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Weaving Webs of Influence: The United States, Free Trade Agreements and Dispute Resolution

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INTRODUCTION

The Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO) was one of the key outcomes of the Uruguay Round of multilateral trade negotiations. For some, it is perhaps the most important outcome.[2] John Jackson, writing about the evolution of the GATT dispute settlement process, contrasts what he terms the "'power-oriented' or 'diplomacy' approach" to the "'rule-oriented' approach" and argues in favour of the latter.[3] The argument for preferring rules is the familiar one—rules when administered and enforced by an impartial body offer certainty and predictability.

The same commitment to rule orientation in trade dispute settlement seems to be finding its way into the regional trade agreements (RTAs) that States have been notifying to the WTO. These agreements, which constitute an allowable exception to the principle of non-discrimination in the WTO trade regime, have grown dramatically in number. From 1948 to 1994, the GATT had received 124 notifications of RTAs. From 1995 to the beginning of 2005, the WTO had received more than 130 notifications. In a decade the WTO had received more notifications than had the GATT in the previous 46 years.[4]

Of the RTAs still in force some 84 percent take the form of free trade agreements (FTAs).[5] The actors that have been most active since the 1990s in the creation of a global web of FTAs have been the European Union, the European Free Trade Area and the United States. The two areas of greatest concentration of FTAs are between the EU and EFTA on the one hand and the transition economies of Europe on the other, followed by agreements between developed and developing countries.[6] These more recent FTAs are comprehensive agreements covering many of the same areas that are

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[2] David Palmeter and Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization* (2nd edn, Cambridge: Cambridge University Press, 2004), p. 16.

[3] John H. Jackson, *The Jurisprudence of GATT and the WTO* (Cambridge: Cambridge University Press, 2000), p. 121.

[4] Information is taken from the WTO website, <http://www.wto.org> (visited 6 January 2006).

[5] Jo-Ann Crawford and Roberto V. Fiorentino, *The Changing Landscape of Regional Trade Agreements*, Discussion Paper No. 8 (Geneva: World Trade Organization, 2005), p. 3.

[6] Ibid., pp. 6–7.

already the subject of obligations under WTO agreements. The areas of overlap include investment, intellectual property, services, government procurement and technical barriers to trade. Typically, an FTA will contain a chapter on dispute settlement that establishes committees and detailed procedures for handling disputes between the parties to the agreement. The growing number of these agreements is creating, in effect, a web of bilateral trade dispute resolution fora.

The purpose of this article is to draw attention to this bilateral web and in particular to focus on the role that the United States is playing in its construction. Since the Second World War, the United States has been the single most important influence on the evolution of many international regimes, including the trade regime.[7] Self-help is an important and widespread value within US culture. Its impulse and manifestation in the trade regime is never far away.[8] In short, what the United States does in trade dispute resolution matters to the evolution of the trade regime.

As we will see, one of the features of the FTAs that the United States has signed is that the dispute settlement chapters contain choice-of-forum provisions that give the complaining State choice of forum in those cases where the State complained against has breached an obligation under more than one trade agreement and both states are parties to the relevant trade agreements.[9] The capacity of a strong State to choose, as it were, its legal battleground has important implications for weaker States, especially in those cases where the stronger State shifts the contest out of the multilateral setting of the WTO. One standard argument in favour of the WTO, recently repeated in a report on the future of the WTO, is that "no group has a greater interest [in the success of the WTO] than the weak and the poor".[10] If the United States and the EU together create a bilateral network of trade rules dotted with enforcement mechanisms then both will have increased their options for managing disputes with their various trading partners. It is true that all States that participate in this bilateral network will as a matter of formal equality increase their forum-shifting opportunities. However, as a matter of substantive equality only a few States will have the capacity to exploit these opportunities. Weaker States will not necessarily be made better off in a world of bilateralized and enforceable trade rules. The aim of this article is to point to some of the dangers for weaker players. In particular the study argues that the highly organized intellectual property lobby groups in the United States have more incentive to use or threaten the use of the dispute resolution mechanisms in FTAs to enforce the intellectual property chapters of these agreements.

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[7] For a historical analysis of US influence, see John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000).

[8] See Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Salem, NH: Butterworth Legal Publishers, 1993), p. 365.

[9] See Article 22.3 US–Chile FTA; Article 20.4.3 US–Singapore FTA; Article 21.4 US–Australia FTA; Article 19.4 US–Bahrain FTA; Article 20.3 US–CAFTA–Dominican Republic FTA; and Article 20.4 US–Morocco FTA.

[10] See *The Future of the WTO*, Report by the Consultative Board to the Director-General Supachai Panitchpakdi (Geneva: WTO, 2004), para. 53.

The article is organized as follows. Section I places the current wave of FTAs in historical context. FTAs represent a subset of bilateralism in US trade and bilateralism in trade has been integral to the long-term strategy of the United States on intellectual property rights. The historical lesson here is that intellectual property has been at the core of US trade interests since the 1980s and that US FTAs have to be understood as part of this long-term interest. Section II briefly analyses the dispute settlement chapters of recent FTAs. Section III analyses some of the potential disadvantages of bilateral dispute settlement for weaker States. The key argument of this section is that the third-party procedures of the DSU offer the smaller state the possibility of prevailing as part of a coalition. Dispute resolution under an FTA excludes this possibility. Section IV uses some case examples to illustrate the argument in section III. Section V draws attention to the problem of rent-seeking in intellectual property and suggests that FTA dispute settlement offers incentives for the enforcement of intellectual property rights.

Before moving on it is worth asking whether in fact the dispute settlement provisions of FTAs will be used. There are costs after all to establishing rosters of panellists, constituting panels and developing procedures. To date the dispute settlement provisions of the recent FTAs that the United States has signed have not been used. This is not surprising since most of these agreements have been in operation for less than four years. It is possible that these FTA dispute settlement chapters may turn out to be dead letters. There are two reasons as to why this might turn out not to be the case. There are overlaps in terms of rights and obligations between WTO agreements and the North American Free Trade Agreement (NAFTA) in areas such as agricultural trade, trade in services, intellectual property and investment that give rise to choice-of-forum possibilities for the United States, Canada and Mexico.[11] Even though the number of cases is small, it is clear from these that the parties to NAFTA are thinking carefully about choice of forum.[12] To date choice of forum has favoured the WTO when it has come to a choice between NAFTA's general dispute settlement provisions and the DSU.[13] Nevertheless, once States create options for themselves in terms of dispute settlement they will approach the use of those options in ways that maximize their chances of winning. FTAs may prove a desirable forum for settling disputes over intellectual property. These recent FTAs contain intellectual property

[11] State-to-state disputes are regulated by NAFTA Chapter 20. Under Article 2005.1 disputes that arise under NAFTA and the WTO "may be settled in either forum at the discretion of the complaining Party". Once proceedings are initiated in a forum it must be used exclusively unless the proceeding relates to an environmental or health matter. See Article 2005.6.

[12] For an analysis, see David A. Gantz, *Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties*, 14 Am. U. Int'l L. Rev. (1999), p. 1025. Gantz's analysis is based on two panel decisions under NAFTA Chapter 20, a WTO decision involving the NAFTA parties and 11 consultation requests under NAFTA.

[13] See Patricia Hansen, *Judicialization and Globalization in the North American Free Trade Agreement*, 38 Tex. Int'l L.J. (2003), pp. 489, 491. In a recent article, William Davey has pointed out that there have been 15 US–Canada WTO disputes and one Chapter 20 NAFTA US–Canada dispute, and nine US–Mexico WTO disputes compared to two Chapter 20 disputes. See William J. Davey, *Regional Trade Agreements and the WTO: General Observations and NAFTA Lessons for Asia*, Illinois Public Law and Legal Theory Research Paper Series No. 05-18 (30 November 2005), p. 22.

standards that match or exceed those to be found in the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[14] If the United States does nothing to enforce these higher standards then the potential economic rents that it has secured through the negotiation of these higher standards will be lost. As Michael Finger has noted creating the legal obligation to pay the United States billions in intellectual property revenue is not the same as collecting.[15] In much the same way that the United States has projected invincibility on the negotiation of these higher standards it must also project the image of the relentless enforcer of these standards. At least in some cases, FTAs may be a better forum for the United States in which to settle a dispute over intellectual property rights.

I. US Bilateralism in Historical Context

Trade is and has always been a carefully managed and regulated institution. There is perhaps no better example of this trade managerialism than the refusal by the US Congress in the 1940s to approve the Havana Charter for an International Trade Organization.[16] There were simply too many concerns about the sovereignty implications of a multilateral institution for trade. Instead the GATT was born provisionally, its members served by a "non-organization". Trade as an institution remained squarely in the Westphalian model, something to be managed on the basis of a power-diplomacy approach.[17] The United States supported the GATT because under the GATT's consensus rule its power was maximized. GATT members operated on the basis of a negative consensus rule, meaning that unless a given member objected to a decision consensus was assumed. A powerful player such as the United States could better absorb the costs of negating consensus, more credibly threaten the negation of consensus and find more ways to exert pressure in order to obtain consensus.

The United States did not pursue its trade interests through the GATT alone, but rather evolved a sophisticated negotiating strategy that was based on coordination across bilateral and multilateral trade fora to obtain the outcomes it wanted.[18] This strategy was used with spectacular results in the area of trade in intellectual property rights, where the United States had by far the greatest export interests of any

[14] For a recent survey of intellectual property standards in US FTAs, see John R. Thomas, *Intellectual Property and the Free Trade Agreements: Innovation Policy Issues*, Congressional Research Service Report for Congress (21 December 2005).

[15] J. Michael Finger, *The Doha Agenda and Development: A View from the Uruguay Round*, ERD Working Paper Series No. 21 (Asian Development Bank, September 2002), p. 13.

[16] Palmeter and Mavroidis, as note 2 above, p. 2.

[17] Under the Westphalian model of the international relations, a state ultimately settles its disputes based on the principle of might, subject only to the logic of competitive power. See David Held, "Democracy: From City-states to a Cosmopolitan Order?", in Robert E. Goodin and Philip Pettit (eds), *Contemporary Political Philosophy* (Oxford: Blackwell, 1997), p. 87.

[18] For the historical details, see Peter Drahos with John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* (London: Earthscan, 2002).

country.[19] During the 1980s, the United States set the scene for the inclusion of an agreement on intellectual property in the Uruguay Round through a series of strategic bilateral negotiations on intellectual property with countries like Brazil, Singapore and South Korea.[20] The purpose of these bilaterals was to set precedents for the kind of standards that the United States wanted to see included in a multilateral agreement on intellectual property. The United States also developed a Bilateral Investment Treaty (BIT) programme during the 1980s.[21] It also began the process of forging stronger links between regional political objectives and trade in the form of the Caribbean Basin Initiative (1983), which gave Caribbean States the benefit of certain preferential trading arrangements. This bilateralism of the 1980s intensified in the 1990s with more bilateral agreements being signed and more countries being individually reviewed under US trade law processes for possible unfair trade practices.[22] John Jackson writing of US trade policy in 1997 describes US trade policy as having moved away from multilateralism to "a more 'pragmatic'—some might say 'ad hoc' approach—of dealing with trading partners on a bilateral basis and 'rewarding friends'".[23]

The 1980s saw two contrary trends develop in trade relations. The growing rule orientation of GATT panels that Jackson notes was also a period of strong rule-breaking by the United States. It acted precisely in the way that a realist theory of international relations would predict, something noted by developing country trade analysts.[24] As Hudec has observed, it abused the GATT process of dispute settlement more than any other country and it acted unilaterally against developed and developing countries alike on the new issues of the Uruguay Round such as intellectual property rights, investment and services.[25] Dispute resolution under these agreements tended to be governed by a simple clause in which the parties agreed to consult promptly on matters of implementation and enforcement of the obligations contained in the agreement.[26] The enforcement driver behind this consultative process was the threat of trade retaliation by the United States under its Trade Act.

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[19] For estimates as to the net transfers to the United States of the patent provisions of TRIPS, see *Global Economic Prospects and the Developing Countries* (Washington, D.C.: World Bank, 2002), p. 137. For a discussion as to why higher standards of intellectual property do not generally benefit developing countries, see Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (London: CIPR, September 2002).

[20] Drahos with Braithwaite, as note 18 above.

[21] By 1987, the United States had signed BITs with 11 developing countries and was negotiating with seven others. See F. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework, Symposium: Trade-Related Aspects Of Intellectual Property*, 22 Vanderbilt J. Transnational L. (1989), p. 712, fn. 12.

[22] See P. Drahos, *BITs and BIPs—Bilateralism in Intellectual Property*, 4 J. World Intellectual Property (2001), p. 791.

[23] J. Jackson, *The World Trading System* (Cambridge, MA: MIT Press, 1997), p. 173.

[24] See, e.g., Durval de Noronha Goyos, *Arbitration in the World Trade Organization*, Legal Observer (Miami, FL: 2003), p. 26.

[25] R. Hudec, "Dispute Settlement", in J.J. Schott (ed.), *Completing the Uruguay Round* (Washington, D.C.: Institute for International Economics, 1990), pp. 203–204.

[26] For example, Article 19 of the Nicaragua Intellectual Property Rights Agreement, states the following: "Both parties agree, at the request of the other party, to consult promptly on matters relating for the protection and enforcement of intellectual property rights, in particular with respect to implementation of the obligation of this Agreement."

The use by the United States of its trade law to bring anti-dumping actions, threaten the imposition of duties on the imports from other countries, remove countries from GSP benefits and so on led some States to ask for preferential trading agreements that would lessen the risk of this kind of aggressive unilateralism. Canada and Mexico, both of which had been on the receiving end of US trade actions, saw merits in a preferential trade arrangement that offered a way of dealing with US trade unilateralism.[27] In short, the power-diplomacy approach of the United States led to a demand by other States for a greater rules-based approach to trade dispute resolution. For the United States, this demand for preferential trade agreements created the opportunity of negotiating more market access arrangements for its industries. Those US industries, such as the copyright industries (music, film, records and software) and the pharmaceutical industry that had been involved in the push to promote ever-higher standards of intellectual property in the WTO also saw that the prospects of obtaining an increase in standards of protection in the WTO was growing ever dimmer. The WTO in the 1990s became mired in general controversies over its role in globalization, with many critics focusing on the effect of the patent provisions of the TRIPS on access to medicines in the context of the AIDS pandemic.[28] With civil society paying so much attention to the WTO, US companies and their lobbyists turned their attention to possibilities offered by FTAs.[29]

II. Dispute Settlement Chapters in FTAs

The preferential trading arrangements that States have entered into have over time become more detailed and comprehensive, covering many of the topics and issues that were part of the Uruguay Round of multilateral trade negotiations, but that were not necessarily concluded or settled to the satisfaction of all countries. As one would expect, the details of these agreements vary, reflecting a vast array of individual trading interests that one country has *vis-à-vis* another country, as well as disparate levels of bargaining power that individual countries possess *vis-à-vis* one another. By way of example, the FTAs that the United States has concluded contain long and detailed chapters on intellectual property that, as one would predict, favour a powerful State which is also the world's principal exporter of intellectual property rights. Other FTAs that do not have the United States as a party contain much more modest chapters on intellectual property, because the parties are net intellectual property importers and

[27] Jackson, as note 3 above, p. 102. See also Gustavo Vega C. and Gilbert R. Winham, *The Role of NAFTA Dispute Settlement in the Management of Canadian, Mexican and US Trade and Investment Relations*, 28 Ohio N.U.L. Rev. (2002), p. 652.

[28] See R. Mayne, "The Global Campaign on Patents and Access to Medicines: An Oxfam Perspective", in Peter Drahos and Ruth Mayne (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* (Basingstoke: Palgrave Macmillan, 2002), p. 244; Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003), pp. 146–162.

[29] Peter Drahos, *Intellectual Property and Pharmaceutical Markets: A Nodal Governance Approach*, 77 Temple L. Rev. (2004), p. 401.

have little to gain from raising the current international standards of protection. The FTA between Australia and Thailand, for example, contains a mere five articles on intellectual property.[30] It simply commits the two parties to TRIPS standards. Similarly, the Singapore–Australia FTA intellectual property chapter contains a modest seven articles.[31]

Within this growing web of bilateral dispute settlement chapters there are important variations, but in general terms these chapters follow the same structure. Typically the agreement will establish a joint committee or commission to oversee the operation of the entire agreement, including the process of dispute resolution. In some agreements the procedures for dispute resolution are only the tip of the iceberg, because the agreement as a whole sets up working parties and groups to monitor various parts of the agreement.[32] Such provisions commit the bureaucracies of each party to a detailed dialogue over regulatory policy and standards.

Typically, the parties commit themselves to consultations as a first step. Where consultations fail they may request a meeting of the body appointed to oversee the agreement and if that fails to produce an agreed solution, the parties may go to a panel. As in the case of the DSU, there are rules for the qualifications of panellists and procedures for panel selection. There are variations among the rules for choosing panellists, but the goal is to select for technical expertise and independence.[33] Detailed rules of procedure are not elaborated, except to provide for a minimum of procedural fairness in the form of a right to at least one hearing and the opportunity to provide for initial and rebuttal submissions.[34] The rules of procedure specify time-limits for matters such as submissions, reports by the panel and if necessary the suspension of benefits as well as appeals against such suspension.

There are also important differences between bilateral agreements when it comes to the key issues of openness of the dispute process to the public and scope of participation of non-governmental persons. The US–Australia FTA, for instance, states that subject to the protection of confidential information "hearings shall be open to the public".[35] The Canada–Chile FTA makes confidential the panel's hearings, deliberations, initial reports as well as any submissions and communications it receives.[36] On the issue of the participation of nongovernmental entities the US–Australia FTA requires that the rules of procedure oblige a panel to consider a request from a nongovernmental person to provide a written submission. The Canada–Chile

[30] See Chapter 13, Thailand–Australia Free Trade Agreement.

[31] See Chapter 13, Singapore–Australia Free Trade Agreement.

[32] See, e.g., the US–Australia FTA that sets up working groups in many areas, including the Medicines Working Group to monitor the Annex on Pharmaceuticals.

[33] For example, Article 21.7(5) US–Australia FTA states that panellists shall be chosen on the basis of "objectivity, reliability and sound judgment" and that they are to be independent of either party. Article N-09 Canada–Chile FTA, which sets up a roster of panellists, uses the same language.

[34] See Article 21.8(1)(a) and (b) US–Australia FTA, and Article N-12(1) Canada–Chile FTA.

[35] See Article 21.8(a).

[36] Compare this with the US–Chile FTA, which states that the hearing before the panel shall be open to the public. See Article 22.10(1)(a).

FTA is silent on this point. There is also scope under both agreements for a panel to seek information and technical advice from a person or body, provided that both parties to the dispute consent.[37]

Where the parties are unable to resolve the dispute and agree on compensation, typically the complaining party may suspend some of the benefits of the agreement that the other party is receiving. Compensation and suspension of benefits are standard remedies to be found in the DSU. In its recent FTAs, the United States has been successful in including the payment of a fine as one of the options. Under the US–Australia agreement if, for example, the United States is the complaining party and Australia the complained-against party and the United States is entitled to suspend benefits to Australia, Australia may elect to "pay an annual monetary assessment".[38] Where the complained-against party elects to pay this assessment the complaining party cannot suspend benefits.

Granting States the option of paying fines instead of offering reduced tariffs to a complaining State or suffering the imposition of increased duties by that state, will probably prove to be an attractive option in some trade disputes.[39] Compensation has been infrequently used in the GATT/WTO context because States offering up particular sectors for reduced tariff access are likely to trigger the lobbying wrath of special interest groups and, depending on the sector offered up for compensation, there may be little satisfaction for the aggrieved industry in the complaining State.[40] Fines may be a more targeted and less disruptive form of trade remedy. But as we shall see in section IV fines also set up some potentially dangerous incentives for rent-seeking behaviour.

An important provision to be found in recent US bilaterals is a choice-of-forum provision.[41] The proliferation of FTAs coupled with the high membership of the WTO may well result in a situation where a State breaches an obligation it has under more than one agreement. For example, the intellectual property chapters of the FTAs that the United States is negotiating are picking up some of the language of TRIPS and so, in effect, States are agreeing to obligations they have already agreed to in the WTO context.[42] The approach to cases of "double breach" in these US FTAs, is to allow the complaining party choice of forum. In the words of the US–Australia FTA, "the complaining party may select the forum in which to settle the dispute" and "the forum selected shall be used to the exclusion of others". The exclusion of other fora is contingent upon the complaining party requesting a panel, so presumably fora may be

[37] See Article N-13 Canada–Chile FTA, and Article 21.8(3) US–Australia FTA.
[38] See Article 21.11(5) US–Australia FTA. See also Article 22.15(5) US–Chile FTA.
[39] The Australian Department of Foreign Affairs and Trade has indicated that the payment of a fine may be a desirable option in some circumstances. See Department of Foreign Affairs and Trade, *Guide to the Agreement* (Canberra: DFAT, 2004), p. 123.
[40] Palmeter and Mavroidis, as note 2 above, p. 266.
[41] See, e.g., Article 22.3 US–Chile FTA, and Article 21.4 US–Australia FTA.
[42] For an example of this compare Article 17.9.1 US–Australia FTA with Article 27.1 TRIPS. Both deal with patentable subject-matter.

used in parallel until that event. This approach to choice of forum is not the only one that States might choose. An example of a different approach is to be found in Article 189.4(c) of the EU–Chile FTA. Under this Article where a party seeks redress for breach of an obligation that is also a breach of a WTO obligation, that party "shall have recourse" to the WTO (unless both parties otherwise agree).[43] Importantly, under this approach the WTO's DSU is made the first port of call and the complaining State cannot unilaterally decide to shift the dispute outside of the DSU.

These choice-of-forum provisions may give rise to some complex litigation scenes in the future because in cases of double breach, third States that are not party to the FTA, but are parties to the WTO could only proceed in the WTO while the complaining party under the FTA would have a choice. There may also be cases where a party under a FTA introduces a measure that is seen by a third party as being inconsistent with its WTO obligations. The third party may then seek a review of that measure from the WTO.[44] Finally, the spirit of the choice-of-forum provisions may not be respected with a complaining party finding a way to proceed in both fora. The same set of facts may allow a complaining party to characterize a dispute as giving rise to separate legal matters allowing it to open up two fronts of litigation.[45] For example, in the US–Australia FTA the provisions that relate to the Pharmaceutical Benefits Scheme (a scheme that, among other things, impacts on the price of patented medicines) and the provisions on intellectual property might in certain circumstances give rise to this kind of possibility. The *Softwood Lumber* litigation between the United States and Canada, which over the years has involved both NAFTA and WTO panels, is an example of how parallel fora can be used to prolong and re-contest decisions that one party does not like. The most obvious consequence of a trade regime that has many trade courts is that it will favour States that have the capacity to analyse its complex pathways and pick those that best suit their purposes.

Before we move on to the substantive issues of the next section, it is worth noting that these choice-of-forum provisions to be found in US FTAs do not sit very comfortably with the goal of strengthening the multilateral trading system. The WTO Members are meant to have recourse to the DSU when they decide to pursue a remedy for a breach of a WTO agreement.[46] Article 23 of the DSU provides a basis upon which to argue that the WTO's multilateral system has primacy over competing systems of dispute resolution.[47] More generally, one of the goals of the DSU was to limit the

[43] See Title VIII Chapter III, Article 189.4(c).

[44] For a discussion of the power of WTO Panels to review measures under preferential trading agreements, see Petros C. Mavroidis, "Judicial supremacy, judicial restraint, and the issue of consistency of preferential trade agreements with the WTO: The Apple in the picture", in Daniel L.M. Kennedy and James D. Southwick (eds), *The Political Economy of International Trade Law* (Cambridge: Cambridge University Press, 2002), p. 583.

[45] For a discussion of this in the context of NAFTA, see David A. Gantz, *Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties*, 14 Am. U. Int'l L. Rev. (1999), pp. 1095–1097.

[46] See Article 23.1 of the DSU.

[47] Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (London: Kluwer Law International, 1997), p. 179.

forum shopping that was occurring under the GATT and special Tokyo Round dispute mechanisms.[48] The EU–Chile choice-of-forum provision is drafted in a way that is much more sympathetic to this end. There are good reasons in principle to encourage parties to use the DSU. When parties resolve a trade dispute that requires a determination of obligation in one or more of the covered agreements of the WTO they deliver a public good for other Members, assuming that the dispute results in a greater certainty of the interpretation of the rules. Where an infringing State brings a measure into conformity with an obligation it has under a covered agreement it will be of benefit to all other Members by virtue of the most-favoured-nation (MFN) principle. In short, the third party benefits of two States obtaining a ruling to a dispute under a multilateralized dispute resolution mechanism may be considerable. The same cannot be said of bilateral dispute resolution proceedings. By their nature they prop up preferential trading arrangements that operate outside of the scope of the MFN principle.

III. Bilateral Dispute Settlement—Problems and Costs

If the US roll out of FTAs continues, it (along with the EU) will have more fora in which to pursue its trade disputes than other States.[49] It also follows that the United States and the EU will have more choices in total than other States when it comes to where they will play for rules. Of course, not every dispute under an FTA will raise the issue of choice of forum because some matters will be peculiar to the agreement itself. But in areas such as intellectual property the overlap of obligations is considerable and so choice of forum is likely to arise. The fact that an FTA also creates a choice-of-forum opportunity for the other party is in most cases an opportunity in name only since most States do not have the capacity to play for rules.

Bargaining power is at work in shaping North–South FTAs in favour of the larger northern country.[50] Bargaining power also remains in play in a dispute resolution contest between a strong and weak State. Whether two States pursue a trade dispute in the WTO using the DSU or whether they use the procedure available to them under a bilateral trade agreement, the dispute still remains a bilateral dispute. In either case, the superior bargaining power of a strong State also remains. If an African country decided to bring a WTO action against the United States, arguing that the United States improperly subsidizes its cotton producers, the United States could threaten to withdraw its food aid, whether that action was brought in the WTO or under a bilateral

[48] Ibid., p. 178.

[49] The number of trade and investment framework agreements that the United States has signed suggests that it will continue to negotiate FTAs. The USTR website states the following: "Any potential FTA partner must be a WTO member and have a TIFA with the United States. The United States now has TIFAs with Indonesia, Philippines, Thailand, Brunei Darussalam and Malaysia. The US goal is to create a network of bilateral FTAs with ASEAN countries". See <http://www.ustr.gov/Trade_Agreements/Regional/Enterprise_for_ASEAN_Initiative/Section_Index.html>.

[50] On this point, see Caroline Freund, *Reciprocity in Free Trade Agreements* (Washington, D.C.: World Bank, April 2003), available at <http://www.sice.oas.org/geograph/mktacc/freund.pdf>.

agreement.[51] Ultimately, the mere passage of rules and procedures, whether bilateral or multilateral, does not in some magical way mute the exercise of power. A weaker State must look to ways of increasing its influence when engaged in trade litigation with a larger State and in this respect the DSU offers some clear advantages over bilateral dispute settlement.

One such advantage is linked to the procedural aspects of the DSU that allow for significant third party participation in a dispute between two WTO Members. This participation can take place as early as the consultation stage, albeit in limited fashion.[52] At the panel stage, third parties have a right to be heard, to make written submissions, to receive written submissions (restricted, however, to those made to the first meeting of the panel) and ultimately to bring their own action.[53] Third parties may not appeal a decision, but if an appeal is taken then a third party has a right to be heard and make written submissions.[54] The WTO panels have been prepared to grant third parties enhanced participatory rights. Aside from third party procedures, the DSU also has procedures that facilitate complaining States each bringing an action in relation to the same matter.[55] In short, the procedural rules of the DSU offer weaker States some scope for cooperation and collective action when it comes to defending or bringing trade actions. This coalition building can begin at the consultation stage. The same is not true of procedures that govern dispute resolution under an FTA. Those procedures, such as consultation, are only available to the parties to the agreement.

Coalition building is an informal process. One cannot exclude the possibility that a state faced with a dispute under an FTA may seek the help of other states. However, the advantage of the DSU is that by formally allowing for third party involvement right from the beginning it indirectly recognizes the importance of allowing coalitions of mutually affected trade interests to form and participate in dispute resolution. Summarizing the argument thus far we can say that the third party procedures of the DSU create the possibility of coalition building by a weak actor involved in a dispute with a strong actor. A coalition offers a weak actor the opportunity of enrolling capacities that the weak actor lacks and it also signals to a panel that there are aggregated interests of the WTO membership at work in the dispute rather than just the individual interests of one strong State and one weak State. This signalling function of coalitions will be important if, as some commentators suggest, they may lead WTO panels down an interpretive path that is sensitive to the interests of the WTO as a polity.[56]

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[51] Apparently the United States made such a threat. See Gregory Shaffer, "How to Make the WTO Dispute Settlement Work for Developing Countries: Some Proactive Developing Country Strategies", in *Towards A Development-Supportive Dispute Settlement System in the WTO*, ICTSD Resource Paper No. 5 (Geneva: ICTSD, 2003), p. 45.

[52] The third party must have a substantial trade interest, the consultations must be based on Article XXII of GATT and the WTO Member to which the consultations were originally addressed has to agree to the third party being joined. See Article 4.11 of the DSU.

[53] See Article 10 of the DSU.

[54] See Article 17.4

[55] See Article 9.

[56] See James McCall Smith, *WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings*, 2 World Trade Rev. (2003), p. 65.

Of course, the weaker actor in the WTO still faces a complex contest of trade litigation in which it has disadvantages of resources and expertise.[57] Coalitions are not easy to build. Furthermore, there are no guarantees that other States will participate as third parties against a strong state or that third parties will not join the strong State. Weaker States when they enter a coalition must meet the financial and political costs of litigation against a strong State. But in an isolated FTA engagement the weaker actor will continue to face all the difficulties of litigation in the WTO, but without the prospect of third party assistance in the formal dispute resolution process. It is the possibility of coalitions that makes dispute resolution in the WTO a more fluid and dynamic process than in the static context of an FTA. In the context of an FTA dispute the capacities and power of the two parties are what they are.

To date the evidence of coalition building by developing countries in WTO dispute resolution suggests that it remains an underutilized option. The United States and the EU participate more than other States as third parties in WTO dispute settlement.[58] Both know that in the game of playing for rules and determining the content of obligations third party participation matters. Brazil, Chile, India and Mexico do participate regularly as third parties along with some smaller Latin American countries.[59] However, Bown's work on participation in WTO disputes by countries that have been as a group adversely affected by another country's WTO-inconsistent measure, suggests that developing countries in particular are not making use of the collective action possibilities of the WTO.[60] The cases that Bown investigates are those where a country has in place a WTO-inconsistent measure that negatively affects a group of exporting countries. So these are cases where one might expect a large participation rate from members of the group. In fact many countries, especially developing countries, do not participate. He considers the plausible explanation that weaker States in the group are playing the role of the hopeful free-rider. If the litigation leads to the WTO-inconsistent measure being removed the non-participants gain the benefit of the outcome under the MFN principle (the same is true if a reduction of tariffs is offered as compensation). If the litigation is unsuccessful they have saved the costs of participation. Bown's investigation nevertheless shows that "adversely affected exporters are less likely to participate if they are involved in a preferential trade agreement with the respondent, if they lack the capacity to retaliate against the

[57] On the difficulties facing developing countries, see Shaffer, as note 51 above, p. 1; Gregory C. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Washington, D.C.: Brookings Institution Press, 2003), p. 161.

[58] On the extent of third party participation by the United States and the EU, see Shaffer, as note 51 above, p. 12.

[59] See Marc L. Busch and Eric Reinhardt, *Three's a Crowd: Third Parties and WTO Dispute Settlement*, paper presented at conference "WTO dispute settlement and developing countries: use, implications, strategies, reforms, held at University of Wisconsin, Madison, 20–21 May 2005, p. 19.

[60] Chad P. Bown, *Participation in WTO Dispute Settlement: Complainants, Interested Parties and Free Riders*, 19 World Bank Economic Review 2 (2005), pp. 287–310.

respondent through withdrawing trade concessions, if they are poor or small, or if they are particularly reliant on the respondent for bilateral assistance".[61]

As the web of FTAs continues to grow larger developing countries will have to face the costs of being enmeshed by it. The clearest cost arises in situations of double breach where the United States is the complainant and it chooses the FTA forum. In such a case the weaker State will not be able to use the WTO to defend the case against the United States.[62] It follows that the weaker State will not be able to use the coalitional possibilities of the WTO. At this point it is worth noting the recent important analysis by Busch and Reinhardt that participation by third parties in WTO disputes raises costs in various ways and acts to undermine the early settlement of a case.[63] There are two things to say about the Busch-Reinhardt analysis in the context of the present argument. First, as they point out, their analysis has implications for strengthening the participation of third parties in the WTO, but it is not and nor do they claim it to be an argument against third party participation altogether. Second, the decision that developing countries have to make *ex ante* is whether they will support a dispute resolution process that offers the possibility of coalition building or participate in the creation of a web of trade courts in which their coalition building capacities will be restricted. While there may be problems with third party participation in the WTO these may be preferable, so far as weaker players are concerned, to FTA dispute settlement. Of course, one can imagine examples in which a small State might prefer an FTA dispute settlement procedure. A small protectionist State, for example, would minimize its losses in a FTA dispute over market access because the MFN principle would not apply. However, this line of argument tends to fall into the trap of *ex post* thinking. It does not answer the question as to the type of system of trade dispute resolution that weaker actors as a group should support.

Bown's observation that the presence of a preferential trading arrangement will negatively affect the participation of developing countries in the WTO suggests that as the United States and the EU sign more and more FTAs with developing countries they may well circumscribe the coalitional possibilities of the DSU for developing countries as a group. Developing countries that gain trade preferences from the United States and the EU, may in the context of the WTO become more reluctant to join a coalition against the United States or the EU, reasoning that if they do participate this may well end up creating costs for the preferential deal that they have obtained from the United States or the EU. In short, the web of FTAs will cast a shadow over the WTO dispute settlement forum, affecting the bargaining and settlement processes that take place there. The effects of this are hard to predict, but anything that reduces the coalitional possibilities for developing countries within the WTO for the purposes of a confrontation with the United States or the EU is more likely to make those countries

[61] Ibid.
[62] Third States not party to the FTA would have the option of bringing a dispute in the WTO.
[63] See Busch and Reinhardt, as note 59 above.

worse off as a group. An individual developing country may, however, take the view that despite these costs within the WTO to developing countries as a group it is nevertheless individually better off with an FTA than not.

The comparative advantage that the WTO dispute resolution process offers weaker players can be usefully illustrated by means of some case studies. The next section compares the bilateral dispute that Vietnam had with the United States over its export of catfish with WTO disputes in which weaker States like Ecuador have participated. The dispute over catfish between the United States and Vietnam illustrates the kind of difficulties a weaker State is likely to face if dispute resolution takes place in the context of an FTA, while the case of Ecuador in the WTO dispute over bananas shows the potential advantages that the WTO offers a weaker player.

IV. Case Studies

The trade dispute between Vietnam and the United States over catfish saw the smart manoeuvrings of Southern Congressmen produce a law that confined the use of the label "catfish" to those catfish that swam in rivers of six Southern states. Vietnam lost significant market share in the United States because of this change in US labelling law. The Catfish Farmers of America successfully petitioned for an anti-dumping action to be brought against Vietnam. That action produced anti-dumping duties in the range of 37 to 64 percent.[64] At the time of the dispute Vietnam was seeking membership of the WTO and so it could not take advantage of the WTO dispute resolution mechanism. It did have a bilateral agreement with the United States, but unlike some of the FTAs we have been discussing, this bilateral agreement did not have a comprehensive chapter on dispute settlement.[65]

This trade dispute is not unlike a situation that weaker States may find themselves in under an FTA that contains a choice-of-forum provision. Their route to the WTO may be blocked. In the case of Vietnam it is hard to see how Vietnam would have had worse prospects in the WTO. Arguably it would have been better off because it could have tested the outcome of the US anti-dumping action under the WTO's Anti-dumping Agreement and had the potential benefit of the WTO's third party procedures. There is also empirical evidence to suggest that countries that use the DSU to test anti-dumping actions reduce the odds of having an action brought against them in the first place.[66]

It is also worth considering whether Vietnam might have done better if there had been a comprehensive dispute resolution chapter in the FTA. If we assume for the moment that a panel formed under the FTA would have found in favour of Vietnam, the United States might still not have complied with the panel's determination.

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[64] Federal Register: 23 June 2003 (Vol. 68, Nos. 120), 37116–37121.

[65] Agreement Between The United States of America And The Socialist Republic Of Vietnam On Trade Relations. The agreement entered into force on 10 December 2001.

[66] B. Blonigen and C. Bown, *Antidumping and Retaliation Threats*, 60 J. Int'l Economics (2003), p. 249.

Vietnam would then have had to face the issue of what to do about the US's non-implementation. If Vietnam had decided to deal with non-implementation by imposing duties on US goods that it was importing, the costs of that action to Vietnam remain fundamentally the same, irrespective of whether it proceeded under the actual bilateral agreement it had with the United States or one with a better dispute settlement chapter or under the WTO. However, the costs to the United States of Vietnam choosing one path rather than another do change. Under the existing bilateral, the United States could claim legitimacy for its action by pointing to the outcome of its national anti-dumping investigation, an investigation in which Vietnamese firms had participated as respondents. There was also the possibility of trade retaliation by Vietnam, but Vietnam is not a crucial trading partner for the United States. In any case Vietnam benefits from the bilateral trade agreement and would not want to jeopardize the trading relationship overall.[67] In the hypothetical case where Vietnam wins a case in front of an independent trade panel and the United States refuses to implement the determination of the panel, the United States has to factor in the reputational costs of that defiance and loss of legitimacy. In a bilateral context it may still conclude that refusal to implement is the best option. Reputational costs as a driver of compliance by States can sometimes be overrated for the reasons articulated by Downs and Jones.[68] States have "multiple reputations" and the extent to which they worry about costs to those reputations vary with context. In a bilateral context, the United States might decide to accept the reputational costs of defiance, but it may begin to believe that those costs matter more in the WTO. The point for present purposes is that the ability of the weaker actor to pursue a matter in the WTO may change the cost structure that faces a strong actor when it comes to acts of defiance in ways that favour the weaker actor.

Coalitions are a standard way in which weak States increase their bargaining power when it comes to negotiating new standards in the WTO. The WTO by virtue of its size of membership and range of subject-matter is a dynamic, changing negotiating terrain in which issue linkage opportunities may arise to help the weaker actor even in the context of dispute settlement, a proposition that has some support in the trade dispute over the EU's banana regime.[69] Known as the Common Organization of the Market for Bananas (COMB) (1993) its effect was to favour market access by African, Caribbean and Pacific countries while restricting the access of South American countries. During the 1990s, this regime triggered several GATT/WTO actions. In this dispute, coalitions played an integral part in securing gains for individual South American banana producers. A coalition comprised of Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela, were successful in two GATT actions, but the

[67] See Mark E. Manyin, *The Vietnam–US Bilateral Trade Agreement*, CRS Report for Congress (11 December 2001).

[68] George W. Downs and Michael A. Jones, *Reputation, Compliance and International Law*, 31 J. Legal Studies (2002), p. S95.

[69] T. Josling and T. Taylor (eds), *Banana Wars: The Anatomy of a Trade Dispute* (Cambridge, MA: CABI Publishing, 2003).

adoption of the panel reports was blocked by the EU. Another coalition consisting of Ecuador, Guatemala, Honduras, Mexico and led by the United States were also successful, this time under WTO rules.[70] The United States also brought an action requesting authorization to suspend concessions to the EU.[71] These coalitions brought an increase in capacity to deal with the rule complexity of the disputes and more importantly the presence of the United States (and therefore its large market) lent credibility to the threat of asking for a suspension of concessions. An example of the way in which the principle of linkage was used in these disputes was the refusal by Ecuador to give its approval to the grant of a waiver to the EU from GATT rules that was needed by the EU for the purposes of reaching an agreement with African, Caribbean and Pacific countries on their preferential access to EU banana markets.[72] This refusal by Ecuador took place during the Ministerial meeting in November 2001, where all of the major countries were keen to launch a new trade round and so required the support of all Members. By linking its interests in securing a better deal from the EU's reform of its banana regime to the issue of the waivers and the broad agenda of the successful launch of the Doha Round, Ecuador gained bargaining leverage that it could not possibly have gained in a simple bilateral dispute.

An example of how a threat may have increased effectiveness in the multilateral setting is provided by Ecuador's threat to use cross-retaliation against the EU in the highly sensitive field of intellectual property rights and obligations.[73] Since Ecuador and the United States were on the same side in this dispute, the United States could hardly object to the use of a remedy that had been authorized by WTO arbitrators. If Ecuador had acted on its threat a precedent of great importance to developing countries would have been set. The threat thus had real potency. The danger of using cross-retaliation outside of the WTO against the United States or the EU is that it may draw a crushing reply, because intellectual property has been such a priority issue for these two powers, especially the former. The value of this threat is probably much greater in the WTO than outside it.

V. Intellectual Property, Rent-seeking and FTA Dispute Settlement

The basic theme of those public choice theorists most closely linked with the theory of rent-seeking has been that governments by interfering in markets (essentially by creating barriers to entry by imposing quotas, tariffs, licence requirements, permit conditions and so on) create rents that, because they are entrenched by governmental

[70] See WT/DS27/AB/R, 9 September 1997.
[71] See WT/DS27/ARB, 9 April 1999.
[72] The case study is developed in an illuminating way by James McCall Smith, *Compliance Bargaining in the WTO: Ecuador and the Bananas Dispute*, paper prepared for the UNCTAD Conference on Developing Countries and the Trade Negotiation Process, 6–7 November 2003, Geneva.
[73] See WT/DS27/ARB/ECU, 24 March 2000. For details in the way this threat was actually used see, Smith, ibid.

regulation, cannot be eroded by market competition.[74] Intellectual property is a form of government regulation that is rife with rent-seeking opportunities.[75] In the United States, industries such as the publishing industry have managed to secure rents for themselves by persuading Congress to pass legislation providing for the extension of the copyright term for works already in existence.[76] There is no incentive effect of an increase in the copyright term for works already in existence. All that occurs is a wealth transfer from the consumer to the copyright owner. This rent-seeking behaviour is now being globalized by means of FTAs that require countries to follow US standards on copyright term.[77] The US pharmaceutical industry is also using FTAs to obtain longer and stronger patent protection.[78] However, as the economist Joseph Stiglitz has pointed out stronger standards of intellectual property are not necessarily better and may in fact impede innovation.[79] Using trade agreements as a means of transferring wealth from developing countries to intellectual property owners is likely to deepen questions about the distributive effects of the trade regime. Nevertheless there may be strong incentives for some of the private arms of the public–private partnerships that drive US trade litigation to lobby for a trade action to be brought under an FTA rather than in the WTO.[80]

To begin with, there will be cases where the relevant FTA sets a standard that is not to be found in TRIPS (such as an extension of the copyright term, or an obligation on a drug registration authority to check for the existence of patents in relation to a drug registration application by a generic company) and so dispute resolution under the FTA will be the only option. There will be other situations in which a State that is party to the TRIPS agreement and an FTA with the United States may breach an obligation that is common to both agreements. The forum in which the United States decides to settle a dispute will be affected by a variety of factors, but it is worth noting that US FTAs on intellectual property contain more precisely articulated standards on some topics whereas the TRIPS standard is somewhat vaguer and more open-ended. By way of example, TRIPS Article 31.1, which deals with the protection of data that is submitted by a pharmaceutical company to a drug registration authority for the

[74] See James M. Buchanan, Robert D. Tollison, and Gordon Tulloch (eds), *Toward a Theory of the Rent-Seeking Society* (College Station, TX: Texas A&M University Press, 1980); Charles K. Rowley, Robert D. Tollison, Gordon Tulloch (eds), *The Political Economy of Rent-Seeking* (Boston: Kluwer Academic Publishers, 1988).

[75] William, M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Cambridge, MA: Belknap Press of Harvard University Press, 2003).

[76] Peter Drahos, "Regulating Property: Problems of Efficiency and Regulatory Capture", in Parker, C., Scott, C., Lacey, N. and Braithwaite J. (eds), *Regulating Law* (Oxford: Oxford University Press, 2004), p. 179.

[77] Keith Maskus points out that TRIPS might be seen "as an outstanding example of 'strategic trade policy' on behalf of the United States". See Keith E. Maskus, *Intellectual Property Rights and Economic Development*, 32 Case Western Reserve J. Int'l L. (2000), p. 493.

[78] For an analysis, see *Trade Agreements and Access to Medications Under the Bush Administration*, United States House of Representatives, Committee on Government Reform—Minority Staff Special Investigations Division (June 2005).

[79] See Joseph E. Stiglitz, "Knowledge as a Public Good", in Inge Kaul, Isabelle Grunberg and Marc A. Stern (eds), *Global Public Goods* (Oxford: Oxford University Press, 1999), p. 308.

[80] On the way these partnerships work, see Shaffer, as note 57 above.

purposes of obtaining marketing approval, does not specify a period of protection for that data. Subsequent US FTAs have set a minimum standard of five years of protection.[81] In any dispute over the period of data protection it would work to the advantage of the United States to have a specific standard to point to in the relevant FTA rather than attempt the more difficult task of arguing that a specific term of protection had to be read into the TRIPS standard. Moreover, any dispute in TRIPS that related to public health and patents and that affected developing countries would be guaranteed to attract a large number of third parties. Certainly developing country leaders such as Brazil and India would reserve third-party rights and so probably would African countries which have become very active in the TRIPS Council on intellectual property rights and access to medicines issues.[82] Such a trade dispute would rapidly escalate into a complex coalitional confrontation, a coalitional confrontation that would contain the energetic hands of civil society groups to assist developing countries. For these kinds of reasons FTA dispute resolution processes may well prove to be a more suitable forum in the eyes of the United States for settling disputes over intellectual property.

It is also worth noting that one option for a losing State under recent US FTAs is the payment of a monetary assessment, a fine in other words. The possibility of obtaining a fine may have some influence on the preferences of US intellectual property industries when it comes to choice of forum. Intellectual property lobby groups such as the International Intellectual Property Alliance have become adept at quantifying the size of their losses when it comes to matters of intellectual property infringement.[83] One practical concern for these groups is that litigation in the WTO even if successful does not require "that the sanctioning government provide help to the complaining private actors".[84] Under the US–Australia FTA, for example, there is nothing that would prevent the US government, if it were successful in a dispute and Australia elected to pay a monetary assessment, from channelling some or all of this money back to the companies that claim to have been most damaged by the relevant measures. States may in certain cases prefer for reasons of domestic politics to buy their way out of their obligations rather than change an infringing measure. If Australia lost a trade case with the United States over its Pharmaceutical Benefits Scheme, for instance, it would be difficult for any Australian government to be seen to be introducing measures that

[81] See, e.g., Article 17.10.1(a) of the US–Australia FTA. For a full comparison of TRIPS and FTAs on data exclusivity, see Carlos M. Correa, "Protecting Test Data for Pharmaceutical and Agrochemical Products under Free Trade Agreements", in Pedro Roffe, Geoff Tansey and David Vivas-Eugui (eds), *Negotiating Health: Intellectual Property and Access to Medicines* (London: Earthscan, 2006), p. 81.

[82] For a detailed analysis of the role of developing countries in the recent negotiations in the TRIPS Council over public health and intellectual property, see Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 American J. Int'l L. (2005), p. 317.

[83] The methodology that the IIPA uses to estimate the size of trade losses due to piracy is described in <http:www.iipa.com/pdf/2005spec301methodology.pdf>.

[84] Steve Charnovitz, "Should the teeth be pulled? An Analysis of WTO Sanctions", in Daniel L.M. Kennedy and James D. Southwick (eds), *The Political Economy of International Trade Law* (Cambridge: Cambridge University Press, 2002), p. 620.

went in the direction of increasing the price of medicines.[85] At least in some cases members of the US intellectual property industry might take the pragmatic view that the possibility of obtaining a monetary assessment that went some way to matching their lost royalties or sales was sufficient inducement for them to support bringing an action under an FTA.

VI. Conclusion

The dispute settlement chapters of FTAs have not attracted much attention. On the face of it they continue the growing rule orientation of the multilateral trade regime and the shift away from the power capacity of the Westphalian model of international relations. But to place this much faith in rules in the bilateral context is a mistake. Rules are more often the effects of power than they are the causes of its limitation. Developing countries have perhaps done better in the WTO than might have been predicted under the Westphalian model. Developing countries seem to be doing better in WTO dispute resolution than their track record under the GATT regime might have suggested.[86] We are seeing in the case of trade litigation by developing countries the evolution of a process of learning by doing. There are, as this paper has suggested, other possibilities for weaker actors to increase their bargaining power in the context of dispute settlement, but they require strategic wisdom. The power of coalitions in the context of dispute settlement would appear to be underutilized by developing countries. Even if one concludes that these advantages are hard to use, they are better for weaker actors than what they will have to confront in dispute settlement under FTAs with a powerful actor.

One priority that developing countries should be thinking about is to argue for provisions in these dispute settlement chapters that require the parties in the case of double breach to take the matter to the WTO. That would also be consistent with the aim of the DSU to strengthen the multilateral trading system. The effect of creating a web of bilateral dispute resolution fora will be to give the United States and the EU more opportunities to play for rules. If, as Palmeter and Mavroidis suggest, the DSU was the most important achievement of the Uruguay Round, then perhaps the current proliferation of FTAs represents something of a crossroads for the DSU. By constituting many possible trade courts, the United States and the EU are creating a system in which their respective influential domestic trade interests will lobby them to go to the trade court in which those interests are most likely to obtain satisfaction. How much such a system will help to improve trade liberalization that leads to real economic

[85] Annex 2C of the US–Australia FTA deals with Australia's Pharmaceutical Benefits Scheme. The PBS lies right at the heart of Australia's national medicines policy. See Peter Drahos, Buddhima Lokuge, Tom Faunce, Martyn Goddard and David Henry, *Pharmaceuticals, Intellectual Property and Free Trade: The Case of the US–Australia Free Trade Agreement*, 22 Prometheus (2004), p. 244.

[86] Chad P. Bown, *Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes*, 27 World Economy (2004), p. 59.

gains is an open question. In the case of intellectual property rights we have seen that there is a real danger that dispute mechanisms will be used to enforce rent-seeking bargains. More generally, such a system of many trade courts may simply push the trade regime in the direction of a disorderly mixture of confusing obligations, rule uncertainty and prolonged litigation patterns, a system in which the MFN principle really does assume a ghostly interstitial presence.

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