indeed it might have if the Appellate Body had not modified the lower panel findings and produced a final decision that could be regarded as tolerable from a U.S. point of view.
- 2) Where the changes needed are within the power of the Executive Branch to deliver, they are always delivered and almost always on-time.
- 3) Where the changes needed require an Act of Congress, there are sometimes substantial delays, and a few adverse decisions requiring congressional action remain un-implemented to this day (Examples: Havana Club, antidumping “all others” rate). Congressional action can be obtained, even when political resistance is strong, where meaningful retaliation by powerful trading partners provides an added incentive (Examples: FSC/ETI, Byrd Amendment). But generally, the Administration is more interested in achieving WTO conformity than the Congress is, and is asked to pay some sort of political price to “buy” congressional action. Legislation implementing adverse WTO decisions therefore is sometimes packaged with other provisions, desired by Congress, which the administration would not likely support in isolation. In one case (Irish Music), the United States “monetized” a WTO conformity problem, paying cash as a settlement to stem pressure from a victorious complainant rather than altering a U.S. statute that would have been politically hard to change. In another case that was originally thought to require congressional action (Internet Gambling), the Administration cited changes in its internal “enforcement posture”, which it said were adequate to achieve conformity with the adopted WTO decision. The complainant (Antigua) disagreed and requested compliance proceedings, which resulted in a finding that the United States has not yet achieved WTO-conformity in this matter.

In sum, we have a fairly ponderous mechanism for acting in the wake of an adverse WTO decision, and a pretty skeptical attitude toward the whole endeavor. We certainly could, in theory, streamline things.

III. WHAT ABOUT A CHANGE?

So what are the best reasons for and against a change that would “pierce the membrane,” give WTO obligations a higher status in the U.S. legal system, and (presumably) allow judges to get into the game of policing the government’s behavior? Reasons for such a change include the following:

- 1) The nature of WTO obligations is changing, and in a way that will put ever more pressure on our front-loaded implementing system. Increasingly, the WTO rules include not just negative obligations (“I will refrain from doing X to interfere with trade if you will refrain from doing Y to interfere with trade”) but positive obligations as well (“I will do X to facilitate trade if you will do Y to facilitate trade”). And they are becoming more results-oriented rather than process-oriented (“I will undertake to provide a competitive internal market for basic telecommunications services”). What is needed to implement, and ensure conformity over time, with obligations of this type cannot easily be determined during the brief window between signature and entry into force.
- 2) Judges, based on the trend of their opinions citing the “Charming Betsy” doctrine, seem eager to get into this game, and many of them would be capable of interpreting the WTO agreements and judging government actions against those agreements’ requirements in close cases.
- 3) America’s popularity in the world is at a low ebb in part because of the perception that we are not much interested in being bound by international rules. There is very little scope at present for changing this perception in matters military (UN authorization to use force; International Criminal Court), environmental (Kyoto), or labor-related (ILO Conventions). Perhaps in the economic sphere, where we are doing well and have a basis for acting confidently, we could make a greater allowance and effect a change that would have not just practical but also broad symbolic importance.

Reasons against making such a major change include:

- 1) In debates over trade, we have always had a certain amount of trouble with the “black helicopter” crowd—those who argue that trade pacts, especially when coupled with membership in an institution like the WTO, undermine our sovereignty. Up to now, the WTO’s defenders have always been able to prevail in that argument, by pointing out that the WTO cannot directly change U.S. legal and policy outcomes. We can be found in

breach of WTO rules, but the decision about what to do in that scenario is a political one. Without that layer of political review, those dissenting on sovereignty grounds would have a much more legitimate (and strongly felt) objection. Indeed, for all its “voluntary” aspects, WTO dispute settlement is already considered one of the most binding and effective forms of international dispute settlement.

- 2) The WTO rules have edged (some would say sprawled) into a number of areas that are sensitive, and in which a further transfer of sovereignty would be troublesome. Included—to cite just four that have caused problems for the United States already—are such matters as gambling regulation, product standards, government spending programs, and tax policy, as well as various areas of service sector regulation traditionally dominated by state and local authorities in the United States rather than the federal government. Digesting this broader set of obligations, not to mention finding consensus for still greater expansions of the WTO’s remit (now under discussion), will be easier if we maintain political control in the dispute settlement context.
- 3) The WTO dispute settlement process has produced a substantial number of dubious pro-complainant decisions. Complainants almost always succeed at least on large portions of their cases, and there is a structural concern in that the decision-makers (and the Secretariat officials who staff them) as individuals are deeply invested in the WTO and want it to have the widest footprint possible; they are generally willing to strain to find a WTO rule that applies to conduct they find distasteful. Giving the output of such a system, an official status in U.S. law would be controversial, and rightly so.
- 4) Getting judges into the business of policing the government’s compliance with international rules would present difficult challenges in our constitutional system. There are significant foreign policy implications that cut in favor of a mainly political, rather than legal, approach here. Indeed, there is a broader principle in U.S. law, not limited to the trade field, under which the task of determining what the international obligations of the United States are rests in the first instance with the Executive Branch. Allowing lawsuits against the government to challenge assertedly WTO—inconsistent behavior would put judges in the position of second-guessing—or possibly even jumping ahead of—Executive Branch determinations.

I come down on the side of continuing to deny WTO dispute settlement decisions formal recognition in U.S. law. It might make sense to temper the

extreme “frontloadedness” of our TPA implementing system, and there may be different ways to structure the political review that occurs in the wake of an adverse WTO decision, but some layer of political review remains essential. This fundamental aspect of the current U.S. approach would be too difficult and risky to change.

But others will no doubt weigh the factors listed above differently, or focus on other factors altogether, and reach a different conclusion. I hope the debate is a vigorous one both during our Q&A this morning and in the forthcoming discussions over renewing TPA. I thank you for your attention and look forward to your comments and questions.