THE DISPUTE SETTLEMENT MESS AND THE WTO APPELLATE BODY AS A LIGHTNING ROD

-- SPEAKING NOTES --

Before a Global Business Dialogue Colloquium

Disputed Court:
A Look at the Challenges To (and From)
the WTO Dispute Settlement System

Washington, DC

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-- SPEAKING NOTES --

Good morning and thanks to Judge Morris for including me in this installment of the Great Conversation about WTO dispute settlement.

I'm going to start with some context which I consider essential to understanding what is happening in regard to the Appellate Body. Bear with me, please.

Context Part I

This storm has been brewing for a long time. The specific tactics being deployed may surprise some observers, but the depth of feeling underneath those tactics cannot surprise anyone.

Dissatisfactions with the DS system are a dog's breakfast of different elements, not all of which directly involve the Appellate Body:

- We get sued too much.
- We get sued for measures that have no effect on trade, and this is a gross misuse of the system tolerated by the system's silly rules.
- We get criticized for our handling of adverse decisions, even though our compliance record is excellent.
- We get criticized when we bring a dispute, unless it is against one of the world's dozen or so richest countries.
- The private parties who care most about a case's outcome cannot be present during hearings, which they therefore experience as something of a star chamber.
- But by far the biggest item is that when on defense, we lose cases and claims we shouldn't lose. I'm pretty sure this has happened in every single year of the WTO's existence. While some of the measures faulted had limited significance, others involved fundamental sovereign prerogatives – *e.g.*, how we raise money, how we spend money, and various measures through which the federal or state governments have sought to regulate in the public interest.

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Context Part II

Virtually every defendant loses in Geneva. None of them enjoys it. A couple of factors may, perhaps, sharpen this especially for the United States.

- One is our front-loaded compliance system. Trade agreement implementing bills in the United States deny domestic legal effect to the agreements themselves. Instead, the government seeks to ensure compliance by amending, before new international obligations take effect, any laws which violate, or require agencies to violate, those new obligations. An implementing bill represents the collective judgment of the Executive Branch and Congress concerning what statutory provisions and agency practices, if left unchanged, would put the United States in breach. This "front-loaded" procedure makes it natural to greet adverse WTO decisions skeptically. If implementing legislation makes all legitimately required changes -- a condition which both political branches routinely certify is met by the implementing bills they craft, including the Uruguay Round Agreements Act of 1994 -- then by definition the amended laws conform to the new agreement, and any contrary decision must be based on an expansion rather than mere enforcement of the negotiated commitments.

- A second is that the WTO DS system is operated in a way that offends our basic notions of civics. The same Secretariat officials who staff negotiations (the legislative function) staff dispute settlement (the judicial function) at the panel level. Panelists too frequently are incumbent officials of WTO Member governments; we indulge the fiction that they can serve individually and independently, but that is a fiction indeed. Closure of the hearings, mentioned above, offends our notions of civics as well.

But as noted the biggest grievance is the results not the plumbing. Behavior that we never promised to refrain from, is faulted. Obligations are expanded. Measures that shouldn't even be challengeable are challenged successfully.

A Plaintiff's Court

Participants in the DS system – panelists, Secretariat staff and AB Members alike – have a pro-WTO bias that winds up producing a pro-complainant bias.

What's the pro-WTO bias? Conscious of the contribution multilateralism has made to global economic welfare, these individuals believe in the WTO enterprise and wish to see it become more and more important over time. They want the WTO to have the biggest possible footprint, want the coverage of its rules to be as comprehensive as possible. Not unrelated: virtually all of them make their living either working for, or in jobs that exist because of, the WTO.

How does this become a pro-complainant bias? These individuals have an instinctively negative view of gaps within which Members may do what they

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please. They find distressing the notion that there might not be a WTO rule or obligation on a particular point complained about in dispute settlement, and accordingly are prepared to strain to find one. By finding obligations which they can enforce, they are expanding the franchise of the WTO itself. This pulls them away from the default rule that what sovereign states have not expressly promised to refrain from doing, they cannot be faulted for doing. *In dubio mitius.* The judges often forget to ask themselves whether the defending Member specifically promised not to do the thing about which the complaining Member is complaining.

A pro-complainant bias could be a good thing, depending on which side you think your bread is buttered on. There are some who insist – normally just on principle and without detailed consideration of the economic significance of the measures and trade flows involved – that our losses on defense are fully offset by our wins on offense. Some even see losing on defense as affirmatively desirable, in that it helps us to get rid of elements of our trade regime that are retrograde and that would be purged anyway if our politics were more mature and enlightened.

Among the many problems with this viewpoint is its blinkered, short-term focus. A runaway DS system complicates, and may totally block, ongoing progress at the negotiating table. Anyone who does not see a link between what has been happening in dispute settlement since 1995, and the paucity of multilateral negotiating outcomes during that same period, isn't looking very closely.

The Appellate Body

Better late than never, we come to the AB itself. Currently, a lightning rod. Why?

First, it owns a lot of the most adventuresome decisions faulting U.S. measures.

Second, it unapologetically claims to have gap-filling authority. This claim, which the AB bases on the Vienna Convention of the Law of Treaties and certain cross references thereto in the WTO agreements, has exactly zero public acceptance in the United States. The WTO's most articulate U.S. champions are unwilling to endorse, cultivate public appreciation of, or even defend privately the Appellate Body's view on gap-filling. The absence of gap-filling authority was an important part of the basis on which the U.S. Congress agreed to implement the Uruguay Round results.

Third, the AB has a continued institutional existence. Panels produce disappointing decisions and then disband. Ill will toward individual panelists may last a while, but in time that fades too. The DSB does not serve very well as a target of outrage, although the views articulated at its meetings are often sharply worded. This leaves only the WTO Secretariat and the AB as potential targets. The Secretariat does too many other things, and its role in dispute settlement is too poorly understood by the public, for it to be the lightning rod. So the AB wins.

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Fourth, the AB's continued operation depends on appointments and reappointments, which in turn require consensus. So it is the locus of a point of leverage, in regard to a broader set of DS-related concerns that have been unwisely ignored for more than two decades.

I'm not here to defend the specific tactics of the Trump administration on re-stocking the AB. So far those tactics are not producing noticeable results or reforms. I do believe the underlying grievance is legitimate, and I am glad to see the US government elevating that grievance forcefully at long last. Further, it is doing so within the rules, by declining to join in a consensus where the WTO's rules require consensus. There are other tactics the USG could – and might – deploy that would more fairly be characterized as lawless. Hopefully solutions will be found, and systemic changes put in place, that will make anything like that unnecessary.

Rule of Law at Risk?

A final word on what all of this does, and does not, mean with regard to the Rule of Law.

Adverse WTO decisions do not have to be implemented. We can decide that we are too deeply attached, to a measure that has been faulted, to even consider removing it. We can decide that an off-piste decision – a loss in a case we weren't supposed to lose – should be ignored for that reason alone. We can decide that the "price tag" (in the form of expected WTO-authorized retaliation) associated with refusing to implement an adverse decision is bearable and, channeling Nancy Reagan, we can "just say no." We can do these things, because what happens *after* dispute settlement is a matter of politics and not of law. There is no WTO police force, and the Organization's members are sovereigns. We would not have joined a WTO equipped with a police force.

Making an informed political decision requires information. How wildly creative *was* the adverse ruling? What *are* the faulted measure's trade effects, which will determine the size (and painfulness) of the retaliation we might face? Elected officials cannot make political judgments without this kind of context.

Some would say that the very idea of considering the persuasiveness of an adverse WTO decision, and/or the "price tag" associated with refusing to implement it – as opposed to just cheerfully doing what the DSB says – is destructive of the Rule of Law. One might as easily say that unpersuasive decisions and challenges of measures with no detectible trade effects are destructive of the rule of law. But there is also a question of which of the fundamental goals identified in Article 3.2 of the DSU – predictability or not expanding obligations – one prefers to emphasize. In the Uruguay Round, negotiators changed the rules governing panel establishment and DSB adoption of decisions, but did not meaningfully change the rules on what happens next (compliance / compensation / retaliation). They left this essentially a bilateral affair

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between complainant and defendant based on relative economic and political leverage – exercised in the shadow cast by the adopted decision, and informed by an aspirational "preference" for implementation. Compliance – both "whether" and "how" – is up to the defendant, and requires a political decision by officials whose job is to make cost-benefit judgments. One can disagree with the way they value certain costs, including reputational and systemic harms, but one cannot seriously question the fact that a political decision is involved. And in that context, how can a decision's perceived soundness, and the price tag of flouting it, be ignored?

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