

CIVIL SOCIETY AT THE WTO: THE ILLUSION OF INCLUSION?

*Jeffrey L. Dunoff**

In this brief essay, I want to link our panel's focus on civil society—and related issues of inclusion and participation—with the broader conference theme of international law and organizations as we enter the 21st century. In short, what can a focus on inclusion and participation tell us about the World Trade Organization (WTO) as it enters the new millennium?

I believe that a focus on inclusion and participation suggests a three-part thesis about the WTO. First, the WTO is in a time of fundamental transition. Second, the strategies used to date to address this transition have been, at best, ineffectual, and at worst, counterproductive. Third, the transition issues reveal the limits of current WTO practices and strategies. Successful approaches to transition issues will require not only new political strategies, but also new understandings of the trade regime.

I can do no more than outline this thesis here. To do so, I will explore a few simple sounding questions: “who,” “what,” and “where.” “Who” is a question about constituents: who has a meaningful voice, and who is excluded from the trade system? “What” is a question about competence: what subject areas fall within the trade system? “Where” is a question about coherence: where does WTO law and doctrine fit within the larger international law universe?

Each of these questions implicates civil society, and issues of inclusion and participation. The “who” question focuses directly on Non-Governmental Organization (NGO) participation at the WTO. The “what” and “where” questions focus on issues that NGOs have pressed upon the WTO. As we will see, in each area, there are significant pressures for the WTO to be less closed or isolated, and more inclusive, open, or integrated. In each area there are moves towards these goals, but upon examination, it is not clear whether progress is real or illusory.

* Professor of Law and Director, Transnational Law Program, Temple University School of Law. This paper is a slightly revised version of a presentation at the International Law Association's International Law Weekend in October 2000. An expanded treatment of the ideas presented here can be found in Jeffrey L. Dunoff, *The WTO in Transition: Of Constituents, Competence and Coherence*, 33 GEO. WASH. INT'L L. REV. (forthcoming 2001). I am grateful to Padideh Ala'i for the opportunity to participate in this conference, and to Jane Baron for helpful comments on an earlier version of this paper.

I then want to explore a final question: "How?" How are these transition issues related? How come they seem so intractable? How might they be solved?

I

The "who" question asks who has a meaningful voice in the WTO. Until recently, there was a short and simple answer to this question—the United States and the Europeans. But, after the Uruguay Round, increasing pressure from both inside and outside the WTO signaled that this was no longer an adequate answer.

Inside the WTO, developing countries raised concerns about the *nature* and *quality* of their participation. The procedural concern was that developing nations had been largely excluded from the most important Uruguay Round negotiations. The substantive concern was that the Uruguay Round Agreements favored developed nations at their expense. Developing nations saw an asymmetry between the very limited progress on developed nations' Uruguay Round commitments on textiles and apparel, and the increasing pressure on them to timely implement their Uruguay Round commitments. By 1999, this asymmetry made the Uruguay Round's "grand bargain" look more like a "bum deal."

Developing nations resolved not to be effectively excluded from the process again. In retrospect, the protracted debates over selection of a new WTO Director General signaled that developing nations were no longer willing to conduct business as usual. The procedural demands that developing nations raised at Seattle underscored how important this issue had become. There are also, of course, external pressures, from NGOs and other sectors of civil society. Here, the concern has less to do with the quality of participation than with near-total exclusion, and related concerns about WTO transparency.

In Seattle, these internal and external trends coalesced. In the streets, NGO theatrics captured public and media attention. In the suites, developed and developing nations were unable to reach agreement on either procedural or substantive issues. On the procedural front, developing nations rejected the United States proposals for working groups. On the substantive front, there was deep disagreement over the scope of a new round, including the possible inclusion of, for example, labor and environmental standards and reform of anti-dumping rules.

Since Seattle, much time has been spent on how to improve the quality of developing nations' participation. There have been numerous meetings, proposals, and reports. But many thoughtful observers question whether much progress has been made.

On the NGO front, there has been substantial activity and some important progress. However, this limited progress is often oversold. An example here is the ostensible opening of WTO dispute resolution to NGOs. In this regard, the most dramatic development was the Shrimp-Turtle Appellate Body (AB) report holding that Panels had legal authority to receive amicus briefs from NGOs.¹ This is widely heralded as an important breakthrough in NGO participation at the WTO.

But it may be too soon to conclude that this doctrinal development should be celebrated. It is instructive to look at actual practice. Prior to the Shrimp-Turtle dispute, NGOs had submitted amicus briefs in two disputes. In each case, the panel simply refused to consider these submissions.²

In Shrimp-Turtle, the panel followed this pattern and concluded that NGO briefs were inadmissible as a matter of WTO law. However, the panel then invited the parties to append NGO briefs to their own, which the United States did. While the AB explicitly rejected the panel's legal determination, it expressly approved the panel's decision to permit parties to append NGO briefs to their own and adopted a similar procedure itself. The AB then specifically asked the United States to state whether it "agree[d] with or adopt[ed]" the NGO arguments. It then "focused" solely on the NGO arguments that were already in the United States submission.

Since the AB report, amicus briefs have been submitted in a handful of disputes. In one case, a panel actually appeared to have relied on an amicus submission. This occurred, however, not in determining the merits of the dispute, but rather in a later compliance proceeding.³

In every other case in which amicus briefs or other materials have been submitted, it appears that they have had little or no impact. For example, in the course of the European Community challenge to a portion of the United States Copyright Act, the United States Trade Representative (USTR) asked the American Society of Composers, Authors and Publishers (ASCAP) for information in response to a series of queries from the panel. A law firm representing ASCAP responded, by letter, to the USTR, and forwarded a copy of this letter to the panel. The panel stated that while "it did not reject outright the information contained in the letter," it did not rely on the letter "for our reasoning or our conclusions."⁴

1. Appellate Body, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998).

2. Appellate Body, *United States-Standards on Reformulated Gasoline*, WT/DS2/AB/R (May 20, 1996); Appellate Body, *EU-Measures Concerning Meat and Meat Products*, WT/DS26/R/USA (Aug. 18, 1997).

3. Award of Arbitrator, *Australia - Measures Affecting Importation of Salmon*, WT/DS18/9 (Feb. 23, 1999).

4. Report of Panel, *United States-Section 110(5) of the US Copyright Act*, WT/DS160/R, ¶ 6.8

In India's challenge to the European Union's imposition of antidumping duties on certain Indian bed linens, the panel received an unsolicited amicus brief from the Foreign Trade Association supporting India's arguments. The panel's entire discussion of this submission, found in a footnote, reads as follows: "We did not find it necessary to take the submission into account in reaching our decision in this dispute."⁵

In the British Steel case, the United States asked the panel to open up the hearing to outside observers. This request was denied. The panel also refused to accept an amicus brief submitted by the American Iron and Steel Institute (AISI) on the grounds that it had not been timely filed.⁶ On appeal, amicus briefs were submitted by AISI and the Specialty Steel Association of America. The European Union, Mexico, and Brazil argued that the AB had no authority to accept these briefs; the United States argued that such authority existed. The AB stated:

We are of the opinion that we have the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so. In this appeal, we have not found it necessary to take the two *amicus curiae* briefs filed into account in rendering our decision.⁷

The most recent—and the most telling—developments on this front have come in the Asbestos Case. At the panel stage of this dispute, five NGOs submitted amicus briefs. The European Community incorporated by reference two of these briefs, which the panel considered. The other three NGO briefs were rejected, again with minimal discussion.⁸

The European Community appealed the decision. When it became apparent that many NGOs wanted to submit briefs in this action, the AB issued a "communication" setting out a procedure whereby interested entities could file a petition for leave to file a written brief with the AB. In response, the WTO's General Council scheduled a special meeting to discuss this communication and the larger issue of NGO participation. At this meeting, a large majority of WTO

(June 15, 2000).

5. Report of Panel, *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, at n.10 (Oct. 30, 2000).

6. Report of Panel, *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R, ¶ 6.3 (Dec. 23, 1999).

7. Appellate Body, *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, ¶ 42 (May 10, 2000).

8. Report of Panel, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, ¶¶ 6.1-6.4 (Sept. 18, 2000).

members who spoke criticized the AB for issuing this communication. The Chair of the General Council stated that he would forward a note to the AB urging it to exercise “extreme caution” on this issue. The AB denied each of the seventeen applications for leave to file an amicus brief that had been filed in the case.

So, on the doctrinal front, there is an apparent advance—panels and the AB now clearly have legal authority to accept NGO submissions. But, paradoxically, the resulting practice is actually a step backwards for those who urge greater NGO involvement. In practice, NGO submissions are frequently rejected. In those few instances when they are even considered, they typically are considered only when adopted by a party. In these cases, NGOs do not participate as independent actors, but rather as “appendages” to the parties’ submissions. In practice, they participate at the sufferance of the parties to the dispute. But, by effectively turning NGOs from independent actors into entities that simply echo government arguments, the panels eliminate the potential advantages of NGO participation.

Moreover, this process reinforces many of the conventional argument against NGO participation—that NGOs most appropriately participate at the domestic level, that states are free to adopt or reject NGO positions, and that NGOs should not have “two bites at the apple” by participating at the international level. While doctrinal developments deprive NGOs of a powerful rhetorical argument about the closed nature of WTO dispute resolution, actual practice effectively keeps NGOs excluded from WTO dispute resolution.⁹

In short, despite substantial activity, there is a real question whether meaningful progress has been made on the inclusion front. Do we, in practice, have only the illusion of inclusion?

II

Let me now turn from the “who” question to very briefly touch upon the “what” question. What issue areas are properly in the trade regime? What topics are—or should be—properly considered in other fora?

There is substantial debate over whether certain “social” issues, such as environment or labor, should be within the WTO. NGOs have, of course, played a key role in these debates. While a full discussion of this controversial topic is outside the scope of our focus on civil society, I suggest below why this debate—forcefully raised by civil society—is unlikely to reach closure anytime soon. For present purposes, however, the salient point is that NGOs have put

9. This is particularly disturbing when one considers the access the other types of non-state actors have to WTO dispute resolution proceedings. See, e.g., Jeffrey L. Dunoff, *The Misguided Debate Over NGO Participation at the WTO*, 1 J. OF INT'L ECON. L. 433 (1998) (outlining the considerable roles that business entities play in WTO dispute resolution).

this issue on the table, and absent progress toward a consensus on this question, negotiations on a new WTO round are unlikely to make significant progress.

III

There is a third important transitional question, “where?” Where does WTO law fit into the broader international law universe? This is a question about coherence. Again, NGOs have been at the center of the debate, urging the WTO to account for non-trade law and values. Once again, there is apparent movement on this front, as recent WTO panels have been much more likely to invoke non-WTO law. The question, as above, is whether, in this context, appearances are deceiving.

Again, the Shrimp-Turtle dispute provides a good example. The AB reviewed relevant provisions of several international environmental instruments in interpreting General Agreements on Tariffs and Trade Article XX. This was unprecedented, and the environmental community and other NGOs have largely celebrated this move. Again, this appears to be a move from a relatively insulated legal regime toward a more open regime.

But the underlying question is whether the incorporation of non-WTO law will be a “selective” incorporation? For example, as long as the AB was invoking international environmental law in this dispute, why did it not examine whether complainants had any duties under international environmental law towards endangered sea turtles? Why did it not directly address whether the United States embargo was either authorized or required by international environmental law—even though this issue was squarely presented in an NGO amicus brief? So, the critical question here is whether panels will use all or only some non-WTO law. More pointedly, with future panels rely on non-WTO law where to do so does not interfere with the goal of market access and trade liberalization, but fail to do so where non-WTO law impedes these objectives?

So, in the “who,” “what,” and “where” issues there is tremendous pressure from civil society to be more inclusive, more open, and more integrated. In response, there has been much activity apparently designed to move towards this goal. But, in each case, progress may be more apparent than real. Again, the open question is whether all the activity represents real progress or merely the illusion of inclusion?

IV

The “who,” “what,” and “where” questions illustrate the nature and scope of the issues facing the WTO as it enters the new century. Now let’s explore another question: “how?” How are these issues related? How come they seem so difficult? How might they be solved?

Let me suggest three ways these transition questions are related. First, each of the three questions are not only central to the WTO's transition, but also raise fundamental questions about nature of the international legal order. Consider again the question of what issues belong in the trade system. On one level this is a question about the competence and limits of the WTO. But on a deeper level, this question is a profound challenge to the current conventional vision of public international law. We usually view international law as consisting of a series of substantive fields (e.g., trade, human rights, environment, etc.) that exist as independent and autonomous areas, each subject to its own practices, norms, and institutions.

But this way of organizing the field is historically contingent. Today trade is a hugely visible area of international law. However, in the 1960s, leading casebooks considered trade to be outside the mainstream of international law, and, in 1971, the French Society of International Law sponsored its famous debate on whether international economic law was part of international law or an autonomous discipline.¹⁰ All of this suggests that there is nothing necessary or natural in current doctrinal divisions. Elsewhere, I have argued that the "who" and "where" questions also raise foundational international law issues. So one way that the transitional issues are related is that they transcend the trade context and raise foundational questions about the international legal order.

There is a second way that the three questions are related. Each of them reveals and subverts a fundamental myth about the trade system. Given space constraints, I will again give just one example. Consider again the question of who participates in the WTO. In this context, many invoke the "fact" that the WTO is an intergovernmental body as a justification for not providing NGO access to WTO processes. It is surely true that, as a formal textual matter, the WTO is an intergovernmental body. But, again, it is helpful to shift our attention from doctrine to actual practice.

There can be little doubt that non-state actors have long played very significant—albeit informal and unofficial—roles in both the legislative and dispute resolution processes. Consider, for example, the role of the software and pharmaceutical industries in driving the intellectual property agenda in the Uruguay Round negotiations. Or, how firms like American Express and AIG shaped the negotiations over what would eventually become the General Agreement on Trade in Services.

Non-state actors also play significant roles in dispute resolution. Indeed, a number of WTO disputes—including the Kodak-Fuji dispute and the Reformulated Gas dispute¹¹—are only nominally between WTO parties, and can

10. SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL, COLLOQUE D'ORLÉANS, ASPECTS DU DROIT INTERNATIONAL ÉCONOMIQUE (Paris, éditions Pedone 1972).

11. Report of Panel, *Japan - Measures Affecting Consumer Photographic Film and Paper*,

be more fruitfully understood as components of complex international corporate battles.¹²

Close examination of the role of civil society reveals that the truism that the WTO is an intergovernmental body is formally accurate, but in practice largely a myth. The “what” and “where” questions likewise reveal myths about the trade system. The underlying question is whether these myths serve some purpose. Or, at this point, do they instead frustrate efforts to move ahead on the WTO transition issues?

Let me briefly outline a third answer to the question of how the “who,” “what,” and “where” questions are related. In a nutshell, what is at stake in these issues is fundamentally different from what is at stake in more traditional trade issues. Let me try quickly to explain what I mean here.

The conventional wisdom about trade disputes runs along the following lines: Nation A restricts trade in goods from nation B. If B prevails in WTO dispute resolution, A is supposed to remove the offending trade measure. While A “loses” the particular dispute, the conventional understanding is that A “wins” because removing the trade restriction increases welfare.

But for many of the most controversial of the current disputes, this conventional understanding of the “win-win” nature of disputes is inapposite. Consider disputes over intellectual property rights in the traditional knowledge of indigenous peoples; over trade in GMOs; over the “multifunctional” nature of agriculture; over trade in cultural products; or over the role of civil society at the WTO. Why are these disputes so highly charged, and why do they seem so intractable?

I wonder if it is because participants in these disputes do not understand them to be about maximizing welfare. Rather, they understand these disputes to be about the social and moral standing of competing communities, whether regional or racial, cultural or economic. Groups directly involved in these debates often understand their resolution as a signal about their political and social standing. The traditional consequentialist logic of trade law and doctrines is unlikely to adequately capture this important “expressive” dimension of these issues.¹³

V

Identifying the ways that these three questions—the “who,” “what,” and “where” questions—are related also shows how hard they are to solve. If they

WT/DS44 (Apr. 22, 1998); Appellate Body, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996).

12. For an extended discussion, see Dunoff, *supra* note 9.

13. This idea is explored in Jeffrey L. Dunoff, *Some Costs and Benefits of Economic Analysis of International Law*, 94 PROC. AM. SOC'Y. INT'L L. PROC. 185 (2000).

each reveal myths of the system; if they each reveal how our conventional consequentialist rhetoric is insufficient; if they all raise foundational international law questions; then the resolution of these issues will be exceedingly difficult. How should these issues be addressed?

Given space limitations, let me simply suggest here that the primary institutional mechanism used to date is inadequate. Who has decided whether WTO panels should use non-WTO law? The answer has come from dispute resolution panels. Who has decided whether NGOs should participate in dispute resolution processes? Again, the panels have been, *de facto*, the body to answer this question. This is problematic in several respects.

I'll mention just one. Consider institutional roles and politics. When a domestic legislature confronts difficult issues like, for example, how to balance conflicting trade and environmental interests, it is perfectly appropriate for that body to declare that it has resolved a value conflict, and made policy, through majority vote. But the same is not true of WTO panels. They are not policy-making bodies. Instead, they are supposed to apply law to fact to decide according to principle, not politics. Indeed, WTO dispute resolution would be delegitimated if it were seen as a forum for the political resolution of value conflicts.

But this poses an unavoidable obstacle to successful panel resolution of questions like the "who," "what," and "where" questions. Why? Precisely because these transition issues are so contested. While numerous issues are contested, the transitional issues are today contested in a way that appears to take them outside of the legal domain, and squarely into the political domain. Now, paradoxically, it has been sustained and effective NGO advocacy that has made these issues so contested; but it is precisely this contestedness that would make it difficult for panels to address these issues in ways that seem consistent. But inconsistency in these areas would signal that politics—not law—is at play. And for institutional reasons, panels should rarely send that signal.

In other words, these transitional issues threaten to overwhelm WTO dispute resolution. While the WTO dispute resolution system is, of course, a tremendous achievement, the plea here is to be cognizant of its limitations.¹⁴ Where does all this leave us? Let me conclude with two thoughts about transitions.

First, in transitional times, procedure is substance. There are strong procedural elements to the "who," "what," and "where" questions. These are all a search for ways to surface the appropriate voices and values. In this sense, at least in the short term, it may be less important that the resolution of any of

14. For more on the ways that the new trade agenda threatens to overburden WTO dispute resolution, and what to do about this, see Jeffrey L. Dunoff, *The Death of the Trade Regime*, 10 EUR. J. INT'L L. 733 (1999).

the questions is “correct” in some substantive sense, than that the resolution ensure that all the relevant interests are identified and taken into account.

Finally, we should not be surprised by the ubiquity. The ancient Greek philosopher Heraclitus said that “one cannot step into the same river twice.” There is a useful insight here about the constancy of change. We should not be surprised to see that the WTO is in transition. Like people, legal rules and institutions have life cycles. They are born because of a practical need. If well-designed, they flourish for a time. But changing conditions pose new challenges. When the tensions between a rule and social necessity finally become too intense, the rule dies. It is replaced by another rule that is destined to experience the same fate. So it may be that we will come to see that for the WTO—and the other international bodies we will discuss at this conference—to be in a time of transition is more a norm than an aberration, and more an opportunity than a crisis.