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# Moving the WTO Forward—One Case at a Time

Robert Howse<sup>†</sup>

The story that I would like to tell here could be said to reflect common law prejudice about what makes legal systems work. It is the following: that any legal system, if it is going to be effective, has to be able to evolve incrementally through practice.<sup>1</sup> A legal system that can only respond to change—to changing values, technology, and events—through dramatic constitutional moments resulting in an explicit and comprehensive break with the past, is unlikely to be an effective legal system.<sup>2</sup>

This is necessarily a controversial and contestable assumption. But based on that assumption, I want to argue that the World Trade Organization (WTO) legal system, and particularly the WTO dispute settlement system, possesses some of the characteristics of an effective or efficacious legal system that I have defined or at least declared to be connected to the capacity for evolution through incremental practice. The WTO dispute settlement system has demonstrated its efficacy by evolving incrementally through practice without a formal change in the treaty mandate that estab-

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1. See Giacomo A. M. Ponzetto & Patricio A. Fernandez, *Case Law Versus Statute Law: An Evolutionary Comparison*, 37 J. LEGAL STUD. 379, 411 (2008) (modeling Posner's hypothesis that common law tends toward greater efficiency and arguing that evolution of case law provides better outcomes than statutory law).

2. See Sujit Choudhry, *Ackerman's Higher Lawmaking in Comparative Constitutional Perspective: Constitutional Moments as Constitutional Failures?*, 6 INT'L J. CONST. L. 193, 210-14 (2008) (discussing how constitutional moments can be interpreted as constitutional failures).

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lished and defined the parameters of that system.<sup>3</sup>

The particular area that I am going to address is the place of non-governmental actors. The WTO dispute settlement system, like the WTO itself, is a product of the post-Cold War environment.<sup>4</sup> The Uruguay Round negotiations began and went quite far before the end of the Cold War, but the end of the Cold War and related global developments influenced, in particular, the creation of what one might call the crown jewel of the WTO legal system—the Appellate Body.<sup>5</sup> The two great tendencies that have affected the overall structure and course of international law since the Cold War are 1) globalization<sup>6</sup> and 2) what Professor Ruti Teitel has called the “humanity-law” revolution—the reorientation of international law toward the interests, values, and rights of persons and peoples, not just states, through the evolution of human rights law, the law of war, and humanitarian law.<sup>7</sup> I think that Professor Teitel is absolutely correct that the “humanity-law” revolution is a fundamental change that has altered perceptions of, hopes for, and fears from international law in certain parts of the world in very basic ways.<sup>8</sup>

However, when we turn to the WTO system and the dispute settlement system in particular, we see a disconnect with these tendencies. Although the humanity-law revolution was already starting to take place toward the end of the Uruguay Round—post-Cold War transitional justice being one element that helped develop it<sup>9</sup>—the WTO dispute settlement system seems to be mired in the classic Westphalian or statist understanding of the nature of international law.<sup>10</sup> The WTO serves—at least directly—the values, the interests, and the prerogatives of sovereign states.<sup>11</sup> Hence, the

3. See Alan Yanovich, *The Evolving WTO Dispute Settlement System*, in *THE WTO IN THE TWENTY-FIRST CENTURY: DISPUTE SETTLEMENT, NEGOTIATIONS, AND REGIONALISM IN ASIA* 248, 248-49 (Yasuhei Taniguchi et al. eds., 2007) (stating that the factor explaining the success of the WTO dispute settlement system is its ability to evolve).

4. Paul B. Stephan, *International Governance and American Democracy*, 1 *CHI. J. INT'L L.* 237, 243 (2000).

5. See Richard L. Bernal, Debra P. Steger & Andrew L. Stoler, Comment, *Key Procedural Issues: Resources*, 32 *INT'L LAW.* 871, 878 (1998) (“The Appellate Body is often cited as the crown jewel of the WTO DSU . . .”); Anna Lanoszka, *The Promises of Multilateralism and the Hazards of ‘Single Undertaking’: The Breakdown of Decision Making Within the WTO*, 16 *MICH. ST. J. INT'L L.* 655, 662-63 (2008) (stating that the Cold War mentality influenced the start and completion of the Uruguay Round).

6. The relationship between globalization and the WTO is obvious. See Robert Howse, *The End of the Globalization Debate: A Review Essay*, 121 *HARV. L. REV.* 1528, 1528 (2008) (book review).

7. See Ruti G. Teitel, *Humanity’s Law: Rule of Law for the New Global Politics*, 35 *CORNELL INT'L L.J.* 355, 357-58 (2002) [hereinafter *Humanity’s Law*].

8. See *id.* at 360.

9. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 *HARV. HUM. RTS. J.* 69, 70 (2003) (noting that the post-Cold War period shaped the wave of democratic transitions and modernization associated with the humanity-law revolution).

10. Craig VanGrassstek & Pierre Sauvé, *The Consistency of WTO Rules: Can the Single Undertaking Be Squared with Variable Geometry?*, 9 *J. INT'L ECON. L.* 837, 852 (2006) (“GATT and the WTO are based upon the cardinal, Westphalian principle of sovereign equality . . .”).

11. See James Bacchus, *Groping Toward Grotius: The WTO and the International Rule of Law*, 44 *HARV. INT'L L.J.* 533, 547 (2003).

mantra that the WTO is a member- (meaning member state) driven organization.<sup>12</sup>

Thus, when we look at the Dispute Settlement Understanding<sup>13</sup> (DSU), we find nothing that provides directly for the participation of governmental actors, persons, and peoples in the system.<sup>14</sup> Similarly, there is nothing in the DSU that explicitly suggests or insists on accountability for non-state actors or stakeholders in the multilateral trading system.<sup>15</sup>

The DSU contemplates non-transparent proceedings that limit the ability of persons and peoples to understand what is happening and makes it difficult for people to recognize the way in which member states make decisions that may affect their interests and touch their values.<sup>16</sup> In an era where the legitimacy of and expectations for international law are starting to be fundamentally shaped by this humanity-law revolution, we seem to have a system that was produced by older, classical assumptions of international law, where the primary, if not only, relevant international actors are sovereign states.<sup>17</sup> Therefore, the risk of a kind of legitimacy crisis exists as the system runs up against a normative trend to which it is unable to adapt.<sup>18</sup>

Within the very narrow parameters that the WTO treaty texts afforded, it is remarkable how the system has succeeded in making some adaptations to the new “humanity-law” world.<sup>19</sup> Each adaptation is in itself small and at the margins, but as Alexis de Tocqueville—among others—has shown us, even small changes can lead to new perspectives,

12. *See id.*

13. 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) [hereinafter DSU].

14. *See* LORI WALLACH & PATRICK WOODALL, *WHOSE TRADE ORGANIZATION?: A COMPREHENSIVE GUIDE TO THE WTO* 240 (The New Press 2004).

15. *Id.* at 15.

16. *See* Sean P. Feeney, *The Dispute Settlement Understanding of the WTO Agreement: An Inadequate Mechanism for the Resolution of International Trade Disputes*, 2 PEPP. DISP. RESOL. L.J. 99, 106-07 (2002).

17. *See Humanity's Law*, *supra* note 7, at 369-70 (describing the tension between the Westphalian nation-state system and the increasingly prevalent humanitarian law); *see also* John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 782 (2003) (“The old ‘Westphalian’ concept in the context of a nation-state’s ‘right’ to monopolize certain exercises of power with respect to its territory and citizens has been discredited in many ways . . .”). *But see* Stephen D. Krasner, *Abiding Sovereignty*, 22 INT'L POL. SCI. REV. 229, 231 (2001) (arguing that globalization and the rise of other transnational actors will alter but not weaken state sovereignty in international relations).

18. *See* A. Claire Cutler, *Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy*, 27 REV. INT'L STUD. 133, 133-34 (2001) (arguing that the inability of Westphalian notions of state sovereignty to adapt to changes in international law has led to a legitimacy crisis).

19. *See* Robert Howse, *WTO Governance and the Doha Round*, 5 GLOBAL ECON. J. 1, 5-6 (2005) (describing the WTO trend toward accepting input from other institutions and allowing more transparency in its negotiations).

new vistas, and new understandings of what is legitimate.<sup>20</sup> These small changes may be the basis for larger, sweeping, or fundamental changes on a longer-term basis.<sup>21</sup> For example, incremental changes may create differences of perspective and attitude that can actually unblock the route to more basic changes in the long term.

One example of incremental change is the use of amicus briefs. There is nothing in the DSU that seems to allow non-governmental actors to formally participate in the dispute settlement process.<sup>22</sup> The Appellate Body, acting in the best traditions of a judiciary charged with developing its own practice out of a relatively incomplete code of civil procedure, found within the incompleteness of that code the space to have a basis for submissions of amicus briefs—not the formal right to have an amicus brief taken into account, but the possibility of access at the discretion of the judges.<sup>23</sup> The Appellate Body has occasionally used this procedure, and its existence has been affirmed.<sup>24</sup> Although this procedure does not seem to have had a dramatic effect—the Appellate Body has never come out and said, “Because of the amicus brief, we have decided this way or that”—such reliance is equally rare in the case of domestic constitutional courts.<sup>25</sup>

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20. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 456-59 (Arthur Goldhammer trans., Penguin Putnam Inc. 2004) (1835) (explaining how the American people do not change their underlying principles, but instead make small, progressive adjustments).

21. *Id.*

22. See PETER VAN DEN BOSSCHE, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 197 (2005) (“Under the current rules, [amicus curiae] do not have the right to be heard or to participate, in any way, in the proceedings.”). See generally DSU.

23. See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 105-108, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp Appellate Body Report*] (finding that Articles 12.1 and 13 of DSU allow the panel to consider whether to accept information and advice from unsolicited sources); see also Eric L. White, *Written and Oral Submissions in WTO Dispute Settlement*, in *IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES: ISSUES & LESSONS FROM THE PRACTICE OF OTHER INTERNATIONAL COURTS & TRIBUNALS* 121, 127 (Friedl Weiss ed., 2000).

24. See Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 51, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *Asbestos Appellate Body Report*] (nothing that in November 2000 the Appellate Body adopted an additional procedure to deal with amicus briefs); Appellate Body Report, *European Communities—Trade Description of Sardines*, ¶¶ 164-167, WT/DS231/AB/R (Sept. 26, 2002) (accepting an amicus brief from a WTO member); Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, ¶¶ 38-42, WT/DS138/AB/R (May 10, 2000) (ruling that the Appellate Body itself has the authority to accept and consider amicus briefs). But see General Council, *Minutes of Meeting Held in the Centre William Rappard on 22 November 2000*, ¶¶ 114-118, WT/GC/M/60 (Jan. 23, 2001) (addressing members’ concerns that “since there was no specific provision regarding amicus briefs such briefs should not be accepted”).

25. See Petko D. Kantchevski, Note, *The Differences Between the Panel Procedures of the GATT and the WTO: The Role of GATT and WTO Panels in Trade Dispute Settlement*, 3 *BYU INT’L L. & MGMT. REV.* 79, 127 (2006); see, e.g., Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 *U. PA. L. REV.* 743 (2000) (discussing the increasing trend of amicus brief influence collectively, but failing to mention an individual brief relied on for an decision).

Amicus practice has shifted the attitudes of a number of non-governmental actors who see their values as being affected by the system. The practice has made them more conscious of their capacity to express views in a number of different ways: not just through the amicus route, but also by giving expert opinions, via advocacy, via lobbying, and by making public statements about litigation in a variety of contexts.<sup>26</sup>

Another respect in which incremental change has occurred comes from an unusual source—trade officials, who are known for adhering to the “member-driven” ideology of the WTO.<sup>27</sup> As a general rule, the DSU provides for confidentiality of its written and oral proceedings.<sup>28</sup> Increasingly, parties in WTO litigation have been making their pleadings in WTO disputes public, often posting them to the Internet.<sup>29</sup> Recently, the parties to the second round of the *EC–Hormones* dispute<sup>30</sup> agreed to open up of the oral proceedings to the public.<sup>31</sup> In the case of the panel proceedings, the DSU did not provide explicitly for such a possibility.<sup>32</sup> In the case of the Appellate Body, much more dramatically, the DSU appeared to require confidential proceedings.<sup>33</sup> Thus, the Appellate Body, in agreeing to open up its hearing to the public in *EC–Hormones*, had to deemphasize the meaning of confidentiality in the DSU, reading it as not applying to every aspect of the appellate process. These last developments have occurred at a time when the capacity of the system to evolve through diplomatic negotiations has been in question (see, for example, the impasse of the Doha Round negotiations).<sup>34</sup>

It is interesting to reflect on the relationship between judicial inventiveness and the impasse of the Doha Round negotiations. Some commentators, such as former Appellate Body Member Claus-Dieter Ehlermann, have suggested that the difficulty of political adjustment of the WTO bargain makes the legitimacy of judicial activism in the WTO more precari-

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26. See Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U. L. REV. 315, 338–45 (2008) (describing amicus participation on the democratic system framework and citing different types of active amicus groups); Joseph Keller, *The Future of Amicus Participation at the WTO: Implications of the Sardines Decision and Suggestions for Future Developments*, 33 INT’L J. LEGAL INFO. 449, 456–62 (2005) (describing the benefits of amicus briefs).

27. See Lanoszka, *supra* note 5, at 668 (stating that the WTO is a member-driven organization).

28. DSU arts. 14, 17.10, 18.2.

29. See VAN DEN BOSSCHE, *supra* note 22, at 213.

30. See Appellate Body Report, *European Community–Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *EC–Hormones* Appellate Body Report].

31. Communication from the Chairman of the Panels, *United States–Continued Suspension of Obligations in the EC–Hormones Dispute, Canada–Continued Suspension of Obligations in the EC–Hormones Dispute*, WT/DS320/8, WT/DS321/8 (Aug. 2, 2005).

32. DSU arts. 14, 18.2.

33. *Id.* art. 17.10.

34. See Mareike Meyn, *The WTO Doha Round Impasse* (Overseas Dev. Inst., London), Sept. 2008, at 1–2.

ous.<sup>35</sup> But as Susan Esserman and I have suggested, one could look at this relationship in a different way.<sup>36</sup> In the presence of political and diplomatic impasse, the judiciary has an enhanced role in the preservation of the legitimacy of the system through evolving its practices to reflect shifting conceptions of legitimate international order.<sup>37</sup> It is remarkable in this connection that, while many WTO members have responded to the impasse by shifting focus to regional and bilateral negotiations and agreements,<sup>38</sup> the WTO dispute settlement system remains vital and, anecdotally, seems to be preferred to regional or bilateral dispute settlement processes to settle disputes that could arguably be brought in either forum.<sup>39</sup>

A different way in which the WTO judiciary has arguably responded to the “humanity-law” revolution is through what might be called virtual representation of non-governmental stakeholders in its interpretation of WTO law.<sup>40</sup> The notion of “indirect effect” developed by the panel in the *US—Section 301* case captures most pointedly the conception that these interests are virtually present in WTO dispute settlement.<sup>41</sup> According to the panel:

The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators.

7.77 Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines. The denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of individuals within it . . . .

7.78 It may, thus, be convenient in the GATT/WTO legal order to speak not of the principle of direct effect but of the principle of indirect effect.<sup>42</sup>

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35. Claus-Dieter Ehlermann, *Six Years on the Bench of the “World Trade Court”: Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 36 J. WORLD TRADE 605, 633-34 (2002).

36. See Susan Esserman & Robert Howse, *The WTO on Trial*, FOREIGN AFF., Jan./Feb. 2003, at 130, 133-35 (giving examples where the Appellate Body judiciary has adapted to new interpretations of legitimate government actions under the WTO agreement).

37. See *id.*

38. See Peter Fuchs & Klaus Schilder, *Watch Out Beyond the WTO: The EU’s Aggressive Multi-Level Trade Agenda*, WEED (World Econ. Ecology & Dev., Germany), Oct. 2004, at 1, available at <http://www2.weed-online.org/uploads/Watch%20out%20beyond%20the%20WTO.pdf>.

39. See, e.g., Rafael Leal-Arcas, *Choice of Jurisdiction in International Trade Disputes: Going Regional or Global?*, 16 MINN. J. INT’L L. 1, 55 (2007) (noting that in the *WTO Canada—Patent Term* case where either forum was arguably proper, the United States chose the WTO settlement system over the regional NAFTA settlement process).

40. See, e.g., John O. McGinnis & Mark L. Movsesian, *Against Global Governance in the WTO*, 45 HARV. INT’L L.J. 353, 356 (2004) (describing how the WTO “provid[es] virtual representation for the public’s interest in free trade”).

41. Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999) [hereinafter *Section 301 Panel Report*].

42. *Id.* ¶¶ 7.76-7.78.

Now consider the following statement of the Appellate Body in the *EC–Hormones I* dispute:

[A] panel charged with determining, for instance, whether “sufficient scientific evidence” exists to warrant the maintenance by a Member of a particular SPS measure may, of course, and should, bear in mind that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life terminating, damage to human health are concerned.<sup>43</sup>

Here, the Appellate Body would seem to be according an extra margin of deference (based on the precautionary principle)<sup>44</sup> to the judgment of WTO member states, but only where those states have “responsible, representative governments.”<sup>45</sup> We know that not all WTO Members are democracies—one need only think of Burma, China, or Saudi Arabia.<sup>46</sup> Thus, the principle of deference here is not based on state sovereignty and national prerogatives, but rather is based on the responsibility of the state to protect its people and its accountability to citizens’ interests and needs.<sup>47</sup>

This human-centered, as opposed to state-centered, vision is also apparent in the *EC–Asbestos* case, in which the Appellate Body dealt with a challenge to a French ban on asbestos, a substance responsible for thousands of deaths and instances of serious illness.<sup>48</sup> In its application of the GATT’s non-discrimination norm,<sup>49</sup> and as part of its analysis of National Treatment,<sup>50</sup> the Appellate Body considered the health effects of asbestos in determining whether physical differences between asbestos and substitute products that France did not ban were sufficiently important for the products not to be considered “like.”<sup>51</sup> The health exception in Article XX of the GATT shields the prerogative of governments to regulate for health purposes.<sup>52</sup> Therefore, the panel of first instance determined that

43. *EC–Hormones* Appellate Body Report, *supra* note 30, ¶ 124.

44. See Cass R. Sunstein, *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003, 1003–04 (2003) (describing the precautionary principle as “[u]ntil safety is established, be cautious; do not require unambiguous evidence”).

45. *EC–Hormones* Appellate Body Report, *supra* note 30, ¶ 124.

46. See Morton H. Halperin & Kristen Lomasney, *Guaranteeing Democracy: A Review of the Record*, 9 J. DEMOCRACY 134, 143 (1998) (indicating a suppression of democracy in Burma); John R. Oneal, Bruce Russett & Michael L. Berbaum, *Causes of Peace: Democracy, Interdependence, and International Organizations, 1885–1992*, 47 INT’L STUD. Q. 371, 388 (2003) (indicating that China is not democratic); Michael L. Ross, *Does Oil Hinder Democracy?*, 53 WORLD POL. 325, 333 (2001) (indicating that Saudi Arabia is not democratic).

47. See, e.g., M. Gregg Bloche, *WTO Deference to National Health Policy: Toward an Interpretive Principle*, 5 J. INT’L ECON. L. 825, 845 (2002) (discussing the deference the WTO accords to national health policies because of a state’s duty to protect its citizens’ health).

48. See generally *Asbestos* Appellate Body Report, *supra* note 24.

49. General Agreement on Tariffs and Trade art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

50. National treatment is the prohibition on less favorable treatment of imported products in relation to “like” domestic products. See *id.* art. III:4

51. *Asbestos* Appellate Body Report, *supra* note 24, ¶ 114.

52. GATT art. XX.



health considerations should be limited to the application of that exception and had no place in the analysis of National Treatment.<sup>53</sup> The Appellate Body, however, responded that one could take into account such effects, not from the state's point of view, but from that of the *consumer*.<sup>54</sup> When the Appellate Body considered the health exception in Article XX, it additionally determined that human life and health were interests of the first or highest importance.<sup>55</sup> Currently Article XX of the GATT contains a range of exceptions, and the states that agreed to these exceptions did not establish any hierarchy between the regulatory fields protected under Article XX.<sup>56</sup> If one views Article XX as a reservation of state sovereignty, it seems inappropriate for the Appellate Body to tell states which of their sovereign interests is of the highest importance.<sup>57</sup> But if one regards Article XX from a human-centered, not state-centered, perspective, then it makes perfect sense to give the utmost importance to human life and health.<sup>58</sup>

Additionally, the Appellate Body has "virtually" enfranchised non-state actors by introducing international legal and policy instruments that speak to and reflect the activism of those non-governmental stakeholders in WTO dispute settlements.<sup>59</sup> Thus in its first *Shrimp* ruling, the Appellate Body referred to international instruments on biodiversity to interpret the expression "conservation of exhaustible natural resources" as including living resources, i.e., endangered species such as sea turtles.<sup>60</sup> The Appellate Body referenced these international instruments on diversity even though it could have reached the same conclusion simply by citing old GATT cases as authority for this proposition and even though not all WTO members were signatories to these instruments or parties to the dispute in question.<sup>61</sup> Arguably, the Appellate Body probably cited to these instruments to "virtually" enfranchise environmentalist constituencies. It is perhaps no coincidence that this is the very same case where, for the first time, the Appellate Body held that WTO panels and the Appellate Body had the discretion to receive and consider amicus briefs from non-governmental actors.<sup>62</sup>

The WTO legal system, and particularly the dispute settlement system, has shown its capacity for evolution through incremental practice and has thereby demonstrated its efficacy and ability to adapt to change in interna-

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53. Panel Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 8.129-8.130, WT/DS135/R (Sept. 18, 2000).

54. *Asbestos* Appellate Body Report, *supra* note 24, ¶¶ 117-123.

55. *Id.* ¶ 172.

56. GATT art. XX.

57. *See, e.g.*, Howse, *supra* note 6, at 1547.

58. *See id.*

59. *See generally Shrimp* Appellate Body Report, *supra* note 23.

60. *Id.* ¶¶ 131-135 (referring to one of a handful of major instruments on biodiversity, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243). Environmental NGOs influenced the negotiation of these international instruments on biodiversity. *See id.*

61. For a list of parties to the Convention on Biological Diversity, see List of Parties, <http://www.cbd.int/convention/parties/list/> (last visited Sept. 27, 2009).

62. *Shrimp* Appellate Body Report, *supra* note 23, ¶¶ 89-91.

tional law, politics, and economics in the absence of formal “constitutional” amendments or overhaul.<sup>63</sup> In particular, it has been able to interpret its founding treaties, such as the DSU, as allowing for the participation of non-governmental actors.<sup>64</sup> The Appellate Body’s decision-making now reflects a more human-centered approach that shows an evolution from the historically state-centered approach of GATT dispute settlement.<sup>65</sup> The WTO’s dispute settlement system has shown its capacity to evolve in light of the “humanity-law” revolution through doctrinal innovations that reflect a sensitivity to the values and interests of multiple constituencies, including a variety of non-governmental stakeholders.<sup>66</sup> Each of the changes discussed above may in itself seem small, but in the face of an impasse in the Doha Round negotiations these innovations, taken together, provide an important ground for hope that the WTO has at least some resources that will allow it to remain relevant and legitimate in a world of constant change in dominant values, institutions, and technology.

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63. See Yanovich, *supra* note 3, at 248-49.

64. For example, the Appellate Body has interpreted the DSU as permitting participation of non-governmental actors via the use of appellate briefs. See *supra* note 24 and accompanying text.

65. See, e.g., *Asbestos Appellate Body Report*, *supra* note 24 (demonstrating the Appellate Body’s ability to consider the health effects of a governmental decision from the point of view of the consumer).

66. See, e.g., *Shrimp Appellate Body Report*, *supra* note 23.

