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International Judicial Lawmaking: A Theoretical and Political Analysis of the WTO Appellate Body

By
Shoaib A. Ghias*

I. INTRODUCTION

In the past twelve years, the World Trade Organization (WTO)² has come to epitomize globalization (and its discontents)³ as a cornerstone of the “new world order.”⁴ The WTO has also led to increasing judicialization of politics⁵ in international trade, since the Dispute Settlement Body (DSB) of the WTO has the power to issue binding reports that are generally respected by member states. This article shows how dispute resolution in the WTO is shaping and making international trade law and policy.

The WTO is the successor to the General Agreement on Tariffs and Trade (GATT),⁶ an international treaty regulating trade relations since 1947. The fundamental aim of GATT was to promote liberalization of international trade by reducing protectionist measures.⁷ The WTO expands on the legacy of GATT while remaining committed to the fundamental aim of trade liberalization.⁸ The

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2. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement].

3. For a critical assessment of WTO, see RICHARD PEET, *THE UNHOLY TRINITY: THE IMF, WORLD BANK AND WTO* 146-99 (2003).

4. See Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFFAIRS 183 (1997).

5. See generally ON LAW, POLITICS, AND JUDICIALIZATION (Martin Shapiro & Alec Stone Sweet eds., 2002).

6. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

7. JEFF WAICYMER, *WTO LITIGATION: PROCEDURAL ASPECTS OF FORMAL DISPUTE SETTLEMENT* 31 (2002).

8. Whereas GATT only regulated barriers on trades of goods, WTO and its agreements regu-

DSB is the institution that governs how these rules are enforced. It consists of WTO member states and appoints ad hoc Panels to review cases. Appeals to the Panels' reports can be taken to the standing Appellate Body, an institutionally independent organ with permanent members that functions like an appellate court. This article examines the jurisprudence of the Appellate Body from the perspective of public law theory in political science.

The public law model states, in brief, that economic liberalization not only requires rules governing economic exchange (such as multilateral trade agreements), but also institutions (such as courts) governing how rules are enforced. However, once courts are established to govern economic exchange, they tend to expand their competence to political and social policy. Courts first assert judicial independence and embed claims to broad judicial powers in relatively uncontroversial decisions. Later, they rely on the precedential value of these decisions to expand their control to areas beyond economic exchange. In this way, the courts redefine the terms of the original agreement that they were designed to uphold. Political scientists have used this theoretical framework to explain the evolution of domestic (for example the U.S. Supreme Court) and quasi-international (for example the European Court of Justice) judicial institutions.⁹ In this article, I explain how this model can be extended to a truly international "judicial" institution, the WTO's Appellate Body. The thesis of this article is that the Appellate Body has followed the process predicted by public law theory by using its institutional independence to develop doctrine that has spilled over to political and social policy areas.

The article is organized as follows. Section II outlines the contours of public law theory in political science used to explain the behavior of courts. Section III describes the institutional structure of dispute resolution by the WTO, in particular the Appellate Body, which is the focus of this study. Section IV applies public law theory to describe and explain the behavior of the Appellate Body. This section presents the main claim of the article and argues that the Appellate Body has used its institutional independence to expand its influence over the political and social policies of member states in three steps. First, by incorporating the Vienna Convention into its jurisprudence, the Appellate Body declared that the general principles of international law are applicable to disputes involving WTO law. Second, relying on this jurisprudence and an expansive reading of the preface to the WTO Agreement, the Appellate Body incorporated environmental policy concerns into WTO dispute settlement. Third, by asserting the discretion-

late trade in services, and in traded inventions, creations and designs (intellectual property). See WORLD TRADE ORGANIZATION, INFORMATION AND MEDIA RELATIONS DIVISION, UNDERSTANDING THE WTO (3d ed. 2005), http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_text_e.pdf [hereinafter UNDERSTANDING THE WTO].

9. Gordon Silverstein, *Globalization and the rule of law: "A machine that runs of itself?"*, 1 INT'L J. CONST. L. 3, 427 (2003); see also Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 4, 803 (1989).

ary power to accept amicus briefs, the Appellate Body brought “civil society”¹⁰ concerns into the WTO dispute resolution process. This section also describes the measures member states are taking to control the Appellate Body and explains how effective they can be. Section V concludes with the projection that the Appellate Body will continue, albeit cautiously, to expand and consolidate its influence over political and social aspects of international trade.

II. PUBLIC LAW THEORY OF COURTS

In this article, I use the notion of “theory” offered by David Caron in this volume. The article primarily offers a framework for *understanding*¹¹ the phenomenon of expansion of judicial competency by the Appellate Body. I do not seek to question the wisdom of WTO law or policy, whether made by treaty negotiation or through dispute resolution. My aim is to make objective observations, in the tradition of positive political theory, that help us in understanding the nature and role of dispute resolution by the WTO. The theoretical framework I rely on holds that courts achieve judicial independence, by virtue of their ability to uphold credible commitments, in order to support economic growth. But courts use this independence not only to uphold credible commitments, but also to engage in judicial lawmaking. And judicial lawmaking finally spills over from economic exchange to social and political arenas.

A. Credible Commitments and Judicial Independence

Credible commitments—that is *reliable* rules governing economic exchange—are considered necessary for economic growth.¹² Therefore, a critical political factor underpinning economic growth and development of markets is the degree to which the regime is committed to not simply the rules governing economic exchange, but also the institutions governing how these rules are enforced. Courts are unique institutions that can enforce the rules of economic exchange by claiming institutional independence, and thereby support economic growth. This independence is not challenged; in fact it is often encouraged by political powers because economic growth rests in part on the independent judiciary. For example, dispute resolution under GATT was not very efficient in governing the rules of economic exchange. The losing party could refuse to adopt the report of the dispute resolution panel.¹³ Therefore, the WTO provided

10. The term civil society, in the context of international trade, means non-governmental, non-profit making organizations, networks and voluntary associations focusing on influencing the policy of international governmental institutions. See Glossary of EU Jargon, http://www.lgib.gov.uk/european_work/glossary.html.

11. David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 *BERKELEY J. INT'L L* 401 (2006).

12. See North & Weingast, *supra* note 9.

13. See JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO: INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 122-23 (2000).

for binding dispute resolution at the panel level and an independent appellate body for the purpose of “providing security and predictability to the multilateral trading system.”¹⁴

B. Judicial Independence and Judicial Lawmaking

Courts use their independence not only to uphold credible commitments, but also to engage in judicial lawmaking. The notion of judicial lawmaking is often cast off by lawyers. Martin Shapiro points out that lawyers see adjudication as “(1) an independent judge applying (2) pre-existing legal norms after (3) adversary proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned a legal right and the other found wrong.”¹⁵ This conception of adjudication is mirrored in literature published by the WTO, which describes dispute settlement in the WTO as follows:

Trade relations often involve conflicting interests. Agreements, including those painstakingly negotiated in the WTO system, often need interpreting. The most harmonious way to settle these differences is through some neutral procedure based on an agreed legal foundation. That is the purpose behind the dispute settlement process written into the WTO agreements.¹⁶

However, as Alec Stone Sweet argues, courts not only uphold credible commitments, they do a great deal of policy making.¹⁷ In the process of adjudication, courts not only resolve a dispute, they also “enact elements of the normative structure.”¹⁸ Both of these activities involve significant rule-making. First, courts make rules that are “concrete, particular, and retrospective.”¹⁹ For instance, they resolve the dispute between two parties about a contract. Second, in justifying their decision—giving a normative basis for or against a particular act—they make rules that are “abstract, general, and prospective.”²⁰

It is not possible to ignore the existence of judicial choice and thus judicial lawmaking in either theory or practice.²¹ But the abstract, general, and prospective rule-making raises the issue of the legitimacy of the court. From the perspective of the disputing parties, “the exact content of the rules governing the dispute could not have been ascertained at the time the dispute erupted.”²² The perception of the court’s neutrality erodes as its capacity to make rules is revealed. The court can mitigate but can never permanently resolve this problem.

14. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994), art. 3.2 [hereinafter DSU].

15. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 1 (1981).

16. See UNDERSTANDING THE WTO, *supra* note 8, at 10.

17. Alec Stone Sweet, *Judicialization and the Construction of Governance*, in ON LAW, POLITICS, AND JUDICIALIZATION 63, 64-5 (Martin Shapiro & Alec Stone Sweet eds., 2002).

18. *Id.*

19. *Id.*

20. *Id.*

21. Martin Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism and Stare Decisis?*, 2 LAW IN TRANSITION Q. 134, 155 (1965).

22. Sweet, *supra* note 17.

Courts can portray adjudication as a “deliberation about the precise relationship of abstract rules to a concrete dispute, portraying [their] decision as a record of these deliberations.”²³ In this way, they portray rule-making as a by-product of adjudication rather than an outcome that they desire in and of itself.

In other words, courts reconsecrate the contract and re-enact the normative structure. At this stage, courts can take either a conservative or an activist path. If the courts select a conservative path, they can fashion a “partial victory for each disputant and [appeal] to rules whose prior existence is relatively unquestioned.”²⁴ In this way, they reinforce the “existing structure while clarifying its domain of relevance and application.”²⁵ On the other hand, if the courts take an activist path, they can declare “a clear winner and loser while revising an existing rule or crafting a new one.”²⁶ In this way, they reshape the “normative structure, expanding its domain.”²⁷

However, in order for this process to work, the disputing parties must consider that they are better off in a world with adjudication than they would be in a world without adjudication. In addition, courts must consider that their decisions have some authoritative value as precedent. If these conditions are fulfilled, courts will “inexorably become powerful mechanisms of political change,” and exchange between conflicting parties will inevitably be placed in the “shadow” of judicial lawmaking.²⁸

C. Judicial Lawmaking and Social Control

Judicial lawmaking does not remain limited to the enforcement of contracts. It spills over to social and political arenas. As Shapiro argues, courts also play the role of “social control.” When two parties go to a third who is an officer, they are not going to a disinterested third. “Instead, they are introducing a third interest.”²⁹ When courts are subordinated by a sovereign, social control takes the form of enforcing the sovereign’s will in the adjudication of disputes. However, when courts are institutionally independent, they acquire a will of their own. Gordon Silverstein describes this almost mechanistic spill over of judicial power from economic liberalization to social and political areas in three steps:

First, judges will embed claims to judicial authority, making it increasingly difficult for the government to reverse their rulings. Second, judges will identify and employ implied powers (and implied restrictions) inferred from explicit powers and prohibitions. And third, because of the nature of legal reasoning, doctrine developed in one arena will not be easily limited to that arena and thus will overlap with other areas. Therefore doctrine needed to assure economic goals, particularly

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. SHAPIRO, *supra* note 15, at 18.

economic liberalization, will spill over to govern cases in the political and social realms as well.³⁰

III.

UNDERSTANDING THE DISPUTE SETTLEMENT UNDERSTANDING

This section first traces the historical development of dispute resolution under GATT, and describes the Dispute Settlement Understanding (DSU) adopted by the Uruguay Round in 1994 and subsequent attempts at revising the agreement. The section then focuses on the institutional structure of WTO panel and appellate review, and sets the background for a political analysis in the subsequent section.

A. Background and History

GATT, the predecessor of the WTO, had a mechanism of non-binding arbitration for resolution of disputes. Under the GATT dispute resolution system, a member state could request a Panel to be established for resolving a dispute with another state. The report of the Panel could only be adopted, however, by a consensus of the GATT Contracting Parties. This meant that the party losing the case had the power to effectively block the dispute resolution process.³¹ In addition, there was no timetable for the resolution of disputes and some cases dragged on for long periods without any conclusion. In the absence of an effective system for the settlement of disputes, the rules-based system of GATT was proving less successful than desired because the rules could not be enforced. In order to address these concerns, the Uruguay Round adopted the DSU at the formation of the WTO. The DSU created the Dispute Settlement Body (DSB), consisting of all WTO member states, generally represented by ambassadors or the equivalent.³² Emphasizing the importance of the rule of law, the DSU was designed to make the trading system more secure and predictable. The DSU sets up clearly defined procedure for dispute resolution, including review by a three-member Panel,³³ a timetable for completion of the case,³⁴ and the opportunity to appeal the Panel's decision.³⁵ The final report can also be rejected if all members of the DSB, including the representative of the losing state, vote against it.³⁶

The Uruguay Round also included a ministerial decision for a complete review of the rules and procedures of DSU after four years of entry into force of the WTO Agreement. The decision further stated that the Ministers would "take

30. Silverstein, *supra* note 9, at 430.

31. JACKSON, *supra* note 13.

32. DSU art. 2.1.

33. DSU art. 8.

34. DSU art. 20.

35. DSU art. 17.

36. DSU arts. 16.4, 17.14.

a decision on the occasion of [their] first meeting after the completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures.”³⁷ Members decided to complete the review by January 1, 1999 (later extended to January 31, 1999). But the review yielded no agreement. At the Doha Ministerial Conference in November 2001, member states once again decided to improve and clarify the DSU. The ministers agreed that new negotiations should be completed by no later than May 2003.³⁸ The negotiations on the DSU took place in special sessions beginning in March 2003. In July 2003, the General Council agreed to extend the special session’s timeframe by one year (up to May 2004) to give the DSB special session more time to conclude its work. The special session has continued to meet beyond the May 2004 deadline without reaching any agreement. The inability to reach any agreement highlights the structural constraints in the evolution of the WTO. Since the WTO Agreement, including the DSU, consists of multilateral treaties that create international legal obligations, it can only be modified through the painstaking process of treaty negotiation and ratification. The consent of all signatory parties is thus required to make any change. Given the vast membership of the WTO,³⁹ and the varied interests among member states, gaining the consent of all parties on any issue is a daunting task. Current negotiations have focused, *inter alia*, on procedures for accepting amicus briefs, and the mechanism for adopting Panel and Appellate Body reports by the DSB.⁴⁰

B. Panel Review

The DSB has jurisdiction over any dispute arising out of the WTO Agreement. If a member state determines that another member state is not complying with its WTO obligations, for example, by imposing tariffs or other trade restrictions, the aggrieved member state can bring the dispute to the DSB. The disputing parties are given up to sixty days to resolve the dispute through consultation.⁴¹ If the parties fail to reach a resolution by diplomatic means at the end of this period, the DSB appoints a Panel of three (or in some cases five) arbitrators to review the case and issue a report.⁴² The report of the Panel is then adopted

37. Uruguay Round Agreement: Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, http://www.wto.org/english/docs_e/legal_e/53-ddsu.pdf.

38. World Trade Organization, Ministerial Declaration of 20 November 2001, WT/MIN(01)/DEC/1, art. 30.

39. With the recent accession of Saudi Arabia to the WTO, the number of member countries of the WTO has risen to 149. See General Council, Welcoming address by the Director-General to the Kingdom of Saudi Arabia, Nov. 11, 2005, http://www.wto.org/english/news_e/news05_e/stat_lamy_11nov05_e.htm (last visited Mar. 18, 2006). For a complete list of WTO member states (not including Saudi Arabia), see UNDERSTANDING THE WTO, *supra* note 8, at 116.

40. Special Session of the Dispute Settlement Body, Minutes of Meeting, TN/DS/M/27, Doc. No. (05-3436) (Jul. 15, 2005).

41. DSU art. 4.7.

42. DSU art. 8.

by the DSB, unless there is a consensus against adopting it.⁴³ Officially the job of the Panel is to give recommendations, but because of the high threshold for rejecting a Panel's report (unanimity of members, including the losing state), the reports are extremely difficult to overturn. However, the Panel's report can be appealed in the Appellate Body.

C. Appellate Review

Either party can appeal the report of the Panel to the Appellate Body. The appeals can only be based on the Panel's application of WTO law to the case in controversy, and not a reevaluation of the facts of the case.⁴⁴ The Appellate Body consists of seven permanent members, appointed for four-year terms, which are renewable once.⁴⁵ In this way an Appellate Body member may have a fixed appointment of up to 8 years, as opposed to Panel members, who are appointed ad hoc for each dispute. The length of the appointment of the Appellate Body members has important ramifications for WTO jurisprudence, as will be discussed later. The Appellate Body members must be "individuals with recognized standing in the field of law and international trade, not affiliated with any government."⁴⁶ They have come from a variety of backgrounds, and include retired government officials and judges, international law academics, international lawyers, international courts and tribunals' judges, et cetera.⁴⁷ Most of them have had a significant connection to academia and national or international judicial institutions.

The remainder of this article will focus on the role of the Appellate Body in developing WTO jurisprudence. As I will argue, the Appellate Body is guided by a particular set of economic, political and social policy preferences, as opposed to only WTO law and policy that is negotiated by member states.

IV.

A PUBLIC LAW ANALYSIS OF WTO DISPUTE RESOLUTION BODY

A. Preconditions for Judicial Independence

As discussed earlier, in order for courts to become mechanisms for political and social change, two preconditions must be fulfilled. First, the disputing parties must consider that a regime of adjudication is useful for their long term interests. A look at the compliance record of member states to dispute resolution shows that this condition is met. Secondly, courts must consider that their deci-

43. DSU art. 16.4.

44. DSU art. 17.6.

45. DSU art. 17.2.

46. UNDERSTANDING THE WTO, *supra* note 8, at 61.

47. For a complete list of Appellate Body members, past and present, including their biographies, see WTO Dispute Settlement: Appellate Body Members, http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited Mar. 18, 2006).

sions have some authoritative value as precedent. An analysis of “collegiality” in the Appellate Body’s working procedures along with the self-consciousness of its members portrays the extent to which its members regard the precedential value of its reports.

1. Collegiality

If we examine the DSU, it appears that while the Panels and Appellate Body were designed to function as conflict resolvers in a court-like way, the DSU deliberately stopped short of creating a court *per se*. The dispute resolution institutions of WTO lack some fundamental and conspicuous markers of the judiciary. For example, the DSU creates a “Dispute Settlement Body,” not a “World Trade Court.” At the Panel level, the dispute is reviewed by “panelists” not “judges.” The Appellate Body, too, has “members” instead of “judges.” The panelists and the Appellate Body members issue “reports” instead of “opinions.” In addition, the Panels and Appellate Body have no fixed bench *per se*.

Despite this lack of conspicuous signs of judicial institutions, the Appellate Body has understood itself as a judicial institution from the very beginning. While the DSU gives detailed working procedures for the panel review,⁴⁸ the Appellate Body has fairly broad discretion to draw its own working procedures.⁴⁹ The DSU does specify some details, however, about the working of the Appellate Body. For example, Article 17(1) of the DSU explicitly states that the Appellate Body “shall be composed of seven persons, three of whom shall serve on any one case.” Soon after the Appellate Body came into force, its members exercised their authority to adopt a document called Working Procedures for the Appellate Review (Working Procedures), which included a section entitled “Collegiality.” This section states that:

(1) To ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the Members, the Members shall convene on a regular basis to discuss matters of policy, practice and procedure

(3) In accordance with the objectives set out in paragraph 1, the division responsible for deciding each appeal shall exchange views with the other Members before the division finalizes the appellate report for circulation to the WTO Members.⁵⁰

When a case on appeal is under review by the acting division consisting of three members of the Appellate Body, the acting division convenes with the other four members of the Appellate Body at some point during the process in Geneva to discuss the case. The other four members are also kept informed based on a provision of the Working Procedures stating that “each Member shall receive all

48. DSU art. 12 (“Panel Procedure, 1. Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.”).

49. DSU art. 17 (“Appellate Review. . . 9. Working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.”).

50. Working Procedures for Appellate Review, WT/AB/WP/5, Jan. 4, 2005, art. 4 [hereinafter Working Procedures].

documents filed in an appeal.”⁵¹ Collegiality has been understood by some commentators as a practice that “promotes consistency in decisions, and it offers the acting division members the benefit of their colleagues’ expertise.”⁵² While celebrating the institutional virtues of the practice, these commentators have failed to notice or appreciate that collegiality seems to go against Article 17(1) of the DSU, which explicitly states that three of the seven Appellate Body members shall serve on any given case.⁵³ In essence, collegiality marks the move toward the judicial nature of the Appellate Body in a way in which DSU does not seem to imagine. It provides an institutional mechanism to develop the sort of camaraderie among the Appellate Body members that is necessary for a more activist jurisprudence. The Appellate Body’s composition as a rotating three-member appellate panel as envisioned by the DSU has been transformed into a seven-member fixed appellate bench.

The move toward a conscious judicialization of WTO dispute resolution is also evident in the descriptions of the Appellate Body’s role by its former members. As one member stated in a speech:

[T]he Appellate Body has been described as unflinching in its rulings. I believe this to be the case. We are well aware that none of our rulings is likely to be greeted with universal approval; but our function is another: to be independent, impartial and objective at all times. I believe this also to have been the case.⁵⁴

The focus on independence, impartiality, and objectivity of the institution moves the focus away from the institution as a dispute resolution mechanism. I shall argue that the Appellate Body, like other judicial institutions, has not been very objective. It has, however, managed to muster substantial independence, which it has used to promote a particular vision of trade liberalization.

2. Compliance Record

As Sweet argues, “[c]ompliance is a crucial test of the social legitimacy of consensual [dispute resolution].”⁵⁵ Compliance in WTO dispute resolution is consensual since the remedy of last resort in case of noncompliance is only the right to withhold trade concessions. Therefore, compliance would demonstrate that the disputing parties recognize the overall efficacy of the system. The compliance record of DSB/Appellate Body reports has been very successful, espe-

51. *Id.* art. 4.2.

52. John H. Jackson, *The Role and Effectiveness of WTO Dispute Settlement Mechanism*, BROOKINGS TRADE FORUM 179, 188 (2000) [hereinafter *WTO Dispute Settlement Mechanism*].

53. Article 4.4 of the Working Procedures, however, addresses the concern of such an inconsistency as follows: “Nothing in these Rules shall be interpreted as interfering with a division’s full authority and freedom to hear and decide an appeal assigned to it in accordance with paragraph 1 of Article 17 of the DSU.” Working Procedures, *supra* note 46.

54. Julio Lacarte (appellate body judge from 1995-2001), swearing in-ceremony for new Appellate Body members on Dec. 19, 2001, quoted in Claus-Dieter Ehlermann, *Six Years on the Bench of the “World Trade Court”: Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, in WTO JURISPRUDENCE AND POLICY: PRACTITIONERS’ PERSPECTIVES 13-57 (Marco C.E.J. Bronckers & Gary N. Horlick eds., 2004).

55. Sweet, *supra* note 17, at 63.

cially if compared to other international judicial institutions.⁵⁶ This record lends the Appellate Body a form of social legitimacy and emboldens it to assert independence and judicial lawmaking powers as described next.

B. Judicial Lawmaking

Courts assert judicial independence not only to uphold credible commitments, but also to engage in judicial lawmaking. This judicial lawmaking often spills over from rules of economic exchange to social and political arenas.⁵⁷ In this subsection, I will describe the judicial lawmaking of the Appellate Body by explaining how it incorporated the Vienna Convention into its jurisprudence and declared that the general principles of international law are applicable to disputes involving WTO law. Then, I will discuss how the Appellate Body relied on this jurisprudence and an expansive reading of the preface to the WTO Agreement in *Shrimp-Turtle* to incorporate environmental policy concerns into WTO dispute settlement. Finally, I will show how the Appellate Body asserted the power to accept amicus briefs to bring civil society concerns into the WTO dispute resolution process. This section will also describe the steps member states are taking to control the Appellate Body and the effectiveness of those steps.

1. Vienna Convention and Public International Law

As Sweet argues, courts not only uphold credible commitments, they also enact elements of a normative order.⁵⁸ After embedding claims to judicial authority, courts identify and employ implied powers derived from explicit powers.⁵⁹ This section focuses on the Appellate Body's incorporation of parts of the Vienna Convention on the Law of Treaties (Vienna Convention) as applicable law in WTO disputes.⁶⁰ The Appellate Body has used the explicit power that it has under the DSU to use "customary rules of interpretation of public international law," to acquire implied power from the Vienna Convention. Article 3(2) of the DSU stipulates that:

The Members recognize that [the dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

56. See William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 1 (2005); but see Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 44-45 (2005).

57. Silverstein, *supra* note 9, at 430.

58. Sweet, *supra* note 17, at 64-65.

59. Silverstein, *supra* note 9, at 430.

60. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) [hereinafter Vienna Convention].

The 1996 Appellate Body report on *US – Standards for Reformulated and Conventional Gasoline (US-Gasoline)* said that the general rule of interpretation in Article 31(1) of the Vienna Convention “forms part of the ‘customary rules of interpretation of public international law’ which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law.”⁶¹

In *Japan – Taxes on Alcoholic Beverages (Alcoholic Beverages)*, the Appellate Body stated that “Article 31, as a whole, and Article 32 [of the Vienna Convention] are each highly pertinent to the present appeal.”⁶² The report then produced Articles 31 and 32 *ad verbum*, and made specific references to Articles 31(1), 31(2), and 31(3)(b). The report did not, however, make any reference to Article 31(3)(c) perhaps because of finding no use for it in the case presented. Article 31(3)(c), which states that treaty interpretation shall take into account “any relevant rules of international law applicable in the relations between the parties,”⁶³ gives broad powers to the Panels and the Appellate Body. What is the reach of this article? Does this article open the door to considering non-WTO law (for example, human rights conventions, environmental law, etc.) in the interpretation of WTO Agreement by the Panels and the Appellate Body? Joel P. Trachtman, relying on the DSU provision that “recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements,”⁶⁴ asserts that:

This language would be absurd if rights and obligations arising from other international law could be applied by the DSB. The standard panel terms of reference provided under article 7 provides for reference only to law arising from the WTO agreements. Finally, article 11 of the DSU specifies the function of panels to assess the applicability of and conformity with the covered agreements. With so much specific reference to the covered agreements as the law applicable in WTO dispute resolution, it would be odd if the members intended non-WTO law to be applicable.⁶⁵

However, it appears that now there is a general consensus that while the WTO Agreement constitutes *lex specialis*, it does not constitute a self-contained regime.⁶⁶ As John H. Jackson puts it:

The Appellate Body has made it clear that general principles of international law

61. Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996), at 17.

62. Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, AB-1996-2, WT/DS8, WT/DS10, WTDS/11/AB/R (95-0000) (Oct. 4, 1996), at 6 [hereinafter *Alcoholic Beverages*] (emphasis added).

63. Vienna Convention, *supra* note 61.

64. DSU art. 3.2.

65. Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT’L L.J. 2, 7 (1999).

66. MARIANO GARCIA-RUBIO, ON THE APPLICATION OF CUSTOMARY RULES OF STATE RESPONSIBILITY BY THE WTO DISPUTE SETTLEMENT ORGANS: A GENERAL INTERNATIONAL LAW PERSPECTIVE 67-73, 83 (2001); see also Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT’L L. 4 (2002).

apply to the WTO agreements. Under GATT, there had been some question about this, and certain parties argued that the agreement was a separate regime. The Appellate Body explicitly ruled that it is not and has referred to international law in support of its ruling, particularly as embodied in the Vienna Convention on the Law of Treaties, on which the Appellate Body calls for questions of treaty interpretation.⁶⁷

The above discussion shows that the doctrine of application of “customary rules of treaty interpretation of public international law”⁶⁸ found in DSU has been transformed into the application of “general principles of public international law.”⁶⁹ In other words, the Appellate Body, through its jurisprudence in *US-Gasoline* and *Alcoholic Beverages*, has succeeded in identifying and embedding implied powers with a significantly broad scope from explicit powers in the DSU.

2. Product/Process Distinction and Environmental Concerns

Environmental concerns are perhaps the most potent space for public criticism of free international trade.⁷⁰ The need to protect the environment has led to legislation in many states in recent years.⁷¹ Under GATT, states could enforce import restrictions on *products* if they damaged the health and safety of their citizens, but import restrictions on products based on their *process* of production were considered illegal. This distinction between product and process in the legal treatment of import restriction prevented states—generally developed states—from placing trade restrictions on products that were manufactured in an environmentally unfriendly way—generally by undeveloped states. The product/process distinction was addressed by the GATT dispute resolution system in *United States – Restrictions on Imports of Tuna (Tuna-Dolphin)*.⁷² While the GATT Panel recognized in *Tuna-Dolphin* that there is a “problem about how the environment and the process question relate and how process characteristics should be applied in this context,”⁷³ the Panel did not consider it appropriate to solve that problem, leaving it for the negotiators to address the question. In this way, the Panel took a conservative approach by relying on rules whose prior existence was relatively unquestioned and reinforced the existing structure while clarifying its domain of relevance. According to Jackson, “This raises the ques-

67. Jackson, *WTO Dispute Settlement Mechanism*, *supra* note 52, at 196.

68. DSU art. 3.2

69. Jackson, *WTO Dispute Settlement Mechanism*, *supra* note 52, at 196; *See also* Vienna Convention, *supra* note 61, art. 31(3)(c).

70. Robert Howse & Donald Regan, *Product/Process Distinction – An Illusory Basis for Disciplining ‘Unilateralism’ in Trade Policy*, 11 EUR. J. INT’L L. 249, 250 (2000).

71. PETER MALANCZUK, *AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 241 (7th ed. 1997).

72. Report of the Panel, *United States – Restrictions on Imports of Tuna from Mexico*, GATT B.I.S.D. (39th Supp.) at 155 (1993) (report not adopted by the GATT Contracting Parties) [hereinafter *Tuna-Dolphin*].

73. John H. Jackson, *Comments on Shrimp/Turtle and the Product/Process Distinction*, 11 EUR. J. INT’L L. 303, 305 (2000) [hereinafter *Comments on Shrimp/Turtle*].

tion of judicial activism or judicial restraint, in other words, the question of whether the Panel is the appropriate place to frame an appropriate rule to accommodate the opposing policy motives involved or, alternatively, whether this task more appropriately belongs to the negotiators.”⁷⁴ Given the lack of “judicial” authority and independence of panels under GATT, the Panel was well-advised to exercise restraint.

The WTO’s Appellate Body, however, changed the jurisprudence of international trade on the question of product/process distinction with respect to environmental concerns. The Appellate Body report in the 1998 case *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp-Turtle)* addressed this issue.⁷⁵ The WTO Panel had followed the GATT Panel’s report and argued that environmental concerns could not supersede trade policies under the WTO Agreement. The Appellate Body reversed this view. As discussed earlier, the Appellate Body had asserted in *Alcoholic Beverages* that Article 31 of the Vienna Convention applied as a whole in the interpretation of treaties under WTO Agreement, including Article 31(3)(c) that provided for using “any relevant principles of international law applicable in the relations between the parties.” If any doubt remained after *Alcoholic Beverages* as to the incorporation of Article 31(3)(c), that doubt was laid to rest in *Shrimp-Turtle*. In *Shrimp-Turtle*, the Appellate Body used Article 31(3)(c) to argue that “our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.”⁷⁶ The Appellate Body, then, relying on the preamble to the WTO Agreement and a series of non-WTO international treaties and declarations, determined that the WTO dispute settlement process must take into consideration policies other than trade liberalization. Jackson argues that the *Shrimp-Turtle* decision was probably the most important case in WTO jurisprudence, and describes his reaction to it as follows:

On this point, many observers believe that the Appellate Body rose to a high standard; some, however, have faulted the Appellate Body as perhaps a little too innovative. Nevertheless, most legal systems of the world, national and international, have to struggle with the problem of balancing competing policy goals in contexts where each has considerable merit. The WTO system cannot escape that difficult position, and the Appellate Body has not sought to escape it.⁷⁷

The Appellate Body, however, took an activist path when it could have taken a more conservative approach. Instead of applying rules whose prior existence was relatively unquestioned, as in *Tuna-Dolphin*, the Appellate Body revised existing rules and crafted new ones in *Shrimp-Turtle*. In this way, it reshaped the normative structure and expanded its domain. But Jackson justifies the Appellate Body’s approach as follows:

At the time of that case, it could be argued (and I have so argued) that the Panel

74. *Id.*

75. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp-Turtle*].

76. *Id.* para. 158.

77. Jackson, *WTO Dispute Settlement Mechanism*, *supra* note 52, at 197.

took an appropriate approach [in *Tuna-Dolphin*]. But it is my belief . . . that if after ten years no progress has been made using other procedures, then there is an institutional argument that there should be more accommodation within the 'judicial process'.⁷⁸

Jackson's argument, however, depends on the presumption that trade barriers by (developed) states to enforce environmental protection on other (developing) states are good policy.⁷⁹ While this notion may or may not be true (perhaps based on where you stand), it is different from the question whether the WTO Agreement provides an exception for such trade barriers. Moreover, the fact that the negotiators have not reached a decision means that there is a lack of consensus on these issues among member states, which is responsible for the inability to reach an understanding on the appropriate public policy. What qualifies the judicial bodies to make public policy? The text of the DSU is clear in saying that "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."⁸⁰ The Appellate Body was designed to interpret WTO treaty provisions in the resolution of disputes. These treaty provisions were a result of painstaking negotiations between sovereign states about what policies best achieve trade liberalization (as they understand it), and what other policy exceptions should be allowed from trade liberalization. Policy considerations, whether about trade liberalization or other concerns, were not within the mandate of the Appellate Body. However, the Appellate Body has taken advantage of the fact that as long as member states think that the benefits of adjudication outweigh the costs, it can continue to enact policy considerations. In addition, the United States, which exercises relatively great influence in WTO negotiations, won the case. In Silverstein's words, "[h]aving won, however, the state had no incentive to reject or oppose the ruling, and, by accepting the ruling in the case at hand, it implicitly accepted and supported the doctrine and jurisprudence that came with that ruling."⁸¹ In this way, the Appellate Body which is designed to uphold credible commitments (that is, the WTO Agreement) among member states has become a mechanism for social and political change, and the exchange between member states has been placed in the shadow of judicial lawmaking.

Jackson, nevertheless, recognizes the importance of *Shrimp-Turtle's* doctrinal implication.

[T]he Appellate Body ruled that there *may* be circumstances under which a country might prohibit the importation of goods based not on the product characteristics of those goods but on the process by which those goods were developed, harvested, or prepared for commerce—namely, prohibiting shrimp imports on the basis of whether shrimp harvesting resulted in deaths of an endangered species of

78. Jackson, *Comments on Shrimp/Turtle*, *supra* note 73, at 305.

79. In *Tuna-Dolphin*, the United States (a developed state) was trying to impose its standards for the protection of dolphins on Mexico (a developing state). Similarly, in *Shrimp-Turtle*, the United States was trying to impose its standards for the protection of turtles on Pakistan, India, Malaysia, and Thailand (all developing states.)

80. DSU art. 3.2.

81. Silverstein, *supra* note 9, at 432.

turtles.⁸²

This doctrine brings into question the entire product/process distinction. According to Jackson, the product/process distinction has been a bright-line barrier against abuse. If this distinction is abandoned, the “question then becomes: what other conditions could be addressed (such as minimum wage standards or gender discrimination) and what other process possibilities should we consider? One could think of thousands of them, and they could become serious obstacles for the trade policies we are trying to promote.”⁸³

Other considerations that can be addressed if the product/process distinction is abandoned include child labor, slave labor, human rights, et cetera.⁸⁴ In summary, the *Shrimp-Turtle* case is an example of the Appellate Body seizing on the opportunity to identify and apply implied powers—not just trade liberalization—from explicit powers and explicit prohibitions. The developed state (that is, the United States) won the case, but in accepting the ruling it wanted, the United States lent legitimacy and authority to the expansive legal doctrine embedded in the case.

3. Amicus Briefs

Under the DSU, only WTO member states that have a conflict over the interpretation or application of a particular provision of the WTO Agreement can take a dispute to the DSB and submit briefs.⁸⁵ Members who are not directly involved in a particular dispute can become third-party participants if they show a substantial interest in the outcome of the case.⁸⁶ The DSU does not explicitly allow for any participation by NGOs or private individuals. The *Shrimp-Turtle* case, however, also laid the foundation for the participation of NGOs or private individuals in the WTO dispute settlement process by allowing them to submit amicus briefs. The Appellate Body said that based on the DSU:

[O]nly Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel. Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding.⁸⁷

This emphasis on the legal right of disputants and third parties, and the legal obligation of the panelists, was used to argue that accepting solicited or unsolicited submissions from NGOs was left to the Panel’s discretion.⁸⁸ The Panel’s origi-

82. Jackson, *WTO Dispute Settlement Mechanism*, *supra* note 52, at 197.

83. Jackson, *Comments on Shrimp/Turtle*, *supra* note 73, at 306-7.

84. See Marceau, *supra* note 66.

85. UNDERSTANDING THE WTO, *supra* note 8, at 59.

86. DSU art. 10.

87. *Shrimp-Turtle*, *supra* note 75, para. 101.

88. It is interesting to see how the Appellate Body report exploits the Hohfeldian inconsistency in the DSU. See generally WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS: AS APPLIED IN JUDICIAL REASONING* (1919).

nal position had been that amicus briefs could be accepted only if they were a part of a disputing party's submissions. The Appellate Body, however, said that the Panel held the discretionary power to accept (or reject) unsolicited amicus briefs even when they were submitted independently.⁸⁹ In a later case, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC-Asbestos)*, the Appellate Body provided working procedures for submitting amicus briefs, though these working procedures were applicable only to the particular case.⁹⁰

The issue of amicus briefs is yet another example of how the Appellate Body identified and employed implied powers inferred from explicit powers and prohibitions. Instead of upholding the Panel's position based on rules whose prior existence was relatively unquestioned, the Appellate Body crafted a new rule. The Appellate Body once again reconstructed the terms of the contract. Allowing amicus briefs from NGOs means that the Appellate Body is asserting the discretion to consider other policy considerations. While the Appellate Body relied on environmental policy considerations in *Shrimp-Turtle*, the *EC-Asbestos* case shows that doctrine developed in one arena (namely environmental law) spills over to other arenas (namely public health).

However, as Sweet argues, judicial rule-making raises the issue of the court's legitimacy. The perception of the court's neutrality is eroded as its capacity to make rules is revealed. The courts can mitigate but never really resolve this problem. The vociferous opposition of developing member states to amicus curiae procedures shows erosion of the Appellate Body's credibility.⁹¹ In fact, "some [states] have called the situation created by the *amicus curiae* conflict an 'institutional crisis.'"⁹² The Appellate Body has tried to mitigate these concerns by not accepting most of the amicus briefs submitted (while retaining the power to accept them at discretion). Nevertheless, it seems that the Appellate Body has also taken advantage of the lack of consensus against its inclusion of civil society concerns. In the review of the DSU during the Doha Round, the concerns of WTO member states on the question of amicus briefs can be summarized as follows:

Touching on an issue of intense interest to civil society, the European Union and the United States have proposed explicit recognition of the right of panels and the Appellate Body to accept unsolicited friend-of-the-court (*amicus curiae*) briefs, as they already do on an *ad hoc* basis. Most developing countries vigorously oppose this practice — and the two proposals — partly due to fears that well-

89. *Shrimp-Turtle*, *supra* note 75, para. 110.

90. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001).

91. For a detailed analysis of the amicus brief procedure and political response to it from developing states, see C.L. Lim, *The Amicus Brief Issue at the WTO*, 4 CHINESE J. INT'L L. 85; see also Chakravarthi Raghavan, *Appellate Body Asserts Right to Receive Amicus Curiae Briefs*, THIRD WORLD NETWORK, Geneva, May 11, 2000, <http://www.twinside.org.sg/title/amicus.htm>; *WTO General Council Slaps Appellate Body on Amicus Briefs*, 4 BRIDGES WEEKLY TRADE NEWS DIGEST 45 (Nov. 28, 2000), <http://www.ictsd.org/html/weekly/story1.28-11-00.htm>.

92. Ehlermann, *supra* note 54, at 57.

endowed institutions in developed countries, including powerful business associations, would be most likely to be called upon for information and technical advice.⁹³

Moreover, the developing countries know that most of the amicus briefs would be in favor of more health, safety, labor, and environmental limitations on them than presently exist under WTO law. They are not as much concerned about amicus briefs in principle, as they are concerned about how these briefs will adversely affect their trade interests.

4. Future Directions: Enforcing Kyoto in WTO Dispute Settlement

It has been suggested that the European Union, relying on doctrine developed in *Shrimp-Turtle*, can enforce the Kyoto protocol using the DSB.⁹⁴ If this move toward a global rule of law works, countries such as the United States may find themselves having an increasing array of international obligations in WTO dispute settlement. For instance, “with the evolution of WTO case law, as exemplified by the *Shrimp-Turtle* decision, it is conceivable that a Kyoto Annex 1 country could claim that a border tax . . . is entitled to an environmental exception under GATT Article XX.”⁹⁵

C. Controlling the Powers of the Appellate Body

So far, this article has described how the Appellate Body has expanded its powers beyond the WTO Agreement’s text and taken the role of economic and social policy-maker. Arguably, the Appellate Body sees itself as the institutional organ addressing civil society concerns and responding to critics of globalization. The Appellate Body has been able to take these steps because of the institutional structure of dispute settlement in WTO—Appellate Body decisions cannot be overruled by member states unless there is a negative consensus, which is almost impossible to achieve.

Expansion of judicial authority, however, does not always go unnoticed. For example, when the European Court of Justice expanded its power into the political and social sphere, the Maastricht Treaty tried to limit the court to enforcing only economic treaty provisions of the union. This approach nevertheless failed to completely control the European Court of Justice, which continues

93. *Review of the Dispute Settlement Understanding*, 1 DOHA ROUND BRIEFING SERIES, Feb. 2003, at 1. http://www.wto.org/english/forums_e/ngo_e/iisd_disputesettlement_e.pdf.

94. See Gary P. Sampson, *WTO Rules and Climate Change: The Need for Policy Coherence*, GLOBAL CLIMATE GOVERNANCE: INTER-LINKAGES BETWEEN THE KYOTO PROTOCOL AND OTHER MULTILATERAL REGIMES, <http://www.geic.or.jp/climgov/04.pdf>; see also W. Bradnee Chambers, *International Trade Law and the Kyoto Protocol: Potential Incompatibilities*, GLOBAL CLIMATE GOVERNANCE: INTER-LINKAGES BETWEEN THE KYOTO PROTOCOL AND OTHER MULTILATERAL REGIMES, <http://www.geic.or.jp/climgov/05.pdf>.

95. See United States Council for International Business, *WTO Rules and Procedures and Their Implication for the Kyoto Protocol: A Background Paper*, <http://www.uscib.org/index.asp?documentID=2323> (last visited Mar. 18, 2006).

to handle cases that implicate political and social policy.⁹⁶

Reforming the DSU has become an important concern for many states. Developing states, on the one hand, seem to be concerned about developed states imposing their environmental and labor standards, and thereby affecting the competitive advantage of the developing states. Developed states, on the other hand, seem to be realizing that requiring developing states to internalize externalities is setting precedents that would come back to haunt them. There is an emerging sense that when the Appellate Body's decisions widen (or narrow) "the ability of member states to restrict trade in ways that go beyond the negotiated limits placed on the use of trade measures, they are not applying WTO law, but are legislating it."⁹⁷ Many suggestions have been made in ongoing negotiations to reform the Appellate Body. For example:

One of these suggestions is that the Director-General or a special standing committee of the Dispute Settlement Body (DSB) be empowered to step in and direct the contending WTO Members to settle their difference through bilateral negotiations, mediation, or arbitration by an outside party. Another recommendation is to set up a new blocking mechanism according to which at least one-third of the members of the DSB, representing at least one-quarter of the total trade among WTO Members, could oppose a panel or Appellate Body report, so that the report would be set aside.⁹⁸

Whenever courts try to expand their power to political and social arenas, there is a possibility of backlash from political institutions.⁹⁹ The Appellate Body's response to the crisis created by amicus briefs shows that it is mindful of this risk. As a former Appellate Body member put it, "It seemed to me then – and even today – to be wise not to take the existence of such a compulsory system for granted, and guaranteed forever, but to contribute through each Appellate Body report to its steady consolidation and further development."¹⁰⁰ It is not likely that the Appellate Body is going to gain unbridled power over international trade law and policy; rather, it will slowly continue to consolidate and expand its influence as it engages in judicial lawmaking.

V.

CONCLUSION

This article uses public law theory in political science to analyze the WTO's dispute settlement system. Dispute resolution is considered important because of the need to add predictability and security to the international trading system. However, binding dispute resolution not only strengthens the system, it

96. See Silverstein, *supra* note 9, at 432-36.

97. John Greenwald, *WTO Dispute Settlement: An Exercise in Trade Law Legislation?*, 6 J. INT'L ECON. L. 113, 114 (2003).

98. Ehlermann, *supra* note 54, at 53.

99. See Tamir Moustafa, *Law versus the State: The Judicialization of Politics in Egypt*, 28 LAW & SOC. INQUIRY 883 (2003); see also Silverstein, *supra* note 9.

100. Ehlermann, *supra* note 54, at 16.

also remakes the system.¹⁰¹ The WTO's Appellate Body is remaking international trade by moving into policy areas beyond the WTO Agreement. In this regard, the Appellate Body, an international "court," is following the same path that domestic and quasi-international courts tend to follow. The expanding judicial power of the Appellate Body, however, has created some risks for the institution. But the Appellate Body has remained largely successful in maintaining the perception of its importance in the multilateral world trading system, and to the extent that this perception has eroded, it has responded by judiciously exercising self-restraint. In this way, the Appellate Body has continued to expand its influence, taking further advantage of the fact that it is very difficult for WTO member states to renegotiate the DSU and change the institutional structure of the Appellate Body. It is expected that the Appellate Body will continue to consolidate and expand its control over the economic and social policy aspects of the WTO.

101. This is the problem that Martin Shapiro describes as, 'If you buy a junk yard dog, you will occasionally get bitten.' See Martin Shapiro, "Deliberative," *"Independent" Technology v. Democratic Politics: Will the Globe Echo the E.U.?*, 68 LAW & CONTEMP. PROBS. 341, 356 (2005) ("One historical lesson, however, to which politicians repeatedly appear singularly blind is that the junk yard dog of judicial review, once unleashed, will likely have a much larger bite than anticipated.").