

Negotiate or Litigate?

Effects of WTO Judicial Delegation on Domestic Trade Politics

Judith L. Goldstein
Stanford University

Richard H. Steinberg
UCLA

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Since its creation in 1995, critics and supporters of the WTO can agree on at least two things: there has been a surprising amount of judicial activism and an equally surprising lack of success at advancing a broad trade ‘deal’ among members. This paper argues that these two phenomena are related. As the GATT/WTO system has expanded in number and type of members, consensus building to legislate new deals has become increasingly difficult, reflecting the often-conflicting constituent interests brought to the table. As the prospects for broad legislative rule-making have declined, judicial law-making has become more common, especially through interpretation of unclear rules and the filling of gaps in WTO agreements. Such law-making has been particularly evident in cases challenging subsidies or countervailing measures, anti-dumping duties, and safeguards measures, with considerable effects on the steel sector and agriculture. Adherence to judicial action, however, does not reflect 'binding' delegation but rather, a preference by nations for compliance with liberalizing judicial decisions, even though the same trade liberalization may face domestic resistance in the context of legislative trade negotiations.

We examine the difficulty of legislating, as well as the question of judicial lawmaking and adherence to dispute settlement decisions in the context of overall delegation to the GATT/WTO. Our basic delegation model is drawn from Moe (1984) who argues that “the principal-agent model is an analytic expression of the agency relationship, in which one party, the principal, considers entering into a contractual agreement with another, the agent, in the expectation that the agent will subsequently choose actions that produce the outcomes desired by the principal.” (756) We assume that the relationship between the GATT/WTO and its principals, nations or customs

territories, always held some degree of a principal-agent relationship, although the membership exerted far more oversight over the secretariat than is common with other international agencies. Still, as we suggest below, an agency relationship did develop with a nascent secretariat in the mid-1950s and after 1995 grew with the establishment of the contemporary dispute settlement system. What we suggest, however, is that it is not necessary to think of the relationship as any more ‘binding’ than other international contracts. The principals have always been able to renege on an agreement, including informal opinions by the legal office of the secretariat and later formal decisions of the dispute settlement process.

We proceed as follows. First, we suggest that delegation to the GATT/WTO was an unintended byproduct of the creation of an underspecified set of rules and procedures, first by the delegates who created the GATT, and later by those that participated in its re-invention as the WTO. Second, we argue that there has been no *de jure* delegation to the regime, in the sense that most countries have not given up legal authority under domestic law to maintain trade rules they deem appropriate, but there is ‘behavioral’ delegation, meaning that countries have *de facto* begun to act as if they have given authority to the regime.¹ Third, we examine the rise of judicial law-making and argue that it has become an imperfect substitute for liberalization through legislative action. Even where powerful domestic sectors seem to have had an effective veto over liberalization in trade rounds, the rules and procedures brought to bear in complying with WTO judicial decisions reconfigures domestic coalitions in ways that favor liberalization long thought

¹ For more on the distinction between formal or *de jure* sovereignty and informal or *de facto* sovereignty, see Steinberg 2004a.

unimaginable. Looking back, we see the judicial arm of the WTO acting akin to the ECJ's liberalizing role in the early days of the EU.

The Impetus to Delegate

When the United States invited 15 nations to join in an initial round of trade talks in 1946, participants did not expect the meeting to yield the rules and procedures for commercial policy that would regulate trade for the subsequent century. The Havana Charter included provisions to establish an International Trade Organization and procedural rules that would have guided its governance. Thus when agreeing to the interim agreement, the Protocol of Provisional Application of the GATT, participants assumed that the regime's rules and procedures were short term and paid scant attention to the structure and procedures of the new organization. The GATT structure did survive, however, and with minimal changes over the following decades, influenced the trajectory of the trade regime in two fundamental ways.

First, because of this unusual history, the relationship between the principals (states) and an agent (initially, the secretariat) has remained under-defined throughout GATT/WTO history. In fact, many would say that thinking in these terms is misleading because the organization was always 'member driven'. The early GATT did not even have a secretariat *per se* since the creators envisioned the organization as a treaty and not an international organization. But, from the start there needed to be at least a small central governance structure: what was called a 'secretariat' for almost fifty years was in law a staff under the executive secretary of the International Committee for the International Trade Organization, which the GATT called its 'director-general.' By the

1980s, that structure had grown into numerous divisions with a separate legal office. The Agreement Establishing the WTO formally created a secretariat and expanded the role of the judiciary, extending the scope of delegation into new arenas.

Second, liberalization at the international level has occurred within a regime that never fully settled the basic procedural issues that accompany the setting of trade policy. From the beginning, the GATT liberalized episodically through trade rounds. In each round and within each negotiating country, protectionist interests threatened with near certain economic loss from liberalization joined together to make sure they were not on the chopping block. Each nation devised different mechanisms by which to circumvent protectionist interests at home with the result that liberalization Rounds were highly polarized and occurred under the shadow of politics at home. Deals were precarious and politicians needed to worry about whether or not they could find support at home for agreements initialed in Geneva. As the membership of the GATT expanded and there were increasing efforts to discipline behind-the-border measures, legislating liberalization became increasingly more difficult. As a result, legislation through trade rounds slowed appreciably by the 1980s. In the place of specific strictures, countries often agreed to general principles.

This inability to specify more detailed rules and procedures on trade opened the door for increased de facto delegation to the secretariat over the course of the GATT years, and considerable de facto delegation to the dispute settlement system since the creation of the WTO. In theory, the secretariat at the GATT/WTO is granted limited independence from the membership, and the Director General, elected by the members, is given little real authority. The members have stated clearly that autonomy might lead the

organization to promote policies inconsistent with political pressures at home, a problem of particular importance for the more powerful nations participating in the regime. As a result, the members of the secretariat rarely chair committees and the growth in the number of professionals, as opposed to support staff, has been far less than expected, given the rapid increase in membership. Still, the functions of the secretariat have grown with the increases in size and complexity of the organization.

This growth in the secretariat's functions is not surprising. As the demands on the organization increased to both provide information on trade practices and to support the process of trade liberalization, the secretariat was forced to perform more functions and become the legal memory of the regime. All forms of delegation were unintentional – members never wanted an autonomous organization in Geneva. But the inability of the membership to concur easily on comprehensive and detailed rules, both for trade policy and the specific scope of the secretariat's powers, led to more autonomy than most countries would have wanted. And key, the agent has a consistent and often different position from the membership on trade matters, consistently advocating more open markets.

The secretariat performs at least three functions that have been delegated de facto by the members. First, the secretariat is the keeper of information. Not only does it collect and disseminate data provided by members to others in the organization, but it also collates and organizes-- and often creates-- the data sets on trade flows and trade restrictions used as bases for trade round negotiations.

Second, the secretariat plays a key role in dispute settlement. Even though members do not allow cases to be based on formal precedent (i.e., although precedent is

persuasive, there is no stare decisis), the secretariat helps assure the intellectual continuity of panel decisions. Even with no formal legal role, members of the secretariat influence decisions, through advice to panel participants and recommendations on written panel reports. The effect has been generally consistent panel reports and far fewer decisions that would be politically difficult to administer. Particularly through the dispute settlement panel stage, the secretariat is the collective memory of the organization: understanding the political pressures of members, it serves to mediate the dispute process and increase the likelihood that decisions resonate with political realities.

Third, the secretariat provides support for small developing nations. The regime provides training for government officials on how to interpret rules and how to stay in compliance with these rules. Training sessions both transfer information and socialize trade officials of new members to support the underlying purposes of the regime. Past employees of the secretariat advise developing countries on a range of activities, from dispute panel processes to the collection of appropriate information for trade talks, to reform proposals on how to increase their voice in the organization. While the larger nations can rely on expertise at home, smaller and developing economies rely more extensively on the secretariat for support.

Further, while the first director generals were selected because of their expertise as international civil servants, the most recent appointees have political rather than technical backgrounds. The lack of expertise at the top of the organization, either in economics or in international law, has created a widening division between the professional staff and the political leadership. Needing to rely upon the permanent staff for support, the relationship between the Office of the Director General and the civil

service has become increasingly strained over time. This is not to suggest that power resides in the Director General's office. He and his staff are as constrained by the membership as is the secretariat. Still, the relationship between the professional staff and the director general's office has evolved with changes in the organization. Where the early secretariat saw the director general as its representative to the contracting parties, the more politicized relationship of recent years has led the secretariat to view the director general's office as pursuing interests often at odds with the more liberal policies being promoted by the professional staff.

The mantra among the staff and the members of the WTO is that the organization is 'member driven;' the reality of a complex organization supported by an educated and sophisticated staff is not entirely consistent with this image. Institutional change has had unanticipated effects on the organization and given that the rules of the WTO became more complex and inclusive, some agent had to be entrusted with the job of maintaining the institutional memory important to interpretation of rules and monitoring the evolution of members' trade policy. Unintentionally, the role of the secretariat has expanded, even as the membership attempts to keep the bureaucracy in a subservient role and as the leadership has become more a political position and less one entrusted to an individual with trade expertise. This unintentional de facto delegation may be best exemplified in the history of delegation to another agent-- the Appellate Body.

How did Judicial Delegation Occur and is it Binding?

The WTO's dispute settlement rules and processes are best understood in the context of the GATT's dispute settlement rules and processes. The GATT was created to facilitate

bargaining among participants over the regulation and liberalization of trade policy. Although concerned that nations live up to their promises, the mechanism for oversight depended upon a nation, in the name of a producer, complaining about a violation. The secretariat had neither oversight nor judicial power. Although the secretariat compiled data on trade practices starting in 1989 through the Trade Policy Review Mechanism (TPRM), the data in these reports constituted neither formal grounds for a dispute nor legal evidence of a country's trade practices. Monitoring occurred through oversight by individual contracting parties; when a complaint was filed, the Secretariat assisted in the formation of a panel. If the panel found in favor of the complainant, and the complainant did not block a consensus to adopt the panel report, then the contravening party was required to change its behavior. In the absence of a change in practice, little could be done other than sanctioning retaliation -- though that too required a consensus.

The weakness of the GATT dispute settlement procedure became increasingly apparent in the 1980s. In the early years of GATT, 1948-59, contracting parties brought a relatively few (53) legal complaints against each other. The panel procedure mentioned above was developed in these years and it was used in over half of these cases (Hudec 1999). As the number of contracting parties grew, the number of conflicts increased. Perhaps reflecting dissatisfaction with the settlement procedures, the number of formal complaints did not rise and, in fact, fell after 1963. While there were almost 60 cases that were dealt with by the dispute settlement process through 1962, only one new case was brought forward through 1970. Hudec argued the issue was legitimacy—the process was viewed as unfair (Hudec 1999). Legitimate or not, the case load increased in the 1970s to a total of 32; in the 1980s the panel process began to be regularly invoked (Hudec 1999).

Of the 115 complaints filed in the 1980s, 47 led to panel reports. However, only about two-fifths of rulings for the complainant resulted in full compliance by the respondent (Busch and Reinhardt 2002, 473). Nonetheless, the increased caseload forced the Secretariat to create a separate legal division, which had the effect of encouraging even more legal complaints. As the number, visibility, and importance of cases increased so too did the number of cases in which consensus was blocked.

During the 1970s and 1980s, in response to a growing trade deficit, perceptions of unfair trade practices abroad, and frustration with the sclerotic GATT dispute settlement system, the U.S. increasingly turned to domestic law to deal with its trade disputes. Specifically, a "unilateral" approach to addressing trade disputes was enacted by the U.S. Congress in the form of Section 301 of the Trade Act of 1974. Section 301 permits (and in some cases, requires) the President to impose retaliatory trade sanctions on countries engaging in practices that are "unjustifiable, discriminatory, or unfair" -- as determined by the USTR. Thus, when a foreign government blocked the GATT dispute settlement process, the U.S. government often found itself in a position of threatening unilateral trade retaliation against that government unless it agreed to change its trade practices in accordance with Washington's demands. This American approach to the settlement of trade disputes was not viewed favorably by the rest of the world.

As part of an attempt to credibly commit to the regime in the post-Cold War days, the U.S. championed a change in dispute settlement procedures.² In 1989 the US had supported a new dispute settlement understanding adopted in the Midterm Review of the Uruguay Round; in the next year, the U.S. heralded an even more radical change in the

² For more details on this argument see Goldstein and Gowa, 2003.

rules. The underlying theme was that it was time for member nations to agree to give up their right to block a consensus in the establishment of panels, the adoption of panel reports, and retaliation. Initially aligned closely with Canada but not the other Quad members, the U.S. proposal included not only the automatic adoption of panel reports, but also created a right to appeal to a new Appellate Body whose purpose was to oversee the work of panels on questions of law. The time limits established in this process would be modeled on its own Section 301 statute. For the United States, this seemingly radical position was contingent on a crucial proviso -- that the substantive rules adopted in the Uruguay Round had to be adequately specific and reflect U.S. policy objectives.³

At home, increased delegation under these terms was argued to be consistent with American interests: the U.S. would remain more often in compliance with WTO rules that reflected its interests and policy objectives than would its trading partners. If the WTO's substantive rules were to its liking, and the dispute settlement procedures were both consistent with the timeline for action under Section 301 and could ultimately authorize retaliation for noncompliance, then a more legalized WTO dispute settlement system would legitimize U.S. use of its market power to pressure other countries to comply with U.S. trade policy objectives. Tellingly, the U.S. shifted to this position on dispute settlement reform at the end of 1990, at the same time that it reached agreement with the EC to impose the results of the Uruguay Round on developing countries via the "single undertaking." Few nations agreed with the U.S. analysis of who would end up in front of panels. But curbing U.S. unilateralism was one of the most salient elements in

³ This description of the U.S. position in 1990 is documented in USTR, Dispute Settlement, U.S. Objectives for Brussels, in The U.S. Delegation Briefing Book for the Brussels Ministerial, December 1990 (on file with the authors).

both Japan's and the EC's publicly stated interest in the Round and both endorsed the reforms.

In the end, the new procedures occupied 35 pages of text and an elaborate accompanying description. The process is far more complex and precise than in the past and covers all areas of WTO agreements, including Section 301 actions by the United States. The DSU is far more obligatory, automatic, and apolitical than the GATT rules. The effect of the change -- a vast increase in use of the DSU -- was far broader than was anticipated by most. While 535 dispute settlement complaints were filed in the 46-year period of the GATT system, 269 complaints were filed in the first eight years alone of the WTO system.⁴

Reform meant that two substantive changes occurred in the WTO judicial system. First, judicial action became more automatic. A consensus is now required to *block* the formation of a panel, adoption of a report, or an authorization of retaliation for continued non-compliance -- a reversal of the former rule that required a consensus to move through each of these stages. Of course, petitioners would not agree to block establishment of a panel they are demanding, and prevailing parties would not block the adoption of favorable panel reports.

Second, the reform led to the creation of a judicial body to which nations could appeal panel reports. The Appellate Body's mandate is formally limited to the review of legal findings made by panels, given the facts established by the panel. The Appellate Body has seven members, chosen by the Members at large, and appeals are heard by a subset of three members.

⁴ Data for the 1995-2003 period is from Leitner and Lester 2004. Data from the 1948-95 period is from Busch and Reinhardt 2002.

To what extent are the decisions of the Appellate Body binding? As a matter of international law, there is a legal obligation to comply with their decisions (Jackson 1997). But as a matter of domestic law, few if any national legal systems give direct effect to Appellate Body decisions (Steinberg 1997; Govaere 1997). As a matter of domestic law, sovereignty has not been “delegated” to the WTO Appellate Body. Therefore, behaviorally, compliance is a domestic political decision, analyzed in greater detail below.

The preceding analysis of the negotiating history behind the move to legalization of GATT/WTO dispute resolution suggests that it was not intended to lead to expansive judicial law-making. The switch to automatic dispute resolution, and the establishment of the Appellate Body were seen by the United States as an opportunity to foster implementation of and compliance with the deals struck in the legislative process -- even if those deals were not optimally efficient and even if they were not considered equitable. The dispute settlement process was to fulfill that purpose by offering a neutral judicial process to enforce the WTO agreements. The United States was willing, and remains willing, to delegate to WTO dispute settlement the authority to enforce the WTO “contract.” The U.S. government may win a few cases, and it may lose a few, but WTO dispute settlement losses are of little consequence if the overall effect of the system is to help enforce substantive agreements supported by the United States (Steinberg 2004 b). Hence, to the extent that it is performed effectively, the judicial function helps reinforce political support for the WTO by powerful countries and from the U.S. perspective the DSU is a vehicle by which the U.S. government may legitimately challenge WTO-inconsistent practices by foreign governments, and it has simultaneously helped solve

America's credibility problem arising from unilateralism. From the U.S. government perspective, the radical judicial reforms of the Uruguay Round represented not a multilateralization of U.S. unilateralism, but an Americanization of the GATT/WTO dispute settlement process. It was not some new form of delegation and certainly, it was not construed as binding, in the sense that the US could refuse to comply with an Appellate Body report, if inconvenient.

Understanding Judicial Activism—and its limits⁵

Few, if any, architects of increased legalization at the WTO foresaw the institutional development that would follow. As in domestic legal systems, rules and principles guiding the interpretation of public international law permitted the Appellate Body to take a range of interpretive stances: at one extreme, a restrained interpretive stance that is highly deferential to the express consent of states; at the other extreme, an expansive interpretive stance that is less deferential to state consent, favors dynamic interpretation of treaty provisions, and expands upon terms and gaps. Largely in the interests of completeness, coherence, and internal consistency of WTO law, the Appellate Body chose a more expansive stance both on questions of whether to interpret and on the method used for interpretation. The resulting judicial decisions have created an expansive body of new law.

WTO judicial law-making has two dimensions: filling gaps and clarifying ambiguities. Gap-filling refers to judicial law-making on a question for which there is no

⁵ For more detail on the arguments in this section, see Steinberg 2004b.

legal text directly on point, whereas ambiguity clarification refers to judicial law-making on a question for which there is legal text but that text needs clarification.⁶

First, the DSU's silence on many procedural questions has been seen by some as an invitation to the Appellate Body to make procedural rules. In some cases, the Appellate Body has created law that fills procedural gaps in WTO agreements, even though the existence of the gap resulted from sharp disagreement among Members about how to fill it. For example, in *United States - Import Prohibition of Certain Shrimp and Shrimp Products (U.S. - Shrimp-Turtle) (2000)*, the Appellate Body decided -- without clear guidance from WTO agreements -- that dispute settlement panels could consider *amicus curiae* briefs submitted by non-state actors. In so ruling, the Appellate Body relied on general language in DSU Article 13, which provides that panels have a right to seek information and technical advice from any individual or body that it deems appropriate. Regardless of the merits on the question, the Appellate Body's interpretation of Article 13 was made in the context of several years of north-south deadlock on the question of whether to permit *amicus* briefs: few developing countries would have consented to an agreement with that outcome, yet the Appellate Body chose to interpret the DSU as supporting it.

Similarly, in *European Communities - Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas)(1997)*, the Appellate Body established that private lawyers may represent Members in its oral proceedings, despite EC and U.S. opposition on grounds that the practice from the earliest years of the GATT was to permit presentations in dispute settlement proceedings exclusively by government lawyers or

⁶ Ultimately, the distinction between gap-filling and ambiguity clarification may be fragile, but the distinction is respected here out of convention. See generally Hart 1961.

government trade experts. The Appellate Body acted at odds with nearly fifty years of GATT practice, reasoning that nothing in 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." At the panel stage, this practice of permitting participation by non-government lawyers was subsequently adopted in *Indonesia - Certain Measures Affecting the Automobile Industry (Indonesia - Autos) (1998)*.

Second, the WTO Appellate Body has engaged repeatedly in a form of law-making by which it has given specific meaning to ambiguous treaty language. Such clarifications may cause a negative political reaction by Members or non-governmental stakeholders that engaged in behavior that was within a range of possible meanings, given the ambiguity. For example, in *U.S. - Shrimp-Turtle*, the Appellate Body decided whether the United States could rely on GATT Article XX(g) to ban the importation of certain shrimp and shrimp products from Members that did not maintain laws that guaranteed particular methods of protecting endangered sea turtles in the process of shrimp fishing. GATT Article XX(g) excepts 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 the question of whether such exhaustible natural resources must be located within the jurisdiction of the country invoking the exception. Earlier decisions suggesting that they must catalyzed enormous debate by the members. The Appellate Body offered a dynamic interpretation of the conditions under which the GATT Article XX(g) exception for conservation of exhaustible natural resources could be invoked, stating that it must be read "in light of

contemporary concerns of the community of nations about the protection and conservation of the environment." After concluding that the measures in question fell within the meaning of Article XX(g), the Appellate Body interpreted the chapeau to Article XX and established at least five specific factors that would apply in considering whether a measure contravenes the terms of the chapeau. Some of the factors had no textual lineage (e.g., whether the respondent's actions have an "intended and coercive effect on the specific policy decisions of other members"). In short, the Appellate Body ruling provided an approach to balancing trade-environment issues, despite WTO Members having been deadlocked for a decade about how to achieve balance on the question (Steinberg 2002).

Third, in a number of instances, the Appellate Body has given precise and narrow meaning to language that was intentionally left vague by negotiators, either because they could not agree on more specific language, or in order to permit a range of alternative behaviors or national practices. For example, in three decisions, *United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* (US - Lamb Meat) (2001) *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* (2000), and *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, (2002), the Appellate Body fleshed out the causation analysis to be used in safeguards cases, which Uruguay Round negotiators intentionally left ambiguous.⁷ In the *Lamb Meat* case, for example, based on the obligation not to

⁷ In the Uruguay Round negotiations, U.S. negotiators had refused to agree to a test that would require national authorities to quantify the relative effects of imports and other factors on domestic industry. In so refusing, the U.S. negotiators intended to enable the ITC to continue

attribute injury from other causes to imports that were the subject of a safeguards investigation, the Appellate Body established an affirmative requirement that national authorities analyze not only the nature but also the "extent" of other causes. A similar approach was taken in the anti-dumping context in *United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan (U.S. - Japan Hot-Rolled Steel)*(2001). The U.S. government and commentators have identified several other cases in which the Appellate Body or dispute settlement panels have given a specific and narrow interpretation of language in WTO agreements that was intended by at least some of its negotiators to be ambiguous and to permit a range of national practices (U.S. Secretary of Commerce 2002, Tarullo 2003, Barfield 2001). Decisions like these might enhance efficiency (Sykes 1991), but they are certain to engender negative political reactions in countries that intended to consent to broader interpretations.

Finally, a conflict between GATT/WTO texts (or between text and GATT practice) may create an ambiguity and in a handful of cases, the Appellate Body has read language across GATT/WTO agreements cumulatively in a way that has generated an expansive set of legal obligations. Perhaps most controversially, in *U.S. - Lambmeat* and *Argentina - Safeguard Measures on Imports of Footwear*, (1999), the Appellate Body ruled that national authorities imposing a safeguards measure must demonstrate the existence of "unforeseen developments." In the 1952 *U.S. - Hatters' Fur* case, a GATT Working Party had agreed that the application of Article XIX safeguards measures could be based on an argument that an unexpected degree of change in consumer tastes that increased imports constituted demonstration of "unforeseen developments." Given that

using its qualitative approach to analysis of the "substantial cause" question in safeguards cases (Reif 2002).

implicitly broad interpretation of the phrase, which would seem to allow almost any increase in imports to constitute "unforeseen developments," subsequent GATT panels did not require national authorities to demonstrate "unforeseen developments" prior to imposing safeguards measures. Moreover, the WTO Safeguards Agreement makes no reference to a requirement to demonstrate "unforeseen developments," and the negotiators expressly considered and rejected inclusion of any such requirement. The cumulation of GATT practice, relevant texts, and negotiating history created an ambiguity over whether "unforeseen developments" must be demonstrated in safeguards cases. 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 to the conclusion that a demonstration of "unforeseen developments" must be shown if a safeguards measure is to be applied.

This expansive interpretive stance by the Appellate Body is not without limits. It is constrained by politics. For example, powerful members, particularly the EC and the United States, have had a *de facto* veto over the appointment of Appellate Body members: in the WTO's early years, these powerful members engaged in a comparatively cursory review of AB nominees; in more recent years, as the AB's capacity to make law became apparent, the United States began engaging in a thorough review and interview of AB nominees, blocking the appointment of some nominees who were seen as too activist. Similarly, members are not shy about complaining when the AB engages in law-making they dislike, and proposals by powerful members to rewrite parts of the DSU in the Doha Round may have had a sobering effect on the Appellate Body. To some extent, agent slack is limited.

Three key points, suggested by this analysis, arise from WTO case law and the reaction of members to it. First, judicial action has supplemented legislative action—under the guise of interpretation, the Appellate Body has legislated. Second, in just about all cases, Appellate Body interpretations have favored more openness, the preference of the agent.⁸ This has become particularly apparent in cases that have increasingly reigned in the use of antidumping duties, countervailing measures, and safeguards measures, and—more recently—in successful challenges to the maintenance agricultural protection and subsidization.⁹ Third, judicial activism occurs in the shadow of power politics, both between nations and within nations. The Appellate Body is not ignoring the interests of the membership: it often acts to induce behaviors that are consistent with the interest of members but are politically difficult to implement at home.

Understanding Trade Delegation and Compliance

Two observations preface our analysis of trade delegation. First, delegation both during Rounds and to the Appellate Body has moved policy in the free trade direction. Second, once the agent renders a decision, principals comply with the finding to a great extent, even when inconvenient.

The observation that the dispute settlement system favors openness is intuitive: in all cases, complainants advance interpretations of WTO agreements that challenge a respondent's trade barrier, and respondents argue for interpretations that would permit the

⁸ Tarullo 2003. We note that complainants win almost ninety percent of all dispute settlement cases.

⁹ See, e.g., rulings against the EC's banana regime, beef hormones directive, subsidization of sugar, and restrictions on GMOs, and against the United States' trade remedy laws (particularly those used to protect steel) and cotton subsidies.

maintenance of the barrier. If the complainant wins even some of the cases, the result is more open trade. For WTO cases initiated before 2001, 89 percent of the 152 dispositive reports held that at least one of the national measures at issue was WTO-inconsistent (Busch and Reinhardt 2003). Qualitative assessments of Appellate Body decision, such as those by Dan Tarullo, have also shown a liberalizing bias (Tarullo 2002).

On compliance with WTO dispute settlement decisions, only in about one out of twenty dispositive WTO cases, is a losing party held to have failed to comply within a 'reasonable period.' This 95 percent rate of compliance with judicial decisions would be respectable in most national legal systems. That it persists in an international legal context, which many describe as anarchic, may be surprising. This compliance rate is particularly impressive, given that compliance with WTO dispute settlement decisions typically involves political defeat from historically powerful and intransigent protections sectors. Why does the WTO dispute settlement system enjoy such a high compliance rate?

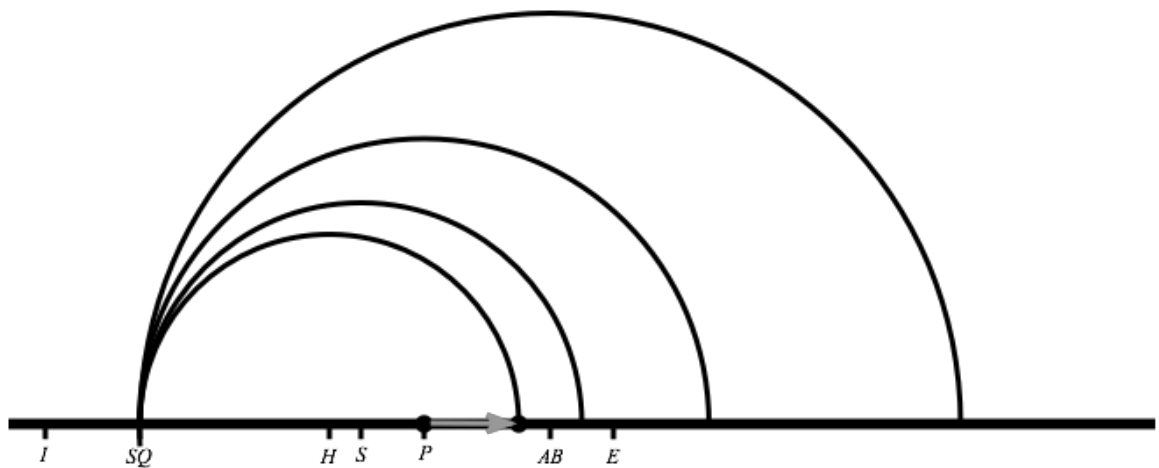
The essence of the mechanics by which the dispute settlement system enjoys such a high compliance rate is rooted in decentralized enforcement—a legitimized retaliatory threat that reconfigures domestic politics in the contravening country. At the interstate level of analysis, when ruled against, a Member is expected to comply within a "reasonable period of time" (which is determined by a WTO panel). If not, the adversely affected complainant can retaliate. Retaliation takes the form of raising tariffs on goods originating in the territory of the contravening country to a level that is intended to have the effect of eliminating demand for the imports in proportion to the adverse effect of the contravening measures. At the domestic politics level, the potency of this mechanism

becomes clear. The dispute settlement system provides national leaders with a way to get around domestic pressures to keep the market closed. The potential of retaliation is an important means to motivate exporters who will be hurt by the sanction. Since countries publish a list of products that will be effected by the sanction (in the US case, the government publishes a proposed retaliation list in the Federal Register thirty days prior to the effective date of retaliation) this has the effect of pitting those politically powerful export-oriented producers against the industry that champions the contravening measures. If targeted smartly, the proposed retaliation list mobilizes sufficient political muscle within the contravening country to result in WTO-consistent reform. In this way, the DSU works in conjunction with domestic laws, regulations, and politics to foster compliance with the legislative outcomes that are codified in the WTO agreements (Goldstein and Martin 2000).

Thinking about politics in a one dimensional preference space can further illustrate why compliance should not be surprising and can shed light on other relationships. We do this below, in figure 1. Imagine a simple set of preferences about liberalization based on non-controversial assumptions. First, although both exporters and import competing groups –firms and labor – influence Washington policy, the latter groups, which face a certain and substantial loss from liberalization, are more likely to get around collective action costs and voice their preferences to Congress than the former. Thus, we align the preferences of Congress closer to the latter group. Second, the size of a constituency determines trade policy preferences for elected officials. Export-oriented producers are more likely than import-competing producers to be geographically dispersed; a high proportion of local production is consumed locally. By that logic,

which has been demonstrated empirically, import-competing producers have more influence over smaller electoral districts than larger ones. (Hiscox 1999; Bailey, Goldstein and Weingast, 1997) Hence, the House is less free trade oriented than is the Senate, and they are both more prone to trade closure than is the President. Finally, since all dispute settlement bodies include non-Americans, we assume that their preferences will be more pro-liberalization than any domestic actor, except export interests.

Figure 1



In the diagram above, the continuum ranges from no liberalization on the left to liberalization on the right. *I* represents the ideal point of import competing groups; *SQ* is the status quo. The ideal positions on liberalization (whether through negotiation or other means) of the House, Senate, and President are represented by *H*, *S* and *P*, respectively. *AB* is the preference of the Appellate Body, and *E* are export interests. These are general preferences toward trade liberalization, not preferences in any particular case or with respect to any particular industry. The win set for each actor is

established as an arc, with each actor's ideal point equidistant from the status quo (on the left) and an increase of liberalization (on the right) beyond which it would prefer reversion to the status quo.

Given contemporary procedures for negotiated trade liberalization, such as those established under current Trade Promotion Authority, the President proposes a trade deal initialed in Geneva. That negotiated deal, however, must be acceptable to both the House and the Senate. A new policy will be acceptable to all if it falls within that small circle centered on the House. In this scenario, the President proposes a position at his ideal point and Congress agrees. The circle on the line represents this outcome.

Now consider the situation when a matter is litigated. Eventually, the Appellate Body makes a decision. As long as it rules within the preference space represented by the arrow, the U.S. should comply with the ruling. Why wouldn't the President prefer a position at his ideal point and so reject the AB ruling? In practice, if the President were to respond by proposing his ideal point, Congress would bargain with him and the outcome, which would be in the absence of agenda control by the Appellate Body, would likely be closer to the Congress's ideal than the President's. In such a world, the President has an interest in giving the AB agenda control and Congress will not object, as long as the outcome is within the win set that centers on the House.

We suggest this model only as a simple illustration. Our central point is that it is not counterintuitive to have the US President go along with liberalization efforts by the Appellate Body and similarly, for Congress to not object to this judicial liberalization. Given this very rudimentary model of domestic preferences, such liberalization may be an outcome that everyone sees as superior to the status quo.

Three additional observations, none of which should be counterintuitive, derive from our simple diagram.

First, the President may be able to move outside the House's and Senate's respective winsets and liberalize further than Congress would like, if compliance can be achieved by a regulatory change or sole Executive action (such as an Executive Order). In those cases, where compliance can be achieved by liberalizing without an affirmative act of Congress, the President has considerable freedom to do what the Appellate Body prescribes. However, the President can not accommodate the Appellate Body by liberalizing so much that he catalyzes veto-proof action by both the House and the Senate. Empirically, we note many cases in which the United States has complied (partly or fully) with an Appellate Body decision through sole executive action that arguably went further than the House (or Congress) would have preferred, including *U.S. - Shrimp-Turtle*, *US-Lambmeat*, and *United States - Subsidies on Upland Cotton*.

Second, the Appellate Body must usually engage in some compromise and accommodation to enjoy compliance, particularly when US compliance requires an act of Congress. If Congressional action is required for compliance, then the United States will comply only if the prescribed action is within the House's winset. Assuming that the Appellate Body prefers substantially more liberalization than the House, such that its ideal point resides outside the House's winset, then the Appellate Body will need to offer compromise opinions. Empirically, it appears that the Appellate Body has offered such politically sensitive reports in several cases. For example, in *US-Shrimp/Turtle*, the Appellate Body could have limited the scope of GATT Article XX(g), which might have created conflicts between GATT and various multilateral environmental agreements and

would certainly have angered environmentalists and members of Congress, but it evaded the question. In several cases, the Appellate Body has embraced the doctrine of judicial economy,¹⁰ thereby limiting the scope of judicial lawmaking and enhancing the prospects for compliance.

Third, the model may be used to suggest longitudinal change. The dispute settlement process can move policy toward liberalization by influencing the number and type of groups on the left side of the continuum. Once liberalized and faced with competition, import-competing firms and jobs disappear. Once gone, the political landscape shifts. House, Senate, and Presidential preferences may shift to the right. In this sense, Appellate Body rulings can have direct effects on US politics. The existence of international delegation, however, does not imply an inevitable move toward openness. Competition may lead to a changing number of actors on either side of the continuum. With the growth of competition at home, more firms are likely to find themselves aligning on the left, stopping any attempt to open the US market; likewise, the growth of export opportunities, or the threat of retaliation, will mobilize exporters on the right hand side and could move policy in that direction. In the end, it is the preferences of US industries that will move policy in one direction or the other, no matter the degree of delegation to the WTO dispute settlement system.

Conclusions

From the start, delegation of authority in the United States, first from Congress to the President, and then from the President to a multilateral trade regime, has been a

¹⁰ See, e.g., *United States - Measures Affecting Imports of Woven Shirts and Blouses from India*, WTO Doc. WT/DS33/AB/R, pt. VI (adopted May 23, 1997).

means to get around domestic resistance to trade reform. America's tolerance for de facto delegation to the WTO and judicial lawmaking continues to perform that function.

Today, more than ever, liberalization is difficult and export interests do not necessarily hold sway over powerful private groups unwilling to face international competition. Partly because of powerful and recalcitrant protectionist sectors, the most optimistic expectation for the Doha Round was a minimalist package. As of this writing, the Round delivered even less. While big bundled deals gained majority support in the United States during the GATT years, judicial action has come to be an increasingly salient and effective means of defeating recalcitrant protectionism. In trade rounds, U.S. steel, sugar, cotton, apparel and other inefficient producers have succeeded for a half century in assuring their continued protection: facing certain, devastating losses from liberalization, they have remained united in successfully keeping their protection off the bargaining table, even if including their liberalization in U.S. offers could have helped U.S. export-oriented producers. Liberalization of these sectors has been stuck in the mud.

The WTO dispute settlement process is one method to keep markets opening, even given this stalemate. In broad terms, granting agenda power to the Appellate Body forces US leaders to compare the liberalizing stance of the Appellate Body in its reports with the status quo; if the Appellate Body has been strategic, its overall stance on liberalization will be closer to those of US leaders than the status quo.. Mechanically, at the end of each individual dispute, the threat of retaliation usually pits one of the offending protectionist sub-sectors against a large number of export-oriented interests. If retaliation occurs, certain loss will now befall the exporters, motivating them to support

ending the protection under challenge. In the dispute settlement context, the export-oriented producers who in the legislative context merely had a possible gain are now threatened with a clear and credible loss, motivating them to act decisively against protection. This asymmetry – many exporters against a single import-competing group– creates the political space that pushes liberalization forward. As long as the Appellate Body does not deviate too far from underlying interests in member countries, they can rule, the United States will comply, and liberalization moves forward. Further, liberalization itself can be self-reinforcing: as groups are unable to maintain protection and cannot compete, they ‘peel’ off and become less powerful domestic interests. To be sure, the Doha Round negotiations increasingly operated under the shadow of the law and politics of these liberalizing judicial decisions; in this way, litigation may be feeding back onto legislation (Steinberg & Josling 2003). In any case, the "judicial liberalization" of WTO judicial action is currently a crucial piece of the contemporary WTO liberalization story.

This important role for the WTO dispute settlement system is reminiscent of the crucial liberalizing role played by the ECJ in the 1960s through the late-1980s-- until the Single European Act. In that period, the Council was paralyzed by the Luxemburg compromise, which effectively required unanimity for any important action. The ECJ's exercise in "negative liberalization," striking down national protectionist measures in such famous cases as the *Rheinheitsgebot* and *Cassis de Dijon* cases, is credited with being the main engine of internal market liberalization in the period. Of course, the ECJ's role is in some ways distinguishable from that of the WTO Appellate Body in the contemporary period: perhaps most significantly, the ECJ established direct effects and

unqualified supremacy of its decisions in member-state legal systems, whereas the Appellate Body has to rely on the political mechanisms described above for compliance.

As long as these WTO agents are supporters of open trade, the agency relationship will lead nations to continue to open up markets. For powerful WTO members, like the United States, they will abide by these liberal decisions to the extent that they catalyze decisive action by efficient, export-oriented producers and are favored by elites and leaders who still see openness to be in the national interest.

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