

The Power of Law or the Law of Power? A Critique of the Liberal Approach to the Dispute Settlement Understanding

O poder da lei ou a lei do poder? Uma crítica à abordagem liberal do Mecanismo de Solução de Controvérsia

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Introduction

Ever since International Relations scholars converged around the concept of “regimes” in the 1980s, they have focused on the GATT/WTO to argue that institutional settings render all member states better-off (Medina de Souza 2015). Post-Cold War liberals have overlooked the asymmetries entrenched in the substantive norms of the *Agreement Establishing the World Trade Organization* (WTO Agreement) to concentrate on the new dispute settlement system.

David Kennedy (1999) remarked that the celebrated convergence of mainstream International Relations and Law under the umbrella of post-Cold War liberalism has narrowed the space of the politically contestable. In addition to narrowing the debate on the WTO to dispute settlement, liberals provide a superficial and misleading approach to the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* (known as the Dispute Settlement Understanding or simply DSU). The DSU is erroneously considered to attenuate the bias of the GATT panel system towards powerful countries.

Liberal scholars conceptualize the DSU as a “highly legalized” (Abbott, Moravcsik, Keohane, Slaughter & Snidal 2000) or “hard law” (Abbott & Snidal 2000) arrangement, as opposed to the “power-oriented” GATT mechanism. They overlook that power is often exercised not despite, but through law. In fact, accumulated empirical evidence from the DSU shows that it has actually worsened the prospects to developing countries (Busch & Reinhardt 2003), especially least developing nations.

This is so even if revoked preferences, intellectual property protection and loose agricultural rules led observers to stress that aggregate “gains” from the WTO to least developed nations were concentrated on “certainty” provided by the DSU (Overseas Development Institute 1995, p. 3-4). In view of poor countries’ notorious lack of legal capacity, alleged benefits from “certainty” turn into additional liabilities. Bangladesh was the first least developed nation to initiate a case as late as of 2004. No African country has initiated any of the almost 500 cases filed to date in the DSU.

Post-Cold War Liberalism: Trade Regime as Reference Point

The convergence of liberal IR scholars in the last years of the Cold War was visible in the concept of “regimes”, which was created in reference to the GATT 1947 (Kratochwil & Ruggie 1986, p. 769). Following up the special

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edition of *International Organization* devoted to regimes, the founding father of neoliberal institutionalism Robert Keohane (1984) argued that institutions allow states to realize mutual gains by reducing uncertainties and transaction costs. The GATT regime was once again the reference point. As Keohane (2005, p. xi) admitted more recently, “indeed, it could be argued that my theory generalizes the experience of the GATT”.

Liberal regime theorists and neoliberal institutionalists rationalized the international order by focusing on its general desirability when the theory of “hegemonic stability”¹ could hardly work in the perceived absence of a hegemonic state. They clearly refrained from inquiring into asymmetries. As Susan Strange (1988, p. 21) put it, they “tended to take the way things are managed in the international market economy as given, without inquiring too much into the underlying reasons of why it was certain principles, norms and rules and not others that prevailed”.

The end of the Cold War exacerbated the ideological tone of liberal scholarship. Liberal lawyer Ernst-Ulrich Petersmann (1997, p. 4) argued for the constitutionalization of the WTO Agreement, which is considered, with its “worldwide mandatory dispute settlement system”, a milestone on the road to economic freedom, consumer welfare and democratic peace. IR scholar Andrew Moravcsik (1992, 1997, p. 516) assumed that “the fundamental actors in international politics are individuals and private groups”. Sovereignty is in decline, since “the state is not an actor but a representative institution constantly subject to capture and recapture” (Moravcsik 1997, p. 518).

Liberal lawyer Anne-Marie Slaughter (1993) preached a dual agenda for the interdisciplinary debate between International Relations and Law, comprising neoliberal institutionalism and Moravcsik’s liberal theory as platforms of collaboration between lawyers and political scientists. The dual agenda was accomplished when neoliberal institutionalist scholars, first and foremost Robert Keohane, joined Slaughter and Moravcsik in the special issue of *International Organization* devoted to “legalization and world politics”.

Martha Finnemore and Stephen Toope (2001) correctly remarked that liberal internationalists’ concept of law is overwhelmingly focused on its regulative and bureaucratic aspects related to dispute settlement. Repeating early liberal scholarship of the 1980s, contemporary liberals do not address *cui bono* issues connected to the substantive rules of the WTO Agreement. They have concentrated instead on the DSU. Worse still, even when analyzing the DSU they mistakenly believe the more legalized nature of the WTO system reduces the bias towards powerful countries (Goldstein & Martin 2000, Petersmann 1997, Keohane, Moravcsik & Slaughter 2000).

The Liberal Focus on the Dispute Settlement Understanding

The concept of “legalization” was broken down by liberal theorists into the dimensions of obligation, precision and delegation, which resulted in the categorization of regimes in between the extremes of hard law and anarchy. Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal (2000, p. 21) locate the WTO and its dispute settlement mechanism “near the ideal type of full legalization”. Kenneth Abbott and Duncan Snidal (2000, p. 441) argue in particular that the WTO allowed states to learn that “harder legalization (such as a stronger dispute settlement mechanism) can produce greater benefits”.

Judith Goldstein and Lisa Martin (2000) employed the concept of “legalization” to the DSU to argue that the WTO Agreement may have surpassed the optimal point in which liberalization is maximized, as the increased juridicization will probably result in a backlash by the hands of protectionist groups. Goldstein and Martin assumed that the DSU was created to bind powerful states to their juridical obligations, suggesting that the absence of the *de facto* veto will restrain the advantages of powerful states. They formulated the following

1 The term “hegemonic stability” was created by Robert Keohane (1980) to designate the thesis espoused by Charles Kindleberger (1973) to the effect that liberal international orders are conditioned on hegemonic states.

hypotheses: 1) we should expect the proportion of complaints against developed countries to rise under the WTO; 2) we should see developing countries increasingly bringing complaints; 3) we should see an increase in the proportion of cases brought by developing countries against developed countries; 4) legalization of dispute resolution has reduced the bias toward the powerful in the settlement of disputes. That they found out that the hypotheses do not hold is not surprising in view of Goldstein and Martin's superficial analysis of the DSU (Goldstein & Martin 2000, p. 630):

Improving the compliance of powerful states with their explicit obligations under the rules of international trade was one of the primary motivations behind the enhanced dispute-resolution mechanisms of the WTO. Thus moving from a politicized process to a more legalized one should have an observable impact on the behavior of powerful states. However, the evidence is weak that the WTO has made the difference intended by proponents of more legalized dispute-resolution procedures.

The assumption that the DSU was created to bind powerful countries to their obligations is problematic. There is significant evidence that the United States only reversed the proverbial resistance to international adjudication when favorable substantive rules were guaranteed at a late stage of the Uruguay Round (Ostry 2002). More consequentially, Goldstein and Martin seem not to apprehend that power is often exercised not despite but *through* law. As commentators of domestic law have long noticed, material imbalances tend to be reflected in judicial outcomes because of the unequal means available to litigants. The ability of hiring better lawyers is just the most obvious advantage of more resourceful parties in legal processes.

Asymmetries are exacerbated in international litigation, since the legal forum is distant, political processes more complex and legal expertise less widespread and hence more expensive (Shaffer 2003). In fact, the average fee for a market access case in the WTO reaches US\$500,000, with reported fees in excess of US\$10 million (Nottage 2009). Since developed countries are repeat players in the DSU, they instill in the system some additional asymmetries from economies of scale (Shaffer 2005). The US and the EU have been able to shape WTO jurisprudence also because they participated as a party or third party in most of the cases that ended up in an adopted panel or Appellate Body decision (Shaffer 2005, pp. 130-31). In fact, the EU and the US have participated in, respectively, 326 (65%) and 354 (71%) of the 497 cases brought to the WTO.

As Richard Steinberg noted in reference to the influence of the US and the EU in the DSU, "the power politics that created the WTO agreements also constrains their interpretation" (Steinberg 2004, p. 274). The US and the EU have exercised *de facto* veto power on the selection of Appellate Body members. The very fact that the reform of the DSU, Slaughter's targeted policy problem, has been a claim made by developing countries from the WTO Seattle ministerial conference in 1999 suggests that the empirical evidence goes in the opposite direction of Goldstein and Martin's hypotheses.

Only large developing countries, especially Brazil and India, have used the system effectively, whereas "the vast majority of developing countries are largely absent from the process" (Nottage 2009, p. 2) or "have not used it at all" (Evans & Shaffer 2010, p. 2-3). Bangladesh was the first least developed country to initiate a dispute as late as of 2004. Tellingly, even if there have been eight cases filed to date against Egypt and South Africa in the DSU, no African country has ever initiated a trade dispute at the WTO.

This is so if even institutions committed to the cause of development, such as the Overseas Development Institute (1995, p. 3-4), have reasoned that apparent losers in Africa and other least developed countries perceived that gains in terms of certainty provided by the DSU would outweigh losses. In addition to their absence from the DSU, estimates of the effects from the overall WTO Agreement for African countries indicate that they

undergo, especially in Sub-Saharan Africa, losses in terms of GDP and economic welfare (Harrison, Rutherford & Tarr 1995; Davenport 1994; Hertel, Masters & Elbehri 1998), adjustment and implementation costs (Finger & Schuler 2000), together with enhanced royalties and monopolization derived from the access to intellectual property (World Bank 2001).

When they manage to litigate successfully, the meagre market power of most developing countries makes them unable to cope with non-compliance or to retaliate successfully. As Antigua and Barbuda stated in its request for retaliation against the US (DS285, US – Gambling), “ceasing all trade whatsoever with the United States (approximately US\$ 180 million annually, or less than 0.02 per cent of all exports from the United States) would have virtually no impact on the economy of the United States”. Poor countries’ lack of market power might be compensated in the future by multilateral forms of retaliation.

Even with the creation in 2001 of the Advisory Centre on WTO Law, which is designed to provide legal support for poorer countries, domestic legal capacity remains a problem because of the lack of coordination between governments and private actors, weak stakeholder communities and incapacity to process information so as to identify unlawful trade practices (Shaffer & Meléndez-Ortiz 2010; Shaffer, Mosoti & Qureshi 2010).

In the most carefully designed empirical analysis of the DSU to date, Marc Busch and Eric Reinhardt (2003) argued that developing countries are worse-off with the new system. Following Robert Hudec’s (1993) method of evaluating the outcomes of GATT/WTO disputes in terms of policies rather than rulings, they demonstrated that developed nations are not only more likely to secure their desired outcomes, but also the number of complaints filed by wealthier countries against developing nations increased dramatically. As Busch and Reinhardt (2003, pp. 721-22) pointed out,

The new premium on legal capacity under the DSU is likely less burdensome for most of the advanced industrial states, which generally maintain large, dedicated, permanent legal and economic staffs tasked with WTO and trade law matters. For these countries, the move from a “power-oriented” to a more “rule-oriented” system contains little additional ambiguity. But for poorer countries, such a move simply substitutes (or compounds) the traditional source of weakness – namely, the lack of market size and thus retaliatory power – with a new one: legal capacity.

Finnemore and Toope appropriately assert that the liberal approach is excessively formalistic. Focusing strictly on the formal attributes of the DSU, liberal theorists often exaggerate the extent to which adjudication is the governing feature of the trade regime. Simply characterizing the WTO as the most telling example of highly legalized or hard law arrangement overlooks that most of the consequential action in the system happens in the shadow of law (Busch & Reinhardt 2000). The US and the EC often shift the WTO forum and negotiate bilaterally in the shadow of a potential claim in the WTO (Shaffer 2005). Weaker countries may concede because of the costs of legal procedures, the possibility of non-compliance, the lack of retaliatory power, their own fear of retaliation and the relatively small amount of their trade (Busch & Reinhardt 2003).

Liberal Scholars’ Misguided Proposals to Reform de DSU

Even if many commentators stress preoccupation with the distributive prospects of the DSU and propose reforms to improve developing countries’ legal capacity (Busch, Reinhardt and Shaffer 2008), liberal scholars concentrate on the need to give access to private actors (Slaughter 2000, Keohane, Moravcsik & Slaughter 2000). Since virtually all major transnational companies are headquartered in developed countries, the construction of public-private partnerships to litigate in the WTO is precisely one of the main reasons why the US and the

EC have prevailed in the DSU (Shaffer 2003). Large and well-organized interests make big companies better informed, and because they have high per capita stakes, they will not hesitate to make use of the best resources to engage in complex and prolonged litigation.

In the context of her interdisciplinary efforts to bridge IR and IL, Anne-Marie Slaughter (2000, p. 152) drew on IR theories to address “an important current policy problem: what, if any, reforms are needed to improve the World Trade Organization (WTO) dispute resolution process?”. Slaughter bases her analysis on the work of Richard Shell (1995, 1996), who applied different IR theories to develop models of trade “legalism”. Shell’s two models (1995, pp. 834, 864, 877) are akin to Slaughter’s own dual agenda for the interdisciplinary debate, since the “régime management model” and the “efficient market model” are explicitly affiliated to neoliberal institutionalism and Moravcsik’s liberal theory, respectively.

While the régime management model is consistent with neoliberal institutionalism in emphasizing that trade treaties are contracts among sovereign parties to reinforce mutually advantageous long-term cooperation, the efficient market model is derived from the liberal focus on domestic constituencies and the normative commitment to economic free trade theory (Shell 1995, p. 866).

The liberal tone is strengthened when Shell proposes the third and most preferred “trade stakeholders model”, in which a “global deliberative process” would allow all interested groups to have access to the DSU. The unrestrained faith in free trade gives place to a “civic republican conception of democracy” that supposedly reflects the values of the whole society (Shell 1995, p. 913). To borrow Martti Koskenniemi’s (2001, p. 441) insight, Slaughter’s dual agenda is thus invisibly transformed into a liberal agenda. The obvious goal is the dismissal of state power in favor of private groups, defended rhetorically through the need of international law to increase the welfare of individuals rather than either state power or the strict interests of the business community (Slaughter 2000, pp. 877-78).

Shell and Slaughter’s defense of the trade stockholder model is revealing of the ambiguous use they make of Moravcsik’s new version of liberalism. Even if the remoteness of institutions and high stakes suggest that the action of interest groups is more consequential internationally, Slaughter and Shell fail to notice the extent to which the trade stakeholders model is much closer to the efficient market model than they would admit.

While domestically state institutions are always susceptible to be “captured” by interest groups, internationally private groups are praised as part of a “global deliberative process” or a “civic republican conception of democracy” (Slaughter 2000, p. 172). Whenever challenged in their cosmopolitan panacea, they appeal to a rather crude division of IR and IL literature in which one is either realist or liberal,² according to the apology or dismissal of the sovereign state. In case they were implemented, Shell and Slaughter’s proposal to reform the DSU would aggravate the empirically ascertained inequality of the system.³

Conclusion

Even if liberal mainstream scholarship in International Relations and Law has centered on the trade regime, liberal theorists have systematically refrained from inquiring into the asymmetries created by the GATT/WTO. When approaching the WTO, they have not only narrowed the debate to dispute settlement, but also displayed unawareness to the effects of power in the DSU. Liberal scholars erroneously argue that enhanced legalization

2 This point was accurately noticed by Philip Nichols (1996) in his debate with Richard Shell on the desirability of the standing of private parties before the DSU.

3 It is thus not surprising that developing countries have long opposed amicus curiae briefs from non-state actors and protested when the Appellate Body allowed panels to consider such briefs in DS 58 (US – Shrimp Turtle I).

would reduce the bias towards powerful countries. Their proposals for increased participation of third parties would actually widen the asymmetries of the system. There must also be intensified assistance to least developed countries to strengthen their negotiating capacity and their ability to participate successfully in the DSU. Retaliations must be applied on a multilateral basis in order not to preclude poorer nations from effectively benefiting from a favorable ruling. The misguided liberal point of view is solely explainable through the typical liberal image of law as an antidote to power, even if increased legalization in the DSU has highlighted more the law of power than the power of law.

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Abstract

This article criticizes the approach liberal scholars in International Relations and Law have provided to the Dispute Settlement Understanding of the World Trade Organization. Liberal theorists erroneously believe the enhanced legalization of the system, as compared to dispute resolution under the GATT 1947, will reduce the bias towards powerful countries.

Resumo

Este artigo prove crítica da abordagem liberal em Relações Internacionais e Direito Internacional para o Entendimento para Solução de Controvérsias da Organização Mundial do Comércio. Os teóricos liberais erroneamente sustentam que a maior legalização do DSU, quando comparado ao GATT 1947, reduzirá a tendência de beneficiar países poderosos.

Palavras-chave: Liberalismo Internacionalista; Organização Mundial do Comércio; Entendimento para Solução de Controvérsias.

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