

FRAGMENTATION OR UNIFICATION AMONG
INTERNATIONAL INSTITUTIONS:
THE WORLD TRADE ORGANIZATION

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Many quite interesting, exciting, and provocative ideas have been expressed in this conference. I would like to turn away from the theory and look at our subject in the context of a particular institution, for it is often said that the devil is in the details. The World Trade Organization (WTO), as a case study, touches on a number of the issues discussed in this conference. In this article, I look at the way international law is developing and at how these theoretical concepts apply in the context of the WTO.

First, I will not focus on theory, although I have written about theories touching on this subject, such as sovereignty, in other contexts.¹ For example, although many of us, and particularly Lou Henkin, think that sovereignty is out of date and that, as he puts it, we should get rid of the “S” word, I suggest in my writing that the concept of sovereignty may still have some usefulness in terms of allocation of power. When I testified before Congress in 1994, in the development of the Implementation Act for the Uruguay Round results, I could see what was motivating the Congressmen and some of the witnesses—including Ralph Nader, among others—who were opposite me in that debate. Essentially, there was concern that certain kinds of decisions and governmental actions are more appropriately handled in Washington or Sacramento than in Geneva.

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1. See, e.g., John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT'L L. 157 (1997).

But I want to add that this process works both vertically and horizontally. The vertical process operates between Geneva, Washington, Sacramento, or your village. Horizontally, there is the so-called “separation of powers” question on which Philip Allott has cast some doubt. I think this is a very important concept that applies at the international level as well as the national level. There are also several dimensions to this concept. One is the idea that we do not trust humans enough to be very comfortable with a monopoly of power in any human institution, so we want to prevent a monopoly of power. This leads to a struggle among power centers that can arguably promote good and long-lasting approaches to “constitutionalism.” But then, of course, there are questions of different kinds of institutions: judicial, administrative, and legislative—and maybe lots of little things in between. We now see that tensions among the different functions—tensions which have existed for many centuries and are now apparent in the context of the WTO—are tensions worth considering.

One over-arching principle is that we are dealing with economic affairs. Clearly at least the questions can be asked whether there should be a difference as to the underlying puzzles posed for this conference (i.e., fragmentations or unifications), with respect to those puzzles regarding human rights on one hand and economic affairs on the other. I think there is a plausible case for such differences, although I confess that I have not thought it all the way through and am sure that there will be some controversial and different ideas on this subject. In any event, one of these differences is that in economic affairs we are now dealing with a more globalized and interdependent economy. That suggests more of a need to unify the rules applying to all market participants, wherever they may be.

Those are just some ideas that I put on the table for a later discussion. Obviously, we began with the General Agreement on Tariffs and Trade (GATT), which applied to goods. From its origin to perhaps its last decade, the GATT was largely focused on border measures. Now we have changed the institution. We have developed a new World Trade Organization. The GATT still lives, incidentally, because the substance of provisions of GATT are part of an annex to the WTO. In addition, we have added trade in services and trade-related intellectual property, which are also covered in an-

nexes to the WTO. So we have enormously broadened the context and the competence of this organization—not just threefold, but arguably many more-fold. And what is happening—both with respect to the new subjects and indeed to the GATT itself—with more focus on the national treatment clause of Article 3, is that its procedures and its norms are beginning to touch the vital nerves of the “S” word: sovereignty. In other words, the vital nerves of how national governments go about their economic regulation are being brought into play in connection with these matters of competence in the WTO. Thus, these matters have caused a great deal more public interest, outcry, and tension as it becomes obvious that some decisions made in Geneva actually hurt the pocketbooks of those in Wall Street firms or on Iowa farms. And it is therefore not surprising that these citizens go to their various political delegates and try to shape policies, not only in Washington, but also in Geneva.

In order to evaluate an organization or a regime, if we want to call it that, we really do have to look at its goal. And the goal here in economic affairs has been, first of all, to limit what governments can do with respect to border measures affecting trade. But now attention goes to the impact of internal measures affecting trade and to limits on what governments can do, so that they will not get into a race to the bottom or a “prisoner’s dilemma.” In other words, governments acting independently can take a series of actions that end up being disastrous for all. There must be some sort of cooperative mechanism. We are dealing with a process involving the global systems as we know them today, systems which, especially in recent decades, have tended to focus on market economy principles. We are dealing with the decentralized decision-making of millions and millions of entrepreneurs. So one of the goals of this system is to have a rule structure that provides a certain amount of predictability and stability, which will help shape how those millions and millions of economic decisions are and can be made. Another way of looking at it is the notion that this predictability will allow entrepreneurs to reduce what is often called the “risk premium.” (This view is from the economists from whom I have been privileged to draw wisdom.) With investment in an atmosphere where risks are somewhat reduced, investors can and will accept a smaller return. This premium for the reduction of risk is arguably an

important element in the more efficient allocation of productive resources in the world, including investment market penetration ideas, activities, and services. So it may be that this landscape I have just painted would suggest a substantially different consideration than from the human rights area, and indeed from some of the other endeavors of international relations.

Secondly, let me turn to a very brief overview of the GATT/WTO institution and its history. Most of you are familiar with this, but I will trouble you with this word “constitutional” or “constitutionalism.” This has been the subject of some discussion in a speech by the Director General of the WTO himself. But part of the reason why I am troubled by this word is because it has so many different definitions. I will use the term “constitutionalism” or “constitutional evolution” to describe what we see in the historical process that got us where we are now, compared to where we were at the end of World War II.

The overall characterization of this history is that the institutions have developed bottom up, rather than top down. That is because the original concept of an International Trade Organization (ITO), developed between the 1944 Bretton Woods Conference and the 1948 Havana Conference, failed to materialize. The ITO never came into being. The GATT was originally designed as a subordinate part of the ITO and the GATT was to be dependent on it for all of its institutional backups, such as a secretariat and dispute settlement processes (elaborated at length in the Havana Charter).

That plan failed, and therefore the GATT, despite its meager language, was left in place to fill this gap over time. For instance, the GATT basically has two paragraphs on dispute settlement, and arguably another paragraph in another article. At the beginning there was quite a bit of difference in viewpoint as to what those clauses meant. The language in the GATT spoke of something called “nullification” or “impairment.” It did not necessarily target the question of “breach” of treaties. The language of this GATT dispute settlement article meant that a breach was neither a necessary nor a sufficient basis to bring what you might call a “complaint.” So at the very start there was a tension about the goals of this procedure. On the one hand, there were those who felt it was simply an extension of the diplomatic process, what I describe as the “power

oriented” process. Basically the hope of this approach was that the procedure would help governments settle their differences. On the other hand, in a “rule oriented” process the idea is to achieve a result that is rule-consistent and that perhaps helps interpret and elaborate the meaning of the rules, so as to add to the longer term predictability and stability of the system.

Throughout its half century of history, the GATT has experimented through trial and error. There are several landmarks in that history. Toward the end of the 1950s, for example, the Director General actually nudged the contracting parties to change the dispute settlement procedure from that of a “working party,” which was basically a diplomatic process, to a “panel” of usually three independent experts who did not take instruction from their governments and were supposed to make a finding independently. This was an enormously significant step, but it was not based on treaty language as such. It was trial and error and practice; it caught on and kept going that way.

Then another benchmark occurred in the early 1960s when a number of alleged violations were brought. The panel struggled with the notion of nullification or impairment. The panel decided that even though a violation is not itself the basis of a complaint, it is “prima facie” nullification or impairment. So the concept of that presumption then entered into the jurisprudence and caught on.

There followed many other steps that I will skip over. However, the most important aspect for us is that the WTO agreement (what I call a “charter,” although such is not the technical term)—those fifteen pages or so which constitute the institutional part of the twenty-six thousand pages of the Uruguay Round text—included Article 16, with an explicit guidance clause stating that all the decisions, reports and so on of the GATT shall be “guidance” for the new organization. The clause calls for continuity of the GATT jurisprudence: the new panels under the WTO cite the previous panels, and so on. That is, I think, a pretty interesting process.

To make a couple of quick points before completing this segment, there was some discussion about certain viewpoints of Europe and the United States concerning dispute settlement. Through this process, which continued until the 1980s,

I think it was fair to say that the United States was pushing hard for a rule oriented system and for improvement of the dispute settlement process. The Europeans opposed that and tried to prevent any change to the settlement process beyond that which had occurred in the evolution I described. During the 1980s, however, the Europeans changed 180 degrees. By the end of that decade they came to embrace the need for a stronger dispute process with implementation of what might be called “sanctions” in appropriate cases. There are various reasons for this shift, but arguably among them was the so-called U.S. “unilateralism.” The Europeans felt that the institutions needed some sort of check on U.S. unilateralism. Has that succeeded? So far, for the first three and one-half years, it has succeeded. The question remains: will it continue to succeed?

It is interesting to note the difference between this and some other dispute institutions, particularly the International Court of Justice (ICJ). The ICJ has little more than 100 cases on its docket, compared to the GATT/WTO which has approximately 400 cases in this period. Since the creation of the WTO at the beginning of 1995, over 140 cases have been brought. A number of those have been settled independently in a process that appears very rule oriented, so that in fact the rules are succeeding in leading to more settlements. About fifteen cases have gone all the way through the process, through the appeal. The addition of an appeal is one of the striking elements of this new procedure.

Let me turn to some other questions that have been raised. My third point looks at the question of how international law interacts with the WTO system. Is this a hermetically sealed regime? Clearly, the answer is no! And the answer has always been no, in my opinion. Some scholarly writings have suggested the contrary, but I think those were wrong. And I think they have quite adequately been proven wrong. Even the late GATT jurisprudence referred to the Vienna Convention on the Law of Treaties and to customary international law. Late panel reports also referred to international law principles. Even the WTO’s first case, the *Gasoline Case*, explicitly referred to international law—including, in particular, Article

31 of the Vienna Convention—as guiding the panels and the appellate body.²

There is a series of other examples of the use of international concepts in the GATT/WTO dispute cases. The question of the right of a government to hire a private counsel of its own choosing clearly has been influenced by general international law and seems to be more or less settled.³ There is a question of what constitutes practice under the agreement that was discussed in the *Japanese Alcoholic Beverages Case*.⁴ There are questions about the precedential effect of opinions. All of those have been referred to and all generally have incorporated international law concepts. I have discussed this issue with some of the appellate body members, and there is very little doubt in my mind that international law clearly is the motivating umbrella for their work.

My fourth point—which I will only discuss briefly—touches on the relationship of national and international rules or norms in this area. I have already referred to the notion of separation of powers, leading to the question: Can you take a national constitutional concept and use it internationally by analogy? The answer is given only with great care, because certainly there are some instances in which the analogy fails. There was an attempt to bring into the international treaty a U.S. concept of standard of review and court review of administrative processes. I think this attempt was totally inappropriate, and it was not accepted. I have written an article about that subject,⁵ so I will leave that to complete the point.

2. See United States—Standard for Reformulated and Conventional Gasoline and Like Products of National Origin, Report of the Panel, W.T.O. Doc. WT/DS2/R (Jan. 29, 1996), 35 I.L.M. 274, 293-94 & n.25; United States—Standards for Reformulated Conventional Gasoline, Report of the Appellate Body, W.T.O. Doc. WT/DS2/AB/R (May 20, 1996), 35 I.L.M. 603.

3. See European Communities—Regime for the Importation, Sale and Distribution of Bananas, Report of the Appellate Body, para. 10, W.T.O. Doc. WT/DS27/AB (Sept. 9, 1997).

4. See Japan—Taxes on Alcoholic Beverages, Report of the Appellate Body, W.T.O. Doc. WT/DS8/B/R, WT/DS/10/AB/R, WT/DS11/AB/R (Oct. 4, 1996), *overruling* Japan—Taxes on Alcoholic Beverages, Report of the Panel, W.T.O. Doc. WT/DS/8/R, WT/DS10/R, WT/DS11/R (July 11, 1996).

5. See Steven Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193 (1996).

A fifth point involves what is happening now in terms of the constitutional and jurisprudential developments. From a long list, let me mention two concepts that I think are really quite striking. First, in this international constraint on domestic economic regulation: how much deference should the international organization give to national government decisions? I think the appellate body and the panel are struggling with this question, and I see strong hints in several of the cases that there will be a concept of deference. There will be an idea that the national governments have to have something like a “margin of appreciation” or room to maneuver. And there are phrases in those decisions that I have written about that would support such a conclusion.⁶ Second, another closely related concept is judicial restraint. Indeed, the Dispute Settlement Understanding (DSU) itself obliges the panels not to make reports that would change the rights or obligations of the members. I join others who view that provision as a sort of shot over the bow by the negotiators who frame these treaties, warning the panel process not to be too judicially “active.”

A sixth point regards procedures. I will take up just a few procedural points with which people are now struggling. I have already mentioned the right to counsel, as well as presumptions such as prima facie nullification or impairment. There is a big discussion of “burden of proof,” and a very interesting question of how the panel should receive and utilize scientific evidence that relates to economic regulation.⁷ I think there is a wealth of WTO jurisprudence, and some of this should now be useable in other parts of international law. This is sort of a two-way flow of influences. The jurisprudence of the GATT/WTO system as a whole is so much more extensive than almost any other international body that it merits our closer attention.

My seventh point is the question of compliance, which has been pretty good so far. We are now coming to a period where there is anxiety about whether some of the major powers will in fact comply with some of the cases that have been

6. *See id.*

7. *See, e.g.*, EC Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body, W.T.O. Doc. WT/DS26/AB/R (Jan. 16, 1998).

decided recently. For Europe, there are the *Hormones Case*⁸ and the *Bananas Case*.⁹ For the United States, there is the *Shrimp-Turtle Case*,¹⁰ which is on appeal. In fact, one of the reasons why Judge Feliciano did not attend this symposium is that he was on the division of the appellate body in that case.

My last point, which I will make very briefly, is that this year is supposedly the year for review of the dispute settlement process, as mandated by a ministerial declaration in April 1994.¹¹ So there is the notion of taking a look at this whole set of procedures. There are lots of inventories of what to do, and there are 80 to 100 items on many of those inventories. Discussion of these inventories will have to be reserved for the future. For the present, although it is too soon to be sure, there is much expression of satisfaction with the way the system has worked so far.

8. *See id.*

9. *See* European Communities—Regime for the Importation, Sale and Distribution of Bananas, Report of the Panel, W.T.O. Doc. WT/DS27/RW/EEC (Apr. 12, 1999), *available in* 1999 WL 216742.

10. *See* United States—Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, W.T.O. Doc. WT/DS58/AB/R (Oct. 12, 1998), *available in* 1998 WL 720123, *modifying* United States—Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Panel, W.T.O. Doc. WT/DS58/R (May 15, 1998), *available in* 1998 WL 256632.

11. *See* Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Ministerial Decision adopted by the Trade Negotiations Committee of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1125, 1259 (Apr. 15, 1994).