World Trade Organization and Judicial Enforcement of International Trade Law

KRZYSZTOF J. PELC

Abstract

The Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO) is an international court of unprecedented ambition. This essay examines why countries agreed to delegate as much power as they did to this international legal body, by looking to the rise of US unilateralism during the 1970s. I then offer an overview of the DSU's functioning, which concludes that its effectiveness derives more from the way it forces countries to negotiate in the shadow of the law than from the threat of material sanctions following noncompliance. Finally, I assess some widespread concerns about how developing countries fare in the system. I show that while there does exist a cleavage between rich and poor countries in dispute settlement, it does not lie where conventional wisdom often has it.

INTRODUCTION

It is invariably described as the workhorse, the crown jewel, and the cornerstone of the international trade regime. The Dispute Settlement Understanding (DSU), which is the legal body at the center of the World Trade Organization (WTO), has become the poster child for the concept of legalization in international politics. And, with good reason. There is arguably no other example of as many countries delegating as much decision-making power to an international legal body over the enforcement of binding country commitments. Since its creation in 1995 alongside the WTO, the DSU has developed a sophisticated jurisprudence, leading some to argue that in contradistinction to the common belief about international law, the WTO features de facto binding precedent, whereby past rulings constrain current ones (Bhala, 1998–1999). The rate of country compliance is high, and most cases are resolved before even making it to a ruling (Busch & Reinhardt, 2000). At a time when the Doha Round is at a standstill, and multilateral negotiations are

Emerging Trends in the Social and Behavioral Sciences. Edited by Robert Scott and Stephen Kosslyn.
 ISBN 978-1-118-90077-2.

effectively dead, litigation through the DSU may be the only means countries still have at their disposal to further liberalization (Goldstein & Steinberg, 2008; Steinberg, 2009).

Yet, the DSU is not free of criticism. Observers have denounced the dispute mechanism for implicitly excluding poor countries, and for being a weapon of the powerful (Steinberg, 2002; Heisenberg, 2007). Similarly, others have claimed that the DSU limits internal transparency within the membership, by holding proceedings behind closed doors, insulated from other member countries, let alone nongovernmental organizations (NGOs) (Smythe & Smith, 2006). In short, the greatest complaint against the DSU has been over a participation deficit.

This essay is concerned with accounting for both the successes and critiques of this unique legal body. Specifically, the author asks, how has such an ambitious international enforcement mechanism come about? Why have powerful countries agreed to delegate power to foreign judges deciding over the legality of their trade policies? What are the factors accounting for the DSU's effectiveness, as measured by its impact on country behavior? And finally, to what extent are the prevalent concerns about the DSU warranted?

To offer a preview of the author's claims, it is argued that the success of the WTO lies in its least heralded functions. Having no true enforcement power of its own, the DSU relies entirely on self-enforcement. The reason this is possible in an anarchic international environment is that countries have a strong incentive to avoid a court's legal condemnation. Countries settle disputes so as to avoid being branded violators within a forum of countries with whom they interact continuously.

By contrast, the institution's last resort, retaliation, has drawn disproportionately much attention in the literature. Yet, it is not the threat that compels compliance with trade rules. Retaliation is necessarily flawed; the strength of the system lies in how it allows countries to bargain in the shadow of the law (Busch & Reinhardt, 2000). This view is borne out by the success of dispute settlement during the General Agreement on Tariffs and Trade (GATT) period (1947–1994), where the legal function of the institution was much weaker, yet still met with considerable success.

And, while critics are right to worry about the distributional effects of the DSU, the sources of these disparities are often not found where they are thought to be. Rather than a lack of market power, it is poor legal capacity that hampers the participation of developing countries (Busch, Reinhardt, & Shaffer, 2009; Davis & Bermeo, 2009). Not only are these two variables not perfectly correlated, but the solutions to addressing the issue naturally differ according to which is at fault, and so the distinction is a valuable one. Similarly, the litigation record shows no disadvantage for poor countries: poor countries win as many of their cases as do rich states. The difference, rather,

is in their settlement record (Busch & Reinhardt, 2003). And, as in most court systems, litigation is inefficient, and the greatest concessions tend to be made before the panel is ever convened. In other words, developing countries do less well on average, not because they win fewer cases, but because they settle too few of them. As a result, they bring cases with high legal merit to litigation, yet they are likely to get fewer concessions, on average.

Attention to the DSU peaked over a period during which the political science literature attempted to account for why sovereign states would ever tie their hands at the international level (Keohane, 1982; Milner, 1997; Ikenberry, 1999). When scholars began testing their claims on real institutions, they naturally turned to the GATT/WTO, and its dispute resolution organ. The trade regime offered them a case where countries were making deep, credible commitments, and more importantly, it offered data. Scholars have access to highly disaggregated product-level data on countries' commitments (e.g., maximum tariff levels) and their subsequent behavior (trade volume), the likes of few other issue areas can offer. While the result has been a rich body of work, the availability of data has been both a boon to analysis and its greatest challenge. Often, the wide availability of data leads to a search for correlational findings that do little justice to the institution itself and to the complexity of its rules.

This essay proceeds as follows. The author begins by offering a historical overview of the development of the DSU, which is where the answer to how such an ambitious international legal system came about really lies. In Part 2, the author outlines the anatomy of the contemporary DSU, and ask: where does the effectiveness of the DSU as a legal body come from? Part 3 addresses the most common criticism of the DSU, namely how it limits access to rich countries. Finally, in Part 4, the author concludes by taking a step back to assess the most progressive strands of the literature on dispute settlement and the possible challenges this literature faces in the years to come.

A Brief Historical Account

Dispute settlement procedures in the trade regime had been envisaged since negotiations over a multilateral trade agreement in the late 1940s. Yet, the entire legal function of the trade regime under the GATT was described in a couple of short clauses. These have been expanded into a sophisticated mechanism in the WTO's DSU, the full meaning of which has been further clarified in a large body of rulings by WTO panels and the Appellate Body (AB).[1] In this essay, the author offers an overview of the passage from the GATT to the

1. For an overview of WTO jurisprudence, see https://www.wto.org/english/res_e/booksp_e/analytic_index_ e/analytic_index_e.htm, last accessed 10 May 2013.

WTO and attempts to address this fundamental puzzle: how did countries agree to delegate such power to the highly legalistic court in place today?

The GATT's dispute settlement mechanism was effective—a point the author returns to—yet it suffered from considerable weaknesses in its design. Although recommendations of the panel were considered "binding" once they were adopted by the membership, this concealed a flaw. Most decisions taken in the organization from the beginning of the institution were arrived at by consensus, and dispute settlement was no exception. This meant that both litigants, including the "losing" state, could block the proceedings at any point. While countries were obliged to consult, the request for a panel could be blocked; if the panel was allowed to convene, parties could block the results of the panel's recommendations if they did not like what was coming. In such a case, they were not bound by the panel's recommendation in any way. Procedures became less ad hoc through time, and emerging practices were first codified during the Tokyo Round, and continued to evolve incrementally thereafter.[2] Yet, few countries would have predicted the shape and ambition of the legal body that in 1995 would replace the GATT dispute settlement mechanism.

The option to block unfavorable legal proceedings went away with the inception of the DSU. The GATT's positive consensus rule, which required everyone to agree for the proceedings to continue, now shifted to negative consensus, where everyone, including the winning party, would have to disagree with the ruling for the proceedings to halt. Such "automaticity" in the formation of panels ensures that countries taken to court today cannot openly spurn challenges to the legality of their trade policies. Similarly, if a request for retaliation is granted, it cannot be blocked by a recalcitrant defendant. The WTO's DSU also added a standing body of judges, the AB, which reviews the rulings of panels, and enforces the continuity of legal reasoning across cases. How might we explain a series of such significant institutional changes? How did an institution go from a diplomatic club to a hard law institution, with automatically adopted rulings, tight deadlines, precise rules, and a higher court with great authority? The answer lies most clearly in a now largely defunct piece of US legislation from the 1970s.

The 1970s were precarious times for the US economy. An overvalued dollar, in combination with independent economic growth in Asia, led to a growing US trade deficit. Japan, especially, was seen as a looming threat on the horizon, one that was bringing about the deindustrialization of the United States. There was widespread perception in Congress that US trade partners were cheating, by enacting unfair trade barriers and subsidizing production. The

2. Culminating in what is referred to as the 1989 "improvements," which ushered some of the changes that would be featured more formally in the DSU 6 years later, on an experimental, provisional basis (Stewart and Callahan, 1993).

playing field had to be leveled, and the trade regime was not up to the task. The United States was principally frustrated with the lax timelines for GATT cases and the ever-present possibility of blocked panels.[3] The resulting frustration led to the adoption in Congress of Section 301 of the 1974 Trade Act.

Section 301 was a domestic legislative tool that mimicked the procedures of a formal GATT complaint, yet did so entirely within the United States, and on a faster clock. Following either petitions by a domestic industry alleging illegal trade barriers, or self-initiation by the United States Trade Representative (USTR), the government would launch an investigation. If the investigation led to a finding of violation against a trade partner, the executive was expected to automatically retaliate against the violating country by raising US trade barriers.

Section 301 held obvious advantages from the point of view of the United States. It was fast, playing out on a much swifter schedule than the analogous GATT procedures; it was not prone to blocked legal findings by the defendant; and retaliation was largely unconstrained. On the downside, it enjoyed none of the legitimacy flowing from GATT multilateralism—this is the aspect of Section 301 that trade partners reviled the most. It is difficult to overstate just how appalled US trade partners were at the US policy. GATT representatives branded the US legislation as a "Damocles' sword," an "irreparable act of folly," a "commercial nuclear bomb," and "war against all" (Pelc, 2010, 69). Hudec, the leading American theorist of the GATT, described Section 301 as a mechanism where "the United States plays both prosecutor and judge … in which the defendants are tried in absentia" (Hudec, 1990, 114).

Not coincidentally, just as negotiations over the DSU got underway in 1987, the United States sharpened Section 301, openly targeting presumed violations in countries that held persistent trade surpluses with the United States.[4] The United States was pushing both the unilateral and the multilateral options simultaneously, which may come as some surprise. Indeed, the United States was the greatest proponents of a formal dispute settlement mechanism that would address the shortcomings of the GATT.[5] Yet in hindsight, the two positions are not only compatible—they can be said to have reinforced one another.

The eagerness of the United States to adopt a hard law enforcement mechanism came from its conviction that it would most often be sitting in the complainant seat (Elsig, 2013). There was a strong belief in Congress that the United States was upholding the rules that its trade partners were flouting.

3. See GATT 1987 doc MTN.GNG/NG13/W/3, where the US representative complains about "stalling," "delaying tactics," and the ever-present risk of blocked panels.

4. This change was formally contained in the 1988 Omnibus Trade and Competitiveness Act.

5. GATT doc MTN.GNG/NG13/W/3, April 1987. See also Elsig (2013).

This prevalent view can account both for the United States' position on an ambitious DSU, and for its resorting to unilateral means of enforcement.

US trade partners, for their part, faced a clear trade-off. Many countries were uneasy with the legalism of an ambitious DSU, yet they were far more uneasy with unchecked US unilateral enforcement. In the end, WTO members accepted the ambitious legal character of the DSU in exchange for the United States renouncing the unilateral option it had built up before over two decades (Pelc, 2010). In a sense, the creation of the DSU amounts to a small-scale rendering of the kind of "strategic restraint" that Ikenberry (1999) describes the United States going through in the wake of the Second World War—with the notable difference that in this case, the United States itself built up the unilateral threat, making clear to its trade partners what the alternative to deep multilateral cooperation would have been.

On this basis, one could even view the threat of unilateralism as a vital ingredient to the success of the multilateral court. In this vein, Hudec (1990) wrote of a possible case for Section 301 as "justified disobedience," if it could jolt useful GATT reform, or obtain globally beneficial trade liberalization. Not surprisingly, such views were most prevalent among US scholars and policy-makers. Whether or not the normative argument for Section 301 is defendable, these arguments offer a misleading impression. While in hindsight, Section 301 may be justified by its outcome, it is unlikely that this was its original motivation, which is more likely found in Congress seeking quick solutions to provide market access to special interests. When a multilateral dispute settlement mechanism that fixed the GATT's flaw became a possibility,[6] American legislators progressively abandoned their unilateral fallback weapon.[7] The widespread legitimacy of the DSU may have appeared the better option, compared against a reviled US legislative tool. The outcome was an ambitious international court that few observers could have predicted a decade before.

AN ANATOMY OF THE DISPUTE SETTLEMENT UNDERSTANDING

How does dispute settlement at the WTO actually work? Its defining feature is that it is decentralized. This distinguishes the WTO from domestic courts, or supranational enforcement, such as one finds in the European context, which feature some centralized prosecutorial function. By contrast, no WTO dispute begins unless a member-country initiates it. As a result, all disputes start when a country considers that its rights under an agreement have

6. Automaticity was sold to Congress in testimony over the Uruguay Round as leading to faster retaliation (Elsig, 2013).

7. As it turns out, precisely because of the pushback that Section 301 inspired, it was less than fully effective at changing trade partners' policies, as countries dug in their heels to resist American unilateralism (Pelc, 2010).

been flouted, or that its interests have been otherwise harmed as a result of the trade concessions it has offered under the WTO. For the most part, disputes are responses to domestic interest groups that lobby to demand better market access abroad (Davis, 2011). States can be brought to dispute settlement if they are thought to be illegally subsidizing production for export; if they have raised trade barriers in excess of their allowed ceilings; if they have erected health and safety standards that favor domestic producers over foreign exporters; if they have offered preferential treatment to one trade partner over others; or if they have favored domestic firms in government contracts. Yet, the biggest portion—nearly half—of all WTO disputes is concerned with the use of trade remedies (Pelc, 2011). These include antidumping and countervailing duties, and safeguards. They are broadly termed "*flexibility provisions*," and they effectively specify the circumstances under which countries can temporarily flout WTO obligations when failing to do so would cause harm to domestic industries (Pelc, 2009). The use of trade remedies is governed by specific rules, and when countries misapply these rules, they can be taken to task at the DSU. This often occurs.

In keeping with its decentralized character, the WTO has no enforcement power to speak of. It merely produces legal rulings, which are referred to as "*recommendations*," which are considered binding on states. Yet, it cannot force compliance with them. The institution itself cannot punish persistent violators—in a way that other international institutions, such as the International Monetary Fund (IMF), can, for example, by modifying conditions for subsequent loans. All that the institution can do is authorize the complainant country to "suspend concessions," by raising barriers to the level of harm incurred.

Consultations

Few disputes—less than 1%—ever result in retaliation. In fact, a minority of cases (about 45% of all filed disputes) even make it to the panel. Disputes start with a mandatory 60-day period of "consultations." Consultations existed during the GATT period as well, and they attest to how the DSU is still primarily concerned with settlement. Consultations occur behind closed doors, and this is essential to their success. Indeed, countries are much more likely to reach an agreement if they do not need to pander to powerful domestic interest groups while negotiating. Much of the DSU is the recognition of the fact that governments must negotiate as much with their domestic groups as with one another. In this way, consultations shield negotiators from domestic demands. There is a cost to this insulation, to which the author returns below.

Consultations are not completely closed off to nonlitigants. Other WTO members can enter the room as "third parties" if they have a substantial trade

interest in the dispute at hand, as when they are affected by the barrier at issue (Busch and Reinhardt, 2006). Yet, this only happens if both the complainant and the defendant agree to have those other countries present. Complainants welcome such third parties in about half of all cases, and defendants rarely block them, for the good reason that a blocked third party can always bring a suit of its own, which leads to greater trouble for the defendant (Johns and Pelc, forthcoming). The one most telling finding about the effect of privacy on negotiations is that the greater the number of third parties present in the room, the less likely the odds of an agreement are (Busch and Reinhardt, 2006; Davey and Porges, 1998). Indeed, third parties add voices and issues to the disputes, and they may also create an incentive on the part of litigants to posture, to "act tough," and demonstrate resolve with an eye toward subsequent disputes (Stasavage, 2004).

The high settlement rate within the DSU is good news. Litigation is an inefficient outcome (Gilligan, Johns and Rosendorff, 2010): it entails considerable legal and bureaucratic costs, and from the point of view of litigants, it throws a spotlight on the underlying issue. Litigants no longer enjoy insulation from domestic interests, as the outcome of litigation, the panel report, is always made public, together with both litigants' full arguments. Governments can no longer claim that they wrought a "hard won deal," and misrepresent any losses as wins. The panel report lays it out for all to see. For these reasons, concessions on the part of the defendant are most likely to take place prior to the ruling. This, indeed, is the sign of a functioning legal system: most of the action takes place in the shadow of the law.

These beliefs are empirically supported. On average, complainants are more likely to obtain concessions if they can reach a settlement than if the case moves onto litigation and results in a ruling, even if the complainant wins that ruling on all counts (Busch and Reinhardt, 2000). Indeed, what pushes respondents to concede is the benefit of doing so privately, which allows governments to shape the perception of these concessions domestically. That, together with governments' desire to avoid the condemnation that comes with a ruling by a legitimate court, explains why the odds of agreement are greatest before the panel hands down a ruling. And, herein lies the force of the DSU.

Litigation: Panel and AB Report

The trade regime effectively relies on self-enforcement. One reason this is achievable in an "anarchic" international realm is that countries have a wealth of information about each other's behavior. When there is reason for ambiguity over the legality of a given country's policies, litigation is a means of resolving it. Indeed, one of the main functions of panel and AB

reports is to clarify the meaning of WTO rules in a way that leads to greater predictability.

Another reason why self-enforcement is achievable is that governments continually interact with one another: the trade regime, after all, is nearly 70 years old. And, while it remains the prerogative of a sovereign country to ignore a WTO ruling if it chooses, it does so at the risk that a subsequent ruling favoring it may be spurned in turn; that its demands will grow less likely of being given into; and that the concessions it offers during trade rounds will grow devalued. In short, countries join the institution knowing that in some cases, its rules will work against it, but that on average, they will favor the country—otherwise there would have been little sense in making binding commitments in the first place. This is also the reason why despite the ability to block unfavorable rulings during the GATT, surprisingly few countries availed themselves of this option over that half-century period. Just as countries can spurn rulings now, countries could block rulings then. In both cases, they avoid doing so for analogous reasons.

What the desire to avoid normative condemnation entails is that defendants will dig in their heels once an unfavorable ruling is handed down. Indeed, there is little left to lose at that point. As Schelling had it, a threat that needs to be exercised has lost all potency; it is an ineffective threat. As a result, concessions are most likely to occur at the prelitigation stage (Schelling, 1960). Of course, whether cases proceed to litigation and result in a panel report is not a random event. Some cases stand no chance of settling. Key disputes such as *US—Cotton*, *EC—Hormones*, and *US—Steel Safeguards* are all disputes where settlement was known to be unlikely: these disputes touch on such sensitive issues that the domestic political costs of conceding, even behind closed doors, would have been forbidding. Some disputes, in other words, are launched knowing they will not settle. Moreover, it is likely that countries sometimes file cases not principally for the sake of the aggrieved domestic industry, but rather because they are seeking a favorable interpretation of the rules (Pelc, 2013). Indeed, while international law does not recognize formally binding precedent, or *stare decisis*, there is growing reason to believe that both countries and judges within the WTO act as though precedent were binding, resulting in some form of *de facto stare decisis* (Bhala, 1998–1999). If this is true, then countries may want to initiate cases with the sole objectives of modifying their meaning in a way that favors them in the future.

Most cases that make it to a ruling are then appealed by one or the other party. This is a step that did not exist during the GATT. It tells that countries that "win" the panel ruling will often appeal it: once again, what matters is not only the direction of the panel ruling, but the implications of its legal reasoning for subsequent jurisprudence. The AB is the dispute settlement mechanism's thinking organ. While panelists are selected ad hoc from a pool

of some 400 individuals (Busch and Pelc, 2009), AB judges are a standing body. As a result, the same individual judges see disputes over a long period of time and are able to enforce continuity and coherence in panel rulings. Insofar as precedents can be set in the WTO, they are most likely of being set by AB judges, rather than panelists. The AB is dedicated entirely to assessing the validity of the appealed portion of a given panel report. It has no fact-finding or remand power: it cannot collect additional information or ask questions, and it cannot send a case back to a panel to do so.

If the defendant loses net of appeal, and the complainant perceives that the policy at fault has not been remedied, the next step is a compliance panel, where the same panelists from the panel report now assess a single question: has the defendant followed the panel's recommendations?[8] If the defendant is found not to have complied, then the complainant can ask for the authorization to retaliate.

RETALIATION

This final step, the DSU's last resort, has preoccupied much of the literature on dispute settlement in trade. One thing is readily agreed on: retaliation serves no balancing function, insofar as it does not remedy the harm done (Hudec, 2000, p. 22). In economic terms, it amounts to shooting oneself in the foot. Indeed, there is considerable irony in a system built on the belief that free trade is the optimal policy, which then allows aggrieved countries to offset injury by raising tariffs in turn.

Adam Smith foresaw retaliation for what it was: economic folly in service of potentially rational politics, belonging "not … so much to the science of a legislator, … as to the skill of that insidious and crafty animal, vulgarly called a *statesman* or *politician*" (Smith, 1937, p. 435). In other words, Smith saw retaliation as justified only if it procured the desired change of policy abroad, and having in and of itself no desirable effect at home. Although nearly 250 years old, this view is not out-of-date. As the representative from Ecuador put it recently, retaliation at the WTO "does not restore the balance lost, […] but rather tends to inflict greater injury on the complaining party, as occurred in the banana dispute."[9] This is not the position of developing countries alone. The EU has declared that "the use of suspension of trade concessions involves a cost not only for the defending party, but also for the economy of the complaining Member."[10]

8. DSU Article 21.

9. Contribution of Ecuador to the Improvement of the Dispute Settlement System of the WTO, 2002, TN/DS/W/9. The dispute being referred to is *EC—Bananas*, WTO/DS27.

10. WTO doc TN/DS/W/1.

Despite these considerations, there has been disproportionately much attention given to retaliation in the trade regime. This is perhaps not surprising. The self-proclaimed weakness of all of international law is a lack of teeth. The avowed lack of "bail bondsmen, … blue helmets, … truncheons or tear gas" (Bello, 1996) has meant that international courts had no real power to affect state behavior. Retaliation is as close as the trade regime comes to such power: the prospect of retaliation arms the WTO, albeit in a decentralized manner. This has led to a focus on which countries have retaliatory capacity, and which do not. In this view, countries that lack markets of value to the defendant would be unable to compel a defendant to back down. And to be sure, developing countries have long claimed that power asymmetry means that they are unable to avail themselves of dispute settlement in the same way as rich countries, since their final threat is not credible. Yet, several factors should lead us to doubt that this is the whole story. First, the possibility of cross-retaliation, where a complainant suspends concessions in an area distinct from the one at issue in the dispute, has opened doors to effective retaliation by poor countries against rich countries. Specifically, the WTO has started allowing developing countries, such as Ecuador in a complaint against the European Union, and Antigua in a dispute against the United States, to suspend concessions in intellectual property rights, making threats of retaliation far more potent. More importantly, the threat most likely to drive behavior is that of an unfavorable ruling, rather than the suspension of concessions, no matter how credible the latter may be. The GATT period, where the trade system successfully resolved trade conflicts, serves as a good evidence on this count. Despite any credible threat of retaliation—since defendants could always block a case—the system worked. It did so because it led countries to settle their disagreements, to avoid being branded as violators.

CRITICISMS OF DISPUTE SETTLEMENT: PARTICIPATION

While the DSU has earned praise for its ability to enforce deep country commitments in an anarchic international environment, the institution has also weathered its share of criticism. One of these critiques has been of particular concern: observers have claimed that developing countries are effectively excluded from the system.[11] One reason is that because they lack the capacity to retaliate, they have little power to compel rich country defendants to concede, and thus seldom challenge their trade partners' policies in court.

11. In a 2011 WTO meeting, the representatives of Bolivia, Cuba, Ecuador, and Nicaragua complained that "In practice, the WTO has become an organization that is not led by its Members, in which decision-making based on facts is not governed by consensus, and negotiation meetings are not open to participation by all Members."

Others claim that developing countries are at a disadvantage during litigation itself, since the complexity of trade law has meant that countries with large, sophisticated legal teams hold an advantage. A related criticism is that the institution lacks internal transparency. Just as with multilateral negotiations during trade rounds, most countries are kept outside of the room during WTO legal proceedings, even if their interests are at stake (Smythe and Peter, 2006; Steinberg, 2002; Heisenberg, 2007). And neither domestic interest groups nor non-NGOs have any access to DSU hearings.[12] Scholars have begun to assess these beliefs empirically, and have come to some surprising conclusions.

It is first worth mentioning that in many ways, the WTO compares favorably in terms of its transparency with, for instance, the other Bretton Woods institutions. The public access to panel reports, and to the exact legal reasoning that motivated judicial decisions, constitutes a unique window on decision-making in the institution. The comparison is less favorable with other courts, such as the European Court of Justice, where hearings are open to the public.

Partly in reaction to such criticism, the WTO has championed the possibility of third party participation. Third party status, whereby nonlitigant countries can join a dispute from its very beginning, is one means of allowing developing and least-developed countries, especially, to be in the room when an issue they may have a stake in is being negotiated. It is also a means for countries to learn the intricacies of trade law, and build up their legal capacity in so doing (Busch, Reinhardt and Shaffer, 2009). And there is evidence that the presence of third parties has a positive effect on the content of settlements. While complainants are found to capture a disproportionate portion of gains from settlement when consultations are conducted entirely in private, this is not the case when third parties are present (Kucik and Pelc, 2013). In those instances, the complainant, on average, gains no more than the remainder of the membership. Third parties, in other words, play an enforcement function, by ensuring that any gains reached in a settlement are extended to the remainder of the membership, as per DSU rules.[13]

There is a catch. This beneficial effect of third parties pertains to those disputes where a settlement is reached. Yet, it turns out that the presence of third parties also affects the odds of that settlement ever being reached. Despite all the benefits of third party participation, this step toward greater inclusivity thus comes at a cost. The presence of an audience makes settlement significantly less likely (Busch and Reinhardt, 2006; Davey and Porges, 1998;

12. Oxfam International, WWF International, together with eight other NGOs, released a 2003 memo claiming that the WTO features "proliferation of 'informal', undocumented and exclusive meetings, amounting to lack of transparency and inability of many countries to participate."

13. See Article 3.2 of the DSU.

Stasavage, 2004). There is enough incentive to posture for the sake of these other member-states that the odds of reaching agreement between the litigants decline precipitously as the number of other countries in the room rises. In fact, beyond five third parties, the odds of agreement are effectively nil (Busch and Reinhardt, 2006). In other words, if settlement is the goal of the system, then greater inclusiveness through third party participation exerts a cost. And this is the case even when the audience in the room is made up of other countries, rather than NGOs and domestic interest groups.

The effect of third parties on the odds of prelitigation settlement, it turns out, is a special concern for developing countries, who tend to attract the greatest number of third parties. And, herein lies one of the true cleavages between rich and poor countries in dispute settlement. Strikingly, it does not lie in the odds of winning a case, which are statistically indistinguishable for rich versus poor countries. The true difference, which is often overlooked, is that on average, developed countries settle, and developing countries litigate. And given what we know about the odds of concessions in each of these two outcomes, developed countries end up doing better, on average.

Overall, it appears that the main obstacle to recognizing legal merit, choosing the correct cases to file, and reaching settlement during consultations, comes down to legal capacity, more than to market power, or income. Legal capacity corresponds to the human and bureaucratic resources a country has to invest in dispute settlement, and such questions as whether a country has a permanent delegation in Geneva. And while developed countries naturally tend to have greater legal capacity and experience, this is something that a country can develop. Davis and Bermeo (2009) find that the odds of filing a case grow as a country gains experience, and that such experience is gained not only by acting as a complainant, but also by being taken to court as a respondent. What this means is that certain countries are likely to emerge as disproportionately active players in dispute settlement. Brazil, for instance, ranks as the fourth most active initiator of disputes in the system, ahead of far bigger and wealthier countries. It has invested a great deal in its legal capacity, with powerful effects.

In sum, cleavages between rich and poor countries exist. Yet, they do not lie where we often think. Success in dispute settlement hinges most of all on the ability to assess the legal merit of potential cases, and to settle disputes in the shadow of the law, before a ruling is handed down. Developing countries are at a disadvantage in this respect, as they tend to settle less and litigate more. Yet, scholars have shown that countries can learn to use dispute settlement rapidly. Gaining legal capacity is more easily achievable than growing one's market power or retaliatory capacity. Finally, there are institutional solutions to the participation deficit. The option of joining as a third party is beneficial, as it allows poor countries to be present and participate in proceedings, to

voice their views and potentially affect legal outcomes, and to protect their trade interests in so doing. Yet, third party participation also comes at a cost to the institution: as diplomats know, audiences make agreement less likely. There exists an observable trade-off between inclusiveness and the odds of settlement, meaning that there is no easy solution to the participation deficit. The challenge of the institution is to balance these competing objectives.

CONCLUSION

WTO dispute settlement is a success story of global governance. That, together with the fact that there is a wealth of available data about country commitments and their subsequent behavior, has naturally meant that the institution has received a great deal of scholarly attention. In this respect, the availability of rich data, at a highly disaggregated level, has been both a boon and a challenge for scholarship.

Studies of the WTO have become especially prone to simple correlational stories, where legal outcomes are regressed on country characteristics, with little regard for the actual rules at issue. What this has also meant is that there has been relatively little dialog between political science and legal scholarship. In this way, the promise of WTO research is still falling short of its mark.

As the notion that precedent in trade law can bind both countries and judges gains greater acceptance, we are likely to see more attention being paid to words. Law, after all, is a fundamentally rhetorical exercise: the currently available datasets abstract from the richness of the legal texts and the judicial rulings that interpret them. Political scientists, especially, need to recognize that beyond the direction of a ruling, judges' choice of words is likely to matter for political outcomes. Judges' use of judicial economy (Busch and Pelc, 2010), countries' appeals of favorable rulings, and the importance paid to the WTO's Analytical Index are all signs that the relevant actors have recognized this fact[14]; scholars will gain from doing so as well.

Similarly, if the study of other international courts is any sign, greater attention is likely to be paid to individual judges, especially appellate judges (Voeten, 2008, 2007). In this respect, governments already appear to know more than scholars, since a majority of disputes now end in deadlock between the litigants over what panelists to agree on, and the Director General routinely has to step in to make that choice for countries. In other words, countries are acting on a past history of rulings in a way that scholars have yet to recognize.

The WTO, and its dispute settlement body, is a rare example of a functioning international institution that appears to successfully bind country

14. https://www.wto.org/english/res_e/booksp_e/analytic_index_e/analytic_index_e.htm, last accessed May 10th, 2013.

behavior. This often makes it prone to misperception and resulting suspicion among popular audiences. Moreover, liberalization inevitably produces winners and losers, and the latter often have an incentive to misrepresent the institution's function. As a result, students of international courts such as the dispute settlement body of the WTO have a double mission. Not only must they produce innovative research that can offer clues to improving the institution's effectiveness and addressing its shortcomings, but they must also communicate to popular audiences, to convey how constraints on government action can be welfare-enhancing, and to demarcate between misleading concerns and real ones.

REFERENCES

Bello, J. H. (1996). The WTO dispute settlement understanding: Less is more. *American Journal of International Law*, *90*, 416–418.

Bhala, R. (1998–1999). The myth about stare decisis and international trade law (part one of a trilogy). *American University International Law Review*, *14*, 845–956.

Busch, M. L., & Reinhardt, E. (2000). Bargaining in the shadow of the law: Early settlement in GATT/WTO disputes. *Fordham International Law Journal*, *24*(1), 158–172.

Busch, M. L., & Reinhardt, E. (2003). Developing countries and general agreement on tariffs and trade/world trade organization dispute settlement. *Journal of World Trade*, *37*, 719–35.

Busch, M. L., & Reinhardt, E. (2006). Three's a crowd: Third parties and WTO dispute settlement. *World Politics*, *58*, 446–477.

Busch, M. L., Reinhardt, E., & Shaffer, G. (2009). Does legal capacity matter? Explaining dispute initiation and antidumping actions in the WTO. *World Trade Review*, *8*, 559–577.

Busch, M. L., & Pelc, K. J. (2009). Does the WTO need a permanent body of panelists? *Journal of International Economic Law*, *12*(3), 579–594.

Busch, M. L., & Pelc, K. J. (2010). The politics of judicial economy at the world trade organization. *International Organization*, *64*, 257–279.

Davey, W. J., & Porges, A. (1998). Comments on performance of the system I: Consultations and deterrence. *International Lawyer*, *32*, 695–707.

Davis, C. (2011). *Why adjudicate? Enforcing Trade Rules*. Princeton, NJ: Princeton Press.

Davis, C. L., & Bermeo, S. B. (2009). Who files? Developing country participation in GATT/WTO adjudication. *The Journal of Politics*, *71*, 1033–1049.

Elsig, M. (2013). "Legalization leap and international institutions: The design of the WTO's dispute settlement systems." *ISA Annual Convention, San Francisco*, 3–6 April 2013.

Gilligan, M., Johns, L., & Rosendorff, B. P. (2010). Strengthening international courts and the early settlement of disputes. *Journal of Conflict Resolution*, *54*, 5–38.

Goldstein, J. L., & Steinberg, R. H. (2008). Negotiate or litigate-effects of WTO judicial delegation on US trade politics. *Law and Contemporary Problems*, *71*, 257.

Heisenberg, D. (2007). Informal decision-making in the council: The secret of the EUs success?. In S. Meunier & K. R. McNamara (Eds.), *Making history: European integration and institutional change at fifty* (pp. 67–88). Oxford, England: Oxford University Press.

Hudec, R. E. (1990). Thinking about the new Section 301: Beyond good and evil. In J. N. Bhagwati & H. T. Patrick (Eds.), *Aggressive unilateralism: America's 301 trade policy and the world trading system* (Vol. 301, pp. 113–159).

Hudec, R. E. (2000). *Broadening the scope of remedies in the WTO dispute settlement, issues and lessons from the practice of other international court and tribunals*. London, England: Cameron May.

Ikenberry, G. J. (1999). Institutions, strategic restraint, and the persistence of American postwar order. *International Security*, *23*(3), 43–78.

Johns, L., & Pelc, K. J. (2014). Who gets to be in the room? Manipulating participation in WTO disputes. *International Organization*, *68*(3), 663–699.

Keohane, R. O. (1982). The demand for international regimes. *International Organization*, *36*, 325–355.

Kucik, J. & Pelc, K. J. (2013). "Measuring the cost of privacy: A look at the distributional effects of private bargaining." McGill University and University College London Working Paper.

Milner, H. V. (1997). *Interests, institutions, and information: Domestic politics and international relations*. Princeton, NJ: Princeton University Press.

Pelc, K. J. (2009). Seeking escape: The use of escape clauses in international trade agreements. *International Studies Quarterly*, *53*(2), 349–368.

Pelc, K. J. (2010). Constraining coercion? Legitimacy and its role in U.S. trade policy, 19752000. *International Organization*, *64*, 65–96.

Pelc, K. J. (2011). How states ration flexibility: Tariffs, remedies, and exchange rates as policy substitutes. *World Politics*, *63*(4), 618–646.

Pelc, K. J. (2013). "Shaping precedent in international trade law: A social network application." *Working Paper*.

Schelling, T. C. (1960). *The strategy of conflict*. Cambridge, MA: Harvard University Press.

Smith, A. (1937). *The wealth of nations (1776)* (p. 740). New York, NY: Modern Library.

Smythe, E., & Smith, P. J. (2006). Legitimacy, transparency, and information technology: The world trade organization in an era of contentious trade politics. *Global Governance: A Review of Multilateralism and International Organizations*, *12*(1), 31–53.

Stasavage, D. (2004). Open-door or closed-door? Transparency in domestic and international bargaining. *International Organization*, *58*, 667–703.

Steinberg, R. H. (2002). In the shadow of law or power? Consensus-based bargaining and outcomes in the GATT/WTO. *International Organization*, *56*, 339–374.

Steinberg, R. (2009). *Future of the WTO*. Chicago Law School Faculty Blog. Retrived from http://uchicagolaw.typepad.com/faculty/2009/02/future-of-the-wto.html.

Stewart, T. P., & Callahan, C. J. (1993). *Dispute settlement mechanisms*. In *The GATT uruguay round: A negotiating history*. Boston, MA: Kluwer Law & Taxation. Retrived from http://books.google.ca/books?id=l3FsAAAACAAJ.

Voeten, E. (2007). The politics of international judicial appointments: Evidence from the European court of human rights. *International Organization*, *61*, 669–701.
Voeten, E. (2008). The impartiality of international judges: Evidence from the European court of human rights. *American Political Science Review*, *102*, 417–433.

KRZYSZTOF J. PELC SHORT BIOGRAPHY

Krzysztof J. Pelc is William Dawson Scholar and Associate Professor in the Department of Political Science at McGill University.

His research examines the international political economy, with a focus on international rules. He has written on participation in institutions, privacy and publicity, optimal ambiguity, the impact of hard times on cooperation, and the circumstances under which actors are allowed to break formal rules.

Much of this research looks specifically at the rules of the World Trade Organization (WTO). His work appears, among others, in International Organization, the American Political Science Review, World Politics, the International Studies Quarterly, the World Trade Review, the British Journal of Political Science, the Journal of International Economic Law, and the Journal of Conflict Resolution. His book manuscript, "Making and Bending International Rules" addresses the means by which actors resolve the "architectural challenge" of legal flexibility: how can we attain the benefits of flexibility, whereby countries are allowed to temporarily break the rules in hard times, while curbing its abuse?

RELATED ESSAYS

Lawmaking *(Political Science)*, Jamie L. Carson and Mark E. Owens
Judicial Independence *(Political Science)*, Tom S. Clark
The Evolving View of the Law and Judicial Decision-Making *(Political Science)*, Justine D'Elia-Kueper and Jeffrey A. Segal
Why Do States Sign Alliances? *(Political Science)*, Brett Ashley Leeds
Economics and Culture *(Economics)*, Gérard Roland