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# EVALUATING INTERNATIONAL ECONOMIC LAW DISPUTE RESOLUTION MECHANISMS

FRANK J. GARCIA\*

I would like to comment on six themes in Professor Davey's remarks that I believe will come up throughout the rest of the conference. First, what is the role of international economic law conflict resolution in the international legal community generally? I think it is fair to say that the WTO dispute settlement process is something of a model for the rest of international law in terms of its dispute settlement mechanism, both in its design and in some of the successful operational features that Professor Davey mentioned. It is interesting to reflect for a few moments as to why this might be. Professor Davey mentioned two particular systemic values: security and predictability. These values are key to the success of international commercial activity and also to the implementation and successful operation of the rule of law. I think the happy congruence between those two features means that international economic law is a powerful engine for the rule of law in international relations generally, particularly in the settlement of disputes.

The second theme is the difficulty of developing a law-based dispute resolution mechanism where powerful state interests are at stake. There is a traditional distinction between rule-oriented and power-oriented dispute settlement in international economic relations and international relations generally. We can see in the old GATT dispute settlement history some of the weaknesses of a system that is generally considered to be more power-based—for example, the requirement for consensus. Where one finds a consensus requirement, one often finds underneath that states have been unwilling to agree to rules that will have effect over their veto, which consequently weakens any kind of dispute settlement mechanism established. The WTO is generally regarded as a shift to more explicitly law-based or rule-oriented dispute settlement. One important example Professor Davey mentioned is the switching of the consensus rule to a negative-

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consensus rule. I will return to this issue of power and rules when I conclude.

The third important theme to emerge is the crucial role of settlement in any international economic conflict resolution system. As Professor Davey pointed out, half of the disputes are weeded out at the consultation stage alone. This possibility for settlement and the value placed on settlement is particularly important because in settlement negotiations, state interests and state power have maximum sway. States have maximum flexibility to negotiate resolutions that they feel are politically and economically more acceptable before getting into the more explicitly rule-based part of the system. As a dispute settlement system becomes increasingly legalized, it becomes even more important that there be appropriate places for compromise in the shadow of the law, not in the glare of the law itself.

The fourth theme is the crucial, and difficult, role of retaliation within the larger problem of the enforcement of decisions. As Professor Davey pointed out, there have been several very contentious proceedings, including the *EC Bananas* case, in which we saw the WTO dispute settlement mechanism at great risk when enforcing difficult decisions against difficult politics. It is at these points of retaliation and enforcement that an international dispute settlement system is going to be at maximum risk. This may have both positive and negative consequences. If the system breaks down, of course, it is going to be a negative consequence. But if the weaknesses are revealed, and if the scare that everyone gets from the crisis is sufficient to generate increased political will to make difficult compromises and difficult reforms, then the volatility of those points can be made to serve the strengthening of the system.

Fifth, we see the question of how to measure the success of a dispute settlement system. Professor Davey characterized the functioning of the WTO dispute settlement mechanism as basically successful. One can imagine a couple of different criteria by which one would measure that success. Does the system still exist? Well, yes, it does still exist, but I think we need to push a little harder on this question of "success." Have there been any significant exits or risks of exit? Have difficult decisions been fully implemented? Moreover, we have to ask ourselves from what perspective the success of the system is being evaluated. In particular, how do developing countries view the success of the system? What is the view of environmental groups with regard to the success of the system? We have to be careful what criteria we apply in evaluating success.

The sixth theme is the recognition that creating an international economic conflict resolution system is an ongoing commitment, an evolutionary process. Professor Davey mentioned several ways in which the WTO system itself needs to be improved—technical issues, resource questions, transparency, and remedies. There is much difficult political work ahead for WTO Member States as they grapple with maintaining and improving the system. The particular conflicts that come up, and conferences such as these that study the conflicts, have an important role to play in the ongoing maintenance and reform needs that these kinds of systems generate.

A theme that emerged more in the questions following Professor Davey's talk is the issue of choice of forum. The proliferation of regional trading systems, such as NAFTA, means that states have a greater degree of real choice with respect to where they take their international economic conflicts for resolution. That may have a variety of interesting effects, both in creating stronger and more desirable rules in the dominant system like the WTO and in providing adverse opportunities for forum shopping. It remains to be seen what sort of effect the existence of other options will have on the WTO as alternative systems become more attractive.

Let me close with something of an anecdote and an observation. In 1996 I was fortunate to have lunch with a panelist of the Appellate Body, and we discussed, among other things, the profile or background of Appellate Body panelists, in particular, because at that point the Appellate Body was a relatively new institution. The panelist made a rather curious remark, or at least one that seemed curious to me. He opined that, in his view, Appellate Body panelists should not be merely judges or legal academics—WTO Member States did not want panelists of that ilk. Being a legal academic, I was particularly interested to hear this and asked him why. He said that Member States wanted Appellate Body panelists with some government experience who understood what it meant for governments to have billions of dollars at stake in their decisions. Professor Davey confirmed this predilection at work when he cited statistics to the effect that at the primary (not Appellate) panel level, eighty-five percent of panelists have government service or are in the service of government.

The Ambassador's remark left me wondering why this would be important, in particular with respect to an appellate court, and whether this preference was a good or a bad thing for international economic law. I think of this point in terms of the traditional distinction between rule-oriented and power-oriented diplomacy. It

seems to me that the Ambassador's comment could signal that WTO Member States are, in fact, hedging their bets in terms of the dispute settlement mechanism. They are not ready for a pure rule-based system, even at the appellate level. They do not want decisions that are legally and formally correct but ignore the realities of economic power. If so, that might be an indication that there is still additional room for development in terms of the legal basis of the dispute settlement process.

However, one could evaluate the Ambassador's remarks from a different point of view. Perhaps governments, particularly losing governments, are more likely to "take their medicine" if they have confidence that the prescribing physician, in this case the Appellate Body panel, understands the political realities and has considered them, particularly in rendering decisions that create acute political difficulties for these losing states. If that is so, then the fact that panelists, even at the Appellate Body level, have government experience actually strengthens the degree to which the system will operate effectively and the respect which these decisions will be given.

Ultimately, I am not sure what the Ambassador meant, and I am not sure whether, on balance, it is a good or a bad thing. Nevertheless, I think his remark embodies the particular sorts of tensions and ambiguities that are inherent in any international economic law conflict resolution system.