

# Resolving or exacerbating disputes?

## The WTO's new dispute resolution system

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### **International law in international politics**

International law and international courts are experiencing a renaissance. Historically maligned by realists as irrelevant, and by legal scholars who questioned whether international law deserved even to be called 'law', they are today the focus of a renewed interest. Seventeen international judicial bodies and 37 quasi-judicial international bodies have been created since the end of the Second World War, and if anything the trend is accelerating. The 1990s witnessed the formation of more international judicial bodies than any other decade,<sup>1</sup> and a proliferation in the use of existing international courts.<sup>2</sup>

At their best, international legal mechanisms facilitate the peaceful resolution of disputes and have a prophylactic effect, encouraging political actors to think about how their actions might hold up if scrutinized by a third party, such as a court. But there is a problem inherent in the international legal process that raises the question of whether this trend towards using legal bodies to enforce international rules is a positive development. Put simply: the political-judicial balance that at the domestic level allows legal bodies to offer independent and authoritative rulings, while keeping courts in harmony with political sentiment, does not work well at the international level. International courts are more likely than most courts to generate conflict, yet the international legal and political system is less able to respond in a timely manner to address valid public concerns. Left unaddressed, these concerns can erode support for the international legal system and multilateral strategies in general.

The new dispute resolution mechanism of the World Trade Organization (WTO) is a case in point. The WTO's dispute resolution mechanism was reformed

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<sup>1</sup> Cesare Romano, 'The proliferation of international judicial bodies: the pieces of the puzzle', *New York University Journal of International Law and Politics* 31, Summer (1999).

<sup>2</sup> Karen J. Alter, 'International legal systems, regime design and the shadow of international law in international relations', paper presented at the American Political Science Association Conference, Boston, MA, 2002, p. 45.

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in 1995, as part of the Uruguay Round, to make it more effective in enforcing WTO trade rules. Ironically, the greater ability to enforce WTO rules has contributed directly to the political difficulties the WTO currently faces. From the transatlantic trade wars over bananas and beef with hormones to the pressure on developing countries to respect intellectual property rights and to allow non-governmental organizations to participate more in WTO proceedings, dispute resolution rulings have given groups on the left and the right of the political spectrum, and in the North and South of the international political system, reason to be deeply unhappy and united in opposition to the WTO. The enhanced dispute resolution system is not the only reason protesters are fighting globalization in the streets of Seattle, Sydney and elsewhere; but the issues provoked by the dispute resolution process have mobilized opposition, and shaped the demands of many countries in negotiations in the Doha trade round. How can improving a system to resolve disputes actually exacerbate conflict?

### **A jewel in the crown of the Uruguay Round**

The WTO's new dispute resolution mechanism was to many the jewel in the crown of the Uruguay Round. It offered tangible benefits that did not have to wait to be phased in. And unlike the Trade Agreement on International Property Rights (TRIPS) and the rules regarding free trade in services (GATS), improving the dispute resolution mechanism seemed to offer something for everyone. The new system was to improve the quality of dispute resolution panel rulings, end the practice of states blocking panel decisions and make the retaliatory sanctioning mechanisms of the GATT (General Agreement on Tariffs and Trade) usable. This outcome would satisfy the US Congress and those American firms that had long complained about the unenforceability of GATT rules. The new system would also satisfy other GATT members because, in exchange for these desired reforms, the US promised not to use its unilateral tool of section 301 to retaliate against 'unfair' trading practices. Developing countries were also going to be big winners. They would gain an effective legal tool enabling them to confront big powers, and each other, and they were promised special allowances to help them benefit from the WTO system and its dispute resolution mechanism.

These promised benefits were to be achieved through an institutional reform of the existing GATT dispute resolution system. The Achilles heel of the GATT system was the ability of states to block formation of panels and the adoption of panel rulings. There were a number of gentlemen's agreements among states not to exercise this right to block, but they continually broke down. The GATT system resolved 53 disputes between 1948 and 1959; it was used successfully only 7 times in the 1960s, and 32 times in the 1970s. In the 1980s, countries significantly increased their use of the GATT dispute resolution system; but, as the number of cases rose, blocking of panels became a significant problem. According to Robert Hudec's data, 25 per cent of the disputes initiated in the

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1980s, and fully half of all complaints raised by developing countries, were either blocked or withdrawn because it was clear that a GATT ruling was not going to lead to a policy change.<sup>3</sup> In the 1990s, before the new system was operational, 40 per cent of the panel reports (12 out of 29) were blocked.<sup>4</sup> Blocking a panel report meant the report was not binding, and was not published—in other words, no formal finding of a violation existed.

The dispute resolution reforms changed decision-making rules so that proceeding from consultations to panel formation, from panel formation to the issuing of a binding report, and from the issuing of a report to implementation and if necessary retaliatory sanctions is virtually automatic. Whereas previously *adoption* of a panel report required unanimous support (allowing for a single-country veto), now a country needs unanimous support to *block* a panel report. The reforms brought other changes too: unilateral retaliation is now explicitly prohibited; strict timelines were created for each stage of the dispute resolution process, to speed up the resolution of disputes; and a permanent Appellate Body was created to allow ‘bad’ rulings to be appealed. The reforms also brought greater legal transparency. There is now a single organizational forum for managing disputes, replacing the hotch-potch system where procedures and rules varied by GATT agreement. The arguments of the parties are included in panel and Appellate Body rulings, and information about the proceedings at each stage of the process is available in real time over the internet.<sup>5</sup>

The new reforms came into effect on 1 January 1995. What have they delivered?

### **Assessing the dispute resolution reforms: a mixed bag**

Certainly the reforms have brought many positive results. More disputes are now making it through the resolution process, and thus being resolved. Where there were 229 cases in the first 42 years of the GATT system (1948–89) leading to 98 rulings, since 1995 a total of 282 cases have been registered, resulting in 68 adopted rulings and 64 cases where an out-of-court settlement has been reported to the WTO. According to WTO officials, the more automatic system is speeding up the dispute resolution process.<sup>6</sup> Also, under the new system the US has refrained from unilateral use of its section 301 tool.<sup>7</sup>

Also on the plus side, there is anecdotal evidence that the new system enhances the bargaining power of weaker states. A trade diplomat in Geneva told

<sup>3</sup> Robert E. Hudec, *Enforcing international trade law: evolution of the modern GATT system* (New Hampshire: Butterworths, 1993), pp. 286, 322.

<sup>4</sup> Robert Hudec, ‘The new WTO dispute settlement procedure: an overview of the first three years’, *Minnesota Journal of Global Trade* 8, 1999, pp. 153 at n. 14.

<sup>5</sup> [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm).

<sup>6</sup> Based on interviews at the WTO’s legal secretariat, Geneva, 12–15 March 2001.

<sup>7</sup> Eric Reinhardt, ‘To GATT or not to GATT: which trade disputes does the US litigate, 1975–1999’, unpublished manuscript. Technically the United States retains the right to use section 301 wherever it finds unreasonable and unjustifiable trade restrictions, but it is keeping its promise to go through the WTO system first. On the legality of the United States section 301 policy, see Sean Murphy, ‘WTO upholds US section 301 trade authority as GATT-consistent’, *American Journal of International Law* 94, 2001.

of a long-running dispute with the EU regarding its treatment of soluble coffee. Brazil had not pursued a complaint under the old GATT system because it knew the complaint would be blocked. Negotiations under the new system got nowhere until Brazil notified the EU that it would request formal consultations at the next Dispute Settlement Body meeting—the first step in initiating the dispute resolution process. Three days later, the EU offered concessions it had previously said were impossible, and the dispute was resolved.<sup>8</sup> Indeed, statistical analyses show that both developed and developing countries are more likely to win full concessions in the new WTO system than they were in the GATT system.<sup>9</sup>

These successes are reason enough not to go back to the old GATT system. But there are many disappointments with the new system. Most disappointing, retaliation is not the remedy it was expected to be. In the WTO, states may be authorized to retaliate against WTO-illegal behaviour by raising tariffs on imports from the violating country equal in sum to the damage caused by the defendants' continued protectionism (officially known as 'suspending concessions'). Retaliation works most effectively when the retaliating country picks industries that are domestically powerful in the violating country, with the hope that these industries will put pressure on their government to comply with WTO rules. Retaliation is not, in itself, an ideal tool of enforcement. It is trade-diminishing, and since it comes in the form of higher tariffs on imports, it is paid in essence through a tax on the importing country's consumers. The WTO's retaliation system, however, is especially problematic. Its design undermines the system's deterrent effect and is inherently unfair.

There is no provision for retaliation to correct for past wrongs, and only parties that raised the dispute are authorized to retaliate. This means a country can violate WTO rules until it loses a dispute settlement case and, without cost, drag out implementation until the day retaliation is at hand.<sup>10</sup> And it can continue to violate rules with respect to countries that were not involved in the original WTO case. The system also, by design, allows the rich to buy their way out of compliance by accepting retaliation instead. Whether accepting retaliation is a *legitimate* option is debatable.<sup>11</sup> In any event, the choice exists only for the rich. Developing countries are too poor to choose retaliation over

<sup>8</sup> Based on interviews with a diplomat from a country's permanent mission at the WTO, Geneva, 12 March 2001.

<sup>9</sup> Marc L. Busch and Eric Reinhardt, 'Developing countries and GATT/WTO dispute settlement', *Journal of World Trade* 4: 3, 2003.

<sup>10</sup> There is evidence, however, that, at least for disputes involving anti-dumping and countervailing duties, a state can gain a reputation for violating the law that increases the chance of litigation against it. Todd Allee finds that a country that loses cases challenging anti-dumping or countervailing duties is more likely to have more challenges against it filed in the WTO system. See Todd Allee, 'Going to Geneva: the selection of trade disputes for GATT/WTO dispute resolution', unpublished manuscript, 2003, p. 32.

<sup>11</sup> The legal opinion is that WTO law requires compliance, but many diplomats still see the system as creating an option of accepting retaliation instead. Judith Hippler Bello, 'The WTO dispute settlement understanding: less is more', *American Journal of International Law* 90, 1996; John H. Jackson, 'The WTO dispute settlement understanding: misunderstandings on the nature of legal obligation', *American Journal of International Law* 91, 1997.

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compliance, and often they are too poor even to use retaliation, consuming such a small fraction of the overall exports of rich countries that even targeted retaliation would be politically and economically insignificant. In many cases, too, a developing country cannot find an industry to target without raising the cost of its own exports, or without hurting key domestic groups.<sup>12</sup> Indeed, it seems that Ecuador never implemented its authorized retaliation against Europe in the case of bananas and was unable to find a way to sting the Europeans without hurting itself more.

Also disappointing is that the concessions for which developing countries fought hard have counted for little in a legalized process. There is no concrete way to compel the Dispute Settlement Body to take the 'special situation' of developing countries into account; and American and European skill at negotiating agreements and crafting language in such a way as to protect sensitive economic areas has meant that developing countries lack a legal basis to challenge policies that clearly disadvantage their producers. For example, virtually all of the significant changes in the US and European textile regimes will come in the last year of the transition period. Meanwhile, despite the promises of time to adjust to new rules, in 1997 India lost a case involving TRIPS, even though this agreement supposedly did not create obligations for developing countries until 2000.<sup>13</sup>

Rich and poor countries have sought to redress the imbalance to some extent by creating a law advisory office for poor countries. This innovative agency provides free advice on WTO law, helps train lawyers from developing countries and offers legal services in dispute resolution cases at steeply discounted prices. Most importantly, it facilitates the pooling of developing country resources, allowing legal fees to be split and coordinating multicountry suits that can lead to multicountry retaliation.<sup>14</sup> The idea is excellent. But, like all legal aid schemes, it is far from enough to bring the scales back into balance. Legal suits are still very expensive for poor countries, and developing countries cannot pool resources or continually draw from the well of legal aid to challenge the United States and Europe's latest protectionist tool: countervailing duties that are applied on an item-by-item, firm-by-firm basis. The legal help may also come too late. Studies show that countries are most likely to win concessions by laying their legal cards on the table before a panel is formed, persuading the defendant to concede the case.<sup>15</sup> If this is true, providing limited free legal advice through a legal aid office in Geneva may help defence more than plaintiff. Wealthy firms will hire private lawyers to prepare cases governments can pursue.<sup>16</sup> There will be no aid for a Jamaican tanner to put together a case, and a general claim of unfair discrimination

<sup>12</sup> For critiques and suggested reforms for the WTO's system of retaliatory sanctions, see Petros C. Mavroidis, 'Remedies in the WTO legal system: between a rock and a hard place', *European Journal of International Law* 11: 4, 2000; Joost Pauwelyn, 'Enforcement and countermeasures in the WTO: rules are rules toward a more collective approach', *American Journal of International Law* 94, 2000, p. 335.

<sup>13</sup> India—Patent Protection for Pharmaceutical and Agricultural Chemical Products WT/DS50/1.

<sup>14</sup> <http://www.acwl.ch/MainFrameset.htm>.

<sup>15</sup> Eric Reinhardt, 'Adjudication without enforcement in GATT disputes', *Journal of Conflict Resolution* 45, 2001.

<sup>16</sup> Gregory Shaffer, 'The law in action of international trade litigation: the blurring of the public and the private', unpublished manuscript, 2002.

put forward by the Jamaican trade representative after free consultations with the legal aid office is not likely to intimidate.

That the new system is unfair may matter little to some. International politics is rarely fair. But the reforms of the dispute settlement process created an expectation that power would be equalized by having disputes resolved by law. Instead, preliminary studies show that the transformed system has increased the gap between concessions won by rich compared to poor countries,<sup>17</sup> in no small part because WTO rules favour the rich and the new system heightens the advantage conferred by good (read: expensive) lawyers, which wealthy countries have in abundance. Worst of all, and now more obvious than ever, is that rich countries opt out of the system by accepting retaliation. Together these factors contribute to a sense of injustice in the WTO system that undermines its legitimacy and future international cooperation.

### **The greater problem: exacerbating conflict in the WTO**

Lawyers have long known that international courts are not a panacea for the problems of international law.<sup>18</sup> But is it also true that the new dispute resolution process is generating more conflict? In a news search in Westlaw, the terms 'GATT' or 'WTO' and 'law' and 'violation' yielded 176 newspaper articles from 1985 to 1990, and 2,744 articles from 1995 to 2000. This may just mean that disputes are now more transparent because they are being pursued through the WTO system. But there is reason to believe that the transformation of the WTO system really is creating more conflict, and thus more news to be covered. The bickering over whether or not states are complying with a ruling, the authorization of retaliation, the release of new lists of targeted sectors, and the protests engendered by some WTO rulings are newsworthy events. These events are signs of greater conflict, and serve to focus public attention on disagreements regarding the WTO, and on the less desirable aspects of WTO membership.

It seems that the greater effectiveness of the dispute resolution system itself contributes to greater conflict in the WTO. The ability to block panel reports was a key weakness in the old GATT system, making threats of legal action far less menacing. But the GATT system did ensure that the most conflictual disputes did not escalate. The cases where compliance has been the most problematic in the WTO system thus far—the disputes over bananas, beef hormones and US export subsidies—were all blocked in the old system;<sup>19</sup> and perhaps they should have been. The EU–US bananas dispute was a thorn in the side of

<sup>17</sup> Busch and Reinhardt, 'Developing countries and GATT/WTO dispute settlement'.

<sup>18</sup> Abram Chayes and Antonia Handler Chayes, *The new sovereignty* (Cambridge, MA: Harvard University Press, 1995), pp. 205–9.

<sup>19</sup> Robert E. Hudec, 'Reforming GATT adjudication procedures: the lessons of the disc case', *Minnesota Law Review* 72, 1988; Daniel McNeil, 'The first case under the WTO's sanitary and phytosanitary agreement: the European Union's hormone ban', *Virginia Journal of International Law Association* 39, 1998, p. 110; Paul Sutton, 'The banana regime of the European Union, the Caribbean, and Latin America', *Journal of Inter-American Studies and World Affairs* 39: 2, 1997, p. 19.

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US–European relations for years. The United States does not even produce bananas, and only \$191 million—roughly 0.03 per cent of Europe’s total imports—was at stake. The beef hormones dispute continues to anger US beef producers, while raising the ire of the European public, who find it incredible that at a time when they were spending billions of dollars fighting the man-made BSE epidemic, the WTO could insist there is no good evidence that injecting hormones in beef is actually dangerous. The US victory in the hormones case fuels the claims of producers of genetically modified products. The damaging rhetoric is escalating as Europeans protest against American ‘Frankenfood’ while Americans label Europeans as ‘whiny’, self-righteous snobs who irrationally reject genetically modified foods while smoking cigarettes.<sup>20</sup> These disputes are lightning rods, distorting public perceptions about the vast commonalities in Europe’s and America’s interests and values.

Statistics undeniably show that more disputes are being resolved. But disputes—even when they are ‘resolved’—breed more disputes. Eric Reinhardt finds that being the defendant of a case increases the chance that the targeted state will raise a suit against the plaintiff state by up to 55 times.<sup>21</sup> There are two reasons for this: first, losing a WTO case leads a country to look for cases to bring so that they can show domestic actors that being a member of the WTO brings advantages for their country too; and second, once targeted, countries look for cases they can bring against their accusers as bargaining chips in negotiations over compliance. For example, Europe’s case against the US system of export subsidies was clearly brought as payback for the banana and beef hormones cases.<sup>22</sup>

On the one hand, this could be a positive phenomenon. It could mean that the WTO dispute resolution process harnesses an army of national monitors to police compliance, which helps liberalize the international economy. Retaliation cases could also contribute to compliance, as tit-for-tat reciprocity strategies are shown to do.<sup>23</sup> But one can question whether, in the wider scheme of things, harnessing businesses, bureaucrats and their lawyers to look for fights that do not already exist, and creating for Europe a right to \$4.1 billion of retaliatory tariffs it can drop on the US when it wishes, is a way to build support for liberalizing domestic economies.

Retaliation, more prevalent now that the right to block panel reports is gone, also leads to more conflict, without providing relief for aggrieved industries. Gucci bags, French *foie gras* and British Scotch cost more, upsetting producers of luxury goods, while doing nothing for beef producers in Idaho. And while the banana dispute among Ecuador, the EU and the United States is ‘resolved’, the banana firm Chiquita filed for bankruptcy,<sup>24</sup> and Ecuador was so upset with the

<sup>20</sup> Thomas L. Friedman, ‘Cry of the Euro-whiners’, syndicated *New York Times* column, printed in many papers, including the *Baltimore Sun*, 4 Feb. 2003, p. 17a.

<sup>21</sup> Eric Reinhardt, ‘Aggressive multilateralism: the determinants of GATT/WTO dispute initiation, 1948–1998’, unpublished manuscript, 1999, <http://userwww.service.emory.edu/~erein/>, p. 25.

<sup>22</sup> *United States: tax treatment for foreign sales corporations*, Appellate Body Report, WT/DS108/25 04/02/2002.

<sup>23</sup> Robert Axelrod, *The evolution of cooperation* (New York: Basic Books, 1984).

<sup>24</sup> ‘Chiquita Brands Inc. won US bankruptcy court approval’, *Food Institute Report*, Mon. 28 Jan. 2002.

US–EU settlement that the foreign minister threatened to demand the United States withdraw a military base from his country.<sup>25</sup>

The WTO's new Appellate Body approach, legalistic and at times harshly critical of ad hoc panel rulings, has also contributed to greater conflict. Legalism was already on the rise in the old GATT, as governments turned to lawyers to draft their submissions and argue their cases. But the transformation of the dispute resolution mechanism instilled legalism at a new level. No longer is the goal of a panel report to resolve the dispute; instead, panels mainly want to avoid having their decisions reversed by the Appellate Body. Avoiding reversal means following the Appellate Body's legalistic method, drawn from the Vienna Convention on the Law of Treaties—looking first to the 'plain meaning' of the text in the context of general rules of international law, rather than relying on the arguments of the parties regarding the original intent of negotiators. Given the complexity of the cases, and the legalistic, somewhat dismissive tones of the Appellate Body, few diplomats are willing to serve as panellists any longer. Lawyers who do sign up for service are heavily dependent on the WTO's legal secretariat—the only people with the time and the expertise to evaluate the legal arguments.

As Joseph Weiler has argued, the culture of law has a more pervasive impact on the politics of dispute resolution. Turning the process over to lawyers means that cases are chosen on the basis of their legal merits, not their political merits. The best arguments are saved for court, and not divulged during the consultation phase. Once in court, the goal is to win the case, making compromise harder.<sup>26</sup> The result: legalism supplants diplomacy in resolving the dispute. And, as noted, those with a comparative advantage in lawyering—chiefly, the United States and Europe—become even more advantaged in negotiations over compliance with WTO rules.

Perhaps most worrisome of all has been the willingness of the WTO's dispute resolution bodies to fill in the gaps where political actors failed to go. Filling in is not unique to the Appellate Body. Indeed, GATT panels also filled in lacunae. But the problem is more sensitive now because reports cannot, in practice, be blocked, while the Uruguay Round agreement reaches into areas of regulatory policy not directly related to trade—such as health and safety standards, and environmental protection rules. The shrimp–turtle ruling is a case in point. The ruling itself is a generally well-reasoned, politically artful effort to split the difference. The Appellate Body in fact upheld the inherent right of the US Congress to protect sea turtles by prohibiting the importation of shrimp caught in a way that harms sea turtles. This advance in WTO law should have pleased environmentalists. Developing countries were supposed to find satisfaction in the ruling's condemnation of the Department of Commerce's application of US law, and in the harsh words criticizing the United States for not working hard

<sup>25</sup> 'Ecuadorian banana growers request US base withdrawal due to new import scheme', *World News Connection*, 26 April 2001.

<sup>26</sup> Joseph Weiler, *The rule of lawyers and the ethos of diplomats: reflections on the internal and external legitimacy of WTO dispute settlement*, Jean Monnet Working Paper Series WP 09/00, 2000.

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enough to find a multilateral solution to the problem. In fact, no one was happy. Developing countries were angry that the US law was not rejected for imposing American production standards on foreign producers. They were even more incensed by the Appellate Body's doctrinal development that allowed non-governmental actors, who by definition are not party to the suit, to submit amicus curiae briefs. For developing countries, this doctrine gave to western countries an advantage that they had failed to win in the Uruguay Round. Environmentalists could not see the environmental protection through the Appellate Body's criticism. The sentences vindicating US policy were easy to miss. They were buried in the middle of the ruling, referred to abstract notions, and were offset by over 20 pages harshly criticizing US environmental policy.<sup>27</sup> So developing countries boycotted efforts to improve the WTO's dispute resolution system further, while environmentalists donned sea-turtle costumes and protested against the WTO.

WTO dispute resolution exacerbates conflict by creating expectations that are unfulfilled, while breeding legal suits, supplanting diplomacy with crafty lawyering, focusing attention on differences and widening the circle of disgruntled domestic actors. Rulings themselves exacerbate conflict, even though panels and the Appellate Body are doing only what states have asked them to do, and despite sound legal reasoning and attempts at judicial diplomacy. This system stands in contrast to the GATT system, where the requirement of unanimity forced states and panellists to rely on diplomacy in the resolution of disputes, avoiding damaging retaliation, and helping to ensure that legal rulings did not run roughshod over politically sensitive issues.

<sup>27</sup> The key sentences upholding the US law protecting sea turtles came on pp. 53–4:

In its general design and structure ... Section 609 is not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality of sea turtles. Focusing on the design of the measure here at stake, it appears to us that Section 609, cum implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species ... The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one, a relationship that is every bit as substantial as that which we found in *United States–Gasoline* between the EPA baseline establishment rules and the conservation of clean air in the United States. In our view, therefore, Section 609 is a measure relating to the conservation of an exhaustible natural resource within the meaning of Article XX(g) of the GATT 1994.

Environmentalists not reading the fine print would focus on the conclusion of the ruling, where the Appellate Body affirms it is rejecting how the Department of Commerce applies the law in question. The final lines of the ruling note that the Appellate Body

(b) reverses the Panels finding that the United States measure at issue is not within the scope of measures permitted under the chapeau of Article XX of the GATT 1994, and  
(c) concludes that the United States measure, while qualifying for provisional justification under Article XX(g), fails to meet the requirements of the chapeau of Article XX, and, therefore, is not justified under Article XX of the GATT 1994. The Appellate Body recommends that the DSB request the United States to bring its measure found in the Panel Report to be inconsistent with Article XI of the GATT 1994, and found in this Report to be not justified under Article XX of the GATT 1994, into conformity with the obligations of the United States under that Agreement.

*United States: Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R DSR (Dispute Settlement Reports) 1998: VII 2755 (12 Oct. 1998; adopted, Dispute Settlement Body, 6 Nov. 1998) pp. 53–4, 76.

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But going back to the old GATT system is not the answer. Blocking cases was too easy, and the ineffectiveness of the system contributed to the United States pursuit of unilateral approaches. International trade can enhance the welfare of all states, and promoting trade through multilateral institutions is the best way to help the weakest states benefit from international trade, and to constrain the strongest states from using their power in ways that undermine the achievement of common objectives. How can we change the current system to work better? To answer this, we must understand what has gone wrong.

Assessing the legitimacy of the WTO's dispute resolution body is currently in vogue. Most analyses recite the accusations and then defend the system. They show that many criticisms of the WTO are misplaced. They argue that WTO dispute resolution bodies are acting no differently from other international or domestic legal bodies, and point out that governments have tacitly if not explicitly consented to the set of rules and dispute resolution procedures the Appellate Body is applying. They conceptually identify alternative methods of legitimating WTO rules and argue that, flawed as it is, the current model is the best one we have.<sup>28</sup>

These analyses miss the point. Regardless of whether political actors created this system, and even ask international legal bodies to resolve these issues, having unaccountable international legal bodies impose solutions on national governments creates an inescapable political problem.

### What went wrong?

It might be tempting to look at individual cases in isolation. The new dispute resolution process is still in its infancy. In retrospect, some cases that have been brought should not have been. Panellists and the Appellate Body are making mistakes, and there are a number of technical fixes that are necessary for the system to operate smoothly. Nevertheless, even when the Appellate Body has become more acute, when the technical problems with the dispute resolution system have been addressed,<sup>29</sup> and when the current conflicts are resolved, the dispute resolution process will continue to exacerbate conflict.

Conflict in itself is not bad. In any political system, legislative texts are likely to be vague and imperfect, judges are likely to be called upon to fill in, and political

<sup>28</sup> Examples include Craig A. A. Dixon, 'Environmental survey of WTO dispute panel resolution panel decisions since 1995: "trade at all costs"?', *William and Mary Environmental Law and Policy Review* 24, 2000; Andrea Kupfer Schneider, 'Institutional concerns of an expanded trade regime: where should global social and regulatory policy be made? Unfriendly actions: the amicus brief battle at the WTO', *Widener Law Symposium Journal* 7, Spring 2001; Gregory C. Shaffer, 'The World Trade Organization under challenge: democracy and the law and politics of the WTO's treatment of trade and environment matters', *Harvard Environmental Law Review* 25: 1, 2001; Debra Steger, 'The rule of law or the rule of lawyers?', *Journal of World Investment* 3: 5, 2002; Joel Trachtman, 'The domain of WTO dispute resolution', *Harvard Journal of International Law* 40, 1999.

<sup>29</sup> Negotiations on reforming the dispute settlement process are proceeding as part of the Doha negotiations. They are explicitly not part of the 'single undertaking' in hopes that reforms will not be held hostage to other changes under negotiation. Updates on the discussions are available on the WTO's website: [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm#negotiations](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#negotiations). There are also numerous scholarly articles looking at a variety of technical fixes to facilitate dispute resolution.

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actors are in some cases going to be unhappy. Indeed, it is arguably good that protesters have forced governments to justify and explain more fully the benefits of participating in the WTO, because this can only enhance the legitimacy and accountability of the organization. The problem is that the international political process has trouble responding to the controversies that international legal bodies generate. There is a risk that unpopular legal rulings may undermine support for international legal processes and multilateral approaches more generally, hindering continuing efforts to address common problems multilaterally. Unfavourable rulings can also be used as a pretext to withdraw from international fora.<sup>30</sup>

International courts are more likely to generate conflict than their domestic counterparts because international legal texts contain political minefields that international judges especially are poorly placed to navigate successfully. While the majority of WTO disputes may involve misunderstandings or disagreements that are easily resolved, controversy is likely to emerge under two recurring conditions endemic to international politics:

- *Trip-wire texts*: international legal texts may actually reflect diplomatic fudges that negotiators are counting on. Pretty much any effort by an international legal body to clarify an intentional diplomatic fudge will be controversial.
- *Hair-trigger settings*: governments may be using international litigation for political reasons—to pander to a domestic constituency, to shift the blame for disappointing a domestic group on to an international body, to embarrass other countries, to create a bargaining chip, or to win in court something they could not get through negotiations. Cases inspired by these political motivations are likely to escalate tension.

Domestic judges deal with explosive suits too. But there is reason to believe that domestic judges are better equipped to handle such cases. Being products of their national political environment, and working within the same cultural and political context in which they adjudicate, national judges are far more likely to be in harmony with political sentiment. International judges, on the other hand, often lack the experience and information they need to do their job well. Many international judges are former law professors or lower-level domestic judges, with little real experience in negotiating international politics or anticipating the passions different interpretations of a text will arouse. Also, international

<sup>30</sup> The US withdrew from the compulsory jurisdiction of the International Court of Justice in light of its Nicaragua ruling, and has more recently chosen to withdraw from the International Criminal Court. We are seeing countries withdraw from international human rights systems in response to legal rulings. Trade might be an area where withdrawing from the multilateral system is just too costly, which mainly means that countries will choose exit through non-compliance rather than exit through withdrawal. On countries withdrawing from human rights regimes, see Laurence R. Helfer, 'Overlegalizing human rights: international relations theory and the Commonwealth Caribbean backlash against human rights regimes', *Columbia Law Review* 102: 7, 2002; Natasha Parassran Concepcion, 'The legal implications of Trinidad and Tobago's withdrawal from the American Convention on Human Rights', *American University International Law Review* 16, 2001; Richard Wilson and Jan Perlin, 'The inter-American human rights system: activities during 1999 through October 2000', *ibid.* On the US position regarding the ICC, see Monroe Leigh, Ruth Wedgwood, Harold K. Jacobson, 'The United States and the Statute of Rome', *American Journal of International Law* 95, 2001.

judges work in relative seclusion, meeting as a group infrequently, and often with the submissions of the parties as their sole source of information.<sup>31</sup> Skilful legal diplomacy, in any event, may not be enough to satisfy parties to a dispute. Having fought hard and traded for the compromises in international agreements, countries will feel very strongly that agreements should be applied as negotiators intended. Pointing out that different negotiators in a different context came to an international legal formulation that is embedded in a different international convention does not help. Nor will governments or the broader public find solace in knowing that an interpretation is a plausible read supportable by legal reasoning.

Compounding the difficulty international judges face is that international courts inherently lack the popular legitimacy needed to transform disappointment into popular acceptance 'of the law'. Courts gain legitimacy from the prestige of their members, and from their reputation, gained over time, for ruling fairly. Domestic courts can draw on their cache of legitimacy to make controversial rulings palatable. Thus when the US Supreme Court intervened in a presidential election, handing George W. Bush a victory, it emerged with its legitimacy largely intact even though the legal basis for the ruling was as radical as it was controversial.<sup>32</sup> International legal bodies do not have the same legitimacy. The problem is not that international courts do not deserve to be seen as legitimate. International legal bodies are composed of competent and intelligent judges who go to great lengths to be procedurally fair, which is why the lawyers who work with international courts generally hold international judges and their rulings in high esteem. The problem is that the larger public has no real knowledge or appreciation of the workings of international legal bodies.

Support for international legal bodies comes primarily from the general goodwill and faith populations have in legal systems.<sup>33</sup> This good faith can disappear when populations are confronted with an unpopular ruling and a claim by their government that the ruling lacks sound legal reasoning or exceeds the international court's mandate. In this context, an international court can be transformed from an institution esteemed because it is 'legal' into a group of unknown (and hence suspected as probably unqualified) foreigners who ruled against a reasonable national policy that had passed through legitimate democratic processes.<sup>34</sup>

<sup>31</sup> The difficulty of this situation is precisely the impetus for the Appellate Body's controversial position on amicus briefs, founded on the belief that Appellate Body judges need to be able to access more views. On amicus briefs, see Schneider, 'Institutional concerns of an expanded trade regime'.

<sup>32</sup> By some accounts, George W. Bush took the blame and the Supreme Court escaped relatively unscathed. See Lani Gunier, 'Supreme democracy: Bush v. Gore redux', *Loyola University of Chicago Law Journal* 30, 2002; Jeffrey L. Yates and Andrew B. Whitford, 'The Presidency and the Supreme Court after Bush v. Gore: implications for institutional legitimacy and effectiveness', *Stanford Law and Policy Review* 13, 2002.

<sup>33</sup> Gregory Caldeira and James Gibson, 'The legitimacy of the Court of Justice in the European Union: models of institutional support', *American Political Science Review* 89: 2, 1995; James Gibson and Gregory Caldeira, 'The legitimacy of transnational legal institutions: compliance, support, and the European Court of Justice', *American Journal of Political Science* 39: 2, 1995.

<sup>34</sup> This is clear from surveys of the European Court of Justice that show popular awareness in Europe about the European Court and its jurisprudence to be abysmally low, and that the vast majority of Europeans would be willing to do away with the ECJ entirely if it made a ruling invalidating a cherished national policy. See Gregory Caldeira and James Gibson, 'Democracy and legitimacy in the European Union: the Court of Justice and its constituents', *International Social Science Journal* 152, June 1997, esp. p. 216.

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This reality is a problem for international legal bodies. Despite their best efforts, international courts are less likely to have a fund of legitimacy that commands respect from national governments or that makes controversial rulings politically palatable. It does not help that governments often take for themselves credit for good things and pin on international bodies the blame for bad things. And it may also be true that international society is so heterogeneous that no group of arbiters, no matter how skilled, will be able to craft a solution that will be acceptable in Chile, Malaysia, Egypt, Europe and the United States—which may be why the international legal texts are so vague in the first place.

Equally problematic is that when there is an unpopular ruling, international political bodies are less able to correct it. Courts are by design counter-majoritarian institutions; they are not intended to be directly accountable to the public will. But at the domestic level, if politicians are unhappy with the way a judge is interpreting a law, they can rewrite the law—all it takes is a simple majority to clarify the meaning of a law, and such an action in no way threatens judicial independence or undermines the rule of law.<sup>35</sup> This balance does not work at the international level, where the legislative process of negotiating international treaties is unusually onerous. International agreements are negotiated only occasionally, and the requirement of unanimous support makes it difficult to make amendments later on. While in theory one could create a process to adjust the rules incrementally—through working parties, or regular diplomatic meetings—these processes never really work. International agreements, and especially trade agreements, are made by linking issues. Even if countries find no objection to proposals that clarify WTO rules to reflect the intent of the negotiators, they usually want something in return for their support. In practice, a legal ruling that sets a precedent that is strongly opposed, whether by few or many, cannot be addressed for years, and then the requirement of unanimity to change the status quo makes reform extremely difficult. We have seen this hold true in the WTO, where the US and Europe could ignore developing country concerns regarding amicus briefs, and where even small technical fixes that involve no clear benefit to any particular group have proved beyond the capacity of WTO political bodies, and could not even be attained as a bare minimum result in the Seattle ministerial conference.<sup>36</sup>

Given that international judges can shift the interpretation of international legal texts in ways that are not politically reversible, one might expect judicial appointments to international courts to be carefully scrutinized. In reality, the politics of appointment is focused primarily on the geographical distribution of judicial appointees. For example, a Japanese judge was selected for the WTO's Appellate Body largely because states wanted an Asian member to complement

<sup>35</sup> Constitutional court rulings are of course an exception. But very few countries even allow for constitutional review of policy, and constitutional courts are, after all, applying constitutions, not international treaties.

<sup>36</sup> I refer here to the so-called sequencing problem discussed in Cherise Valles and Brendan McGivern, 'The right to retaliate under the WTO agreement: the sequencing problem', *Journal of World Trade* 32: 2, 2000.

the geographical origins of the other appointees. Countries are free to pick whomever they want to nominate. This particular judge had been selected primarily because he was one of the few candidates with the time (he was retired), English-language skills and legal background for the job.<sup>37</sup> He was a fine appointment, but it is fair to say that most states had no idea about his views regarding how the Appellate Body should treat legal lacunae. Defenders of judicial independence would say that this is how it should be. Equality before the law is promoted, they would say, when judges are not biased by political vetting. Perhaps. But political actors carefully select domestic appointees to high courts. Political vetting in the domestic context is a tool of political accountability. It is somewhat unsettling that international judicial appointees face less scrutiny than their national supreme court counterparts.

Contrary to what many expect, once these appointees are in place, political actors have few political tools at their disposal to sway judicial decisions. Even if one knew how individual judges voted,<sup>38</sup> international judges tend to be at the end of their careers, and are in any event unlikely to be reappointed if states want to rotate geographical representation. And the unanimity rule makes it extremely hard, if not impossible, for governments credibly to threaten to ‘clip the wings’ of an international court by cutting back its jurisdiction or changing its mandate<sup>39</sup> tools that in any case only really work in extreme situations. Usually, governments exert influence through legal means: persuasive legal arguments, moral suasion and public appeals.

It would be wrong to conclude from this analysis that international courts should never be created or used to address international disputes. International legal bodies can be helpful in resolving disputes, and having a permanent judicial body is certainly better than creating ad hoc legal bodies to address only some violations by some countries. The answer lies in recognizing the limits of international courts. We should not turn to international courts where there is no social consensus supporting international rules. Nor should we expect international courts to solve problems diplomacy cannot: turning such disputes over to international courts is likely to harm international law and international legal institutions. We should also design international legal mechanisms to help international legal bodies better navigate the minefields of international politics, to build their legitimacy and to be more politically accountable.

### Lessons for the WTO and beyond

One reason the WTO system is under attack is that the rules themselves are unpopular. Developing countries have been forced to accept agreements regarding

<sup>37</sup> Comments based on an interview with a former appellate court judge, Tokyo, 14 Dec. 2002.

<sup>38</sup> In most international courts, decisions are made by majority vote, but the ruling is issued *en banc* (as a group), making it impossible to know how individual judges vote.

<sup>39</sup> For more on the difficulties governments have in influencing international courts, see Karen J. Alter, ‘Who are the masters of the treaty? European governments and the European Court of Justice’, *International Organization* 52: 1, 1998.

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intellectual property rights that offer them little, while the US and Europe have resisted reforms in the areas about which developing countries care most: agriculture, and anti-dumping and countervailing duties. No procedural justification of how the rules are made can change this reality, and without some justice in the rules and the dispute settlement process, the WTO system will face constant difficulties. In the aftermath of September 11, the US and Europe saw launching a millennium round as vital to boosting confidence in the international economy; thus they agreed to negotiate on issues of concern to developing countries. They must now fulfil their promises. Wealthy countries should facilitate greater access to their markets because promoting economic growth in developing countries through international trade is in everyone's interest. States should also fix the WTO's retaliation system so that rich countries cannot escape compliance by accepting retaliatory tariffs paid by consumers in importing countries. One solution would be for a legal victory to carry two possible penalties, from which the violator can choose: compensation for the plaintiff(s) to correct the wrong, or retaliation at a rate much higher than compensation, that can be levied by all countries that can show injury—so that poor countries can maximize their leverage and in some cases get real compensation if rich countries want to buy their way out of compliance.

At the same time, we need explicitly to allow more safety valves for all countries—developing and developed. A government's first obligation is to the well-being of its citizens. Any reasonable rule aimed at protecting the environment, public safety, cultural institutions and/or the health of citizens must be accepted regardless of its trade consequences. The legal provisions for this are already present in the WTO agreements. What is needed is a more clearly articulated legal rule of reason, subject to some proportionality principle to ensure that market access is not unnecessarily compromised in achieving a valid goal. States would still be required to defend their policies; but the assumption would be that any domestic legislation that has a reasonable aim, is proportional to its objective, and has not been adopted with the intention of distorting trade, is acceptable. A rule like this would allow countries to ban beef with hormones and genetically modified food because the policy genuinely springs from concern and uncertainty regarding whether hormones and genetically modified food cause harm.

The WTO system must also become more transparent. This is not easy, because developing countries strongly oppose allowing non-governmental actors to participate in WTO negotiations, fearing it would only reinforce the political advantage of Western interests. Claude Barfield offers a solution: allow non-governmental actors as observers, with opportunities to lobby governments during political negotiations; open oral argument sessions to the public and the press; and post legal briefs of governments on the Internet.<sup>40</sup> One might also create fora and explicit processes for public input in the dispute resolution

<sup>40</sup> Claude Barfield, *Free trade, sovereignty, democracy* (Washington DC: American Enterprise Institute, 2001), pp. 135-43.

process, appointing officials in the WTO secretariat to distil the public arguments for the judges.<sup>41</sup>

We should also explicitly endeavour to enhance the legitimacy of the dispute resolution process. Putting a length limit on the submissions of parties would be a service to all. It would end the practice of lawyers overwhelming panellists with arguments, lessen the advantages rich litigants have in hiring teams of lawyers, and make it more feasible to include more non-trade specialists and non-lawyers as panellists in dispute resolution cases.

Appellate Body judges should also be chosen for their skill in navigating politically charged legal contexts, and for their ability to bring to the task their own cache of legitimacy. Domestic supreme court judges and well-known international diplomats fit this bill better than law professors and unknown former judges.

One should also encourage diplomats to be panellists at the first stage of dispute resolution by making their job easier. This mainly requires a shift in mentality. If all the actors involved knew that the first stage was about diplomacy, and if the Appellate Body were more forgiving of panel rulings that lack legal fidelity, one might be able to encourage a larger spirit at the first stage of negotiations.

Since rulings are one of the few public manifestations of the WTO as an institution, Appellate Body and panel rulings should speak to the broader public. Discussions of parties' arguments in rulings should be shortened (which would be easier if there were page limits on submissions), and the ruling part of each decision should be concise, well written and crafted in plain language, without numerous references to chapeaus and articles, so that the media and the public can clearly see what WTO law requires and what it does not.<sup>42</sup> For example, the shrimp-turtle decision's support of environmental protection efforts should have been sung with great clarity. Rather than burying in the middle of the ruling the statement that 'Section 609 is a measure relating to the conservation of an exhaustible natural resource within the meaning of Article XX(g) of the GATT 1994,'<sup>43</sup> the ruling should loudly have stated, in the middle *and* at the end, that 'WTO law allows states to enact policies protecting endangered species, so long as the means are reasonably related to the ends.'

We also need political accountability devices that can work. Promoting political accountability by further politicizing international judicial appointments would be a cure worse than the disease it seeks to remedy. Rather, we should help judges exercise their job with political skill. WTO panellists often

<sup>41</sup> The EU has created a potential model called the 'Trade dialogue with civil society' which meets to inform civic organizations associated with trade policy-making of recent trade developments, and has issue groups where representatives of civil society present proposals of their own. See Sophie Meunier, 'Trade policy and political legitimacy in the European Union', *Comparative European Politics* 1, 2003, pp. 67-90.

<sup>42</sup> General recommendations on how supranational judges could enhance the legitimacy of their rulings are offered in Laurence Helfer and Anne-Marie Slaughter, 'Toward a theory of effective supranational adjudication', *Yale Law Journal* 107: 2, 1997.

<sup>43</sup> See note 27.

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find themselves in a bind when the rules are unclear. The parties to the dispute want a resolution, yet there is no way to remand the issue back to negotiating bodies for clarification. There should be a way for panellists to stop the proceeding and request submissions from any state that wishes to clarify how it understood the rule when it was negotiated. Such a process is akin to a Bernstein Letter in the US legal system.<sup>44</sup> The dispute resolution body would still be the final arbiter, but at least it would be better informed. WTO judges might also be well advised to avoid issues that are too politically controversial, using one of their many judicial techniques to avoid ruling on the legal question. Better yet, they should put the ball firmly in the political court, not hesitating to say that an area of law lacks political consensus, and so they will not apply the law until states clarify it. In the absence of a judicial ruling, the default position might hinder market access, but it will likely reflect the political will of the time.

Last but not least, the requirement of consensus to reject a panel decision must be addressed, for it raises the political bar too high; even the winner of the case would have to agree to reject the decision. A more appropriate rule might be consensus minus some number of members, so that a ruling that angers too many can still be blocked.

Fixing the WTO's dispute resolution system should be a political priority. Frustration with unpopular rulings and disregard for legal rulings can trigger a vicious circle of international law, where legal rulings and legal bodies are increasingly ignored, states increasingly instrumentalize the law to justify suspect policies, and the sense of reciprocity underpinning international law erodes.<sup>45</sup> We might also find a return to unilateralism in the form of exit through non-compliance, with the US resuming use of its section 301 tool, or even withdrawing from the WTO system. More ominously, the less the WTO serves as a useful venue for reaching trade agreements that elicit compliance, the more states will turn to other fora to negotiate about trade. Already countries are negotiating regional agreements that complement the WTO system (and sometimes circumvent the multilateral principles of that system).<sup>46</sup> These agreements could end up as substitutes for a world trade system. Such a development is not to be encouraged. It would lead to fortresses of integrated wealthy countries, surrounded by ghettos of poor countries. Any of these developments would be a distinct step backwards in the multilateral trading system the world has been building in the last 50 years, and would hinder rather than help address global problems with global repercussions like poverty and terrorism.

<sup>44</sup> Curtis Bradley, 'Chevron deference and foreign affairs', *Virginia Law Review* 86, 2000, p. 719.

<sup>45</sup> Karen J. Alter, *Establishing the supremacy of European law: the making of an international rule of law in Europe* (Oxford: Oxford University Press, 2001), pp. 211–17.

<sup>46</sup> Eric Reinhardt and Edward Mansfield even posit a link between losses in the WTO dispute resolution system and the formation of regional trade agreements. See Eric Reinhardt and Edward Mansfield, 'Multilateral determinants of regionalism: the effects of GATT/WTO on the formation of preferential trading arrangements', *International Organization* 57, 2003.

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The general lesson to draw is that domestic legal systems are fundamentally different from international legal systems. All legal systems have ambiguity in legal texts. All legal systems have courts that fill in the blanks, sometimes creating great controversy. International legal systems add to this mix a complex and heterogeneous international political context, international judges who lack a cache of legitimacy and are poorly placed to negotiate this context, and a dysfunctional international political process that relies on international consensus and is thus unable to correct unwanted legal rulings or respond to public dissatisfaction in real time. Together these factors provide the ingredients for an explosive backlash against international law and multilateralism more generally.

It would be nice if we could rely on governments to think in the longer term, to consider the best interests of the international system, eschewing cases that are only likely to antagonize others and reveal the fragility of the international legal system. But any such expectation, surely, is naïve. The more international courts are created and used, the more judicial politics will be a permanent feature of international relations. Returning to a system of self-help or national veto is not the solution. The world is better off in a rule-based system governed by principled multilateral rules. But given that the tools domestic systems use to create political and legal balance do not work well at the international level, and given that we cannot count on prudence and self-constraint, we need to be more determined about enhancing the legitimacy and building appropriate political checks into international legal systems. Demonstrated here in the case of the WTO, this is an important lesson that applies to international law, international dispute resolution mechanisms and international tribunals generally.