

## **Comity in International Political Economy: The Benefits of Trade Legalization**

### **Introduction**

Inter-state trade dynamics have been coloured by a myriad of different forces, actors and institutions over the course of history. Divergent viewpoints contest, however, the origins and implications of trade and the character of the institutions that mediate state interests. In this respect, a general consensus exists that the post-World War II period has been marked by considerable international trade and a trend towards institutionalized trade liberalization. Indeed, Ruggie has argued that the postwar period has been defined by what he terms ‘embedded liberalism’, noting that “unlike the economic nationalism of the thirties, it would be multilateral in character; unlike the liberalism of the gold standard and free trade, its multilateralism would be predicated upon domestic interventionism”.<sup>1</sup> To this end, the development of international bodies such as the General Agreement on Tariffs and Trade (GATT) and, later, the World Trade Organization (WTO), serve as institutional mediums through which international trade concerns are mediated and, more importantly, adjudicated.

This paper will examine the dispute settlement process of the WTO and, more specifically, whether “legalization” has been a constructive force in trade dispute adjudication or whether the GATT model was perhaps superior insofar as it facilitated diplomatic settlement. The argument advanced herein is that the robust legal structure of

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<sup>1</sup> John Gerard Ruggie “International regimes, transactions, and change: embedded liberalism in the postwar economic order” in *International Regimes* Ed. Stephen Krasner. Ithaca and London: Cornell University Press (1983), 209.

the WTO<sup>2</sup> has, in fact, been a constructive development in the domain of international trade. Indeed, a frequent criticism of international institutions relates to their apparent inability to adequately address and enforce grievances pursuant to non-conformity or violations of agreed upon provisions. The WTO is somewhat unique insofar as its legalized dispute settlement mechanism has heretofore generated a considerable measure of success in enforcing its institutional tenets. Success, however, is a multidimensional concept and critics have argued, for numerous reasons, that the WTO dispute settlement process is inadequate, or may have had unintended consequences. Nevertheless, this paper will endeavour to account for the apparent *legal* success of the WTO Dispute Settlement Understanding (DSU)<sup>3</sup> in enforcing conformity with its institutional principles. Paying particular attention to the interplay between theoretical conceptions of the functioning of international bodies in general, and the actual record of the WTO in particular, this paper will proceed in four major parts.

The general task of this discourse is to identify the theoretical underpinnings of collective action problems, the impetus for the transformation from the GATT to the WTO, the manifestations of this change and, finally, its implications. The first component of this paper will therefore serve as a necessary theoretical basis from which to orient a broader examination of the specifics of the WTO-GATT dynamic. The second component will encompass a general consideration of the specific principles of dispute settlement and the differences between the two institutions under consideration. Third, the practical manifestations of this change – actual WTO jurisprudence – will be highlighted in order to evaluate the merits of the model more generally. Finally, the

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<sup>2</sup> Hereinafter used interchangeably with ‘legalization’.

<sup>3</sup> The DSU acronym is used interchangeably with DSB, ‘Dispute Settlement Body’, DSP, ‘Dispute Settlement Process’, and DSS, ‘Dispute Settlement System’, as necessary.

fourth component will point to the policy implications of the shift to the WTO, paying particular attention to the strength of the DSU, but also to the deficiencies of the mechanism and potential areas for reform.

### **Adjudicating Collective Action Problems in the Global Domain**

Absent a ubiquitous central authority governing state behaviour in the international domain, mandating conformity to particular rules and norms appears to be a somewhat nebulous task. To be sure, “in international relations, the most important diffuse principle is sovereignty”.<sup>4</sup> While inter-state cooperation, mediated frequently by international institutions, certainly remains an important dimension in global the economy, the sovereign interest of states undergirds any such cooperation. In this vein, mechanisms by which state sovereignty become subject to the dynamics and commitments engendered by diplomacy are of particular importance.

In order to effectively navigate the nuances of the WTO dispute settlement system, it is first necessary to outline some basic definitional premises. Krasner reports that:

Regimes can be defined as sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations. Principles are beliefs of fact, causation and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.<sup>5</sup>

On this view, there is considerable latitude with respect to what constitutes a regime and the characteristics therein. What is important to extract from these broad parameters is

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<sup>4</sup> Stephen D. Krasner, “Structural causes and regime consequences: regimes as intervening variables” in *International Regimes* Ed. Stephen Krasner. Ithaca and London: Cornell University Press (1983), 17.

<sup>5</sup> *Ibid*, 2.

that the WTO undoubtedly comports with these criteria. Indeed, the institutional makeup of the WTO encompasses clearly articulated standards and a broad mandate to liberalize trade in a multitude of areas. Moreover, it endeavours to impart rationality with regard to the expectations of states as participants and signatories to the principles of the WTO schemata. Further, the WTO framework enumerates a myriad of rules and norms governing the behaviour of member states. Last, the gamut of WTO rules and procedures are subject to the DSU and thereby conform to Krasner's understanding of a regime, insofar as it adjudicates and enforces 'collective choice'.

Accession to the WTO in particular and international institutions in general entails a cost-benefit calculus marked by important tradeoffs, both economic and otherwise. It is unlikely, however, that countries would commit to multilateral institutions harboring the belief that participation would not accrue a net benefit. In this respect, the creation and sustenance of international regimes depends to a considerable measure on the belief that their existence confers more benefit than cost. Moreover, Aggarwal and Dupont contend that inter-state collaboration is frequently necessary in effectively channeling the forces of globalization and in addressing "problems of free riding, an inhibiting fear that their efforts will lead to instability for their economy, and the need to find co-ordination points that have varying costs and benefits".<sup>6</sup> Successfully managing these interests is at the crux of the dispute settlement function of the WTO. By increasing the likelihood of adherence to WTO regulations, the DSU empowers states to actively address their grievances in a formalized setting. It serves to diminish the probability of free riding and, moreover, generates a trade equilibrium that is unlikely to

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<sup>6</sup> Vinod Aggarwal and Cedric Dupont, "Collaboration and Co-ordination in the Global Political Economy" in *Global Political Economy. Second Edition* Ed. John Ravenhill. Oxford and New York: Oxford University Press (2008), 91.

be as acutely disrupted in view of serious ramifications for non-conformity. Finally, the model engenders a considerable measure of predictability to the rules governing trade in the international domain by ensuring robust protection and enforcement of the stipulated rules.

Furthermore, international institutions can serve as a means to enact multi-party agreements in an environment where bilateral agreements would either not find favour or would be impractical. Keohane suggests that “regimes are valuable to governments where, in their absence, certain mutually beneficial agreements would be impossible to consummate. In such situations *ad hoc* joint action would be inferior to results of negotiation within a regime context”.<sup>7</sup> To this end, the considerable scope of the WTO – that is, its far-reaching legal structure – can be interpreted as a strength of the institution.

Moreover, membership at the GATT/WTO should not be interpreted as detracting from the strength of *other* trade agreements. That is, participation in the WTO and some other regional or bilateral agreement is not mutually exclusive or ‘hierarchical’. Goldstein et al contend that “postwar trade agreements typically have not undercut one another. To the contrary, they have created interrelated and often complementary rule systems that support international trade”.<sup>8</sup> Consequently, participation in the WTO should not be construed as a barrier to the enactment of smaller or more localized and specific agreements, nor as diminishing the value of a larger international body. In a similar optic, “one reason to join international institutions is precisely to lock-in more predictable laws

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<sup>7</sup> Robert O. Keohane, “The demand for international regimes” in *International Regimes* Ed. Stephen Krasner. Ithaca and London: Cornell University Press (1983), 150.

<sup>8</sup> Judith L. Goldstein, Douglas Rivers, and Michael Tomz, “Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade” in *International Organization* 61 (2007), 64.

and regulations in order to achieve desired policy outcomes from other countries”.<sup>9</sup> The WTO facilitates this in numerous respects by concomitantly complementing other trade agreements. Its dispute settlement mechanism, while unable to fully guarantee certain policy outcomes, strongly incentivizes countries towards compliance and thus can be said to greatly enhance predictability pursuant to trade in the international milieu.

Predictability emanates in part from the increasingly legalized structure of dispute settlement adjudication at the WTO. Indeed, Keohane states that international regimes can facilitate agreement more effectively in the international realm “if they provide frameworks for establishing legal liability (even if these are not perfect); improve the quantity and quality of information available to actors; or reduce other transaction costs”.<sup>10</sup> The formalized process of dispute resolution contributes to these ends. Moreover, the acknowledgement that even imperfect legal structures may contribute to agreements with respect to trade will be an important point to be cognizant of in considering criticism of the DSU from the perspective of developing countries. In short, qualifying the WTO’s legalized structure as imperfect does not *ipso facto* indicate that the dispute settlement institution is without value. Rather, in accordance with the contention advanced herein, it is argued that while the benefits of a robust legal structure are clear, the negative assessments of the legalized DSU tend to be somewhat inconclusive. Thus, the shift from the GATT dispute settlement mechanism to the WTO ought to be considered a strength, and certainly not inferior to the processes of the GATT.

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<sup>9</sup> Guy Gensey and Gilbert R. Winham, “International Law, Dispute Settlement and Autonomy” in *Global Ordering. Institutions and Autonomy in a Changing World* Ed. Louis W. Pauly and William D. Coleman. Vancouver and Toronto: UBC Press (2008), 61.

<sup>10</sup> Keohane, 154.

The marked change in dispute settlement between the GATT and the WTO presents an opportunity to examine the stages of its evolution. Young advances an argument that “it is helpful to separate three developmental sequences for international regimes and that the resultant regimes can be labeled spontaneous orders, negotiated orders, and imposed orders”.<sup>11</sup> The classification of the DSU at the WTO in this regard may depend upon idiosyncratic prisms through which scholars of international relations view these institutions. What is important to extract from this categorization is that numerous viewpoints are meritorious. Highlighting this interpretational flexibility is thus important in further examination of the GATT-WTO dynamic. Whereas a realist or Marxist might view the WTO as an imposed order, the emergence of the WTO can alternatively be viewed through a more liberal, rational choice lens. To be sure, the shift from the GATT to the WTO may in part be accounted for by increasing membership and increasingly sophisticated trade grievances, and therefore consistent with the criteria of both negotiated and spontaneous orders. In this context, “as more states become involved, modification becomes more difficult and time consuming”.<sup>12</sup> Perhaps this reflects the impetus, or at least a rationale, in formulating the ‘hard law’ of the WTO from the ‘softer’ law and norms espoused under GATT.

A final point with respect to the theoretical conception of international regimes is warranted as it relates to eliminating or modifying certain institutional features.

Koremenos et al contend that “many institutional arrangements are best understood though ‘rational design’ among multiple participants” and, moreover, that “this

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<sup>11</sup> Oran R. Young, “The rise and fall of international regimes” in *International Regimes* Ed. Stephen D. Krasner. Ithaca and London: Cornell University Press (1983), 113.

<sup>12</sup> Barbara Koremenos, Charles Lipson and Duncan Snidal, “The Rational Design of International Institutions” in *International Organization* 55(4) (2001), 794.

rationality is forward looking as states use diplomacy and conferences to select institutional features to further their individual and collective goals, both by creating new institutions and modifying existing ones”.<sup>13</sup> It is important to consider this theoretical lens in accounting for the shift from GATT-style dispute settlement, largely favouring diplomatic channels, to the WTO’s legalized DSU. On this view, the rational choice model assists in elucidating the functional shortcomings of the GATT model and the consequent modifications undertaken in negotiation of the WTO. The idea that “states use international institutions to further their own goals, and they design institutions accordingly”<sup>14</sup> reflects the operational premise of this model. To this end, the construction of a powerful, binding, dispute settlement mechanism vis-à-vis the relatively *ad hoc* and diplomatic nature of the GATT should be viewed as conscious effort and intended outcome rather than simply a practical or circumstantial manifestation. Further, it is indicative of the changing trade dynamics and the emergence of developing countries as actors in the international trade arena. The next task, therefore, is to enumerate the differences between the GATT and WTO and account for this transformative change.

### **Organizational Tenets and Antecedents: Why the WTO?**

Consistent with the theoretical lens of rational choice employed in this discourse, evaluating the shift to the WTO from the GATT requires a precise understanding of, at the very least, core sections in which to categorize the change. The rational choice model places emphasis on five crucial areas in which international institutions may vary – specifically: (1) with respect to membership rules; (2) the degree of centralization of important tasks; (3) the scope of issues covered; (4) the general flexibility of the

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<sup>13</sup> Ibid, 766.

<sup>14</sup> Ibid, 762,

institutional arrangement; and (5) rules for managing the institution.<sup>15</sup> To be sure, the GATT and WTO differ on these criteria in numerous ways.

First, the specific character of the two institutions has obviously changed. Ostry notes that the WTO “turns the GATT from a trade agreement into a membership organization. It establishes a legal framework that brings together all the various pacts and codes and other arrangements that were negotiated under the GATT”.<sup>16</sup> While the scope of the agreement has been incrementally adjusted in successive trade rounds, the institution itself has evolved from a particular trade agreement to a broader, more ubiquitous global membership organization. As will be highlighted below, the criteria for membership has become somewhat more stringent and less amenable to flexibility for member states. To account in part for the creation of the WTO from the GATT, an argument has been advanced that as more countries became party to the GATT, “and the rules became more complex, the dispute settlement mechanism proved increasingly impotent”.<sup>17</sup> In this respect, the promulgation of a strengthened dispute settlement mechanism negotiated at the Uruguay Round for the WTO is, in part, a result of the shortcomings of the GATT. Moreover, the increasing complexity of trade adjudication, and the growing inadequacy of mere diplomacy in addressing trade grievances reflects the impetus for the more legalized WTO DSU. The membership rules have therefore evolved, as has the scope of the trade agreements.

Second, pursuant to the centralization of tasks within the GATT-WTO framework, it is important to highlight certain distinctions and similarities between the

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<sup>15</sup> Koremenos et al, 763.

<sup>16</sup> Sylvia Ostry, *The Post-Cold War Trading System*. Chicago and London: The University of Chicago Press (1997), 194.

<sup>17</sup> *Ibid*, 71.

organizations. With respect to centralization of power in a frequently ‘super-ordinate’ manner, “the dispute-resolution panels of the WTO are a particularly significant example”.<sup>18</sup> That the findings proffered by WTO panels are not only binding, but also frequently quite effectively implemented, reinforces this contention. However, it is worth emphasizing the fact that actual enforcement or trade retaliation in some cases, while authorized centrally, is applied by autonomous states and not by the WTO itself. Similarly, “GATT itself had no centralized powers to punish or reward, only to authorize individual members to do so”.<sup>19</sup> This is consistent with the general difficulty of centralization of authority in the context of collective action problems.

Third, the WTO addresses this issue much more effectively than the GATT insofar as individual states have been empowered with a more forceful legal mechanism to address a broader scope of trade grievances. That is, the capacity for dispute settlement ‘gridlock’ is lessened under the principles of the WTO. Specifically, Jackson identifies five improvements of the DSU: first, a unified procedure applicable to the gamut of WTO/GATT issues; second, all legal text can be considered; third, the DSU affirms the right to panel proceedings and does not allow for premature blocking; fourth, the acceptance of the ‘reverse consensus’ principle mandating panel report adoption, except in cases of universal opposition; and fifth, a new procedure for the affirmation of panel reports.<sup>20</sup> The overarching trend reflects a tangible shift towards legalization. It harmonizes the processes of inter-state trade litigation thus increasing predictability. It engenders the development of legal precedent in adjudicating state grievances, thereby reinforcing rationality and coherence within the system. It empowers states with genuine

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<sup>18</sup> Koremenos et al, 771.

<sup>19</sup> Ibid, 772.

<sup>20</sup> John H. Jackson, “The Case of the World Trade Organization” in *International Affairs* 84(3) (2008), 444.

legal rights by reversing the curious capacity of states to block proceedings against themselves and block undesirable findings from binding adoption – as was the case in the GATT. Finally, it cements the judicial process in the international milieu by establishing the right of appeal through creation of the Appellate Body. Taken together, the five main improvements to dispute settlement, as evidenced by the aforesaid, represent a profound shift to legalization of inter-state trade disputes in the WTO relative to the GATT.

Fourth, notwithstanding these arguable improvements, the GATT is generally construed as allowing for greater latitude in managing the trade liberalization principles of the agreement. Indeed, it stipulated that “domestic safeguards may be invoked for balance-of-payments reasons (Article XII), or to prevent injury to domestic producers caused by a sudden surge of imports that can be attributed to past tariff concessions (Article XIX)”, where the latter “permits alteration or suspension of past tariff concessions in a nondiscriminatory manner” if affected parties are notified.<sup>21</sup> Interpretive and practical flexibility is thus extended to participants in the interest of mitigating the potential volatility – both economic and otherwise – from liberalized trade. Pursuant to the WTO, on the other hand, “the DSU with its system of compulsory jurisdiction constituted a substantial change from the way trade rules had been implemented in the earlier GATT”.<sup>22</sup> That is, the capacity for states to circumvent particular obligations through exemptions, flexibility, or diplomacy is reduced in the WTO by virtue of compulsory jurisdiction with respect to its institutional tenets. A central criterion of the rational choice model – specifically that of flexibility of arrangements – has thus been reduced by the shift from the GATT to the WTO.

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<sup>21</sup> Ruggie, 227.

<sup>22</sup> Gensey and Winham, 57.

Fifth, the sustenance of the agreement at the WTO is premised on a rule-oriented dynamic with recourse to the DSU. During the GATT, the rules were subject to panels also, but only with the acquiescence of all concerned parties – thereby indicating that dispute settlement was by and large the theatre of diplomatic effort. Lipson reports that “GATT bargaining, adjudication, and enforcement all recognize that no state can long sustain agreements that disrupt important economic sectors. GATT trade rounds thus involve a delicate balance between multilateral bargains and a limited right to escape from them”.<sup>23</sup> The WTO, conversely, formalized the heretofore voluntary nature of dispute settlement “and created a system that was both automatic and compulsory—in other words, a judicial system that looked more like a domestic court than anything previously seen in international law”.<sup>24</sup> In this vein, the rules for controlling disputes within the institution have experienced a marked shift. In considering the fifth element of the rational choice paradigm, the rules for controlling disputes within the institutional framework have certainly evolved.

Clearly, then, the ambit of flexibility offered under the GATT has diminished considerably through the enactment of certain WTO Articles. While procedural flexibility offered by GATT encompassed a considerable measure of state flexibility in addressing domestic political pressure and exchange issues,<sup>25</sup> the rules-oriented paradigm underpinned by a strong DSU at the WTO detracts from this capacity. For example, the WTO “requires prospective member to bring key domestic economic rules in line with

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<sup>23</sup> Charles Lipson, “The transformation of trade: sources and effects of regime change” in *International Regimes* Ed. Stephen Krasner. Ithaca and London: Cornell University Press (1983), 242.

<sup>24</sup> Gensey and Winham, 44-45.

<sup>25</sup> Lipson, 249.

WTO rules” as a condition of membership.<sup>26</sup> Commensurate with the argument that the WTO offers less flexibility vis-à-vis the GATT, this entry requirement marks a departure from past practice. As such, members of the WTO against whom a grievance is filed also have considerably less latitude in responding to their perceived non-conformity.

To this end, “Article 22.2 of the DSU states that compensation must be mutually agreed upon and if it is not, an injured country can apply for retaliation”.<sup>27</sup> This would seem to constrain diplomatic efforts (which may or may not be a good thing) by empowering the winners of a dispute to retaliate. Moreover, the diplomatic process cannot continue *ad nauseum* in that certain DSU time constraints can in fact be implemented: “DSU Article 21.5 allows for a complaint under procedures that use a shortened time frame”.<sup>28</sup> In relation to the adage that ‘justice delayed, is justice denied’, Article 21.5 seeks to address the issue of drawn out legal proceedings. More importantly, however, is that diplomatic processes would thus be forced to operate under time constraints, and they are underpinned by the threat of authorized trade retaliation. Certainly, then, the rules controlling the institution have changed in relation to the amount of diplomatic flexibility offered, but also in the requirements of prospective members. Considered together, it is therefore evident that the five elements of change enunciated under the rational choice paradigm indicate that there are important institutional differences between the GATT and the WTO. These changes, moreover, are important to consider in conjunction with the jurisprudence under evaluation in the next section.

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<sup>26</sup> Koremenos et al, 748.

<sup>27</sup> Nuno Limao and Kamal Saggi “Tariff retaliation versus financial compensation in the enforcement of international trade agreements” in *Journal of International Economic* 76 (2008), 49.

<sup>28</sup> Kara Leitner and Simon Lester, “WTO Dispute Settlement 1995-2007 – A Statistical Analysis” in *Journal of International Economic Law* 11(1) (2008), 188.

### **WTO Jurisprudence: A Practical Understanding**

Evaluating the efficacy of the legalization of dispute settlement at the WTO as distinguished from the GATT requires examination of practical instances of WTO jurisprudence. Adequately assessing this dimension of global trade is a fruitless undertaking without due consideration of *actual* circumstances under which states manage their trade grievances. This section therefore sheds light on three key cases litigated at the WTO. Specifically, it considers *Shrimp—Turtle*, *EC—Hormones* and *US—Offset Act (Byrd Amendment)*, respectively. Before turning to the relevant jurisprudence, however, it is essential to briefly discuss the tendency of the majority of cases that ultimately do not result in formal panel proceedings.

Two features are important to highlight before turning to the actual record of the WTO. First, it is crucial to acknowledge that a disproportionate number of complaints are settled well before formal proceedings are undertaken. Indeed, Jackson reports that in the thirteen years since the inception of the WTO, a total of 369 complaints were brought forth and, moreover, “Fewer than half of these went to a panel; in other words, there is a lot of settlement going on, and this can be viewed as a strength of the system”.<sup>29</sup> That a considerable proportion of cases are never actually presented before a panel appears to lend credence to the assertion that the legalized DSB system is superior to the GATT and its diplomacy-oriented structure. To be sure, while the DSB benefits from a powerful legal mechanism, it also generates considerable latitude for diplomatic resolutions, as evidenced by the strong propensity for settlement *before* the establishment of formal panels. Furthermore, the diplomatic channels availed by the WTO may arguably also lead to more serious diplomatic negotiation. Specifically, failed diplomacy on a WTO matter

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<sup>29</sup> Jackson, 439.

will in all likelihood activate considerable legal expense, considerable opportunity cost of wasted time and effort in dealing with the matter, the continuation of an alleged illiberal trade practice, and the potential for an even worse result in the form of a lost dispute.

Clearly, then, an argument can be advanced that the WTO appears to provide an equal – if not superior – structure for diplomacy, in addition to its legalized constitution. In short, it may ameliorate diplomatic efforts by making the negotiation process more salient under the potential threat of recourse to the DSU.

The second attribute pertains to the participation of less developed countries (LDCs) in the WTO dispute settlement processes. In this respect, the literature varies to some extent as to the true place of LDCs in the WTO DSB – a point that will be more fully developed in the fourth section addressing policy implications. Not surprisingly, powerful countries with considerable economic power are the preeminent users of dispute settlement. On the one hand, however, Bown and Hoekman point to the fact that “of the more than 350 formal WTO dispute settlement cases through 2006, none of the 32 WTO members classified by the United Nations as LDCs have been challenged”.<sup>30</sup> On the other hand, Jackson notes that *developing* countries do in fact participate in dispute settlement considerably, “and are involved in almost 80 percent of the cases, either as complainants or respondents”.<sup>31</sup> While the poorest member-states do not formally and actively participate, it appears that the intermediate size countries and emerging economies do. Considerable disagreement exists as to the ramifications of these latter trends, and this will be discussed in conjunction with the general policy implications. Nonetheless, it is important to highlight from these two general tendencies – namely the strong propensity

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<sup>30</sup> Chad P. Bown and Bernard M. Hoekman, “Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is Not Enough” in *Journal of World Trade* 42(1) (2008), 178.

<sup>31</sup> Jackson, 439.

for settlement and the uneven usage of the DSB by middle and smaller economies – the notion that advancement to formal proceedings is neither a necessary outcome nor a regular undertaking for *all* WTO participants.

*Case 1: Shrimp—Turtle*

The resolution of the *Shrimp—Turtle* case has had important ramifications for the general ‘flexibility’ of the WTO DSB in its treatment of non-trade interests. Generally speaking, what was in question for this particular case was how to reconcile – in an institution intended to mediate *trade* disputes – non-trade interests such as the environment, with legalized trade rules, norms and prior jurisprudence. Moreover, it epitomizes the inherent tension between nation-states with their obvious sovereignty interests and international institutions, inasmuch as they necessarily constrain behaviour when solving collective action problems.

Turning to the context of the case, it essentially entailed a US environmental law banning imported shrimp caught in a manner that killed sea turtles<sup>32</sup> – a widely recognized endangered species. Specifically, a 1988 law was passed under the Endangered Species Act that American shrimp boats must set up turtle exclusion devices in order to avoid killing turtles during the process of fishing for shrimp; moreover, a 1989 law stipulated that imported shrimp from countries without akin protective measures would be banned.<sup>33</sup>

The response to these measures manifested in 1998 when various countries contested these measures at the WTO. In dispute was an important provision yet to be

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<sup>32</sup> Jackson, 450.

<sup>33</sup> R. Daniel Kelemen, “The Limits of Judicial Power: Trade-Environmental Disputes in the GATT/WTO and the EU” in *Comparative Political Studies* 34 (2001), 637.

fully considered by the DSB. In particular, Article XX (g) of the GATT allows for exceptions from trade obligations in the interests of conserving natural resources, though it does not explicitly stipulate that the aforesaid resource *must* be territorially and jurisdictionally circumscribed, or whether it can in fact be located elsewhere.<sup>34</sup>

The issue was decided principally in favour of striking down the ban at the panel level, though this was adjusted in part upon appeal. Indeed, the initial ruling, notwithstanding its supposedly cognizant demeanor towards the stated WTO objective of ‘sustainable development’, still prioritized trade concerns over environmental ones.<sup>35</sup> Considering the final appellate ruling, however, the decision “clearly manifested a measure of deference towards nation-state ‘sovereign’ authority, with the Appellate Body starkly overruling a more ‘internationalist’ panel report”.<sup>36</sup> This case clearly elucidates the tension between a state’s sovereign prerogative to legislate environmental standards against its necessity to meet its international commitments. To be sure, the appellate decision propagated three important conclusions. First and contrary to the panel, it ruled non-governmental actors’ participation does not violate DSU tenets; second, it held that the US policy *was* in fact within the scope of its WTO obligations under GATT section XX (g); third, it “concluded that the US measure while qualifying for provisional justification under Article XX (g), failed to meet the requirements of the chapeau of Article XX, and, therefore, was not justified under Article XX of the GATT 1994”.<sup>37</sup> The decision, though somewhat recondite and technical, strikes an interesting balance

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<sup>34</sup> Richard H. Steinberg, “Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints” in *The American Journal of International Law* 98(2) (2004), 252.

<sup>35</sup> B.S. Chimini, “WTO and Environment: Shrimp—Turtle and EC—Hormones Cases” in *Economic and Political Weekly* 35(20) (2000), 1754.

<sup>36</sup> Jackson, 451.

<sup>37</sup> Chimini, 1755.

between competing interests with respect to international obligations and sovereignty, inasmuch as it established a preliminary equilibrium between trade and environmental concerns.

Adjudicating a contentious and, indeed, difficult case required a balanced view of divergent, but very important, interests. It has been argued that “although environmental interests were handed a defeat on the issue at hand in the case, they were granted important victories on point of legal principle that will influence future cases “. <sup>38</sup> At the crux of the partial victory for non-state interests is the finding that their participation in panel proceedings does not violate DSU principles. By establishing a measure of NGO standing in WTO jurisprudence, *Shrimp—Turtle* thus demonstrates that the dispute-settlement forum, and perhaps the institution in general, is more amenable to the input of civil society than initially believed. Moreover, the decision in question also appears to have been the correct one. It seems reasonable that the ban be upheld given that the US did not act *completely* in good faith. To this end, it circumvented diplomatic channels by acting unilaterally and mandating collective action in protection of sea turtles without consultation of other parties. This is not to say that unilateral environmental protections are not sometimes justified or in fact necessary. On the contrary, unilateral action may be of value, though it ought to be a last resort, and good faith action requires constructive measures intent on forming agreement as opposed to mandating conformity by unilateral action. In this respect, the US did not endeavour to negotiate a treaty, nor executive agreement. Thus, it seems eminently fair that it should not be able to enact overbroad legislation resulting in adverse effects on the trade interests of other states. What is also reasonable, however, is the proposition that unilateral environmental protection can

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<sup>38</sup> Kelemen, 638.

nonetheless at times remain a possibility and, in fact, a laudable objective when collective action fails.

Furthermore, it is essential to observe the *legislative* function of the DSB in this case. Law, in general, never accounts for every tangential and specific circumstance possible. That is, not only is it impossible to legislate for every single possible scenario, it is also improbable that agreement on precise law covering the gamut of minutia could ever be consummated. Consequently, the task of courts in many instances is to resolve the various lacunae within in a given legal structure. As identified, WTO law is silent as to whether an exception can be granted to trade law in the interest of protecting an exhaustible resource *outside* of a territorial jurisdiction. In this regard, the *Shrimp—Turtle* decision, among other things, established that in this case the US law overstepped in its reach and thus did not meet its trade obligations. It is reasonable to infer, moreover, that while the case does not preclude unilateral protection of exhaustible resources *outside* a circumscribed jurisdiction, good faith measures to secure collective action on an issue with adverse trade implications appear to be a necessary precursor to a policy of this sort.

This case, however, raises serious philosophical questions as to the place of courts and the law in the international domain. The view adopted herein, namely that the increasingly legalized structure of the WTO is a positive force for international trade, has been challenged elsewhere. While it is true that “the Appellate Body has engaged in such expansive lawmaking, regularly clarifying ambiguities and filling in gaps in the GATT and WTO agreements”<sup>39</sup>, what is less clear is whether the court is in fact justified in doing so. In this respect, two principles are worth highlighting. First, *in dubio mitius* “is a well-established canon of treaty interpretation that attaches deference to state

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<sup>39</sup> Steinberg, 248.

sovereignty when a rule is ambiguous”.<sup>40</sup> Second, the principle of *non liquet* – or “it is not clear” – can be invoked “if the law does not permit deciding a case one way or the other”.<sup>41</sup> The *Shrimp—Turtle* decision endorses neither principle. Not only did both the panel and the Appellate Body conceive that they in fact had the authority to decide a case on a matter not explicitly agreed upon, a penumbral case was decided in a manner inconsistent with an attitude of deference to state sovereignty. Nonetheless, there is a certain benefit in allowing for independent arbitration of nuanced and highly specific issue-areas under which diplomacy would be either inefficient or ineffective.

Notwithstanding these important philosophic principles which appear as *prima facie* arguments against the legal structure of the WTO, it may at times be more valuable, particularly in the long-run, to settle important disputes rather than adopt a ‘laissez-faire’ sentiment to complex and expensive litigation that would otherwise be left unsettled. In a similar optic, it is useful for the court to take a somewhat expansive view of trade law in the interest of preventing the exploitation of technical loopholes that violate the spirit of the agreement.

Furthermore, actively addressing intentional vagueness of language creates a legal paradigm that effectively informs states and thereby guides future behaviour, both trade practices and otherwise. The notion of *stare decisis* – the idea that legal precedent matters in future cases – is of principal importance in this regard. Indeed, it has been noted that “while strictly speaking the doctrine of precedent is not a part of the WTO DSS, in practice the previous reports of the Panel and the Appellate Body receive due

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<sup>40</sup> Ibid, 258.

<sup>41</sup> Ibid.

consideration”.<sup>42</sup> Similarly, “previous decisions and doctrine are so highly persuasive in WTO jurisprudence, and their use is so central to the discourse of dispute settlement, that it may be said that the WTO observes de facto *stare decisis*”.<sup>43</sup> The *Shrimp—Turtle* case for the United States arguably had precedent on its side, however, in the prior case of *Tuna—Dolphin*. Nevertheless, the court’s decision was different and the decision went in most part against the US. This signals that although there is a considerable measure of continuity in the interest of maintaining judicial coherence, outcomes are nonetheless liable to interpretational flexibility at the WTO. Taken together, this seems to be a strength of the legalized structure inasmuch as it provides both a coherent and predictable legal mechanism, while at the same time allowing for a balancing of different interests in the context of particular cases and when specific cases deviate from the norm.

In adjudicating decisions in this manner, the court, consistent with the rational choice model, provided the losing party with an opportunity to validate the ruling. That is, “the report enabled the United States to comply with relative ease”.<sup>44</sup> To this end, mediating disputes in this fashion may be an important way to lubricate inter-state tensions while maintaining a forceful legal structure. Indeed, this idea comports well with the rational choice model. In order to remain a relevant actor and to mitigate against possible political backlash, the court finds against a certain party but endeavours to make compliance easy. Further, “If elected officials frequently reject or overturn a court’s ruling, the court’s status as the authoritative adjudicator of disputes is called into question. Therefore, courts will avoid making rulings that elected officials frequently

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<sup>42</sup> Chimini, 1753.

<sup>43</sup> Steinberg, 254.

<sup>44</sup> Steinberg, 272.

reject”.<sup>45</sup> This would imply certain parameters from which a court cannot – or should not – deviate. The legalized DSB of the WTO, in this respect, arguably establishes such parameters thereby resulting in two valuable developments. First, it allows for legal lacunae to be addressed by panel and Appellate reports. Second, in doing so it contributes to the longer-term sustenance of the institution more generally.

Case 2: EC—Hormones

A second important case at the WTO, *EC—Hormones*, also relates to sovereign environmental and health protection policies weighed against international trade obligations. Further, it highlights the difficulty in ensuring compliance with DSB rulings in certain narrow instances. The present case pertains to a conflict between the European Communities (EC), on the one hand, and Canada and the United States, on the other. Indeed, it is a useful case to study given that it has been one of the few circumstances under which trade sanctions have actually been authorized in response to non-compliance.

The conflict centers around a dispute over hormone-treated meat products. Indeed, towards the end of the 1980s, “the EC and its Member States began banning the sale of hormone-treated meat in response to consumer health fears”.<sup>46</sup> In response, the US issued a complaint at the WTO alleging that “the importation restrictions on certain meat products violated the WTO Sanitary and Phytosanitary Measures Agreement (SPS) because they neither reflected an international health standard nor were scientifically justified by an EC risk assessment”.<sup>47</sup> Citing WTO text, Chimini notes that “SPS

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<sup>45</sup> Kelemen, 623.

<sup>46</sup> Suzanne Bermann, “EC—Hormones and the Case for an Express WTO Postretaliation Procedure” in *Columbia Law Review* 107 (131) (2004), 138.

<sup>47</sup> *Ibid.*

measures are however to be ‘applied only to the extent necessary’ and ‘within the territory of the member’. They are to be ‘based on scientific principles’ and not maintained ‘without sufficient scientific evidence’.<sup>48</sup> The WTO standards appear to be justified in that the maintenance of discriminatory measure on the basis of health concerns ought to be grounded in a rigorous scientific standard. Moreover, the *legal* standard should be sufficiently high so as to withstand potentially specious assertions of health concerns on what would otherwise be a mere trade obstruction.

Whereas the US and Canadian lawyers argued (to separate panels) that the measure did not meet the stipulated standards, the EC contended that this was a legitimate policy, underpinned by sufficient scientific research. In short, the EC lost on all fronts. First, its policy was not premised on a risk assessment necessary to meet SPS Article 5.1; second, its arbitrary distinctions also violated SPS Article 5.1; third, the standards created were incongruent with international standards and therefore violated SPS 3.1 and 3.3; it is worth noting that the panel finding was also upheld by the Appellate Body.<sup>49</sup> Thus, what was argued to be a legitimate health concern was found to be a discriminatory and unjustifiable trade barrier. Non-conformity with the panel finding, consistent with WTO practice and as enumerated in the second section herein, may result in authorized trade retaliation.

The aftermath of this case was in fact plagued by enforcement problems. While instances of non-conformity are certainly the exception, they nonetheless present an important point for analysis. Indeed, dispute settlement at the WTO reaches a nadir when its findings are not implemented by member-states. Simply put, non-compliance raises

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<sup>48</sup> Chimini, 1757.

<sup>49</sup> Chimini, 1757-1758.

serious questions for the efficacy of the DSB process and the longevity of the model more generally. In light of only “residual compliance”, both the American and the Canadian challenges were authorized by the DSB to retaliate against the EC in the amount of \$130 million and \$20 million respectively.<sup>50</sup> Trade retaliation is fundamentally illiberal, however, and curiously antithetical to the objectives of the WTO. Nevertheless, it is an important device intended to compel compliance with panel reports. *Ceteris paribus*, however, the short term consequences are lower levels of trade liberalization and a net welfare loss for all parties.

To be sure, the absence of a formal post-retaliation mechanism for addressing conformity has been cited to be a serious issue. Specifically, Bermann’s chief grievance with the current system relates to the fact that “although the DSU provides detailed procedure governing initial complaints, it fails to supply an explicit avenue for parties to resolve postretaliation disagreements”.<sup>51</sup> While it may be argued that economic considerations in the form of authorized retaliation are there precisely to encourage compliance, the record is inconsistent.<sup>52</sup> To this end, economic sanctions may at times be insufficient to compel adherence. States may be more willing to accept the economic loss in favour of retaining a politically popular or principled sovereignty assertion. In this respect – and at risk of overstating the case for increased legalization – it may be that the DSU is in need of *further* legalization in cases where compliance does not exist.

Notwithstanding the compliance issue, the legal structure of the WTO provides clearly delineated standards of scientific proof necessary to justify measures such as those

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<sup>50</sup> Bruce Wilson, “Compliance by WTO Members with Adverse Dispute Settlement Rulings: The Record to Date”, in *Journal of International Economic Law* (2007), 5-6.

<sup>51</sup> Bermann, 137.

<sup>52</sup> *Ibid*, 148.

evident in *EC—Hormones*. Consider for a moment the alternative to the legal standards stipulated under the WTO. Absent such standards, an assertion of health or environmental policy that violates trade agreements would be more likely to stand on tenuous scientific grounds – promulgated, moreover, by the party seeking to uphold the legitimacy of the initial measure. The WTO dispute settlement forum, on the other hand, provides an impartial and independent body for assessing the merits of the science more generally and is therefore better suited to redress trade grievances. Similar to the *Shrimp—Turtle*, the *EC—Hormones* case demonstrates that specious assertions of health or environmental concerns cannot stand in the absence of independent, empirically verified scientific proof. The absence of an independent body to mediate these difficult disputes would leave the international trade milieu liable to greater trade barriers, veiled by insufficiently substantiated and contested scientific underpinnings. In providing independent adjudication of conflicting claims, the legalized DSB effectively mediates trade disputes in a manner that diplomacy could not.

*Case 3: US—Offset Act (Byrd Amendment)*

A final case study under examination is the *US—Offset Act*. The full name of this law, enacted on 28 October, 2000, was the Continued Dumping and Subsidy Offset Act (CDSOA)<sup>53</sup>, proposed by US Senator Robert Byrd and herein after referred to as the *Byrd Amendment*. The purpose of the law was to address the supposed competitive disadvantage faced by domestic producers of certain products from allegedly WTO-illegal ‘dumping’ of foreign products at unfair prices. Specifically, the law seeks to attenuate domestic producers “by mandating the redistribution of collected antidumping

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<sup>53</sup> Stephen Davadoss and Ben Harris, “Why Did the Byrd Amendment Not Fly with the WTO?” in *The Estey Center of International Law* 6(2) (2005), 226.

duties to ‘affected domestic producers’ in the form of ‘offset’ payments”.<sup>54</sup> In both taxing foreign products deemed to have been ‘dumped’ into the US market and, furthermore, redistributing the revenues generated from the tax policy to specific producers, the policy was ruled WTO illegal. Indeed, “the Appellate Body condemned the so-called US *Byrd Amendment* by finding that it was inconsistent with the US obligations under the WTO Agreements on Antidumping (AD) and Subsidies and Countervailing Measures (SCM)”.<sup>55</sup> In this respect, this case addresses both compliance issues and how the legalized structure deals with overextended trade responses.

To be sure, a pivotal component of the case related to the precise definition of the word ‘against’. Article 18.1 of the AD stipulates that “No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this agreement”.<sup>56</sup> Of enormous importance is to interpret exactly what constitutes ‘action against’. Indeed, the final decision hinges on this. In finding against the US, the Appellate Body deemed that the amendment in questions had an ‘adverse bearing on’ and thus met the ‘against’ requirement: in this vein, Greenwald rightly argues that the WTO is in effect legislating.<sup>57</sup> Again, a penumbral case turning on a vague but important legal lacuna was redressed by a WTO decision. By finding that ‘adverse bearing on’ was tantamount to ‘against’, the WTO DSB filled a void in the agreement.

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<sup>54</sup> Ibid.

<sup>55</sup> Jagdish Bhagwati and Petros C. Mavroidis, “Killing the Byrd Amendment with the right stone” in *World Trade Review* 3(1) (2004), 119.

<sup>56</sup> John Greenwald, “WTO Dispute Settlement: An Exercise in Trade Law Legislation?” in *Journal of International Economic Law* (2003), 120.

<sup>57</sup> Ibid, 122.

The effect of this decision was an important one. The merits of the case, however, appear to side with the WTO ruling. What was transpiring by dint of the amendment amounted to a form of ‘double’ compensation. Specifically, not only did the *Byrd Amendment* erect countervailing barriers on foreign products, Davadoss argues, it then distributed the revenues to ‘affected producers’. In so doing, a fair equilibrium was not restored. Indeed, simply countervailing duties would have likely rectified the situation; alternatively, a formal subsidy could have been used to address the problem. Both, however, together amounted to double compensation and therefore reinforced disequilibrium in favour of the US, the initially aggrieved party. In this way, the policy overreached in its scope.<sup>58</sup>

The panel findings support this view. To this end, what is effectively stated is that:

First, the CDSOA constitutes a ‘specific action’ taken *in response* to a situation containing all the key elements of dumping; second, the CDSOA – by distorting the competition between imported goods and domestic producers, and by providing a financial incentive for domestic producers to file/support AD/CVD applications – has an adverse bearing on dumping and, as such, may be deemed to be action *against* dumping.<sup>59</sup>

Thus, the US law was found to be in violation of WTO provisions. What is important to extract from this case, however, is that the DSB of the WTO clearly is filling a legal void. Additionally, this case is evidence of the difficulty in mandating compliance for measures that need to go through the US Congress. To be sure, it took until 1 October 2007 to actually implement legislation that repealed the *Byrd Amendment*: “nonetheless, recent congressional actions to implement adverse panel and Appellate Body reports have been

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<sup>58</sup> Davadoss, 231.

<sup>59</sup> *Ibid*, 238.

significant and their importance for maintaining the legitimacy of the WTO dispute settlement system should not be underestimated”.<sup>60</sup> That the US is complying – albeit with less rigour than one might hope – lends credence to the notion that the legalized structure of the WTO is more effective in circumventing or at least lessening the power relations at play in inter-state trade disputes and thereby legitimizing outcomes. It is unlikely that the same can be said for *ad hoc* diplomacy.

### **Discussion of Implications and Policy Prescriptions**

Evaluating the shift to increased legalization in managing inter-state trade disputes does not center solely on net economic effects. If its evaluation was to be premised only on this criterion, it would likely not pass muster. To this end, Brown posits that “even if the Uruguay Round reforms did create a more efficient legalized system, our results suggest that these reforms may have minimal *economic* impact on the resolution of disputes”.<sup>61</sup> This is a fair assessment. However, the indirect effect ought to also be considered. As identified in the first section, the rising membership of the GATT and increasing complexity of trade disputes was cited as one reason for the shift to a more legalized structure. Insofar as the legal system of the DSU addresses this complexity and legitimizes outcomes, it is valuable. Moreover, in many cases – chiefly those in which powerful states lose and still comply – this legitimizing function of the DSU can be interpreted to have a contributory value for the longevity of the institution more generally.

The effect of legalization on creating a predictable environment should not be understated. While critics of this model often point to the legal complexities and apparent

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<sup>60</sup> Wilson, 4.

<sup>61</sup> Chad P. Bown, “On the Economic Success of GATT/WTO Dispute Settlement” in *The Review of Economics and Statistics* 86(3) (2004), 813.

inaccessibility of this model for developing countries, further questions are worth asking. Namely, would diplomatic channels and the inherent power dimensions therein truly be preferable to the legal structure? In addition, does the WTO model even rule this out? The view espoused herein is that the answer to both questions is a resounding “no”. Informal negotiations and diplomatic channels have certainly not been closed by the creation of a legalized DSB. Rather, the DSB should be interpreted as a channel for addressing grievances where less costly diplomacy has failed. Thus, while the DSU certainly provides new and arguably improved avenues for dispute adjudication, it should be viewed to having a complementary character to diplomacy. That is, diplomacy and the DSU should not be viewed to be – and in fact, are not – mutually exclusive. Indeed, there is much more of a symbiotic relationship, particularly where the paradigm can be said to encourage settlement more frequently than might otherwise have been the case.

It is necessary to address one of the chief criticisms of the DSU more fully as it relates to the supposed ‘inaccessibility’ of the system. While it is true that sophisticated legal expertise has considerable cost, particularly for the developing world, it is useful to bear in mind that the relevant actors at the WTO are *states*. To this end, Kim articulates the argument that “procedural costs borne by countries with lower administrative and expertise capacities can prevent countries from utilizing dispute settlement procedures”.<sup>62</sup> However, even if a state lacks internal legal capacity, this does not preclude it from hiring external legal help. Moreover, chances are that if a grievance is being pursued against a larger market, the policy in question likely affects various countries. As such, states can jointly pursue their interests and thereby reduce the cost of litigation. Alternatively and

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<sup>62</sup> Moonhawk Kim, “Costly Procedures: Divergent Effects of Legalization in the GATT/WTO Dispute Settlement Procedures” in *International Studies Quarterly* 52 (2008), 666.

consistent with the aforesaid, the DSU does not preclude diplomatic solutions to trade grievances. The notion that “even if developing countries understand exactly why and how the WTO decision-making process leads to asymmetrical outcomes...there is little they can do about it”<sup>63</sup>, while certainly warranting investigation, rings somewhat hollow. At the extreme, states can abdicate from the agreement. That developing countries have been dealt a difficult hand in the international domain from time to time is not really a contestable assertion. This is not symptomatic only of the WTO, however. Nevertheless, the legalized structure, it is argued, is a constructive force for developing countries with a commitment to liberalized trade because it lessens the power relations by providing a more equal and independent forum for addressing trade disputes. Taken together, then, it appears that this apparent ‘inaccessibility’ of the DSU may be at times overstated.

This is not to say that important issues have not arisen with respect to developing countries. A central feature of the DSU has been the conspicuous *absence* of larger countries challenging developing countries for non-conformity with WTO rules. Apparently lacking is any economic or principled impetus for pursuing these violations. Whether this is due to altruism is for another time. Of serious importance, however, is that it is precisely this lack of enforcement for developing countries that may reinforce economic and other development problems. Bown and Hoekman argue that the lack of challenges to LDCs results in four distinct issues for developing countries: first, there is a net economic welfare cost to consumers within their territory; second, emanating from this phenomenon is a perversion of incentives for emerging countries to devote political will towards trade liberalizing practices; third, this sort of free riding could present

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<sup>63</sup> Richard H. Steinberg, “In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the WTO” in *International Organization* 56(2) (2002), 368.

political obstacles to future trade negotiation; and last, it may disproportionately affect exports from *other* developing countries.<sup>64</sup> In addressing these issues, they suggest that instead of relying on the unlikelihood of formal dispute proceedings, it would be better to reconsider the rules for developing countries and perhaps seek waivers and exceptions for certain industries.<sup>65</sup> This would seem to be a prudent path insofar as it would reinforce the legalized structure – as opposed to circumvention of rules – and inhibit the potential for defection from WTO norms that undermine the institutional principles adopted by its signatories.

Reinforcing the legal paradigm is of paramount importance in the maintenance of the legitimacy and fairness of the institution. Goldstein and Martin note that “Reducing the ability of governments to opt out of commitments has the positive effect of reducing the chances that governments will behave opportunistically by invoking phony criteria for protecting their industries”.<sup>66</sup> The *EC—Hormones* case presented herein is a testament to that conclusion and, it is argued, the same result is unlikely to have been reached had the GATT model been in effect.

Turning to the economic ramifications of the DSU and its overall efficacy, it is essential to consider the nuances of the model. Indeed, it is generally accepted that the DSU draws its strength from its enforcement mechanism employed in the interest of ‘coercing’ compliance with the WTO’s institutional tenets. The predictability and stability of the institution is premised on compliance with panel and Appellate rulings. On the contrary and as has been pointed to, the DSU reaches a nadir and the legalized

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<sup>64</sup> Bown and Hoekman, 185-186.

<sup>65</sup> *Ibid*, 180.

<sup>66</sup> Judith Goldstein and Lisa L. Martin, “Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note” in *International Organization* 54(3) (2000), 604.

process is seriously weakened when states do not comply with decisions. Choi echoes this sentiment, remarking that “the nascent success of the DSP system in the past ten years is tainted by occasional non-implementation problems. The successful implementation of WTO panel rulings during the past ten years has dropped from 69 percent in the first five years to 54 percent in the second five years”.<sup>67</sup> In this respect, the model has its obvious limitations. It is not clear, however, that this sort of implementation challenge characteristic of collective action problems would be considerably different under a more diplomatic dispute settlement body such as the framework provided under GATT.

Nevertheless, the WTO system as a whole may function more effectively if the retaliation procedure was amended. In this respect, it may be that “the enforcement advantage of tariff retaliation would be even stronger if injured countries can select the goods on which they retaliate, as observed in recent cases where retaliating parties chose products concentrated in swing states”.<sup>68</sup> This appears to capture the idea that imposing a *political* in addition to economic sanction may serve to enhance the likelihood of compliance with a ruling, particularly in cases where the objecting party is the US. The problem of non-compliance, then, is in part symptomatic of the political structure (separation of powers) in the US. Choi suggests that this idiosyncratic political relationship between the president and Congress “is the largest challenge facing the WTO in the next decade”.<sup>69</sup> While there is not an immediate answer to this difficulty, it appears

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<sup>67</sup> Won-Mog Choi, “To Comply or Not to Comply? – Non-implementation Problems in the WTO Dispute Settlement System” in *Journal of World Trade* 41(5) 1043.

<sup>68</sup> Limao and Saggi, 59.

<sup>69</sup> Choi, 1063.

that conferral of a measure of discretion in applying trade retaliation – targeting products in swing states, for instance – may be a step in the right directions.

To conclude, it is clear that the legalized structure has had a positive effect on international trade dispute settlement. It has been argued that this legalization should be interpreted to be constructive development in the theatre of international trade. To the extent that it generates coherence in the remedying disputes over time, it is valuable. Moreover, the independent character of panels provides for fairer adjudication of grievances that would likely be absent in diplomatic efforts marked by power relations. Indeed, managing the plethora of trade issues that have arisen is more effectively addressed with the *complementary* functions of diplomacy in conjunction with the DSU. These developments, then, taken in the context of the theoretical basis of collective action and the institutional differences between the GATT and WTO, and in light of the actual WTO record, indicate that the efficacy of dispute settlement is enhanced by the robust legal structure consummated by the WTO.

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