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13 Accountability and the WTO Dispute Settlement System

Rob Jenkins

Introduction

Like many institutions of international governance, particularly those of recent vintage (Bodansky 1999: 596–624), the World Trade Organization (WTO), born in 1995 as the successor to the General Agreement on Tariffs and Trade (GATT), has suffered considerable legitimacy problems since its inception.[1] Indeed, controversy dogged the WTO even before it came into being: many countries, such as India, experienced heated political debates and public protests following the 1993 publication of the 'Dunkel Draft Text' of the treaty that would eventually create the WTO. The global trade body's failure to win popular support was demonstrated most graphically in the large-scale protest actions that accompanied its Seattle ministerial meeting in 1999.

The WTO's status as a lightning rod of anti-globalization activism, it could be argued, merely reflects the widespread dissatisfaction with existing power inequalities between states, rather than representing any rectifiable failing on the part of the institution itself. The ability of large and prosperous member states (most notably the United States and the 'European Communities', the latter operating as a recognized bloc in the WTO) to dominate the WTO negotiating agenda, and to force more concessions from their developing-country trading partners than they themselves are willing to offer, is a constant source of complaint among the organization's critics. But the realities of power politics are not so easily wished away. Developed countries, which account for the bulk of world trade, have very little incentive to enter what are, after all, voluntary associations of states, such as the WTO, if rules are to be made by minor trading partners.

The WTO's legitimacy problems are partly due to difficulties that arise in all systems of multilevel governance. One key issue in the operation of such systems is accountability. As Hirst puts it: 'in a multilevel system it is very, very difficult to say who is responsible for what decisions. Indeed, many decisions simply get lost in the plumbing. So for the public, it is as if nobody made them.'[2] This general principle holds true, though to varying

degrees, in a range of policy domains. In the security field, Krahmann has argued that 'network governance' – involving private-sector actors as well as public authorities from both above and below the national level – implies a 'dissolution of clear lines of responsibility' (Krahmann 2002: 19). Rather than resting ultimately with identifiable agencies, accountability gets 'distributed among a multiplicity of public and private actors', and because such a diverse array of stakeholders 'cooperate in the making and implementation of security policies ... no single actor can be held accountable for the outcomes of this process' (*ibid.*). Even where decisions can be traced back to specific actors, coordination problems emerge because 'governments, international organizations, NGOs, armaments corporations and private security companies are accountable to different agents. ... Only the former three are in some sense accountable to the general public ...' (*ibid.*).

In the field of development policy, Johnston, whose work examines the means by which transborder corruption can be checked, echoes the concerns of both Hirst and Krahmann. Problems of vertical coordination (among different levels of governance) have, according to Johnston, become intertwined with problems of horizontal coordination (across parallel national jurisdictions), to thwart efforts at enforcement. Summarizing the issue, Johnston argues that a

> world in which capital, people, information and enterprises move freely and rapidly from place to place offers new development opportunities of many sorts, but also makes accountability more difficult. Because the agents of cross-border corruption are capable of doing business almost everywhere, it is difficult to hold them accountable anywhere.
>
> (1998: 1)

The WTO's Dispute Settlement System (DSS), which operates under the provisions of the Dispute Settlement Understanding (DSU) – itself part of the Marrakesh agreement of 1994 – provides a valuable lens on the way in which accountability relationships are being reordered in response to changing patterns of 'power and governance in a partially globalized world', to use Keohane's (2002) turn of phrase. Anne Marie Goetz and I have argued that these trends constitute a 'new accountability agenda' – something that is being forged through experimentation, rather than executed by design (see Goetz and Jenkins 2005). This chapter examines trends that may be leading to a similar 'reinvention of accountability' in the DSS as well as the challenges facing those who would like to create a fairer system of trade governance. Critiques of the rules governing, and the actual operation of, the WTO's DSS reveal several aspects of the evolving accountability landscape. These questions will be addressed by examining proposals for reform of the DSS in relation to the three elements of

the new accountability agenda – (1) a more direct role for ordinary people and their associations in demanding accountability, (2) using an expanded repertoire of methods across a constantly shifting set of jurisdictions, on the basis of (3) a more exacting standard of social justice.

The chapter is organized as follows: the second section introduces some key concepts in the analysis of accountability; the third section outlines critiques of the DSS, examining the roles of capture and bias in the DSS's failures as an accountability institution; the fourth section assesses the DSS reform agenda against the three elements of the new accountability agenda; the final section concludes by examining whether the three trends contained within the new agenda could potentially come together to create a new 'hybrid' form of accountability that, with the DSS as its linchpin, could integrate both national and multilateral processes.

Accountability and its dimensions

In order to proceed with an analysis of the DSS, we must first introduce accountability. Accountability describes a relationship where *A* is accountable to *B* if *A* is obliged to explain and justify his actions to *B*, or if *A* may suffer sanctions if his conduct, or explanation for it, is found wanting by *B* (or by some other agent influenced, but not dictated to, by *B*) (Schedler *et al.* 1999: 14–17).

Note first the distinction between the two key *actors* in the accountability drama, between the *target* of accountability, the one obliged to account for his or her actions and to face sanction, and the *seeker* of accountability, the one entitled to insist on explanations and/or to impose punishments. In the standard 'principal–agent' accountability framework, the principal is trying to keep tabs on his or her agent, who has less (or no) stake in the outcome of the endeavour and so tends to pursue his own interest at the expense of his principal's. In the version of accountability used in this chapter, the target and seeker correspond, respectively, to the agent (the one to whom power has been delegated) and the principal. While the central dilemma of the principal–agent framework is accepted, different terms are used in this chapter – for two main reasons. First, doing so makes it is easier to comprehend the unaccustomed roles existing actors are playing in the new landscape of accountability-seeking. Some, for instance, may seek accountability without actually being a principal, highlighting their moral claim to demand answers or impose sanction on holders of power. Second, the principal–agent (or formal contract) model does not help us to understand accountability relationships – or how to bring accountability to relationships – where power is not explicitly delegated, but has been assumed by default.

There is also a distinction between the two *elements* of accountability: (1) having to provide information about one's actions and justifications for their correctness; and (2) having to suffer penalties from those

dissatisfied either with the actions themselves or with the rationale invoked to justify them. These aspects of accountability are sometimes called *answerability* and *enforcement* (Schedler 1999 *et al.*: 14–15). In practice, answerability and enforcement are equally important. Both are necessary; neither is sufficient.

Two further distinctions help to understand how the concept of accountability is evolving in response to changes in the relationship between states and citizens, between public and private sectors, and between states and global institutions. Reality has a way of complicating the definitional precision and elegance of the principal–agent model, not least because relationships become difficult to map when multiple levels of governance are involved.

First, actually existing accountability systems force us to confront the difference between *de jure* and *de facto* lines of accountability. In the real world there is very often a difference between whom one is accountable to according to law or accepted procedure, and whom one is accountable to because of his/her/its practical power to impose a sanction. In *principle*, of course, politicians are answerable to citizens. But in *practice* they are often more immediately concerned with the sanctions wielded by corporate interests, such as the withdrawal of campaign finance. When we hear people talking about the need to increase accountability, they are usually referring to one of two things – either ways of making *de facto* accountability relationships correspond more closely with those stipulated in law, or else insisting that moral claims be encoded into law, or at least followed in practice. 'Accountability' is thus shorthand for *democratic* accountability – accountability to ordinary people and to the legal framework through which governance is effected. It is conventionally conceived as a way of providing citizens a means to control the behaviour of actors, such as politicians and government officials, to whom power has been delegated, whether through elections or some other means of leadership selection. That actors in the private sector have come to assume many more powers than they once did in large part explains why they have come to be seen as legitimate targets of direct, rather than mediated, accountability.

The second distinction of relevance to the practical operation of accountability systems is between *vertical* forms of accountability, in which citizens and their associations play direct roles in holding the powerful to account, and *horizontal* forms of accountability, in which the holding to account is indirect, delegated to other powerful actors (O'Donnell 1994). Elections are the classic form of vertical accountability. But also in this camp are the processes through which citizens organize themselves into associations capable of lobbying governments, demanding explanations, and threatening less formal sanctions such as negative publicity. Vertical accountability is the state being held to account by non-state agents. Horizontal accountability is one part of the state holding another to account. Through ombudsmen, oversight committees, and the like, state

institutions of accountability are designed, in theory, to overcome collective action problems that make it impossible for citizens to both live normal lives and investigate the finances of the people and institutions around them.

The DSS and its critics: capture and bias as sources of accountability failure

Charges that the system of multilateral trade governance administered by the WTO is lacking in accountability usually centre on the inability of the WTO's institutional structures, which theoretically constrain all member states equally, to resist the undue influence exerted by a small number of powerful states. This, allegedly, gets reflected in: (a) the conduct of negotiations; (b) the review of trade performance; and (c) the adjudication of disputes between member states. Another way of stating this is to say that Southern states – both the 'Developing Countries' and the 'Least Developed Countries' (LDCs), to employ the nomenclature used by the WTO to distinguish the poor from the extremely poor – lack the capacity to hold either the WTO's machinery to account for its failure to ensure procedural fairness, or to hold rich member states accountable for their failure to honour their treaty obligations.

Compared to the dispute settlement procedures used by the GATT, the WTO's Dispute Settlement System certainly represents a step – though perhaps only a half-step – in the direction of greater 'legalization'. According to the typology outlined by Keohane *et al.* (2000: 152–189), the new DSS is not more 'independent' than its GATT predecessor – the 'independence spectrum' used in that paper referring to the selection method and tenure of judges. In terms of the 'access continuum' – the question of whether it is just states or other parties that can file cases – the DSS also scores at the same level as its GATT predecessor. It is, however, in terms of the third criterion – legal embeddedness – that the WTO's DSS represents an advance on earlier models: whereas the GATT was deemed to score 'Low' in terms of its 'level of embeddedness', because 'Individual governments can veto implementation of legal judgement', the WTO's DSS moves up to the 'Moderate' category, described as 'No veto, but no domestic legal enforcement'. The WTO and International Court of Justice (ICJ) systems are both placed in this category. Only the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) make it into the 'High' embeddedness category.

The key difference between the WTO's DSS and its GATT predecessor is the element of compulsion: under the GATT system, a member state against whom a complaint was raised could opt out. It was, in effect, a system of voluntary mediation, reliant on goodwill and mutual attendance to the reputational consequences of non-participation. The size and detail

of the submissions by litigating parties in WTO disputes, and the complexity of the rulings from the panels, represent a quantum leap by the DSS (in terms of institutional density) over its GATT predecessor. The other key difference is the potential threat of Dispute Settlement Body (DSB)-authorized sanction as a means of incentivizing the losing party in a dispute to comply with the panel's decision by correcting the offending regulatory measure.

The DSS's legitimacy problems stem from the fact that it is seen as subjected to two types of failures: those caused by 'capture' and those caused by 'bias'. These two categories have been a central part of the analysis Anne Marie and Goetz and I have conducted on why accountability institutions so often fail to address the concerns of less powerful actors. Capture is when corruption of one form or another has undermined the impartiality of decision-making within an accountability institution. Bias is when an accountability institution either (a) has no remit for considering in its deliberations the effects of fundamental power inequalities, or (b) presents substantial access barriers to less powerful actors. Arguably, most of the complaints about the DSS's failures as an accountability institution involve questions of bias: that is, the institution, as currently constituted, has no remit for addressing issues of inequality between states, which undermines basic procedural fairness. Of course, some of the complaints concern allegations of systematic capture, or the use of undue influence to obtain better outcomes through the subversion of norms governing the operation of existing institutions.

The extent to which the DSS is the victim of bias rather than capture is as much a matter of debate as is the question of how to analyse its legitimacy. While the intensity of criticism has risen since the late 1990s, developing countries' continued engagement within WTO processes could also be seen as evidence of the institution's legitimacy. Institutional participation is often held up as an indicator of legitimacy. People who vote in elections are presumed less likely than those who do not to regard the political system as illegitimate. Hirschman's classic 1970 framework of exit, voice, and loyalty is relevant here. Those who find institutions illegitimate tend to exercise their right of exit, rather than to continue seeking to influence the institution through the exercise of voice. In the case of the WTO, of course, many states continue to combine the use of voice with displays of loyalty to those with greater power within the institution: such states side with the United States and the EU on a selective basis, when it suits their interests. They reserve their right to do so, making clear to the richer countries that they will not refrain from criticizing the institution, and to fellow developing countries that they may be willing to forgo benefits that loyalty might make available to them (through, for instance, preferential trading agreements) on particularly important issues of common concern to less powerful countries.

Usage is a good basic indicator of legitimacy for courts as well. The

WTO's DSS has shown a large increase in usage, compared to the old GATT system. This does not necessarily tell us what types of countries are using the system: was it mainly the developed, the developing, or the least-developed countries who initiated cases? Who won? With what consequences? How has this changed over time? These are surprisingly difficult questions to answer.

The old GATT system, according to one of the pioneers in the study of international trade-dispute mechanisms, was biased against poorer countries: 'the quantitative analysis ... makes it pretty clear that the GATT dispute-settlement system is, at the margin, more responsive to the interests of the strong than to the interests of the weak ... in the rates of success as complainants, in the rates of non-compliance as defendants, in the quality of the outcomes achieved, and in the extent to which complainants are able to carry complaints forward to a decision' (Hudec 1993: 153).

Busch and Reinhardt argue that there is also a significant bias against poor countries in terms of usage of the WTO's DSS (Busch and Reinhardt 2002: 457–481). They compare developing countries' use of GATT dispute processes with their use of the DSS. Whereas LDCs were the targets of 8 per cent of cases under the GATT system, they were the target of 37 per cent of cases under the WTO's DSS. Only part of this is accounted for by the fact that LDCs form a larger percentage of WTO countries than they did, for most of the time, under the GATT. By contrast, Holmes *et al.* (2003) find that the share of cases initiated by developing countries has been increasing over the life of the WTO (their study covering the period up to the end of 2002). The headline finding from the Holmes *et al.* study is that there is little evidence of bias against developing countries in terms of who wins and who loses cases at the DSM. They note that, for instance, Canada and the US lose a greater-than-average share of the cases they initiate. But Holmes *et al.* introduce methodological caveats that make their determination that bias does not exist far less comforting. First, while the data 'gives some support to the proposition that poorer and perhaps smaller countries do better in the dispute settlement game ... (i)t may also reflect the possibility that richer countries can afford to take on more speculative cases to placate domestic lobbies' (Holmes *et al.* 2003: 17). Second, the conclusion drawn on this matter depends on what one means by 'bias'. Holmes *et al.* measure *outcomes*. Critics focus on *process*, and stress that outcome measures are unable to take account of cases that could have been, but were not, initiated because developing or least-developed countries lack adequate funding, are fatalistic about their inability to enforce compliance, or fear retribution by their more powerful trading partners through other, non-WTO channels.

What makes the no-bias finding even more suspect is the methodology for classifying winners and losers. This is not a fault of the authors of the study, who are constrained by the nature of the data – and, as they put it, their limited expertise in legal matters – to look only at the formal ruling by the dispute-settlement panel that heard the case or the Appellate Body that reviewed the original panel's findings. The authors rightly point out two shortcomings of this approach. First, it means that, where a case has multiple sources of complaint, only one such source of complaint need be upheld by the panel in order to qualify as a 'win'. Second, and more importantly, there has been no attempt in the data analysis to take account of whether rulings have been complied with by losing parties – again, for good reason: it would be difficult to code consistently for compliance-propensity. Moreover, the authors are scrupulous in reporting that 'the question (of who wins and who loses) is inevitably bound up with whether the respondent complies and even if it does comply, whether it does so in a way that leaves the barrier effectively in place' (Holmes *et al.* 2003: 17).

Holmes *et al.* also note a shift in the type of cases being brought – that is, on the legal basis of the complaints. The share of cases that complained about 'behind the border' issues – those that involve 'domestic' regulations that a member state feels unfairly disadvantages its firms in another member state's market – has been on the decline.

This is significant for examining the legitimacy of the DSS as an accountability institution. One of the most controversial aspects of the WTO has been the tendency for the agreements it administers to encompass issues that affect the way in which states pursue domestic regulation. Such provisions were included in these agreements on the grounds that regulatory systems can discriminate in favour of domestic firms or, alternatively, in favour of firms from some, but not all, WTO member states. But to many countries, particularly in the developing world, this inclusion of behind-the-border issues within trade agreements appeared severely to constrain their ability to regulate in ways that many had long considered necessary in order to move their economies up the 'value chain' – from primary commodity production and relatively capital-unintensive product fabrication, to more complex types of economic activity, including high-technology manufacturing, and marketing, branding, and other cross-border services. Holmes *et al.* found that disputes over behind-the-border issues – in which member states litigate on grounds that their trading partners have not fulfilled their obligations to remove discriminatory domestic regulations – have given way to complaints over more traditional sorts of issues. In particular, 'trade-defence' cases have been on the rise: these concern alleged abuse by member states of the provisions within WTO rules that permit them, under a limited set of circumstances, to deviate from the normal principle that trade is to be progressively liberalized. Such provisions include countervailing duties, special safeguard clauses, anti-dumping remedies, and so forth. The cases involved disputes over whether the circumstances necessary to make such defensive actions legally permissible were in evidence.

In the eight years from 1995 to 2002 (inclusive), roughly one-third of all DSS cases were based on complaints concerning the alleged abuse of 'trade defence' provisions. But this overall figure masks significant inter-year variation. In the first year of the DSS's operation (1995), only 4 per cent of cases registered were based on these grounds. The proportion rose only slowly at first – to 13 per cent for 1996. But by 2000, nearly half of cases involved allegations that trade defences were being used unwarrantedly to shield member states who enact them from competitive pressures. In 2001, more than two-thirds of cases (68 per cent) involved such allegations, and this figure remained above the 50 per cent mark in the final year for which data was available (53 per cent in 2002). This shift in the nature of cases, moreover, has had an impact on *who uses the DSS*. Holmes *et al.* argue that, 'The more recent surge in trade defence cases has brought the NICs (newly industrialized countries) and LDCs (less developed countries) more clearly into the picture, especially proportionately, as the EU/US cases have fallen' (2003: 21).

Holmes *et al.* argue that the trend away from behind-the-border cases shows a learning process at work in the DSS. This has several interrelated facets. Complainants are more careful in assessing their chances of winning a behind-the-border case, particularly as they have seen that 'the DSB has issued a number of rulings ... that have interpreted various agreements in such a way as to emphasize the legitimate scope for governments to adopt non-discriminatory, but trade-impeding regulations' (*ibid.*). This combines with another process of adaptation: 'government generally getting used to the rules and learning to play the game better in terms of keeping their regulations within permissible bounds' (*ibid.*: 22).

Why, then, is the legitimacy of the WTO's institution of accountability compromised to the point of being regarded as rigged against poor states? There is a long list of grievances – issues of legal standing, the availability of funds, the appointment of panels, and the rules governing enforcement. In accountability terms, it could be said that several rules governing the operation of the DSS adversely affect the interests of LDCs and developing countries, making them unable either to: (a) obtain answerability; or to (b) impose sanctions against rich countries that fail to honour their treaty commitments.

There are three main complaints against the WTO's fairness as an accountability institution – all of which indicate the difficulties of distinguishing bias from capture. The first is the cost of mounting a case, and the disparity in the ability of different states to meet this elementary hurdle. This is a classic issue in any dispute system, but the huge disparity between states, combined with the need for rich member states to continue in a cordial relationship with poor member states on a regular basis, makes this a starker problem than it is in domestic legal systems. There have been some efforts to try to redress the obscene disparity between rich and poor member states. The Advisory Centre on WTO Law was established to act as a form of legal aid for states lacking the funds to pursue legitimate claims. But the level of funds – and the strings attached – made this a not hugely popular alternative.

The second set of concerns has to do with structural issues. For instance, there have been worries that the procedures used in selecting panellists – both in general terms, and in terms of assignment to particular cases – have worked against the interests of developing countries: Chakravarthi Raghavan and others have complained about appointments procedures within the Secretariat and the Dispute Settlement Body, which administers the Dispute Settlement Understanding (Raghavan 2000). (It is the operation of all of these components, including the actions of member states who either use or are influenced by the existence of these institutions, that I collectively refer to as the Dispute Settlement System.) There have been similar complaints about other elements of the WTO Secretariat, particularly concerning the appointment of ex-delegates. The appointment of Stuart Harbinson (a former member-state delegate) was one such high-profile case.[3] There are a range of other structural issues that could fall into this category: the procedure for adding member states as co-complainants on a case; the lack of clarity in the relationship between WTO treaty law and other multilateral agreements (particularly those dealing with the environment).

The third, and arguably the most contentious, variety of complaint about the DSS's fairness concerns the system for enforcing judgments. As we know, this is a central element in an accountability system. Currently, most developing and LDC member states are disadvantaged in terms of their ability to compel compliance by developed member states with their WTO commitments. Though there are several reasons for this – not least their lack of legal and administrative capacity – a major cause for concern is the bilateral nature of enforcement. The only way for a member state to enforce a Panel decision that has found violation by another member state (in the absence of that state's voluntary compliance with the actions specified in the Panel report) is to impose retaliatory sanctions – that is, to withdraw trade access. When a developing or LDC member state has its complaint upheld, but nevertheless has a small domestic market, the lack of access to which is not a priority for the developed member state against whom a Panel report has ruled, the developing country or LDC deemed by the Panel to have suffered 'nullification or impairment of benefit' has little leverage to enforce compliance on the part of its richer trading partners.

Some of these issues are covered in the next section's discussion of accountability trends (under methods). For now we can note a particular point of controversy with regard to the non-equity of enforcement – in this case the alleged spillover of rich-country influence from other *non*-WTO domains, particularly those based on less democratic (shareholder-based) governance models, like the World Bank or IMF. Moreover,

governments – all governments, but particularly those representing rich (or 'developed') member states – fail to follow practices that would allow less-advantaged people, or associations purporting to act on their behalf, to hold them to account. Poorer-country governments, however, are constrained by these power imbalances in their dealings with DSS officialdom and in dealings with member states with which they may be in dispute.

Proposed reforms to the DSS and the new accountability agenda

From within the mass of governance experiments worldwide a 'new accountability agenda' is in the making. As indicated above, this consists primarily of three interrelated elements: (1) a more direct role for ordinary people and their associations in demanding accountability (2) using an expanded repertoire of methods across a constantly shifting set of jurisdictions, on the basis of (3) a more exacting standard of social justice. Despite the undeniable diversity among these initiatives, and the widely differing contexts in which they have been undertaken, it is possible to discern the defining characteristics of an emerging agenda. There is, of course, a great diversity of policy and advocacy agendas related to governance reform, and these are constantly in flux, changing in response to the unfolding of events. They exist mainly in fragments of conceptual innovation and practical experiment. Efforts to put the elements of the new agenda into practice are, however, more widespread than ever.

International aid organizations, such as the UK's Department for International Development, have put forth a strong commitment to making the WTO's DSS a fairer place. This is found in a number of areas of work. The principle underlying this work is expressed most clearly in para 236 (p. 70) of DFID's 2000 White Paper 'Eliminating World Poverty: Making Globalization Work for the Poor', where there is a commitment to helping 'poor countries ... exercise their rights, on more equal terms' within the WTO's DSS. DFID has already taken steps in this regard by helping to establish the 'Advisory Centre on WTO Law', but this is widely seen as inadequate. DFID and other donors must also target the DSS in particular when pressing 'for special and differential [treatment] provisions to be real and binding' (para 238). In other words, rather than simply using the dispute procedure to adjudicate on the *applicability* of existing special and differential treatment provisions, new such provisions should be devised that would apply to the operation of the DSS *itself*.

Proposals for reforming the DSS that have emerged both during the ongoing Review of the DSU[4] – one of the processes that emerged from the November 2001 Doha ministerial – nicely reveal key issues in the evolving accountability landscape. Reform proposals are thus examined in terms of the agenda's three elements – new *roles* in accountability relationships, new *methods* for obtaining answerability and enforcement, and new *standards* of accountability against which actors can be judged.

New roles

The new accountability agenda consists, above all else, of new types of accountability relationships – with familiar actors playing new roles. In the case of the WTO, the actor is new, though it has a pedigree due to its institutional inheritances from the GATT. Citizens are old actors, but they are making similar demands with respect to the WTO that they have made with respect to other powerful actors who are ultimately accountable to people, but through mediated forms (a shareholders' vote, a national election). Hence, people are demanding less mediation of accountability relationships: they are insisting on being more directly involved in accountability processes. In this case the key point of intermediation challenged is the state's position as a member of the WTO, a status reserved for states by the institution's rules. This is thus a slightly different matter from what one finds in the purely domestic version of this accountability trend, where the role shift consists primarily of citizens demanding to take part in audits of state agencies that are conducted by *other* state institutions – that is, to be at least a secondary spectator and preferably an active participant as the state scrutinizes its own workings. In the multilevel governance case of the WTO DSS, however, the issue is the state's role in a broader sense.

As we have seen, institutional features of the DSS are seen to violate widely shared views on basic fairness. One of these, alluded to briefly earlier, was *legal standing* for participating within WTO disputes. One complaint often heard in this connection is that developed countries are able to obtain – free of charge, as it were – the services of corporations and their lawyers in the preparation of cases. Developing countries do not have those kinds of resources to draw on. Moreover, where a complaint touches on an issue of 'sustainable development', one of the ideas found in the preamble to what is in effect the WTO's constitution, there is almost always insufficient voluntary legal assistance available for cases to be researched and pursued. Non-governmental organizations (NGOs) have sought to insert themselves as friends of the court in some cases, as in the asbestos case and others with environmental consequences, and in some cases have managed to be heard, most notably the 'shrimp–turtle' dispute (Sampson 2000).

Many DSM reform proposals focus on involving non-governmental actors in the process by which Panels and the Appellate Body assess the claims made by disputing parties. This would require the specification of structured procedures for supporting non-state actors – for instance, by regularizing an open and transparent system for submission of *amicus curiae* (friend of the court) briefs that panels would be permitted, but not

required, to consult in considering a case, or even rely upon in rendering a judgment on a specific matter (Umbricht 2001: 773–794). Such reforms have been opposed by various developing country governments, who see them as a means by which expert voices from the north will continue to dictate global economic policy to the south. Developing countries are weary of international aid charities that have absorbed most of the neoliberal assumptions of World Bank economics, and certainly do not want to be lectured to by large Western environmental NGOs, like the Sierra Club, which many critics feel promotes conservation over people's development. Developing countries fear that such (mainly Western) organizations would, if given the chance, use their financial muscle to enter into every dispute involving Southern challenges to Northern environment-linked trade restrictions, food-safety regulations, and so forth. *Amicus curiae* has been seen by its opponents as part and parcel of the strategy to bring labour and environmental standards in through the WTO's back door (as there have been difficulties getting them agreed, as we will see in the 'New standards' section below).

One widely circulated reform proposal is to negotiate an amendment to Article 13 of the DSU (or to support an Interpretive Declaration) that would formally entitle Panels to accept legal submissions (and other forms of information) from non-disputing parties (including NGOs). Two cases gave particular prominence to this reform proposal. The first was the 'shrimp–turtle' case, in which the Panel considered, in formulating its Report, submissions by non-governmental experts. The second case was the complaint by Canada against France, which had banned imports of chrysotile asbestos on health and safety grounds. The Appellate Body in the asbestos case initially invited concerned parties to submit *amicus curiae* briefs, but once submitted, it disallowed them (Marsden 2003).

Discussions with a wide range of developing country actors (including Southern NGO representatives as well as member-state delegations) revealed that such a proposal would face stiff resistance. Developing and LDC member states fear that Northern NGOs (many with more resources than small developing countries) will have undue influence over the dispute proceedings, and that this will work to their detriment.

New methods

The second element of the new agenda is seen in the worldwide activist community's attempts to obtain accountability through an expanded repertoire of methods. These actors have had to navigate the simultaneous processes of localization and globalization, the ceaseless reconfiguration of the scope of accountability relationships. Because scope so closely affects the choice of technique, the analysis of methods has been combined with the discussion of accountability jurisdictions.

In describing activities within the DSS the emphasis thus far has been on the existence of new kinds of relationships, in which actors play unaccustomed roles. But this second feature of the new accountability agenda is also present. The use of a novel set of tools is, in fact, at the heart of the DSS's approach. There is currently widespread acknowledgement that the existing sanctions-based approach to enforcement must be replaced with something fairer (The South Centre 1999). Shaffer is among those who believe that the US and the EU are focusing on procedural issues that 'fail to address the central challenge that developing countries face under the current WTO dispute settlement system: that of remedies' (1999: 5–6). This view is supported by formal submissions by a number of developing countries – for instance, proposals by Ecuador,[5] and by a group consisting of Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania, and Zimbabwe.[6]

Of the many proposals for fixing the problem of enforcement (or 'remedy') discussed at various times – both informally and in more official contexts by member states, multilateral agencies, and NGOs – there are three that share one crucial feature: they address the most commonly voiced concerns about proposed reforms to the DSM – the fear that they will lead to increased protectionism. Officials in the WTO secretariat, as well as developed-country member states, while acknowledging the shortcomings of the existing system, worry that greater leverage for developing countries would mean more retaliation, and therefore a *de facto* deliberalization of trade.[7] These three reform options seek specifically to prevent any net increase in retaliatory sanctions.

The first is to use enhanced (above-normal) trade access to rich-country markets as *itself* a penalty to be imposed by developing countries on rich countries when the latter's trade regimes are found by a panel ruling to be non-compliant with WTO treaty provisions, leading to nullification or impairment of benefit for the developing-country government. Rather than a developing member state obtaining (as a result of a Panel ruling) the right to withdraw trade access (that is, to abrogate the principle of non-discrimination), this reform would force the offending developed member state (whose trade measures were found by a Panel report to have violated treaty provisions) to *reduce* tariff barriers (to a level below what is already stipulated in existing reciprocal commitments) for imports from those member states that had initiated the complaint in question. Which sectors would receive these additional tariff reductions could be left to the Appellate Body, in consultation with the complaining member state, to decide. The additional relief would need to amount to more than the estimated loss arising from the original violation in order to create a positive incentive for compliance. There is also the possibility that access to these self-punitive reduced tariff barriers in the developed member state concerned could be made available to *all* developing member states, rather than only to those that had initiated the dispute.[8]

This solution, however, could well impose sufficiently intense free-rider problems to forestall collective action, and so would need to be carefully modelled.

The second reform proposal that uses a non-trade-sanctions approach recommends that developed-country member states that fail to comply with a Panel ruling be prohibited from initiating a new dispute against *any* member state (developed or developing). This proposal, it is felt (most notably by European country WTO delegates who have experienced first hand the difficulty of establishing an effective WTO Advisory Centre), would act as a serious disincentive to developed member states who might otherwise consider it acceptable to suffer the (not-very-serious) consequences of retaliatory trade sanctions by much smaller developing and LDC member states. Developed countries might conclude that the cost of non-compliance on any given issue was too severe if failing to abide by a Panel ruling meant that they lost their ability to compel compliance from other member states on issues of greater concern.[9]

In the third proposal to reform the enforcement methods used in the DSS, developed member states found by Panels to be in violation of their commitments (in cases brought by developing member states) would be liable, in some instances, to pay monetary damages rather than to suffer trade sanctions. The advantages of this approach, in addition to halting the spiral of protectionist retaliation, is to focus public opinion generally in the penalized developed member states on the costs of non-compliance (rather than relying on discontent among sectoral interests adversely affected by the retaliatory sanctions imposed).

Shaffer argues that 'remedies (which) rely on trade sanction to induce compliance instead of monetary damage awards' allow rich countries to take advantage of their market leverage. His proposal is to 'modify WTO remedies to provide that retrospective monetary damages be awarded when developing countries prevail against developed countries in WTO disputes, as well as (in certain cases) reasonable attorney fees' (Shaffer 1999: 4). He advocates doing this in a phased experimental fashion, so that it applies first to some agreements, and then others. An alternative version of this proposal is to have a portion of the monetary fine paid over to the Advisory Centre on WTO Law. Monetary compensation already features in other aspects of WTO rules (such as with respect to special safeguards), and is also a feature of other (non-WTO) trade treaties.

New standards

New standards of accountability are a central part of the new accountability agenda, but also the most difficult to pin down. New standards – what targets of accountability are to be held accountable *for* – are also closely related to the first two dimensions of the new agenda. Shifting standards, for instance, are a crucial part of what has propelled non-state actors into

unprecedented roles, while the constantly fluctuating scale of accountability jurisdictions also has an impact on the type of criteria that can be used effectively.

Standards debates have also been a source of much controversy in and around the WTO over the past decade – particularly the question of whether trade-access privileges should be conditional upon adherence to internationally agreed norms on the treatment of workers and the environment. Interestingly, it was not possible to reach agreement on these matters, meaning that the WTO's change-resistant properties meant that no action was taken. So there are limits to standard revisions.

Though these 'social-clause standards' were 'driven out of the WTO', as the battle-hardened veterans of these debates put it, a case can be made that other types of standards have been taking root with less fanfare. The most far-reaching is the emerging consensus that poverty reduction, in the form of 'sustainable development' – a term found in both the preamble of the WTO's founding document and in the subsequent Johannesburg summit of 2002 – which while not achieving much in concrete terms, did have the effect of placing further pressure on the WTO to be seen to be using the Special and Differential Treatment (SDT) provisions of the WTO negotiating instruments to support this common aim. Through the instrument of SDT, and in the name of promoting 'coherence' across all sites of North–South negotiation (whether in the World Bank, the IMF, or the WTO), a raft of reform proposals has been floated (Sampson 2001: 69–85). Shaffer's proposal for reforming the enforcement machinery, for instance, is built around the idea that it should be possible to make poverty reduction an explicit factor in deciding the distribution of rights and obligations among WTO member states in the use of the DSS.

Conclusion: towards a domestic/multilateral hybrid?

Thus far we have examined the DSS as a self-contained accountability institution charged with holding states accountable – to one another and to the institution itself – for their substantive treaty commitments and their obligations under procedural rules. This has involved an examination of the DSS's perceived failure to deliver accountability to poorer states, particularly on issues of 'remedy', because of a range of 'biases'. Most critics have stressed this interstate accountability relationship. Indeed, while DSS reform proposals, taken collectively, have embodied much of the new accountability agenda, interstate accountability has remained relatively distinct from what we might call domestic accountability.

In the WTO context, the domestic accountability deficit refers to the inability of ordinary citizens effectively to demand answers from their governments (let alone impose sanctions against them) for either government actions taken *within* the multilateral arena, or the content and sequencing of policy measures introduced (or not introduced) in order to

conform to the provisions of multilateral agreements. Member states are rarely held specifically accountable for their determinations on (a) whether to comply with specific WTO treaty commitments (or panel rulings, if it comes to that); (b) the time frame within which to do so; and (c) the policy levers to be employed. There is a substantial list of decisions that governments, North and South, must make in the course of the dispute-settlement processes: which cases to initiate, which to settle (and on what terms – agreeing to do *what* in order to avoid further proceedings), which actions to undertake when losing a case (in order to avoid retaliation), which forms of retaliation to take when winning a case, and so forth. This gives states far more discretionary power than is often recognized.

The demand that the WTO be made more accountable to ordinary people is often dismissed as an arrogation of power by NGOs, who are not infrequently lacking in accountability themselves. Another common rejoinder is that demands for greater 'access' and 'participation' fundamentally misunderstand the WTO's legal status as an intergovernmental institution, which implies that the relationship between citizens and the WTO must per force be mediated by the state. Thus, according to this logic, if member-state representatives are insufficiently attentive to the domestic distributional consequences of their DSS-related actions, then the appropriate course of action is to shore up domestic processes of accountability. Indeed, the general tendency in DSS reform proposals has been to focus on the interstate aspects of accountability (between rich and poor countries), while expecting the intrastate power inequalities to be addressed separately. This is not an unreasonable position. But there is also a sense in which the divide between the domestic (citizen–state) accountability relationship and the interstate relationship has already begun to evolve. As we saw earlier, there has been limited progress in expanding the role of non-governmental experts in the DSS process through the submission of amicus briefs.

WTO observers have started to acknowledge – at times in an oblique way – the importance of domestic-accountability issues. Charnovitz was one of the first to argue that the domestic component of accountability could be used to rectify the huge inequality in the distribution of the capacities necessary to permit member states to enforce DSS rulings in their favour. In a slight variation on this theme, Charnovitz (2001) argued that 'more can be done to use public opinion as a means to influence' those governments that fail to comply with judgments against them.

More far-reaching proposals envisage something approaching a hybrid form of accountability, in which the domestic relationships of accountability were more firmly linked to interstate aspects of accountability, and vice versa.[10] The range of accountability reforms to the interstate dispute procedure already outlined would need to be combined with measures to open up to domestic scrutiny the process by which these countries bring

complaints to the DSS. Complainants, for instance, could be required to conduct a publicly transparent domestic fact-finding and reporting process to determine which of the many potential cases is worth pursuing – based on an independent analysis of the economic costs of current non-compliance by the targeted trading partner. Such a process would place the governments of developed member states, in particular, under increased pressure (from domestic public opinion) to pursue only valid disputes, not those of concern to only very narrow economic constituencies.

Further domestic-accountability-related SDT provisions could be developed which would require developed country member states that win cases against developing countries or LDCs to conduct a public hearing that would consider the impacts of various proposed forms of retaliatory sanctions on poor people in the target country. The purpose would be to act as a spur to domestic public opinion in donor countries, which might in turn convince developed-country governments that it is self-defeating to promote poverty reduction through development programmes, while simultaneously disregarding the distributional impacts of trade-related measures, including those effected as part of the enforcement function of the WTO's interstate accountability institution.

One set of recommendations for institutional reform of the WTO referred specifically to the difference between internal democracy and external accountability (Action Aid *et al.* 2002). Differentiating between processes within the WTO and those that concern relations with groups outside of its framework is in fact an improvement on much of the insufficiently focussed writings on how the organization's seeming power can be checked. The recommendations for increasing external accountability acknowledged, above all, the current lack of clarity as to the rights and obligations of those who should be the key actors. What 'the general public' desperately need is 'information about ... who is accountable to them for decisions taken at the WTO; and how they can influence these decisions' (Action Aid *et al.* 2002: 9).

In other words, even to the extent that it is necessary to focus more on domestic accountability relationships, the sheer scope of the WTO's influence on policy-making makes it increasingly *necessary* to operationalize these through multilateral rule-changes, resulting in institutional fusion of the two levels. This becomes *possible* because of shifts in the standards against which developed-country governments are being held accountable: initiatives are invariably 'development-led', stressing the need to fix institutions to prevent them working at cross-purposes with the donor community's Millennium Development Goals.

It in fact makes sense for the DSS to perform this role as a hybrid institution: by some accounts, it already is one. Keohane *et al.* (2000) admit that the WTO's DSS falls somewhere between the 'interstate' and 'transnational' types in their categorization of legal institutions. But as the

authors employed three variables, and the DSS scores mainly as an (old-style) interstate institution on two of them, it was only thanks to its enforcement features that the DSS could justly claim partial hybrid status.

Seeing the DSS as a hybrid institution makes further sense if we recognize the extent to which certain domestic actors have already inserted themselves into the processes of multilateral accountability. Shaffer (1999) has documented and analysed the role played by national business associations in supplying their governments with fully researched legal briefs against the states in which their competitors are based. While 'in formal terms', according to Keohane, 'states have the exclusive right to bring cases before (WTO) tribunals', in practical terms 'in the GATT/WTO proceedings the principal actors from civil society are firms or industry groups, which are typically wealthy enough to afford litigation ...' (2002: 179). The result is that 'although states retain formal gatekeeping authority in the GATT/WTO system, they often have incentives to open the gates, letting actors in civil society set much of the agenda' (*ibid.*: 179–180). Linking DSS reforms to domestic processes strikes a balance between the need to respect the state as the critical site of politics and to use inter-state mechanisms to offset some of what is lost by virtue of the accountability-depleting qualities of multilevel governance.

Notes

1 'The WTO is facing a crisis of legitimacy' was the conclusion of a measured discussion paper produced by Oxfam UK, 'Institutional Reform of the WTO', March 2000. Available on line at: http://www.wtowatch.org/library/admin/uploadedfiles/Institutional_Reform_of_the_WTO.htm (accessed 10 December 2001).
2 'Globalisation: The Argument of Our Time', an OpenDemocracy.net debate between Paul Hirst and David Held, 2002. Available online at: http://www.opendemocracy.net/debates/article.jsp?id=6&debateId=28&articleId=637#one.
3 See 'WTO Secretariat's Chef De Cabinet Breaks the Rules', *Focus on the Global South*, 23 September 2002.
4 Formally known as the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (the Dispute Settlement Understanding).
5 *Contribution of Ecuador to the Improvement of the Dispute Settlement Understanding of the WTO*, TN/DS/W/9 (8 July 2002).
6 *Negotiations on the Dispute Settlement Understanding*, TN/DS/W/19 (9 October 2002).
7 This was made clear in the author's interviews with senior officials in the WTO secretariat, and in the delegations of OECD and non-OECD member-states, Geneva, February 2001.
8 *Ibid.*
9 *Ibid.*
10 This form of accountability hybrid – incorporating the national and international levels – is conceptually distinct from another form identified by Goetz and Jenkins, which involves the blurring of the lines between horizontal and vertical forms of accountability. See Goetz and Jenkins 2005.

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14 Conclusion

Actors, institutions and democratic governance: comparing across levels

Arthur Benz and Yannis Papadopoulos

Introduction

By covering analyses of democratic governance from different sub-disciplines of political science, the intention of this volume was to extend the analytical perspectives that usually predominate in debates on this subject. A view that cuts across different levels of politics enables us to comprehend better the variations in the problems of, and prospects for, democratic legitimacy in different governance arrangements: 'There is much to be gained by developing the debate across the empirical and theoretical boundaries between those studying transnational developments, for example, European integration and transnational governance, and colleagues working on network governance at subnational and local levels' (Skelcher 2005: 106).

In the following sections, we draw some conclusions on conceptual and analytical issues that we regard as relevant for future research. We begin with some remarks on the normative concept of democratic legitimacy which provide a common ground for comparing national, European, and international governance, and proceed to point out how this concept can be applied in empirical research. Secondly we focus on actors in governance, assuming that governance includes new actors but does not extend participation of citizens in general. Therefore the justification of the inclusion and exclusion of actors as well as the issue of the accountability of these actors has gained the utmost importance in the governance debate.

Finally, we deal with the institutional framework which sets the rules for the interaction between representatives, from both governments and non-governmental organizations, and those represented in governance arrangements. These rules determine the selection of representatives, and create formal structures of communication and control, in which representatives can be effectively held accountable for their decisions. For that reason we believe that institutional structures of governance are decisive for democratic legitimacy. However, governance structures and institutions are not always congruent; they do not necessarily follow compatible