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Is WTO Dispute Settlement Effective?

Keisuke Iida

The World Trade Organization (WTO) has become one of the most controversial international institutions, as evidenced by the massive protests in Seattle in November 1999.[1] Curiously, both the defendants and the critics of the WTO seem to believe that it is a highly effective institution, but that should not be assumed. Rather, that assumption has to be examined and demonstrated objectively and systematically. This article makes a first step in that direction.

The WTO has two major functions: legislative and judicial. The legislative function refers to the role of the WTO as a forum in which to reach trade agreements. The judicial function is performed by the dispute settlement system, one of the new major features of the current multilateral trade system. The political features and underpinnings of these two functions, although somewhat similar, are distinct enough to warrant separate analyses. Furthermore, due to the long stalemate in multilateral negotiations until the breakthrough at the Doha ministerial conference in November 2001, the legislative function of the WTO has been in low gear, and the real action has been taken by the judicial arm. Therefore, in this article, I focus only on dispute settlement, or the judicial arm of the WTO.

Effectiveness

Recent regime analyses have concentrated on the question of effectiveness. This trend is particularly notable in environmental studies, presumably because the idea of "effectiveness" moves our attention away from formalism and directs it to substance. For instance, questions about an international environmental regime's effectiveness are not directed to the formal language of a treaty, but rather to whether or not it does anything useful for the environment. Oran Young and Marc Levy distinguish between several different types of effectiveness: problem-solving, legal, economic, normative, and political.[2] Effectiveness in problem solving is

the most intuitive: whether or not a regime solves the problem that the regime is supposed to combat or to help solve. Although this is clearly one of the most important concerns, Young and Levy argue that this definition sometimes poses several difficulties. Legal effectiveness focuses on compliance: whether or not contracting parties behave according to the rules specified in the regime. While measurement is easier with regard to this dimension, it may trap us into a purely formal analysis. Economic effectiveness adds an economic-cost dimension to the problem-solving approach mentioned above. Normative effectiveness refers to whether or not a regime achieves values, such as fairness and participation. Finally, political effectiveness refers to the effectiveness of a regime in altering the behavior of actors in favor of better management of environmental problems. According to this yardstick, a regime could be "politically" effective without full compliance, presumably a difficult goal to achieve in international politics.

While this classification suffers from some operational ambiguities, it is useful in generating a multifaceted approach to the analysis of international regimes. Some of the questions I pose later in this article could be classified accordingly. For example, the questions of the effectiveness of the WTO in facilitating dispute resolution and preventing unilateralism are problem-solving approaches. The analysis of its effectiveness in assuring a level playing field and reconciling trade and nontrade concerns is a normative approach, and the discussion of the legislative-judicial balance in dispute settlement is "political."

A major concern in the literature has been to search for clues to establish causal connections between regimes and their effectiveness with regard to some of these dimensions. However, an equally important research question is "What makes international regimes effective?"—if effectiveness can be measured and can be traced back to the regimes. The answers to this question have been few and far between.

One of the most promising answers is that "regime design matters." In a path-breaking work on oil pollution, Ronald Mitchell showed that the way a maritime oil pollution regime was designed affected the effectiveness of the regime in a crucial manner.[3] In particular, he showed that a regulatory change in the direction of greater visibility of an individual ship's actions prevented pollution. This gives an insight into international regulation and human behavior in environmental issues, but it remains to be seen if it is generalizable to other issue areas. Since the dispute settlement mechanism of the multilateral trade system has undergone a substantial change in regime design, as I describe shortly, it provides us with a quasi-experiment in examining its impact on effectiveness.

While there is voluminous political science literature on the legislative side of the multilateral trade system—namely, the politics of multilateral trade negotiations—political scientists had until recently shunned the study of the judicial function of the global trade system. By default, it had been left to lawyers or legal scholars to analyze and diagnose the effectiveness of dispute settlement systems. Therefore, it is not surprising that legal scholars and lawyers wrote the first diagnosis of the effectiveness of the WTO dispute settlement system.[4] Although some political scientists have begun to make a foray into this area recently, the data used have been largely limited to the previous General Agreement on Tariffs and Trade (GATT) regime.[5] While I take into account the opinions and analyses of legal scholars, I provide a more political slant on the question of effectiveness.

Institutional Framework

Before proceeding to the evaluation of the effectiveness of WTO dispute settlement, I need to discuss some of the changes in the institutional procedures that were made from the previous GATT to the new WTO regime. There have been four major changes from GATT to the WTO in terms of dispute settlement, and these changes affect the desiderata for firms and governments involved in trade disputes. First, the most decisive change from GATT to the WTO is the introduction of "negative consensus": the rulings of the panel (first instance) and the Appellate Body (AB) are adopted automatically unless there is a consensus within the Dispute Settlement Body, an intergovernmental organ, to overturn them. This essentially means that if the case is appealed, the AB has the final say. Given the assumption that the AB renders rulings independent of government pressure and that it is neutral in not favoring particular governments,[6] firms and governments will weigh the "merits" and "precedents" of the case and decide whether they should file a case on which they have grievances. This means that the cases with greater merits and clear precedents of winning are more likely to be filed at the WTO. On the other hand, the defending party is not oblivious to this fact. Even the most risk-taking governments and firms would concede if the chance of losing were nearly 100 percent. Shifting resources to market competition may bring higher profits (or smaller losses) than persisting with a futile litigation. Therefore, the cases brought to the WTO have high merits but do not have a 100 percent chance of winning; there is at least some residual uncertainty about how the rulings will go.

Another accompanying change to this "automaticity" is the greater likelihood of facing retaliation when the defending party refuses to comply with a guilty verdict. In GATT days, the losing side could easily block the panel report or a request for retaliation (retaliation happened only once at GATT). Now neither a "guilty" finding nor a request for retaliation is easily blocked. Hence, the defending party, once it has received a violation finding, has to resign itself to the likelihood of retaliation authorized by the WTO. However, the likelihood of retaliation is not 100 percent either. The complaining party has to weigh various factors when it decides to retaliate, not the least of which is the cost to its own industry. This is where a "realist" concern may creep in, even in this nonrealist setting. A large economy with a large import market—for example, the United States—that is important to the defending party can wield more influence by threatening retaliation than a small economy with vulnerable industries dependent on imports.

The second major change from GATT to the WTO is the speeding up of the process. While GATT cases could drag on forever, there is a strict timetable for proceedings at the WTO. Firms involved in disputes have welcomed this change. The more quickly their cases are resolved, the more quickly the benefits of winning are reaped. Therefore, firms on the offensive side have greater incentive to file disputes at the WTO. Conversely, firms on the defending side have greater incentive to concede. In GATT days, they could rely on delaying tactics, but at the WTO, delaying tactics are less effective, although still used.

The third change that the WTO brought is the addition of the appellate process. Although the AB is not likely to overturn the panel rulings completely, partial modifications are common. Given this fact, the government on the defending side (with a loss at the panel stage) is likely to appeal, hoping for a more lenient ruling from the AB. Equally, the complainant government is likely to appeal if the panel report is unfavorable or does not give enough relief. Moreover, appeals are good for reputational concerns of the government: it can show to its constituency that it has fought a good fight. Therefore, the appeal process is used quite often. Of the seventy-eight panel rulings issued from 1995 to October 2003, fifty-three cases (68 percent) have been appealed.

A fourth major change from GATT to the WTO is the participation of nongovernment organizations (NGOs). While the WTO is an intergovernmental dispute resolution mechanism, denying standing to nonstate actors, it has made its processes more transparent and accessible. For instance, the Appellate Body allowed NGOs to attach their briefs to the U.S. government's submission to the WTO in the shrimp-turtle case.[7] This has already changed the character of the WTO process.

More and more nontrade issues are involved in the disputes. This poses an interesting question: Is the WTO more influenced by trade considerations than nontrade considerations?

Finally, apart from the institutional changes in dispute settlement, the Uruguay Round, which led to the creation of the WTO, produced a number of important changes in substantive rules. It is beyond the scope of this article to examine all the ramifications of these changes—not to mention the changes likely to be made during the Doha Round. However, worthy of mention is the addition of new issues, such as agriculture, services, trade-related investment measures, and intellectual property rights. To date, about a third of the disputes have concerned these "new" issues.[8] The expansion in the jurisdiction of the multilateral trade system is likely to have considerable impact on the effectiveness of the dispute settlement procedure as well.

Is the WTO Dispute Settlement System Effective in Settling Disputes?

In the rest of this article, I examine the effectiveness of the WTO dispute settlement system in five areas: actually solving disputes, fending off unilateralism, assuring a level playing field, reconciling trade and nontrade concerns, and balancing legislative and judicial functions.

First, does the WTO dispute system do what it is intended to do—that is, facilitate dispute resolution? Let me give an overview of the numbers of disputes. As of October 2003, more than 300 complaints have been filed at the WTO. This caseload is comparable to that of GATT over the forty years of its history. However, this number is somewhat misleading. Several countries often complain about the same trade measure of a particular country. The WTO treats each of these complaints as distinct, but as long as the substance of the complaints is the same and provided that the same panel handles them, I have treated them as one complaint.[9] According to this method of counting, 248 distinct complaints have been filed.

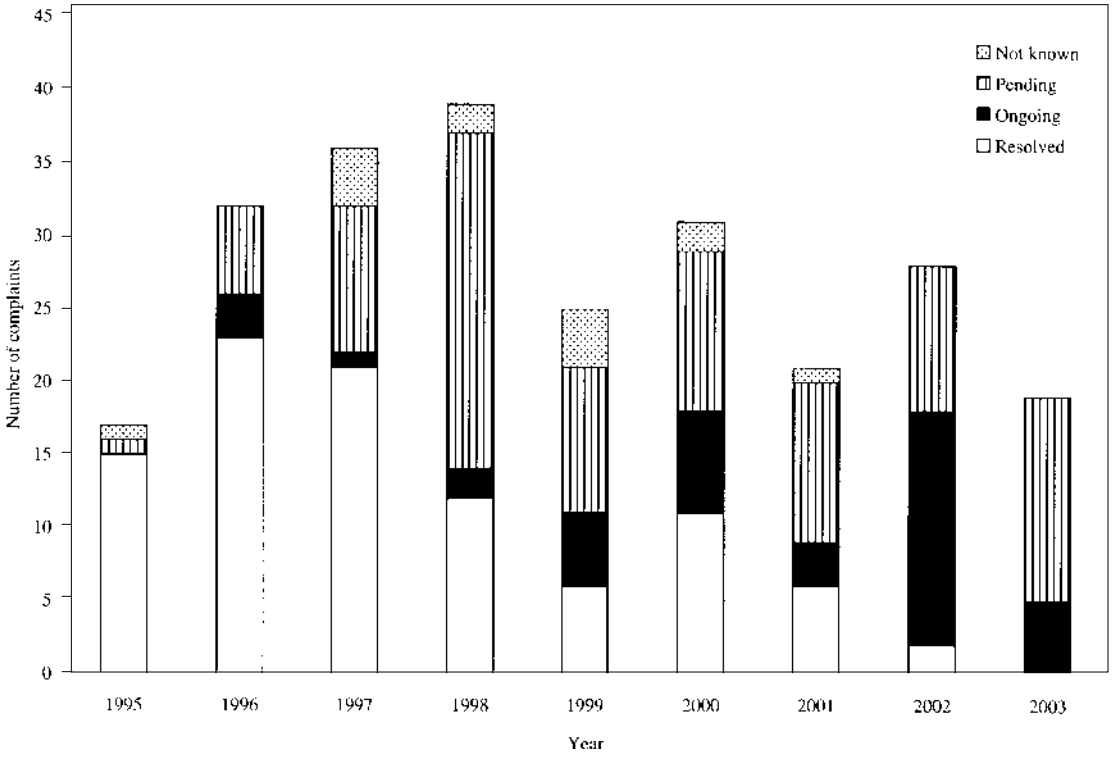
What is the overall track record of dispute resolution? This question, while simple, is not so easy to answer. It depends on the analyst's judgment as to what counts as a "satisfactory" outcome. I have tried to rely on the parties' assessment as much as possible. There are two main categories of satisfactory outcome: (1) the parties have implemented the WTO rulings, and (2) the parties have settled the dispute between themselves, with or without WTO adjudication. While the first type is relatively easy to track, the second category is not. Therefore, I have relied

on the parties' notification to the WTO as to whether or not they have reached a mutually agreed solution. A third "possibly satisfactory" category is one in which the WTO found no wrongdoing on the part of the defendants, and hence no action was required. This could be considered a "successful" dispute outcome, at least from a legal point of view. All of these cases are classified as "resolved" in Figure 1. There are two classes of pending cases. One is the class of cases that are still going through the adjudication procedures or have gone through adjudication and are in the implementation stage. The WTO allows a "reasonable period of time" for implementation, which ranges from several months to a maximum of fifteen months. A number of cases are at this stage. This class is named "ongoing" in Figure 1. The second class of pending cases (denoted as "pending" in Figure 1) comprises those cases on which consultations have been held without reaching concrete agreement. It is possible that some of these cases have actually been settled, but the parties have not notified the WTO of that fact, thereby making the interpretation of this class of cases difficult. Finally, there are a few cases for which the final result is not known.

Figure 1 shows the classification of disputes according to these criteria.[10] The complaints are divided according to the year in which they were initially filed. This shows that during the first two to three years of dispute settlement, the WTO had a good track record, but from 1998 on, the number of possibly unsatisfactory outcomes increased. This may be partly due to the fact that not enough time has elapsed since the inception of disputes. This can be seen in the number of "ongoing" cases since 1998. However, a majority of unresolved cases are so-called pending consultations cases, as seen in Figure 1. For this class of cases, especially those on which consultations were held in 1998 or 1999, it is hard to argue that the parties have not had enough time. I suspect that for a large proportion of cases in this category, the complainants have all but abandoned the complaint, for one reason or another, but have not made this fact public. Based on this analysis, we could tentatively conclude that in the first few years of dispute settlement, the WTO performed well, whereas since 1998, it has not been working as smoothly.

A comparison with the track record of GATT may be useful. Robert Hudec has assembled the most comprehensive data on GATT disputes, and of 207 cases that were filed at GATT from 1948 to 1989 (data for the cases from 1990 through 1994 are missing), there were 88 rulings, of which 20 were no-violation findings and 68 were violation findings. Since no action was required for the 20 no-violation cases, they would be included in our "success" category. Of the 68 violation rulings, 45 led to fully satisfactory outcomes and 15 led to partly satisfactory outcomes.

Figure 1 Outcomes of WTO Disputes (1995–2003)



Of 64 cases that were settled or conceded without GATT rulings, 37 led to fully satisfactory outcomes and 25 reached partly satisfactory outcomes. Therefore, by the most conservative measure, the overall success rate of the GATT dispute system was 102 of 207 cases, or 49 percent. Hudec reports a different figure, using only the cases with known results (139 cases). According to his calculation (excluding those with nonviolation findings), the success rate is 60 percent.[11] That said, a decade-by-decade breakdown shows some fluctuations, with success rates lower in the 1950s and 1960s.

Therefore, the performance of the first few years of the WTO dispute settlement is comparable to, or above, the success rate of the GATT system, but the rate has been below that of GATT since 1998. It has to be admitted that the number and nature of disputes filed are different and that no totally comparable analysis can be made. Nevertheless, it should be emphasized that the conventional wisdom that the WTO is extremely "effective" in resolving disputes (in particular, relative to GATT) should be questioned.[12]

One possible explanation for the decline in the effectiveness of the WTO dispute system since 1998 is the complication of U.S.–European Union relations. The WTO ruled on two of the most difficult cases in 1997—bananas and beef hormones—and on finding the European Union's compliance insufficient in the banana dispute and nonexistent in the beef dispute, the United States resorted to sanctions in 1999 in both cases. This soured U.S.–European Union relations considerably. The subsequent case brought by the European Union against the United States over foreign sales corporations,[13] for example, is widely reputed to have been a retaliatory suit. In addition, according to negotiators in Geneva, political bargaining is often suspended during the panel and AB proceedings, with haggling restarting only after all the legal procedures are exhausted. This is not an efficient use of time, since it causes substantial delays.

A related question with regard to this dimension of effectiveness is whether or not the WTO has restrained the outbreak of trade wars. The answer depends on how one defines trade wars and what would have happened without the WTO. As already mentioned, so far the United States has resorted to sanctions in two disputes against the European Union—bananas and hormones. In the former, Ecuador also joined the retaliation, and in the latter, Canada joined. If one includes these cases as trade wars, the WTO has certainly not stopped trade wars. In each case, however, the WTO appointed an arbitrator to determine the size of countermeasures. This has had a restraining effect on the parties' behavior.[14]

Is WTO Dispute Settlement Effective in Fending Off Unilateralism?

Another purpose for which the WTO dispute settlement system was constructed was to fend off unilateralism. There is more than one way to resolve trade disputes. In the 1980s, the United States in particular turned increasingly to unilateral measures authorized under Section 301 of the U.S. Trade Act of 1974. Hudec has described how the United States increasingly defied GATT rulings, using its power to block adoption of panel rulings.

While the U.S. government wanted a stronger dispute settlement system during the Uruguay Round negotiations, the Europeans and Japanese wanted the annulment of Section 301 in exchange. Therefore, an important question is whether or not this has happened. Has the WTO disarmed Section 301?

The most important factor in this regard is the perception of the firms. If they feel that they can more effectively achieve their purposes of market opening abroad through Section 301 rather than through the WTO, they will continue to file complaints. On the other hand, if they find that the WTO is more likely to resolve their disputes in their favor, if the U.S. government is more reluctant to receive their complaints under Section 301, or if they find that the WTO disputes are cheaper than using Section 301, they will increasingly route their complaints through their governments to the WTO. One of the desiderata for the firms is the propensity of their government to resort to the WTO rather than to unilateral measures.

In this regard, it seems that there has been a learning process for the United States. One of the first disputes fought at the WTO was the auto talks between the United States and Japan. The United States was frustrated with Japanese recalcitrance in the negotiations and threatened to impose retaliatory duties on luxury cars from Japan. In turn, Japan filed a complaint regarding this unilateral measure at the WTO. At the last minute in this game of "chicken," the United States blinked and decided not to retaliate unilaterally.

A similar process was repeated in a film dispute, when Kodak initially filed a complaint against Japan under Section 301. However, during the investigation the U.S. trade representative (USTR) decided to route this dispute through the WTO, fearing that Japan would repeat its tactic during the auto talks and would file a WTO complaint against any retaliation under Section 301.[15] Because of this learning process, the USTR started routing most Section 301 cases through the WTO, causing

Section 301 to become moribund as a unilateral measure. Of the twenty-seven Section 301 cases that were initiated between January 1995 and August 2002, seventeen cases were adjudicated at the WTO and the rest settled bilaterally without WTO intervention.[16] More important, since the Kodak case, the United States has not resorted to retaliation under Section 301 without first going through the WTO.

Another sign that the WTO has tamed U.S. unilateralism is the fact that most of the recent invocations of Section 301 have been self-initiated cases in connection with WTO proceedings. A USTR official says that the industry is learning this fact and refrains from filing Section 301 cases.[17] Indeed, after the Kodak case (filed in May 1995), the private sector filed only six Section 301 petitions (up to August 2002). All the others have been self-initiated by the USTR. In contrast, the private sector filed 98 petitions (70 initiated, 28 rejected or withdrawn) during the GATT period (1975–1994), or about five cases per year on average.

In summary, the U.S. government has learned that any Section 301 retaliation will be a target of countersuit at the WTO and has decided to route most of the Section 301 cases through the WTO. In addition, U.S. industry has learned that the U.S. government will bring their Section 301 cases to the WTO and hence has changed its strategy.[18]

Is WTO Dispute Settlement Effective in Assuring a Level Playing Field?

Suppose that a firm in a developing country has a legitimate grievance about the trade practices of a large developed country. Will it ask its government to pursue a dispute at the WTO? Several negative considerations dictate otherwise. First of all, WTO disputes are not cheap.[19] A small firm or the government of a developing country may find it unaffordable. Therefore, it will simply keep silent. This would leave many such cases invisible to third parties, including myself. In these situations, the best that could be done would be to negotiate these problems bilaterally. However, as long as the government (and firm) on the other side knows that the complainant cannot afford to file a WTO dispute, there is less incentive to concede.

These considerations lead to the following hypotheses: poor developing countries will be underrepresented in the WTO dispute settlement system (as plaintiffs), and the legitimate grievances they may have will not come to the WTO. None of the above considerations suggests that poor countries are immune from disputes as defendants. Although developing countries receive special treatment in the GATT/WTO system

(their obligations are less stringent and their implementation has a grace period of five years or more), many of them have been targeted by developed countries in WTO disputes. Hudec had noted the underrepresentation of developing countries in the previous GATT dispute system: "Developing countries accounted for 44 of 229 complaints (19 percent) and 29 of 223 appearances as defendant (13 percent)."[20]

However, there has been some improvement in the underrepresentation of developing countries at the WTO. Until 2000, developing countries were reluctant to file disputes at the WTO. From 1995 through 1999, developing countries filed (either alone or jointly) only forty-one complaints (or 27 percent of 149 disputes). Since 2000, however, they have been more aggressive. As many as 51 percent of disputes in 2000 and 71 percent of disputes filed in 2001 came from developing countries. In addition, developing countries are just as frequently targeted: ninety-one complaints (37 percent) were filed against developing countries.

The only notable exception to underrepresentation is Africa.[21] While Africa currently includes thirty-three WTO members (nearly a quarter of the membership), only Egypt (twice) and South Africa (twice) have appeared in WTO disputes, and both appeared only as defendants. None has filed a complaint. In other words, Africa is not even a target of disputes.

Reputational considerations work somewhat against hauling developing countries before the WTO. For instance, Canada and Brazil have been locking horns over subsidies on regional aircraft (or commuter airplanes), which are mainly sold in U.S. markets. Canada obtained WTO authorization for retaliation but did not retaliate. An official from Canada admitted that the authorization was highly embarrassing: it would not be good for Canada's image to impose sanctions on a "poor" country like Brazil.[22]

Cost considerations and the lack of legal expertise[23] have so far inhibited developing countries from fully taking advantage of the WTO dispute settlement system. As a consequence, they are still handicapped as plaintiffs at the WTO, but their trade practices are increasingly complained about at the WTO. Although reputational considerations should work against developed countries suing developing countries, these considerations have not been strong enough to stop those countries from doing so.

The developing countries have begun to address this problem. At the Seattle meeting in 1999, some developing country members of the WTO agreed to establish the Advisory Center on WTO Law to help themselves and others utilize the WTO dispute system more effectively. The center was inaugurated in Geneva in October 2001,[24] but it remains

to be seen how this will affect the course of future litigation at the WTO.

Another possible concern for developing countries is whether the WTO panels and the AB are truly impartial. As described below, there have been a few controversies over the decisions that the AB has made. It is beyond the scope of this article to evaluate the legal merits of WTO rulings, which have to be left to legal scholars. Statistically, it is hard to determine whether WTO rulings are biased in favor of, or against, developing countries, partly because once the disputes reach the ruling stages, it is very rare for the WTO to find no violations. The probability that the WTO will make violation findings is slightly higher when the defendant is a developing country, but the chances that the WTO will find violations are also higher when the complainants include developing countries.[25]

Is WTO Dispute Settlement Effective in Reconciling Trade Concerns with Nontrade Concerns?

As many NGOs fear, there are several reasons why we might expect the WTO to give greater weight to trade concerns than nontrade concerns if there is a need for a balance to be struck between them. First, when WTO agreements are negotiated, firms and industries speak the loudest, and they are the most likely to be heard. Although firms and industries are hardly monolithic, they are unified in the sense that they give priority to economic concerns. Other considerations, such as environmental concerns, consumer safety concerns, human rights, and cultural and other values will not figure prominently in their demands and pressures on the government officials and diplomats who negotiate trade agreements. Second, firms are a key force behind the WTO dispute process, and therefore most of the cases are likely to reflect significant trade concerns. Finally, the incentive for retaliation may also be influenced by corporate concerns, as already alluded to in this article. All these considerations seem to suggest that the WTO dispute process will not be very favorable to environmentalists, cultural purists, human rights advocates, and other noncorporate actors.

This being said, the WTO has already opened the door to these NGOs, albeit modestly. NGOs have also had a significant impact on some government policies. Thus, either directly or indirectly, they may be able to influence the course of events. Unfortunately, there have not been enough cases involving nontrade concerns on the WTO docket to

make definitive judgments. Some high-profile cases give mixed answers to this question.

There have been two major WTO dispute decisions that have incensed environmentalists: the reformulated gasoline case and the shrimp-turtle case. In the former, the Environmental Protection Agency's decision to impose differential treatment on foreign unreformulated gasoline was ruled to be in violation of the principle of national treatment (equal treatment of domestic and foreign goods once foreign goods have entered the country). The second, higher-profile case of shrimp imports concerned a U.S. measure to prohibit imports of shrimp from countries that did not mandate the use of turtle excluder devices. Four shrimp-exporting countries from Asia sued the United States at the WTO and won a ruling in their favor. Although the panel report categorically reprimanded the United States for taking a unilateral measure to pursue the environmental protection goal of protecting turtles, the AB toned down the criticism of the U.S. policy by upholding the principle of environmental protection while still disapproving the specific measure that the United States took. The most controversial issue was the AB decision that the term "exhaustible resources" in Article XX included living resources such as turtles, allegedly contrary to the original intent of the drafters. This "evolutionary" ("read in light of contemporary concerns") interpretation was heavily criticized by developing counties.

The asbestos case is another interesting case, pitting Canada, an exporter of asbestos, against France, which banned the importation of asbestos for public health reasons. In a rare decision, accepting the general exception of GATT Article XX(b), the panel and the AB upheld the French ban.[26] This shows that as long as there is firm scientific evidence in support of the trade-restrictive measure in question, the WTO supports those nontrade concerns.

Finally, confrontation has been averted in a very controversial case concerning Brazil's drug policy. To fight increasing levels of human immunodeficiency virus (HIV) infection, the Brazilian government is promoting local manufacturing of generic acquired immunodeficiency (AIDS) drugs. In order to comply with the WTO law, Brazil had to pass a new patent law to protect new drug patents. However, by using the local manufacturing requirement in the new law (to deny patents unless the firms promised to manufacture locally), the Brazilian government threatened to manufacture generic copies of two new drugs produced by two foreign companies—America's Merck and Switzerland's Roche Holding—unless they started making them in Brazil or importing them at a lower cost.[27] The United States brought this patent case against

Brazil to the WTO in 2000, and the WTO established a panel to adjudicate it. However, to avoid unnecessary controversy, the United States dropped the case in June 2001.[28]

The UN and the WTO quickly became aware of this problem as politically explosive. In the summer of 2000, the UN Sub-Commission on the Promotion and Protection of Human Rights called on the secretary-general and the high commissioner for human rights to analyze the impact that the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) had on human rights. In its August 17 resolution, the subcommission said, "There are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement on the one hand, and international human rights law on the other."[29] Human rights activists argued that provisions of the TRIPS agreement obligating countries to patent pharmaceuticals restricted access to drugs in poorer countries. The WTO also held a special meeting of the Council on Intellectual Property Rights to discuss this issue in June 2001, well timed to coincide with the UN Special Session on AIDS. Finally, the Doha ministerial meeting issued a special ministerial declaration on TRIPS and public health, affirming the broad-ranging rights of states to break intellectual property rights in the name of protecting public health. After a year-long negotiation, a final agreement was reached in August 2003. This example underscores the fact that important "political" decisions need to be made through multilateral negotiations—or through the legislative function of the WTO—and not through dispute settlement.

In sum, the WTO dispute settlement system is capable of reconciling trade (or commercial) interests with nontrade concerns, but in a limited way. In the view of many environmentalists, consumer advocates, and others, the hurdles for accepting trade-restrictive measures as legitimate are too high. For instance, the precautionary principle, which is becoming established in international environmental law, is yet to be firmly embedded in WTO law.[30] There is certainly room for improvement in this regard, but reform has to be implemented by legislative bodies, such as the General Council and/or the Committee on Trade and Environment, not by dispute settlement.

Is WTO Dispute Settlement Too Effective (Powerful)?

The last consideration in the previous section leads to the question of the balance between legislation and adjudication. Even in a domestic system with separation of powers, there is some overlap between the

legislative branch and the judicial branch. Since a court is required to settle urgent disputes at times, it is obliged to "fill the gap" when legislation is not sufficiently clear on some points in question. In that instance, the court performs a quasi-legislative function. However, if a court goes too far in encroaching on the legislative (that is, political) territory, there is bound to be a backlash, with a criticism that unelected judges do not have the right to write legislation. A similar problem happens at the WTO. Since the dispute settlement system has been highly automatic in making decisions lately, there is sufficient ground for concern. Suppose that the AB makes a substantial legal error or a new interpretation of some WTO agreements that was not intended or foreseen by negotiators. Due to the automaticity of adoption, the ruling is most likely to be adopted and implemented. Although judicial activists would welcome such an outcome, most governments are increasingly wary of this danger.

While the most controversial decision has been the procedural ruling regarding amicus briefs, which led to turmoil at the Dispute Settlement Body,[31] some have criticized the AB for trespassing on legislative ground in interpreting substantive rules as well. For instance, in an article published by the Third Trade Network, Chakravarthi Raghavan argued that panels and the AB have gone to the extent of adjudicating between two conflicting provisions of the agreements, citing the example of the Indonesia auto case.[32] To avoid this kind of problem, he suggested that the General Council, the legislative organ of the WTO, give guidelines to the panels and the AB regarding the interpretation of the agreements.[33] Frieder Roessler, former director of the GATT Legal Division and currently executive director of the Advisory Center on WTO Law, was reported to have drawn attention to the trend that the panels/AB are transgressing into areas that should rightly be the jurisdiction of various other organs of the WTO.[34]

A similar concern arose in the U.S. Congress; and in the Trade Promotion Authority legislation, Congress instructed the executive branch to look into the issue. In a subsequent report to Congress, the Department of Commerce agreed that "panels and the Appellate Body must ground their analyses firmly in the agreement text and accept reasonable permissible interpretations of the WTO Agreements by the Members."[35] Perhaps taking a cue from the U.S. concern, the AB is beginning to place more emphasis on textual analysis than before. The change was most dramatically symbolized by the AB's overturning of the panel ruling in the German steel case in late 2002.[36] However, room for legal maneuver for panels and the AB is limited, and here again a fundamental "political" resolution awaits decisions by the Ministerial Conference or other "legislative" bodies.

Conclusion

The central message of this article is that "effectiveness" is not one-dimensional, as many seem to believe. The WTO is no exception; its effectiveness needs to be measured with regard to several dimensions. To summarize the main findings, the WTO dispute settlement system has been most effective in "disarming" Section 301. Since the debacle of the auto talks in 1995, the United States has rarely resorted to Section 301 unilaterally, as it often had in the 1980s. American industries have been filing fewer and fewer cases under Section 301. Even with this most spectacular success, however, the WTO has not been completely effective: the panel that was asked directly to rule on the WTO consistency of Section 301 did not outlaw the statute, given the recent U.S. practice.[37]

The most obvious criterion of effectiveness—whether the WTO actually resolves disputes—is much harder to assess. However, on a relatively simple operationalization of this dimension—whether or not disputes have reached mutually agreeable solutions or implementation of WTO rulings—the scorecard is good only in the first few years of the system. Since 1998, the stockpile of pending cases has been increasing.

The WTO is less effective when measured with regard to the more demanding dimensions, such as creating a level playing field and balancing trade and nontrade concerns. Developing countries are more active in the system than before, but some countries are still completely excluded. The scorecard on balancing disparate interests is very low as well, as indicated by various criticisms leveled at the WTO by NGOs. Finally, the most curious criticism of the WTO is that it is too effective, at least in one sense: going beyond its mandate. Some suggest that the WTO is stepping out of bounds—in essence, making new rules—while the rulemaking bodies such as the General Council and the Ministerial Conference are still hampered by the consensus rule. Unless some kind of political decision is made, this problem is bound to grow in the future, despite the WTO's recent exercise of self-restraint. Legalism does not exist in a political vacuum. If legalism goes too far, other dimensions of effectiveness may suffer as a result. 🌐

Notes

Keisuke Iida is professor in the School of International Politics, Economics and Business at Aoyama Gakuin University, Tokyo, and from 2002 to 2003 was a visiting scholar in the Department of Political Science at the University of California, Berkeley. Formerly he taught at Princeton University.

1. Lori Wallach and Michelle Sforza, *The WTO: Five Years of Reasons to Resist Corporate Globalization* (New York: Seven Stories Press, 1999); Lori Wallach and Michelle Sforza, *Whose Trade Organization? Corporate Globalization and the Erosion of Democracy* (Washington, D.C.: Public Citizen, 1999). For a description of the Seattle protests, see Janet Thomas, *The Battle in Seattle: The Story Behind and Beyond the WTO Demonstrations* (Golden, Colo.: Fulcrum, 2000).

2. Oran R. Young and Marc A. Levy, "The Effectiveness of International Environmental Regimes," in Oran R. Young, ed., *The Effectiveness of International Environmental Regimes: Causal Connections and Behavioral Mechanisms* (Cambridge: MIT Press, 1999), pp. 4–5.

3. Ronald B. Mitchell, "International Oil Pollution of the Oceans," in Peter M. Haas, Robert O. Keohane, and Marc A. Levy, eds., *Institutions for the Earth: Sources of Effective International Environmental Protection* (Cambridge: MIT Press, 1993), pp. 183–247; Ronald B. Mitchell, "Regime Design Matters: Intentional Oil Pollution and Treaty Compliance," *International Organization* 48, no. 3 (summer 1994): 425–458; Ronald B. Mitchell, Moira L. McConnell, Alexi Roginko, and Ann Barrett, "International Vessel-Source Oil Pollution," in Young, *The Effectiveness of International Environmental Regimes,"* pp. 33–90.

4. See the special issue of *International Lawyer* (fall 1998). Also see Robert E. Hudec, "The New WTO Dispute Settlement Procedure: An Overview of the First Three Years," *Minnesota Journal of Global Trade* 8, no. 1 (1999): 1–50.

5. Marc L. Busch, "Democracy, Consultations, and the Paneling of Disputes Under GATT," *Journal of Conflict Resolution* 4, no. 4 (August 2000): 425–446; Eric Reinhardt, "Adjudication Without Enforcement in GATT Disputes," *Journal of Conflict Resolution* 45, no. 2 (April 2001): 174–195. However, their newer studies include WTO data as well. See, for instance, Marc L. Busch and Eric Reinhardt, "Transatlantic Trade Conflicts and GATT/WTO Dispute Settlement," paper delivered at the conference "Dispute Prevention and Dispute Settlement in the Transatlantic Partnership," European University Institute, 3–4 May 2002.

6. Geoffrey Garrett and James McCall Smith doubt this proposition, however. See Geoffrey Garrett and James McCall Smith, "The Politics of WTO Dispute Settlement," paper presented at the annual meeting of the American Political Science Association, Atlanta, 1999.

7. WTO, WT/DS58/R (15 May 1998), par. 91.

8. Of the 248 disputes that are examined in this article, 48 cases concerned agriculture, 20 intellectual property rights, 5 investment, and 5 services.

9. However, the same panel may deliberate on similar complaints separately. In that case, they are counted as distinct. For instance, the European Union and Japan complained separately about the 1916 Antidumping Act of the United States, and the panel proceedings were separate (the European Union panel moved before the Japan panel), although the Appellate Body proceedings were merged. However, I have counted all the complaints about the U.S. steel safeguard measure in 2002 as one dispute, because it is most likely that a single panel will handle all the complaints.

10. The data in Figure 1 are taken from WTO, Update of WTO Dispute Settlement Cases, WT/DS/OV/16 (17 October 2003).

11. Robert E. Hudec, *Enforcing International Trade Law* (Austin, Tex.: Butterworth Legal Publishers, 1993), Table 11.13, p. 293.

12. Busch and Reinhardt have reached the same conclusion independently. See their "Transatlantic Trade Conflicts."

13. WT/DS108/1 (28 November 1997).

14. There is a tension between enforcement and restraints on escalation, however. It may be argued that for the sake of ensuring compliance, the degree of retaliation should be greater than the amount of injury to the complainant, but that may aggravate the conflict.

15. Kodak actually tried to pursue a three-track approach: the WTO, the 1960 GATT CP Decision (regarding private restrictive practices), and Section 301 (for the remainder of the issues). The latter two approaches were eventually dropped.

16. Office of the United States Trade Representative, "Section 301 Table of Cases," available online at http://www.ustr.gov/html/act301.htm (accessed 2 December 2003).

17. Interview with author, 22 March 2001.

18. For a similar view, see Matthew Shaefer, "Section 301 and the World Trade Organization: A Largely Peaceful Coexistence to Date," *Journal of International Economic Law* 1, no. 1 (March 1998): 156–160.

19. For instance, Powell, Goldstein, Frazer & Murphy of Atlanta, Georgia, one of the first American law firms to open a WTO practice in Geneva, quotes U.S.$250,000 per dispute. "WTO Is New Mecca for Lawyers," *Gazetta Mercantil Online,* 21 June 2000.

20. Hudec, *Enforcing International Trade Law,* p. 295.

21. A regional breakdown of parties shows that Latin America is dominant, followed by Asia, among developing countries. Up to October 2003, Latin American countries had filed 61 disputes while Asian developing countries filed 41 disputes. On the defending side, Latin America was a target of complaints in 56 disputes while Asian developing countries were targeted in 25 disputes.

22. Interview with author, 13 September 2000.

23. Another factor may be a fear of aid being withdrawn, but this has not been confirmed.

24. See http://www.acwl.ch/ (accessed 5 December 2003). The center provided legal assistance to developing countries in six WTO disputes in its first year of operation. Also see "Legal Centre for Poor Nations to Be Launched," *Financial Times,* 1 December 1999, p. 12; Kim Van der Borght, "The Advisory Center on WTO Law: Advancing Fairness and Equality," *Journal of International Economic Law* 2, no. 4 (December 1999): 723–728.

25. As of the 78 rulings issued up to October, the panels and/or the AB found some WTO inconsistencies in 68 cases (87 percent). When the defendant was a developing country, the rate was 92 percent (24 out of 26 cases). When the complainants included developing countries, the rate was also 92 percent (25 out of 27 cases).

26. DS135/R (18 September 2000), DS135/AB/R (12 March 2001).

27. Miriam Jordan, "Brazil May Flout Trade Laws to Keep AIDS Drugs Free for Patients," *Wall Street Journal,* 12 February 2001, p. B1; Stephen Buckley, "U.S., Brazil Clash over AIDS Drugs," *Washington Post,* 6 February 2001, p. A1.

28. Helen Cooper, "U.S. Drops WTO Claim Against Brazilian Patent Law," *Wall Street Journal,* 26 June 2001, p. B7. This WTO case is extremely

similar to a civil case litigated in South Africa, but the pharmaceutical companies had to abandon the latter case because of the bad publicity it generated.

29. "UN Calls for Analysis of Human Rights Impacts of TRIPS," *Inside US Trade*, 25 August 2000.

30. However, there is a minor provision in the Sanitary and Phytosanitary (SPS) agreement (Article 5.7) of the WTO that incorporates this principle.

31. See Claude E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (Washington, D.C.: AEI Press, 2001), pp. 50–53; James McCall Smith, "Manufacturing Legitimacy: Judicial Politics in the WTO," paper presented at the annual meeting of the American Political Science Association, Boston, 29 August–1 September 2002, pp. 17–21.

32. Chakravarthi Raghavan, *The World Trade Organization and Its Dispute Settlement System: Tilting the Balance Against the South* (Penang, Malaysia: Third World Network, 2000), pp. 15–16.

33. Ibid., p. 28.

34. "WTO's Defective Dispute Settlement Process," *The Hindu*, 6 July 2000; Frieder Roessler, "The Institutional Balance Between the Judicial and the Political Organs of the WTO," paper presented at the conference "Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium," J. F. Kennedy School of Government, Harvard University, 1–2 June 2000.

35. Department of Commerce, "Executive Branch Strategy Regarding WTO Dispute Settlement Panels and the Appellate Body," 30 December 2002, p. 8. See http://www.ita.doc.gov/ReporttoCongress.pdf (accessed 5 December 2003).

36. WT/DS213/AB/R (28 November 2002).

37. WT/DS152/R (22 December 1999).