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Reforming Fairness: The Need for Legal Pragmatism in the WTO Dispute Settlement Process

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REFORMING FAIRNESS: THE NEED FOR LEGAL PRAGMATISM IN THE WTO DISPUTE SETTLEMENT PROCESS

*Webb McArthur**

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The World Trade Organization (“WTO”) dispute settlement system is intended to be the central pillar of the international trade system by which trade disputes involving WTO member states are adjudicated,¹ whether regarding trade in goods, services, or in intellectual property rights.² However, an innocuous statement such as this, when closely considered, indicates potential problems for the system. The WTO is an international treaty-based organization, established in

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¹ World Trade Organization, Understanding the WTO: Settling Disputes A Unique Contribution, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Jan. 26, 2010).

² See Multilateral Agreements on Trade in Goods, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1125, 1154 (1994); General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1125, 1167 (1994); Trade-Related Aspects of Intellectual Property Rights, Annex 1C, 33 I.L.M. 1125, 1197 (1994).

1994 by 123 countries in Marrakesh, Morocco.³ In addition to settling disputes in international trade, the WTO is also a negotiating forum and a set of rules.⁴ The organization is more than a “table” for its member states, as the WTO website implies: the set of rules includes common principles, which translate into purposes for the organization.⁵ These include non-discrimination (*i.e.*, treating domestic products no more favorably than imported products), free trade, predictability, fair competition, and the encouragement of economic development.⁶

Yet, as a voluntary political organization, any judicial enforcement of its actions will not come without controversy.⁷ Thus, the dispute settlement mechanism of the WTO cannot act in a traditional judicial sense since such judicial decisions are binding only because autonomous member states have agreed that they be binding.⁸ Even the process by which the system was established was inherently political, and such politics are expected to, and do, permeate the system’s functioning.⁹

The WTO functions with an understanding of its own limitations. The dispute settlement mechanism’s actions are administrative and decided by a system of arbitration. It is not an international equivalent of a domestic common (or civil) law court, but an economic creation with a political end. Considering the natural autonomy of its members and the ends of the organization, including the disposal of disputes, natural inequities will not be easily resolved. If the WTO intends to pursue its stated principles, then it should be aware of these natural inequities and appropriately deal with them.¹⁰ This is the problem of fairness, and it reveals itself in the dispute settlement

³ World Trade Organization, Understanding the WTO: Uruguay Round, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm (last visited Jan. 26, 2010) [hereinafter Uruguay Round].

⁴ World Trade Organization, Understanding the WTO: What is the WTO?, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited Jan. 26, 2010).

⁵ *Id.*

⁶ World Trade Organization, Understanding the WTO: Principles of the Trading System, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Jan. 26, 2010).

⁷ Debra P. Steger, *The Future of the WTO: The Case for Institutional Reform*, 12 J. INT’L. ECON. L. 803, 803–04 (2009).

⁸ *Id.* at 806.

⁹ *Id.*

¹⁰ Chad P. Bown & Bernard M. Hoekman, *WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector*, 8 J. INT’L. ECON. L. 861, 862 (2005), available at <http://jiel.oxfordjournals.org/cgi/content/full/8/4/861?ijkey=sctstP41iBTuveY&keytype=ref> (last visited Jan. 26, 2010).

mechanism, particularly in the treatment of developed versus developing nations.

The system as it stands intends simply to “deal with” natural inequities within the system, mitigating unfair advantages, rather than structuring the system so that inequities do not translate into advantage and disadvantage.¹¹ The Dispute Settlement Understanding (“DSU”), the guiding document for the dispute settlement system, allows for “special procedures involving least-developed country members” in certain areas.¹² Philosophically, the DSU reveals intent to balance two competing tendencies, egalitarian liberalism and libertarian liberalism, in trying to reach an optimal agreement for the system to function. An examination of this system reveals problems and the need for a solution.

I. THE SYSTEM AS IT STANDS

A. *The WTO Dispute Settlement System*

The DSU, signed on April 15, 1994, along with other documents, decisions, and understandings, was part of the finalizing act of the Uruguay Round of trade negotiations.¹³ The Uruguay Round, named for the country in which the first meeting was held in 1986, was the set of trade negotiations that formally created the WTO.¹⁴ The idea for the Uruguay Round began in 1982 at a ministerial meeting of GATT members in Geneva.¹⁵ Up to that point, the organization had been called the General Agreement on Tariffs and Trade, or GATT, and its jurisdiction extended only to trade in goods.¹⁶ With the establishment of the WTO, the organization agreed to negotiate trade in other areas, particularly in services and intellectual property.¹⁷ Politically, the organization was restructured, and the dispute settle-

¹¹ See generally Kristin Bohl, *Problems of Developing Country Access to WTO Dispute Settlement*, 9 CHI. KENT. J. INT'L. & COMP. L. 130 (describing why developing countries shy away from participating in disputes or are unable to access the dispute settlement system).

¹² 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), available at http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm [hereinafter DSU].

¹³ Uruguay Round, *supra* note 3.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ World Trade Organization, Understanding the WTO, The GATT Years: From Havana to Marrakesh, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Jan. 26, 2010).

¹⁷ Uruguay Round, *supra* note 3.

ment system underwent changes as prescribed by the DSU.¹⁸ Under GATT, dispute settlement was largely another negotiation function of the body, and decisions were products of political capital.¹⁹ That process was based on diplomacy, and the system that emerged from the DSU was rule-based.²⁰ Particularly, decisions made were automatically binding, and countries were given an automatic right of review to the Appellate Body.²¹ Such measures were intended to be helpful to developing nations who had less to bargain with in terms of political or economic capital under the GATT system.

By partially judicializing the system, the WTO “table,” at least as far as dispute settlement matters relating to developing countries, was thought to have been made more equitable. Although such measures wrongly assumed developing nations would be willing to use the system to resolve their trade disputes, the DSU’s new measures can be viewed as an attempt to mitigate natural inequities. It assumes that if efforts are taken to put developing nations in the same place at the beginning of a dispute as developed nations, they have no reason to act differently. There are two problems that arise in evaluating the fairness of the dispute settlement system as it stands. First, it does not do enough to fully mitigate obstacles developing nations face when entering the international trade regime. Second, its philosophical underpinnings do not allow it to alleviate more essential problems, including the problem of participation and the consequences that result from the way trade disputes work out for developing nations, given their special circumstances. If the system is reformed according to a legal pragmatism model, basing its function on a non-philosophical and goal-oriented meaning of fairness and targeting those more essential issues (particularly participation), secondary issues will take care of themselves.

B. Developing Nation Special and Differential Treatment

The DSU gives “special and differential treatment” to developing nations in a number of ways. These privileges occur at various stages of the dispute resolution process and are intended to alleviate some of the problems that naturally occur for developing nations, including the lack of experts on particular trade issues and the long-

¹⁸ World Trade Organization, Understanding the WTO, The GATT Years: From Havana to Marrakesh, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Jan. 26, 2010).

¹⁹ Timothy Stostad, Note, *Trappings of Legality: Judicialization of Dispute Settlement in the WTO, and Its Impact on Developing Countries*, 39 CORNELL INT’L L.J. 811, 812 (2006).

²⁰ *Id.*

²¹ *Id.*

term financial strain of dedicating resources to resolving disputes.²² First, the DSU provides for special and differential treatment during consultations. This is the first stage of the dispute resolution process, where parties are required to negotiate a resolution to the dispute before a panel is involved. The DSU instructs members (of the WTO) to give “special attention” to the particular problems and interest of developing countries if they are involved in the dispute.²³ The parties are required to indicate on a form exactly how these special considerations were made. The DSU also provides two ways that the period for consultation may extend beyond its normal length of sixty days:²⁴ The parties may mutually agree to extend the period or the Dispute Settlement Body (“DSB”) chairperson may extend the period.²⁵

Normally, the panel stage comes after consultation, assuming parties are not able to reach a consensus on how to dispose of the dispute. The DSB, comprised of all members of the WTO, has the authority to establish panels to hear disputes. If a developing country is a party to the dispute, at least one of the three panel members must be from a developing country.²⁶ If the respondent is a developing country, the DSU instructs the panel to ensure the nation has sufficient time to prepare and present its defense, though there is no provision for the time period provided to be extended.²⁷ The panel is required to explicitly indicate on a form if a developing nation raises issues of special and differential treatment and how consideration was made.²⁸

Special and differential treatment also extends to the implementation stage after the panel has reached a decision. Implementation includes guaranteeing that the “losing” party acts upon the panel’s decision as well as the withdrawal of violative trade mechanisms, compensation for loss, and, as a last resort, the suspension of an obligation of the opposing party equivalent to the loss of that party as was adjudged by the dispute body.²⁹ Here again, the DSU requires special consideration be given to issues of developing nations.³⁰ The DSB is required to give consideration to the way implementation is

²² World Trade Organization, Dispute Settlement System Training Module: Developing Countries in WTO Dispute Settlement, http://www.wto.int/english/tratop_e/dispu_e/disps_settlement_cbt_e/c11s1p1_e.htm (last visited Jan. 26, 2010).

²³ DSU, *supra* note 12, art. 4.10.

²⁴ *Id.* art. 4.7.

²⁵ *Id.* art. 12.10.

²⁶ *Id.* art. 8.10.

²⁷ *Id.* art. 12.10.

²⁸ *Id.* art. 12.11.

²⁹ *Id.* art. 3.7.

³⁰ *Id.* art. 21.2.

managed in a developing nation, what measures would be appropriate, and their impact on the member state's economy.³¹

The previously mentioned provisions are primarily intended for developing nations that are respondents in a dispute and need additional time to defend themselves. When developing nations are complainants, they have the right to invoke Article 3.12, which allows for accelerated procedures through the entire process as prescribed by the WTO decision of April 5, 1966.³² These special procedures allow for additional considerations available to developing nations, including post-consultation dispute facilitation by the WTO Director-General, the consideration of special circumstances of the developing nation at the panel stage, and a shortened time period for the panel to submit its report.³³

Beyond these provisions, additional allowances are set out in the DSU for the least-developed countries. Special circumstances must be considered at all stages, not just at the panel and implementation stages, and developed states are urged to use restraint in seeking compensation.³⁴ The Director-General must also be available at all stages of the dispute settlement process to consult and facilitate equitable resolutions.³⁵

Finally, the WTO provides assistance for developing countries' lack of legal expertise. The organization Secretariat provides legal assistance because they are required to provide developing nations a legal expert if requested.³⁶ But, there are conflict of interest issues, and therefore, limitations for WTO employees consulting for developing nations, so the WTO allows for private legal counsel to be employed in cases of a dispute.³⁷ The WTO also has established the Advisory Centre on WTO Law, an agency independent from the WTO that can provide assistance in dispute matters.³⁸

³¹ *Id.* arts. 21.7–21.8.

³² Decision of 5 April 1966 on Procedures under Article XXII, GATT B.I.S.D. (14th Supp.) at 18 (1967).

³³ *Id.*

³⁴ DSU, *supra* note 12, art. 24.1.

³⁵ *Id.* art. 24.2.

³⁶ *Id.* art. 27.2.

³⁷ World Trade Organization, Dispute Settlement System Training Module: Developing Countries in Dispute Settlement—Special and Differential Treatment, http://www.wto.int/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c11s2p2_e.htm (last visited Jan. 26, 2010).

³⁸ *Id.*

II. IS THE SYSTEM FAIR?

Do these provisions serve their purpose? The intent of this special and differential treatment of developing nations is to mitigate natural, and thus “unfair,” advantages of developed nations. If the goal is to make the proceedings fair, or as fair as possible, then what do we mean by fair? Are there external goals to be accomplished by fairness? Traditionally, the fairness of these provisions has been evaluated using the opposing standards of egalitarian liberalism and libertarian liberalism.

Why liberalism? WTO academic study has all but assumed that “liberal” would be an appropriate philosophical characterization of the organization and its purpose. When considering the issue of fairness of the dispute resolution mechanism, the characterization takes on a strikingly more active meaning than might be assumed. Scholars have viewed liberalism, in this context, as a “theory of justice, a view about the justifications of social arrangements.”³⁹ What justifications are appropriate would then be the main point of contention between differing views of liberalism, particularly egalitarian and libertarian liberalism.⁴⁰ The form of this justification would take that of the consent of the governed, following a social contract theory. To what have the people agreed,⁴¹ or, in the case of the WTO, to what have the members agreed? This is what the philosophical approaches strive to answer.

The two approaches have been criticized, however, on several grounds. By evaluating fairness using a philosophical standard, there is a natural presumption of neutrality as to any favoring of developed or developing states.⁴² The philosophical approaches also do not consistently take into account the consequences of WTO actions by its members.⁴³

A. *What is Fair?*

1. *Egalitarian and Libertarian Liberalism*

Egalitarian liberalism stands on one end of the spectrum in evaluating what it means for the WTO dispute settlement system to be fair concerning the special treatment of developing nations. This eval-

³⁹ Frank J. Garcia, *Trade and Inequality: Economic Justice and the Developing World*, 21 MICH. J. INT'L L. 975, 996 (1999).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² JAMES GATHII, FAIRNESS AS FIDELITY TO MAKING THE WTO FULLY RESPONSIVE TO ALL ITS MEMBERS 1, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=594485.

⁴³ *Id.*

uation originates from the thought of John Rawls, an American philosopher, and would see the benefits and burdens of the trading system equally disbursed, bearing in mind what Rawls called the “difference principle,” which would give special consideration to vulnerable members.⁴⁴ This principle, derived from his thought that inequitable distribution of what he called “social primary goods,” was not justified and must be undone.⁴⁵ Thus, the egalitarian liberal approach would favor developing nations in doling out benefits and burdens, eliminating any natural advantages of developed nations and disadvantages of developing nations. The approach appears ends-focused, considering non-trade issues that might affect a developing country’s ability to respond to a dispute settlement proceeding.⁴⁶ Members are thus viewed as rights holders, not just economic bodies.⁴⁷ The egalitarian liberal would demand that developing nations receive equal benefits in the end. The current system would be criticized for not doing enough to mandate removal of all advantages of developed nations. Frank Garcia, an egalitarian proponent, notes, “[I]f . . . the principle of special and differential treatment is key to the justification of inequality, then adequate implementation of the principle . . . is equally important for the creation of a just trading system.”⁴⁸ The opportunity to succeed is not justice or fairness; success is.

Libertarian liberalism, on the other hand, considers WTO members solely economic beings, and considerations are all self-contained.⁴⁹ Non-trade issues are not considered in dispensing fairness.⁵⁰ Rather than being ends-focused, libertarian liberalism demands fairness be accomplished by procedural equality and by equality of opportunity.⁵¹ This is because morality to the libertarian is a matter of rights, not of equality.⁵² Rights would demand a return of developing and developed nations to their original positions, not their end positions as egalitarianism might demand, because it is not equality itself that is in need of repair; it is the right to equality and the opportunity of equality, not the guarantee of it. In looking at the WTO, the libertarian liberal would believe that developing nations should have the right to compete equally with developed nations, not the guarantee of

⁴⁴ *Id.* at 2. See generally JOHN RAWLS, A THEORY OF JUSTICE (Harvard Univ. Press 1972).

⁴⁵ Garcia, *supra* note 39, at 998.

⁴⁶ GATHII, *supra* note 42, at 2.

⁴⁷ *Id.*

⁴⁸ Garcia, *supra* note 39, at 1042.

⁴⁹ GATHII, *supra* note 42, at 3.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Garcia, *supra* note 39, at 1007.

or right to equal results. Thus, a proponent would favor ways the developing nation could better its position if it so chooses.⁵³

In practice, the two philosophies lead the WTO dispute resolution mechanism to be crafted in two directions. Egalitarian liberalism so benefits developing nations that it eliminates any incentive to develop further economically because, in the end, all nations are on the same level. Libertarian liberalism does not consider external factors that show up in the consequences of a WTO action, and nations are not able to preemptively act to avoid disputes. Thus, both philosophies blind the actors to an extent, and a position of compromise would simply result in equalizing disadvantages and advantages. The problem is that balancing advantages and disadvantages needs to be done subjectively, on a case-by-case basis, but such a structural balance must be set out objectively.

The consequences of the problem of philosophical approaches can be illustrated by the following situation. Philosophical dependence has left a gaping hole in WTO treaty interpretation; there is no judicial precedent for a rule for the DSB.⁵⁴ The Appellate Body has adopted a rule, *in dubio mitius*, or “the less onerous meaning controls,” but it would only apply if a case were reviewed on the point.⁵⁵ As a result, the DSB has had no guidance in interpreting treaty language, and the Appellate Body is left with a broad rule with questionable application. Both bodies’ decisions have led to contradictions, including in the case of Article Fifteen of the Anti-Dumping Agreement.

The Agreement, an implementation of the GATT Treaty in 1994, left open the question of whether developed nations must implement alternate measures against a developing country before applying anti-dumping duties.⁵⁶ The agreement says: “Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.”⁵⁷ In a 2002 decision against the United States, the Panel found that Article Fifteen did not impose any “specific or general obligation on Members to undertake any particular action.”⁵⁸ This is an example of a “disempowering characterization”⁵⁹ that finds a violation based on a non-trade issue, where

⁵³ *Id.* at 1042.

⁵⁴ GATHII, *supra* note 42, at 6.

⁵⁵ *Id.*; see also Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 107, WT/DS58/AB/R (Oct. 12, 1998).

⁵⁶ Agreement on Implementation of Article VI of GATT, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 33 I.L.M. 13 (1994).

⁵⁷ *Id.*

⁵⁸ Panel Report, *United States—Antidumping and Countervailing Measures on Steel Plate From India*, ¶ 7.110, WT/DS206/R (June 28, 2002).

⁵⁹ GATHII, *supra* note 42, at 8.

an alternate interpretation would not have found one. Despite the *in dubio mitius* precedent, the disempowering characterization approach has become the more commonplace interpretation. In a 2000 case involving the European Union and India, however, a panel found otherwise, requiring the European Union to explore potential outcomes of implementing alternatives to anti-dumping duties.⁶⁰ It did not confirm the existence of an actual duty under which a violation could be brought.⁶¹ Even assuming that the lack of clear judicial precedent has not yielded contradiction in this case, a reconciling view is not much comfort. The lack of a clear judicial precedent renders a measure attempting to assist developing nations entirely impotent.

2. *Legal Pragmatism: Theory, Purpose, and Practice*

If the two WTO decisions are indeed without contradiction and are attempting to reach a middle ground, the dependence upon warring philosophies has resulted in policies that fail to assist developing nations, yet still create additional hurdles through which developed nations must jump. Essentially, the WTO has perfected finding the unhappy medium, one that is both unfair and ineffective. The philosophical approach has resulted in simply mitigating inequities so long as they do not overly burden the other side, and has thus failed to remedy root problems. A pragmatic approach, whose goal is to make a system that performs at a predictable and efficient level, stands as an alternative to a philosophically-guided approach. Rather than trying to reconcile opposing philosophical views and producing policies, laws and standards that are the sum of all equals, a pragmatic approach would be free to embrace an entirely egalitarian consideration of non-trade issues without mandating the employment of certain privileges, a libertarian preference.

A third philosophical approach, mentioned less often, that might be confused with legal pragmatism is utilitarianism. Utilitarianism is based on the thought of Jeremy Bentham and John Stuart Mill.⁶² Unlike egalitarianism, it advocates redistribution of inequities based on a morality of consequence, not equality.⁶³ Unlike libertarianism, it is concerned with equality of ends, not just equality of opportunity.⁶⁴ However, as with egalitarianism, utilitarianism does not satisfy a tangible goal. Legal pragmatism recognizes that the two

⁶⁰ Panel Report, European Communities—*Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R (Oct. 30, 2000).

⁶¹ *Id.*

⁶² See Garcia, *supra* note 39, at 1002–03.

⁶³ *Id.* at 1003.

⁶⁴ *Id.* at 1007.

models often diverge, and that in such a case it would be better to follow the latter.

B. Systematic Unevenness

Legal pragmatism must address several systematic problems to decide whether the dispute settlement system works fairly. The dispute settlement system is underutilized because costs are too high, the process functions opaquely, and its decisions are difficult to predict. Legal standards are nearly impossible to articulate, as evidenced by the Article Fifteen anti-dumping problem.⁶⁵ It is harder to determine whether issues are causes or consequences, because the system's inherent problems are simultaneously mitigated and aggravated by the "special and differential treatment" of developing nations.⁶⁶ Examination of the resulting unevenness reveals a central problem, one that should be targeted to alleviate the negative results in other issues.

1. Participation in the System

Timothy Stostad examined the impact the dispute settlement mechanism's level of judicialization has on developing nations' participation in the system.⁶⁷ He concludes that there is evidence of systematic biases within the WTO dispute resolution process that have led to underutilization by developing nations.⁶⁸ The question of utilization of the system must examine not one year, but the trend of participation since the WTO establishment overhauled the system in 1994. Overall, developing nations have been using the dispute resolution system more often, though the raw numbers seem to have plateaued. There were nineteen disputes in 2008, with developing nations as complainants in eleven of those and as respondents in eight.⁶⁹ This trend was established in 2005, when developing nations participated in four out of eleven disputes as complainant or respondent.⁷⁰ For the past four years, developing nations have participated in about half the disputes, equally as complainant and respondent. In 2004, however, developing nations comprised just over a quarter of the disputes.⁷¹ This is striking considering about three-quarters of WTO members consider

⁶⁵ See *supra* notes 54–61 and accompanying text.

⁶⁶ See Dispute Settlement System Training Module, *supra* note 22.

⁶⁷ Stostad, *supra* note 19, at 812.

⁶⁸ *Id.* at 834.

⁶⁹ World Trade Organization, Dispute Settlement: Chronological List of Disputes Cases, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Jan. 26, 2010).

⁷⁰ *Id.*

⁷¹ *Id.* (developing nations participated as five out of nineteen complainants and five out of nineteen respondents).

themselves a developing nation.⁷² At the same time, the total number of disputes has noticeably decreased. In 2002, there were thirty-seven disputes, followed by twenty-six in 2003, nineteen in 2004, eleven in 2005, and they have remained relatively stable through 2008.⁷³

Regarding the relative increase in the participation of developing nations in the dispute system, Stostad notes that the difference with the GATT years is actually negligible once one considers such factors as the number of WTO members, the increasing number of areas in which the WTO regulates, and a general increased trade dependency.⁷⁴ Eric Posner and John C. Yoo calculated that the total number of disputes has not increased since GATT, averaging 0.0044 complaints per state per year, compared with 0.0037 complaints per state per year under GATT, a negligible difference.⁷⁵ They based their calculation on the number of state pairs possible, using factorial analysis and eliminating outlier years.⁷⁶ Regarding the gross decrease in the amount of cases since 2005, Stostad hypothesizes that nations have been saving up disputes, anticipating new and better rules at the end of the Doha Round of negotiation.⁷⁷

If developing nations are participating at rates relatively equal to developed nations, though both have dropped off in the past four years, are they participating enough? Is peaking at nearly half of WTO cases fair considering, as a whole, they share less of a trade burden than most developed nations? The conclusion seems to be no. Despite the fact that they trade less than developed nations, as three-quarters of the WTO membership, developing nations underutilize the WTO dispute resolution mechanism. As a basic calculation, the costs do not outweigh the benefits. There are a number of reasons why this is the case.

Naturally, the costs are comparatively higher for developing nations. First, in terms of human capital, developing nations are far less represented at the WTO.⁷⁸ Stostad estimates that nearly 60% of

⁷² World Trade Organization, Understanding the WTO, Principles of the Trading System: http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Jan. 26, 2010).

⁷³ World Trade Organization, Dispute Settlement: Chronological List of Disputes Cases, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Jan. 26, 2010).

⁷⁴ Stostad, *supra* note 19, at 824.

⁷⁵ Eric A. Posner & John C. Yoo, *A Theory of International Adjudication* 40 (Univ. Chi. Law Sch., John M. Olin Law & Econ. Working Paper Series, Paper No. 206, 2004), available at <http://www.law.uchicago.edu/files/206-eap-jy.tribunals.pdf>.

⁷⁶ *Id.*

⁷⁷ Stostad, *supra* note 19, at 824.

⁷⁸ *Id.* at 825.

WTO members are inadequately represented.⁷⁹ The cost of legal services is higher per dollar (or peso or dong) for developing nations because litigation costs do not increase proportionally according to the value of the trade barrier.⁸⁰ For this reason, partially judicializing the dispute resolution system has increased the costs on developing nations, having to advance the costs of formal litigation. Are the benefits also higher as to counterbalance the costs? No; in fact, they are lower than developed nations because of the risk they will be unable to reap the benefits of winning a dispute. Because the implementation and enforcement of decisions are not guaranteed, developing nations have less political capital to force a nation in violation to comply. Thus, it is less likely that a developing nation will be able to benefit from a successful dispute decision.

If these are barriers, do developing nations actually underutilize the WTO dispute resolution system as a result? The answer is yes. Despite the fact that the number of disputes brought by developing nations has increased, it is counterbalanced by the gross increase in the amount of trade done by developing nations.⁸¹ Even though developing nations such as China are trading more, their disputes are still being resolved at a lesser rate than developed nations. “[A] large poor country doing lots of trade is as likely to be a [disputant] as a small rich one with the same trade value.”⁸² The simple dichotomy of developing and developed nations entirely eliminates any shade of gray, pigeonholing countries and erasing incentives for gradual growth. Beyond this, there is no way to determine the extent to which developing nations are underutilizing the dispute process because there is no external point of comparison.⁸³

2. *Transparency and Predictability of the System*

There are consequences that follow underutilization as one analyzes the fairness of the special and differential treatment of developing nations in the system. While special and differential treatment attempts to mitigate some of the natural problems for developing nations, such as the costs of legal representation, it does not solve those problems. At the same time, it makes some natural inequities more visible and more likely to affect the developing nation’s participation in the system. Partial judicialization of the system, as will be dis-

⁷⁹ *Id.* at 826.

⁸⁰ *Id.*

⁸¹ *Id.* at 828.

⁸² Peter Holmes et al., *Emerging Trends in WTO Dispute Settlement: Back to the GATT?* 13 (World Bank, Policy Research Working Paper Series, Paper No. 3133, 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=636553.

⁸³ Stostad, *supra* note 19, at 831.

cussed later, was intended to assist the developing nations with limited political capital. Rather than eliminating the problem of limited political capital, it instead made the problem a lack of economic capital.

Beyond underutilization, other issues and complications arise, particularly transparency and predictability. As the Antidumping Agreement Article Fifteen problem illustrates, if countries do not bring disputes to the DSB, no judicial precedent is created. Without judicial precedent, countries do not know the law and cannot avoid a dispute preemptively, the ultimate goal of the system. It is a problem of predictability. Without participation in the system, the system will not become predictable.

Transparency is another complementary complication. Without transparency, nations are unable to understand prior case law to avoid disputes. The developed nations, interestingly, have most notably pushed for transparency reform. The United States has pushed for the dispute resolution process to be opened to the public eye, both during the process and after, in document requests.⁸⁴ The proposal was presented to the WTO after pressure from Non-Governmental Organizations (“NGOs”) with particular concern for the issues of developing nations, including labor and environmental rights.⁸⁵ Private attorneys have also advocated such a change so that they can better prepare for disputes.⁸⁶ That is where transparency becomes predictability. Additionally, such change would help with the public view of the legitimacy of the WTO, which is likely to encourage future participation.⁸⁷

III. REFORMING FAIRNESS

A. *Where: Procedurally*

1. *Participation and Regularization*

Partial judicialization is to blame for a lack of participation and has made the dispute resolution process less accessible to poorer member states.⁸⁸ In 2006, Stostad wrote that the root of the problem of participation lies in the limited judicialization of the dispute settlement system.⁸⁹ Problems for developing nations in the world of partial judicialization include the increased complexity of the substantive law,

⁸⁴ Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 43 (1999).

⁸⁵ *Id.* at 44.

⁸⁶ *Id.*

⁸⁷ *Id.* at 46.

⁸⁸ Stostad, *supra* note 19, at 813–14.

⁸⁹ *Id.*

a more formal litigation process, and extraordinary costs on the litigants.⁹⁰ Increased complexity of the law is a result of growing case law that has begun to stack up as the sum of singular decisions, not in drawing a picture of the greater law, in the common law sense. This is the problem with the DSB's hesitancy to use set standards in evaluating disputes, instead depending on case-by-case compromises. It would not be a problem if it were not coupled with a formal process and high costs to use the system.⁹¹ Stostad paints a picture of a schizophrenic system: an expensive, formal process that produces binding compromises.⁹² The problem with participation results from the confused system that only exists because the DSB is intended to compromise the interests of developing and developed nations and mitigate natural inequities.⁹³ Philosophical compromise does not solve the problem of nature; it aggravates it by institutionalizing new inequities. The WTO needs to address these problems to find a proper solution.

One potential solution is full judicialization of the dispute process.⁹⁴ Full judicialization would increase the power of the DSB. Such a recommendation is commendable, but room remains for caution. Judicialization should not proceed if it is merely to make the system work like a court in the domestic common or civil law sense. To make the dispute settlement mechanism more effective, the WTO must address the problems that directly affect the principle of predictability.⁹⁵ A more promising solution is increased regularization of the dispute process. The DSB is not a court, and it does not, nor should it, dispense justice; however, by regularizing legal standards and increasing the transparency of its procedures and decisions, both developed and developing nations may be better able to avoid disputes and trade freer and fairer on their own.

Strengthened enforcement of the DSB's decisions may cause controversy. Although the consequences of strong enforcement encourage nations to avoid disputes, overzealous enforcement can discourage participation in the system. If the consequences of losing a dispute become disproportionate to the dispute itself, nations would be encouraged to work outside of the system. Working outside of the system would undermine confidence in the system as a whole, and an increase in cloudy, back-room deals would be adverse to the rule of law.

⁹⁰ *Id.* at 814.

⁹¹ *Id.*

⁹² *Id.*

⁹³ World Trade Organization, Dispute Settlement System Training Module: Introduction to the WTO Dispute Settlement System, http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c1s1p1_e.htm (last visited Jan. 26, 2010).

⁹⁴ Stostad, *supra* note 19, at 834.

⁹⁵ *Id.* at 812.

Here, the difference between the philosophical approaches and legal pragmatism becomes clear. The balance struck from a compromise between making countries more equal and making countries more free does not make the system effective. The balance between freedom and equality is an inescapable problem; the balance struck at a given time is a product of the values of a society at that time. If the WTO wants to be a stable force promoting the rule of law in international trade disputes, fairness should not depend on the relativistic interpretation of the sum of the world's values. It must look inward and rely on the principles it seeks to uphold, including predictability.

There are several specific ways to accomplish the above goals. First is a mechanism for compulsory compensation.⁹⁶ Potential developing nation complainants are often dissuaded by initial costs, so compulsory compensation would require respondents to pay a minimal "benefit-of-the-bargain" amount retroactive to the beginning of litigation.⁹⁷ This would encourage developed nation respondents to be conservative and measured in their defenses and prevent them from drowning developing nation complainants in expensive details.⁹⁸

As for the panel process, the establishment of an independent prosecutorial system to separate the administrative and judicial aspects could lead to more equitable treatment of issues.⁹⁹ The current system is more administrative than judicial, and consequently, there is no reason for it to be treated as a civil litigation system, in which a private party brings the suit.¹⁰⁰ Some might argue that the DSB might produce more equitable results if an independent party brings the action; however, as seen in the United States, "[a]dministrative agencies . . . conduct quasi-judicial hearings in which both the prosecutor and the administrative law judge ("ALJ") are technically within the agency's chain of command but in which neither is permitted to influence the court of the other's work."¹⁰¹ In fact, because of the growing interconnectedness of the global trading world, it has become harder to characterize an improper trade mechanism as harmful only to the complaining nation. Furthermore, the creation of public defenders could lead to more equitable solutions for developing country respondents in dispute settlement actions.¹⁰² Rather than replacing the respondent party, this suggestion would simply assist in the great need

⁹⁶ *Id.* at 835.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 837–38.

¹⁰⁰ *Id.* at 839.

¹⁰¹ *Id.*

¹⁰² *Id.* at 839.

to lessen the financial and time burdens faced by the respondent developing nations.

The other end of the process could use reform as well. Stostad argues that the DSU should require mandatory removal of trade barriers deemed improper by the WTO.¹⁰³ Currently, a winning complainant might not win the removal of a harmful mechanism or even the payment of appropriate compensation; instead, the WTO may give them permission to implement an equally harmful mechanism against the losing respondent.¹⁰⁴ Other proposals have circulated, including a mutual agreement among WTO members to cooperatively act against a nation found in violation of a WTO agreement.¹⁰⁵ As the WTO is not an entity of its own but a collection of parts, it is important that these parts are active enough to “[give] the WTO teeth.”¹⁰⁶

2. *Substantive Development and Transparency*

Increasing participation by further regularizing the dispute settlement process will clear up other issues in the pursuit of predictability. Regularization of the process should extend to the substantive law of the WTO, with decisions made less on a case-by-case basis and more by established legal standards. By letting WTO principles more freely develop as a common law rather than returning to the GATT system of diplomatic decision-making, regularization would allow nations to more easily predict the results of the procedure and act preemptively to avoid a dispute. Additionally, regularization would decrease the need to cloud and hide the decisions of the DSB and increase the need to publish and explain results, thus increasing the transparency of the proceedings and increasing the predictability of WTO proceedings.

Robert Hudec emphasizes the need for transparency to complement reform in other areas, particularly participation and better management of the DSB process.¹⁰⁷ He notes that there have been proposals put forward eliminating the confidentiality of many documents, opening DSB hearings to the general public, and those permitting private individuals to submit briefs to both the panels and the Appellate Body.¹⁰⁸ For the United States and other advocates of increased transparency, these proposals are important because they would bring further legitimacy to the proceedings.¹⁰⁹

¹⁰³ *Id.* at 836.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 842.

¹⁰⁶ *Id.* at 841.

¹⁰⁷ Hudec, *supra* note 84.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

B. *How: Politically*

The WTO is, at heart, a political entity, not a judicial one.¹¹⁰ It is not a government, but a collection of governments, and implementing any reform should proceed with a view toward this existence. Forgetting it is a political entity can create problems, but remembering this can offer novel solutions. The United States' push for greater transparency is but one example of the ways in which the dispute settlement process can be reformed pragmatically, giving developing nations tools to compete as equals. In fact, if legal reform is going to work, developing nations must reform politically.¹¹¹ Asif Qureshi suggests scrapping the DSU entirely and drafting a new agreement where decisions are binding and where the WTO is authorized to monitor compliance with such decisions.¹¹² He suggests other reforms as well, to ensure the procedures reach just results.¹¹³

Though this comment is about reforming the WTO, developing nations should be aware of other ways to access the market and compete fairly. Regional and bilateral mechanisms are important to complement participation in the international regime. Whether it is participation in the Asia-Pacific Economic Cooperation forum discussions or a free trade agreement with a fellow developing country, such development not only increases the nation's trade, but also helps develop political capital that it can take to the world stage. For instance, in making economic allies regionally, a developing nation might have more success in getting a decision of a dispute resolution panel implemented if there are other nations that will support the developing nation against a larger nation in violation of an international trade obligation. It should be cautioned that dependence on unilateral trade policies is inherently illiberal and the policies unstable.¹¹⁴ Unilateral policies should complement a multilateral approach.

Finally, the key pragmatic approach would allow choice application of key philosophical reforms, but not for philosophical reasons. The WTO should open the conversation about non-trade issues and emphasize them, not only in dispute resolution proceedings, but within the Doha Round negotiations. Inclusion of non-trade issues within formal WTO considerations is fair because it allows policies and decisions to be created with greater foresight and lasting effect. At the same time, the WTO should resist the temptation to treat developing nations differently because they characterize themselves as "develop-

¹¹⁰ That goes for the Dispute Resolution system as well.

¹¹¹ Asif H. Qureshi, *Participation of Developing Countries in the WTO Dispute Settlement System*, 47 J. AFR. L. 174 (2003).

¹¹² *Id.* at 195–96.

¹¹³ *Id.*

¹¹⁴ Garcia, *supra* note 39, at 1031–32.

ing.” Outside philosophical concerns, such an approach would appreciate the short-term effects of trade policies much more than the long-term effects (considering current conditions without any incentive to grow), and it does not appropriately treat poorer developed nations or wealthier developing nations. The proposed approach is fair because it looks forward and appreciates the details.

IV. CONCLUSION

Where did this notion of fairness originate? Because the WTO dispute resolution system is a pseudo-adjudicative system, it dispenses justice to the extent that the DSB acts as a court. Courts apply the law when it controls, and they do what is equitable, or fair, when the law does not control. Traditionally, fairness has been viewed *a priori*, as a notion gaining its definition from outside the particular, subjective circumstances of a dispute. Viewing the WTO and its dispute resolution system as a dispenser of a philosophical fairness is a consistent view, but it is not concerned with what works best when formula and reality divide. What is misguided about a philosophical view is that it puts the system in a vacuum and ignores all other political, economic, and social forces that affect how the WTO can and does work. Pragmatic legalism views the WTO as merely one cog in the international political economy—one that insists upon doing what works, not just what should work.

To return to a question posed earlier, of what the members of the WTO have consented to, it should be self-evident that the members consented to a particular philosophical point of view. It is likely that the WTO and its dispute resolution process is intended to be a way of predictably and efficiently resolving disputes where, hopefully, in the future, panels might no longer be needed and nations could self-govern knowing both how a dispute would come out if challenged and how to avoid a problem becoming a dispute.

[N]o judicial system, no matter how well run, can avoid the inevitable messiness of politics, and no system will ever replace diplomacy. Nor should it . . . The WTO must therefore . . . figure out how to improve its mechanisms for negotiated solutions, and not automatically resort to its judges.¹¹⁵

If liberalism is what the WTO strives for, then it is freedom in self-governance that is its essence.

¹¹⁵ Susan Esserman & Robert Howse, *The WTO on Trial*, 82 FOREIGN AFF., 130, 140 (2003).