WTO Report Card II

An Exercise or Surrender of U.S. Sovereignty?

by William H. Lash III and Daniel T. Griswold

Executive Summary

Critics across the political spectrum allege that the World Trade Organization undermines the ability of the United States to determine its own trade, tax, environmental, and foreign policy. But an examination of how the WTO really works reveals that no such threat exists to U.S. sovereignty. The WTO is a contract organization that arbitrates disputes among its members on the basis of rules that all have agreed to follow. Like every other member, the United States has the power to veto any agreement of which it disapproves.

The WTO wields no power of enforcement. It has no authority or power to levy fines, impose sanctions, change tariff rates, or modify domestic laws in any way to bring about compliance. If a member refuses to comply with rules it previously agreed to follow, all the WTO can do is approve a request by the complaining member to impose sanctions—a "power" that member governments have always been able to wield against each other. The WTO's dispute settlement mechanism actually makes the use of sanctions less likely.

The WTO's basic charter contains explicit exemptions for broad categories of trade restrictions. Under the WTO charter, members can enact trade restrictions for reasons of national security, public health and safety, and conservation of natural resources and to ban imports made with forced or prison labor. Such barriers are not subject to challenge by other WTO members.

The same dispute settlement mechanism that can render judgments against U.S. laws has been used effectively to encourage other nations to scrap trade laws that discriminate against exports from the United States.

Membership in the WTO is not a surrender of U.S. sovereignty but its wise exercise. The WTO encourages the United States to keep its own markets open for the benefit of U.S. consumers and import-using industries. WTO membership also promotes trade liberalization abroad, which opens markets and keeps them open for U.S. exporters.

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Introduction

Last November in Seattle, the Ministerial Meeting of the World Trade Organization was disrupted and effectively shut down for a day by sometimes-violent protests. The 50,000 protesters, ranging from labor and environmental activists to violent anarchists, were motivated by a grab bag of fears—fears of foreign economic competition, a "race to the bottom" on labor and environmental standards, and a loss of national sovereignty to a multinational body.

None of those fears holds up under scrutiny, but each has found traction in the public debate over America's participation in the WTO.[1] The sovereignty issue, in particular, has found an audience among conservatives and liberals alike and even a few libertarians who are otherwise sympathetic to the WTO's stated mission of trade liberalization.

In March a resolution to withdraw the United States from the WTO was introduced by Rep. Ron Paul (R-Tex.), one of the few self-described libertarians in Congress. In a statement announcing the introduction of the resolution, Paul declared:

> The World Trade Organization is the furthest thing from free trade. Instead, it is an egregious attack upon our national sovereignty, and this is the reason we must vigorously oppose it. No nation can maintain its sovereignty if it surrenders its authority to an international collective.[2]

From the left, regulatory activist Ralph Nader has also denounced "the far-reaching, powerful" WTO, warning:

> Under this new system, many decisions affecting people's daily lives are being shifted away from our local and national governments and being placed increasingly in the hands of unelected trade bureaucrats sitting behind closed doors in Geneva, Switzerland. . . . Once the WTO's secret tribunals issue their edicts, no independent appeals are possible. Worldwide conformity or continued payment of fines are [sic] required.[3]

If the WTO were in fact dictating the domestic laws and regulations of its members, it would indeed be a threat to national sovereignty. But the WTO can do nothing of the kind. This briefing paper will describe what exactly the WTO is and how it works. The paper will then analyze the record of the WTO since its creation in 1995 and the impact, if any, it has had on the ability of its members to determine their own national policies.[4]

How the WTO Really Works

The WTO is a multilateral institution that provides a forum for negotiating international agreements to reduce trade barriers and for adjudicating complaints from any of its 135 members regarding breaches of those agreements. Created in 1995, after the eight-year negotiation of the Uruguay Round of the General Agreements on Tariffs and Trade, the new permanent body goes well beyond the GATT's historical focus on reducing tariffs on manufactured goods. The WTO includes agreements on services, government procurement, agriculture, intellectual property, and investment. In addition, it clarifies rules on subsidies and antidumping law.

Essentially, the WTO is a contract organization that reflects the consensus of its members. It arbitrates disputes among its members on the basis of rules that all members have agreed to follow. The WTO itself does not write the rules. That responsibility rests with the members, who can change the rules or create new ones only through negotiations, which are often long and sometimes tortuous. The agreements that result from those negotiations become WTO law only when all members have agreed to accept every word; if there is no agreement, the negotiations either end or continue until a compromise acceptable to all can be reached. As the failed WTO Ministerial

Meeting in Seattle last year demonstrated, no agreements are reached or rules written until all members are ready to move forward together.

Accordingly, the United States cannot be outvoted as some critics have charged. Like every other member, the United States has the power to veto any agreement of which it disapproves. Moreover, no agreement that requires change in U.S. law can take effect here until the U.S. Congress passes the necessary implementing legislation.

Conservatives, in particular, are prone to lump the WTO with other multilateral organizations, such as the United Nations, the International Monetary Fund, and the World Bank, which they accuse of meddling in global markets or U.S. foreign policy. But the WTO is fundamentally different from those other organizations. It commands no troops or police, dispenses no loans or aid packages, administers no programs within the territory of its members, and strikes no deals with sovereign states.[5] The WTO's limited resources and mandate also contrast sharply with those of the European Union. From its headquarters in Brussels, the EU's executive arm, the European Commission, can issue regulations that are then automatically enforceable as national law in the EU member countries. The WTO possesses no such powers.

Dispute Settlement

The principal ongoing work of the WTO is to render decisions on whether members are in conformity with the organization's rules. But those decisions come only after a member has initiated a complaint and subsequent efforts to reach a negotiated settlement have failed. The main difference between the WTO and its predecessor, the GATT, is that panel rulings can no longer be suppressed by the losing party.

The tensions over and confusion about the power of the WTO system stem from a flawed understanding of U.S. power under the old GATT system. Traditionally, under the GATT, members could block or exercise veto power over decisions of dispute panels. Historically, the power of a member to block acceptance of a GATT ruling was popular when a decision went against the United States, but less popular when the United States was the complaining party. Under the strengthened WTO dispute settlement understanding (DSU), a panel decision becomes official unless all members agree to reject it, which is a remote possibility. As a leading plaintiff in WTO complaints, the United States has a substantial interest in seeing determinations of dispute settlement panels accepted.

Critics of the WTO have cited the loss of the veto by the "losing" member as proof that the new dispute settlement system undermines U.S. sovereignty. But Georgetown University professor John Jackson, perhaps the nation's leading GATT expert, dismisses the sovereignty argument against the WTO as "ludicrous." According to Jackson, the WTO "has no more real power than that which existed for the GATT under the previous agreements."[6]

WTO dispute settlement procedures are designed to produce consensus, not further disputes or trade tension. The WTO dispute resolution mechanism is still based on old GATT principles of negotiation, conciliation, meditation, and arbitration. At any point in the dispute settlement process, the parties are free to mediate a resolution to the dispute. The only sanction under the WTO process is the suspension of the complaining party's WTO trade-agreement-based "concessions." Under the WTO agreement, such relief should be requested only as a last resort. The 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.

No Power of Enforcement

In reality, the WTO wields no power of enforcement. It has no authority or power to levy fines, change tariff rates, or modify domestic laws in any way to bring about compliance. *The WTO has no power to make any member do anything the member doesn't want to do.* If a member's domestic laws are successfully challenged by another mem-

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ber through the WTO, the losing member remains free to exercise its sovereign will on the question of whether or not to conform.

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 monetary harm caused by the actions of the defendant. If the defendant member refuses to either change its out-of-conformity law or offer acceptable compensation, then under WTO rules the plaintiff member can impose trade sanctions against the offending member. The sanctions are meant to punish the defendant for flouting its obligations and to encourage it to make the challenged law WTO consistent.

Sanctions are not imposed by the WTO itself but at the discretion of the plaintiff member. The WTO does not confer a new "right" to impose sanctions; sovereign nations have always had the ability to impose trade sanctions against other nations for a variety of reasons. For example, Section 301 of the Trade Act of 1974 authorized unilateral sanctions against our trading partners for a variety of allegedly "unfair" trading practices. If anything, the WTO system makes the use of sanctions less likely by encouraging members to follow a set of procedures and seek conciliation before pulling the sanctions trigger.[7]

The dispute settlement system of the WTO is intended to provide "security and predictability" for the entire multilateral trading system. Members agree not to take unilateral action against perceived violations of trade rules; to refer disputes to the dispute settlement system; and, perhaps most important, to abide by its rules and findings.

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The Principle of Nondiscrimination

WTO rules do not require that members adopt specific tariff rates or a certain level of domestic regulation. Those decisions are rightly left to individual members. What WTO rules do require is that members apply tariffs and regulations to other WTO members in a transparent and nondiscriminatory manner.

A fundamental obligation of WTO membership is the so-called most favored nation principle. Article I of the 1994 basic GATT agreement requires that "any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."[8] In other words, a WTO member must apply the same tariffs and rules to like imports, no matter from which member the imports originated.

Another fundamental obligation is the principle of "national treatment." Under Article III, WTO members agree that all internal taxes and regulations they impose on the transportation, distribution, and sale of goods and services "should not be applied to imported or domestic products so as to afford protection to domestic production."[9] That is, a WTO member cannot apply one set of domestic taxes and regulations to domestic products and another, more burdensome, set of rules to imported goods once they enter the country for sale.

Article III does not obligate the United States to lower its domestic health and environmental standards for imports; it obliges the United States only to set the same standard for domestic and imported products. The first case decided by a WTO panel involved U.S. Environmental Protection Agency regulations for imported gasoline. That case, brought by Venezuela and Brazil, asserted that EPA regulations on reformulated gasoline required that imported fuel quality be pegged to a tough 1990 U.S. baseline standard rather than the less restrictive standard for domestically produced fuel, which was determined individually for each refinery. 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.[10]

As a result of that early test of compliance with WTO rules the EPA issued new pollution rules for imported gasoline. The new rules give foreign refineries more flexibility in meeting the overall guidelines for reducing pollution-causing chemicals in conventional gasoline; imported gasoline was 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. Instead, the EPA simply let the reformulated gas rules expire at the end of 1997 as scheduled by law.

The United States ran afoul of WTO rules, not because the U.S. law on reformulated gasoline was too restrictive, but because it was blatantly discriminatory. It was clearly written to give domestic producers an unfair advantage over their foreign competition. Making U.S. law compliant with WTO rules did not require that U.S. law be weakened or changed at all but that it be enforced in a way that does not discriminate against foreign producers for no other reason than that they are foreign.

The Primacy of Domestic Law

Many people who criticize the WTO on sovereignty grounds assume that the WTO is a self-executing agreement. But neither WTO agreements nor WTO rulings automatically become U.S. law. The WTO can neither rewrite U.S. laws nor levy taxes or fines on violators.

Leading legal scholars have joined in debunking the notion of a powerful WTO. Former appeals court judge Robert Bork, a constitutional law scholar generally respected by conservatives, has concluded that the sovereignty issue "is merely a scarecrow."[11] 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."[12]

Exercise of sovereign power over U.S. trade law resides exclusively in the U.S. federal government. In congressional testimony before passage of the Uruguay Round Agreements Act in 1994, then–U.S. trade representative Mickey Kantor explained:

> Nothing in the dispute settlement mechanism . . . requires the United States to change or alter its laws or pass new laws or to repeal old laws. Of course if . . . we're the subject of a negative finding of the panel, we might have to pay either compensation [in the form of lower tariff barriers] or be the subject of some trade action. That would be a choice we would make. We retain full sovereignty to make those choices on our own.[13]

Kantor elaborated:

> No ruling by any dispute panel, under this new dispute settlement mechanism . . . can force us to change any federal, state or local law or regulation. Not the city council of Los Angeles, nor the Senate of the United States can be bound by these dispute settlement rulings.[14]

Other international trade law experts have made similar statements. Former USTR general counsel Judith Bello states: "Like the GATT rules that preceded them, the WTO rules are simply not 'binding' in the traditional sense. . . . The WTO—essentially a confederation of sovereign national governments—relies upon voluntary compliance. The genius of the GATT/WTO system is the flexibility with which it accommodates the national exercise of sovereignty, yet promotes compliance with its trade rules through incentives."[15]

Congress Retains Power of Taxation

A timely example of the primacy of domestic law is the February 24, 2000, ruling by the WTO Appellate Body against a U.S. tax law on foreign sales corporations (FSCs). The FSC law allows U.S. multinational corporations to reduce their corporate income tax liability in part on the basis of export performance. Acting on a complaint from the EU, the WTO ruled that the FSC tax provisions amount to an illegal export subsidy under the WTO's Agreement on Subsidies and Countervailing Measures. If the United States does not change the FSC law to conform to WTO rules, the

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EU could eventually impose trade sanctions against exports from the United States.

Critics of the WTO have seized on that ruling as an example of the WTO's overriding even the sacred constitutional authority of Congress to determine U.S. tax law. The WTO ruling is nothing of the kind. The WTO Appellate Body did not strike down a single line of the U.S. tax code, nor did it even suggest an alternative law. It merely issued a legal opinion that the current FSC provisions of the U.S. tax code are inconsistent with WTO rules on export subsidies—rules that the U.S. government agreed to and the U.S. Congress ratified. The U.S. government is now free to leave the FSC law unchanged, or to seek a compromise with the EU to avoid the threat of sanctions. Whatever the outcome, U.S. tax law will change only when Congress decides to change it.

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Beef, Bananas, and Nuts to the WTO

Proof of the WTO's lack of enforcement power can be plainly seen in the few cases in which members have refused outright to implement a dispute panel ruling. If a member government decides, for whatever reason, that it cannot or will not comply, all the WTO can do is flash a green light of approval to sanctions—a "power" that member governments have been able to wield against each other since the origin of the nation-state centuries ago. While sanctions raise the cost of nonconformity, they cannot coerce a nation to change its laws if its sovereign government refuses to do so.

The chief example of the WTO's ultimate lack of enforcement power is the cases of the EU and its import barriers against bananas and hormone-treated beef. In both cases, the EU has lost repeated dispute settlement decisions in the GATT and the WTO yet has refused to bring its domestic law into conformity with the WTO rules it agreed to follow.

In the case of bananas, the EU has for more than a decade discriminated in favor of bananas grown in former colonies of EU member states. The EU's discriminatory banana regime has hurt banana growers in Latin American countries such as Ecuador as well as U.S.-based banana distributors such as Chiquita. The United States challenged the law both under the old GATT system and under the WTO, winning favorable rulings at every stage. In response to that string of losses, the EU tinkered at the margins of its policy but has failed to make it consistent with WTO rules. In 1999 a WTO panel ruled that the EU banana regime was inflicting an annual cost on the U.S. economy of $191 million and that sanctions on an equivalent amount of EU imports to the United States would be within WTO rules. The United States imposed the sanctions in March 1999, but the EU has yet to make its banana regime WTO consistent.

A similar scenario has played out on the issue of hormone-treated beef. In 1989 the EU, citing health concerns, banned the importation of U.S. beef from livestock treated with growth-promoting hormones. The United States challenged the law in 1996 under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures, which requires that such a ban be based on scientific risk assessment. The U.S. position was affirmed by a WTO panel in 1997 and upheld by the WTO Appellate Body in 1998. Despite lack of evidence that the U.S. beef imports pose any public health risk, the EU has refused to budge on its ban. After following established WTO procedures, the United States imposed $117 million in sanctions against the EU beginning in July 1999. The EU still refuses to change its policy and has no current plans to do so.

EU trade policy on beef and bananas can be criticized as economically foolish and damaging to the concept of a rules-based trading system. What has not been and cannot be challenged, in the WTO or anywhere else, is the EU's right as a sovereign entity to maintain its own trade policies, no matter how unjustified or economically self-damaging some of those policies may be.

WTO Rules Exempt Nontrade Concerns

The WTO's basic charter contains explicit exemptions for broad categories of trade restrictions. Under Articles XX and XXI of the

GATT, members can enact trade restrictions for reasons of national security, public health and safety, and conservation of natural resources and to ban imports made with forced or prison labor. Such barriers are not subject to challenge by other WTO members.

Article XX, under the heading "General Exceptions," lists a number of WTO legal justifications for erecting trade barriers, including these: "necessary to protect public morals"; "necessary to protect human, animal or plant life or health"; "relating to the products of prison labor"; "imposed for the protection of national treasures of artistic, historic or archeological value"; and "relating to the conservation of exhaustible natural resources."[16] Those exceptions mean that in the sensitive areas of national security and public health and safety, where fears about loss of sovereignty are most acute, the WTO explicitly recognizes the authority of member countries to deviate from open trade.

Health and Environment Trump Trade

WTO rules grant broad latitude for using trade measures in the name of resource conservation. Environmental critics of the WTO repeatedly cite the so-called Shrimp-Turtle case as an example of WTO rules trumping environmental protection. In fact, the case demonstrates how WTO rules accommodate a wide range of environmental concerns, including the preservation of endangered species outside a member's territory.

The Shrimp-Turtle dispute centers on a section of the U.S. Endangered Species Act aimed at protecting an endangered species of sea turtles. Section 609 of the act forbids the importation of shrimp from countries whose fleets are not equipped with turtle-excluder devices that allow sea turtles to escape unharmed. The U.S. embargo was designed to safeguard sea turtles worldwide, not solely turtles within U.S. waters.

In defending the WTO consistency of U.S. law, the U.S. trade representative invoked GATT Article XX, which recognizes the right of members to block imports in an effort to protect natural resources. WTO members such as India, Malaysia, Thailand, and Pakistan were not able to conform to the letter of the U.S. law, which imposed shorter deadlines and more burdensome requirements on Asian shrimp exporters than on those in the Western Hemisphere. Even where Asian fisherman could demonstrate that no turtles had been injured, the imports were still banned because the exporting countries had been deemed not in compliance.[17]

The WTO Appellate Body agreed that the U.S. Shrimp-Turtle law fit within the scope of the Article XX exception for conservation measures. What the WTO panel found not in conformity was the arbitrary and discriminatory way the law was implemented. Specifically, the panel found that the United States had (1) negotiated a more favorable agreement with Caribbean shrimp exporters while issuing nonnegotiable ultimatums to Asian exporters; (2) banned all shrimp from countries classified as "non-certified," even shrimp known to have been caught in nets with turtle-excluder devices; and (3) administered the certification process in a nontransparent manner.

The WTO's ruling in the Shrimp-Turtle case affirmed a key principle of international trade law: the United States can enact a broad range of laws to protect its own environment and can even act to protect international resources such as sea turtles, but such laws cannot treat other countries in an arbitrary or discriminatory way without running into conflict with WTO commitments.

Environmentalist critics of the WTO, such as the Naderite group Global Trade Watch, argue that trade interests have prevailed every time environmental laws have been challenged in the WTO. But in each of the half dozen cases in which environmental laws have been challenged, the rulings have not been against the purpose of the laws; the rulings have been against the unfair way the laws have been implemented. In comparison with that handful of cases, thousands of restrictive environmental laws and regulations in the United States and other WTO members have gone unchallenged because they are manifestly consistent with the WTO's modest, narrow, and reasonable rules regarding trade and the environment.

National Security Paramount

National security is another area broadly exempted from WTO rules. Article XXI states

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that nothing in the agreement "shall be construed . . . to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests."[18] That exemption has proven wide enough to exclude virtually any action a WTO member could take in the name of national security.

A prominent example is the Cuban Liberty and Democratic Solidarity Act passed by Congress in 1996. The so-called Helms-Burton law gives U.S. citizens whose property was seized by the Castro government in Cuba since 1959 the right to sue those who knowingly traffic in the stolen property. The law also denies U.S. visas to the traffickers. The law's main targets are European, Japanese, and Canadian companies that invest in Cuba. Those nations have complained about the law's extraterritorial reach since its enactment. To ease tensions, President Clinton has suspended the right to sue under Helms-Burton, but the visa ban provisions remain in effect. The U.S. asserts that the law is exempt from WTO review, on the basis of Article XXI.

Article XXI 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 may not be wise. It has obvious economic flaws. As an extraterritorial application of U.S. policy, it embroils us in trade disputes with many of our closest trading partners. It is unlikely to bring the Castro regime to its knees. But, as a matter of customary international law, Helms-Burton and other foreign-policy-related measures are exempt from WTO challenge.

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 early dispute involving U.S. restrictions on exports to Czechoslovakia, the GATT determined that each country is the final judge on questions relating to its own security. For more than 35 years, WTO members have recognized that principle and that a country's security interest may be threatened by a potential as well as actual danger.

Sir Leon Brittan, former trade commissioner of the EU, denounced the Helms-Burton law. He has a short memory: In 1982 the EU imposed trade sanctions against Argentina in response to the invasion of the Falkland Islands—and cited the same Article XXI and 35 years of precedent to which the United States now points. The EU even argued, as the United States does today, that its action required no approval from the trade body.

This is not the first time that the United States has resorted to Article XXI. In 1985 the U.S. embargo against Nicaragua was exempt from challenge on the basis of the GATT security exception. The trade community accepted that—and so did the International Court of Justice. The ICJ did question whether the United States had correctly balanced its need to employ an Article XXI exemption against basic GATT objectives of stable trade relations. But the court then recognized that the GATT was ill equipped to deal with political questions that range beyond free-trade issues. That remains true today.

The subjective determination of essential security is crucial to maintaining the integrity and consensus of the WTO. If it tried to force members to abdicate the determination of their own foreign policy and national security interests, the WTO would splinter and collapse under a barrage of sovereignty claims. A WTO decision against Helms-Burton would fuel isolationism, drastically weakening domestic support for the multilateral organization. Congressional supporters of Helms-Burton, in a letter to U.S. Trade Representative Charlene Barshefsky, cautioned that the United States must "prevent the WTO from undermining its own credibility by reaching a decision on a non-trade matter that purports to circumscribe our ability to adopt policies essential to our national security."[19] The WTO's own exceptions and precedent make such a confrontation a remote possibility.

The Benefits of a Rules-Based System

Despite its lack of enforcement power, the WTO system has been remarkably successful in

encouraging compliance among its contracting members. In the overwhelming number of cases brought to dispute settlement, the losing party has modified its domestic laws or regulations enough to satisfy the complaining party. The reason behind this compliance is not the coercive power of an international body—the WTO wields no such power—but the realization of WTO members that it is in their long-term self-interest to follow a set of rules that promote mutual economic gain through trade liberalization.

Member states are using the new dispute settlement mechanism at a rate five times greater than the rate at which they used the old GATT system. Since the inception of the WTO, there have been 185 requests for consultation concerning 144 distinct matters. Currently, there are 25 active cases, 22 that have been adjudicated, and another 37 that have been settled or are inactive. This level of use and settlement shows that the system enjoys the respect of our trading partners.

The WTO DSU and the stability and credibility it provides are vital to U.S. economic interests. The United States is the complaining party in numerous cases, including cases involving protection of intellectual property in India and the importation of computers, bananas, and beef to Europe; periodicals to Canada; and shoes and apparel to Argentina. We challenge everything from protectionist health standards to protection of software, export subsidies, distribution systems, antidumping investigations, and discriminatory taxation of U.S. exports.

We are also the respondent in many trade disputes. Currently, those disputes involve dozens of states and issues ranging from foreign policy to trademarks to textile imports. The question of whether we will adhere to WTO panel dispute reports really hinges on what types of treatment we expect from our trading partners. If we routinely ignore panel reports when we are the losing party, we will be hard-pressed to justify our support for the WTO when we seek to have reports enforced in the event of a U.S. victory.

Fair Treatment for U.S. Exports

The same dispute settlement mechanism that can render judgments against U.S. laws has been used effectively to encourage other nations to scrap trade laws that discriminate against exports from the United States. In the first five years after the WTO was created, 1995–99, the United States filed 49 requests for consultation with other WTO members who the U.S. government believed were violating their WTO commitments. The U.S. position prevailed in 23 of the 25 cases that have been resolved so far—13 through WTO panel rulings and 10 through out-of-court settlement.[20] Among the major U.S.-instigated victories for freer trade are the following:

- elimination of India's import bans and quotas on 2,700 categories of products, thereby opening markets to U.S. exports of consumer goods, farm products, textiles, petrochemicals, high-tech goods, and other industrial products;
- elimination of barriers to the export of U.S. magazines to the Canadian market;
- elimination of Indonesia's local content provisions on car production, which discriminated against automobiles imported from the United States;
- elimination of discriminatory taxes on U.S. liquor exports to Korea and Japan;
- elimination of Japanese restrictions on the importation of apples, cherries, and other fruits from the United States;
- greater market access for U.S. exports of pork and poultry to the Philippines;
- greater access for U.S. rice exports to the EU; and
- elimination of tax discrimination against U.S. movies in Turkey.

Even when the U.S. government "loses" a case brought by another WTO member, the people of the United States typically win. Those cases can pressure the U.S. government to lower its tariff barriers and to adopt nondiscriminatory regulations. In the first five years of the WTO, through 1999, U.S. laws and regulations were the target of 35 complaints filed by other WTO members. Of those, seven have worked their way through the system, with panels determining in six of them that U.S. law

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was inconsistent with WTO rules.

It's difficult to find a downside for the United States in most of those cases. In two of them, those dealing with the reformulated gasoline and Shrimp-Turtle regulations, the result was, not the "striking down" or even the "weakening" of U.S. regulations, but a less arbitrary and unfair application of those regulations. In two other cases, covering U.S. import barriers against underwear from Costa Rica and wool shirts and blouses from India, the WTO ruled against costly and self-defeating U.S. trade restrictions. Even though such cases are technically losses for the United States, they are clear victories for Americans who buy underwear, shirts, and blouses.

Under the dispute settlement mechanism of the WTO, neither the United States nor its trading partners can suppress the issuance of dispute panel reports, as members could under the old GATT. Nor should we want to. 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 tests the validity of many laws and evaluates how we may be engaging in market-distorting activities while preaching free trade to others. Whether the United States is the complaining party or the respondent, we must bear in mind that the WTO does not have the power it is perceived as having. If the cost of this forum is constructive criticism and review of our policies, we should bear it gladly and without fear. As the leading complainant at the WTO, we should not fear being a respondent before the same body we so eagerly embrace for our own disputes.

Avoiding Trade Wars

Establishing the rule of law in international trade has been the crowning achievement of the WTO. The WTO embodies multilateral trade rules established by consensus and an impartial dispute settlement mechanism to interpret those rules. Under the current system, WTO members settle trade disputes through mutually agreed upon procedures, not through bluster and threats that, without constraint, can quickly escalate into tit-for-tat trade wars, leaving innocent workers and their families as the chief victims. Thanks to the WTO, the world is far less likely to suffer a repeat of the "beggar-thy-neighbor" trade policies of the 1930s that deepened the global economic crisis that defined that era.

In contrast to the trade wars and economic turbulence of the interwar years, the GATT/WTO system has helped to define the postwar era as one of falling trade barriers, expanding integration, and rising prosperity for those nations that have decided to join the global economy. At the end of World War II, the average tariff on manufactured goods in the industrialized countries was 40 percent. Today, in part because of eight rounds of multilateral trade negotiations through the GATT/WTO, the average tariff is 4 percent.[21] Declining barriers to trade have led during that same period to a 16-fold expansion in the volume of world trade.[22]

Although the WTO's rules have not violated the sovereignty of its member governments, they have encouraged those government to lower trade barriers and to keep them down. Americans today enjoy greater freedom to buy, sell, and invest in the international marketplace because of the rules and procedures established through the WTO. The WTO has enhanced the sovereignty of individual Americans as producers and consumers without compromising the sovereignty of the U.S. government to act on our collective behalf where necessary.[23]

Conclusion

Membership in the WTO is not a surrender of U.S. sovereignty but the wise exercise of it. The WTO encourages the United States to keep its own markets open, for the benefit of U.S. consumers and import-using industries. It also promotes trade liberalization abroad, which opens markets and keeps them open for U.S. exports.

By its nature, the WTO is incapable of infringing on U.S. sovereignty. It lacks any tangible enforcement power other than the respect and credibility its dispute settlement mechanism has built among its members. Unlike the International Monetary Fund or the World

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Bank, the WTO dispenses no large amounts of money with strings attached to foreign governments. Unlike the United Nations, it dispatches no troops with "WTO" written on their helmets. Unlike the EU, it writes no rules that are automatically enforceable in member countries. The WTO's chief function is to facilitate negotiations among its members and then to render nonbinding, unenforceable opinions about whether particular laws and regulations of its members are consistent with the WTO rules—rules that each and every one of its members has agreed to follow.

The sovereignty of the U.S. government is protected behind an insurmountable series of firewalls. First, no trade rules can be adopted by the WTO without the agreement of every one of its members. This grants the U.S. government effective veto power over any change or expansion of WTO rules. Second, the WTO's basic charter explicitly authorizes member countries to impose trade restrictions in the name of national security, public health and safety, and other considerations that touch sensitive issues of sovereignty.

Third, any challenge to a U.S. trade-related law must be initiated by another WTO member and will proceed to a dispute settlement panel only after efforts to compromise have failed. The WTO itself does not challenge any U.S. law or regulation. Fourth, if the U.S. government actually "loses" a case in dispute settlement, the WTO has no authority or power to do anything to enforce the decision. If the U.S. government decides to ignore a WTO decision against it, the WTO possesses no coercive power of any kind that could be used to enforce any outcome the United States does not want to accept.

Finally, if the complaining member ultimately decides to impose sanctions against exports from the United States, the U.S. government retains exactly the same freedom of action it has always possessed in the face of foreign trade threats. Trade sanctions have been used and abused as a tool of foreign policy for decades, by the United States as well as by other nations. The WTO's "enforcement" mechanism has not conferred any power on other countries that those countries have not possessed all along. Indeed, by establishing a set procedure for settling trade disputes, WTO rules make it *less* likely that the United States will face the external pressure of sanctions.

Membership in the WTO enhances the freedom and the prosperity of Americans without surrendering an inch of national sovereignty.

Notes

1. This Trade Briefing Paper is the second of three studies that examine the impact of the WTO on the U.S. economy, national sovereignty, and global labor and environmental standards.

2. Ron Paul, "Statement Introducing Legislation Calling for the United States to Withdraw from the World Trade Organization," *Congressional Record*, March 1, 2000, p. H612, http://www.house.gov/paul/congrec/congrec2000/cr030100wto.htm.

3. Ralph Nader, introduction to Lori Wallach and Michelle Sforza, "The WTO: 5 Years of Reasons to Resist Corporate Globalization," *Public Citizen*, December 15, 1999, p. 1, http://www.citizen.org/press/pr-wto3.htm.

4. For an analysis of the economic benefits to the United States of WTO membership, see Daniel T. Griswold, "WTO Report Card: America's Economic Stake in Open Trade," Cato Institute Trade Briefing Paper no. 8, April 3, 2000.

5. According to the criteria used by the U.S. Small Business Administration, the WTO's staff of 500 and annual budget of $80 million would qualify the organization as a small-business enterprise. (The SBA qualifications for various industry codes can be found at http://www.sba.gov/regulations/siccodes/siccodes.pdf.) In contrast, the IMF employs 2,700 people and has an annual budget of more than $500 million and tens of billions of dollars in outstanding loans. The World Bank employs 10,000 people and has an annual budget of $1.8 billion, and the United Nations employs 8,700 people and has an annual budget of $2.5 billion.

6. John H. Jackson, Testimony at Hearing on the WTO and U.S. Sovereignty before the Senate Foreign Relations Committee, 103d Cong., 2d sess., June 14, 1994.

7. For a more detailed discussion of the WTO's enforcement mechanism and proposals for reform, see the section on "Improving Dispute Settlement" in Brink Lindsey et al., "Seattle and Beyond: A WTO Agenda for the New Millennium," Cato Institute Trade Policy Analysis no. 8, November 4, 1999, pp. 28–31.

The sovereignty of the U.S. government is protected behind an insurmountable series of firewalls.

8. World Trade Organization, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (Geneva: WTO, 1995), p. 486, http://www.wto.org/wto/legal/legal.htm.

9. Ibid., p. 490.

10. World Trade Organization, "United States—Standards for Reformulated and Conventional Gasoline," Appellate Body report and panel report, January 29, 1996, http://www.wto.org/wto/dispute/gas1.htm.

11. Quoted in Mickey Kantor, Testimony at Hearing on the World Trade Organization before the Subcommittee on Trade of the House Ways and Means Committee, 104th Cong., 2d sess., March 13, 1996.

12. "Bork Defends GATT Proposed World Trade Organization," *CongressDaily*, June 2, 1994.

13. Mickey Kantor, Testimony at Hearing on U.S. Trade Policy before the House Committee on Foreign Affairs, 103d Cong., 2d sess., March 2, 1994.

14. Mickey Kantor, Testimony at Hearing on GATT Implementation before the Senate Committee on Commerce, Science and Transportation, 103d Cong., 2d sess., October 4, 1994.

15. Judith Hippler Bello, "The WTO Dispute Settlement Understanding: Less Is More," *American Journal of International Law* 90 July (1996): 416–17.

16. World Trade Organization, *Legal Texts*, p. 519.

17. While the Clinton administration was defending endangered species, the Department of Justice was attacking the sanctions. The DOJ favored a firm-by-firm approach to sanctions that would punish only firms that failed to use turtle-excluder devices rather than the broad nation-based approach. See John Maggs, "US May Buck Tide, Take on the WTO," *Journal of Commerce*, April 9, 1999, p. 1A.

18. World Trade Organization, *Legal Texts*, p. 520.

19. Quoted in statement by U.S. Representative Ileana Ros-Lehtinen (R-Fla.), *Congressional Record*, February 26, 1997, p. H647.

20. U.S. Trade Representative, "2000 Trade Policy Agenda and 1999 Annual Report of the President of the United States on the Trade Agreements Program," March 2000, p. 42.

21. Organization for Economic Cooperation and Development, *Open Markets Matter: The Benefits of Trade and Investment Liberalization* (Paris: OECD, 1998), p. 31.

22. Ibid., p. 25.

23. For a discussion of the related issue of national sovereignty and the North American Free Trade Agreement, see Jerry Taylor, "NAFTA's Green Accords: Sound and Fury Signifying Little," Cato Institute Policy Analysis no. 198, November 17, 1993, pp. 2–4.

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