

Facing the legitimacy challenges in the WTO

A LIGHTNING ROD FOR PROTEST AND DISSENT

Although the WTO was established only in 1995, it has very quickly become a focal point for public opposition to globalization and trade liberalization generally. This is surprising, especially as its predecessor, the GATT, toiled in relative obscurity for almost 50 years before the birth of the WTO. Why has the WTO become the lightning rod for protest and dissent? Some argue that it is because of its “judicialized” and binding dispute settlement system, which is more effective and efficient than the rule-making mechanisms of the GATT. A more cogent explanation is that the agreements resulting from the Uruguay Round are considerably more intrusive into domestic sovereignty, reaching deeper into areas of domestic regulation, such as intellectual property, food safety, environment, services, and investment, than did the “shallow integration” model of the GATT.

LEGITIMACY CHALLENGES

The WTO faces two major challenges to its legitimacy. The first is to make its internal rule-making and decision-making mechanisms more transparent, effective, and inclusive. This is “the *internal* legitimacy challenge.” The second is to respond to criticisms from outside the WTO, from NGOs and “civil society,” that the WTO is a closed, bureaucratic supranational entity that is not transparent, democratic, or accountable. This is “the *external* legitimacy challenge.”

The WTO has become a “universal” organization. It now has a membership of 144 countries, over 100 of which are developing and least-developed countries. The developing countries do not feel “included” in many of the decision-making processes that affect them. In addition, the rule-making procedures of the WTO, which operate largely on the principle of consensus decision making, are cumbersome, slow, and, some would argue, unworkable. The chal-

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lenge of “internal legitimacy” is to improve the rule-making mechanisms of the WTO to make them more effective and efficient, while ensuring that the smallest and poorest countries have a real voice in decision making.

THE DISPUTE SETTLEMENT PROCESS

The WTO dispute settlement system has attracted a lot of attention in the last few years, in part, because it has been extremely busy and prolific. Countries have brought more cases to the WTO than to any other international tribunal or dispute settlement mechanism in operation in the world today. The Uruguay Round *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“the DSU”) ushered in a new, more “judicialized” dispute settlement system, which represented a major shift from the previous “diplomatic” model of dispute resolution that had characterized the GATT. Three major reforms moved the system significantly toward a judicial model: compulsory jurisdiction, “binding” decisions, and the establishment of the Appellate Body.

Unlike most international dispute resolution mechanisms, a complaining

party in the WTO has a right to the establishment of an arbitral panel after a mandatory 60-day period for consultations has expired. In the WTO, the consent of the parties to the jurisdiction of an arbitral body is not required to initiate panel proceedings. Under the GATT, the contracting parties had to “adopt” or approve a report of an arbitral panel by a consensus decision of the GATT Council. Under the WTO, Panel and Appellate Body reports are “automatically” adopted by the Dispute Settlement Body, unless there is a “reverse” consensus against adoption, which is not likely to occur since the winning party will not join in such a decision. Furthermore, under the GATT, when a losing party failed to implement the rulings of a panel, in order to retaliate, a winning party would have to obtain the authorization of the contracting parties, again by a consensus decision. Now, under the WTO, authorization to retaliate is also granted by the Dispute Settlement Body “automatically” upon the request of the winning party when a losing party has failed to implement the rulings of the Panel or the Appellate Body (unless the Dispute Settlement Body decides by a “reverse” consensus not to authorize retaliation).

A JUDICIALIZED MODEL

The *quid pro quo* for “automatic” adoption of panel reports and authorization of retaliation was the establishment of the Appellate Body, a standing tribunal that hears appeals from legal findings of panels. The Appellate Body is clearly the most “judicial” part of the WTO dispute settlement system. Although the panels still have many trappings of the “diplomatic” model of dispute settlement, the Appellate Body acts as a court in all but name. It is composed of seven members, appointed by the Dispute Settlement Body (made up of all WTO member countries), who are senior jurists, independent from any affiliation with governments. To date, a very high

percentage of panel decisions have been appealed to the Appellate Body, and the Appellate Body has developed an impressive jurisprudence, both on procedural as well as on substantive legal issues, which is having a major influence on panels and the WTO members.

These reforms have driven the dispute settlement system dramatically toward a “judicialized” model, but elements of the “diplomatic” model remain, particularly in the composition and operation of panels. These “diplomatic” elements work to make the dispute settlement system more acceptable to WTO member governments, and thus contribute to its “internal” legitimacy. But, these very same elements detract from the perceptions of accountability and credibility of the WTO in the outside world—that is, from its “external” legitimacy.

THE BATTLEGROUND FOR LEGITIMACY

There is a struggle for legitimacy in the WTO, and the dispute settlement system has become the battleground. There are conflicting pulls on the system. From *within* the WTO, member governments perceive the system as essentially “diplomatic” and want to keep the system closed in order to maintain control over it. From *outside* the WTO, NGOs and representatives of “civil society” maintain that the dispute settlement system must become more open and allow participation by all its stakeholders, including members of the public.

“Confidentiality” is a hallmark of WTO dispute settlement. The DSU requires that written submissions, evidence, and oral argument presented by parties; Panel meetings and Appellate Body hearings; deliberations of Panels and the Appellate Body; and all other aspects of dispute settlement proceedings be kept confidential. Even other WTO members, who are not parties to the dispute, may not see any of the record of the proceedings before panels or the Appellate Body. This emphasis on secrecy of proceedings is a vestige of the “diplomatic” model of dispute settle-

ment. Most governments continue to maintain that documents and proceedings must be kept confidential to allow the parties maximum negotiating flexibility to resolve their disputes mutually at any stage in the process. The DSU itself states that the primary aim of dispute settlement is for the parties to achieve mutual resolutions of their disputes.

THE EXTERNAL LEGITIMACY CRISIS

However, nothing works against the legitimacy and acceptance of WTO decisions and rulings vis-à-vis the outside world like the closed nature of the dispute settlement system. There is simply no excuse, given the gravity of the decisions made by WTO Panels and the Appellate Body, for a dispute settlement system that operates in secret, behind closed doors. Members of the WTO that are parties to the disputes may feel that they control the process if NGOs and other representatives of “civil society” are not allowed to submit *amicus curiae* briefs or to appear in meetings of the Panels and hearings of the Appellate Body. However, the WTO faces a very serious threat to its “external” legitimacy, a threat that is fuelled by a lack of understanding and trust of a system that operates largely in secret. Opening up the dispute settlement system would help to inform the outside world about how the WTO actually functions, and would help to ensure that Panels and the Appellate Body have all of the relevant information and arguments available when they are making their important decisions. This is a necessary, but not a sufficient, first step in making the WTO more transparent and accountable to civil society.

EMPLOYING ALTERNATIVE DISPUTE RESOLUTION METHODS

Short of allowing non-state actors standing to bring complaints against member governments (which the failure of the negotiations on the OECD Multilateral Agreement on Investment and the experience with chapter 11 of the NAFTA have demonstrated is not a good idea), there is much that WTO members can do to

make the dispute settlement system more transparent, better understood, and more accountable. If the WTO is to deal with its “external” legitimacy crisis, which is real and threatens the credibility and ongoing viability of the multilateral trading system, it must move, and be seen to move, decisively in the direction of greater “judicialization” and enhanced transparency and openness. Parties should be encouraged to make use of alternative dispute resolution options such as mediation, conciliation, and arbitration in addition to the “judicial” process of Panel and Appellate Body proceedings. Not every dispute calls for a judicial decision—interpreting and applying provisions of the WTO agreement. Some disputes are better resolved through diplomatic means. Governments should recognize this and make use of alternative dispute resolution methods. The Panel process could be significantly professionalized and improved by establishing a standing body of panelists (a lower instance standing tribunal) with detailed rules of procedure and rules of evidence. Submissions to Panels and the Appellate Body should be made available to the public; Panel meetings with the parties and Appellate Body oral hearings should be open to *observation*, not *participation*, by NGOs and representatives of “civil society”; and Panels and the Appellate Body should be allowed to accept and consider *amicus curiae* briefs where they deem it pertinent and useful to do so.

Governments will not lose control over the WTO if non-state actors are permitted access to information, to attend meetings of Panels and hearings of the Appellate Body as observers, and to submit *amicus curiae* briefs, when authorized to do so, by Panels and the Appellate Body. If these reforms are made, not only will public interest groups become more informed about the functioning of the WTO, but governments, which after all comprise the WTO, will be observed and held accountable by their own constituents. This will contribute, in significant measure, to the “external” legitimacy of the WTO. ❁