World Trade Review (2005), 4: 3, 391–399 Printed in the United Kingdom
© Sungjoon Cho doi:10.1017/S1474745605002533

A quest for WTO's legitimacy

SUNGJOON CHO*

The WTO Consultative Report, dubbed the 'Sutherland Report' (the Report), was released on 17 January 2005 in an attempt to identify the WTO's institutional challenges, to provide non-binding recommendations from eminent persons, and thus to trigger a 'process of reflection'.[1] While these challenges (and criticism) vary, they are inextricably linked to the fundamental question of the legitimacy of WTO as a *system*, not necessarily as a mere gathering of 148 Members. In fact, the question has hotly been debated ever since the WTO's creation, generating a great deal of debates and reactions among scholars and politicians alike.

The Report did not explicitly address the question of WTO's legitimacy. In a sense, every chapter of the Report is related to WTO's legitimacy in that both WTO's norm (e.g., non-discrimination) and institution (e.g., dispute settlement mechanism and decision-making procedure) eventually shape how the WTO is perceived and evaluated by the outside world. Yet, Chapter V 'Transparency and Dialogue with Civil Society' may be considered as the most proximate chapter to the theme of legitimacy in that it attempted to respond to one of the most vocal critics of the WTO, i.e., non-governmental organizations (NGOs) and civil society, as well as their main criticism, i.e., lack of transparency.

In a nutshell, the Report confirmed the WTO's achievements in improving its external relations with NGOs; attempted to disillusion NGOs, for instance the disparity of capacity and resources among them; and recommended Members to take stronger initiatives in this issue through offering more funding and guidance. Although the Report's analysis and recommendations in Chapter V are generally agreeable, the chapter leaves further questions regarding WTO's legitimacy. In particular, it did not pay due attention to the general public, i.e., actual/potential 'users' of the WTO system. Although NGOs and civil society may hold certain stakes and influences in WTO's legitimacy, they are not users of the system per se, even if we fully grapple with their often elusive identities. After all, WTO's legitimacy ultimately rests on voices of everyday people around the world (*vox populi*).

* Assistant Professor of Law, Chicago-Kent College of Law, Illionois Institute of Technology, Chicago, IL, USA.

1 'The Future of the WTO: Addressing Institutional Challenges in the New Millennium', WTO Consultative Report, 'Foreword', at 2 [hereinafter the Report]. This Report can be downloaded from the WTO website at http://www.wto.org/english/thewto_e/10anniv_e/10anniv_e.htm#future. See also Sungjoon Cho, 'The Future of the WTO: Report by the Consultative Board', *ASIL Insights* (Januaury 2005), http://www.asil.org/insights/2005/01/insight050131.htm.

https://doi.org/10.1017/S1474745605002533 Published online by Cambridge University Press

This comment approaches the issue of legitimacy as one of the main challenges that WTO faces today. The comment documents and amplifies certain analyses and recommendations in Chapter V of the Report and then further pushes the legitimacy question by focusing on the WTO's images and perception to ordinary people. It concludes that education and social marketing can contribute to enhancing WTO's legitimacy, and calls for more investment in such direction.

1. Two concepts of legitimacy

The concept of legitimacy as an evaluative criterion for a polity or an institution can be defined both narrowly and broadly. A narrow definition mainly concerns formal procedures,[2] such as ratification, while a broad one concerns 'societal acceptability' of the polity or institution.[3] This narrow and broad concept of legitimacy is deeply associated with the institutional nature of WTO. The more one emphasizes the 'inter-governmental' nature of the WTO, the closer its legitimacy approaches a narrow view. According to this view, the WTO's legitimacy is attributed to that of WTO Members. If Member governments are legitimate, then the WTO should also be legitimate because these governments negotiated, signed, and ratified the WTO. Yet, that is not the end of the story, at least to those who cast doubts on the WTO's legitimacy. Even though the WTO is a Member-driven organization, Members themselves often blame the WTO system itself, not merely other Members, for various alleged failures and poor performance, be they concerning negotiation or dispute settlement.[4]

Yet, more routine attack on the WTO's alleged lack of legitimacy has steadily been undertaken by NGOs and the titular civil society. Thanks to the 'global associational revolution',[5] new players like NGOs have recently been added to the global trading community, rendering the intergovernmental *ethos* less sustainable than before. At the same time, the success of GATT and the launch of WTO have generated high expectations among observers and pulled like a 'magnet' attention from a broad audience.[6] This widening of the observer or stakeholder circle has led to a shift in the dimension of WTO's legitimacy

2 See Joseph H. H. Weiler, 'The Transformation of Europe', 100 *Yale L. J.* 2403, 2468–2469 (1991) [hereinafter Weiler, 'Transformation']. In a similar yet slightly different context, Thomas Franck scrutinized the legitimacy of international rules by focusing on a 'rule's and a rule-making process' legitimacy,' and regarded legitimacy in terms of the 'compliance pull' of such rules. Thomas M. Franck, *The Power of Legitimacy among Nations* (New York/Oxford: Oxford University Press, 1990), p. 49.

3 Weiler, 'Transformation', *supra* note 2, at 2468–2469.

4 See, e.g., Max Baucus, 'US Trade Laws and the WTO', http://www.senate.gov/~finance/press/pr092702.pdf (condemning the WTO tribunal as a 'kangaroo court').

5 The Report, *supra* note 1, para. 176.

6 See Steve Charnovitz, 'Triangulating the World Trade Organization', 96 *Am J Intl L* (2002), 28, 29; Sylvia Ostry, 'The WTO and International Governance', in Klaus Günter Deutsch and Bernhard Speyer (eds), *The World Trade Organization Millennium Round: Freer Trade in the Twenty-First Century* (Routledge, 2001), pp. 285, 290, 293.

https://doi.org/10.1017/S1474745605002533 Published online by Cambridge University Press

from a narrow to a broad one, which corresponds with acceptability by this extended society. The focal point of their criticism is the WTO's esoteric, insulated operative structure, which is allegedly disconnected from the external environment, i.e., themselves. Yet, their target is seldom certain (powerful) Members of the WTO, such as the United States or the European Union, but rather the WTO itself.

2. Transparency and external relations

Transparency is attentive to the foregoing social acceptability in that it enhances visibility and communicativeness of the WTO operation *vis-à-vis* the extended base of audience. If the WTO's decision-making process can be made transparent to the public, subject to various inputs from various levels of participants of the global trading community – namely, governments, NGOs and the civil society in general – and thus facilitate discussion, deliberation and enlightenment on a global scale, the WTO can be deemed acceptable and thus legitimate.[7]

The Report seems to largely share this premise. It viewed that NGOs and civil society are helpful *if* the WTO's engagement with them is 'proper'.[8] It documented hitherto WTO's engagement with NGOs and civil society, such as a broader extent of de-restriction of documents and web-posting,[9] NGOs' improved access via briefing and attendance to major meetings such as Ministerial Conferences and other public symposia,[10] and 'online outreach'.[11] The Report observed that such engagement has been proper, extolling the Secretariat's effort despite such scant resources.[12] Then, the Report brought up the merits of engagement with NGOs and civil society. First, in terms of public relations (PR) such engagement can promote the WTO's image and enhance awareness of the WTO in general.[13] Second, NGOs can distribute 'knowledge and expertise' and thus contribute to the multilateral trading system in various ways.[14] For instance, they can help poor Members negotiate more effectively with their rich counterparts.[15] Third, they may be 'quite effective in building caucuses and in influencing governments to shift positions and strengthen their commitment to

7 See Paul B. Stephan, 'Accountability and International Lawmaking: Rules, Rents and Legitimacy', 17 *Nw. J. Int'l L. & Bus.* (1996–97), 726–727 (arguing that 'the greater the quantity and quality of information generated during the formation of the rule, the more willing would be the decision-maker to respect the international norm').

8 The Report, *supra* note 1, para. 194.

9 Ibid., para. 183.

10 Ibid., para. 184.

11 Ibid., para. 185.

12 Ibid., para. 180.

13 Ibid., para. 189.

14 Ibid., para. 193.

15 Ibid., para. 197.

https://doi.org/10.1017/S1474745605002533 Published online by Cambridge University Press

agreed rules'.[16] Finally, they can 'serve to create space in the domestic policy-making arena for Member governments to overcome domestic barriers to further liberalization'.[17]

Nonetheless, the Report's position on NGOs and civil society was not without caution and reservation. First, the Report underlined asymmetrical resources and capacity among NGOs, in particular between northern and southern NGOs.[18] Second, it warned that NGOs might distract and burden certain Members, in particular developing countries, by 'adding parallel tracks' in trade negotiations.[19] Third, it observed that certain NGOs might be neither accountable nor transparent themselves.[20] Fourth, NGOs should be excluded from a deal-making process, which is reserved only for Members.[21] The Report added that Members, not the WTO Secretariat, should decide on how to deal with NGOs and civil society by providing certain 'guidelines' on this matter.[22] In sum, the Report took a balanced position on the role and status of NGOs in the WTO.

Despite the foregoing merits of NGOs and civil society as well as an irreversible trend in their saliency in general, the Report's forebodings may well be amplified for the sake of disillusionment before we ponder on further engagement with them. First, the inter-governmental nature of the WTO tends to be at odds with accommodating NGOs beyond a certain level, such as observers. Only government delegates can negotiate, attend meetings, and sue (or be sued) in the WTO. NGOs' various inputs may supplement, but should not supplant, those governmental activities. Second, an ontological question about 'civil society' should be seriously addressed. What is it? Is it merely a large cluster of NGOs? Or NGOs-plus? Who are these people? Some bloggers in the cyberspace? Who elected them? Who are funding them? Are they fired or hired for what they say or do?

It is not my intention to trivialize any possible contributions from specific NGOs and more a general civil society, albeit unidentifiable. Of course, they can be useful in many ways, as was noted by the Report. They can help prevent the WTO from being insulated from the outer world or reneging on a pro-trade biased organization in the past life, i.e., GATT 1947. Cross-fertilization that may transpire from encounters with them can even enhance the WTO's legitimacy through better reconciliation of trade and non-trade values within the WTO. Nonetheless, certain aspects of NGOs and civil society must be put under strict scrutiny before the WTO decides to further engage with them. The WTO cannot, and should not, deal with what cannot be clearly identified and explained.

16 Ibid., para. 194.
17 Ibid., para. 195.
18 Ibid., paras. 197, 209.
19 Ibid., para. 198.
20 Ibid., paras. 199, 209.
21 Ibid., paras. 200, 210.
22 Ibid., para. 212.

https://doi.org/10.1017/S1474745605002533 Published online by Cambridge University Press

3. A case for education and social marketing

As discussed above, the WTO still remains an inter-governmental organization. Yet, such a formal institutional arrangement may not be equated with its deeper identity, i.e., a 'multilateral trading system'. In other words, the WTO *system* goes beyond a mere inter-governmental contract under which a breach may be bought off at a certain price against a hoary backdrop of the *Lotus*-type sovereignty.[23] A true value of a well-functioning multilateral trading system tends to pierce the veil of sovereignty or intergovernmentalism, reaching out to ordinary people. As Professor John Jackson suggests, the global trading system features a 'rule structure' guaranteeing a certain amount of 'predictability and stability' on the basis of which countless *individual economic decisions* can be made.[24] Likewise, the *Section 301* panel (1999) held that:

> The security and predictability in question are of 'the multilateral trading system.' The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of *individual economic operators*. The lack of security and predictability affects mostly these individual operators.[25]

The nature of the WTO as a 'legal system' tends to rethink the role of NGOs and civil society in terms of the WTO's legitimacy. Even much improved WTO external relations with NGOs and civil society does not necessarily win the deep trust of ordinary people over the WTO's value or usefulness, which should be a paramount yardstick of legitimacy. Although more efforts on the PR front through allocation of additional resources and personnel, as was recommended by the Report, may satisfy certain NGOs, that is not simultaneously translated into the WTO's effective outreach down to earth. If NGOs have already fixed their own agenda,[26] which may be against the WTO's basic direction, it is hard to change their attitudes toward the WTO, even through these PRs.[27] Moreover, there is no guarantee that those NGOs represent the opinions at the grass-root level, i.e., *vox populi*, about international trade and the WTO. One of the worst scenarios might be that improved external relations only serve a certain clientilism for the benefits of certain big, powerful NGOs, while undermining the

23 The WTO's prototype, i.e., the GATT 1947, did manifest this *contract*-like nature in its earlier stage of institutional development. See Sungjoon Cho, 'The Nature of Remedies in International Trade Law', 65 *U. Pitt. L. Rev.* (2004), 763, 766–767 [hereinafter Cho, 'Remedies'].

24 John H. Jackson, 'Fragmentation or Unification among International Institutions: the World Trade Organization', 31 *N. Y. U. J. Int'l & Pol.* (1999), 823, 825.

25 WTO Panel Report on United States, Sections 301–310 of the Trade Act of 1974, WT/DS152/R, para. 7.76 (27 January 2000) (emphasis added).

26 See Anne-Marie Slaughter, *International Law and International Relations* (Hague Lecture, Vol. 285) (Hague Academy, Hague, 2000), Chapter III (discussing many possible identities of NGOs such as pressure groups, advocacy groups, and interest groups).

27 The Report, *supra* note 1, para. 185. See e.g., 'Global Trade Watch', WTO, http://www.citizen.org/trade/wto/ ('[T]he WTO system, rules and procedures are undemocratic, un-transparent and non-accountable and have operated to marginalize the majority of the world's people.').

https://doi.org/10.1017/S1474745605002533 Published online by Cambridge University Press

autonomy and integrity of the WTO in blind pursuit of a 'politically correct path'.[28]

Markedly, NGOs' activism risks over-representing *politics* and at the same time under-representing *law*. When NGOs pass judgment on the WTO, they seem to regard it as a *political* entity close to the World Government in which political battles waged by big corporations determine destinies of varying important regulatory issues, ranging from the environment to intellectual property rights.[29] However, this political portrayal over-simplifies and exaggerates the true nature of the WTO. Decisions flowing from the WTO are not necessarily determined by power dynamics or diplomatic contingency. On the contrary, the main channel through which the WTO yields regulatory decisions is its dispute settlement system, a (quasi-) judicialized mechanism which generates *jurisprudence*. Mere political description of the WTO, without taking into account this jurisprudential aspect, risks misunderstanding the WTO as well as its legitimacy.

The hotly debated *Tuna–Dolphin* dispute in the early 1990s provides a case in point. In this dispute, many environmental NGOs severely criticized the GATT panel report[30] on the grounds that the panel unduly rejected a legitimate environmental concern, namely the protection of an endangered species (dolphins), in the name of free trade.[31] However, a closer examination of the panel report would soon reveal that what the panel condemned was nothing but the 'unilateral' approach taken by the US that failed to take into account development concerns of a poor tuna-harvesting country (Mexico).[32] Nonetheless, the panel report stirred the public sentiment to a great extent thanks to some NGOs' effective strategy employing a rather graphic way of protest, such as the picketing of a 'GATTzilla'

28 The report, *supra* note 1, para. 186.

29 See e.g., Lori Wallach *et al.*, *Whose Trade Organization?: A Comprehensive Guide to the World Trade Organization* (2nd edn, New York: The New Press, 1994).

30 GATT Report of the Panel, *United States – Restrictions on Imports of Tuna*, DS21/R-39 S/155 (3 September 1991) [hereinafter *Tuna–Dolphin* Report].

31 See Sungjoon Cho, 'Linkage of Free Trade and Social Regulation: Moving beyond the Entropic Dilemma', *5 Chi. J. Int'l L.* (2005), 625, 625–626 [hereinafter Cho, Linkage].

32 *Tuna–Dolphin* Report, *supra* note 30, para. 5.28. ('The United States had not demonstrated to the Panel – as required of the party invoking an Article XX exception – that it had exhausted all options reasonably available to it to pursue its dolphin protection objectives through measures consistent with the General Agreement, in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas. Moreover, even assuming that an import prohibition were the only resort reasonably available to the United States, the particular measure chosen by the United States could in the Panel's view not be considered to be necessary within the meaning of Article XX(b). The United States linked the maximum incidental dolphin taking rate which Mexico had to meet during a particular period in order to be able to export tuna to the United States to the taking rate actually recorded for United States fishermen during the same period. Consequently, the Mexican authorities could not know whether, at a given point of time, their policies conformed to the United States' dolphin protection standards. The Panel considered that a limitation on trade based on such unpredictable conditions could not be regarded as necessary to protect the health or life of dolphins.').

https://doi.org/10.1017/S1474745605002533 Published online by Cambridge University Press

devouring poor little dolphins with blood dripping from its mouth, which certainly enjoyed media focus.[33]

A radical prescription for overcoming this under-representation of law and achieving ultimate legitimacy at the grass-roots level may be found in the titular 'constitutionalization' thesis under which WTO rules can self-execute in the domestic arena in a similar way that the doctrine of 'direct effects' operates in the EU.[34] However, this option remains 'fanciful and even mischievous'[35] in the absence of necessary supranational paraphernalia at the WTO.[36] Yet another similarly radical proposal has been raised which advocates private parties' standing in the dispute settlement procedure so that their various interests can be adjudicated in the WTO.[37] However, apart from its sheer infeasibility, this proposal is tantamount to tackling one problem with another one, namely politicization of the dispute settlement system.[38]

A more modest yet doable proposal for the legitimization of the WTO might be to help ordinary people reach a more informed understanding of the WTO via an improved communication of the WTO norm. Obviously, judgment and evaluation on the WTO should eventually be the *people*'s prerogative, not the politicians' or NGOs'. Yet, people's judgment on the WTO need not necessarily be based on over-politicized images through the lens of scandals, fears, or obsessions, it could instead be based on rational understanding of the WTO norm and subsequently well-advised deliberation. Alas, WTO panel reports are however written in a way which even scholars trained in the field of international trade law suffer to read and digest them. To ordinary people, these lengthy reports

33 See Cho, 'Linkage', *supra* note 31, at 625–626.

34 See e.g., Ernst-Ulrich Petersmann, 'How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?', 20 *Mich. J. Int'l L.* (1998), 1, 30 (arguing that 'European integration law and WTO law confirm the Kantian insight that rule of law requires compulsory judicial protection of freedom and non-discrimination at home and abroad'.).

35 Joseph H. H. Weiler, 'Cain and Abel – Convergence and Divergence in International Trade Law', in Joseph H. H. Weiler (ed.), *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade* [hereinafter *Common Law of International Trade*] (New York/Oxford: Oxford University Press, 2000), p. 4.

36 See Joseph H. H. Weiler, 'Epilogue: Towards a Common Law of International Trade', in *Common Law of International Trade*, *supra* note 35, at 202.

37 See Andrea K. Schneider, 'Democracy and Dispute Resolution: Individual Rights in International Trade Organizations', 19 *U. Pa. J. Int'l Econ. L.* (1998), 587 (arguing that increased involvement of private parties to the dispute settlement procedure is a way to increase the WTO's legitimacy); Glen T. Schleyer, 'Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System', 65 *Fordham L. Rev.* (1997), 2275; G. Richard Shell, 'The Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization', 17 *U. Pa. J. Int'l Econ. L.* (1996), 359; Steve Charnovitz, 'Participation of Nongovernmental Organizations in the World Trade Organization', 17 *U. Pa. J. Int'l Econ. L.* (1996), 331.

38 Regarding criticism on the proposal to extend the WTO standing to private parties, see Philip M. Nichols, 'Realism, Liberalism, Values, and the World Trade Organization', 17 *U. Pa. J. Int'l Econ. L.* (1996), 851; Philip M. Nichols, 'Extension of Standing in World Trade Organization Disputes to Nongovernment Parties', 17 *U. Pa. J. Int'l Econ. L.* (1996), 295.

https://doi.org/10.1017/S1474745605002533 Published online by Cambridge University Press

are full of esoteric WTO semantics and codes which few would actually venture to read, let alone comprehend.

In order to educate the public about WTO jurisprudence, two conditions should be met. First, to enable a direct legal discourse between the global trading system and domestic constituencies, an accessible yet comprehensive heuristic of international trade law should be created. To the extent that panel reports remain arcane, international trade law cannot be effectively informed, understood, or used by people. Therefore, greater efforts should be exerted to introduce and teach international trade law to non-specialists in an accessible yet systematic manner. This task would be greatly facilitated by compilation of a '*Jus Gentium* of International Trade' or 'The Law of Trading Nations' which can function as a Restatement in an undemanding format. Second, a reachable platform, be it a website or a newsletter, where people can gain access to this heuristic should also be provided. A public, uncommercialized service in its true sense can help people better access this educational and consultative avenue. Importantly, such a platform should be designed in due appreciation of the necessity of 'social marketing' for the sake of intuitive and compelling communication to ordinary people.[39]

Conclusion

WTO's engagement and dialogue with NGOs and civil society is a double-edged sword. It certainly enhances the WTO's legitimacy through nurturing transparency and promoting PRs. On the other hand, it tends to further strain the WTO's resources which are already in a sorry state, distract the Secretariat from its main responsibilities, and even risk undermining the integrity of the WTO through unnecessary and even harmful over-politicization. Yet, the WTO's legitimacy is linked more to its users, i.e. people, than to NGOs. If the WTO is eventually to serve people and facilitate peace and prosperity, WTO as a *legal* system should be fully appreciated and accepted by everyday people. For this purpose, people should be informed and educated about WTO norms. This didactic approach with its direct orientation toward ordinary people will sensitize, or sanitize, the domestic legal terrain not by a directly imposing apparatus such as constitutionalization but more by an osmotic process of enlightenment. As a result, the gravitational force of international trade law can be better absorbed in the domestic legal system.[40] Under these circumstances, the WTO's legitimacy becomes close to a 'default pattern'[41]

39 See e.g., Social Marketing Institute, Social Marketing, http://www.social-marketing.org/sm.html.

40 See Cho, 'Remedies', *supra* note 23, at 802–807 (discussing 'indirect recognition' which domestic courts respect WTO rules using domestic legal instruments).

41 Cf. Harold Hongju Koh, 'Why Do Nations Obey International Law?', 106 *Yale L. J.* (1997), 2599, 2645–2658.

https://doi.org/10.1017/S1474745605002533 Published online by Cambridge University Press

as more people act as 'norm entrepreneurs'[42] and 'compliance constituencies'.[43]

Member countries must realize their own stakes in enhancing the legitimacy of the WTO, which they own themselves. They have to pour more money and personnel in this project, and enable the Secretariat to effectively implement the project. Certainly, NGOs can also lend their hands in disseminating WTO rules to the public and educating them. Beyond challenging the WTO's legitimacy, NGOs can actually contribute to it.

42 Cf. Harold Hongju Koh, 'Bringing International Law Home', 35, *Hous. L. Rev* (1998), 623, 648.

43 Cf. Miles Kahler, 'Conclusion: The Causes and Consequences of Legalization', 54 *Int. Org.* (2000), 661, 675–676.

https://doi.org/10.1017/S1474745605002533 Published online by Cambridge University Press