Further thoughts on WTO dispute settlement

Remarks of

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How could one go about operationalizing my PIIE Working Paper *WTO 2025: Restoring Binding Dispute Settlement*? It could happen as follows:

You are cast in the role of the lead trade negotiator for the European Union. The Commission has decided that the new closer transatlantic relationship brought about by both being opposed to the Russian invasion of Ukraine may provide an opportunity to resolve differences with the U.S. This would build on the settlements reached on Boeing-Airbus and steel and aluminum. You are given an assignment in no uncertain terms to negotiate an agreement with the United States to provide for binding dispute settlement between the two trading partners, in a format that might be expanded to obtain buy-in from other WTO members.

In an ideal negotiation, you could be allowed to give the United States something entirely outside of WTO dispute settlement – e.g., a promise that there would be no digital tax. But you have no authority to do anything like that.

How do you go about your assignment? You recognize that there are two constants in current U.S. trade policy that you judge to be central and immovable. These will guide your negotiating position. USTR Katherine Tai has stressed repeatedly that (1) she cares about workers and (2) the Biden Administration is very mindful of its strategic rivalry with China. Any negotiation will need to take these two American concerns into account.

The U.S. problem with dispute settlement had grown over decades. According to Dan Ikenson at Cato (March 2017), while the U.S. won 91% of adjudicated issues as complainant (114 of 522 WTO disputes over 22 years), it lost 89% of adjudicated issues as respondent (in 129 cases). The overwhelming majority of the cases the U.S. lost involved its use of trade remedies. If any aspect of the WTO was overtly worker un-friendly, it was these lost cases. They resulted in the removal of relief for workers and industries that exhaustive domestic proceedings had shown definitively were due to import-related injury.

From a U.S. perspective, in recent years the effectiveness of trade remedies has been further impaired by the Appellate Body's difficulty in finding subsidies in China where state-owned enterprises were involved. No argument is to be found in Brussels against this last point.

Two possible, if partial, solutions to the key U.S. concerns would be, first:

- In their bilateral dispute settlement understanding, to require that panels and the equivalent of the Appellate Body, when reviewing the use of trade remedies, take fully into account the likely effect of their decisions on workers.

This is far from outlandish – the U.S. Federal Reserve Board by statute has twin "goals of maximum employment, [and] stable prices and moderate long-term interest rates". This is remarkably similar to the opening words of the Marrakech Agreement Establishing the WTO, which invokes the objective for WTO Members "that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services . . ."

Second,

- When dealing with a case where it is alleged that government influence is overcoming market forces, the burden of proof will shift to the respondent that government influence did not play a decisive role (somewhat similar to relying on "facts available" in trade remedy cases).

This is justified where the government in question opposes the proposition that the WTO's rules require a Member to be "market-oriented". Market orientation in the case of trade means allowing market forces, not state intervention, to determine competitive outcomes.

There are a range of options available to meet U.S. concerns. The two listed above can be a part of a menu of possible choices to find a mutually agreeable solution that would cause the U.S. to part once again to some extent with the full autonomy that it derives from being outside the dispute settlement system. You can point out that America's freedom of action is double-edged, as it also confers equally, if not more importantly, the same absence of constraints on its trading partners. Living by the gun in the Wild West of new-found policy space of necessity involves the prospect of dying by the gun, or at least being wounded. The United States decided when it was at the height of its power as the unrivalled global hegemon to create a rule-based system that was binding. It may find it increasingly unattractive to live without rules knowing that its unilateral leverage to get its way will decrease over time?

Part of the reform effort is changing attitudes. How does one change the culture of an institution? In the United States, the Supreme Court, provides an example. While Chief Justice Roberts maintained control, he was able to bring a majority along with his "institutionalist" position. He cared about the effect of the court's decisions on its standing within the American

system of governance. For the WTO Appellate Body (AB) to think in similar terms will be regarded by purists as a politicization of the judicial process. But all aspects of governance have an inherently political aspect to them to some extent if they are to survive. It is noteworthy that the Appellate Body did not in fact survive.

What would a change in attitude mean in practice? In determining whether "unforeseen developments" exist to allow the use of a safeguard, there is a cost to adopting a reading of the WTO's rules that nullifies having a working safeguards agreement. An institutionalist would decide not solely on the basis of the Vienna Convention and the "plain meaning" of words. Instead, he or she should look at trade agreements as a trade negotiator would, that the parties could not have intended that safeguards actions would as a practical matter almost never be available.

The current Administration in Washington is supported by the industrial unions and clearly cares about the welfare of their workers. What if antidumping relief had not been cut back repeatedly in WTO dispute settlement, what if subsidies had been countered more effectively, and what if the steel safeguard case (with 35 American steel companies in bankruptcy and one in dissolution) had not been nullified? The answer is straightforward: it is a safe bet that there would still be an AB and binding WTO dispute settlement.

Similar care must be taken with respect to national security cases under GATT Art XXI. It is important to give a substantial leeway to its invocation while acting against excesses. Perhaps some number, 80% capacity utilization, may be justifiable as a matter of national security but not a justification for restrictions placed on aluminum ingot or steel imports from allies, not without a very convincing explanation.

What I have presented is a Chinese menu with a very large list of dishes and combinations of ingredients on offer. I have not recommended a solution, but a range of possibilities. I have suggested that for reform to be attainable, one starts with a New Multi-Party Interim Arrangement (an NMPIA) with a few like-minded counterparties, at least the two largest across the Atlantic.

There will be objections to many of the dishes on the menu. The idea of having a new Office of Legal Counsel (OLC) within the Secretariat will seem extreme to some. It is primarily to have another voice that speaks out with some authority when it thinks the AB has strayed from its mission. The idea of giving the Chair of the Dispute Settlement Body (DSB) a more activist role and creating a small dispute settlement group around her is likewise to create another voice so that the judiciary is not alone as the arbiter of what the rules of the trading system are to be. The idea of expanding the number of AB members would bring further diversity, but also less insularity, less opportunity to make *ex cathedra* pronouncements. It is clear that there can be changes to the AB that would strengthen it, improve it, but they can only be put into place in a system that has checks and balances.

While this hypothetical is EU-US centered, there is no reason not to, for example, attempt to reach a U.S.-China NMPIA. It might have different points of emphasis. It might have more in it on disciplines on industrial subsidies, which President Xi has said is a subject area on which China would be willing to negotiate. There is room in the MPIA format to take into account a diversity of interests.

It should be recognized that governance is a political process within a working institutional framework. What institution does world trade need? The WTO must have:

- Binding dispute settlement, preferably two-stage, accepted as legitimate by all,
- Rule-making capability, and
- A functioning executive.