The Struggle for Legitimacy in the WTO

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Introduction

The World Trade Organization (WTO), which was established in 1995, faces two major challenges to its legitimacy and credibility as an international organization.

The first is to make its internal decision-making system more transparent and inclusive, particularly with respect to the developing and least developed countries (which now represent over 100 of its 146 Members). This is the challenge of “internal legitimacy”.

The second is to respond to external critics—mainly non-governmental organizations (NGOs) and non-state actors—who maintain that the WTO is a closed, non-democratic, bureaucratic/autocratic supranational entity. This is the issue of “external legitimacy”. The external legitimacy challenge arises, in part, because the WTO administers a complex set of agreements that reach deeply into subjects normally assumed to be the province of national and sub-national levels of government—for example, intellectual property, health and safety standards, regulation of services, and subsidies. In addition, the dispute settlement system, with its compulsory jurisdiction and binding decisions, more closely resemble domestic judicial systems than the usual voluntary, international arbitration mechanisms.

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With respect to the issue of internal legitimacy, I shall argue that the difficulty with the decision-making procedures in the WTO do not result from defects in the rules, but rather from the revealed preference of the Members of the WTO to proceed largely by consensus, cumbersome as that might be. Changing the procedures for taking decisions is not likely to change the attitudes of WTO Members. Furthermore, changing the decision-making rules would only exacerbate the problems of internal legitimacy within the WTO, because it would increase the perceptions of developing countries that they are not included in the decision-making processes. However, the WTO has become a very complex enterprise and needs a smaller body than the General Council to address the many administrative, procedural and housekeeping issues that arise, as well as to help set priorities and to help provide direction for the system. In my view, a management board could be made to work in a way that would be inclusive of all WTO Members.

With respect to the issue of external legitimacy, it is the dispute settlement system that has attracted the most attention in the last few years. Whereas the political and legislative bodies of the WTO have been viewed as weak and incapable of taking decisions, the WTO dispute settlement system is viewed by most delegations and observers as having been extremely effective—some would even say "too strong".1

To an important extent, this line of criticism of the WTO is emerging from the United States. There is a growing perception in Washington—especially among lawyers representing U.S. industries in antidumping, countervail and safeguards investigations—that the WTO panels and Appellate Body have been

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1 European Trade Commissioner, Pascal Lamy, in a speech to the German Council on Foreign Relations in Berlin on November 27th, 2001 (after the Doha Ministerial Meeting) stated that "the WTO is fundamentally a weak institution. ... The WTO has a substantial body of rules, including a very strong (some would say too strong) dispute settlement system, but its rule-making machinery is heavy-handed and indeed sometimes chaotic — decisions reached by consensus, usually only at the intermittent biannual Ministerial meetings." Trade Commissioner Lamy's speech is available at http://europa.eu.int/comm/trade/speeches_articles/spla86_en.htm.
“overreaching” and legislating in recent cases.² It is alleged that panels and the Appellate Body have disregarded the intent of negotiators in the WTO legal texts and have created new rights and obligations based on their own policy objectives. In doing so, it is argued, the dispute settlement bodies “undermine the legitimacy of the WTO’s agreements, the WTO and its dispute settlement system, and future negotiations on trade.”³ The imbalance that has emerged between the judicial and legislative branches of the WTO, some have argued, represents, in the view of some, a “formidable constitutional flaw”.⁴ It is against this background that the United States together with Chile tabled a proposal in the negotiations on the Dispute Settlement Understanding (DSU) in Geneva aimed at “improving flexibility and Member control in WTO dispute settlement”.⁵


⁵ Contribution by Chile and the United States, “Negotiations on Improvements and Clarifications of the Dispute Settlement Understanding on Improving Flexibility and Member Control in WTO Dispute Settlement”, WTO Doc. TN/DS/W/52, March 14 & 18, 2003. Ironically, in the Uruguay Round, it was the European Communities who called for greater “flexibility and Member control” in WTO dispute settlement while the United States
Is the WTO constitutionally flawed? Have the judicial bodies exceeded their authority under the WTO Agreement and "legislated", thereby creating new rights and obligations for Members and, by the same token, threatening its legitimacy? I will argue that panels and the Appellate Body have not been "legislating" contrary to the intent of negotiators, but rather have been "clarifying" the existing provisions of the WTO Agreement in accordance with the customary rules of interpretation of public international law as they are required to do. In other words, they have simply been doing their jobs as any international or domestic judicial body would do.

WTO dispute settlement has two tracks, diplomatic and judicial. The diplomatic track includes consultation, mediation, conciliation and arbitration mechanisms, including the good offices of the Director-General. A significant percentage of WTO cases settle early in this diplomatic phase. When a case is referred to a panel, it moves into the judicial track.

The current panel and Appellate Body process in the WTO is thus a hybrid between the "diplomatic" and the "judicial" models. Rather than injecting more "flexibility and Member

6 Under Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") and Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Antidumping Agreement").

7 Marc L. Busch and Eric Reinhardt, "The Evolution of GATT/WTO Dispute Settlement", Chapter 5 in this volume, pg 143.

8 Interestingly, Busch and Reinhardt maintain that, after a panel has been established and a case has moved into the formal judicial process, the chances for settlement are greatly diminished. This is not surprising. In fact, it demonstrates that the parties realize that, at that point, they have entrusted the dispute to an independent, impartial tribunal to be determined on the basis of the law. Ibid.
control” into the panel and Appellate Body processes as some have proposed, the legitimacy challenges facing the WTO would best be met by improving the diplomatic process while at the same time taking measures to further “judicialize” or “professionalize” the panel system, improve the rules and procedures for compliance with WTO rulings, and enhance transparency and understanding of the system by opening up panel and Appellate Body hearings to the public.

The following section discusses the issue of legitimacy in conceptual terms. Subsequently, the issues of legitimacy raised by the functioning of the dispute settlement mechanism and of the WTO’s rule-making institutions are addressed in turn. The final section draws some conclusions.

**What is “Legitimacy”?**

The issue of legitimacy is, as noted by J.H.H. Weiler, an inveterate observer of the evolution of the European Community, “part of the standard vocabulary of court watching”.\(^9\) In the last few years, it has also become a hot topic for WTO watchers. Although many commentators have written about the so-called “crisis of legitimacy” in the WTO, few have defined the term with any precision.\(^10\)

Robert Keohane and Joseph Nye Jr. equate “legitimacy” with notions of democracy and accountability. They state that

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“in the contemporary world, democratic norms are increasingly applied to international institutions as a test of their legitimacy.” Democratic governments, they maintain, “are judged both on the procedures they follow (inputs) and on the results they obtain (outputs).” With respect to inputs, they argue that the key issues are accountability and the transparency of decision-making procedures. The legitimacy of international organizations, as of governments, also depends upon substantive outputs—that is, on their effectiveness. Although Keohane and Nye recognize that domestic (or even EU) models of democracy do not apply to international organizations (in particular, because there is neither a coherent world polity nor are there institutional arrangements linking the public to those governing these organizations), they recommend that formal political channels be established between international organizations and constituencies within civil society.

Any examination of the legitimacy of an institution, therefore, must be based on both inputs and outputs. On the input side, the institution must be accountable to its constituencies (however defined) and transparent. On the output side, the institution must be effective. Furthermore, because the perceptions of constituents and observers can be more important than the objective realities, the institution must also be perceived to be effective.

Robert E. Hudec, a renowned legal scholar on the GATT and WTO, has questioned whether the WTO is an institution of governance, separate from the governments which comprise it. He maintains that the WTO is, first and foremost, an international organization and, as such, definitions of legitimacy applied to it cannot be the same as definitions applied to national governments. Grounding discussions of legitimacy in relation

12 Ibid., 290-291.
to the WTO in notions of democracy, therefore, is fundamentally flawed.

Taking Professor Hudeček’s sage advice, we see that, first and foremost, the WTO is an intergovernmental organization comprised of 146 member governments. Most decisions of its political/legislative bodies (i.e., the Ministerial Council, the General Council, other Councils, and Committees) are taken by consensus, although in certain cases the WTO Agreement provides for simple majority voting and in other cases for decisions to be taken by a two-thirds or three-fourths majority. The WTO Agreement itself also constitutes a system of law—for legal purists, an international system of rules—enforced through an automatic and binding dispute settlement system.

Thomas M. Franck, in his book, *The Power of Legitimacy Among Nations*, searches for the properties of “legitimacy” as it applies to international systems of rules. He defines “legitimacy” in this context as: “a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in a concordance with generally accepted principles of right process.” Legitimacy theory, he acknowledges, “has many mansions. If this be muddle, it is muddle of a very high order…. In his search for a taxonomy of the properties of legitimacy, Franck poses the question: “Why do nations obey rules?” And, he proposes the following hypothetical answer to this question: “Be-

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15 “Those addressed”, Franck states, could include “nations, international organizations, leadership elites, and, on occasion, multinational corporations and the global pop ulace.” *Ibid.*, 16.


cause they perceive the rule and its institutional penumbra to have a high degree of legitimacy.”

In developing his hypothesis, Franck defines and examines four indicators of legitimacy applicable in “the community of states”: determinacy, symbolic validation, coherence and adherence. His hypothesis asserts, furthermore, that “to the extent a rule, or rule process, exhibit its these four properties it will exert a strong pull on states to comply. To the extent these properties are not present, the institution will be easier to ignore and the rule easier to avoid by a state tempted to pursue its short-term self-interest.”

A rule’s determinacy is defined by its textual “clarity” or “transparency”—“that which makes its message clear”. Franck recognizes, however, that the degree of clarity of a rule may reflect the degree of agreement among its negotiators. Even textually vague or opaque rules may be made determinant, he states, by a clarification process which itself is perceived as legitimate, such as a court or an international dispute settlement process.

Symbolic validation represents the cultural and anthropological dimension of legitimacy that communicates the “validity” or the “authenticity” of a rule or a rule-making institution. “Ritual” and “pedigree” are forms of symbolic validation, which is part of the legitimation strategy of all communities, or rules-based systems.

Coherence, which Franck notes, is different from “consistency”, relates to a rule’s “connectedness” or “nexus” to ra-
tional principles of general application. “Coherence legitimates
a rule, principle, or implementing institution because it provides
a reasonable connection between a rule, or the application of a
rule, to 1) its own principled purpose, 2) principles previously
employed to solve similar problems, and 3) a lattice of prin-
ciples in use to resolve different problems.”24 Coherence applies
both “internally (among the several parts and purposes of the
rule) and externally (between one rule and other rules, through
shared principles).”25 In examining coherence and its effect on
the perception of a system’s legitimacy, Franck assumes that
there exists a “community” of nations with a “system of prin-
ciples, rules, and decision-making processes.”26

Finally, adherence is what turns an international commu-
nity into a system of rules. By “adherence”, Franck means “the
vertical nexus between a primary rule of obligation ... and a
hierarchy of secondary rules identifying the sources of rules and
establishing normative standards that define how rules are to be
made, interpreted, and applied.”27 Primary rules, that repre-
sent merely ad hoc arrangements between parties, will not exert a
“pull toward compliance” unless they are reinforced “by a hier-
archy of secondary rules which define the rule system’s ‘right
process’.” Rather, “a rule is more likely to obligate if it is
made within the framework of an organized normative hierar-
chy, than if it is merely an ad hoc agreement between parties in
a state of nature.”28

Franck’s indicators of determinacy, symbolic validation,
coherence and adherence provide a framework for assessing the
“legitimacy” of the WTO as an international system of rules.

24 Ibid., 147-48.
25 Ibid., 180.
26 Ibid., 181. Emphasis added.
27 Ibid., 184.
28 Ibid.
For example, we can assess the extent to which the WTO legal system exerts a “compliance pull” on its Member states. We can examine the inputs into the WTO rule-making and dispute settlement processes to assess whether due process and fairness (i.e., “right process”) are applied in making and interpreting the rules. And we can analyze the outputs of the system, by assessing the quality and coherence of the dispute settlement decisions interpreting the rules.

Against this background, this chapter discusses the functioning of the dispute settlement system, which has pulls both toward diplomacy and judicialization, and of the WTO’s rule-making institutions—its political/legislative bodies—to assess whether they are effective in contributing to the legitimacy of the WTO as an international system of rules.

The Dispute Settlement System

The "Diplomatic" vs. The "Judicial" Model

There has long been a tension between the “diplomatic” and the “judicial” features of GATT/WTO dispute settlement. Even during the GATT era, multilateral dispute settlement was evolving ever more towards a judicialized model. For example, in 1989, improvements to the dispute settlement process agreed at the Montreal Ministerial Meeting of 1988 enabled panels to be automatically established upon the request of a complaining party. Under the previous GATT system, a consensus deci-

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29 I have previously referred to this as a “balance” between the pragmatic and the legalistic, but if it is a balance, it is a delicate one. Debra P. Steger and Susan M. Hainsworth, “World Trade Organization Dispute Settlement: The First Three Years”, 1:2 Journal of International Economic Law 199 (June 1998); See also Robert E. Hudec, Enforcing International Trade Law: The Evolution of the Modern GATT Legal System, Butterworths, 1993, 11-15; J.H. Jackson, Restructuring the GATT System, Royal Institute of International Affairs, 1990, 59-68.

sion of the GATT CONTRACTING PARTIES had been required to establish a panel, and, thus, to initiate proceedings. Pursuant to the 1989 Improvements, panels were also given standard terms of reference, a change from the previous practice of the parties determining the terms of reference through negotiation.

The reforms to the DSU agreed in the Uruguay Round, which inter alia provided for binding decisions and established the Appellate Body, accelerated this trend. In fact, Professor Weiler has characterized these modifications as representing a “paradigm shift” toward the “juridification” of the WTO. 31

A major problem in the GATT system had been that reports or decisions of panels had to be adopted by a consensus decision of the CONTRACTING PARTIES in order to become legally effective. However, a party could (and sometimes, did) “block” the adoption of a panel report. The DSU reforms addressed this problem by providing that the reports or decisions of panels and the Appellate Body were to be automatically “adopted” by the Dispute Settlement Body (DSB), a political body made up of all WTO Members, unless there were “reverse consensus” decisions against adoption. Reports of panels and the Appellate Body become legally effective upon their adoption by the DSB. Decisions of the DSB to authorize retaliation (i.e., suspension of concessions) for failure to implement the rulings of a panel or the Appellate Body were also to be taken “automatically”, meaning that once a party to the dispute had formally requested authorization to retaliate, if all the legal requirements had been met, the DSB would have been bound to take that decision, unless there were “reverse consensus” decisions.

The establishment of the Appellate Body, a standing tribunal devoted to hearing appeals on questions of law and legal interpretation from panel reports, was intended by Uruguay Round negotiators as part of the quid pro quo for automatic

adoption of panel reports—in effect, it was to safeguard against the occasional “wrong” decision of panels. The Appellate Body is comprised of seven persons, appointed by consensus by the Members of the WTO, on the basis of their qualifications taking into account the overall geographic representation and diversity of legal systems within the WTO Membership. All but one of the seven incumbents of the Appellate Body are legally-trained jurists; most have distinguished backgrounds in public international law or international economic law generally, rather than in trade policy per se. Their qualifications are very similar to those of judges appointed to other international tribunals. The Members of the WTO, whether by deliberate design or by default, have appointed highly respected jurists—with judicial skills and perspectives—to the Appellate Body.

The DSU reforms, especially the establishment of the Appellate Body, have driven the system more dynamically toward a “judicialized” model, but elements of the “diplomatic” model remain. These diplomatic elements make the dispute settlement system more acceptable to the delegations of WTO Member governments in Geneva, and thus contribute to its “internal” legitimacy. However, these same diplomatic elements raise questions of accountability and reduce the transparency of the WTO dispute settlement system to the outside world—in other words, they detract from its “external” legitimacy.

There is a struggle over legitimacy within the WTO, and the dispute settlement system has become the battleground. There are conflicting pulls on the system. From within, Member governments perceive the dispute settlement system as essentially diplomatic and want to keep it that way so as to enhance their “control” over it. From outside, NGOs and representatives of civil society maintain that the system must become more open and transparent, and must provide greater access to WTO processes—e.g., through amicus curiae briefs—as well as

access to the information prerequisite for informed participation, not only for Members of the WTO but also for non-state “stakeholders”.  

The “Diplomatic” Vestiges Remaining in the Panel System

Several vestiges of the “diplomatic” model of dispute settlement remain in the panel system in the WTO. They endure because most WTO Members put a high priority on retaining control and authority over the system (both in terms of inputs and outputs). The two most important diplomatic features are the selection and *modus operandi* of panels and the confidentiality or secrecy of dispute settlement proceedings.

Panels are selected by the agreement of the parties to the dispute, based on nominations made by the WTO Secretariat, and can be composed of government officials or non-governmental individuals. The overwhelming majority of panelists selected to serve since 1995 have been government officials, often working with delegations in Geneva. When the parties cannot agree on the three persons to sit on a panel, the Director-General of the WTO may appoint the panel.

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34 The recent proposal by Chile and the United States in the Doha Round DSU negotiations underlines this desire to “control” even the judicial aspects of the dispute settlement system. See note 5 herein.

35 DSU, Article 8.

36 DSU, Article 8.7.
occurring in an increasing number of cases, because the parties cannot always agree on the composition of panels.

The function of panels, as set forth in Article 11 of the DSU, illustrates the tension between the “judicial” and “diplomatic” approaches. On the one hand Article 11 requires a panel to “make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements”. On the other hand, this same Article states that panels “should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.”

In order to assist them in carrying out their functions, panels are provided with a sparse set of working procedures in an appendix to the DSU, and are instructed that they may devise additional procedures which “provide sufficient flexibility as to ensure high-quality panel reports, while not unduly delaying the panel process.”

While the DSU provides only that a panel must “consult” with the parties to the dispute when it wishes to adopt additional procedures, panels have been reluctant, on their own, to adopt procedures without the agreement of the parties. This has led the WTO Secretariat to develop a model set of working procedures, which most panels now adopt. However, these procedures deal mostly with issues such as timeframes for filing submissions, holding meetings and responding to questions. They do not deal with the more difficult and contentious issues, such as admissibility of amicus curiae briefs.

Panels are assisted in their deliberations by legal officers of the WTO Secretariat. Because the government officials who sit on panels tend not to be legally trained and often have little time for their panel work, the legal officers assigned to the panel at times take a lead role in assessing the facts, analyzing the legal issues and drafting the panel’s decision. The parties are given an opportunity to review the panel’s decision before it is circu-

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37 DSU, Article 11.

38 DSU, Article 12.2.
lated, and may submit comments to the panel for consideration in finalizing its report. Although the interim review process has rarely led to a panel changing its conclusions or its legal reasoning, it has led, in certain cases, to some important clarifications being made.

The continuing selection of panelists on an *ad hoc* basis from the pool of Geneva-based government officials contributes to the “internal” legitimacy of the dispute settlement system because it gives WTO Member governments at least the perception of control over panel proceedings. Parties to the dispute can select those whom they want to sit on a particular case (more particularly, they can reject suggestions made by the Secretariat even for reasons as specious as the continent from which the person originates). The parties can determine the panel’s procedures. They can present the facts as they see them, and they are given an opportunity to comment on the panel’s description and assessment of the facts (parties are often very particular about how their arguments and evidence are presented in the descriptive parts of panel reports). And, finally, the parties can comment on a panel’s conclusions and legal reasoning even before the final panel report has been circulated and made public.

The *ad hoc* nature of the panel system, the background and qualifications of persons typically appointed as panelists, the lack of consistency and coherence in panel procedures from case to case, and the inconsistency in the quality of the legal reasoning of panels, all contributes to a perception by the outside world of a closed system run by bureaucrats and government trade policy officials, so-called “insiders”. There is some accuracy to that perception of the panel system. Each panel is appointed to hear a particular case, and works in isolation from other panels, without the requirement to observe specific rules of procedure or rules of evidence. The only unifying institutional influence is that of the WTO Secretariat officials—legal officers and panel secretaries assigned to work on the case (although not all the legal officers who work with panels are in the Legal Affairs Division; they are drawn from different divisions within the Secretariat).
Thus, within the panel system, there are weak institutional mechanisms for ensuring coherence and consistency. This militates against common approaches to issues of natural justice, fairness and due process. Moreover, since panelists are appointed solely to hear the case before them, they do not typically take a long-term institutional view of the practices and procedures they are developing, or of the substantive issues of interpretation they may confront, because their goal is simply to assist the parties to that dispute to come to a mutual resolution of that case.

Confidentiality or secrecy is a hallmark of WTO dispute settlement which is explicitly mandated in the DSU: panel deliberations, Appellate Body proceedings, submissions of parties and third parties to a dispute, as well as information provided to a panel by outside individuals or bodies are required to be kept confidential. This emphasis on confidentiality is a vestige of “diplomatic” dispute settlement. Governments have traditionally maintained that keeping proceedings confidential provides them the flexibility to resolve disputes through negotiation. It is true, keeping submissions and proceedings confidential does give the governmental parties to a dispute a privileged position of being the only ones who know what a case is about and thus greater room to manoeuvre in reaching settlements.

At the same time, however, there are important counter arguments. Under the GATT, there was a perception within the system that disputes were of interest only to the parties to the dispute and that panel rulings applied only narrowly to those parties. However, it is clear that this perception has changed within the context of the WTO. In an overwhelming majority of disputes under the WTO to date, there has been a high degree of third party participation by other Members of the WTO. Often Members who notify their interests as third parties to the DSB do not have trade interests at stake, but rather openly state that their interest is “systemic” in nature. Also, it has become commonplace in DSB meetings for Members of the WTO

39 DSU, Articles 13.1, 14.1, 17.10, 18.2 and Appendix 3, para. 3.
which are not directly involved in a particular dispute, either as parties to the dispute or as third parties, to express views on issues of systemic interest raised by the case.

Although many Members of the WTO, particularly the developing countries, remain deeply committed to the principles of confidentiality in dispute settlement, the current rules work against the interests of Members of the WTO who are not parties or third parties to a dispute but who may face similar legal issues arising in other disputes or who take an interest in possible systemic implications.

In my view, the rules requiring confidentiality of documents and proceedings undermine the internal legitimacy of the dispute settlement system because they deny other WTO Member governments the opportunity to know what is being argued in particular cases. Furthermore, within civil society, these rules breed distrust and misunderstanding of the dispute settlement system. Nothing works against the external legitimacy of the WTO dispute system as powerfully as its lack of transparency and the secrecy within which panels and the Appellate Body are required to operate under the DSU. Opening the system up would not only eradicate the perceptions of a non-transparent process lacking in due process and fairness guarantees, but would also improve public understanding of the system.

The “Judicial” Features

The combined effect of introducing compulsory adjudication, automatic adoption of panel and Appellate Body reports, and automatic authorization of retaliation in cases of non-compliance has been to give the dispute settlement process some degree of predictability and to make the findings and conclusions of panels legally binding and effectively enforceable.

Some commentators, however, have argued that the DSU reforms have given an inordinate amount of power to the “judicial” branch of the WTO, resulting in an imbalance of power
vis-à-vis the “legislative” branch. For example, decisions of panels and the Appellate Body are adopted automatically by the DSB, yet the WTO legislative body (the General Council) can only remedy DSB rulings by making decisions pursuant to the procedures for making interpretations or amendments under Articles IX or X of the Marrakesh Agreement Establishing the World Trade Organization.

In the view of some critics, this imbalance represents a fundamental “constitutional defect”, prompting suggestions that the “automaticity” in adoption of panel and Appellate Body reports be undone, so that legal findings and conclusions of a panel or the Appellate Body could be rejected by a vote of one-third of WTO Members.

Some critics maintain that the Appellate Body has “overreached” its constitutional authority under the DSU in several cases, arguing that its decisions have filled gaps in the legal framework left by the political bodies of the WTO. The result, pursuant to this argument, is that the Appellate Body is “legislating” and thereby modifying the rights and obligations of Members as negotiated under the WTO Agreement.

Are these commentators correct? Has the Appellate Body exceeded its authority and created difficulties for the internal legitimacy of the WTO dispute settlement system? Has it contributed to, or detracted from, the external legitimacy of the WTO dispute settlement system?

To get at these questions we turn to Franck’s indicators of legitimacy, taking as our starting point the stated purpose of the WTO dispute settlement system:

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41 Claude E. Barfield, note 4, at page 7.

42 Ibid., at 127.
The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.\(^{43}\)

With respect to Franck’s first indicator, “determinacy”, not all WTO rules are models of textual clarity. Indeed, some of the language in the 500 or so pages of the text of the WTO Agreement is deliberately vague, reflecting a lack of agreement among the negotiators. That being said, one of the purposes of dispute settlement as stated in Article 3.2 of the DSU, quoted above, is precisely “to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.” As Franck notes, it is common for treaties, and even constitutions, to contain rules that have a certain degree of ambiguity because of unresolved disagreements or uncertainties.\(^{44}\) Such vagueness is not necessarily a problem; it may leave room for a rule to evolve flexibly through interpretation and application by a process of clarification recognized as legitimate by those to whom the rules are addressed.\(^{45}\) Franck suggests that courts are a credible process of clarification, but not the only such process. Whether a “clarifying process” is successful in transforming an “indeterminate” rule into a “determinate” rule, depends upon such factors of legitimacy “as who is doing the interpreting, their pedigree or authority to interpret, and the coherence of the principles the interpreters apply.”\(^{46}\)

\(^{43}\) DSU, Article 3.2. Emphasis added.
\(^{44}\) Franck, note 14, at 53.
\(^{45}\) Ibid., at 61.
\(^{46}\) Ibid.
The Appellate Body, in its very first case, *United States - Standards for Reformulated and Conventional Gasoline*, set forth the interpretative approach that it was to follow in subsequent cases. In that case, the Appellate Body stated that the “general rule of interpretation” set forth in Article 31 of the Vienna Convention on the Law of Treaties is a rule of customary international law that is to be followed in interpreting and applying provisions of the WTO Agreement. Article 3.2 of the DSU, the Appellate Body noted, recognizes that the WTO rules are “not to be read in clinical isolation from public international law.”

Rather than “legislating” to fill in gaps in the WTO’s legal framework, the Appellate Body has consistently applied an internationally agreed set of rules to interpret the provisions of the WTO Agreement. In so doing, it has developed a coherent approach to interpretation, in accordance with accepted principles of international law, and has required that panels follow the same method. Thus, the Appellate Body has adopted a “right process” for interpreting and clarifying the sometimes “indeterminate” rules in the WTO Agreement.

With respect to the factor of “symbolic validation”, which features of the WTO’s judicial bodies might be said to correspond to Franck’s concepts of “rituals” and “pedigree”?

In relation to “pedigree”, the Appellate Body is a relatively new judicial institution and was not created endowed with an established reputation. It has had to develop, through its first cases, its own credibility and legitimacy as an international tribunal. The Members of the WTO, in retrospect, made very wise decisions in selecting who would be the first seven Members of the Appellate Body. After interviewing 32 candidates nominated by Members of the WTO, the DSB, after a long, difficult process, finally selected the original seven Members of the Appellate Body. As Franck has observed, *who* decides is an important factor in the legitimacy of a clarifying judicial proc-

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The original seven Members of the Appellate Body were all highly respected jurists with impeccable credentials—senior judges, lawyers and law professors, with extensive backgrounds in public international law or international economic law generally—the very type of persons who would be appointed to the International Court of Justice or other international tribunals. Notably, they were not, for the most part, government trade policy officials. In the more recent appointments made in 2000 and 2001, the DSB has followed the same pattern, selecting senior jurists, law professors and judges with backgrounds in public international law, rather than trade policy practitioners. There is no doubt that the selection of this type of person has made a major difference in the style and content of judicial decisions.

Scanning for “rituals”, one might examine the procedures adopted by the WTO’s judicial bodies. Before the first appeal was filed, the members of the Appellate Body developed and adopted their own detailed rules of procedure, dealing with internal matters relating to the functioning of the Appellate Body as well as the appellate review process. Among its working procedures, the Appellate Body required “collegiality” in its decision-making. This meant that, although the three persons selected to hear a particular appeal would be responsible for deciding that case, all seven Members of the Appellate Body would convene in Geneva to discuss and provide guidance on each case. This principle of “collegiality”, which has been applied religiously by the Appellate Body in practice, has done much to ensure coherence and consistency of its decisions and rulings on issues of legal interpretation as well as on matters relating to practice and procedure.

Another “ritual” that has helped to establish the Appellate Body as a respected, judicial institution is the swearing in ceremony for new members. The first such ceremony, held in 1995, was a small, closed affair, attended by the Director-General, his Deputies, the Chairs of the General Council, the DSB, and the Councils for Trade in Goods, Trade in Services and Trade-related Intellectual Property, members of the Appellate Body and their staff. The second such ceremony was conducted in a
similar manner, with only the Chairs of the General Council, the
DSB, and the Councils for Trade in Goods, Trade in Services
and Trade-related Property representing the WTO Membership;
however, a large reception was held after the ceremony to
which the general WTO Membership was invited. In 2001, the
ceremony swearing in three new Members and bidding farewell
to three retiring Members was held in a formal meeting of the
General Council, with all of the WTO Membership in attend-
ance. The progressive development of this ritual indicates
recognition of the growing respect and esteem held by WTO
Members for the institution of the Appellate Body.

Another very important “ritual”-like feature of the Appellate
Body is the way that it conducts its hearings in individual
appeals. Unlike panel meetings with the parties, Appellate
Body hearings are conducted in a very judicial manner. After
the parties and third parties have made their opening arguments
(they are given time limits for their presentations), the members
of the Appellate Body hearing the appeal engage in intensive,
detailed questioning of the parties and third parties until all the
legal issues in the case have been thoroughly examined. While
this is often grueling for the parties’ counsel, this “face-to-face”
interrogation on the issues of law in the case is critical to the
Appellate Body’s understanding and appreciation of the appeal.
From a Franckian perspective, this procedure, which has been
developed by the Appellate Body in practice, has a ritualistic
quality that has worked to establish the credibility and reputa-
tion of the Appellate Body as an impartial and independent ju-
dicial institution.\footnote{One Ambassador for a third party in the \textit{EC-Bananas} case, took the opportunity to comment to the Appellate Body Division hearing that case that he wished the rest of the WTO worked as effectively and efficiently as the Appellate Body in that hearing.}

With respect to the factor of “coherence”, in its early juris-
prudence, the Appellate Body has established a rigorous a p-
proach to treaty interpretation, based on the general principles
of interpretation set forth in the Vienna Convention as required
by Article 3.2 of the DSU. It also has drawn guidance from
time to time, where appropriate, from the practice of other international tribunals and public international law generally. Moreover, the Appellate Body has developed a comprehensive set of rulings on matters of judicial practice and procedure, dealing with such issues as standing, burden of proof, treatment of evidence and experts, standard of review, jurisdiction of panels, rights of third parties, right to be represented by counsel and treatment of *amicus curiae* briefs.

In making some of its procedural rulings, particularly with respect to the right to representation by private counsel and the acceptance and consideration of *amicus* briefs, the Appellate Body has come under criticism by many WTO Members and some commentators, who maintain that these procedural gaps in the DSU can only be filled by the Members of the WTO, acting in their legislative capacity, and not by the “judicial” bodies of the WTO through the development of case law. Whether or not they agree with individual rulings of the Appellate Body on these matters, legal scholars generally concur that the Appellate Body has behaved, in general, like a prudent, conservative court, motivated by general principles of natural justice, due process and fairness, taking pains to demonstrate its motivations and legal reasoning in its published decisions.

49 Barfield, note 4, 50-53.

date, the Appellate Body has established a comprehensive jurisprudence on matters of judicial practice and procedure applicable not only to its own proceedings but also to the proceedings of panels.

On the issue of “adherence”, Professor Franck tells us: “A rule has greater legitimacy if it is validated by having been made in accordance with secondary rules about rule-making.”

Although it is still early days in the history of the WTO dispute settlement system, there are some discernible trends beginning to emerge. In my observations above relating to the factor of “coherence”, I stated that the Appellate Body had developed a comprehensive and impressive set of rulings on practice and procedure in the appeals it has heard to date. These rulings together with the many interpretative rulings made by the Appellate Body weave together to make a fabric of secondary rules which help to build the foundation of a legitimate judicial institution out of the dispute settlement system of the WTO. This jurisprudence creates a permanent foundation, based on principles of natural justice, due process and fairness—a “right process”—for the WTO dispute settlement system.

The Rule-Making Institutions

While the Appellate Body has been working strategically and purposefully toward establishing its credibility and legitimacy as an international tribunal, the same cannot be said of the WTO political/legislative bodies. The latter WTO bodies have been characterized as “weak” by the key powers in the multilateral trading system.

European trade lawyer and scholar, Marco Bronckers, has stated that under the new WTO procedures for adopting definitive interpretations or amending provisions of the Multilateral Trade Agreement, it is necessary to have a robust and transparent rule-making process. The Appellate Body has been instrumental in establishing a comprehensive jurisprudence on the interpretation and application of WTO law, which has helped to build the foundation of a legitimate judicial institution out of the dispute settlement system of the WTO. This jurisprudence creates a permanent foundation, based on principles of natural justice, due process and fairness—a “right process”—for the WTO dispute settlement system.


Franck, note 14, at 193.

See the speech by Pascal Lamy, European Trade Commissioner, referred to in note 1 herein.
the agreements: “Clarifying rules is practically impossible” and “[a]dopting new rules is cumbersome”. \(^{53}\) “The bottom line,” asserts Claude Barfield, “given the extreme difficulty of using normal legislative procedures in the WTO, is that dispute settlement panels and the Appellate Body will be under increasing pressure to legislate through interpretation and filling in the blanks in WTO disciplines.” \(^{54}\)

The administrative structure and the decision-making apparatus of the WTO is complex. \(^{55}\) The general rule on decision-making is that the WTO will “continue the practice of decision-making by consensus followed under GATT 1947.” \(^{56}\) Where certain decisions cannot be arrived at by consensus, \(^{57}\) the Marrakesh Agreement, Article IX:1. The term “practice” is used to describe the way decisions were made in the GATT since the 1960s because consensus decision-making was not the rule—the rule under Article XXV of the GATT 1947 was majority voting—rather, it was the “practice”. Article IX:1 of the Marrakesh Agreement enshrined this “practice” and made it the “rule” for the WTO. Emphasis added.

“Consensus” does not mean “unanimity”. A decision is “deemed to have been decided by consensus “if no Member present at the meeting when the decision is taken, formally objects to the proposed decision.” Marrakesh Agreement, Article IX:1, footnote 1. The Rules of Procedure of the General Council (the highest political/legislative body in the WTO when the Ministerial Conference is not in session) and the other Councils require that a quorum of two-thirds of the Members be present at any formal meeting; however, that does not always happen. Technically, therefore, a decision could

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52 Barfield, note 4, 42.

53 These organizational features of the WTO are set forth in the Marrakesh Agreement, which is a sort of “mini-constitution” for the multilateral trading system. The Marrakesh Agreement was negotiated during the latter part of the Uruguay Round in the Institutions Group, chaired by Ambassador Julio Lacarte-Muro from Uruguay (who was the first Chairman of the Appellate Body). The history of this negotiation and the decision-making provisions of this agreement are described in Debra P. Steger, “The World Trade Organization: A New Constitution for the Trading System”, in M. Bronckers and R. Quick (eds.), New Directions in International Economic Law, Kluwer, 2000, 135-153.

54 Marrakesh Agreement, Article IX:1. The term “practice” is used to describe the way decisions were made in the GATT since the 1960s because consensus decision-making was not the rule—the rule under Article XXV of the GATT 1947 was majority voting—rather, it was the “practice”. Article IX:1 of the Marrakesh Agreement enshrined this “practice” and made it the “rule” for the WTO. Emphasis added.

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rakesh Agreement provides for a fallback to majority voting. However, for important decisions, such as adoption of a definitive interpretation of an agreement or approval of a waiver from obligations, the Ministerial Conference or the General Council shall first attempt to take the decision by consensus, and if this fails, the decision may be taken by a three-fourths majority of all the Members of the WTO. Decisions to propose amendments to the agreements must be initially attempted to be made by consensus. If, after 90 days, consensus has not been reached, the Ministerial Conference may take the decision by a two-thirds majority of the Members. For most amendments, a decision by the Ministerial Conference to propose an amendment to the Members is only the first step. Following this decision, Members of the WTO must individually ratify and accept the amendment or the proposal for a new rule or agreement. Amendments will only take effect when they have been accepted by two-thirds of the Members of the WTO (for most agreements). Amendments of the DSU are effective upon a consensus decision of the Ministerial Conference approving the proposal to amend the agreement. It is not necessary for individual WTO Members to ratify and accept amendments to the DSU, such amendments become effective upon the consensus decision of the Ministerial Conference approving the amendment.

On the face of it, the commentators are right—the WTO decision-making procedures are cumbersome and difficult. Here lies the paradox: the procedures are cumbersome because they are designed to be inclusive, to ensure that decisions are supported by all Members. However, consensus decision-

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58 Marrakesh Agreement, Article IX, paras. 2 and 3.
59 Marrakesh Agreement, Article X:1.
60 Marrakesh Agreement, Article X, paras. 3, 4 and 5.
61 Marrakesh Agreement, Article X:8.
making also allows one country, no matter what its size or relative power, to prevent a decision from being taken. Thus, individual Members can, and do, “hijack” the system from time to time, not always for rational reasons.

This has led the major powers to use informal techniques of “consensus-building”, involving groupings of countries (e.g., such as “Green Room” meetings) which inevitably means that some countries are not included in the key planning and drafting stages of a particular proposed decision. This solution can, however, lead to further problems: for example, at the Seattle Ministerial Meeting in 1999, a large group of developing countries threatened to walk out of the meeting because they claimed they were not included in the “Green Room” meetings in which approximately 60 heads of delegation were involved. Moreover, even when a proposal that has gone through a thorough informal “consensus-building” exercise, it can meet with blocking tactics when a Member attempts to put it on the agenda of a formal meeting for approval.

Is there a “constitutional defect” in the decision-making rules of the WTO? Can they be amended to make them more functional? How can developing countries be made to feel more included in the system?

To be fair, the new rules for making definitive interpretations or amendments of the agreements have not yet been used. However, many important decisions have been taken, including decisions approving the accession of several new Members to the WTO as well as decisions granting waivers from WTO obligations.

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62 For example, in 1999, before the Seattle Ministerial Meeting, an informal group of approximately 14 countries met outside of the WTO to draft a proposed amendment to the DSU attempting to resolve some of the ambiguities in Articles 21.5 and 22 of that agreement relating to implementation of rulings. The meetings of this informal group were open to any country that wished to participate. Although this group, chaired by Japan, attempted on several occasions to bring its draft amendment into a formal meeting of the DSB, this was blocked repeatedly by two developing country delegations (not because they were not included in the negotiation—they did participate—they blocked for strategic reasons unrelated to the text of the proposed amendment itself).
ligations for specific countries. Almost all of these decisions have been taken by consensus in the General Council after careful preparation in informal meetings of working parties open to participation by all WTO Members. In only one case to date, the accession of Ecuador in 1995, was a decision taken by a vote, rather than by consensus.\footnote{Article XII:2 of the Marrakesh Agreement stipulates that decisions on accession of new Members are to be taken by a two-thirds majority vote of the Ministerial Conference, but, in practice, except for the accession of Ecuador, these decisions have been taken by consensus in meetings of the General Council.} A long struggle occurred in 1999 over the selection of a new Director-General because Membership support was almost evenly divided between two candidates for the post. Eventually, that impasse was resolved when it was decided that the term would be split into two parts, with each candidate taking the post for a period of three years. However, while this issue was being settled, the WTO was nearly paralyzed for several months, which in the view of many contributed to the failure of the Seattle Ministerial Meeting.

Amending the decision-making procedures would be extremely difficult, if not impossible. All WTO Members, from the US and EU to the least-developed countries, are wedded to the practice of decision-making by consensus. It is part of the ethos of the WTO. It would not be in the interests of developing countries for the WTO to adopt weighted-voting mechanisms such as those used in the International Monetary Fund and the World Bank. The Members of the WTO are strongly opposed to any such suggestion, and such a mechanism would not help to make the WTO more inclusive of developing countries.

One might ask: if it is so difficult to achieve consensus, why do Members not use the voting procedures more often? Although the thresholds for decisions to adopt interpretations, waivers or amendments are very high (three-fourths or two-thirds of the Membership), for many decisions, such as the election of a new Director-General, the “fallback” would be a simple majority vote. However, although the rules have always...
provided that decisions could be taken by a majority vote.\textsuperscript{64} This has not been the practice in the GATT or in the WTO. Members seem to prefer to use the cumbersome and slow process of decision-making by consensus over the voting procedures allowed for in the rules.

The difficulty with the decision-making procedures in the WTO, in my view, does not result from a "constitutional defect" in the rules, but rather from the preferences and the practice of the Members of the WTO. Changing the procedures for taking decisions is not likely to change the attitudes of WTO Members. Furthermore, changing the decision-making rules would only exacerbate the problems of internal legitimacy within the WTO, because it would increase the perceptions of developing countries that they are not included in the decision-making processes.

During the Uruguay Round, the United States put forward a proposal in the Functioning of the GATT System (FOGS) Group that a management board or committee, consisting of approximately 18 Members, should be established to set policy direction and assist in the management and administration of the system. That idea has resurfaced both among delegations in Geneva and in academic debate;\textsuperscript{65} however, the developing countries remain opposed to any suggestion that would lead to some countries being excluded from any decision-making body.

Despite the objections of smaller and developing countries, a management board is essential and could be made to work in a way that would be inclusive of all WTO Members. The WTO

\textsuperscript{64} Article XXV of the GATT 1947 stipulated, as a general rule, that decisions of the CONTRACTING PARTIES were to be taken by a majority vote (except for waivers and amendments that required a two-thirds majority). However, the practice, throughout most of GATT history, was for decisions to be taken by consensus.

\textsuperscript{65} Sylvia Ostry has long been a strong proponent of this idea. See, for example: Sylvia Ostry, "World Trade Organization: Institutional Design for Better Governance", in Porter, Sauve, Subramanian & Zampetti, \textit{Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium}, Brookings, 2001, 361 - 380; Barfield, note 4.
has become a complex enterprise—there are many administrative, procedural and housekeeping decisions that could be made by a smaller body than the General Council. It is clear, particularly after the Seattle fiasco, that a smaller management body is needed to help set priorities and provide direction for the system. Informal groupings exist presently within the WTO—there is an African Group, made up of all the African countries in the WTO, which meets and develops coordinated positions on a regular basis. There is also an ASEAN Group, which meets regularly and takes coordinated positions in key WTO meetings. The Latin American countries have often acted in a coordinated fashion—they walked out en masse and blocked the Brussels Ministerial Meeting in 1990 over the contentious negotiations on agriculture. A management board or committee, structured so that it was truly representative of the WTO membership, could be made to work in a transparent and inclusive manner. It could also help to move proposals forward and to alleviate some of the lengthy delays and paralysis caused by the existing cumbersome procedures.

Conclusions

In my view, the solution to the legitimacy crisis in the WTO lies not in turning back the clock and returning, as some have suggested, to a dispute settlement system grounded in diplomatic custom and practice. Nor does it lie in encouraging greater “flexibility and Member control” over the panel and Appellate Body processes. This sounds ominously like political interference with the judicial system. It is extremely important that the independence and impartiality of the judicial processes in the WTO not be diminished or threatened.

The key lies in recognizing that the WTO dispute settlement system has two tracks: one is “diplomatic” and the other is “judicial”. A clear distinction must be made between the two.

WTO Members should be encouraged to make more and better use of the alternative dispute resolution (“ADR”) mechanisms available to them under the DSU. Improvements to the “diplomatic” mechanisms to make them more effective would
increase recourse to them by WTO Members and result in more cases being settled by diplomatic means.

At the same time, the independence, impartiality and integrity of the “judicial” system should be maintained and defended against political interference—a hybrid version of the judicial track is not in the interest of WTO Members nor is it consistent with a “rules-based” international trading system. The “judicial” system should be strengthened and improved by “professionalizing” the panel system, and giving it the attributes of a standing, independent tribunal based on the model of the Appellate Body. Transparency in panel and Appellate Body proceedings should also be guaranteed by making submissions of parties available to the public and by opening up panel meetings and Appellate Body hearings to the public. At the same time, new rules for the protection of “business confidential” information and workable procedures for admission of *amicus curiae* briefs should also be developed by WTO Members.

The “external” legitimacy problem of the WTO is a far greater threat to its continued viability than its “internal” legitimacy difficulties. For that reason, the WTO must move, and be seen to move, decisively and purposefully in the direction of greater transparency and openness. There is simply no excuse, given the gravity and importance of the decisions being made by the WTO, for a dispute settlement system or a legislative system that operates in secret, behind closed doors. Governments will not lose control over the WTO if non-state actors are permitted access to information, to attend hearings and meetings as observers, and to submit *amicus curiae* briefs to panels and the Appellate Body. By making the WTO more transparent and accessible, it will be better understood and appreciated. This will help to enhance the legitimacy and credibility of the WTO as an international organization.