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Settlement of International Trade Disputes--Challenges to Sovereignty--A U.S. Perspective

Richard O. Cunningham

SETTLEMENT OF INTERNATIONAL TRADE DISPUTES – CHALLENGES TO SOVEREIGNTY – A U.S. PERSPECTIVE

*Richard O. Cunningham**

I. INTRODUCTION

As I look back over the thirty years during which I have practiced international trade law, the change in U.S. policy toward resolution of international trade disputes has been truly remarkable. When I began practicing in this area, it was inconceivable that the United States would commit the final resolution of trade issues to a multilateral or plurilateral body.

In those simpler days, it was almost invariably the practice of the United States to try to resolve its own trade problems. Most of these were problems encountered by U.S. industries in competition with imports in the U.S. market. Such issues were dealt with under U.S. law: anti-dumping, countervailing duties, Section 201, Section 406, and Section 337. Where problems were encountered in foreign markets (market access, intellectual property, standards, etc.), the United States used Section 301, with the threat and/or actuality of trade retaliation used to lever an agreement with (in most cases, a capitulation by) the "offending" foreign government.

True, there was a General Agreement on Tariffs and Trade (GATT), and the United States did, in fact, use GATT mechanisms from time to time to address trade issues whose locus was in markets outside the United States. However, there were at least two major reasons why multilateral dispute resolution under the GATT appeared less than satisfactory to most U.S. industries and government trade policymakers. First, the GATT disciplines were imprecise in many areas critical to the United States. For example, the GATT only prohibited export subsidies. Domestic subsidies were very vaguely defined and were explicitly said to be permissible, provided that the GATT Member took care to avoid causing "adverse effects," also loosely defined. A second major problem was that the GATT dispute resolution process was uncertain to produce results. A recommendation by a GATT panel could be blocked by a GATT Member, even by the party against whom the recommendation was made. Indeed, the United States itself occasionally

* Richard Cunningham is a partner in the law firm of Steptoe & Johnson in Washington, D.C.

blocked panel reports. It is hardly surprising, therefore, that the U.S. approach to trade dispute resolution centered on various forms of unilateralism.

How different things seem today! Now, when you have a problem with unfair practices in foreign markets, the adjudication of your case is likely to be done by a World Trade Organization (WTO) or North American Free Trade Agreement (NAFTA) panel. Even proceedings seeking relief from import competition – under the anti-dumping or countervailing duty laws, or even under Section 201 – may lead to a challenge of U.S. import restrictions before a WTO or NAFTA panel. And, believe it or not, the United States has given up the power to block those panel determinations.

Clearly there has been a substantial shift in U.S. policy. Increasingly, unilateralism is being supplanted by a resort to supranational dispute resolution mechanisms. In effect, concerns over loss of sovereignty seem to have diminished significantly.

Why has all this happened? How are the plurilateral and multilateral dispute resolution mechanisms working? Will these concessions of trade sovereignty to supranational bodies last in the face of domestic U.S. political reaction? And – in the final analysis – will this be good or bad for U.S. economic and trade interests?

Those are the issues I want to address today. But first, let me give a brief overview of these new trade dispute resolution mechanisms under NAFTA and the WTO.

II. ENTRUSTING TRADE DISPUTE RESOLUTION TO SUPRANATIONAL PROCESSES – NAFTA AND THE WTO

Under both NAFTA and the WTO, the United States has agreed to submit broad categories of international trade disputes to *binding* resolution under a process involving compulsory consultations, followed, if necessary, by a largely adjudicative procedure before a panel of trade experts. Indeed, under both regimes, a dispute over an issue covered by WTO (or NAFTA, as the case may be) disciplines is required to be resolved through these dispute resolution procedures.[1] Since both NAFTA and the WTO cover most of the basic categories of trade issues, the net effect is that most U.S. claims of foreign unfair trade practices are now subject to these supranational procedures. Perhaps most surprising to anyone who has practiced in this area over the past several decades is the fact that decisions under the two major U.S. import relief laws – anti-dumping and countervailing duties – can now be overturned by non-blockable panel decisions under both NAFTA and the

[1] *See* NAFTA, art. 2005 (a dispute arising under both NAFTA and WTO disciplines "may be settled in either forum at the discretion of the complaining Party").

WTO. Needless to say, this was the most controversial concession of sovereignty in the political trade debate that raged around these arguments.

While the NAFTA and WTO dispute resolution processes are similar in many ways, there are differences of some significance.

A. Dispute Settlement Procedures Under NAFTA Chapter 20

The overall operation of NAFTA is governed by a Free Trade Commission (FTC), which is composed of "cabinet-level representatives of the Parties or their designees,"[2] by a set of Committees and Working Groups,[3] and by a Secretariat of three Sections corresponding to the three Member countries.[4] Within this structure, dispute settlement procedures involve consultation, then consideration of the issue by the FTC, and finally (if necessary) resolution by a five-member arbitral panel. The Chapter 20 dispute settlement procedures are intended to cover all disputes between two or more of the Member countries concerning:

* interpretation or application of the Agreement,

* an actual or proposed measure by one Party deemed by another Party to be inconsistent with the Agreement, or

* an actual or proposed measure by one Party that, although not itself inconsistent with the Agreement, is deemed by another Party to nullify or impair its benefits under provisions of the Agreement dealing with trade in goods (except automotive or energy investment issues), technical barriers to trade, trade in services, or intellectual property.[5]

The process begins with a request for consultations, which must be commenced within fifteen days.[6] If no resolution is reached within fifteen days, the complaining Party may request that a meeting of the FTC be held within ten days.[7] If the FTC cannot resolve the dispute within a further thirty days, any Party to the dispute may call for an arbitral panel.[8] Panelists in Chapter 20 proceedings are drawn from a standing roster of thirty experts in issues relevant to the Agreement.[9] Each panel is made up of five panelists. First, the

2 NAFTA, art. 2001
3 *Id.*, annex 2001.2.
4 *Id.*, art. 2002.
5 *Id.*, art. 2004 and annex 2004.
6 *Id.*, art. 2006.
7 *Id.*, art. 2007.
8 NAFTA, art. 2008.
9 *Id.*, art. 2009.

disputing Parties must agree on a chair (failing agreement, one Party is selected by lot to choose the chair). Then, each Party selects two panelists who are citizens of the other Party.[10] In considering the dispute, the panel may obtain the advice of experts[11] or of a scientific review board.[12] Chapter 20 panel proceedings are expeditious. The panel's initial report is made within ninety days, after which Parties may submit comments within fourteen days.[13] The final report is to be issued within thirty days after the initial report.[14]

The effect of a final panel report might be described as mandatory, but with one last shot at negotiation. Upon receipt of the report, the disputing parties "shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations of the panel."[15] The preferred resolution is non-implementation or removal of the offending measure.[16] However, if a resolution cannot be agreed upon within thirty days, the complaining Party may suspend NAFTA benefits in an amount equivalent to the adverse effect of the offending measure, and may maintain such suspension until such time as a resolution is agreed upon.[17]

It is worth noting that Chapter 20 is somewhat more flexible than the WTO with regard to suspension of benefits. While there is a stated preference for suspension of benefits in the same sector as that affected by the offending measure, a complaining Party may suspend benefits in other sectors where it "considers it is not practicable or effective to suspend benefits in the same sector."[18] And while the amount of benefits suspended is subject to review by a panel, the amount will be sustained unless it is "manifestly excessive."[19]

B. WTO – The Uruguay Round Understanding on Dispute Settlement

The Dispute Settlement Understanding (DSU) is best understood as the necessary corollary to the grand vision of the United States of the Uruguay

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10 *Id.*, art. 2011.
11 *Id.*, art. 2014.
12 *Id.*, art. 2015.
13 *Id.*, art. 2016.
14 NAFTA, art. 2017, para. 1.
15 *Id.*, art. 2018, para. 1.
16 *Id.*, art. 2018, para. 2.
17 *Id.*, art. 2019, para. 1.
18 *Id.*, art. 2019, para. 2.
19 *Id.*, art. 2019, para. 3.

Round negotiations.[20] The U.S. negotiators went to great lengths to shape the Round as an effort to create sweeping new rules of fair trade, rules covering such diverse issues as agriculture, subsidies, sanitary/phytosanitary measures, services, intellectual property, and investment. Most of these new disciplines involved sales by U.S. firms and investments in non-U.S. markets and, thus, did not lend themselves to enforcement by U.S. import restrictions. Therefore, to make the new disciplines meaningful – and to make them worth the negotiating price of accepting some restrictions on the ability of the United States to impose anti-dumping and countervailing duties – it was necessary to craft an international enforcement mechanism. Thus, the DSU was born.

In the new WTO, settlement of disputes is conferred on a standing organization known as the Dispute Settlement Body (DSB).[21] While an elaborate and binding panel process is set up under the DSB (as discussed below), it should be recognized that the WTO continues the former GATT's emphasis on the importance of negotiated resolutions. Consultations are required as the first step in any dispute, and Members are adjured "to accord sympathetic consideration to and afford adequate opportunity for consultation."[22] One Member must respond within ten days to another Member's request for consultations and must enter into consultations within thirty days after receiving such a request.[23] Moreover, the disputing Members may at any time request (or the Director-General may offer) good offices, conciliation, or mediation.[24]

However, if consultations do not resolve the dispute within sixty days from the request for such consultations, the complaining Member may request the establishment of a panel,[25] which is established at the next DSB meeting.[26] The DSB maintains an "indicative list" of panelists,[27] but panelists need not be chosen from that list. A panel will consist of three panelists unless the disputing Members agree to have five panelists. Panelists will be

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[20] GATT – Multilateral Trade Negotiaions (The Uruguay Round): Understanding on Rules & Procedures Governing the Settlement of Disputes, Dec. 15, 1993, 33 I.L.M. 112 [hereinafter DSU].

[21] DSU, art. 2.

[22] *Id.*, art. 4, para. 2.

[23] *Id.* There is a specific DSU within the Agreement on Subsidies and Countervailing Measures, under which the timetables are somewhat different from those of the general DSU. *See* Agreement on Subsidies and Countervailing Measures, Sept. 27, 1994, 1994 WL 761793 (G.A.T.T.) [hereinafter SCM Agreement].

[24] DSU, art. 5.

[25] *Id.*, art. 4, para. 7.

[26] *Id.*, art. 6.

[27] *Id.*, art. 8, para. 4.

proposed by the WTO Secretariat and may not be opposed by the Parties "except for compelling reasons."[28]

Once a panel is established and panelists are selected, Annex 3 to the DSU spells out fairly detailed rules for the consideration of the case and for written and oral presentation by the Parties. The panel may also pose its own informational requests to the Parties and may seek information from other persons or sources.[29] The normal duration of a panel proceeding is twenty-three to thirty-four weeks from the commencement of proceedings.[30] A final report is to be issued within six months, unless the panel informs the DSB of reasons why further time is needed, in which case the deadline may be extended to nine months.[31]

In a sharp departure from the former GATT rules, a panel report may no longer be blocked by an objecting Member. Objections may be submitted to the DSB,[32] but a panel report "shall be adopted at a DSB meeting" within sixty days after its circulation among WTO Members, unless a Party notifies the DSB of its intention to appeal or the "DSB decides by consensus not to adopt the report."[33] Review by the Standing Appellate Body is normally completed within sixty days, with a ninety-day maximum limit.[34]

Where the ultimate result (panel report or decision of Standing Appellate Body) finds a Member's measure not to be in compliance with WTO obligations, "it shall recommend that the Member concerned bring the measure into conformity" with its obligations and may also "suggest ways in which the Member concerned could implement the recommendations."[35]

Within thirty days after adoption of a final panel report or after a Standing Appellate Body decision, a Member is to report to the DSB on its intentions with respect to compliance. "If it is impracticable to comply immediately," a Member may be given "a reasonable time," determined on the basis of its own proposal, by agreement by Parties to the dispute, or by a decision reached in binding arbitration. As to the latter, the DSU provides as a guideline that the "reasonable time" should not exceed fifteen months.[36] If the

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[28] *Id.*, art. 8, para. 6.
[29] *Id.*, art. 13.
[30] DSU, annex 3, para. 12.
[31] *Id.*, art. 12, para. 8, 9.
[32] *Id.*, art. 16, para. 2.
[33] *Id.*, art. 16, para. 4.
[34] *Id.*, art. 17, para. 5.
[35] *Id.*, art. 19, para. 1. In the area of subsidies, the SCM Agreement is somewhat more explicit, authorizing the panel to direct that the Member "withdraw" the subsidy and/or take steps to eliminate the subsidy's adverse effects on the complaining Member. *See* SCM Agreement, art. 7.8.
[36] DSU, art. 21, para. 3.

complaining Member has concerns as to the measures adopted to comply with the ruling, it may reconvene the original panel for a ninety-day consideration.[37]

Where the losing Member does not take conforming measures, the DSU provides for a negotiation between the Parties as to trade compensation. Such negotiation is to be completed not less than twenty days after the end of the above-discussed "reasonable period" for implementing conforming measures. Failing success in such negotiation, the complaining Party may request authority to suspend WTO concessions or obligations.[38] In this regard, the following is the order of preference for such compensatory measures:

> (1) [In] the same sector. In the case of trade in goods, "sector" means all goods; in the case of trade in services, it means a "principal" services sector; and in the case of intellectual property rights, it means certain categories of IPR as defined in the TRIPS Agreement;[39] or
>
> (2) [A] different sector under the same WTO Agreement; or
>
> (3) [C]oncessions or other obligations under another WTO Agreement.[40]

The level of such compensatory measures is to be equal to the level of the nullification or impairment caused by the offending Member's act or practice.[41]

C. NAFTA and WTO Challenges To Anti-dumping and Countervailing Duty Decisions

In the area of U.S. trade sovereignty, the ability to take import relief measures under the anti-dumping and countervailing duty laws is by far the most politically sensitive issue. Under both NAFTA and the WTO, the United States has agreed to procedures by which a supranational panel may rule that a countervailing duty or anti-dumping order was improperly reached. The NAFTA and WTO procedures differ fundamentally from each other, however, and the differences between them say much about the evolution of U.S. policy on the issue of trade sovereignty.

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37 *Id.*, art. 21, para. 5.
38 *Id.*, art. 22, para. 2.
39 Agreement on Trade-Related Aspects of Intellectual Property Rights, 33 I.L.M. 1223 [hereinafter TRIPS Agreement].
40 DSU, art. 12, para. 3.
41 *Id.*, art. 12, para. 4.

1. NAFTA Chapter 19

The NAFTA approach to plurilateral review of anti-dumping and countervailing duty decisions has its genesis in the predecessor U.S.-Canada Free Trade Agreement (FTA). In the FTA negotiations, it will be recalled, Canadian negotiators advanced the concept of a true single market, in which anti-dumping and countervailing duty enforcement between the two nations would be phased out. That concept was politically unmarketable in the United States, to put it mildly. As a consequence, the negotiators sought a binational panel review mechanism to curb what the Canadian side saw as excesses and unfairness in U.S. anti-dumping and countervailing duty interpretations.

The U.S. FTA negotiators, however, steadfastly refused to subject U.S. anti-dumping and countervailing duty rulings to any supranational standards. The most they would accept – to which the Canadian side ultimately agreed – was a regime in which a binational panel would review U.S. anti-dumping and countervailing decisions, but in which the standards of review would be whether U.S. law was properly applied and interpreted. In effect, the supranational panel would perform the same function as a U.S. reviewing court.

That concept is now embodied in NAFTA Chapter 19, which announces at the outset that ". . . each Party shall replace judicial review of final anti-dumping and countervailing duty determinations with binational panel review."[42] Such review of anti-dumping and countervailing duty determinations is to be "based on the administrative record," and its purpose is ". . . to determine whether such determination was in accordance with the anti-dumping or countervailing duty law of the importing Party."[43] The standard of review is that which is applied by a court as specified in the law of each of the three NAFTA countries,[44] and the general legal principles of the importing country are also incorporated into the process.[45]

Every facet of NAFTA Chapter 19 also reinforces the point that these are not dispute resolution procedures in the consultation-oriented sense of the WTO DSU or NAFTA Chapter 20. Rather, these are judicial exercises, with a few arbitration-like characteristics. Thus the roster of panelists "shall include judges or former judges to the fullest extent possible."[46] From that roster, each Party selects two panelists – in consultation with the opposing Party and with four preemptory challenges – and then the Parties must agree

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42 NAFTA, art. 1904, para. 1.

43 *Id.*, art. 1904, para. 2.

44 *Id.*, art.1904, para. 3 and annex 1911.

45 *Id.*, art.1904, para. 3.

46 *Id.*, annex 1901.2, para. 1.

on a fifth panelist.[47] A decision must be reached by a majority of the panelists, and is accompanied by a written analysis of the reasons, together with dissents and concurrences, if any.[48]

A final panel decision in a Chapter 19 review is "binding on the involved Parties with respect to the particular matter."[49] As will be discussed later, U.S. administering authorities have interpreted this language to mean that a panel determination has no precedential effect beyond the administrative proceeding examined by the panel.

Finally, a limited form of appeal from an adverse panel decision is provided in Article 1904, paragraph 9, denominated an "extraordinary challenge." Such a challenge must be based on one of three grounds:

> * a panel Member "was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,"[50]
>
> * the panel "seriously departed from a rule of procedure," or
>
> * the panel "manifestly exceeded its powers, authority or jurisdiction set out in this Article, for example by failing to apply the appropriate standard of review."[51]

In short, the NAFTA Chapter 19 process represents a very limited yielding of sovereignty in the anti-dumping/countervailing duty context. While it is true that a supranational body can overturn a U.S. administrative decision, it can do so only on the basis of inconsistency with U.S. law and its decision has no precedential impact on other U.S. anti-dumping or countervailing duty proceedings.

2. WTO Challenges to U.S. Anti-Dumping and Countervailing Duty Decisions

In the Uruguay Round of Multilateral Trade Negotiations, the United States was faced with a radically different negotiating challenge. In a very real sense, the U.S. negotiators found themselves hoist on their own petards.

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47 *Id.*, annex 1901.2, para. 2, 3.

48 NAFTA, annex 1901.2, para. 4.

49 *Id.*, art. 1904, para. 9.

50 Such misconduct was alleged in an extraordinary challenge lodged by the U.S. side in one of the panel proceedings in the *Softwood Lumber* countervailing duty litigation – surely the darkest episode of Chapter 19 advocacy. *See In Re Certain Softwood Lumber Products from Canada*, ECC-94-1904-01 USA (Appeal of USA-92-1904-01) (Aug. 3, 1994).

51 NAFTA, art. 1904, para. 9.

Having set out to establish a broad range of fair trading disciplines and a binding Dispute Settlement Understanding to enforce those new disciplines, the United States could hardly contend that the same binding DSU should not be applied to challenges of anti-dumping and countervailing duty decisions. Moreover, many of our trading partners saw the creation of some discipline on U.S. anti-dumping/countervailing duty enforcement as the quid pro quo for accepting the subsidy, market access, agricultural, and other disciplines demanded of them by the U.S. side.

Nor was it possible for U.S. negotiators to insist – as they had done in the FTA and NAFTA negotiations – that U.S. anti-dumping and countervailing duty decisions should be reviewed only for consistency with U.S. law. Almost every other voice in the negotiations was demanding an international standard of fair anti-dumping/countervailing duty enforcement. The only viable strategy for the United States, therefore, was to agree to subject anti-dumping and countervailing duty decisions to WTO dispute settlement and to WTO Codes on anti-dumping and countervailing duty measures, and to try to make those Codes reflect U.S. anti-dumping/countervailing duty law and practice as closely as possible. The U.S. negotiators were largely – but by no means totally – successful in this approach.

The result in the WTO, then, was that the United States succeeded in limiting the threat to its anti-dumping and countervailing duty practices by incorporating most of those practices into the WTO Codes. However, it was forced to concede the sovereignty issue. Henceforth, U.S. import relief decisions – like other trade issues – could be taken to the WTO for dispute resolution under international criteria.

III. U.S. TRADE POLICY CONSEQUENCES OF DIMINISHED SOVEREIGNTY IN TRADE DISPUTES

The evolution of U.S. policy toward concessions of trade sovereignty to supranational bodies reflects a realization on the part of U.S. policymakers that U.S. trade interests are increasingly focused on exports to, and investments in, markets outside the United States. The corollary of that realization is that it is important to enhance the ability to address foreign governmental practices – subsidies, access barriers, investment restrictions – that U.S. firms encounter outside the United States, even if a consequence is that the United States must accept some supranational discipline on its ability to restrict what it regards as unfair (dumped or subsidized) imports.

The policy choice the United States made in the Uruguay Round negotiations was to move away from a unilateral approach to foreign market unfair practices – an approach which said to foreign governments, "Abandon your practice that we regard as unfair, or we will restrict your exports to the United States." That approach, using Section 301 as the main tool, had generated increasing friction with our trading partners, for two reasons. First, it was seen as a derogation of serious magnitude from the professed policy of the United States supporting the GATT system – in short, it was pure brute force unilateralism. Second, in many cases the United States was taking action against foreign practices that the international trading community had not defined as "unfair."

This shift in policy to increased "supranationalization of trade disputes poses two major trade policy issues for the United States. On the "trade offensive" side, is the ability of the United States to address unfair practices in foreign markets enhanced or lessened? On the "defensive" side, how much new constraint is placed on the ability of the United States to protect domestic industries from injurious dumped or subsidized imports? While there are clearly pluses and minuses on both issues, this observer is guardedly optimistic that on balance U.S. trade interests will be advanced by the shift away from unilateralism.

A. The Effect on the U.S. Ability To Address Unfair Practices Encountered in Foreign Markets

This policy issue may be divided into two interrelated questions:

> * To what extent will NAFTA Chapter 20 and the WTO Dispute Settlement Understanding be effective vehicles for addressing the trade problems encountered by U.S. industries in foreign markets?
>
> * As to trade issues for which the WTO and NAFTA do not provide adequate remedies, can the United States still take effective unilateral action?

With respect to the first issue, it is undeniable that the substantive disciplines in most of the important areas of potential trade dispute are greatly expanded and clarified by both the WTO Agreements and by NAFTA. Moreover, with one major exception, the United States has had a high success rate in its early cases using the new WTO dispute resolution mechanism against foreign practices violative of those WTO disciplines.[52] Thus, as to practices covered by the new disciplines, which are engaged in by NAFTA or WTO Members, the early results suggest strongly that the new dispute reso-

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[52] The major exception, of course, was the rejection by a WTO panel of the U.S. case against Japan alleging market access barriers in the photographic film market. *See Japan - Measures Affecting Consumer Photographic Film and Paper*, (WT/DS44/R, Dec. 6, 1997) [hereinafter *Film*].

lution mechanisms have enhanced the ability of the United States to address unfair practices in foreign markets.

The more serious question is whether the United States has deprived itself of the ability to act unilaterally to protect its trade interests against unfair foreign practices not covered under NAFTA or the WTO. This question is multifaceted, and the returns are not all in yet.

At the outset, it should be noted that there is no impediment under the WTO or NAFTA to taking unilateral action against the unfair trade practices of a non-Member country. This is significant because countries that have not joined the WTO or NAFTA may not have conformed their laws and practices to the disciplines of these Agreements.

More difficult problems are posed where a grievance by the United States against a NAFTA or WTO Member relates to a practice considered unfair by the United States, but not covered by the NAFTA or WTO substantive disciplines. Were the United States unilaterally to take trade retaliation measures in such a circumstance, it would itself be committing a NAFTA and/or WTO violation. The aggrieved Member would presumably bring a case to a WTO (or NAFTA Chapter 20) panel, and the United States would not be able to block a panel decision finding its trade retaliation to be inconsistent with its WTO (or NAFTA) obligations.

In testifying before the Senate Commerce Committee on June 16, 1994 in support of the Uruguay Round Agreements Act (URAA) legislation, then-USTR Mickey Kantor took the aggressive position that there is no problem at all in taking unilateral action under Section 301[53] against an unfair practice not covered by WTO disciplines:

> Some countries have even tried to claim that the WTO will restrict the ability of the United States to use Section 301 because it requires a Member to abide by the DSU rules and procedures when it seeks to redress a violation of the WTO. There is, however, absolutely no basis for such a claim. Since 1979, Section 301 has required the Trade Representative to resort to the dispute settlement provisions of the GATT if a Section 301 investigation involved a GATT agreement. The DSU will, therefore, make no changes in the way the United States conducts Section 301 investigations. Section 301 will also remain fully available to address unfair practices that are not covered by the WTO or GATT or that are committed by non-WTO members. As in the past, such investigations will not involve recourse to mul-

[53] Trade Act of 1974, Pub. L. No. 93-618, §§ 301-09, 88 Stat. 1978, 2041 (1975), amended by Omnibus Trade and Competitive Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1164 (codified at 19 U.S.C. §§ 2411-19 (1988)) [hereinafter "Section 301].

> tilateral dispute settlement procedures. Moreover, the mere fact that the Uruguay Round Agreements treat a particular subject matter – such as intellectual property rights – does not mean that the Trade Representative must initiate DSU proceedings in every Section 301 investigation involving that subject matter. In the event that the actions of the foreign government in question fall outside the disciplines of those agreements, the Section 301 investigation would proceed without recourse to DSU procedure....
>
> There is no basis for concern that the Uruguay Round Agreements in general, or the DSU in particular, will make future Administrations more reluctant to apply Section 301 sanctions that may be inconsistent with U.S. trade obligations because such sanctions could engender DSU-authorized counter-retaliation. Just as the United States may now choose to take Section 301 actions that are not GATT-authorized, governments that are the subject of such actions may choose to respond in kind. That situation will not change under the Uruguay Round Agreements. The risk of counter-retaliation under the GATT has not prevented the United States from taking unauthorized actions in connection with such matters as semiconductors, pharmaceuticals, beer, and hormone-treated beef.[54]

In practice, the United States has not been quite so bold. Consider, for example, the effort of Eastman Kodak under Section 301 against the Japanese government's alleged toleration of and complicity in a set of essentially private anti-competitive practices that Kodak claimed constituted a denial of access by foreign competitors to Japan's photographic film market.[55] A year of negotiations under threat of unilateral trade retaliation failed to produce a negotiated resolution, and the U.S. side was forced to decide whether to take unilateral action. They blinked. Instead of trade retaliation, the USTR chose to recast the allegations as WTO violations, downplaying the concept of government toleration of private anticompetitive conduct and emphasizing instead allegations that government actions in and of themselves constituted market access barriers. Ultimately, however, a WTO panel ruled against the United States on every claim.[56]

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[54] Testimony of Michael Kantor, U.S. Trade Representative, before the Senate Committee on Commerce, June 16, 1994.

[55] *See Film, supra* note 52.

[56] Interestingly, the USTR is continuing to pursue the case in a creative way. They have characterized numerous statements made by Japan in the course of the WTO proceeding as "commitments" to an open film market and have set up a process of "monitoring" Japan's

Just a few weeks ago, the USTR took a different approach to an issue similar in many ways to that raised in the Japan film case. U.S. exporters of high fructose corn syrup (the principal sweetener in most countries' production of soft drinks) complained that the Mexican government had given explicit approval to an anticompetitive agreement between Mexico's sugar industry and its soft drink bottling industry. The gist of the agreement was that the bottlers would limit their purchases of high fructose corn syrup (principally supplied by U.S. imports), using Mexican sugar instead. In return, the sugar producers gave certain undertakings on pricing. The effect, the U.S. corn syrup exporters complained under Section 301, was an "unreasonable practice burdening U.S. trade." The Section 301 petition crafted by the industry in cooperation with USTR attorneys, led to USTR's initiation of an investigation in early May 1998.[57]

The Mexican corn syrup case represents a deliberate decision to address this problem bilaterally (with potential unilateral retaliation), rather than under WTO or NAFTA dispute resolution. The key to this strategy is the nature of the potential retaliation. The petitioners and the USTR contemplate that, if no negotiated resolution can be achieved, retaliation would be accomplished by means not violative of WTO obligations.

This non-violation retaliation approach has been used successfully by the USTR in other contexts. For example, when the USTR wished to pressure certain foreign governments to improve their offers in the international telecommunications negotiations, it arranged with the Federal Communications Commission to hold up approval of license applications by telecommunications companies from those countries. Since this was not a trade restriction in violation of any WTO discipline, the affected foreign government had no recourse to a WTO DSU remedy. At least in the case of one foreign government, the tactic worked.

There remains some role for U.S. unilateral action under Section 301, albeit less ambitious than was suggested in Ambassador Kantor's testimony. Section 301 is, after all, first and foremost, a vehicle for the negotiated resolution of trade problems. From the standpoint of the petitioning U.S. industry, unilateral U.S. retaliation is not the desired result. Such retaliation has a role primarily as leverage for negotiations. And such leverage can still exist, through threat of non-WTO-violative action or – in rare cases – the threat that the United States might take unilateral action and accept any resulting WTO measures.

"adherence" to those "commitments." Whether this novel approach yields market-opening results remains to be seen.

[57] *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) From the United States*, Sept. 15, 1997, WT/DS101/1, 1997 WL 570768.

Thus viewed, the effects of the move away from unilateralism toward plurilateral and multilateral dispute resolution should be strongly beneficial to U.S. efforts to address foreign unfair practices. The new WTO and NAFTA disciplines and unblockable dispute settlement procedures are a major new weapon in the trade arsenal. And, where the WTO or NAFTA processes are not adequate, recourse to Section 301 bilateral negotiations under a carefully crafted threat of unilateral retaliation remains available in appropriate cases.

B. Impact on U.S. Import Relief Laws

In the view of many who opposed the U.S. adoption of the Uruguay Round Agreements, the concern that loomed largest was that U.S. anti-dumping and countervailing duty decisions would be subjected in a new and totally different way to challenge under WTO dispute resolution. The concern arises, of course, because it is no longer possible for the United States to "block" an unfavorable WTO panel recommendation by refusing to allow it to be adopted. Therefore, the United States will, in the event that a panel finds a U.S. countervailing or anti-dumping decision inconsistent with WTO standards, either change that decision or suffer trade retaliation.

The concern over such non-blockable panel decisions is not exclusively procedural. It relates equally to a fear that consistent criticisms by other countries of U.S anti-dumping and countervailing duty practice as being overly draconian will be reflected in equally hostile panel decisions. While such concerns cannot be dismissed lightly, four points should be noted.

First, even if the United States loses a case in the dispute resolution process, it is not required to change the anti-dumping or countervailing duty decision. It may instead choose to let the decision stand and accept trade retaliation or negotiate a resolution with the other Member or Members. In regard to retaliation, it should be remembered that in most cases retaliation (or negotiated trade compensation) does not involve the same product covered by the countervail case. Thus, the U.S. industry protected by the anti-dumping or countervailing duty will probably not be affected by the retaliation.

Second, the U.S. Congress has threatened to monitor panel results and to consider withdrawal from the WTO in the event that panels repeatedly render decisions against the United States that we conclude to be unjustifiable. This will surely put pressure on the panels.

Third, the concern that the hostility of foreign governments to U.S. anti-dumping and countervailing duty practices will be reflected in the view by panelists may not be well-founded. Panelists tend not to be government trade policy officials, but rather, they tend to be experts – lawyers, judges, academics – chosen from countries not involved in the disputes. Moreover, the

WTO system seeks choices of panelists acceptable to all Parties to the proceeding.

Finally, it should be noted that the U.S. Department of Commerce and the International Trade Commission accord limited precedential value to WTO and NAFTA panel decisions. Wherever possible, panel decisions are viewed as binding only with respect to the particular case in which the decision is rendered. In subsequent cases, both agencies are strongly inclined to continue to apply the WTO-rejected policy unless the panel's decision is so explicit that a change in administrative practice cannot be avoided.

This is not to say, of course, that the new unblockable dispute resolution procedures will have no effect whatsoever on U.S. anti-dumping and countervailing duty enforcement. In the view of this observer, however, the principal impact will not come through panel reversals of Commerce Department or International Trade Commission decisions. Rather, the two administering agencies – especially the Commerce Department – are likely in some cases to be more cautious in their analysis in order to craft decisions and practices that will not be vulnerable to WTO (or, to a lesser extent, a NAFTA) challenge. For example, the Commerce Department is understood to have abandoned certain aspects of its "grants methodology" for calculating the value of capital subsidies, specifically out of concern that the methodology might not withstand WTO panel scrutiny. However, such increased caution by the administering agencies would seem to be a positive development.

IV. POSTSCRIPT – A PERSONAL OBSERVATION

The shift away from unilateralism toward multilateral and plurilateral dispute resolution will be, on balance, substantially beneficial to U.S. trade policy. In particular, objective and binding processes for enforcing the expanded and better-defined trade disciplines of NAFTA and the WTO must be constructive for a U.S. economy whose trade concerns are increasingly focused on trade and investment access to foreign markets, rather than on import protection measures.

One issue remains troubling, however – the reluctance to date of the U.S. business community to actively pursue its new, enhanced trade remedies. Historically, the volume of import protection cases has dramatically outstripped the trickle of cases focused on market access, investment barriers, and other unfair practices in foreign markets. One would have hoped that the increased emphasis of U.S. companies on foreign markets, coupled with much-improved NAFTA and WTO disciplines and effective dispute settlement procedures, would have changed all that. To date, it has not happened. Whether in fact these new disciplines and dispute resolution procedures will achieve the goals our negotiators envisioned will, in the long run, depend on whether U.S. businesses wake up to their potential. So far, that does not seem to be happening.