

INTERNATIONAL ECONOMIC LAW: THE POLITICAL THEATRE DIMENSION

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The inauguration of a new law journal of international economic law provides an occasion to share a few ideas about its substantive content. One of the constituent elements of international economic law stands a bit outside the territory of conventional scholarship. This component may be referred to as such law's "political theatre" dimension — the tendency of governments to adopt laws and agreements that create the appearance of legal solutions when in reality no solution has been achieved.

Normally, the term "economic law" brings to mind legal structures that facilitate commercial transactions by providing rational solutions to particular business problems. Scholars writing about such law usually take it at face value. Their scholarly criticism consists of probing for weaknesses in particular solutions, and of looking for better answers.

In the public law of international economic law — that is, the international law of trade agreements and the national law regulating private trade transactions — legal instruments are often created with a somewhat different purpose in mind. The international agreements in this area, like international agreements generally, are frequently documents which claim to solve problems, but in fact merely paper over conflicting national positions without resolving them. The normal way of doing this is to create legal documents embroidered with elegant ambiguities, but the same result can be achieved whenever governments simply declare divergent understandings about clear texts.

Many of the same qualities can be found in national laws regulating international trade transactions. Legislators and other government officials often seek to avoid choosing between competing foreign and domestic interests by writing legislation that papers over many points of disagreement. This is accomplished either by promulgating laws that issue conflicting commands, or by writing laws that issue commands that have no

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determinable meaning at all. Government officials administering such laws usually manage to carry out the requisite balancing act by producing conflicting results that give something to each side.

The ephemeral quality of much of the public law in this area often can be attributed to rather basic political behavior. To remain in office and, better yet, to advance to higher office, government officials need to build a record of success. In many cases, a real and lasting success is not within reach because the competing interests are too overpowering. In such cases, a result that appears to be a victory has more political value than an admission of defeat. The appearance of success keeps the official in office in the short run. If the official does not stay in office in the near term, the long run is immaterial.

There is, however, a less pessimistic view of this process. The key to this gentler view is the recognition that conflicting interests that cannot be resolved in the short run present a threat to stability. Interest groups that cannot achieve their goals frequently will be induced to use force of one kind or another in pressing for those ends. One way to contain such pressure is to offer the interest group some hope of success, even if it is only a legal instrument that has the appearance of achievement. By offering hope one buys time, and time is often the most important element in searching for a solution.

An agreement or law that appears to give each side what it wants will draw both sides into a continuing process where they try to make the legal instrument work. For a while, both sides proceed with optimism. Invariably, of course, frustration begins to set in as the parties realize that nothing has been solved. The process nevertheless usually can be stretched out by repeated attempts at reconciliation. It is surprising how often conflicting interests will try again in this situation, which usually testifies to the underlying desire of one or both sides to solve the problem peacefully. Time itself sometimes supplies a way out of the impasse as one side or the other gradually becomes accustomed to its inevitable defeat. Alternatively, given enough time, the circumstances underlying the friction will change and the conflict will become inconsequential. This scenario is less than perfect, but it is often the only one available.

Whether this sort of political theatre is noble in purpose or otherwise, it is a very important part of the public law of international economic affairs. Scholars of international economic law should be prepared to deal with this phenomenon.

To be sure, many legal scholars do very useful work that ignores the above advice. Legal scholars traditionally have viewed their task as supplying a coherent meaning to laws that appear incoherent on their face. Indeed, this process of making good sense out of nonsense may be the highest scholarly art of all.

The complete scholar of international economic law, though, not only needs a mind open to the possibility that legal instruments have no content, but also a curiosity about the underlying forces that produce such phenomena. An appreciation of this dimension is often the first step toward understanding what really has happened in the international law arena, and, more importantly, why it has happened. Without that understanding, scholars operate at a considerable handicap, particularly when they seek to predict events and to prescribe solutions.

The package of international agreements that comprises the new World Trade Organization ("WTO") contains many good examples of the above-mentioned kind of substantive content — or noncontent. The current fashion is to describe these new WTO agreements as the birth of a new era — a rather heroic advance toward the creation of a genuine international law of economic affairs. While what has been achieved is undoubtedly important, a more realistic appraisal is needed to understand what has actually happened, and what is going to happen from here on in.

A case in point is the new WTO rules on dispute settlement. From the legal scholar's point of view, the new WTO Understanding on Rules and Procedures for the Settlement of Disputes ("Understanding") may well be the centerpiece of the entire WTO enterprise. The Understanding sets forth what looks like a quantum leap forward in the rigor and enforceability of WTO law. Adjudication of legal complaints will now move forward automatically at the request of the plaintiff. Legal rulings by WTO panels and the new WTO Appellate Body will be binding as a matter of law (unless overturned by unanimous decision). Compliance with such rulings will be rigorously monitored, and plaintiffs will have an incontrovertible right to retaliate in cases of noncompliance. Moreover, Article 23 of the Understanding states in plain language a general commitment to submit all WTO-based legal claims to adjudication under this binding procedure.

The United States signed the Understanding, and Congress approved it in its WTO implementing legislation. Just a few

months after the Understanding became effective, however, the United States set out on what looked like a flagrant violation of the new agreement. The United States announced that it would impose prohibitive tariffs on \$6 billion worth of Japanese auto exports to the United States if Japan did not meet several major demands pertaining to Japanese automotive trade laws and practices. Contrary to the requirements of the Understanding, the United States did not propose to submit the case to WTO adjudication, even though it did claim some WTO legal justification for judging its claim. The dispute nevertheless was settled with an agreement at the eleventh hour. The United States claimed that the settlement was a victory for its muscular trade diplomacy. On the other hand, WTO sources quickly proclaimed the settlement a victory for the Understanding, implying that the settlement gave the United States little more than Japan had offered to begin with, and that the United States had actually backed down in the face WTO legal threats.

Viewed on the surface, the story is a puzzling one. It is hard to understand how the United States could have decided to flout the Understanding at the very outset, and yet, having done that, why it backed down from what looked like a popular measure. Neither claim of victory rings true.

Looking behind the Understanding, one would have seen that the United States was playing an extremely artful game. True, the United States signed the Understanding, but at the same time the U.S. Trade Representative (“USTR”) also was announcing to Congress that the Understanding would have no effect on the robust U.S. trade policy known as section 301 — the policy whereby the United States threatens WTO-illegal unilateral trade retaliation against those who maintain unreasonable barriers against U.S. trade. The USTR’s statement to Congress could not have been more contradictory, because the whole purpose of the Understanding — and especially the commitment in Article 23 — was to temper the U.S. section 301 trade policy. More than one WTO delegate opined that, by agreeing to the Understanding, the United States agreed to eliminate the WTO-illegal trade practices of section 301. This was not what the U.S. delegates were telling the Congress.

What was happening here? Clearly, the U.S. negotiators had a problem. One side of the problem was the Congress. Congress had imposed section 301 on an unwilling Executive Branch, and it now believed the WTO-illegal threats required by section 301

were the only part of U.S. foreign trade policy that had any value. In recent years, every piece of major U.S. trade legislation had contained a greater and greater commitment to section 301 practices — in 1974, 1979, 1984 and 1988.

The other side of the problem was that other WTO member countries would not have agreed to the overall package of Uruguay Round of GATT's trade agreements unless the United States promised to tame section 301. These negotiating demands placed the United States between the proverbial rock and hard place. The U.S. negotiators could not get an Uruguay Round agreement without promising to control section 301, and they could not obtain congressional approval of the Uruguay Round agreements without promising to preserve section 301 in all its existing vigor.

The Clinton Administration did what any political animal would have done in such a situation; it promised each side that its demands would be met. This scenario explains the rather startling behavior of the United States in its automobile trade dispute with Japan. But it also explains a lot more about how the controversy was handled, and, ultimately, about how the WTO likely will handle such problems in the future.

The Japanese automobile trade dispute was itself a bit of theatre played to both domestic and foreign audiences. The threats and the claim of victory were meant to show Congress that section 301 was alive and well under the Understanding. But, of course, the United States did avoid an actual WTO violation by settling the case. Was this settlement a victory for the new WTO legal order? That depends on one's expectations. If such expectations were based on the claim that the WTO represents a bold new legal order in international economic affairs, the mere fact that the United States launched this muscular threat would have to be regarded as a profound disappointment. On the other hand, if one understood that the United States was really forced to straddle two inconsistent positions, the result was about as good as could have been expected.

How will this game play out? Can such a game be sustained? Can it ever lead to genuine resolution between the conflicting positions?

Obviously, the stratagem would not even have been necessary unless there had been very strong views on each side of the legal issue represented by the Understanding. Neither Congress nor

the other WTO member countries, however, were blind to the nature of the scheme being played by the U.S. negotiators. Each was aware of the other's powerful claims on the process, and each was aware that concessions were being made to the other. Each must have recognized, at some level, that the Understanding was neither totally accepted nor totally rejected. Each side must have been prepared to go forward on this basis, knowing that the other side would have some claim to recognition of its interests. Congress knew that the Understanding was going to be a binding legal document signed by the United States, and the WTO member nations knew that Congress was going to insist on continued use of section 301. The fact that both sides were willing to go forward in these circumstances is an indication that there is some "give" in each side's position; at some level, a recognition that some ground must be given up.

What becomes apparent, therefore, is a situation in which two interest groups both insist on maintaining their position, and yet recognize that something will have to be done to accommodate the interests of the other side. When it honestly considers the dilemma, Congress knows it cannot expect a world in which the United States will have a totally free hand to apply its section 301 policy. Likewise, the other WTO member governments know that they cannot expect the United States to rein in its cherished section 301 policies until it can be assured that its just claims are being met. In this setting, one expects that the WTO dispute settlement procedure will earn some victories and suffer some defeats. If the dispute settlement reforms are ever to prevail, they will do so only through a process in which, over time, the new dispute resolution system wins more than it loses, and in which the momentum generated such by its victories is powerful enough to override the negative effects of its inevitable losses.

The same observations can be made about the content of several other parts of the WTO's foundation agreements. Many such agreements involve a considerable glossing over of the hardest issues. Cracks can be found in all of the major agreements in the package, including agreements regarding agriculture, services, intellectual property, and textiles. In no case is the real meaning of these agreements what it appears to be. The coming decade promises a significant number of defeats and disappointments for each of these agreements. The real question is whether there will be enough victories to overcome them.

Anyone who watches Congress participating in the theatrical

dimensions of the new WTO agreements would have every reason to expect that Congress is equally adept at smoothing over interest group conflicts in its own trade legislation, and that is indeed the case. U.S. trade legislation is replete with protean concepts like “subsidy,” “cause,” and “injury,” that leave room for widely varying interpretations. The government officials who administer these laws have been left free to devise all sorts of inconsistent definitions for their loosely defined concepts, and they have done so. Although Congress occasionally corrects a result here and there, its overall approach has been to leave its trade laws in chaos. In confusion, everyone wins now and then.

The relatively greater force of domestic U.S. trade law will probably invite even greater efforts by scholars to pour coherent meaning into potentially incoherent concepts. Such endeavors are worthwhile. But even in the domestic trade law context, it would be beneficial to begin asking how and where the chaos originated. Domestically, as in the international arena, the law will not provide genuine answers to conflicts unless and until conflicting interests are ready to receive them.