

# FIVE THEORETICAL THEMES IN THE WORLD TRADE ORGANIZATION ADJUDICATORY SYSTEM

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## I. RECOLLECTING EMOTION

I am not sure about the poetic tastes of my distinguished colleagues on the panel. But, I think we could all agree with William Wordsworth's definition of "poetry" as "emotion recollected in tranquility."

"Emotion recollected in tranquility." From lovers of Wordsworth to lovers of E. E. Cummings, I think all of us on the panel would agree that the World Trade Organization (*WTO*) dispute settlement mechanism, indeed, the *WTO* system itself, was born amidst a great deal of emotion on January 1, 1995. And, I think that all of us would agree that, perhaps to our surprise, the emotion surrounding the *DSU* and its operation during the last five years has, if anything, become more heated, dare I say passionate.

Defenders of the system point to the large volume of cases, including high-profile disputes, that the system has handled with a reasonable degree of success in terms of quality decisions and compliance. Detractors call the

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system non-transparent, exclusive if not elitist, and insensitive to important environmental, labor, human rights, and even national security concerns.

Our challenge is to reflect on the emotion surrounding the DSU and its operation, and as lawyers, to evaluate the various defenses and detractions that have been made. We are to try to look back, and look ahead, with a somewhat paradoxical, but really quite unifying, mind set familiar to the greatest of poets: a dispassionate one that nevertheless preserves heart-felt sentiments and instincts.

My distinguished colleagues are far more able than I to lead us through in a tranquil manner the particular ups and downs of the last five years with this mind set. Wordsworth's poetry is famous for its landscapes put into words. My particular challenge is to sketch the outlines of the landscape for the poetry of my colleagues to come. To put it in less metaphorical terms, my task is to discuss some of the grand theoretical themes that have emerged, or are emerging, in and as a result of WTO adjudication.

## II. THEME #1: THE MORIBUND STATE OF JOHN AUSTIN

We have all heard it said that "international law is not really 'law.'" The adage is based on the perception that international rules are unenforceable. It is an adage based on the positivism of John Austin. To Austin, "law" is the command of a sovereign that is habitually obeyed under a threat of punishment.

I think that on our landscape, international trade law, Austinian positivism is in a moribund state. It may have been alive and well in the pre-Uruguay Round era. Cases like *Oilseeds* were the food for this corpus of jurisprudence. Now, we have arguably the most sophisticated dispute resolution system in all of the international law specialties.

We have a mechanism with real deadlines. We have a mechanism with set procedures. Best of all, we have a mechanism that, to put it in its mildest form, expresses a clear preference for compliance, and failing compliance, ineluctably leads to compensation or retaliation.

The *Bananas* and *Beef Hormones*, and possibly *Turtle-Shrimp* cases notwithstanding, losing WTO Members are implementing reports within the typical 15-month time frame. There, then, is the command of the sovereign that is habitually obeyed under threat of punishment. That "sovereign," or central authority in a very loose sense, is the DSB. That threat of punishment is retaliation.

To be sure, there is a legitimate debate about whether the DSU actually compels compliance, whether it means to avoid giving the losing Member an option to comply, pay damages, or accept retaliation. How you read the relevant DSU provisions affects your stance here, and I think there are strong points on both sides. Nevertheless, to say that "international law, at least

international trade law is not really law" is now a statement borne more of ignorance than truth.

### III. THEME #2: THE COLD WAR BETWEEN DEVELOPED AND DEVELOPING COUNTRIES

Can we identify any schism in the global economy of the new millennium that is any wider, and growing any faster, than that between the First and Third Worlds? Fifty years of trade liberalization has done a lot for a handful of countries, and very little for the bulk of them; or, at least, that is the perception.

The WTO is an elite club dominated by the United States, European Union, Japan, and Canada, all of which are far more interested in gaining market access in, or shutting imports out from, the likes of India, Costa Rica, Brazil, and sub-Saharan Africa; or, at least, that is the perception.

WTO adjudication is a war that the hegemonic trading nations are best able to fight, because they have the armies of international trade lawyers, the forward deployments of fully staffed experts in Geneva, and the backing of multinational corporate interests; or, at least, that is the perception.

WTO adjudication is extraordinarily expensive, and developing countries can neither afford the weaponry needed, in the form of a counsel of choice, nor is it firmly established that they have a right to private-sector attorneys; or, at least, that is the perception.

Now, in this war, perception is reality. If the governments of four to five billion people feel a certain way, then that feeling cannot be dismissed. Maybe it can be assuaged by pointing out that small countries like Costa Rica win cases against big countries like the United States. Then, what do you say to the small countries of the African, Caribbean, and Pacific who feel they are being sent to a guillotine operated by Dole, Chiquita, and Del Monte? How do you rationalize a demand for private party access to WTO panels and the Appellate Body if that access would drive up the legal costs of developing countries because they would be named as respondents in a wave of lawsuits? Indeed, how do you rationalize even the current, sovereign-state-only access system with the pathetically small budget of the WTO dedicated to the legal defense interests of Third World countries? (Overall, the WTO's budget is pathetically small, roughly \$122 million, with a staff of a little over 500. It is said that the total WTO budget is roughly equal to the International Monetary Fund's annual travel budget.) It will not do to say that the budget will increase, and a center to help these countries will be established, if the new-found resources cannot be used to bring cases against the First World.

What I am saying, at bottom, is that if the WTO adjudicatory mechanism continues to be perceived as an un-level battle ground on which developed

country interests tend to be advanced, then that mechanism will be increasingly suspect, resented, and maybe even ignored.

#### IV. THEME #3: THE STRUGGLE FOR LEGITIMACY, OR THE RESURRECTION OF IMMANUEL KANT

To put it differently, the legitimacy of that mechanism will be undermined by the gaping schism between the "haves" and "have nots." Indeed, the struggle for legitimacy, or what we might dub the resurrection of Immanuel Kant, is the third theoretical theme on the landscape that I wish to sketch.

I believe that when the history of international trade law is written half a century or a century from now, scholars will look back and draw parallels between the new-born DSU mechanism and the American Supreme Court of our Great Chief Justice's days. In a very different context, Justice Marshall struggled mightily to establish the legitimacy of the Court, and so too are the panels, Appellate Body, and DSB, or, at least, they ought to be.

What do we mean by legitimacy? At bottom, it means an acceptance, a respect, that transcends the mere threat of punishment. An acceptance and respect that is based on a sincere belief in the procedures, substantive reasoning, competence, and most importantly, fairness, of the adjudicator. How do the addressees of panel and Appellate Body reports, and other parties affected by these reports, come to see the DSU system as legitimate?

Individuals and businesses have no direct access to that system. Non-Governmental Organizations (NGO) have only the most indirect and tenuous access. Yet, individuals, businesses, and NGO's can rightly point to the growing body of international relations theory that tells us that a principle tenet of realism, that sovereign states are not the main players in the global economy, is wrong. After all, nations do not trade. People trade. Corporations trade.

It was Immanuel Kant who counseled us in his essay, *Perpetual Peace*, that the center of the international law must be the normative status of the individual, that it is wrong to conceive of international law as concerned only with the rights and duties of states as the fundamental unit of that law without also examining each state's domestic political system and its treatment of its citizens. To Kant, the business of international law was inextricably linked to the question of domestic justice. To Kant, international law, and we can extend this to international trade law, is legitimate only if its founded on an alliance of separate, free nations united by their moral commitment to individual freedom, not merely by their allegiance to the international rule of law and the mutual benefits of peaceful intercourse. Put bluntly (as many are in connection with the WTO Ministerial Meeting in Seattle), whether the General Agreement Tariffs and Trade (*GATT*), WTO regime is "legitimate" or "just" depends very

much on whether the WTO Members are committed to domestic justice in the realms of human, labor, and environmental rights.

So, then what is this World Trade Organization? Is it, perhaps, really a Sovereign State Trading Organization? What are we to make of this Sovereign State animal that produces decisions that, however persuasive in terms of GATT Article XX:(b) and (g), horrify environmentally-minded observers. How are we to deal with the fears of labor and human rights activists, who see their interests as the next ones to be sacrificed at the altar of Most Favored Nation (*MFN*), national treatment, tariff bindings, non-discriminatory application of quotas, or some other trade-liberalizing principle? However noble that principle may be on the black boards of the neo-classical economists, in the equations of the game theorists, or in the theories of the positivist philosophers, obviously it has not been universally persuasive.

In other words, there is a loud, even violent, clash of philosophies and cultures here. On the one side, there are traditionalists who focus on trade liberalization and its merits. On the other side, there are those who see beyond comparative advantage doctrine, who push the trade agenda to include new concepts and concerns.

The pressure to push out the boundaries is exacerbated by the adjudicatory process itself. It is seen by many activists, not unfairly, as non-transparent. An irony indeed, given that the judges of Geneva certainly would embrace GATT Article X, and have in a few decisions, for others! Can anyone sit in on a panel or Appellate Body hearing? Can anyone obtain the briefs in a case? Can we turn on Court TV and watch the proceedings? The answer to these sorts of questions is "no." What about the routine use of outside experts to inform the judges of Geneva about the issues at stake? Here we see a hesitant, *ad hoc* approach. How, then, are we to agree the DSU process is "legitimate" if much of that process excludes important voices, if much of that process is hidden from our eyes, if that process does not always call upon the best and brightest specialists to help resolve a dispute?

#### V. THEME #4: DE FACTO STARE DECISIS

It cannot be denied that the WTO adjudicatory process has produced opinions impressive in number. It cannot be denied that virtually every one of those opinions is replete with citation to previous opinions. It cannot be denied that many of those citations are for more than purposes of guidance or illustrating consistency, but that veer towards and even cross the line, between citation for guidance and continuity, on the one hand, and authority, on the other hand.

Shall we then continue to assert, with Article 38(1)(d) of the Statute of the International Court of Justice and Section 102 of the *Restatement on Foreign*

*Relations Law (Third)*, that judicial decisions are mere evidence of the law, not the law itself? Shall we continue to believe that there is no body of international common law on trade that is emerging? Shall we hold fast to the pretense that *stare decisis* does not operate in a *de facto* sense?

My leading questions suggest my own view. Whether you agree with that view or not, I think you can see the tremendous theoretical challenge posed by the corpus of WTO decisions. Is that corpus illustrative of a re-defining of the way in which Anglo-American and civil law cultures interact? Is it a sort of hybrid between the two cultures? Or, is it an incarnation of a trend in civil, including French, legal culture toward an increasing reliance on precedent, notwithstanding the rhetoric of the civil code? Put in more culturally insensitive terms, is the use of precedent in WTO decisions an illustration of what we know from Coke, McDonalds, Madonna, Steven Spielberg, Nike, and Levi's, namely, that "globalization" means "Americanization?"

I dare say that this issue is likely to become all the more poignant in the coming years. Why? The vast majority of the leading international trade lawyers of the new millennium who are from outside of the United States are, or are seeking, LL.M. degrees in the United States. America is exporting human capital that is being schooled in the ways of common law reasoning. Like Alexandria a few millennia ago, like Oxbridge more recently, the extraterritorial influence of the American academy is unparalleled, indeed, essentially unchallenged. If it is indeed the case that a *de facto stare decisis* doctrine is operating in WTO adjudication, ought we to consider admitting this openly and, further, amending the DSU and WTO Agreement where necessary to make this doctrine official, that is, a *de jure* one whereby reports really possess the potency of precedent?

## VI. THEME #5: THE MISSING MUSES, OR THE DREADFUL QUALITY OF WRITING

It would be an evil overstatement for me to urge that every panel and Appellate Body report bespeaks the extraordinarily poor writing skills of the panelists and Appellate Body members. For the most part, I do not know personally the panelists and Appellate Body members so I cannot say if their innate writing skills veer more to a Wordsworth or a trashy romance novel in the slush pile of a New York editor.

But, I do think it fair to say that whatever writing assets they do have, these assets are not used as frequently as they ought to be. It does not seem to me that the panels and Appellate Body realize the direct link between their legitimacy in the eyes of the world, on the one hand, and the quality of their written product, on the other hand.

Why are the opinions of Justice Marshall, Justice Holmes, Lord Mansfield, or Lord Diplock so revered? Is it only for their substantive content? Of course not. It is because those opinions were so well composed. For the most part, they were concise, avoiding redundancies. For the most part, they drew on the richness of the English language, using words and phraseologies that excited our imaginations. They used cleverly constructed analogies that inspired our intellects, and, for the most part, they dealt squarely and sternly with the issue at hand, not burying their prose in technicalities, not shrinking from the grand underlying tensions.

I suggest that most panel and Appellate Body reports lack these virtues. In connection with my work on the second edition of my *International Trade Law* casebook, and on various law review articles, I am having the experience of reading a large number of these reports. While I am odd enough to find it pleasurable, most would not.

Why must you read, re-read, and read again passages to ascertain their meaning? Why must you wade through paragraph after paragraph of the arguments of the parties, and of third parties, only to find these arguments summarized later in the discussion? Why must you mentally correct grammatical errors, be they split infinitives or misplaced commas? Are you wrong to demand of our supreme adjudicators of international trade law better writing? I think not. I think it eminently fair to ask these panelists and Appellate Body members to recall their education in not just Wordsworth, but also Homer, Gibbon, and Churchill, and to unleash the spirit of the Greats in an effort to make their contemporary work more appealing, and more worthy of acceptance.

## VII. FILLING IN THE LANDSCAPE . . .

I shall stop at this point, in the hope that some of these themes may resonate in you and serve as a sketch of the landscape that my colleagues are now going to discuss in greater practical detail. Let me thank you for your gracious attention, and express my special appreciation to Steve De Luca for this opportunity to recollect, and to forecast, emotion amidst tranquility.