

Special Issue: Dispute Settlement at the WTO

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Issue Editorial

THE WTO, LEGITIMACY AND DEVELOPMENT

JOEL P. TRACHTMAN*

I am honoured to be invited to contribute a guest editorial for TL&D's Special Issue on Dispute Settlement at the WTO. The editors are to be congratulated for assembling an excellent group of papers by a distinguished group of authors. The editors are also to be congratulated for the topic chosen and the analytical acuity that this group of papers displays.

These papers focus on two main topics, and the intersections between them: legitimacy and development. Although there is wide agreement on the importance of legitimacy and development, both concepts entail a number of analytical dangers. I begin with legitimacy, then discuss development, and conclude with some observations on the relationship between the two and the analytical challenges they pose.

“Legitimacy” means so many things, and is so dependent upon the eye of the beholder, that its use in discourse should probably be banned. Most objectionably, it is used as a way of critiquing legal rules from outside the system that produced those legal rules. That is, a commentator argues that, despite the impeccable positive law credentials of a particular legal rule, it is illegitimate. Or the commentator might argue, as some did with respect to the NATO intervention in Kosovo, that despite a duly established prohibitive legal rule, a violative action is legitimate. In each of these cases, the commentator stands outside an established process and offers his own view regarding the substantive or procedural qualities of the action, setting aside the law. But the commentator acts without particular authority, and does not apply authoritatively formulated standards for determining legitimacy: legitimacy analysis is thus, fundamentally, illegitimate.

Thus, the legitimacy-based critic is in danger of making two errors. The first

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error is in establishing the commentator's vision of justice as superior to that reflected in the legal rule at issue. The second error, which may be combined with the first, is in assuming the hierarchical superiority of substantive justice over procedural justice. In Plato's *Crito* dialogue, Socrates accepts the substantively unjust requirement to drink hemlock, rather than reject the procedural justice of Athenian law. In recounting this story, Plato shows that procedural justice may in some cases supervene upon substantive justice. At least we must understand that substantive justice may sometimes be compromised in order to achieve appropriate levels of procedural justice: procedural justice is a type of justice, and justice of one type must sometimes be sacrificed to achieve justice of another type.

More appropriate, but still problematic, are claims that a particular procedure *should* be made more "legitimate", either through procedural changes or through substantive changes. At least here, the commentator is working with the *lex ferenda*, respecting the nature of law, rather than purporting to override the *lex lata*.

Of course, there are bad, even evil, laws. And of course we should seek their reform. There may even be circumstances in which we should disobey them, sacrificing procedural justice for substantive justice. But a claim of illegitimacy is far too imprecise and subjective to support action.

There is no doubt that the WTO has many faults. The problem is that different observers claim different faults, and one observer's fault is another's merit. So, instead of claiming illegitimacy, we should explain with greater precision what the problem is. In this context, actionable problems must be of one of two main related types, known in the literature as output legitimacy and input legitimacy, but I believe that calling them legitimacy only clouds the issue. Let's call them instead "inadequate welfare" and "inadequate accountability".

Public policy, including rules of the WTO, can be attacked for failing to maximize welfare. It is easy to see that the claim of inadequate welfare requires a great deal more analysis than a claim of illegitimacy. It will often require a comparison, using theoretical and/or empirical tools, of the effects of different proposed legal rules or institutions. Professional grade knowledge about what increases welfare and what does not, will increasingly be viewed as essential to public policy discourse. Those who criticize professionalism and expertise as fundamentally illegitimate have selected ignorance as their guide to public policy formulation.

Claims of inadequate accountability can also be understood in welfare terms. Only by knowing what people want – by having them participate and by having legal and governmental institutions reflect what they want – will we be able to have adequate welfare. We are concerned about participation for instrumental-welfare

reasons. A methodological individualist perspective holds that it is only through participation that governmental processes can reflect individual concerns. There may also be an intrinsic value to participation: even if the process could reflect welfare perfectly, individuals might still wish to be involved in the decision-making. However, it is hard to say precisely why a rational person would care to be involved, if his or her welfare would be maximized without his involvement.

More importantly, if greater participation rights are accorded to people who are not affected by the measures proposed to be taken, or who are less affected than others, increased participation may have adverse welfare effects.

Thus, greater participation of citizens in decision-making is often desirable. But it is not always desirable, and legal systems must deal with the question of which citizens are to participate in decision-making, and how they will do so. Nor is it a foregone conclusion that greater participation at an international level is better, where there is already good participation at a domestic level.

So the main criticisms of the WTO should not be phrased in terms of legitimacy, but should relate to either welfare or participation.

Given this framework, it cannot simply be assumed that WTO dispute settlement should be more transparent than it is, or should allow greater participation by NGOs or other private actors. From a welfare standpoint, there are costs and benefits to transparency, and there may be circumstances in which the costs outweigh the benefits. We might establish a presumption that transparency in the strict sense – greater knowledge of governmental processes – is often welfare-enhancing, simply because it allows those interested to know, about decision-making and to express their preferences.

But can we presume that allowing greater participation by NGOs promotes either welfare or accountability? Indeed, arguments for transparency that include NGO voice or control often pit representative democracy in the form of the state against a proposed discursive democracy, empowering organizations that may pejoratively be referred to as “special interests”. The argument for special NGO voice or control, like the argument for legitimacy, attacks agreed methods of doing procedural justice, assuming that there is something deficient in representational terms about our agreed governmental processes. It would take a good deal of very specific analysis in order to determine whether the special interests add to the welfare analysis or to the quality of participation. Presumably, they would add to the welfare analysis through expertise. At the WTO, developing countries have often argued that greater roles for NGOs may impair welfare from their standpoint.

Where does distributive analysis fit into this framework replacing legitimacy? Of course, if global welfare were maximized by allocating all wealth to a single person, it would be a mean sort of legitimacy that would validate this outcome. So, legitimacy cannot refer to global welfare, but must refer to the welfare of each individual. It must be a normatively and methodologically individualistic concept that asks, on an individual-by-individual basis: Is this individual's welfare being maximized, or is this individual's interest being expressed and taken into account in a way that, *ex ante*, maximizes his probable welfare?

This approach is, in a sense, consistent with a consent-based legal system, in which individuals can consent to constitutional or institutional arrangements that will bind them even if they do not maximize their actual *ex post* welfare, so long as they maximize their *ex ante* probable welfare. This consent based *ex ante* system is also consistent with the economic concept of Pareto efficiency: an arrangement is Pareto efficient if no individual is made worse off, and some are made better off. So, a consent-based legal system may have some characteristics that might suggest that it is efficient from a welfare standpoint, provided that strategic problems and transaction costs do not impede consent to appropriate welfare enhancing arrangements.

However, a consent-based international legal system has ambiguous distributive justice consequences, even if we ignore the fact that it focuses on state consent rather than individual consent. That is, taking into account the existing distributive arrangements, we cannot expect a consent-based system to effect redistribution to the poor unless we make heroic assumptions about the altruism of the wealthy. Otherwise, we cannot expect wealthy countries or individuals to agree to redistribute wealth to poor countries or individuals. Thus, it is not clear that a consent-based legal system is legitimate, to the extent that legitimacy is dependent on appropriate distributive justice arrangements. Conversely, under a consent-based system, the poor may refuse to join in a multilateral system in which their participation is valuable to the wealthy, unless they are compensated for their participation.

There is no doubt that the world's distributive arrangements are off-kilter and do not satisfy any reasonable conception of justice or legitimacy. But not every claim or argument that uses the word "development", or that asserts an interest or right of developing countries, will be appealing. Rather, careful analysis –often using social scientific tools –is necessary in order to determine what works to promote development. Moreover, what works in one country may not work in another country. Development is dependent on a nuanced combination of factors and institutional arrangements that can be expected to vary from country to country. Of course, even once we know what works, it is not a simple matter to take the necessary action.

Thus, there are two problems in achieving poverty alleviation, which is the presumed goal of development. First, it is not certain what measures will best alleviate poverty (the problem of what to do). Second, it is difficult to muster the political will to take these costly measures (the problem of how to do it), especially under a consent-based system.

Let us begin with the problem of what to do, in the context of trade. The quasi-legal concept of “special and differential treatment” (S&DT) for developing countries that has been a mantra of the international trade system, is sometimes advanced as a way of alleviating poverty, and perhaps of adding legitimacy to the system. Although S&DT still features prominently in the Doha Development Agenda, it appears that it has limited utility, at least as applied so far. S&DT is a complex phenomenon – some aspects of which are undoubtedly beneficial. It includes several specific rules and approaches that can be placed in four categories: non-reciprocity, preferential market access, permissive protection, and technical assistance.

First, S&DT includes the concept, initially expressed in the mid-1960s, that poor countries will not be expected or requested to make reciprocal concessions in trade negotiations. This vague principle was later incorporated in Part IV of the General Agreement on Tariffs and Trade (GATT). However, those who are not required to reciprocate often find that few concessions are accorded to them – even under conditions of most favored nation non-discrimination. This lack of reciprocity is because the products of export interest to developing countries often differ from those of interest to other countries, and so they are not included in the give-and-take of negotiations over concessions.

Second, S&DT includes the aspiration to provide enhanced market access to developing country products. Partly because of the principle of non-reciprocity, this aspiration has often been ignored. The area in which S&DT has had its greatest effect is in connection with the Generalized System of Preferences (GSP), which provides for reduced tariff treatment for certain developing-country products. Although the GSP has provided modest benefits, it has not been applied to provide greater market access for many of the most important poor country products, and the United States and European Union have imposed substantial conditions on access to their GSP programs. “Graduation” policies, including ceilings on eligible exports, have also diminished the utility of the GSP.

Furthermore, as developed-country tariffs have decreased to an average of less than 5 percent, and with the formation of more free-trade areas and customs unions, the preferences under the GSP have been greatly eroded, and will be further eroded in the future. The magnitude of the differential has declined

substantially. If benefits are unstable and are a wasting asset, they cannot form a sound basis for investment that would allow poor countries to actually achieve market access. Furthermore, the principle of non-reciprocity, as implemented through the GSP, seems to have the effect of diminishing incentives for liberalization by beneficiary countries. Liberalization by poor countries would often be expected to provide welfare benefits.

Third, S&DT includes greater permission for protection, in particular under Articles XII and XVIII of the GATT, relating to balance of payments. For much of the past thirty years, a consensus – part of the “Washington Consensus” – developed that poor countries would benefit from liberalization of their domestic markets. The debate about whether protection of domestic markets is good or bad for poor countries has recently been revived. However, solid reasons still exist for poor countries to liberalize at some point in their development path. Furthermore, there would seem to be little basis for questioning liberalization as to goods and services, such as financial and telecommunications services, that provide infrastructure for other productive activities.

Fourth, technical assistance may be useful insofar as it helps poor countries to address wealthy markets, and helps them to assert their interests in liberalization or in their own protection in negotiations or in dispute settlement. However, it is not necessarily true that technical assistance in dispute settlement is the best way to assist developing countries. Would those resources be better spent on export promotion or on technical assistance to enhance negotiating capabilities, or even on health care or education?

Other than technical assistance and other measures to improve the ability of poor countries to advocate their interests, S&DT offers only ambiguous benefits. Furthermore, it may be understood as a sop to poor countries in place of more serious and costly development or distributive justice efforts.

So, there is certainly no consensus among economists that either (i) the failure of S&DT has somehow caused poverty, or (ii) any of the features of S&DT have been beneficial for poor people. Indeed, it seems equally likely that the S&DT mindset has resulted in actions that would reduce the welfare of poor people.

If there were more consensus regarding the problem of what to do, it would be politically easier to do it. The problem of how to do it is, in part, dependent on the problem of what to do. But the problem of how to do it – politically – is crucial. As suggested above, it is difficult to find in a consent-based international legal system the possibility for strong redistributive action. However, in a consent-based legal system, it is possible to find ways to share in the benefits of liberalization in such a way as to promote liberalization in favour of exports of

goods, services and labour of the poor. This liberalization is a way to allow the poor to compete side-by-side with the wealthy, and is the key to wage convergence.

Not every action urged in the name of development is beneficial to poor people, just as not every action urged in the name of legitimacy promotes either welfare or participatory values. On the other hand, measures that increase welfare, that enhance participation in a way that increases welfare, and that narrow distributive differences, will be attractive. Critics of the WTO, and others interested in public policy, would do well to focus on these parameters, and to develop analytical skills that will allow them to frame their arguments in these terms, rather than in terms of legitimacy, or in terms of unverified assumptions about development or poverty reduction, like many of those involved with S&DT.