

THE LIMITED BUT IMPORTANT ROLE OF THE WTO

William H. Lash, III
Professor, George Mason School of Law
wtoaman@aol.com

Prepared for the Cato Institute's Center for Trade Policy Studies Conference, "Seattle and Beyond: The Future of the WTO," November 17, 1999, Washington, D.C.

The World Trade Organization is in many ways similar to the splitting of the atom. Both have great potential for productivity and destruction. The limited role of the WTO is that it cannot save us from us. It cannot establish new values or agendas for future trade officials. The scope and future of the WTO is limited by the vision, imagination, courage and conscience of the trade community.

The goal and function of the WTO is to remove tariff and non-tariff barriers and provide a mechanism for solving disputes between member states. However, the WTO has limits. Two of the forces forming these limits are consensus and expertise. Consensus is still the watch word for the WTO. Consensus has had a positive impact on restraining those who would turn the WTO into an economic-sanctions-granting version of the United Nations and keeps the membership focused on the serious business of trade. Expertise and the recognition of the limits of the areas of expertise is another limiting force on the WTO.

The GATT also failed to address many areas of the global economy or only addressed them on a piecemeal basis. The old version of GATT created limited, a la carte agreements on government procurement and subsidies, engaging a limited number of parties. The WTO has improved upon the GATT regime and now addresses agriculture, investment, services, and intellectual property. Not bad for only 50 years of work.

The WTO is not like the old Ed Sullivan Show. We do not have an act to please every audience. Since its inception, efforts have been made to hijack the train of trade in the name of the environment, labor, global ethics and sovereignty. Why are these new trade-come-latelys coming to the WTO to pursue their agenda? For the same reason Willie Sutton robbed banks: 'cause that's where the money is. If these "trade terrorists" cannot gain control at the WTO, they would just as soon destroy it. Plans for massive disruptions of traffic and protests in Seattle

illustrate that these people are more interested in press coverage than meaningful debate and dialogue.

Rules on international trade are highly developed, reflecting nearly 50 years of GATT/WTO negotiations. In the multilateral trading system, the environment, labor, and competition policy are new factors which threaten to burden the WTO. Newer areas of trade should properly be studied and addressed at the WTO. But the goal of studying these sectors should be to remove barriers, not create new trade barriers. Those who advocate linking trade and labor or the environment at the WTO are not interested in promoting world trade. They are interested in the leverage of trade to promote their often statist views. They seek not the spirit of the WTO but its perceived power and prestige.

The answer they seek is usually trade sanctions. According to them, we should not trade with states who have different environmental or labor standards than the United States or the European Union. The WTO should establish minimum standards in these and other areas. States failing to meet these standards could be hit with either countervailing duties or trade sanctions. Coming up with new reasons to block trade is not the spirit or intent of the WTO. Denying access to the U.S. market because of our environmental or labor values opens the floodgates to a host of "morality driven trade restrictions," jeopardizing the multilateral trading framework.

We must also recognize that the trade principal of division of labor should apply to the choice of forum. Although well suited to handling trade disputes, the WTO is primarily a trade forum and lacks expertise in assessing environmental or labor standards. The United Nations should continue to address global environmental issues. Similarly, the International Labor Organization, a long-standing body of labor, states and firms, is best suited to handle labor concerns. Issues such as competition policy and corporate conduct belong in the OECD, not the

WTO. To allow the WTO to become saddled with these issues would be inefficient. Relying on non-governmental organizations (NGOs) such as Greenpeace to set standards would also thwart global trade. Governments and environmental NGOs that do not have trade as a primary emphasis are unlikely to take a balanced perspective when evaluating trade and the environment.

What the WTO does best is dispute settlement. The number of trade disputes brought before the WTO is approximately three times the volume handled typically by the GATT. In the past four years, the United States has been the greatest proponent of this system. Approximately 40 cases have been brought by the United States seeking compliance with trade agreements and market access. The U.S. has had a good deal of success in this forum, winning better than 50 percent of its cases. United States trade advocates have gained market access in areas ranging from agriculture to computers. In contrast, the WTO's predecessor, the GATT, often derided as the "Gentleman's Agreement To Talk and Talk," failed to resolve many disputes and lacked credibility as a mechanism for resolving trade disputes. Parties to a GATT dispute could simply reject and block acceptance of the panel report. The case could be reargued numerous times until the parties tired of it and an agreement was reached.

The definition of winning and losing at the WTO departs from the traditional notion of victory. If the WTO supports the United States in a market opening initiative, the United States wins. In other cases, victory may come from the pressure that follows the institution of an action. Many of our trading partners, mindful of the significance of a WTO decision and not willing to be viewed as protectionists, settle the disputes before the case is adjudicated. The newest WTO enforcement provisions have been useful in gaining favorable results short of the courthouse door. Of the approximately 120 disputes brought before the WTO, one quarter have been settled prior to WTO panel decisions. At the risk of sounding like a Zen master, I submit we can also

win by losing at the WTO. The U.S. is the most often named defendant in WTO disputes.

WTO panels provide an opportunity to test U.S. practices and laws to see if we are truly an open economy, dedicated to free trade. Examination of our policies by impartial panels of experts test the validity of many laws and evaluate how we may be engaging in market-distorting activities while preaching free trade to others.

Another limit of the WTO involves the limits of its power. Contrary to all those who bemoan the surrender of sovereignty to the WTO we must bear in mind that the WTO does not have the power it is perceived as having. First and foremost, we must recognize that the WTO has no enforcement powers. It cannot rewrite U.S. laws nor levy taxes on violators. Leading constitutional law scholars have joined in debunking the notion of a powerful WTO . Former Appeals Court Judge Robert Bork, one of American's eminent constitutional law scholars, has concluded that the sovereignty issue "is merely a scarecrow." Under our constitutional system, he says, "no treaty or international agreement can bind the United States if it does not wish to be bound. Congress may at any time override such an agreement or any provision of it by statute." Professor John Jackson of Georgetown University School of Law, perhaps the nation's leading GATT expert, joins in dismissing the sovereignty claims as "ludicrous." Professor Jackson concludes the WTO "has no more real power than that which existed for the GATT under the previous agreements."

The confusion over the power of the WTO system stems from a flawed understanding of U.S. power under the old GATT system. Traditionally under the GATT, states could block or exercise veto power over decisions of dispute panels. Historically this power of a state to block acceptance of a GATT ruling was popular when a decision went against the United States, but less so when the United States was the complaining party. As a leading plaintiff in WTO

complaints, the United States has a substantial interest in seeing the acceptance of determinations of dispute settlement panels.

The WTO dispute resolution mechanism is still based upon old GATT principles of negotiation, conciliation, mediation and arbitration. In the event that this is unsuccessful, an impartial panel hears the case and renders a finding. In the event that the measure in question is found to be inconsistent with WTO, the offending state has the option of changing the WTO-inconsistent measure or offering trade compensation in the form of lower tariffs or increased market access to the aggrieved nation. In the unlikely event that the parties cannot come to any agreement at this stage, the complaining party may take retaliatory measures equal to the amount of the offending action against the offending nation. This action would have the approval of the WTO. The dispute settlement system of the WTO is intended to provide "security and predictability" to the entire multilateral trading system.

The dispute settlement mechanism has limits which have been challenged by WTO members. The U.S -Japan film distribution dispute was not a pure market access dispute. The U.S. attempted to challenge the antitrust laws and enforcement of these laws by Japan. The WTO panel correctly recognized that competition policy is not subject to WTO review. Most importantly the WTO did not accept the claims of non-violation and nullification asserted by the United States. Such an interpretation could leave a host of domestic laws subject to WTO challenge. It is significant to note that parties did not appeal the decision and Japan announced plans to amend some of the challenged laws. In summary, the system worked. Japan's laws were scrutinized by the world and the Japanese voluntarily decided to make changes. Each side gained.

We have seen WTO disputes with the European Union spillover into street fights. This reflects another limit of the WTO. WTO dispute settlement procedures are designed to produce consensus, not further disputes or trade tension. At any point of the dispute settlement, the parties are free to mediate a resolution to the dispute. The only sanction under the WTO process is the suspension of WTO trade-agreement-based concessions against the offending country. Under the WTO agreement, this relief should only be requested as a "last resort."

Unfortunately, in recent disputes we have been forced to retaliate against valued trading partners. I am not an advocate of trade sanctions, but to preserve the integrity of the WTO both at home and abroad we have had to impose sanctions on the European Union. If we failed to impose sanctions WTO critics globally could rightly say that the GATT was back. To quote Napoleon, it is better to kill one thousand and appear harsh than to appear to be too lenient and then have to kill ten thousand as a result of that first mistake. WTO sanctioned trade retaliation is a second best option.

The old time honored GATT rule of consensus has not disappeared. Parties are bound to accept panel or appellate body reports. But bound does not mean the WTO can or will enforce the decision. Enforcement is a coercive act, and the United States has not agreed to surrender sovereignty to the WTO or any other body.

One case often mentioned as an illustration that the WTO weakens U.S. sovereignty is the first case decided by a WTO panel—a case involving U.S. EPA rules on imported gasoline. This case brought by Venezuela and Brazil challenged U.S. EPA regulations on reformulated gasoline requiring that imported fuel quality be pegged to a 1990 U.S. baseline standard rather than individual refinery baselines. Venezuela asserted that the guidelines placed imports at a

disadvantage in U.S. markets. The WTO panel agreed that the U.S. gasoline regulations discriminated against foreign refiners.

In this early test of compliance with WTO reports, the EPA issued new pollution rules for imported gasoline. Pursuant to the new regulations, foreign refiners will have more flexibility in meeting the overall guidelines for reducing pollution-causing chemicals in conventional gasoline and will be allowed to contain the same level of pollutants as U.S.-refined gas. The EPA did not change U.S. rules on cleaner-burning "reformulated" gas despite a determination by the WTO that they were similarly discriminatory. Because the reformulated gas rules expired at the end of 1997, the EPA had no need to rewrite the rules. The United States took 15 months to carry out that partial implementation. There was no threat to U.S. environmental standards in this case. Similar environmental concerns have been raised in the WTO shrimp-turtle dispute. Here, U.S. environmental regulations prohibited the importation of shrimp harvested without sea turtle excluder devices. The WTO found that the United States had the legal right to engage in conservation measures to protect wildlife under Article XX. But the WTO Dispute Panel concluded that the method employed was arbitrary, not the least trade restrictive method, and constituted "in effect an economic embargo."

The shrimp-turtle case has changed the way we view environmental-trade disputes at the WTO. The appellate review of the case opens the door for more environmental issues to be decided before the WTO and with more involvement by NGOs. Several NGOs filed amicus briefs with the WTO, further politicizing the dispute process.

The WTO has also been accused of weakening or threatening U.S. national security. Trade disputes with the European Union have been raised due to the Helms Burton Act. The Helms Burton law calls for a variety of sanctions against companies which have purchased

property in Cuba that was stolen from its rightful pre-Castro owners. Even though the act is economically unsound and frankly does not enhance national security, a WTO panel would not undermine the act. Article XXI of the General Agreement on Tariffs and Trade, the WTO's charter, acknowledges each member's right to act as it deems necessary for the protection of its essential security interests in time of war or other international emergency.

Helms-Burton is legal and would survive WTO review. Article XXI explicitly recognizes that countries can act unilaterally in the name of essential security. But it declines to define exactly what constitutes essential security. In an earlier dispute involving U.S. export restrictions on Czechoslovakia, the GATT determined that each country is the final judge on questions relating to its own security. WTO members have recognized this principle for over 35 years, and that a country's security interest may be threatened by a potential as well as actual danger. Similarly, in 1985, our embargo on Nicaragua relied on the GATT security exception. The trade community accepted this—and so did the International Court of Justice.

The WTO cannot solve all of our ills. It cannot grow hair, bring about world peace or whiten your smile. But the economic prosperity of a stable multilateral framework can improve the standards of living around the globe.