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The WTO Is Inappropriately Usurping American Sovereignty

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The World Trade Organization (WTO) is an international organization that was created to promote free and fair trade. Unfortunately, this organization is exercising authority in excess of its foundational treaty resulting in the usurpation of American sovereignty.

It is axiomatic that national sovereignty, at its most basic level, must include a state's authority to make policy choices regarding self-governance. When sovereign nations join international organizations such as the WTO, they explicitly consent to relinquish a certain degree of independent decision-making authority, but only to the extent provided for in the international agreement or treaty. As the WTO Appellate Body has remarked:

The WTO Agreement is a treaty — the international equivalent of a contract. It is self-evident that in the exercise of their sovereignty, and in the pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement.[1]

Among the commitments that the United States made when it acceded to the WTO was to abide by the dispute settlement understanding (DSU), which requires that WTO members settle trade law disputes through the WTO's dispute settlement system as a condition of membership. The United States, however, did not agree to abdicate its authority to implement and enforce laws and regulations within its borders. Nonetheless, as detailed below, in recent years, both the WTO's Panels and Appellate Body (collectively

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referred to as the "dispute settlement body" or DSB) have pursued increasingly activist approaches to decision-making, which diminish the rights of its members, undermine the negotiating objectives of the WTO, and ultimately call into question whether WTO members are getting what they bargained for.

This danger was recognized when the Uruguay Round Agreements Act (URAA) was first being negotiated.[2] Former Senator Robert Dole introduced the WTO Dispute Settlement Review Commission Act (the "Dole Amendment") in the 104th Congress.[3] The Dole Amendment would have established a commission to review all adverse reports of the DSB resulting from proceedings initiated by WTO members against the United States or at the request of the Office of the United States Trade Representative.[4] Under the Dole Amendment, Congress could have enacted a joint resolution urging the president to negotiate to amend or modify the rules and procedures of dispute resolution, or Congress could withdraw approval of the Marrakesh Agreement establishing the WTO and thus end United States participation in the WTO. Under the Dole Amendment, these procedures could be triggered if there were three reports determined to be adverse in the preceding five-year period.[5] Ultimately, the amendment was not included, although it has been reintroduced several times in both the House and Senate.[6]

Since the enactment of the WTO agreement, which created the WTO's dispute settlement system,[7] the impetus for the Dole Amendment has only strengthened. The DSB's judicial activism has manifested itself in several ways, most notably in those cases involving domestic trade laws. For example, in a number of disputes involving U.S. anti-dumping duty laws, the DSB has failed to apply the standard of review as established in the Anti-Dumping Agreement (ADA) to resolve textual ambiguities. In addition, the DSB also has imposed additional, substantial obligations on member states where none previously existed and which are not provided for in the WTO agreement.

In a number of cases involving trade law disputes, the DSB has failed to appropriately defer to national government decisions, laws and policies. Both Article 3.2 of the DSU and Article 17.6 of the ADA are instructive in this regard. Article 3.2 of the DSU provides that the dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." The WTO has generally interpreted "customary rules of interpretation of public international law" to include Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which provide that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose" and allow for supplementary interpretations.[8]

The first subparagraph of Article 17.6 of the ADA similarly provides that "the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law."[9] The second subparagraph of Article 17.6 states that:

Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.[10]

In other words, where application of the Vienna Convention rules results in more than one permissible interpretation, the DSB must defer to the permissible interpretation of the member state applying the text. Notwithstanding this provision, the DSB has repeatedly resolved textual ambiguities by relying on "customary rules of interpretation of public international law," i.e., the Vienna Convention, to strike down national measures as WTO-inconsistent, even when possible permissible interpretations existed. Indeed, in several cases, the DSB has failed to even reach the question of whether a given provision in the ADA was subject to more than one permissible interpretation to which deference was due, instead simply concluding that a national measure was not a permissible interpretation of the ADA.

The WTO's failure to apply the deference set forth under Article 17.6(ii) has occurred in a number of key cases [11] involving U.S. anti-dumping laws — most notably in those involving "zeroing."[12] [13] In arriving at these conclusions, the Appellate Body narrowly interpreted the standard of review articulated in Article 17.6(ii) of the ADA, stating that multiple meanings of a word or term do not automatically constitute "permissible" interpretations.[14] [15] The WTO's refusal to apply the appropriate deference set forth under 17.6(ii) has not been limited to cases addressing zeroing, however. See for example, in United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea.[16] In that case, the Appellate Body dismissed the United States' claim that in relying on the object and purpose of a particular sentence, rather than on the ADA as a whole, the panel failed to apply the customary rules of interpretation of public international law.[17] In short, despite the ADA's clear mandate to defer to member state interpretations under Article 17.6(ii) to resolve textual ambiguities, the DSB has failed to do so in these and other cases.

In addition, the DSB has impermissibly broadened its reach by imposing additional, non-negotiated obligations on WTO members. For instance, in United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Producers from Japan, Japan challenged a number of aspects of the U.S. Department of Commerce's and International Trade Commission's determinations in their investigation of hot-rolled steel from Japan. One of the issues challenged involved the interpretation of Article 3.5 of the ADA's requirement that domestic authorities "examine any known factors other than dumped imports which at the same time are injuring the domestic industry," and that a "causal relationship" be established between the dumped imports and injury to the domestic industry.[18] Although the panel upheld the ITC's affirmative finding of material injury, the Appellate Body reversed course, concluding that Article 3.5 requires an affirmative duty of "separating and distinguishing the injurious effects of the other factors from injurious effects of dumped imports," thereby imposing additional obligations on the ITC where none previously existed.[19]

Notably, the DSB also imposed additional extra-textual obligations on the United States in United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China.[20] One of the key issues in that case was whether the department's determination that various state-owned enterprises that supplied goods to investigated companies and certain state-owned controlled banks were "public bodies" was consistent with the Agreement on Subsidies and Countervailing Measures. The Appellate Body reversed the panel's finding that the term "public body" in Article 1.1(a)(1) of the SCM Agreement means "any entity controlled by a government." Rather, to satisfy its burden, the WTO created additional evidentiary requirements beyond proving that the entity in question was state-owned and controlled. Once again,

additional obligations — not found in the WTO agreements — were imposed on a U.S. government agency where none had previously existed.

These and other examples of judicial activism strike at the heart of national sovereignty by depriving WTO members of their right to participate in and consent to policy decisions that impact their rights and obligations. And the WTO's decisions go far beyond just anti-dumping investigations and have struck down U.S. laws and regulations regarding the formulation of gasoline, sections of the Internal Revenue Code, certain environmental protections, and much more. Instead of policy decisions being made by elected representatives, they are being made by unelected WTO officials who are appointed behind a closed door process and who are lacking in accountability to member states. This undermines the negotiating objectives of the WTO. Indeed, the WTO is losing its function as a forum where member states negotiate their trade-related rights and commitments. Rather, the WTO is increasingly becoming a dispute resolution forum where activist members of an international institution are creating new, non-negotiated, obligations for member states.

In conclusion, if the WTO is to continue serving a meaningful role as a negotiating forum for trade, it is imperative that member state sovereignty is respected and that DSB actions that challenge such sovereignty are curbed. As a former U.S. ambassador to the WTO aptly remarked, "WTO members cannot have confidence in a system where WTO adjudicators overstep boundaries agreed by WTO Members in the [Dispute Settlement Understanding] and the WTO Agreement." And "if Members do not have confidence that the WTO dispute settlement system will not add to or diminish their existing rights and obligations under agreements they have approved domestically, they will not have confidence that they can conclude new agreements and credibly say domestically what those new agreements mean."[21] Currently, the United States should have no such confidence in the WTO.

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[1] Peter Sutherland et al., The Future of the WTO: Addressing institutional challenges in the new millennium at Chapter 3 (citing to Japan-Taxes on Alcoholic Beverages: AB-1996-2, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) at p.15, F).

[2] The URAA is the Congressional Act that implemented the Marrakesh Agreement Establishing the World Trade Organization. See Pub. L. 103-465, 108 Stat. 4809, enacted Dec. 8, 1994.

[3] S. 16, 104th Cong. (1995).

[4] S. 16, § 4.

[5] S. 16, § 6.

[6] See, e.g., H.R. 4706, 106th Cong. (2000).

[7] The 1995 enactment of the Dispute Settlement Understanding mandated compulsory dispute settlement as a condition of membership.

[8] United States – Standards for Reformulated and Conventional Gasoline, AB-1996-1/WT/DS2/AB/R (95-1597) (Apr. 29, 1996) at 17; Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S 331, 8 I.L.M. 679 (1969).

[9] Article 17.6(i) of the Antidumping Duty Agreement (ADA).

[10] Article 17.6(ii) of the ADA.

[11] See also United States-Laws, Regulations, and Methodology for Calculating Dumping Margins (DS294) (The Appellate Body reversed the Panel's finding and concluded that the United States acted inconsistently with Article 9.3 of the ADA and Article VI:2 of the GATT 1994 because Article 9.3, when interpreted according to customary rules of interpretation of public international law, does not allow the use of zeroing.); United States-Final Dumping Determination on Softwood Lumber from Canada (DS264) (The Appellate Body upheld the Panel's finding that the United States acted inconsistently with Article 2.4.2 of the ADA in determining the existence of margins of dumping on the basis of a methodology incorporating zeroing, concluding that the ADA, when interpreted according to customary rules of interpretation of public international law, does not permit establishing margins of dumping for product types when the product as a whole is under investigation).

[12] "Zeroing" refers to the Department of Commerce practice of assigning a value of zero where a foreign producer's export price to the United States exceeds that producer's "normal value" (i.e., the price at which that foreign producer sells its product in the exporting market).

[13] Appellate Body Report, United States – Continued Existence and Application of Zeroing Methodology, ¶ 316, WTO Doc. WT/DS350/AB/R (adopted Feb. 19, 2009).

[14] See id. at ¶ 268.

[15] A similar rationale was employed to strike down zeroing as WTO-inconsistent in United States-Anti-Dumping Measures on Certain Shrimp from Vietnam. See United States-Anti-Dumping Measures on Certain Shrimp from Vietnam, WT/DS429/R (Nov. 17, 2014). The Panel discussed the Vienna Convention and Article 17.6 in discussing principles of treaty interpretation and the standard of review in general. Notably, the Panel noted that according to the Appellate Body, the second sentence of Article 17.6(ii) takes effect after the customary rules of interpretation are applied and multiple interpretations result. In finding simple zeroing methodology inconsistent with the US's obligations under Article 9.3 of the ADA and Article VI:2 of the GATT 1994, the Panel stated that the Appellate Body has held that zeroing is not a permissible interpretation of the above-mentioned provisions when interpreted in accordance with customary rules of interpretation of public international law, as required by Article 17.6(ii) of the ADA.

[16] Appellate Body Report, United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea, ¶ 5.52, WTO Doc. WT/DS464/AB/R (adopted Sept. 26, 2016).

[17] Id. at ¶ 5.52 n.164.

[18] United States-Anti-Dumping Measures on Certain Hot-Rolled Steel Producers from Japan, WTO/DS184/AB/R (Aug. 23, 2001).

[19] Id. at ¶ 223.

[20] United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R (Mar. 11, 2011) ("DS379").

[21] Punke calls for moving past Doha, warns of over-reaching Appellate Body, Inside U.S. Trade (Dec. 19, 2016).