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THE DECLINE OF GLOBAL TRADE NEGOTIATIONS—AND THE RISE OF JUDICIAL AND REGIONAL ALTERNATIVES*

Richard H. Steinberg**

INTRODUCTION

Even before the beginning of the global financial crisis in late 2008, hopes for a broad multilateral trade deal had faded. Since its creation in 1995, the World Trade Organization¹ (WTO) has been unable to advance an ambitious legislated trade deal among members. Developing countries, often speaking as a bloc, have exacerbated disjuncture in U.S. and European preferences on trade policy. The result has been an impasse at the negotiating table and the slow death of what was once envisioned as an expansive Doha Round of multilateral trade negotiations. The same North-South divisions that have deadlocked multilateral trade negotiations also help explain the increasingly active role being played by the WTO Appellate Body, which has not been subject to an effective check by the divided WTO membership. Moreover, the WTO negotiating deadlock has favored an explosive proliferation of bilateral, plurilateral, and regional trade agreements (known collectively as “preferential trade agreements”- PTAs), which have offered alternative venues for trade negotiations. Taken together, these developments suggest that we are entering a period of regionalization of global trade negotiations and “judicial liberalization,” which has been led by the WTO Appellate Body.

To examine the relationship between multilateral paralysis and alternative venues for trade liberalization, I proceed in three steps. Section I examines the law and politics of successful multilateral trade negotiations in the 1948-95 period. Section II identifies the origins of the contemporary legislative stalemate in the WTO, explaining the collapse of multilateral negotiations and its relationship to the proliferation of PTAs. Section III explains how the WTO dispute settlement system has become an increasingly and unexpectedly important venue for lawmaking with a liberalizing bias, and explains why WTO judicial liberalization persists, arguing that it is favored by developing countries that now join together to block WTO legislative proposals that would diminish the Appellate Body’s independence. I conclude by exploring implications of a world in which liberalization takes place preferentially and in the courtroom.

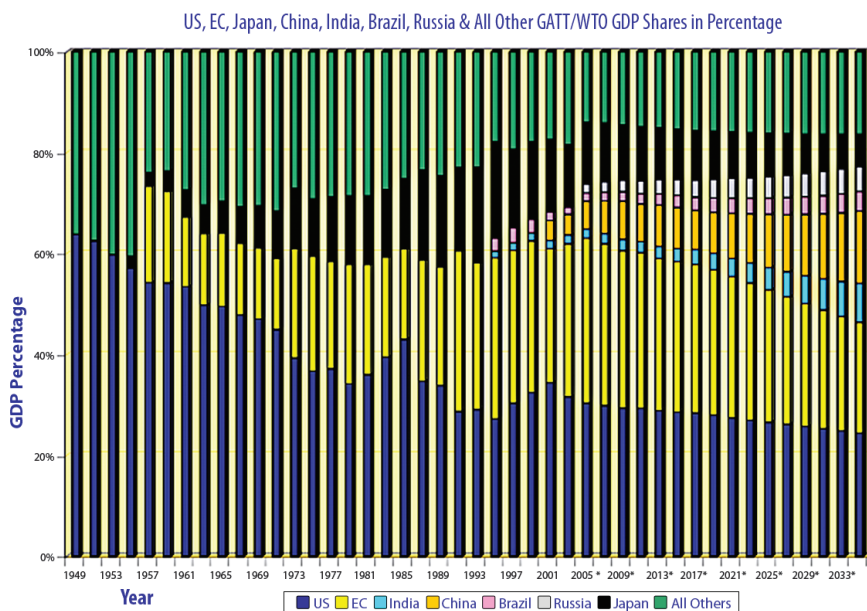
I. Law, Power and the Success of Multilateral Trade Negotiations from 1948 to 1995

The General Agreement on Tariffs and Trade (GATT),² and its successor organization (the WTO), created a rule-based system (GATT/WTO), which facilitated the worldwide lowering of trade barriers and the growth of world commerce.³ The efficacy of the regime, however, rested on a consensus among its largest members. In its earliest years, the GATT reflected U.S. power; as U.S. market share receded, the organization continued to prosper because of a trans-Atlantic bargain between Europe and the United States.

The GATT was created to include both big and small nations, and was built on two norms: most-favored-nation (MFN) treatment and reciprocity. At its inception in 1947, half of the nations that negotiated the GATT were developing countries. These smaller nations benefited from regime participation via the GATT’s MFN provision, which requires GATT parties to accord their most favorable tariff treatment to all GATT parties. At the same time, in most of the first 35 years of the regime, the bigger GATT countries were concerned about reciprocity (i.e., market-opening for imports conditioned on foreign market-opening for exports) with other large countries—but they were not very interested in access to the world’s smaller markets. These larger countries bargained with each other for reciprocal trade liberalization in serial multilateral trade Rounds. Hence, the developing world could deny increased access to its own market, while the MFN provision assured it of new export markets. Some Southern countries did liberalize their markets in the pre-WTO period, either in a multilateral trade Round or in the process of accession, but the majority of these GATT contracting parties eschewed liberalization at home and grew their foreign trade through MFN-garnered export access.

Reliance on a norm, reciprocity (among big countries), and a rule, MFN, to fuel trade liberalization had long-term implications. The reciprocity norm made bargaining power in the GATT/WTO a function of market size and a nation’s willingness to use the threat of market closure (or promise of more openness) as a means to influence others. Figure 1 shows actual market size (measured in Gross Domestic Product—GDP) of the biggest GATT/WTO members from 1949 through 2004, and projected market size from 2005 through 2034, as a percentage of GATT/WTO market size.⁴ In the GATT’s early years, U.S. GDP accounted for about 65% of GATT GDP; the United Kingdom accounted for another 10%. Since then, the relative size of the U.S. market has consistently declined; starting in 1957, that of the European Communities (EC)⁵ has grown.

Figure 1



To predict future growth, I used the projections of the Goldman Sachs Global Economics group. Their model predicts growth as a function of growth in employment, growth in the capital stock, and total factor productivity (TFP) growth. TFP is modeled as a process of catch-up on the developed economies. The Goldman Sachs model forecasts for GDP growth in the next 10 years are similar to IMF estimates of potential growth in the economies evaluated here.⁶

Shifting market share parallels coalition behavior in the GATT/WTO. The early years, 1947 to 1973, were a time of almost complete economic dominance by the United States. While the EC's market share was growing, it only accounted for an average of 15% of GATT GDP during the period. The establishment of the GATT itself best exemplifies U.S. dominance of the negotiating process in these early years. The United States drafted the instrument that became the GATT 1947. It made accommodations to the United Kingdom, enabling the maintenance of colonial preferences, but the General Agreement was fundamentally U.S. designed.⁷

By 1973, the U.S. share of GATT GDP had fallen below 40% and the EC share had grown to more than 20%. Other changes had occurred in the interim. Before 1973, EC institutions were insufficiently developed to enable Brussels to partner with Washington to govern the GATT system. By the mid-1970s, however, the role of the Commission in coordinating Europe's external commercial negotiations, and that of the 113 Committee in overseeing the Commission, were clearly established, enabling the EC to speak with a single voice.⁸ As a result of both shifting market shares and better coordination among EC members, Brussels and Washington began regular bilateral consultations, often followed by an expanded conversation among the "Quad Group," which also included Canada and Japan. Decisions of the "Quad Group" were then often presented as a *fait accompli* to the other GATT contracting parties. By the early 1970s, commentators had begun to suggest that U.S.-EC cooperation was necessary for successful negotiations at the GATT.⁹

The power of this coalition is exemplified by the events surrounding the establishment of the WTO. In 1991, the EC and United States decided to impose the results of the Uruguay Round negotiations on the rest of the world through what they initially referred to as "the power play." Specifically, they agreed that they would withdraw from the GATT 1947 and sign a substantively identical but legally distinct instrument, the GATT 1994.¹⁰ This would disengage Europe and the United States from their GATT 1947 MFN commitments to the rest of the world, and would replace them with new MFN commitments in the GATT 1994. The EC and U.S. negotiators agreed that these new commitments would be conditioned on third countries' acceptance of all the WTO multilateral agreements. The effect of this maneuver was to threaten closure of the world's two largest markets (those of the EC and the United States) to any country that did not accept *all* of the WTO multilateral agreements, including several agreements that most developing countries had previously refused to accept." This transatlantic maneuver, which became known diplomatically as the "Single Undertaking" approach to closing the Uruguay Round, allowed the EC and United States to set the terms of the new organization. Now, reciprocity and all the regime's principles would be applicable to the developing world.

For those favoring rapid and deeper liberalization, the WTO's biggest contemporary problem is an inability to gain consensus on a negotiated outcome. Three developments explain the creation of stalemate in multilateral trade negotiations.

First, as explained above, with the Single Undertaking that closed the Uruguay Round, the norm of reciprocity became generalized across all countries. That event was the culmination of pressures that began in the 1970s and intensified in the 1980s.

Powerful constituencies in the North were demanding deeper liberalization that would discipline behind-the-border measures in such areas as technical barriers to trade, services regulations, and intellectual property protection. And as the U.S. trade balance deteriorated and the Asian Tigers emerged, various groups in the United States began demanding reciprocity on these issues, as well as tariff reductions, from all countries. With the imposition of reciprocity at the conclusion of the Uruguay Round, the developing world began demanding changes in the negotiating agenda, especially for negotiations on a range of goods of their choosing. With developing countries unable or unwilling to offer much in return, negotiations have become attenuated and increasingly difficult.

Second, developing countries have adopted institutional strategies to sustain their coalitional behavior. Trade negotiations have always been difficult, and developing countries have in the past episodically joined together to influence negotiations. But the persistence of contemporary developing country coalitions is unprecedented. Developing countries are continuously acting in concert with each other, sustaining blocs that have successfully vetoed a range of various proposals favored by the EC and United States.

The developing countries are not a unified bloc with identical interests, but they have figured out an institutional solution to remaining more unified and cohesive than ever before. Specifically, they are agreeing to bundle issues together, creating linkages across the interests of varying types of developing countries. When a position is taken on only a single issue by two or more countries, a third country may offer a coalition member a more attractive commercial concession to catalyze withdrawal from the common position. This problem of being split asunder may be solved by agreeing to bundle issues, taking a common position on a host of issues of interest to each country.¹² In the Uruguay Round, the developing countries did not bundle and they were frequently frustrated in efforts to take a common position on individual issues. In the Doha Round, the South seems to have adopted the bundling solution.

As a result, since 1995, the developing world has been more successful than ever at ending Northern hegemony of the GATT/WTO system. Although not able to force the developed world into compliance to their wishes, they have become effective veto-players, a role they have repeatedly played with success in the Doha Round.

Third, beginning in the 1990s, the EC and then the United States began accelerating their conclusion of PTAs, which has had the unintended and unanticipated consequence of diminishing their bargaining power at the WTO. The very idea of a PTA, of course, runs contrary to the GATT MFN principle. GATT Article XXIV has always offered an exception to the MFN rule for PTAs, but the exception was used relatively rarely until the 1990s. Largely in pursuit of a strategy of “competitive liberalization,” the conclusion of PTAs became a cornerstone of EC and U.S. trade policy in the last decade. Frustrated by multilateral stalemate, “competitive liberalization” was adopted as a strategy whereby bilateral PTAs with a hub-and-spoke architecture concluded by the EC, on one hand, and United States, on the other, would pressure excluded third countries (by operation of trade and investment diversion¹³) to also demand PTAs with Washington and Brussels; the idea was that eventually the terms of these PTAs could be multilateralized at the WTO.¹⁴ By 2009, the EC had concluded PTAs covering about 40 countries, with additional negotiations underway to convert the Lome Agreement into a set of reciprocal free trade agreements covering an additional 73 African, Caribbean, and Pacific countries. By the same time, the United States had concluded PTAs with 15 countries, covering nearly one-third of total American trade, and was negotiating to conclude more. Since creation of the WTO, approximately 400 PTAs have been established and remain active; about 200 of these are regional trade agreements.

But neither Washington nor Brussels fully appreciated ways in which the strategy of competitive liberalization could backfire on multilateralism and make progress at the WTO more difficult. It is one thing to conclude a bilateral deal between Washington (or Brussels) and a smaller country; it is quite another to multilateralize its terms with a third country like China. Moreover, the PTA strategy accompanied a new intransigence on the part of the EC and United States in the Doha Round, in part a function of the availability of an alternative to WTO liberalization. Most importantly, however, the conclusion of these PTAs has diminished EC and U.S. bargaining power at the WTO by providing bilateral MFN guarantees to PTA partners. Legally, the proliferation of EC- and U.S.-centered PTAs has fatally constrained the ability of Europe and the United States to behave as hegemonic duopolists. Since each of the PTAs contains an MFN provision, neither Brussels nor Washington can replay the “power play” they used to conclude the Uruguay Round: the third countries with which they have concluded PTAs may rely on the MFN provisions in those PTAs to ensure continued market access to Europe and the United States without regard to whether they continue to enjoy an MFN guarantee through WTO agreements. Proliferation of PTAs therefore poses a significant legal-political constraint on European-U.S. hegemony, a constraint that did not exist a decade ago.

Because of these shifts—the end of non-reciprocity toward the South, sustained developing country coalitions, and U.S.- and EC-centered PTA proliferation—decision-making has become increasingly difficult in the WTO. Nothing symbolizes and illustrates this power shift¹⁵ better than the new “Quad.” In Geneva, “the Quad” no longer refers—as it did for decades—to the EC, Japan, Canada, and the United

States, a group that effectively governed the GATT and shared fundamentally convergent views on the desirability and content of liberalization. Now “the Quad” refers to Brazil, India, the EC, and the United States, a group that has been routinely convened to advance the Doha Round but holds comparatively divergent views about what should be liberalized and who should do it.

The South, now being asked to deliver its markets to international commerce, has become an important demandeur in trade negotiations. What it wants, however, is not easily squared with domestic interests in the North. The agriculture and steel industries in Europe and the United States remain well organized, well financed, and opposed to liberalization. These long-standing protectionist sectors, which have long captured government in the North, have become key obstacles to a successful multilateral negotiation.

At the same time, the South may be unable to deliver in negotiations on key issues. If a broad deal were to be struck at the WTO, it would entail a commitment by the South to address new behind-the-border measures. Credibly committing to such reforms, however, is difficult, given the inefficiencies in state structures in most of the developing world. In Europe and the United States, constituencies now demand that trade negotiations focus on issues such as services, investment, competition policy, labor, environment, and culture. Unlike border measures that invoke a political problem because they lead to factor reallocation, many of these newer issues implicate additional fundamental features of developing countries such as changes in the regulatory structure and capacity of the state, the political structure of society (for example, the power of organized labor), or the industrial structure of the economy. Rules addressing these areas are hard to establish in developing countries, where state capacity and authority structures are simply too poorly developed.

As a result, if there is a proclaimed “successful conclusion” of the Doha Round, the results will be minimalist. Compared to the ambitions of European and U.S. trade policy makers and policy wonks before the Round was launched—for a Round that would zero industrial tariffs, eliminate agricultural subsidies, and address environmental, labor, competition, investment, and transparency issues—the Round failed long ago. But while the ministers of the member nations have been unable to agree on the multilateral trade agenda, they have been able to conclude hundreds of PTAs with each other and the judicial branch of the WTO has begun to address contested policies.

While liberalization through negotiation has become more difficult in the last decade, liberalization (of a different quality, to be sure) has gotten easier through the litigation path. Legislative gridlock and judicial lawmaking are related phenomena in both the domestic and international context.¹⁷ I argue that in the wake of failed multilateral trade negotiations, WTO lawmaking has moved out of the legislative venue of member state negotiations and into the courtroom. Delegation to the judiciary, established with the creation of the WTO, has been unexpectedly accompanied by considerable agent slack.¹⁸ The same divisions that

III. The Rise of Judicial Liberalization¹⁶

have undermined trade talks have made it increasingly difficult for the membership to provide a check on judicial lawmaking. There is more litigation now than in the GATT years; the contemporary dispute settlement system engages in more lawmaking than in the GATT years; and WTO judicial lawmaking has a liberalizing bias.

**A. Explaining
Increased
Litigation:
GATT and WTO
Compared**

The rise of judicial liberalization in the GATT/WTO system, and the WTO's dispute settlement rules and processes, are best understood in the context of the flawed GATT dispute settlement rules and processes. That system of resolving disputes developed over a 40-year period, but by the 1970s its basic form had taken shape. Export-oriented producers that believed their products were being illegally excluded from a foreign market would complain to their government. A GATT contracting party would then ask the GATT to establish a dispute settlement panel, but the establishment of a panel could be blocked by the respondent. Even if established, the respondent could block a consensus to adopt the panel report (i.e., block the act that would make it a legally binding decision). And if the respondent failed to comply with an adopted report, then the respondent could block a decision that would permit retaliation against it for continued contravention. As respondents frequently blocked the process, the weakness of the GATT dispute settlement procedure became increasingly apparent.

During the 1970s and 1980s, in response to frustration with the GATT dispute system and in the face of a growing trade deficit and a perception of unfair trade practices abroad, the U.S. turned to domestic law to deal with its trade problems. Specifically, a “unilateral” approach to addressing trade disputes was enacted by the U.S. Congress in the form of Section 301 of the Trade Act of 1974. Section 301 permits (and in some cases, requires) the President to impose retaliatory trade sanctions on countries engaging in practices that are “unjustifiable, discriminatory, or unfair”—as determined by the United States Trade Representative (USTR). Thus, when a foreign government blocked the GATT dispute settlement process, the U.S. government often found itself in a position of threatening unilateral trade retaliation against that government unless it agreed to change its trade practices in accordance with Washington’s demands.

This American approach to the settlement of trade disputes was not viewed favorably by the rest of the world, which wanted to reform the GATT dispute settlement process so that U.S. measures, including measures taken under Section 301, could be challenged effectively. At the same time, the United States championed a GATT dispute settlement system that would be more effective and automatic, without a country’s right to block the process, because the U.S. government believed it was far more likely than other countries to be in compliance with GATT rules.¹⁹

The resulting WTO Dispute Settlement Understanding (DSU) is far more obligatory, automatic, and apolitical than the GATT rules. Two changes are central. First, the reform led to the creation of a seven-member Appellate Body to which nations could appeal panel reports. Second, judicial action became more automatic. A consensus is now required to *block* the formation of a panel, adoption of a report,

or an authorization of retaliation for continued non-compliance—a reversal of the former rule that required a consensus to move through each of these stages. Of course, petitioners would not agree to block establishment of a panel they are demanding, and prevailing parties would not block the adoption of favorable panel reports.

The automaticity of the new system and the promise that it has held for aggrieved members have led to an increased caseload for the WTO dispute settlement system,²⁰ compared to the GATT dispute settlement system. While 535 dispute settlement complaints were filed in the 46-year period of the GATT system, 269 complaints were filed in the first eight years alone of the WTO system. Moreover, because of automaticity, there were more dispositive reports (that is, adopted panel reports in cases where there was no appeal; adopted Appellate Body reports in all other cases) issued in the first six years of the WTO system than in the last twenty years of the GATT system.²¹ And there are far more parties to WTO disputes than to GATT disputes. In the GATT era, it was rare for a case to feature more than one complainant. In contrast, in the WTO era, in nearly half of all cases there are multiple complainants or interested third parties. Not only have caseloads increased, so has the number of parties involved in each dispute.

Many scholars have suggested that judges may behave strategically and favor increasing their authority,²² yet few Uruguay Round negotiators anticipated or intended the Appellate Body to engage in lawmaking.²³ The switch to automatic, binding dispute resolution and the establishment of the Appellate Body were seen by the United States as an opportunity to foster implementation of and compliance with the deals struck in the legislative process. The dispute settlement process was to fulfill that purpose by offering a neutral judicial process to enforce WTO agreements the substance of which was largely favored by the United States. Most U.S. policy makers at the time expected WTO dispute settlement to enforce the WTO “contract;” they did not expect or accurately anticipate that the Appellate Body would make law.

B. The Emergence of Judicial Lawmaking

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

WTO judicial lawmaking has two dimensions: filling gaps and clarifying ambiguities. Gap-filling refers to judicial lawmaking on a question for which there is no legal text directly on point, whereas ambiguity clarification refers to judicial lawmaking on a question for which there is legal text but that text needs clarification.²⁴

Judicial lawmaking at the GATT/WTO has expanded along four dimensions.²⁵ First, the DSU's silence on many procedural questions has been seen by some as an invitation to the Appellate Body to make procedural rules. In some cases, the Appellate Body has created law that fills procedural gaps in WTO agreements, even though the existence of the gap has resulted from sharp disagreement among members about how to fill it.²⁶ Second, the WTO Appellate Body has engaged repeatedly in a form of lawmaking by which it has given specific meaning to ambiguous treaty language. Such clarifications may cause a negative political reaction by members or non-governmental stakeholders that engaged in behavior that was within a range of possible meanings, given the ambiguity.²⁷ Third, in a number of instances, the Appellate Body has given precise and narrow meaning to language that was intentionally left vague by negotiators, either because they could not agree on more specific language, or in order to permit a range of alternative behaviors or national practices.²⁸ Finally, a conflict between GATT/WTO texts (or between text and GATT practice) may create an ambiguity, and in a handful of cases the Appellate Body has read language across GATT/WTO agreements cumulatively in a way that has generated an expansive set of legal obligations.²⁹

C. Liberalization Through WTO Dispute Settlement?

In most cases, Appellate Body interpretations have favored more trade openness. In all cases, complainants advance interpretations of WTO agreements that challenge a respondent's trade barrier, and respondents argue for interpretations that would permit maintenance of the barrier. For WTO cases initiated before 2001, 89% of the 152 dispositive reports held that at least one of the national measures at issue was WTO-inconsistent.³⁰ Qualitative assessments of Appellate Body decisions, such as those by Dan Tarullo, have also shown a liberalizing bias.³¹ I do not argue that the Appellate Body always favors liberalization, but its decisions do seem biased toward liberalization³² and its opinions tend to suggest a view of the WTO more as an instrument of liberalization than a reflection of a contractual balance between liberalization and protection captured by the concept of embedded liberalism.³³

D. Why Judicial Liberalization Persists

The use of judicial action to open markets, and the acquiescence of the United States to Appellate Body decisions, does not imply that the United States favors the extent of judicial liberalization currently taking place at the WTO. As argued above, there is little evidence in the negotiating history of the DSU that suggests that the move to legalization of GATT/WTO dispute resolution was intended or expected to lead to expansive judicial liberalization. Then why hasn't judicial liberalization been checked?

The expansive interpretive stance by the Appellate Body has faced *some* limits. For example, the EC and the United States have exercised a *de facto* veto over the appointment of some proposed Appellate Body members. Similarly, members have not been shy about complaining when the Appellate Body engages in lawmaking they dislike, and proposals by powerful members to rewrite parts of the DSU in the Doha Round may have had a sobering effect on the Appellate Body. To some extent, agent slack has been limited.

Nonetheless, developing countries have not joined efforts to curb judicial liberalization at the WTO. While many developing country representatives have complained about judicial “activism” by the Appellate Body, their bigger complaint appears to focus on their relative lack of resources to fully avail themselves of the dispute settlement system.³⁴ Moreover, some developing countries, such as Brazil and India, have not been shy about taking developed countries, such as the EC and United States, to dispute settlement. In so far as more sophisticated developing countries that may be on the edge of development choose to litigate, they may act as proxies for the developing world, knocking down protectionism in the North.

Perhaps that is why the developing countries have blocked U.S. efforts to rein in WTO judicial lawmaking. In the Doha Round, the United States has proposed several judicial reforms that are intended to curb Appellate Body lawmaking. The central U.S. proposal in this regard would permit the parties to a dispute to agree to excise from draft Appellate Body decisions language they find objectionable. Such a rule would (and is intended to) enable the parties to a dispute to have greater control over the content of Appellate Body opinions. It is also obvious that under that rule a powerful respondent (such as the United States) could offer a petitioner a side-payment (or compliant behavior) in order to eliminate disagreeable acts of Appellate Body lawmaking. Despite their own complaints about Appellate Body activism, the developing countries have blocked progress on this proposal and others on the ground that they would diminish the Appellate Body’s independence.

More broadly, a lack of consensus on all aspects of ministerial decision-making helps explain the lack of oversight of the judiciary. Legislative deadlock in the WTO has diminished the ability to check the Appellate Body.³⁵

No one at the time of signing the WTO agreements predicted that the organization would suffer from legislative gridlock, that the Appellate Body would be a force for economic liberalization, or that regional venues would emerge as a focus of negotiated trade liberalization. All three developments were the result of fundamentally unanticipated institutional and political developments. The Northern demand of Southern reciprocity catalyzed sustained developing nation coalitions, which have led to a lack of consensus among WTO negotiators, an absence of oversight of their judicial agent, and a turn to regional outlets for negotiated liberalization.

These shifts are likely to persist. In the WTO, the capacity to legislate is diminishing. The Doha Round negotiations have repeatedly collapsed, and although the Round may have been formally revived (again), little progress has been achieved. Trade policy interests among the members have diverged, and the GATT/WTO system has evolved from a hegemonic structure, to a hegemonic duopoly, to tri-polarity (the United States, EU, and developing countries) today. Over the next few decades, it seems headed for multi-polarity with a divergence of interests of key members. In the foreseeable future, legislating trade policy at the WTO will be difficult,

CONCLUSION:
Consequences
of Regional
and Judicial
Liberalization

suggesting increasing agent slack for the WTO's judicial system, the persistence of judicial liberalization, and success negotiating expansive liberalization only in regional, bilateral, and plurilateral contexts.

The consequences of these shifts are concerning. Judicial liberalization is not a perfect substitute for negotiated liberalization. Judicial liberalization is limited in its pace; it liberalizes one product or sub-sector at a time. It is limited in its depth; for example, litigation usually cannot reduce tariffs. And it is limited in its breadth; it is hard to see how the Appellate Body could comprehensively address the newer issues of integration—environment, labor, competition law, and investment—that many from the United States and Europe would like to see on the WTO's legislative agenda. Legal language in WTO instruments offers little discursive basis for the Appellate Body's establishment of new, comprehensive rules on these topics.

The same diffusion of power and interests that has catalyzed judicial liberalization at the WTO has fed the proliferation of PTAs, which is having a problematic and uncertain effect on global trade. Lines and circles diagramming the preferential relationships of countries across PTAs are so chaotic and complicated that they resemble a bowl of spaghetti. From the perspective of a government trade lawyer, the Spaghetti Bowl is so complex that even Bismarck would find it difficult to keep track of all the rules and relationships. From the perspective of a private lawyer, the legal transaction costs associated with international commerce have increased radically: consider the tariff and regulatory questions raised in the cross-national production network of a computer made from components in ten countries, each a party to five or ten PTAs—or more. And while trade creation may have increased from this proliferation of PTAs, so has trade diversion. In fact, no one really knows the full impact of this complexity on world trade or on the prospects for further liberalization.

* Parts of this argument have been adapted from Judith Goldstein & Richard H. Steinberg, *Regulatory Shift: The Rise of Judicial Liberalization at the WTO*, in THE POLITICS OF GLOBAL REGULATION (Walter Mattli & Ngaire Woods eds., 2009) and Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247 (April 2004). I thank Judith Goldstein for her partnership on this project, as well as Karen Alter, Curtis Bradley, Mark Busch, Christina Davis, Joanne Gowa, Oona Hathaway, Larry Helfer, Miles Kahler, Judith Kelly, Robert Keohane, Giovanni Maggi, Walter Mattli, Helen Milner, Andrew Moravcsik, Kalypso Nicolaides, Douglas Rivers, Duncan Snidal, Ngaire Woods, and workshop participants at Duke, Oxford, and Princeton for useful comments on earlier drafts.

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¹ See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144.

² In this context, the “GATT” refers to the organization that facilitated operation of the 1947 General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

³ Judith L. Goldstein et al., *Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade*, 61 INT'L ORG. 37 (2007).

⁴ National GDP figures for 1949–2004 are from the World Bank; they were converted into U.S. dollars at the annual average prevailing exchange rate, using IMF data. WORLD BANK, WORLD DEVELOPMENT INDICATORS (2005). Projected figures for 2005–2035 assume rates of national GDP growth for the largest WTO members that are similar to those used by the Global Economics group at Goldman Sachs. DOMINIC WILSON & ROOPA PURUSHOTHAMAN, GOLDMAN SACHS, GLOBAL ECON. PAPER NO. 99, DREAMING WITH BRICS: THE PATH TO 2050 (2003). Its projections are also close to those using the Levine and Renelt econometric model that explains average 30-year GDP growth as a function of initial per capita income, investment rates, population growth, and secondary school enrollments. Ross Levine & David Renelt, *A Sensitivity Analysis of Cross-Country Growth Regressions*, 82 AM. ECON. REV. 942 (1992). For China, I assumed two shocks, one in 2010 (that would reduce growth from around 8% to 0% for that year, 3% in 2011, and 7% in 2012) and a large political shock in 2015 (resulting in -5% growth that year, returning to projected levels by 2019). For Russia, I assumed only the former shock.

⁵ European Communities is used herein to refer to the European Community, the European Communities, or the European Economic Community. The European Economic Community was “seated” at GATT meetings from about 1960. JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 102 (1969). The European Communities became a member of the WTO at its inception.

⁶ See INTERNATIONAL MONETARY FUND, INT'L FIN. STAT. Y.B. (2005).

⁷ JOHN H. BARTON ET AL., THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW AND ECONOMICS OF THE GATT AND THE WTO (2006).

⁸ Richard H. Steinberg, *The Transformation of European Trading States*, in *THE STATE AFTER STATISM: NEW STATE ACTIVITIES IN THE AGE OF LIBERALIZATION* 340 (Jonah D. Levy ed., 2006).

⁹ Gerard Curzon & Victoria Curzon, *GATT: Trader's Club*, in *THE ANATOMY OF INFLUENCE: DECISION-MAKING IN INTERNATIONAL ORGANIZATION* (Robert W. Cox & Harold K. Jacobson eds., 1973).

¹⁰ General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

¹¹ Richard H. Steinberg, *In the Shadow of Law or Power?: Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002).

¹² In game theory, this is known as a "divide the dollar" problem, the standard solutions to which are bundling or sequencing. See Richard H. Steinberg, *The Prospects for Partnership: Overcoming Obstacles to Transatlantic Trade Policy Cooperation in Asia*, in *PARTNERS OR COMPETITORS?: THE PROSPECTS FOR U.S.-EUROPEAN COOPERATION ON ASIAN TRADE* (Richard H. Steinberg & Bruce Stokes eds., 1999).

¹³ For the classic definition of trade diversion, see JACOB VINER, *THE CUSTOMS UNION ISSUE* (1950).

¹⁴ C. Fred Bergsten, *Globalizing Free Trade: The Ascent of Regionalism*, 75 FOREIGN AFF., May/June 1996, at 105; Robert B. Zoellick, *Campaign 2000: A Republican Foreign Policy*, 79 FOREIGN AFF. Jan./Feb. 2000, at 63; Raj Bhala, *Competitive Liberalization, Competitive Imperialism, and Intellectual Property*, 28 LIVERPOOL L. REV. 77 (2007).

¹⁵ These changes in Geneva and the ensuing stalemate do not reflect a fundamental shift in *market* power of WTO members. Some have claimed that the expanded number of developing countries in the WTO, combined with the spectacular economic growth of China and India, are shifting material bargaining power to the South. The data does not support this claim. China and India are growing, and the number of developing country members is increasing, but their markets are still comparatively small. Nonetheless, we can assume that over the next thirty years, material power at the WTO is likely to shift as Figure 1 illustrates. While predicted GDP from 2009–2035 is highly speculative, Figure 1 suggests some interesting developments: material power at the WTO will diffuse, moving toward a five or six-power system over the next thirty years, with the United States and EC still important, but in decline, and China and India clearly rising in prominence.

¹⁶ In the interest of brevity, the argument in this section is presented with less elaboration and depth than in the version appearing in Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247 (2004).

¹⁷ GEORGE TSEBELIS, *VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK* (2002); George Tsebelis & Geoffrey Garrett, *The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union*, 55 INT'L ORG.

357 (2001); Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993).

¹⁸ “Agent slack” refers to a principal-agent relationship in which the principal is able to exert only imperfect control over the actions of its agent. “[T]he principal-agent model is an analytic expression of the agency relationship, in which one party, the principal, considers entering into a contractual relationship with another, the agent, in the expectation that the agent will subsequently choose actions that produce the outcomes desired by the principal.” Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 756 (1984). I assume that the relationship between the GATT/WTO and its principals, nations or customs territories, always held some degree of a principal-agent relationship, although the membership exerted far more oversight over the agents (the secretariat or the dispute settlement panels) than is common with other international agencies.

¹⁹ For more details on this argument, see Judith Goldstein & Joanne Gowa, *US National Power and the Post-War Trading Regime*, 1 WORLD TRADE REV. 153 (2002).

²⁰ Data for the 1995–2003 period is from Kara Leitner & Simon Lester, *WTO Dispute Settlement 1995–2003: A Statistical Analysis*, 7 J. INT'L ECON. L. 169 (2004). Data from the 1948–1995 period is from Marc L. Busch & Eric Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC 457, 473 (Daniel L. M. Kennedy & James D. Southwick eds., 2002). These include complaints that ended prior to a panel decision and those that went on to be decided by a panel and adopted by the members.

²¹ Marc L. Busch & Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, 37 J. WORLD TRADE 719, 724 (2003); Steinberg, *supra* note 11.

²² Burley & Mattli, *supra* note 17; John Ferejohn & Barry Weingast, *The Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L. J. 565 (1992); Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 INT'L ORG. 669 (2007).

²³ Interview with A. Jane Bradley, former chief U.S. dispute settlement negotiator and Assistant USTR for Monitoring and Enforcement, Washington, D.C. (March 2007), and interview with Kenneth Freiberg, USTR Deputy General Counsel, Washington, D.C. (March 2007), support this conclusion. A handful of lawyers in the USTR General Counsel's office were concerned about judicial lawmaking, but those at the political level in both Washington and Brussels were persuaded by the clarity of the WTO agreements and the WTO Dispute Settlement Understanding (DSU) Art. 3.2 and 19.2 mandates that neither panels nor the Appellate Body could “add to nor diminish the rights and obligations provided in the covered agreements.” Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994). U.S. Senator Bob Dole was concerned enough about judicial lawmaking that he proposed establishment of a commission to review the decisions and behavior of the Appellate Body, but only twelve co-sponsors joined him in support of the

proposal and it never passed the Senate. See generally WTO Dispute Settlement Review Commission Act, S. 16, 104th Cong. (1995).

²⁴ Ultimately, the distinction between gap-filling and ambiguity clarification may be fragile, but the distinction is respected here out of convention. See generally H. L. A. HART, *THE CONCEPT OF LAW* (1961).

²⁵ While there is no doubt that the WTO Appellate Body is making law, I do not claim that it has, on balance, been irresponsibly “activist.” All courts make law to varying degrees. The Appellate Body has not shied away from lawmaking, but it has at times restrained itself, demonstrating some sensitivity to politics. For example, it has sometimes invoked the doctrine of “judicial economy” to limit the extent to which it interprets WTO agreements in any particular case. See, e.g., Appellate Body Report, *European Communities—Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, ¶ 135 (July 23, 1998); Appellate Body Report, *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, § VI (April 25, 1997).

²⁶ See, e.g., Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp-Turtle*] (without clear guidance from WTO agreements, the Appellate Body decided that dispute settlement panels could consider *amicus curiae* briefs submitted by non-state actors); Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997) (Appellate Body established that private lawyers may represent Members in its oral proceedings, despite EC and U.S. opposition on grounds that the practice from the earliest years of the GATT was to permit presentations in dispute settlement proceedings exclusively by government lawyers or government trade experts).

²⁷ See, e.g., *Shrimp-Turtle*, *supra* note 26 (Appellate Body offered a dynamic interpretation of the conditions under which the GATT Article XX(g) exception for conservation of exhaustible natural resources could be invoked, stating that it must be read “in light of contemporary concerns of the community of nations about the protection and conservation of the environment” and establishing at least three specific factors that had no textual lineage but that apply in considering whether a measure contravenes the chapeau to GATT Article XX).

²⁸ For example, in three decisions, Appellate Body Report, *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R (May 1, 2001) [hereinafter *Lamb Meat*], Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R (Dec. 20, 2000), and Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R (Mar. 8, 2002), the Appellate Body fleshed out the causation analysis to be used in safeguards cases, which Uruguay Round negotiators intentionally left ambiguous.

²⁹ Perhaps most controversially, in *Lamb Meat*, *supra* note 28, and Appellate Body Report, *Argentina—Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R

(Dec. 14, 1999), the Appellate Body ruled that national authorities imposing a safeguards measure must demonstrate the existence of “unforeseen developments.”

³⁰ Busch & Reinhardt, *supra* note 21, at 724.

³¹ Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 LAW & POL’Y INT’L BUS. 109 (2002).

³² Some might hypothesize that the Appellate Body nonetheless favors protectionist interpretations in cases involving measures putatively adopted for reasons related to consumer or environmental protection. But several decisions run contrary to that claim: for example, in the *EC—Beef Hormones* case, and in the more recent *EC—GMO* case, the WTO Appellate Body has shown little tolerance for interpretations favoring closure, even though those cases raised politically sensitive social concerns. See Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998); Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006). Even in cases where the Appellate Body has ultimately permitted social measures to serve as a barrier to trade, it has made law that restricts the conditions under which such measures may be maintained or applied, as in the *Shrimp-Turtle* case, *supra* note 26.

³³ Ernst B. Haas, *Words Can Hurt You; Or, Who Said What to Whom About Regimes*, 36 INT’L ORG. 207 (1982).

³⁴ Chad P. Bown & Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. INT’L ECON. L. 861 (2005); Andrew T. Guzman & Beth A. Simmons, *Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes*, 34 J. LEGAL STUD. 557 (2005).

³⁵ WTO judicial liberalization is reminiscent of the crucial liberalizing role played by the European Court of Justice (ECJ) in the 1960’s through the late 1980s—until the Single European Act. In that period, the Council was paralyzed by the Luxemburg Compromise, which effectively required unanimity for any important action. The ECJ’s exercise in “negative liberalization,” striking down national protectionist measures in such famous cases as the *Reinheitsgebot* and *Cassis de Dijon* cases, is credited with being the main engine of internal market liberalization in the period. Burley & Mattli, *supra* note 17; Geoffrey Garrett, R. Daniel Kelemen, & Heiner Schulz, *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT’L ORG. 149 (1998); Karen J. Alter, *The European Union’s Legal System and Domestic Policy: Spillover or Backlash?*, 54 INT’L ORG. 489 (2000).