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The Case Against Judicialization of the WTO Dispute Settlement System

I. Introduction

The change from General Agreement on Tariffs and Trade (GATT)¹ to the World Trade Organization (WTO)² is often described as a shift from a largely diplomacy-based or negotiated apparatus for dispute resolution to a more rules-based or adjudicatory model.³ At the Uruguay Round of Multilateral Trade Negotiations in 1994, the member states of the GATT established the WTO and established a more robust and reliable procedure for the resolution of disputes among member states.⁴ During the negotiations, much of the debate focused on the need for a more judicialized, rule-oriented approach to take the place of the negotiation-based system under the GATT.⁵ Through “judicialization,” trade relations become increasingly regulated by norms and enforcement procedures that are legal in character.⁶

¹ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

² Marrakesh Agreement Establishing the World Trade Organization, Legal Instruments--Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter Marrakesh Agreement or WTO Agreement].

³ See Robert E. Hudec, Enforcing International Trade Law, The Evolution of the Modern GATT Legal System, 138-150 (1993); William J. Davey, Dispute Settlement in GATT, 11 Fordham Int'l L.J. 51, 67-78 (1987).

⁴ Timothy Stostad, Trappings of Legality: Judicialization of Dispute Settlement in the WTO, and Its Impact on Developing Countries, 39 Cornell Int'l L.J. 811, 811 (2006).

⁵ *Id.* Some call this process “juridicization” (see Arie Reich, From Diplomacy to Law: The Juridicization of International Trade Relations, 17 Nw. J. Int'l L. & Bus. 775 (1997)).

“Legalization” is also used for increasing role of law and rules in the settlement process (see Richard H. Steinberg, Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints, 98 Am. J. Int'l L. 247 (2004)).

⁶ Arie Reich, From Diplomacy to Law: The Juridicization of International Trade Relations, 17 Nw. J. Int'l L. & Bus. 775, 776 (1997)).

The WTO dispute settlement system is now said to function very much like a court of international trade.⁷ The Marrakesh Agreement makes dispute resolution through the Dispute Settlement Understanding (DSU)⁸ as one of the five key functions of the WTO.⁹ There is compulsory jurisdiction; disputes are settled largely by applying rules of law; decisions are binding upon the parties; and sanctions may be imposed if decisions are not observed.¹⁰ Other court-like characteristics include an automatic right of appellate review and practically automatic binding of the dispute settlement decisions on the parties.¹¹

In the recent years, the Appellate Body has further judicialized the dispute settlement system through judicial lawmaking by filling the gaps left by the DSU's silence, giving specific meaning to ambiguous treaty language, and cumulatively reading language across the GATT and the WTO agreements. While it is widely accepted that the initial judicialization of trade dispute resolution with the DSU was generally beneficial for international trade, whether procedural and substantive judicial lawmaking would benefit the international trade system is still debated.¹²

The Appellate Body should limit its judicialization through judicial lawmaking. While judicial lawmaking to make the WTO dispute settlement process resemble state court systems

⁷ Thomas Schoenbaum, WTO Dispute Settlement: Praise and Suggestions for Reform, 47 Int'l & Comp. L.Q. 647, 648 (1998).

⁸ See generally Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments--Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

⁹ Marrakesh Agreement, *supra* note 2, art. III:4.

¹⁰ Thomas Schoenbaum, WTO Dispute Settlement: Praise and Suggestions for Reform, 47 Int'l & Comp. L.Q. 647, 648 (1998).

¹¹ GATT, *supra* note 1. The decisions are practically always binding because the Marrakesh Agreement requires negative consent rule, which will be discussed later in this paper.

¹² I call both additional procedures and additional substantive obligations by judicial lawmaking as "judicialization" in this paper. The line between procedural and substantive law is not always clear, and judicial lawmaking's role of changing the trade dispute system to be more rule-based and adjudicative is more or less the same. Additional cost for making and defending claims for developing countries, violation of sovereignty, and lack of democratic controls are similarly implicated.

may theoretically bring objective dispute decisions independent from world politics and benefit the developing countries, the effects of procedural judicial lawmaking actually may harm developing countries with higher costs resulting from more complex litigation system. The judicialization through judicial lawmaking also lacks legitimacy, as it undermines national sovereignty and lacks any democratic controls.

II. Judicialization of the WTO Dispute Settlement Process

According to Yasuhei Taniguchi, a former member of the Appellate Body of WTO, today's reality shows increasing "judicialization" of the dispute settlement.¹³ Small states can win against economic and political giant like the United States and EU in trade disputes, unlike the case in diplomacy.¹⁴ He compares the WTO dispute process to state court litigation.¹⁵

The DSU has incorporated many formal procedures to trade dispute settlement process, since the dispute settlement process under the GATT was criticized for the lack of such procedural rules – no fixed timetable for resolution of disputes, making the system very susceptible to delaying tactics; no automatic establishment a panel upon filing of a complaint; no notification requirement for implementation of a panel recommendation; and requirement of consensus for adoption of a panel recommendation, which allowed the losing party to veto a panel's ruling to prevent it from gaining force.¹⁶ With its lack of procedural formality, GATT

¹³ Yasuhei Taniguchi, The WTO Dispute Settlement As Seen by A Proceduralist, 42 Cornell Int'l L.J. 1, 20 (2009) (citing Ernst-Ulrich Petersmann, Multilevel Judicial Governance of International Trade Requires a Common Conception of Rule of Law and Justice, 10 J. Int'l Econ. L. 529, 531 & n.5 (2007)).

¹⁴ *Id.*

¹⁵ *Id.* at 2.

¹⁶ Timothy Stostad, *supra* note 4, at 816. The losing parties under GATT however seldom used their veto because their long-term interest in having a stable forum for dispute resolution generally outweighed their interest in maintaining a particular trade barrier.

“was essentially a small ‘club’ of like-minded trade officials who had been working together since the . . . ITO negotiations,” and therefore “did not need an elaborate decision-making procedure to generate an effective consensus. . . .”¹⁷ As membership in GATT grew, there was more need for procedural formality, and then came the DSU.¹⁸ The WTO legal system now consists of substantive law rules and procedural (court organization) rules.¹⁹ Substantive law and rules for international trade are contained in various multilateral treaties.²⁰ Procedural and organizational rules are embodied in the DSU.²¹

A. Court-like Process

The WTO dispute settlement process is similar to that of civil litigation.²² Both processes involve adversarial proceedings between the complaining party and the defending party, with a neutral decisionmaker presiding. The complaining party must present a case with supporting legal arguments and evidence, and the defending party has a full opportunity to rebut the allegations.²³ The panel has the right to seek necessary information.²⁴ In practice and by necessity, the panels exercise this power only to supplement the information set forth by the party-states' complaints and rebuttals.²⁵ Due to the similarities between the WTO process and national litigation, one would naturally expect to find many procedural issues in the WTO

¹⁷ *Id.* (citing Robert E. Hudec, The New WTO Dispute Settlement Procedure: An Overview of the First Three Years, 8 *Minn. J. Global Trade* 1, 5-6 (1999)).

¹⁸ *Id.*

¹⁹ Yasuhei Taniguchi, *supra* note 13, at 2.

²⁰ *Id.* Taniguchi lists “Anti-Dumping Agreement,” “Subsidy Agreement,” and “SPS Agreement” as examples of such treaties.

²¹ *Id.*

²² *Id.*, at 9.

²³ *Id.*

²⁴ DSU art. 13.

²⁵ Yasuhei Taniguchi, *supra* note 13, at 9 (2009).

process which also commonly arise in national litigation, such as the required degree of specificity in a complaint and issues relating to evidence--i.e., burden of proof, treatment of confidential information, and questions relating to fact and law.²⁶ These issues may or may not be amenable to the same treatment they receive in national courts.²⁷

B. Compulsory Enforcement and Jurisdiction

Key features of the WTO DSU that demonstrate the Appellate Body's unique place as an international institution are its compulsory enforcement and jurisdiction. The WTO dispute settlement system's increased independence from the influence of the world politics comes from the adoption of "negative consensus rule," embodied in articles 16.4 and 17.14 of the DSU.²⁸ Unless DSB members form a consensus against the adoption of a report, the DSB must adopt the report.²⁹ Since winning state can prevent such consensus from forming, a negative consensus is difficult to form in practice, and no report has been rejected.³⁰ The adoption of all of DSB reports makes DSB appear to be independent decisionmakers similar to national courts in modern states.³¹

The WTO's dispute settlement system also resembles a national judiciary because of its compulsory jurisdiction.³² In national court systems, one can sue someone, and the defendant has no choice but to respond or suffer a default judgment. The national court's power to decide does

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*, at 5.

²⁹ See DSU arts. 16.4, 17.14.

³⁰ Yasuhei Taniguchi, *supra* note 13, at 5. As of April 24, 2015, 187 panel reports and 117 Appellate Body reports have been adopted (<http://www.worldtradelaw.net/databases/wtopanels.php>; <http://www.worldtradelaw.net/databases/abreports.php>).

³¹ *Id.*

³² *Id.*

not depend on the defendant's consent to submit to jurisdiction. The same rule applies in the WTO system. The WTO forms a panel that starts working without the consent or agreement of the respondent state.³³ Such compulsory jurisdiction differs from many other international legal, adjudicative institutions such as the International Court of Justice, where a binding judgment can be rendered only if there is an agreement of the party-states to submit a dispute to the Court.³⁴

Some argue that the judicialization of WTO dispute settlement system is not complete because of the weak enforceability of an adopted report.³⁵ Enforcement of an adopted DSB report is not possible in the same way as a judgment of a state court, as WTO's agreed methods of enforcement are modest and are not strong enough to cope with WTO's recalcitrant non-compliance.³⁶ The losing party may pretend to comply without bringing effective change in their trade policy, and the winning party only has retaliatory trade restrictions as a countermeasure. This countermeasure can amount to almost nothing if the winning party is a small trading country. However, the weak enforceability alone does not disprove the general judicialization of the WTO dispute settlement system. This shortcoming can be accepted as the ultimate limitation of today's international society.³⁷ Taniguchi aptly notes, "there is no king of the village."³⁸ DSU's mild, indirect coercion is still regarded as a remarkable innovation in public international law.³⁹

³³ *Id.* (citing Cesare P.R. Romano, The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent, 39 N.Y.U. J. Int'l L. & Pol. 791, 812 (2007)).

³⁴ *Id.*

³⁵ *Id.*, at 7.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* Taniguchi discusses the retaliatory action under DSU Article 22 as the most effective measure of enforcement. Although local political conditions make countries comply with DSB recommendations, no losing member state ever openly declared that it would not comply.

III. The Process of Judicialization: WTO Appellate Body's Judicial Lawmaking

Even after the DSU, the trade dispute settlement system continued to judicialize through the Appellate Body's judicial lawmaking. The Appellate Body engages in further judicialization by creating laws that fill in the procedural gaps left by the DSU's silence.⁴⁰ For example, in *U.S.--Shrimp/Turtle I*,⁴¹ the Appellate Body decided that dispute settlement panels could consider amicus curiae briefs submitted by nonstate actors by relying on the general language in DSU Article 13.⁴² The provision provides that a panel may "seek information and technical advice from any individual or body it deems appropriate."⁴³ Similarly, in *EC--Bananas III*,⁴⁴ the Appellate Body established that private lawyers may represent members in oral proceedings, despite EC and U.S. opposition on the ground that the practice had been to permit exclusively government lawyers or government trade experts' presentations in dispute settlement proceedings.⁴⁵ The Appellate Body reasoned that nothing in the WTO agreements, customary international law, or the "prevailing practice of international tribunals . . . prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings."⁴⁶ Participation by nongovernment lawyers was first adopted in *Indonesia--Autos*.⁴⁷

⁴⁰ Richard H. Steinberg, Judicial Lawmaking at the Wto: Discursive, Constitutional, and Political Constraints, 98 Am. J. Int'l L. 247, 251 (2004).

⁴¹ United States--Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998), *reprinted in* 38 ILM 118 (1999) [hereinafter U.S.--Shrimp/Turtle I].

⁴² Richard H. Steinberg, *supra* note 40.

⁴³ DSU, art. 13.

⁴⁴ European Communities--Regime for the Importation, Sale and Distribution of Bananas, WTO Doc. WT/DS27/AB/R, paras. 5-10 (adopted Sept. 25, 1997), *excerpted in* 37 ILM 243 (1998) [hereinafter EC--Bananas].

⁴⁵ Richard H. Steinberg, *supra* note 40.

⁴⁶ *Id.*, at 251-52; EC--Bananas, para. 10.

⁴⁷ Richard H. Steinberg, *supra* note 40, at 252; Indonesia--Certain Measures Affecting the Automobile Industry, WTO Doc. WT/DS54/R, paras. 4.1-4.35 (adopted July 23, 1998) [hereinafter Indonesia--Autos].

The WTO Appellate Body engages in lawmaking also by giving specific meaning to ambiguous treaty language.⁴⁸ For example, in *U.S.--Shrimp/Turtle I*, the Appellate Body had to decide whether the U.S. could rely on GATT Article XX(g) to ban the importation of certain shrimp and shrimp products from members that did not maintain laws requiring particular methods of protecting endangered sea turtles while fishing for shrimp.⁴⁹ GATT Article XX(g) exempts certain measures from the GATT's affirmative obligations if they are necessary for the “conservation of exhaustible natural resources,” but the provision is ambiguous through silence on whether such exhaustible natural resources must be located within the jurisdiction of the country invoking the exception.⁵⁰ The Appellate Body concluded that the conditions for GATT Article XX(g) exception must be read “in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.”⁵¹ The Appellate Body also interpreted the chapeau of Article XX after concluding that the U.S. measures fell within Article XX(g) exceptions and established factors that would apply in considering whether a measure contravened the terms of the chapeau.⁵² Some of the factors had no textual lineage.⁵³

Lastly, the Appellate Body has read language across GATT/WTO agreements cumulatively in a way that has generated an expansive set of legal obligations.⁵⁴ In *U.S.--Lamb*

⁴⁸ Richard H. Steinberg, , *supra* note 40, at 252.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *U.S.--Shrimp/Turtle I*, *supra* note 41, para. 129.

⁵² *Id.*

⁵³ *Id.* Steinberg points out “intended and actual coercive effect on the specific policy decisions made by foreign governments” from *U.S.--Shrimp/Turtle I*, para. 161 as an example of such factor.

⁵⁴ *Id.*, at 253.

*Meat*⁵⁵ and *Argentina-- Footwear*,⁵⁶ the Appellate Body ruled that national authorities imposing a safeguard measure must demonstrate the existence of “unforeseen developments” even though the WTO Agreement on Safeguards⁵⁷ makes no reference to a requirement to demonstrate unforeseen developments, as a result of the negotiators’ express consideration and rejection of the inclusion of such requirement.⁵⁸ GATT panels did not require “unforeseen developments” since GATT decision in *U.S.--Hatters' Fur* case in 1952, as broad interpretation of the “unforeseen developments” could allow any events, such as unexpected change in consumer tastes, to constitute unforeseen developments.⁵⁹ The combination of GATT practice, relevant texts, and negotiating history created an ambiguity over whether unforeseen developments must be demonstrated in safeguard cases.⁶⁰ Nevertheless, focusing on GATT Article XIX:1(a), the Appellate Body read all of the relevant GATT/WTO law and practice cumulatively in a way that led it to conclude that a demonstration of unforeseen developments must be shown if a safeguard measure is to be applied.⁶¹

Judicial lawmaking has been possible because the Appellate Body has accorded great weight to its past decisions even though *stare decisis* is not followed formally by international

⁵⁵ United States--Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WTO Doc. WT/DS177/AB/R (adopted May 16, 2001) [hereinafter *U.S.-- Lamb Meat*].

⁵⁶ *Argentina--Safeguard Measures on Imports of Footwear*, WTO Doc. WT/DS121/AB/R (adopted Jan. 12, 2000) [hereinafter *Argentina--Footwear*].

⁵⁷ Agreement on Safeguards, Apr. 15, 1994, WTO Agreement, Annex 1A, in *THE LEGAL TEXTS*, *supra* note 1, at 275.

⁵⁸ Richard H. Steinberg, *supra* note 40, at 253.

⁵⁹ Report on the Withdrawal by the United States of a Tariff Concession Under Article XIX of the General Agreement on Tariffs and Trade, GATT Doc. CP/106 (Nov. 10, 1951); see also John H. Jackson, *World Trade And The Law of GATT*, 560-61 (1969).

⁶⁰ Richard H. Steinberg, *supra* note 40, at 253.

⁶¹ Richard H. Steinberg, *supra* note 40, at 253-54.

tribunals.⁶² In public international law, past decisions may be persuasive but not binding.⁶³ However, previous decisions and doctrine are so highly persuasive in WTO jurisprudence that WTO may be said to observe de facto *stare decisis*.⁶⁴ This practice is reinforced by the Appellate Body's procedure of meeting en banc to discuss each case and ensure consistency across decisions,⁶⁵ although every decision rests with a three-member division of the Appellate Body.

IV. Arguments Against Further Judicialization

A. Complex Procedures Deter Developing Countries' Participation in the WTO

Dispute Settlement Process

Judicialization does bring benefits to the trade dispute settlement process. Judicialization should advance the accountability, rationality, clarity, and stability of the DSB decisions.⁶⁶ The WTO Appellate Body has adopted detailed procedural rules for notices of appeal, specific methods of submitting timely evidence, measures to avoid conflicts of interest for those hearing cases, and has welcomed amicus briefs, giving a new avenue for participation in this critical

⁶² Richard H. Steinberg, *supra* note 40, at 254.

⁶³ Ian Brownlie, *Principles of Public International Law*, 1-29 (6th ed. 2003).

⁶⁴ Richard H. Steinberg, *supra* note 40, at 254 (citing Raj Bhala, The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy), 14 Am. U. Int'l L. Rev. 845, 853 (1999); Raj Bhala, The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy), 9 Fla. St. J. Transnat'l L. & Pol'y 1 (1999); Raj Bhala, The Power of the Past: Towards de Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy), 33 Geo. Wash. Int'l L. Rev. 873, 910-13 (2001)).

⁶⁵ Working Procedures for Appellate Review, WTO Doc. WT/AB/WP/4, para. 4(3) (Jan. 24, 2002) [hereinafter Working Procedures]; see also Claus-Dieter Ehlermann, Six Years on the Bench of the "World Trade Court": Some Personal Experiences as Member of the Appellate Body of the World Trade Organization, 36 J. World Trade 605, 612-13 (2002).

⁶⁶ Daniel C. Esty, Good Governance at the Supranational Scale: Globalizing Administrative Law, 115 Yale L.J. 1490, 1496 (2006).

dimension of WTO rulemaking.⁶⁷ The Appellate Body's formalization of its procedures has helped to build understanding about the rules of international trade, provide a check on WTO policymaking, and promote real policy dialogue.⁶⁸ The dispute settlement rules and procedures have provided the organization with a reputation for fairness and rigor in upholding due process, and thus greater procedural legitimacy.⁶⁹

However, further judicialization, which yields increasingly complex procedural rules, incurs more cost for developing countries to participate in the WTO dispute settlement process⁷⁰ and undermines one of the judicialization's main goals of empowering developing countries.⁷¹ One of the potential benefits of de-politicization through judicialization is putting developing countries that lack economic and political power on an equal footing with developed countries in trade disputes.⁷² However, data reveals that the U.S. and E.C. have been the largest users of the DSU, while developing countries still seldom invoke the DSU.⁷³ The vastly increased complexity of the substantive law, coupled with the more formal, quasi-judicial litigation process, has imposed enormous costs on would-be users of the system, both in the pre-litigation stage and during the litigation.⁷⁴ As judicialization leads to more complex WTO dispute process,

⁶⁷ *Id.*, at 1546 (2006); Carrie Wofford, A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT, 24 Harv. Envtl. L. Rev. 563 (2000).

⁶⁸ Daniel C. Esty, *supra* note 66, at 1546-47.

⁶⁹ Daniel C. Esty, *supra* note 66, at 1547.

⁷⁰ Adam S. Chilton & Ryan W. Davis, Equality, Procedural Justice, and the World Trade Organization, 7 Intercultural Hum. Rts. L. Rev. 277, 310 (2012).

⁷¹ Don Moon, Equality and Inequality in the WTO Dispute Settlement (DS) System: Analysis of the GATT/WTO Dispute Data, 32 Int'l Interactions 201, 202 (2006).

⁷² Adam S. Chilton & Ryan W. Davis, *supra* note 70, at 303-04.

⁷³ Timothy Stostad, *supra* note 4, at 813.

⁷⁴ *Id.*

successful dispute settlement depends more on a country's ability to muster considerable economic and “human capital” resources of the kind developing countries typically lack.⁷⁵

Developing countries suffer from human capital problem and cannot incur the cost required in a more judicialized dispute process. A member state is likely to initiate a case in the WTO dispute settlement system if the expected benefits of litigation exceed the expected cost, where the expected benefit is the gain that would accrue to the exporter following successful resolution of the dispute multiplied by the probability that the dispute will be resolved successfully.⁷⁶ Even before they deliberate whether to litigate, developing countries are much less equipped to incur the cost to identify WTO-inconsistent measures.⁷⁷ In both the public and private sector, they tend to lack the domestic expertise necessary to identify these disputes.⁷⁸ Developing countries are also simply unrepresented or underrepresented at the WTO in Geneva,⁷⁹ and litigating the disputes would incur significant cost on sophisticated legal talent.⁸⁰ Further judicialization of the dispute settlement that requires more human capital in evidence gathering and representation at the WTO would raise barriers to dispute settlement that disparately filter out developing countries and leave out those that de-politicization should

⁷⁵ *Id.*

⁷⁶ Chad P. Bown, Participation in WTO Dispute Settlement: Complaints, Interested Parties, and Free Riders, 19:2 World Bank Econ. Rev. 287, 297 (2005).

⁷⁷ See, e.g., Marc L. Busch & Eric Reinhardt, Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement, in The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec, 457, 477 (Daniel L. M. Kennedy & James Southwick eds., 2002); See generally Gregory C. Shaffer, Defending Interests: Public-Private Partnerships in WTO Litigation (2003).

⁷⁸ Chad P. Bown & Bernard M. Hoekman, WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector, 8 J. Int'l Econ. L. 861, 871-72 (2005).

⁷⁹ See generally Constantine Michalopoulos, The Developing Countries in the WTO, 22:1 World Econ. 117 (1999).

⁸⁰ Timothy Stostad, *supra* note 4, at 826.

benefit.⁸¹ Developing countries already suffer from the lack of retaliatory capacity against the respondents, and the increased cost does not come with more benefit of enforcement.⁸² Decisions under the WTO's DSU do not impinge on member states in the way that the decisions of a domestic court constrain citizens, as the enforcement comes from retaliatory measures or reputational costs for noncompliance.⁸³

Further judicialization could in fact have the opposite of its intended effect by “put[ing] another arrow into the quiver of already powerful states” against the poor countries that lack the technical legal expertise and financial resources to work within the WTO's legal system.⁸⁴ When a developed country files a claim against a developing country, the developing country may not be equipped to defend itself properly with further judicialization. Gregory Shaffer's somber finding shows that developing countries are less likely to file complaints under the WTO than they were under GATT, while the percentage of cases targeting developing countries has risen significantly.⁸⁵ Only states with high capacity can use complicated legal-procedural rules for their interest.⁸⁶ The gap in these members' knowledge and expertise of the dispute settlement process is widened, as some members regularly take part in litigation and gain invaluable experience, while those who remain uninvolved do not.⁸⁷

⁸¹ *Id.*

⁸² *Id.*, at 827..

⁸³ Adam S. Chilton & Ryan W. Davis, *supra* note 70, at 309 (2012)

⁸⁴ *Id.*, at 311.

⁸⁵ *Id.* (citing Gregory Shaffer, How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies, 14 (ICTSD Resource Paper No. 5, 2003)).

⁸⁶ *Id.*

⁸⁷ Amanda Bergstrom, Imbalance of Power: Procedural Inequities Within the Wto Dispute Settlement System, 22 *Pac. McGeorge Global Bus. & Dev. L.J.* 93, 98 (2009).

B. Judicialization Through Judicial Lawmaking Lacks Legitimacy

The WTO dispute settlement system's judicialization through the Appellate Body's judicial activism may also trigger concerns of violation of national sovereignty and lack of democratic controls. The expansiveness of the WTO judicial lawmaking diminishes the sovereignty of states or subvert the will of the national government by increasing their obligations.⁸⁸ John Ragosta, Navin Joneja, and Mikhail Zeldovich accuse the Appellate Body of becoming an international tribunal that creates new obligations and imposes them on sovereign nations in violation of specific provisions and sound concepts of international law development.⁸⁹ Through judicial activism, the Appellate Body may be abusing its binding nature to create WTO "common law," to which the member states never agreed.⁹⁰ The terms of the negotiated agreements could "evolve" into something that none of the original parties to the agreements ever anticipated.⁹¹

At the same time, there is no functioning international governing system to control such law-giving "courts" through "democratic" means of amending of laws, reversal of inappropriate decisions, or fair appointment of judges.⁹² The generative lawmaking by the dispute settlement system would be undemocratic, given the limited transparency and insularity of the process.⁹³

⁸⁸ See, e.g., Claude E. Barfield, Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization (2001).

⁸⁹ John Ragosta, Navin Joneja, Mikhail Zeldovich, WTO Dispute Settlement: The System Is Flawed and Must Be Fixed, 37 Int'l Law. 697, 698 (2003).

⁹⁰ Alan Wm. Wolff & John A. Ragosta, How the Uruguay Round Will Change the Practice of International Trade Law in the United States, in The World Trade Organization: Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation, 697, 698 (Terrence P. Stewart ed. 1996).

⁹¹ John Ragosta, Navin Joneja, Mikhail Zeldovich, *supra* note 89, at 707 (2003).

⁹² John A. Ragosta, Unmasking the WTO—Access to the DSB System: Can the WTO DSB Live Up to the Moniker "World Trade Court"? 31 Law & Pol'y Int'l Bus. 739, 741 (2000); Kal Raustiala, Sovereignty and Multilateralism, 1 Chi. J. Int'l L. 401 (2000).

⁹³ Kal Raustiala, *supra* note 92.

When a domestic court “makes law,” it is subject to review by the legislature, oversight, and modification.⁹⁴ The decision can be reversed by the legislature.⁹⁵ Such protections are essential parts of a democratic system but are lacking or ineffective in the WTO.⁹⁶

Given national sovereignty violation and lack of democratic controls, binding dispute resolution can undermine the negotiation process by chilling enthusiasm for major concessions.⁹⁷ Further judicialization of the WTO is unlikely to offer tangible gains in trade liberalization in the long run as it may lead powerful states to walk away from their obligations.⁹⁸ Emphasizing the negotiators’ need for exit options as safety valves and precondition for reaching consensus and concluding new agreements, Joost Pauwelyn argues that drastically reducing or eliminating exit options by instituting new obligations and further legalizing the WTO without countervailing increases in participation, loyalty and support for the WTO project would risk undermining the substantive commitment both to the WTO and to the DSU in particular.⁹⁹ Overly expansive judicial lawmaking may undermine the political support of powerful states for the WTO, which could collapse the entire institution.¹⁰⁰ Despite a conscious move toward legalization, the negotiating history of the WTO DSU suggests that expansive judicial lawmaking was not a goal of Uruguay Round negotiators.¹⁰¹ The political history suggests that the main intended function of WTO dispute settlement was to help ensure the faithful application of the rules agreed upon in the Uruguay Round negotiations, even if those rules were incomplete, not optimally efficient, or

⁹⁴ John Ragosta, Navin Joneja, Mikhail Zeldovich, *supra* note 89, at 703.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*, at 705.

⁹⁸ Joost Pauwelyn, The Transformation of World Trade, 104 Mich. L. Rev. 1, 51 (2005).

⁹⁹ *Id.*, at 52-53.

¹⁰⁰ Richard H. Steinberg, *supra* note 40, at 257.

¹⁰¹ *Id.*, at 250.

considered inequitable.¹⁰² To help ensure that the WTO dispute settlement system would not shift members' rights and responsibilities,¹⁰³ trade negotiators included a provision in the WTO DSU to the effect that the Appellate Body “cannot add to or diminish the rights and obligations provided in the covered agreements.”¹⁰⁴

Although WTO judicial lawmaking is perhaps more expansive than intended by most Uruguay negotiators, DSB is still politically constrained in a significant way. However, political constraints alone do not warrant further judicialization through judicial lawmaking. Appellate Body members are selected through a process in which powerful members may veto candidates whom they assess as likely to engage in inappropriate or undesired lawmaking; the Appellate Body acts in the shadow of threats to rewrite DSU rules that would weaken it and of possible defiance of its decisions by powerful members; and the Appellate Body receives--and has established means of obtaining-- information on the preferences of powerful members, helping it to avoid political pitfalls.¹⁰⁵ WTO legal discourse has been applied in a manner that pays attention to political signals, and the Appellate Body's interpretations are likely to rest within the interstices of WTO texts.¹⁰⁶ Nevertheless, the Appellate should be careful in the way it decides the disputes. Richard Steinberg suggests that the Appellate Body give greater consideration to object and purpose, context, and preparatory materials to help determine whether an ambiguity or gap was deliberately left vague to permit a range of action, and to help interpret it when it was

¹⁰² *Id.*

¹⁰³ *See, e.g.*, Summary and Comparative Analysis of Proposals for Negotiations, Note by the Secretariat, Negotiating Group on Dispute Settlement, GATT Doc. MTN.GNG/NG13/W/14/Rev.2 (June 22, 1988) [hereinafter 1988 GATT Secretariat Note]; Meeting of 25 June 1987, Note by the Secretariat, Negotiating Group on Dispute Settlement, GATT Doc. MTN.GNG/NG13/2 (July 15, 1987) [hereinafter 1987 GATT Secretariat Note].

¹⁰⁴ Richard H. Steinberg, *supra* note 40, at 250-51; DSU, arts. 3.2, 19.2.

¹⁰⁵ Richard H. Steinberg, *supra* note 40, at 274.

¹⁰⁶ *Id.*

not; make greater use of avoidance techniques in cases where an ambiguity or gap cannot be clearly resolved; treat WTO agreements not as if they have an exclusively liberalizing purpose, but as contracts that embody both liberal and illiberal purposes; and resist pressure to import non-WTO public international law into its decisions unless that law is textually linked to a term in a WTO agreement.¹⁰⁷

V. Conclusion

The Uruguay Round and the DSU created a much more judicialized, rule-based adjudicative model of international trade dispute settlement process that resembles state litigation system. Compared to the GATT dispute settlement system, the present system is far more legalized and fundamentally adjudicative, expressly relying on interpretive rules and principles set forth in the Vienna Convention on the Law of Treaties and sometimes resorting to principles of public international law that are extrinsic to terms in WTO instruments.¹⁰⁸ After the Uruguay Round, the Appellate Body engaged in further judicialization of the dispute process through judicial lawmaking. The Appellate Body engages in judicial lawmaking by filling in the procedural gaps left by the DSU's silence, giving specific meaning to ambiguous treaty language, and cumulatively reading language across the GATT/WTO agreements. While further judicialization might bring some benefits to the international trade system, it can also harm developing countries that judicialization is meant to help. Further judicialization also lacks legitimacy, as it violates state sovereignty by creating obligations that they never agreed to and lacks democratic controls.

¹⁰⁷ Richard H. Steinberg, *supra* note 40, at 274-75.

¹⁰⁸ Richard H. Steinberg, *supra* note 40, at 250.

The WTO dispute settlement system stands in a unique place. The member states do not want a truly independent judiciary that imposes binding judgments.¹⁰⁹ The WTO agreements are a series of contractual arrangement between and among sovereign states, and the states did not intend to establish a comprehensive legal system with an independent judiciary.¹¹⁰ The current dispute settlement system was intentionally designed to be a quasi-adjudicative system with restricted powers, subject ultimately to the control of the WTO members.¹¹¹ At the same time, there are strong arguments for making the WTO dispute system more independent and rule-based. Joost Pauwelyn outlines various arguments for judicialization,¹¹²

The WTO dispute settlement process, under the constraints of international system and the current institutional structure that lacks judicial protections and effective democratic controls, still needs to reform for better procedural protections and due process.¹¹³ There are innumerable procedural improvements that the WTO can make to create a better trade dispute settlement system. Ragosta et al. suggest mandate to decide actual cases, right of real parties in interest to participate, need for transparency, real and consistent opportunity for amicus briefing, improving the rights of least developing countries to effective representation, impartiality of panels, an independent and sufficiently staffed standing judiciary, publication of dissenting opinions, and

¹⁰⁹ S. Bruce Wilson, Can the Wto Dispute Settlement Body Be A Judicial Tribunal Rather Than A Diplomatic Club?, 31 Law & Pol'y Int'l Bus. 779, 780 (2000).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Joost Pauwelyn, *supra* note 98, 60-64 (2005) (“Ernst-Ulrich Petersmann . . . is a strong advocate of further constitutionalization of the WTO. He construes WTO rights and obligations as individual human rights and at the domestic level would give direct effect to those rights before domestic courts. In various ways and degrees, Cottier (direct effect of WTO rules before domestic courts), Weiler (ending the diplomatic remnants of dispute settlement in favor of a more openly legalized approach), Ragosta (standing for private parties under the DSU), Bhala (calling for a de jure rule of precedent), and Horlick and Mavroidis (tougher remedies) have also advocated a further thickening of the WTO legal system”).

¹¹³ S. Bruce Wilson, *supra* note 109, at 779; John A. Ragosta, *supra* note 92, at 768.

improving the clarity of panel and Appellate Body reports.¹¹⁴ Adam Chilton and Ryan Davis suggest informal proceduralist approach that helps to remove the obstacles that developing countries face in the more judicialized system. They highlight Costa Rica’s path to participation in the WTO dispute system and argue that “participating in a dispute provides rovides a ‘pathway to experience’ and future participation as a claimant.”¹¹⁵ They propose improving and expanding the advisory centers, providing financial remedies, and making countermeasures tradable as egalitarian proposals to reform the WTO.¹¹⁶ However, it is difficult to know what effects these reforms would have on developing countries and the legitimacy of the institution.

¹¹⁴ John Ragosta, Navin Joneja, Mikhail Zeldovich, *supra* note 89, at 730-43.

¹¹⁵ Adam S. Chilton & Ryan W. Davis, *supra* note 70, at 313; See Christina Davis & Sarah Blodgett Bermeo, Who Files? Developing Country Participation in GATT/WTO Adjudication, 71 *J. Pol.* 1033, 1038 (2009).

¹¹⁶ Adam S. Chilton & Ryan W. Davis, *supra* note 70, at 314-24.