

**America's Ability  
To Achieve Its Commercial Objectives  
and  
the Operation of the WTO**

Remarks of

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## Preface

This symposium takes place in Washington at the beginning of what should be an informed review of the WTO in the light of United States interests. In an era of increasing “spin” in political discourse, it would be particularly welcome if proponents resisted the temptation to overstate their case in favor of the WTO, denying the existence of problems. Nor should they confuse valid criticism for calumny. At the same time, critics of the WTO should not exaggerate the negatives.

The WTO is at the center of a world trading system that is very beneficial to the United States. The result of the inquiry should be to focus on areas of needed improvements in the WTO system. This would provide a more sure foundation, both in domestic politics and in substance, for the launch of any new round of multilateral trade negotiations than that which existed in December 1999 in Seattle. It would also provide an answer to critics, and could halt the erosion of domestic support for the WTO.

This paper covers one important facet of evaluating U.S. membership in the WTO. The topic assigned by the organizers of this program to this author was, first, to

*examine the ability of the United States, given the existence of the WTO over these last five years: (1) to accomplish America’s objectives through bilateral trade agreements and trade policy; and (2) to pursue its interests through unilateral trade policy initiatives.*

This is a relatively narrow question. The answer is negative. The ability of the United States to accomplish goals bilaterally or to exercise unilateral leverage has definitely been impaired.

The conference organizers then asked a more nuanced question. This was to

*examine the balance between the operation of the WTO agreement, and the ability of the United States to pursue: (1) bilateral trade agreements and trade policy, and (2) “unilateral” trade policy initiatives.*

My conclusion is that the shift toward greater multilateralism is a mixed blessing. There remain serious difficulties in addressing important market access problems abroad, and the WTO is an imperfect instrument to resolve many of these problems. Moreover, the WTO poses a threat to the effective employment of the remedies against unfair trade practices – dumping and subsidies. (With the exception of NAFTA, regional arrangements are not currently being actively pursued by the United States, but the impediment is not the WTO’s rules.)

The fact that there are valid, serious concerns with the operation of the WTO should not be taken as an argument in favor of withdrawing from the WTO. The United States should stay in. An open international trading system serves America's national interest. That open world trading system, whatever its imperfections, largely takes its shape from the rules contained in the WTO.

To the extent possible, I have included suggestions for changes in the WTO Agreement and the conduct of U.S. trade policy through other means that can enhance the pursuit of U.S. trade policy objectives.

Some of the discussion will appear at times chauvinistic. This flavor comes with the assignment, which is to judge how satisfied the U.S. ought to be with the current state of affairs judged by U.S. interests.

Alan Wm. Wolff  
Washington, D.C.

January 21, 2000

Sign in a Seattle shop window

**We Will Be Closed**

Tuesday, November 30<sup>th</sup>

Due to the Presence of the  
**World Trade Organization**

*Ironic Isn't It*

***“Resolved, That the Congress withdraws its approval . . . of the WTO Agreement . . . “.***

Statutory language of a Resolution of Disapproval  
Section 125(c)(1) of the Uruguay Round Agreements Act

By March 1, the President will transmit a report to the Congress which by law must include “an analysis of the effects of the WTO Agreements on the interests of the United States, the costs and benefits to the United States of its participation in the WTO, and the value of the continued participation of the United States in the WTO.” Within a few months of the receipt of the President’s report, whatever its content, it is certain that either one or both houses of Congress will consider the resolution of disapproval quoted above *in haec verba*.

The number of votes against the WTO is at this writing uncertain. Whatever the temper of the Congress, the judgment will be made in the shadow cast by the debacle at Seattle.

It is too early to tell how long and how dark that shadow will be.

**Seattle**

Fifty days ago in Seattle, as I sat “locked down” in my hotel room, I looked out at the street below, at the cloud of tear gas moving slowly from the defensive police line, past the bonfire, toward scattering anti-WTO protesters. Whatever the future of the World Trade Organization, it was hard to avoid the feeling that the first week of

December 1999 was going to be seen later as a turning point in America's participation. Perhaps the definition of America's "trade" interests was being re-written in the streets.

Of course, a large part of the story of the WTO Ministerial Conference at Seattle is about what was supposed to be taking place indoors, in the Convention Center, in the "greenroom" and in the hundreds of bilateral meetings that occurred despite the presence of the protesters outside. The demonstrators seemed to be well-organized, when compared with the disarray of the delegates from all the world's trading nations. The demonstrators appeared to achieve what they collectively sought – a halt to the negotiations. Inside the Convention Center, there was no consensus to be found. What is most shocking about Seattle is not the tear gas, but the fact that 135 nations came together for the sole purpose of drafting a consensus document, and they issued not one single agreed word.

What went wrong?

Clearly on the last day there was not a sense of common purpose sufficient to assemble even a declaration filled with agreed generalities. Many of the developing countries seemed to wish primarily to retreat from their commitments given only five years earlier in the Uruguay Round of trade negotiations. Perhaps some of them did not buy completely into America's triumphalism regarding the benefits of ever-freer world trade. Rather than yielding to global forces to help make themselves more competitive, the developing countries sought to back away from their commitments to protect intellectual property, and to delay making additional commitments for further tariff cuts. In addition, they worried about their capacity to implement existing obligations, even without undertaking new obligations.

The primary contribution of the Japanese negotiators was to advance a more sophisticated, and more dangerous rationale for blocking further trade negotiations. The idea was called “multi-functionality.” It was a concept designed to clothe the protection of inefficient agriculture against more efficiently produced food from abroad in notionally respectable garb. Henceforth, protectionist policy, instead of being advanced by tactics of delay and stubborn, low-key resistance, was to be proudly strutted out by the Government of Japan. Protectionism was given to be given an intellectual basis. The banner of multi-functionality was unfurled in the name of preserving a way of life, the environment, the community, the forests, the land. Simply keeping foreign goods out was not mentioned as an objective.

Most dismaying was not the position of the Japanese Government from which little positive was expected. But where were America’s natural partners for fostering trade liberalization? Going into Seattle, no agreement had been reached with the world’s other largest trading entity – the European Union (EU). For tactical, strategic or ideological reasons, or just because there was no time for the new European team to find a comfortable working relationship with the U.S. negotiators, the EU advanced an agenda that catered to some of the worst instincts of the developing countries and the Japanese, while seeking what from an American perspective was an ill-prepared and ill-considered negotiation on an entirely new subject – competition policy (what Americans call “antitrust”). The idea which caused the last attempt at creating an International Trade Organization (ITO) at Havana fifty years earlier to be stillborn, was being brought back in a manner that could carry the same seeds of destruction within it. However rational

the objective, and it is one that is highly praiseworthy, it was not a proposal that could succeed in the shape put forth by the European Union.

Canada for its own reasons or inadvertently helped to torpedo the last minute efforts to reach a consensus. Exhausted, the delegates simply quit.

Were the Americans blameless? No. While there's joint responsibility for the failure, the Americans were in the chair, and they get an extra share of demerits as they would of kudos, had any been awarded. But they were trying very hard to move the agenda of global trade liberalization, and they had precious little help from others. Never in the half-century history of multilateral trade negotiations had there been so stark a failure. Disagreement prevailed even as to what the point of departure should be for picking up the pieces after Seattle.

Despite the presence of a U.S. team led by the President, the Secretaries of State, Commerce, Labor, and Agriculture, the U.S. Trade Representative, the Deputy Secretary of the Treasury, and the President's Chief Domestic Economic Advisor; despite pleas for cooperation by the President to foreign leaders including most notably the Prime Minister of Japan; despite the goodwill of more than fifty Congressmen and Senators and many hundreds of representatives of American industries and agriculture who came to Seattle to assist, the effort collapsed.

There was no consensus reached on any agenda, and certainly not on the agenda advanced by the United States.

Perhaps this debacle will be soon overcome, as transient as the graffiti written on the stone facades of the shops of the merchants of Seattle. After all, the spray-painted

slogan “tear gas for breakfast” on a building fronting on Seattle’s main thoroughfare is gone, washed away without a trace.

But perhaps those among the world’s citizenry who oppose the WTO, and the foreign negotiators who served as their unwitting allies, will be emboldened by their success at Seattle. Another meeting in the near future might produce the same stalemate. Had the sixty-five year process of trade liberalization reached its high water mark prior to Seattle? That is a shocking notion for any of us who have been engaged in the effort. But it is too early to say definitively what the answer is to this question.

### **The U.S. National Interest – A Brief History**

In order to evaluate whether, and how well, the WTO serves U.S. interests, these interests must first be identified.

First and foremost, it is a tenet of absolute faith for this generation of U.S. policy makers that the largely unfettered operation of market forces will provide the greatest gain for the world and for the United States. The idea -- clearly not shared by those in the streets in Seattle in early December, and not fully bought into by many of the foreign delegates within the walls of the Convention Center -- is that:

*The maximization of economic efficiency, if adhered to as an overriding objective, will give rise to a general increase in the standard of living for the peoples of all countries participating in an open global trading system.*

This is an integral part of the flowering of American triumphalism. It arises out of the Reagan era and the collapse of the Soviet Union. It is shaped by the Asian financial crisis, the continuing stagnation of the Japanese economy, a steady and impressive growth in the U.S. economy and in U.S. productivity, the lowest unemployment rate in

the United States in three decades, and American dominance in the emergence of a global e-economy. This one overriding goal – to foster global economic efficiency – has superceded earlier U.S. objectives.

Trade policy was once seen as part of a different construct. When President Kennedy obtained his negotiating authority in the Trade Expansion Act of 1962, America's purposes, endorsed by the Congress, were: through economic development of the economies devastated by the Second World War and the economic development of former colonies; to counter the world-wide spread of communism; to dilute the discrimination seen as inherent in the formation of the European Common Market; and to foster world growth and increase U.S. exports. The law also gave strong emphasis to the provision of relief to those industries, communities, firms and workers who had to adjust to the injury caused by trade liberalization. The equities mattered. Trade had a human face.

Prior to 1962, Congressional grants of trade authority to the President had been based primarily on the notion of gaining reciprocity. The trade agreements program was designed to tear down the high tariff walls imposed in the early years of the Great Economic Depression. By the Reagan years, in the 1980s, gaining reciprocity had lost respectability, although it was still cited in a lengthy list of objectives in the 1988 Trade Act. Seeking "reciprocity" was seen by its critics as a limitation on U.S. trade liberalization goals, rather than a valid objective. Nothing, even lack of reciprocal benefits, was to hamper every effort to open markets, here and abroad. If America's trading partners did not see the merit in opening their own markets, the market would penalize them directly. Their consumers would suffer.

American self-confidence and belief in the benefits of the free market found further expression in the Uruguay Round trade agreements. For the first time, the services sector (financial services and telecommunications, in particular) would be covered by trade liberalizing commitments, and intellectual property rights would be protected. The Wilsonian ideal of collective action for the common good of nations was enshrined in the creation of a new World Trade Organization. The primary intended difference between the old horse-trading club of the GATT and the new WTO was to be the introduction of a binding dispute settlement system. This would be the capstone of a structure built on both idealism and contractual commitment, and a tribute to America's belief in a rules-based international economic system. It would also, it was hoped, bring about major reforms in Europe's Common Agricultural Policy, which had successfully resisted for a few generations all assaults by the United States and other agricultural exporting nations.

In the Uruguay Round, America's negotiators still respected some of the more important domestic equities, too. It was clearly understood that Congressional and public support, essential to approval of U.S. participation in the new system, required that disciplines be maintained over unfair trade practices affecting U.S. imports. The new WTO system was to preserve unimpaired the ability of the United States and other WTO Members to defend against injurious imports traded unfairly – that is, dumped or subsidized. So said America's negotiators.

Apparently sacrificed in the Uruguay Round was America's ability to act to open foreign markets unilaterally (really bilaterally, as unilateral action was only a tool that led to negotiations). The loss of this capability was heatedly denied by U.S. negotiators,

whose vigorous protests were belied by the loud celebrations of America's trading partners.

### **U.S. National Interest – The Next Chapter**

The dominant American theme of the 1980s and 1990s, the celebration of the benefits of the free market, is likely to continue as an article of faith. This is not pure idealism nor is it solely altruism. America regards its industries as highly competitive and innovative. "Open markets" is to America what "open seas" was to Great Britain in the 19<sup>th</sup> Century. World trade has grown enormously. The U.S. GNP has been growing robustly. U.S. productivity gains are strong. Stable expansion of world trade has been beneficial and is seen to be so (but for a nagging suspicion that a vast U.S. trade deficit may not be very healthy). This policy is deemed to serve America's national interests well. However, it is also believed, with some evidence, that this policy serves other participants fully as well. There is no reason why Hyderabad cannot become a center for software development and it is.

The overriding national interest in what is to be obtained from U.S. trade policy is likely to remain maintaining the openness that currently exists to American trade and investment, and expanding it further. The WTO will be judged by Americans primarily on whether it is capable of delivering on this traditional U.S. objective. Do multilateral means – negotiation and dispute settlement, serve this objective? Or does the WTO unduly inhibit America's pursuit through other means of its goals?

The WTO will be judged by whether it advances or works to the disadvantage of America's commercial interests in trade created by new technologies. An emerging U.S.

objective is to foster the unfettered growth of e-commerce. The implications of the internet for global trade and trade regulation are not yet fully foreseen, much less understood. Global integration of economic activity through this new form of communication (and the creation and delivery of products) is likely to catch unprepared a trading system designed to promote the flow of tangible goods, and some services. This will bring a number of new subjects onto the list requiring special attention – privacy, encryption, and taxation. A related set of issues surrounds trade in the products of biotechnology – genetically modified organisms (GMOs). A near-term American objective will be to ensure that the WTO does no harm to the evolution of this technology and trade. The contest between science and the precautionary principle will need to be sorted out. And these are just a few of the new issues.

The future WTO will also be evaluated in part on whether it creates new threats to American exports and investment. Potentially one of the most serious of these could be taking the wrong approach to “competition policy.” The United States should have been a natural supporter of an initiative on this subject. There is no more aggressive government on earth than the U.S. government when it comes to prosecuting anticompetitive behavior. However, proliferation around the globe of “competition policy” could be under WTO sanction is distinctly contrary to free trade, and the commercial interests of the United States. Why? Foreign governments’ objectives in administering a global competition policy system are likely to differ dramatically from those of the United States. Under the banner of “abuse of dominant position,” the world’s foremost competitive enterprises could be subjected to all forms of nontransparent (and illiberal) conditions for doing business. These might take the form

of forced licensing of technology, forced investments, forced local joint venture partnering, forced participation in local development schemes, and the like.

There is potential common ground between the United States and the European Union. Both have a strong interest in opening foreign markets closed by local anticompetitive private conduct, whether or not aided and abetted by the foreign government authorities. While a system of rules governing competition might, if minimum standards were negotiated, serve to insulate private restraints of trade from prosecution rather than to promote the free functioning of the market place, the WTO is the appropriate forum to negotiate national market closure accomplished through anticompetitive private behavior. An negotiating initiative to regulate this form of protectionism should be supported.

Equity will also continue to be a central required goal of U.S. trade policy. Industries, firms and workers can be adversely affected by world trade – whether in terms of access denied to foreign markets or competing with dumped, subsidized, or otherwise injurious, imports. They will, on occasion make their views forcefully known to their elected representatives. Trade policy cannot be conducted without the support of (or lack of active opposition from) those affected by trade. The political impact of those adversely affected may be tempered by those who gain, such as general consumers, but this will not suffice to maintain American policy on its present course.

### **U.S. National Interests – Other Than Commercial**

There is also a foreign policy component to American trade policy which is more evident now than at any time since the Kennedy Round in the 1960s. Although it is the

gleam of market expansion that lights the eyes of American business and government officials when they think of China WTO Accession, there are strong foreign policy and humanitarian goals served by the formal integration of China into the global economy as well. While there are no guarantees as to the success of any policy, Chinese isolation is more, not less, likely to lead to confrontations in Asia. Much slower economic development in China is certain to lead to greater privation among the vast Chinese populace. Less commercial interchange with the rest of the world is likely to slow rather than enhance the potential for growth of domestic democratic institutions within China.

The argument that a “liberal” (in the 19<sup>th</sup> century economic sense) trade policy will lead to the fostering of democracy around the world was not much heard from the Administration until the end of the last failed attempt to obtain a (fast track) negotiating mandate from the Congress. The pro-democracy aspect of trade policy is likely to be emphasized more in the future, with testimony from Hong Kong and exiled Chinese. While not every other Asian country is a perfect model of democracy, there is a large measure of personal freedom for the citizenry in a number of once and future Asian tigers that would only be diminished by the absence of the economic growth related to trade.

Non-commercial objectives in the formulation of trade policy are often the product of Congressional rather than Executive Branch initiatives. The presence of the Jackson-Vanik amendment for the last quarter century as one of the most visible features of the trade-policy landscape first in dealing with Russia, and then with China, should remind trade policy savants that other policy objectives may intrude on the trade liberalization agenda. In the future, the forces shaping policy may extend more often

beyond the Congress to the states (e.g. through Burma sanctions), and because of the internet, to cross-border affinity groups.

Lastly, in the attempt to look forward, one would have had not only to be blind, but dead, to avoid perceiving that there might be some implications that policy will be affected by the agenda of those on the streets in Seattle.

What lessons can be drawn from the streets of Seattle? The days of trade policy being primarily in the service of David Ricardo (that trade liberalization should occur because it is good in and of itself), and otherwise the occasional unwilling or willing consort of foreign policy, may have come to an end. Trade policy may have to be shared with those making non-traditional demands on trade. These are the environmentalists, and labor and human rights activists – supported by the young. Not since the anti-war protests of the Vietnam Era, or the riots following Martin Luther King's assassination, has a cause emptied out school dormitories. Whether the fault of dispute settlement or the rules themselves, there is growing resistance to the appearance that national governments may not freely ban the use of turtle-killing shrimp nets, or dolphin-killing tuna nets. For organized labor, the absence of internationally agreed labor rights is likely to be an increasingly powerful cause. In addition, businesses may question whether there is not an inherent imbalance in the trading system's rules, under which the lack of even the lowest global minimum standards in labor and the environment may not be countered by countries with higher standards.

The domestic debate is just beginning and the outcome is far from clear. It is likely that the U.S. menu of objectives will be under greater pressure to be broader to encompass these concerns.

### **Should the United States Stay in the WTO?**

Given current and future U.S. objectives, does the WTO serve the United States well? Should the United States continue to be a Member? The latter question is a threshold inquiry, not shocking to anyone who has been forced to engage in zero-based budgeting. One answer is that if something like the WTO (or its predecessor, the General Agreement on Tariffs and Trade (the GATT)) did not exist, the United States would have to invent it. There are too many countries engaged in world trade and too much at stake to make it either practical from a purely mechanical perspective or in America's objective interest to seek to do without it. Only a multilateral process leading to contractually binding multilateral agreements can provide a stable and relatively open international trading environment. This is the first litmus test for the WTO -- and it passes. No series of bilateral agreements could successfully replace the WTO agreements.

### **How Well Does the Current WTO Serve America's Traditional and Emerging Trade Interests?**

#### **a. Market access for industrial goods – tariffs, quotas and other nontariff measures.**

Very seldom do WTO members breach explicit, clear contractual commitments. There is great value in existing tariff bindings and commitments not to impose quotas. Among developed countries industrial tariffs are generally low. There do not appear to be endless serious problems with “technical barriers to trade” (product standards) or with customs valuation. It is not easy to engage in an evaluation based on counterfactual hypothetical arguments about what the world would be like without the existence of the

relevant GATT obligations. Suffice it to say that this part of the rules-based trading system seems to be working, judging by the absence of current controversy.

There is a valid question of whether there is the leverage to move further toward elimination of traditional barriers, including further tariff reductions on the part of developing countries, but the WTO cannot be said to have exhausted its utility in this regard -- yet.

**b. Market access for agricultural products**

Agriculture poses serious problems. Progress, such as it is, is largely made in the context of large, multi-subject, multi-participant trade negotiating rounds. In these great periodic gatherings, it is possible to assemble a package of agreements and commitments that is too large and multidimensional for any country or trading entity to walk away from. Here the Cairns Group of agricultural exporters can see what it can accomplish. There is no evidence to suggest that a bilateral approach with the European Union would have any particular hope of success. Nor has binding dispute resolution -- as far as American negotiators were concerned designed to deal with the problems caused by European agricultural policies -- shown the slightest promise.

And then there is the question of GMOs. The current WTO rules are inadequate. The problems have been politicized to the point where normal diplomacy has not succeeded in finding solutions. WTO litigation has not yet produced an answer. Concerns about consumer safety, whether or not valid, have become a major barrier to the development of new agricultural products and their acceptance in international trade. The WTO should not yet be graded too harshly for this emerging problem which is

currently beyond its capabilities. It is clear that bilateral approaches would be no more successful. They have been tried.

**c. Market access -- the special problem of Japan**

What problem? Most of the world has given up trying to sell much more in the way of competing manufactured goods in Japan. Demand is depressed from a decade of economic stagnation. The market is mature. The population is aging.

At the same time, there are many new, positive developments in Japan. Wherever in the Japanese economy there is economic collapse, foreign capital is welcome. Foreign financial services companies are moving rapidly into Japan.

For a variety of these and other reasons, some positive, some very negative, this has been the least contentious period in U.S.-Japan trade relations in a generation.

And yet, of course, there still is a Japan problem. It just tends to be masked by the unremitting gloom about the recovery of the Japanese economy and the presence of some welcome positive developments in some sectors. But Japan continues to underperform badly as a consumer of the world's manufactured goods produced by non-Japanese companies. Its distribution system is archaic. Its antitrust laws are administered largely to curb competition. Competing industrial goods have a very difficult time making headway in the Japanese market. Japan's willingness to bear the burden of adjustment for its own competitive failings is still very limited (witness the assault on the American market with dumped steel) in 1998.

The issues that once troubled U.S.-Japan relations -- automobiles, automotive parts, flat glass, regulatory reform, etc. -- have been not been allowed to boil over. In fact, they have grown tepid, although the problems still exist. This is not because of

Japan's willingness to reform, or to cure the problems that exist. It is in part because of lack of U.S. private sector interest in pursuing access to the Japanese market as aggressively as previously. It is also because of Japan's surprising success in its policy of *monzenbarai* (not answering the knock at the gate). In the WTO world, with section 301 hung up like Wyatt Earp's peace-keeping device, Japan has succeeded in resisting all attempts at a civil dialogue, not to mention negotiations with its trading partners, over its very special trade barriers. These barriers combine private anticompetitive activity with a complicitous government. The one bright sectoral note is U.S. Japan-trade relations, where there was contentiousness in the past, is in the field of semiconductors. Here there is harmony and cooperation, at both the inter-industry and inter-governmental level, and at the suggestion of the Japanese, the focus is on multilateral cooperation in this sector, without any focus needed or desired on Japan market access. Another potentially bright note is the appearance of a Japanese blue-ribbon panel report calling even more strongly for reform in Japan. It even calls for more lawyers. (It does not call for more economists).

Another factor that deprives the U.S.-Japan relationship of attention: when it comes to the East Asia, China accounts for 95 percent of American trade policy interest, absorbing the energy that was for years devoted to Japan. There is also, despite the enormous bilateral trade imbalance, Japan fatigue in Washington – a weariness that takes the edge out of moral outrage. Moreover, there is no longer a debate between the Japan boosters (known largely behind their backs as the “Chrysanthemum Club”) and the hard liners (once oddly called the “revisionists”). It is now assumed that most of what the hard-liners said about Japan in the past was true (the stories of crony capitalism,

protectionism, and protectionist *keiretsu* relationships) but that all of this no longer matters except to the Japanese. In this time of American triumphalism, there is a feeling that Japan's self-defeating policies are (like virtue) their own reward.

Now, where does the WTO fit in all this? It does not in any positive way. It declared itself wholly irrelevant to most problems of access to the Japanese market in the WTO Japan photographic film case. It could be, and was, foreseen in 1994 at the end of the Uruguay Round, that a case were brought by a country having an open and transparent economy against a country having a complex, rigged protectionist system, WTO dispute settlement would work, perversely, in favor of the closed economy. And it does. WTO dispute settlement is ineffective as a tool to open the Japanese market. This failure of WTO dispute settlement has made section 301 -- the unilateralism that led to bilateral agreements -- usable only at very high cost. (This is explained below). The exceptions are very rare -- e.g. the ability of the Federal Maritime Commission to threaten to retaliate against Japanese shipping for restrictions on use of Japanese ports. (P.S.: the threat worked.)

Thus, while America cares much less about remaining problems of Japan market access, the WTO, which should care, is neither engaged nor held accountable. Will this condition of general *ennui* regarding the opening of the Japanese market persist? Perhaps, but not forever. Were there to be less robust economic conditions in the United States, and the willingness of Japan to finance the U.S. trade deficit flagged, and the mammoth bilateral trade imbalance continued, and/or the degree of current Japanese openness to U.S. services providers, and inward investment into Japan decrease

markedly, the failure to have any answers to the Japan problem revisited, would, in baseball terminology, be *STRIKE ONE* for the WTO.

**d. Market access – the special challenge of China**

Before concluding that the WTO is infirm in each of the special assignments it is given, the case of China should be mentioned. The United States went probably as far as it could with trade liberalization in bilateral agreements with China. For more fundamental reform, negotiation of the WTO Protocol of Accession was needed. It is improbable that China would have been able to take the major step of eliminating tariffs on information technology products, agreeing to curb non-commercial behavior by state-owned enterprises, commitment to liberalize distribution, investment and the like, in further bilateral talks. Something more probably had to be at stake, and this was membership in the WTO. The next challenge, assuming WTO membership goes forward, will be implementation by China of its obligations. This challenge will be sizeable, but necessary.

**e. WTO Dispute Settlement**

Binding dispute settlement, forgive us for our sins, was an American idea. It is easy to see why it would be appealing to smaller countries – Canada, the Nordics, and the developing countries. They do not have much clout when it comes to standing up against larger countries. The EU has the market size to wring concessions from recalcitrant protectionist governments abroad, and has its own version of section 301 (its “commercial instrument”), but it lacks the political consensus among Fifteen Member states to use it. Leverage which is clearly unusable is not leverage at all. For Japan, it could hardly close its market further to foreign goods, and was running gargantuan trade

surpluses, so threats of retaliation or counter-retaliation were not feasible. But America had the political will to act unilaterally, on occasion, and did so, on occasion, to advance its commercial interests when faced with closed markets abroad.

This gave rise to enormous resentment among all of America's trading partners. America for its part, tired of trying to get a good wrestling hold on the Common Agricultural Policy through litigation, surrendered its large country advantage – trade leverage, for binding dispute settlement.

This is why it occurred. How was it that America's leverage was undone? America as a defendant, suffers perhaps the sole disadvantage from having a remarkably transparent law-based system of trade regulation. For dispute settlement purposes, when the U.S. crosses the line of its WTO obligations, it is as if it had a large bulls-eye painted on its chest. The foreign country plaintiff can go to the WTO, get a judgment against the practice, insist on the practice being lifted, and is able to retaliate if it does not get satisfaction, and international right is on its side. Well, that might be all right. The U.S. ought not to transgress.

When the U.S. is a complainant, it may well be faced more often than not with a less transparent system of protection employed by the defendant country. How will it prove that the Korean or Japanese economies are rigged in a variety of hidden ways? The WTO has no ability to investigate. There are no adequate safeguards to screen out bias in staff assigned to a panel. The panel itself is likely to consist of busy diplomats with other, more pressing responsibilities. The results may be appalling.

In fact, the results have been none too good lately. Examples include:

(1) *UK Bar*. The EU has won a case that holds that the sale of a company extinguishes prior subsidies, although the EU does not follow this rule in its own state aids code. The

WTO panel substituted its judgment for that of the national (U.S.) decision makers, violating the standard of review. This expansionist approach creates contractual commitments where none had been negotiated. The WTO panel exercised no judicial restraint there is no WTO tradition of judicial restraint. But, there should be.

(2) *The FSC (foreign sales corporation)*. The original GATT rules favor the use of sales taxes (indirect taxes) over income taxes (direct taxes). The rebate on the export of goods of the first class of tax was permitted, the second prohibited. There was and is no sound economic basis for the distinction. In competitive markets, purchasers will not always bear the indirect tax (in order to make the sale, the seller will absorb some of the tax burden by reducing its profit) and sellers will not always bear all of the income tax (it will be passed on to the purchaser in the price of the goods sold). This problem was resolved in 1981, but the EU, unhappy about cases brought by the U.S. that it was losing, upset the understanding and brought this case to a WTO panel. The U.S. lost the case, and it is currently being appealed.

(3) *Bananas and beef hormones*. With respect to the *bananas* case brought by the U.S. -- don't ask. Suffice it to say that the EU lost, has been unable to rectify the situation, and that the U.S. retaliated within its WTO rights. With respect to *beef hormones*, the EU barred imports of beef without scientific evidence that there was a problem with the use of growth hormones in cattle feed (while not minding the intensive presence of pesticides in the feed going into its cattle). The WTO panel ruled against the EU, which again failed to comply with the ruling and suffered WTO-authorized retaliation by the U.S.

(4) *Japanese market closure to foreign photographic film and paper*. Despite thousands of pages of U.S. evidence, showing GATT-violative acts of the Government of Japan to close its market to foreign film and paper, and the EU joining in the case on behalf of its film manufacturer, the WTO panel could find no evidence of any wrong-doing by Japan. As noted above, this took the WTO largely out of the Japan market access business, leaving an embarrassing gap in the WTO's relevance to current trade problems. It also cut off the use of the WTO dispute settlement process for similar problems in other countries.

(5) *Japanese case against the U.S. for assessing dumping duties of hot-rolled carbon steel*. This matter has just begun. No panel has been constituted as of this writing. This is part of Japan's unashamed offensive against the US trade remedies. Were it to be successful, the case will harm Japan and the WTO more than the U.S.

(6) *Airbus*. Rumor only, as a U.S. case. Does the WTO have an answer when vast subsidies appear to create what could become a dominant supplier of one of the world's largest and important categories of trade? Is the WTO up to resolving the problem, as a case, or otherwise?

Meeting in closed session, staffed by the potentially biased and/or incompetent, not being drawn from a standing judiciary, with panel members having their own biases,

the panel which is the heart of the WTO dispute settlement system is badly in need of reform. There is no systematic U.S. review of those WTO cases brought against the United States which the United States loses. There was a statutory provision recommended by then Senate Majority Leader Bob Dole when the Uruguay Round was being considered, and which President Clinton agreed to support. It called for a panel of retired Federal judges to consider whether the WTO panels were making their decisions in accordance with proper judicial standards, and the provisions of the WTO agreements. The proposed statute is still pending action by the Congress, recently having been re-introduced in the House of Representatives.

Dispute settlement: Potential STRIKE TWO for the WTO.

**f. Antidumping**

Part of the basic political bargain made with industry and workers at home, and with our trading partners abroad, at the founding of the GATT and the WTO, was that if unfair trade took place, most notably dumping, it would be offset. A group of countries with a very poor record of providing market access to the goods of others, led by Japan, Korea and Brazil, has engaged in a campaign to re-open the antidumping code although it was recently revised in the last round of negotiations. If they succeed, they will finally undermine whatever consensus exists for maintaining U.S. participation in the current WTO. As one American academic who is a critic of the antidumping remedy has said, “this is the *third rail* of new trade negotiations”, meaning that to touch it was to be electrocuted, dooming the entire enterprise.

Were Japan and Korea and a number of developing countries to succeed in re-opening antidumping, this might well be STRIKE THREE for the WTO insofar as U.S. participation was concerned.

**g. New (for the WTO) issues: labor and the environment, GMOs**

The nontraditional “trade” issues are the hardest variables to gauge in making judgments about whether the WTO can succeed in the future. There are clear risks to denying that these are issues that must be dealt with. But they should be settled at the negotiating table and not in the streets.

The United States put forward a particularly mild proposal that the relationship of labor rights and trade ought to be examined in the WTO. This proposal met with enormous resistance from many of America’s trading partners.

Nor can the environmental issues be swept aside. The environmental community is deeply troubled by the apparent limits on the ability of the United States to have the right to protect dolphins and sea turtles from fishing techniques that threaten these animals’ existence.

A large part of world trade in agriculture will potentially be affected by the treatment of GMOs.

These issues have little in common substantively. What they do share is that they are new, they are politically explosive, and it is probably not possible to conclude a successful new round of multilateral negotiations without addressing them.

## Some Specific Suggestions

The following are specific suggestions for U.S. policymakers:

**Preparation of additional subjects for negotiation.** The U.S. government, with the advice of the private sector, needs to consider what can and should be negotiated regarding new subjects. Among these are:

- **Competition policy.** When a web of informal restrictions, ranging from administrative guidance to private restraints of trade, function to prevent foreign access to a market, this slice of the highly controversial area of competition policy requires some form of coverage by the WTO rules.
- **Genetically modified organisms (GMOs).** This emerging area represents too much of world trade to be left to the vagaries of dispute settlement.
- **E-commerce.** To leave governments completely free to engage in protectionist actions with respect to this growing area of world commerce is not acceptable.
- **Labor and the environment.** These are subjects linked only by their introduction of nontraditional concerns into the trading system. Finding the appropriate treatment is essential if a domestic consensus for the WTO system is to be maintained.

These issues are lacking in both an international and a domestic consensus (unless one counts the strong U.S. domestic interest in rejecting the EU proposal on competition policy). Valid issues have been raised, however, and solid preparatory work is needed at home, prior to engaging in serious discussions with major trading partners as to what might be accomplished multilaterally.

**Dispute settlement.** An independent U.S. look by highly qualified individuals is needed. A panel of retired judges should be appointed immediately for a report within

six months on how the dispute settlement system is working. Among the questions to be addressed:

- Is due process assured by the procedural aspects of panel and appellate consideration of matters?
- How can doctrines be instilled of judicial restraint, application of appropriate standards of review, deference to national decision-making; avoidance of judicial legislation of additional obligations;
- What are the safeguards against bias?
- Should there be an independent WTO judiciary?
- Should there be professional support for panelists independent of those in the WTO secretariat having other responsibilities?
- How can enforcement be obtained? Where a decision is wrong, what is the appropriate reaction to prevent implementation?
- Are there adequate U.S. government resources to represent U.S. interests in WTO litigation?
- What is the appropriate role of the private persons whose interests are most at stake in WTO litigation?
- Where is the balance to be struck between diplomatic efforts and litigation?
- How open should the proceedings be?

Focus can most easily be on cases in which the United States participated, whether as complainant or defendant, whether won or lost, because of the availability first hand information.

**Institutional structure for WTO governance.** A review is needed of how to manage WTO affairs. Should different bodies be constituted within the WTO? How can consensus be more readily achieved through changes in process or structure? Is voting relevant? If so, should it be weighted by share of global imports?

**U.S. study of alternatives to multilateralism.** This should not be a study of replacing, but supplementing the WTO system. Unless the Free Trade Agreement portions of the WTO are repealed, the impact of regional arrangements on U.S. interests has to be considered. Others' arrangements should be catalogued and an assessment made of their effects on U.S. commerce. Should the United States have more FTAs (include here implementing the one it has not yet ratified)?

**New trade instruments.** Problems not adequately dealt with by international agreement require identification. First among these would be foreign anticompetitive practices that block market access, or that funnel goods or services to the United States market through distortions of trading patterns that would be dictated by normal market forces. The President called for sanctions to enforce new global minimum standards for labor and the environment? What are the pros and cons? New remedies are needed in U.S. statute.

**American capacity to track implementation.** Inadequate resources exist to understand the extent to which existing WTO obligations are being met by other countries. Better organization of existing resources would help. The information available on access to the Japanese market is woefully short of what is needed. There could be more effective tracking of EU initiatives, directives, etc., to determine effects on U.S. commercial interests. Major developing countries require additional attention. The largest new challenge will be implementation by China of its newly acquired international obligations. The U.S. government is not well prepared for this assignment.

**Enhancing developing country capacity for implementation.** Multilateral and bilateral assistance programs are desperately needed to make it possible for the WTO

obligations undertaken by developing countries to yield the promised benefits, for the countries undertaking the obligations as well as the intended beneficiaries.

**Trade policy formulation.** It is difficult to assess from the outside how well the U.S. trade policy formulation mechanism works. One of the questions raised in Congress regarding Seattle was how well was the U.S. prepared for this meeting? There was once a neat organization chart for trade policy formulation as a result of various trade statutes. Each President then organizes his domestic and international economic policy formulation functions in a manner that tends to subordinate the statutory interagency trade policy review process. How effective are the current mechanisms? Where does long range planning take place? Study it; fix it if it is broken.

**Staffing in general.** Are there adequate resources for the planning and implementation of U.S. trade policy? Not at present. If merging agencies does not work, some better form of organizing the current resources should be considered, including an increase in the level of effort devoted to trade. More government support of education of future potential trade policy formulators is needed. (Education should be supported without reference to nationality of the students. We will benefit in general from well-educated decision-makers here and abroad.

**Congressional participation.** How well does the partnership between the Executive Branch and the Congress function? How can it be improved? The Congress needs to address the question. Is “fast track” dead as a concept or in a temporary cryogenic state? New procedural means are necessary to involve the Congress more closely in the process of formulation of negotiating objectives, as well as oversight of

negotiations and approval of the results. The use of Committee votes during checkpoints in the negotiating process should be examined.

**Maintaining a domestic consensus.** A plan needs to be further developed. Involving the Congress more closely will help. The business community is engaged in a grass roots effort.

**The Williams Commission revisited.** It can help to periodically put together a comprehensive survey of trade policy analysis, options and recommendations. Part of the five-year review process could be to establish a new review mechanism to help integrate the various areas of concern listed above into a coherent policy framework. Identifying U.S. objectives explicitly would be a step in the right direction.

## **Conclusion**

U.S. participation in the WTO is far from untroubled, and its future should not be taken as a foregone conclusion. Many of the long-time supporters of the GATT system in Congress are now reaching retirement age. The majority of incoming Members of Congress, which under the U.S. Constitution has the power over foreign commerce, are not convinced of the efficacy of the WTO. Increasingly their constituents are raising concerns about the operation of the WTO.

Part of the problem with the WTO may be an excessive reliance on litigation to the exclusion of traditional diplomacy. Part of the problem lies in the inability to supplement effectively multilateral initiatives with bilateral actions, consultations and negotiations. The WTO should not be the sole avenue for solving all trade problems with other countries. It is not up to the task. When serious problems cannot be successfully addressed, questions of interference with sovereignty become more serious.

Thoughtful members of Congress and Administration officials are reviewing the means to restore more options to the conduct of American trade policy as alternatives to solitary reliance on the WTO. One proposal introduced in the House recently would provide a remedy against private restraints of trade that have the effect of closing a foreign market to U.S. goods. There will be other new trade remedy proposals considered in this and in subsequent Congresses.

The reports that the United States will have no alternatives once again to taking action within the WTO are greatly exaggerated.

**WTO Membership and U.S. Commercial Interests:  
Some Pluses and Minuses After 5 Years**

<b>Positives</b>	<b>Negatives</b>	<b>Not Yet Clear</b>
<p><b>1. Market Access for Goods</b> -- elimination of tariffs and other border measures</p> <p><b>2. Market Access for Services</b> -- telecom and financial</p>	<p><b>1. DSU Cases Against United States</b></p> <ul style="list-style-type: none"> <li>➤ environmental cases</li> <li>➤ FSC</li> <li>➤ CVD/privatization</li> <li>➤ other challenges to AD/CVD measures</li> <li>➤ section 301 -- partial vindication</li> </ul> <p><b>2. Impact on America's Bilateral Trade Diplomacy</b></p> <ul style="list-style-type: none"> <li>➤ <i>monzenbarai</i></li> <li>➤ undermining of section 301/bilateral leverage</li> </ul> <p><b>3. Key "Offensive" DSU Cases -- Not Yielding Market Access</b></p> <ul style="list-style-type: none"> <li>➤ Film</li> <li>➤ Bananas</li> <li>➤ Beef Hormones</li> </ul> <p><b>4. U.S. Trade Deficit Continues to Rise</b></p>	<p><b>1. Impact of New Rules on TRIPs and TRIMs</b></p> <p><b>2. WTO as Forum for Additional Negotiations</b></p> <ul style="list-style-type: none"> <li>➤ agenda of most WTO Members is hostile to United States</li> <li>➤ backsliding/efforts to reopen Uruguay Round commitments and rules</li> <li>➤ WTO starting to resemble UN General Assembly (Seattle)</li> </ul> <p><b>3. Prospects for discipline on private and joint public-private restraints</b></p> <ul style="list-style-type: none"> <li>➤ no success so far</li> <li>➤ strong possibility of making things worse</li> <li>➤ Levin bill seeks to target this problem</li> </ul>