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David Palmeter*

*Mudge Rose Guthrie Alexander & Ferdon

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Lawyers are trained to study the past — cases and statutes — and to attempt to provide for the future — draft contracts or wills, advise or counsel. But we lawyers have no professional crystal ball that permits us see the future any better than anyone else. Hence, a lawyer's attempt to predict what international law will be in the twenty-first century is a hazardous undertaking, particularly so because most, if not all, of that law will be dictated by developments in areas other than in law itself — developments in politics, in technology, in economics, in war, and in peace.

This certainly is true of the law of international trade as now embodied in the legal instruments of the World Trade Organization and, for nearly half a century before that, in the General Agreement on Tariffs and Trade. Politics and economics have controlled the development of GATT law; few would suggest that the reverse has been the case, although GATT law certainly contributed to its own further development as experience taught policy makers what they did and did not like about GATT law as it was evolving.

GATT initially was seen as a diplomatic forum where parties compromised disagreements, not as a court that decided them. Its law developed through what is now called "dispute settlement," but what earlier was called "conciliation." The diplomatic tradition is strong — in 1992, for example, GATT's annual publication, Basic Instruments and Selected Documents, published reports of dispute settlement panels under the heading "Conciliations."[1] With adoption of the WTO's "Understanding on Dispute Settlement," however, the juridical model clearly has prevailed. This is what the WTO will take into the twenty-first century.

Some bemoan the increasing judicialization of GATT and its successor, the WTO. Apart from the usual fears of turning

* Mudge Rose Guthrie Alexander & Ferdon, Washington, D.C.

1. BISD 38S/30 (July 1992). In the subsequent volume, BISD 39S/27 (Dec. 1993) GATT used the heading "Dispute Settlement."

everything over to the lawyers, many trade diplomats are concerned that legalities will drive flexibility out of the system. Perhaps this is true, but it remains to be seen whether this is undesirable: one person's flexibility is another's unbridled discretion. The power to be flexible includes the power to twist, if not to ignore, the rules. A flexible trade regime grounded in diplomacy is a regime dominated by the powerful. This does not necessarily disconcert the powerful, who usually are convinced of the benignity of their own policies and intentions, sometimes justifiably so. Still, as Professor Francis Allen has said, "In this sinful world, when the lion and the lamb lie down together the lamb is usually in the interior of the lion."[2] A system of rules is better for the lamb than a system of interests pursued by strength on a dispute-by-dispute basis, as the latter will all but guarantee the lamb a journey to the interior of the lion whenever the lion is displeased.

Lions that agree to rule-based systems, however, have the lions' share of the say in establishing the content of those rules. The rules of the WTO clearly reflect the views of its lions, particularly the United States and the European Union. For example, the WTO's loose rules on agriculture reflect the results of their battle. The lambs counted for little in the struggle, although their stake was enormous.[3] Similarly, the standards of review contained in the Uruguay Round Antidumping Code[4] are there simply because of the insistence of the United States and its power to get its way, at least when not opposed vigorously by the EU.[5]

These results seem inevitable; in any political regime the strong are likely to have their way. For this reason, the well-being of the lambs, paradoxically, is likely to be furthered by a modest approach to developing WTO law, as is the well-being of the WTO legal system itself.

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2. LAW, INTELLECT, AND EDUCATION 57 (1979).

3. These included the members of the so-called "Cairns Group," named after their 1986 meeting in Cairns, Australia: Argentina, Australia, Brazil, Canada, Chile, Colombia, Fiji, Hungary, Indonesia, Malaysia, New Zealand, the Philippines, Thailand, and Uruguay.

4. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, arts. 17.5, 17.6.

5. Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948*, 31 COMMON MKT. L. REV. 1157, 1204, 1224 (1994).

The core constitutional articles of GATT were its first three: Article I required most-favored-nation treatment; Article II bound tariffs at existing levels; Article III mandated national treatment. Had these been phrased as commandments to contracting parties, they would have said something like, "Thou shalt not discriminate between foreign suppliers; thou shalt not increase thy existing level of protection; thou shalt not discriminate against imports in thy internal market." That effectively is what they said and, though subject to exceptions, they worked quite well, so well in fact that they are continued in the in the Agreement Establishing the WTO.[6]

The virtue of provisions like these is that they establish a framework within which governments are free to act with minimal interference: so long as they do not discriminate, so long as they do not erect new trade barriers, governments can do whatever they wish. They may set their own environmental standards, their own health and safety standards, and their own labor policies. There is minimal interference from the international legal norm.

Of course, what governments choose to do with regard to such matters as environmental standards, health and safety standards, and labor policies will have some impact on their trade performance. This has led some to advocate inclusion of substantive rules in the WTO covering these and other areas of law such as antitrust law. In my view, this would be a mistake. Substantive rules of necessity are intrusive. While no doubt they advance notions of the good entertained by their supporters, they limit the freedom of governments to adopt their own policies, and this in turn risks erosion of the political support needed to sustain the WTO and its rules. The more those who wish to act domestically are frustrated by international rules, the less they will support the international rules.

If the people of this planet have succeeded in putting the

6. The Multilateral Agreement on Trade in Goods contains the three provisions verbatim, as GATT 1994 adopts the provisions of GATT 1947. Articles 3 and 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS") cover national treatment and most-favored-nation treatment, respectively. Services are more complex. Article II of the General Agreement on Trade in Services ("GATS") calls for MFN treatment, but this requirement is subject to explicit exceptions. In addition, TRIPS, unlike GATT and GATS, does contain affirmative, minimum standards; this comes, however, against the background of more than a century of experience with international agreements dealing with intellectual property.

nuclear genie back in the bottle, this struggle between the desire to act locally and the need to cooperate internationally will be the struggle of the twenty-first century. John Kenneth Galbraith has called it the "basic dialectic — the rights of individual sovereignty against the gains from closer union."[7]

International trade law is about the gains from closer union. The cost of those gains is, in national terms, diminished sovereignty; in personal terms, diminished control of our own lives. As with any necessary costs, these should be minimized at the same time the very real gains for which they are exchanged are maximized. The lesson of the forty-seven largely successful years of GATT is that these costs can be minimized by minimizing the intrusiveness of the international rules. WTO law in the twenty-first century will be better law, more effective law, if its development is guided by the words of Grant Gilmore who returns us to the metaphor of the lion and the lamb:

> The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.[8]

We may be closer to Gilmore's due process Hell than we think. "Our statute books," Judge Richard A. Posner has written, "overflow with vicious, exploitive, inane, ineffectual, and extravagantly costly laws."[9] Few now would apply these terms to the law of international trade as established by the WTO, although all but perhaps "ineffectual" might be applied to the WTO Antidumping Code. It would be wise, nevertheless, to keep Judge Posner's adjectives in mind when evaluating proposals to turn the WTO into a substantive environmental, labor, or antitrust organization as well as a trade organization. New areas bring new players, new interest groups, new lobbies, new rent-seekers — all with their own agendas. Their activities produced many of the domestic laws Judge Posner described, taking us closer to Gilmore's total "due process."

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7. A JOURNEY THROUGH ECONOMIC TIME 242 (1994).

8. GRANT GILMORE, THE AGES OF AMERICAN LAW 110-11 (1977).

9. RICHARD POSNER, OVERCOMING LAW 26 (1995).

Long before international trade law comes to that point, however, it most likely either will be rejected outright, or by desuetude, allowed to become irrelevant. Overreaching would turn the WTO Agreement into an economic Kellogg-Briand Pact, the WTO itself into an economic League of Nations. There would then be no useful international trade law in the twenty-first century. And that, indeed, would be tragic.