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The WTO on Trial

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GLOBAL LAW, GLOBAL POLITICS

Last fall, a judicial panel of the World Trade Organization (WTO) issued a controversial ruling in a high-stakes corporate tax dispute between the United States and the European Union. Paying scant attention to the complexities of the case, the panel authorized Brussels to implement retaliatory sanctions of $4 billion -- an unprecedented sum -- against Washington. Notably, around the same time the United States and its European allies were also making headlines with another fierce legal battle: that over the authority of the International Criminal Court to prosecute American soldiers for alleged misdeeds committed abroad.

In the nineteenth century, Clausewitz famously wrote that war is politics conducted by other means; today, as these examples illustrate, the same could be said for the law. Many disputes that used to be settled by negotiation or even by force of arms now end up before a proliferating range of international courts, tribunals, and arbitral panels. Legal briefs are replacing diplomatic notes, and judicial decrees are displacing political compromises.

Less often considered is whether this ascendant legalism is good or bad for global prosperity and stability. In most cases, it turns out, it is still too early to say. There is one exception, however: the WTO. Nowhere else has international conflict resolution by judges emerged more forcefully or developed more rapidly. As in a domestic court -- but unlike in most international bodies -- WTO dispute settlement is both compulsory and binding. Member states have no choice but to submit to it and must accept the consequences of the WTO's ruling.

But what, exactly, does the WTO's record reveal about how it has used its unprecedented powers? The question is a pressing one, for negotiators have only until a May 2003 deadline to take stock of the dispute settlement system and decide whether, or how, it needs to change. Will the dramatic judicialization of international trade be reversed? So far, trade experts have revealed deep ambivalence about the WTO's experiment with binding adjudication, and there is little clear sense of where the system should go from here.

At the WTO's inception in 1995, the organization's provisions for legal dispute settlement were touted as state of the art and the crown jewels of the WTO system. Today, however, even some of the organization's original architects and supporters complain that the process has gotten out of hand. Critics accuse the WTO's appellate tribunal of improper judicial activism, much as conservative American jurists lambasted the U.S. Supreme Court in the 1960s and 1970s. Developing countries, meanwhile, complain that not all states are equal in their ability to use the WTO's laws to advance their own interests. Litigation,

they argue, draws on different skills, resources, and even cultural attitudes than does diplomacy, placing certain nations at a real disadvantage.

An accurate assessment of the WTO's judicial record finds that the system has indeed reduced the role of international diplomacy, while strengthening the rule of law. At the same time, a number of measures, described below, should be implemented to strengthen the rule of law still further while also providing incentives for resolving trade disputes through negotiated solutions -- a more prudent approach when the rules are unsettled and political and cultural differences are a large part of the problem.

ON THE RECORD

When the WTO was established in the mid-1990s at the end of the Uruguay Round of global trade negotiations, the fact that it included a new and improved dispute settlement system was regarded as a signal achievement. Under the preceding regime, the General Agreement on Tariffs and Trade (GATT), dispute resolution worked only if the countries involved voluntarily accepted both the jurisdiction of the arbitral panel and its ultimate ruling. Such rulings could take years to obtain, and the defending party could block the process from moving forward.

In the WTO system, however, parties can no longer block the process at any point. Panels must render their decisions within established time frames, and an Appellate Body has been established to review the initial decisions of the arbitral panels. Rulings by this higher court are final and automatically binding.

The institution of the Appellate Body is the most radical aspect of the new WTO system, and a most remarkable aspect of the Appellate Body is the independence of the jurists who compose it. Members of the Appellate Body do not act as advocates for the national interests of their home countries; in fact, the judges have displayed levels of integrity and independence that rival those found in the best domestic court systems.

As a result, disputes at the WTO are now settled largely on the basis of the rule of law rather than simple power politics. Each member country has equal rights within the system, and each also has an equal obligation to accept the results. Although developing countries have not yet fully reaped the benefits of the system, using the dispute settlement mechanism is crucial to full participation in the WTO. Binding adjudication, moreover, has increased the certainty that trade agreements, once negotiated, will be adhered to and enforced.

In fact, in a majority of cases over the last seven years where the complaining country won a WTO dispute, the losing state removed or revised the offending trade barriers. This positive track record may be surprising to some observers, since the cases that have attracted the most media attention were those few, difficult instances in which the losing party was either unable or unwilling to comply with the ruling.

Despite this largely positive record, WTO dispute settlement has attracted strident criticism. Some of the critiques have been ill-founded and self-serving, reflecting vested interests in specific issues or results. Other arguments, however, point to legitimate problems with the WTO system and highlight the need to refine it.

MAKING THE LAW?

The sharpest and most pervasive critique leveled at the WTO's Appellate Body has been the charge of judicial activism. Ironically, this accusation has come from two usually antagonistic camps: antiglobalization advocates and doctrinaire free traders. Each side has found evidence of judicial activism in those rulings with which it disagrees. But an open-minded look at the record shows that, in most areas, the Appellate Body has acted with due respect for state sovereignty and the letter of the law.

Take, for example, the beef hormones case, a favorite target of the antiglobalization movement. In that dispute, the Appellate Body upheld a panel ruling against an EU ban on U.S. and Canadian beef injected with growth hormones. Antiglobalization activists attacked the decision, claiming that the ban was a response to genuine consumer anxiety and should have been upheld. Given the scientific uncertainty that remains about the safety of hormones, the advocates argued, the Appellate Body should have deferred to

the will of the EU's citizens.

The EU's own lawyers, however, refused to invoke the WTO rule that allows for temporary precautions (including import bans) in situations where scientific evidence of a risk has yet to be confirmed. Instead, the Europeans preferred to go for broke, pushing for a permanent ban. The Appellate Body therefore had little choice but to strike down Brussels' restriction, since it lacked the scientific justification required by WTO rules. But far from being a case of judicial activism as critics have charged, the ruling actually reflected respect for Europe's sovereignty, emphasizing as it did that the requirement of scientific evidence could be flexible and admit "non-mainstream" science.

Hard-core free traders, meanwhile, have taken aim at a different ruling, known as shrimp-turtle. In that case, Washington had banned the import of shrimp from countries that did not mandate the use of fishing techniques that were safe for endangered sea turtles. The Appellate Body found that the ban could have been justified under an environmental provision in the WTO agreement -- except that in this case it had been applied in a discriminatory manner. The United States subsequently made changes to address these concerns, and the WTO tribunal approved the new measures in a later decision.

Critics have charged that this ruling, like the beef hormones case, was an instance of judicial activism, in part because it was inconsistent with an older GATT decision condemning a ban on tuna imports from countries that did not protect dolphins. The critics' complaint, however, reflects a belief that the WTO should not sanction any trade measures that are meant to address environmental concerns. But the problem with this argument is that the WTO treaty does not actually prohibit conservation-minded trade measures, so long as such measures are not merely a pretext for protectionism or unjustifiably discriminatory. Nor is there any rule in international law that prohibits the use of economic pressure on other countries for environmental ends. In fact, the preamble to the WTO agreement actually promotes the objective of sustainable development. Thus the Appellate Body's ruling was hardly radical, as its critics have charged; noting the commitment to sustainable development and the absence of any law banning measures such as the one at hand, the Appellate Body simply deferred to the sovereignty of the United States.

Another issue that has attracted charges of judicial activism is the Appellate Body's willingness to accept amicus curiae briefs from nongovernmental actors. Critics complain that the Appellate Body made this decision despite the fact that it has no explicit authorization in the WTO agreement to do so. But the WTO agreement is also not explicit about the right of governments to provide submissions in their own cases. Clearly, the drafters of the agreement left certain procedural matters to be resolved by the judges and their own sense of due process.

Other critics have suggested that the decision to accept amicus curiae briefs reflected a developed-country agenda hostile to the interests and legal culture of the developing world. Yet this argument is similarly flawed. The judges of the Inter-American Court of Human Rights -- all of whom hail from developing countries -- also allow amicus curiae briefs in their court, as do other international tribunals as diverse as the African Human Rights Commission and the World Bank's inspection panel. It was also sometimes objected that accepting briefs from nongovernmental actors would give them more rights than WTO member governments that weren't party to the dispute -- but the Appellate Body has recently ruled that, in addition to private persons and groups, such states may also submit amicus briefs.

MORE OF A GOOD THING

The sweeping criticisms of judicial activism leveled at the WTO do not, therefore, withstand scrutiny. The Appellate Body can, however, learn a lesson from these attacks: namely, that a measure of judicial caution is essential in all international dispute settlement. This is true especially in contexts such as the WTO, where rulings are automatically binding. Moreover, international courts offer little room for redress. The rulings of domestic courts on most matters can be corrected by a single domestic legislature. But practically speaking, the decisions of the Appellate Body of the WTO can be corrected only by a consensus decision of the organization's 144 members.

For this and other reasons, international law principles, which the Appellate Body is directed to follow,

incorporate judicial caution: when a treaty text is ambiguous and the negotiating history is nonexistent or unhelpful, judges should adopt the interpretation most deferential to state sovereignty. Generally speaking, the Appellate Body has followed this cautious approach.

There is one exception, however. In cases that involve domestic trade laws such as antidumping rules, the Appellate Body has tended to be intrusive in its interpretations of the WTO's rules, even when the treaty is ambiguous. This tendency is especially troubling in the antidumping context, where judges have failed to apply the deferential standard of review negotiated into the Uruguay Round agreement. Free traders have not objected to most of these rulings, since they believe that the domestic measures in question have often smacked of protectionism. But the fact is that trade remedies remain legal under the WTO and can be important safety valves that release political and economic pressures -- pressures that might otherwise threaten WTO members' basic commitment to free trade.

Part of the problem is that the Appellate Body has too often made it difficult for domestic agencies to administer trade remedies in an expeditious and cost-effective fashion. National decisions on technical and procedural matters were not meant to be micromanaged by WTO panels. Doing so will ultimately have an inequitable effect on developing countries, which are newcomers to the use of trade remedies, have the least experience with them, and have the fewest resources to respond to WTO demands.

The WTO's rules are often unclear on their face -- another reason for the Appellate Body to exercise restraint. Compiling a more comprehensive history of WTO negotiations would therefore be a useful way to guide the Appellate Body's approach to ambiguous treaty texts.

In addition, there are a number of other important systemic problems in the WTO regime that need to be addressed. Careful analysis of the past seven years suggests that several changes could safeguard and even enhance the judicial character of WTO dispute resolution while improving and augmenting alternatives to litigation. Such alternatives are important because in every legal system, whether domestic or international, there are cases that cannot be solved simply through applying the law as it is written. The facts may raise novel issues, or the political questions that are raised may be too sensitive for governments to leave to judges. In these situations, the use of judicial dispute settlement is neither constructive nor likely to promote a country's goals.

Although the WTO system makes it easy to litigate a dispute and secure a legal ruling, it unfortunately does not provide a structured way to achieve negotiated settlements. Such an alternative is sorely needed, and the WTO negotiations now under way provide an ideal opportunity to make such midcourse corrections.

The WTO's rules currently require consultations before litigation, with the objective of encouraging settlement. These consultations, however, have all too often proven perfunctory and ineffectual. Negotiations would become far more meaningful if the parties were assisted by an independent, professionally trained facilitator. Mediation already exists as a concept in the WTO, but only in the form of ad hoc intervention by the secretariat. It does not exist as a prehearing process conducted by independent experts schooled in alternative dispute resolution. The current rules should thus be amended to require mediation before a matter goes to full dispute settlement. Should the talks fail, the results of the mediation would remain confidential and not be provided to the WTO dispute settlement panel. Further, the panel could require a return to mediation at any stage of the dispute, provided that this did not lengthen the litigation.

When the panel does render decisions, its standard remedy is to recommend that the losing country change its laws or practices. A losing state, however, might have understandable domestic political reasons why it is not able, for example, to overhaul a complex scheme of legislation in the short or medium term. A distinctive feature of the WTO's system is that if the loser fails to comply with a ruling, an arbitral panel may award the winner the right to retaliate through trade restrictions.

Addressing noncompliance through retaliation, however, can be both ineffective and inequitable. Such trade restrictions may not be enough to induce powerful WTO members such as the United States or the

EU to get into line. On the other hand, for smaller or poorer countries, such sanctions can be unfairly devastating. Retaliation also has the perverse effect of creating further distortions of trade through the reimposition of import barriers and thus may actually do harm to the interests of the winning party. Consider the recent $4 billion ruling against the United States; had the EU imposed the full measure of sanctions (as it was entitled to), it could not easily have avoided damaging its own industries, which have extensive commercial ties with the United States and may import many of the same American products targeted for retaliation.

Alternatives to retaliation should be available in cases where the losing party does not comply with a panel ruling. In a recent dispute between the EU and the United States over music copyrights, monetary payments were used to resolve the matter. This precedent should be generalized by explicitly amending the WTO treaty to allow the winner in a dispute to request monetary damages or increased trade concessions from the losing party as an alternative to retaliation. Although retaliation should remain available as a right of last resort, the winning party should have the flexibility to request less restrictive alternative penalties.

Meanwhile, although some developing countries, such as India and Brazil, have the capacity to participate fully in the WTO's dispute settlement proceedings, many others lack the resources. The WTO's Law Advisory Center is meant to deal with this problem, but with only a handful of lawyers, most of whom are quite junior, it provides minimal assistance. Additional measures should therefore be considered. One possibility would be to implement cost rules -- that is, to require that when a developed country loses a case against one of the least-developed ones, it is required to pay at least a portion of the winner's legal costs.

Although legal aid for poor developing countries is important, it is not a long-term solution to the current imbalance in power and resources. Legal education and training in WTO law and dispute settlement must therefore be improved within developing countries. These measures should be undertaken in partnership with universities and aid agencies. At present, despite the plentiful rhetoric about the need for "capacity building," meaningful support for such efforts is still scarce. For example, the World Trade Institute in Switzerland, which offers an advanced degree in WTO law and economics, may lose applicants because it is unable to provide scholarships.

The WTO's arbitral system also needs to improve its transparency and due process. The rulings of WTO judges affect the public interest in the broadest sense, as is especially evident in cases related to health and the environment. Yet the WTO's hearings and submissions remain secret, an unacceptable vestige of the old days of cloak-and-dagger diplomacy. Conducting hearings and appeals in secret undermines the legitimacy of the WTO and gives rise to unwarranted suspicions. Moreover, such secrecy is unnecessary; there is no good reason why WTO hearings should not be open to the public. Public input would also be enhanced by reaffirming the Appellate Body's decision to permit amicus curiae submissions.

The manner in which the WTO's panelists are chosen also needs to change. At present, selection is ad hoc and often not based on expertise in trade law. As long as that remains the norm, the Appellate Body will continue to revise extensively the rulings of the lower panels, all but ensuring that the Appellate Body continues to be accused of inappropriate activism. The WTO therefore should create a professional corps of judicial panelists, as the European Commission has proposed. Using full-time panelists who are experts in the law and properly compensated would enhance the quality of their decisions and reduce the tendency of the Appellate Body to substantially revise them. Reliance on a professional corps of panelists also might help prevent rulings that disregard international law and WTO precedent.

Finally, although in most cases the WTO's panels focus on treaty wording when interpreting the law -- as they should -- and read the treaties as part of international law as a whole, certain situations still arise when WTO judges end up ruling on ambiguous provisions. Such situations create a real risk that the resulting decision will exceed the limited consensus that framed the original agreement. Some WTO provisions on delicate matters, for example, such as the rules on dumping and subsidies, represent compromises that were heavily bargained and carefully scrutinized by domestic legislators. General international law permits adjudicators to examine the negotiating history of treaties when otherwise

unable to resolve ambiguities. But to properly interpret these documents, a detailed public record of the negotiating process is needed. And yet, during the last round of WTO negotiations, such a detailed record was not kept. This oversight must be corrected so that future panels are not deprived of this important interpretive aid.

ROLE MODEL, RULE MODEL

The WTO's seven years of judicial dispute settlement have been a success overall, notwithstanding the objections of the system's critics. The very range of issues that have been submitted to the WTO's panels shows how much confidence member states now have in the system, and the experience has taught the world a great deal about the challenges inherent in judicializing an international organization.

As other international forums move in a similar direction, they should draw a number of lessons from the WTO's experience. First, the WTO's panels have shown that international tribunals can indeed function independently, with judges basing their rulings on the principled interpretation of the law -- not on national affiliation. Second, the WTO has shown that when rulings directly affect the interests of citizens, the legitimacy of those rulings and the system as a whole depends on the transparency of the judicial process; secrecy and insulation from public input will no longer be tolerated. Third, the WTO's experience shows that once created, an effective international judicial system based on compulsory jurisdiction is likely to be used extensively and intensively. As the $4 billion award in the EU-U.S. tax case illustrates, the stakes in such disputes can be very high indeed. Ensuring adequate resources, equitable access, and the fair treatment of politically sensitive cases is therefore essential and must be thought through early on, ideally when the tribunal and its procedure are first being designed. Of course, no judicial system, no matter how well run, can avoid the inevitable messiness of politics, and no system will ever replace diplomacy. Nor should it. States must avoid the temptation to go to court in situations where political or diplomatic channels would offer a better, more equitable solution. The WTO must therefore also figure out how to improve its mechanisms for negotiated solutions, and not automatically resort to its judges.