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Citation for the published paper:

Strange, Michael. (2016). The discursive (de)legitimisation of global governance : political contestation and the emergence of new actors in the WTO's Dispute Settlement Body. Global Discourse, vol. 6, issue 3, p. null

URL: <https://doi.org/10.1080/23269995.2015.1070019>

Publisher: Taylor & Francis

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Strange, M. (2016) 'The discursive (de)legitimation of global governance: political contestation and the emergence of new actors in the WTO's Dispute Settlement Body', *Global Discourse* (6:3), pp.352-369.

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The discursive (de)legitimation of global governance - political contestation and the emergence of new actors in the World Trade Organization's Dispute Settlement Body

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Abstract:

The World Trade Organization's Dispute Settlement body provides the teeth of the global trade regime – empowering it with substantial means to adjudicate in disagreements between Member-states over the implementation of WTO law. The WTO's teeth have, however, also helped make the organisation controversial. The Dispute Settlement body has frequently found itself at the centre of a much wider societal critique of the broader WTO – as well as contemporary global trade governance – in which its legitimacy to operate has been fiercely questioned.

Contestation around WTO Dispute Settlement is approached in the article as part of a wider struggle over the terms of what is 'legitimate' in global governance. Where WTO Dispute Settlement has been re-politicised, both inside and outside the formal institution, a contradiction becomes visible – between its legal-technocratic identity, and a world that is fundamentally political. The legal normalisation of new actor identities needs to be understood in this context, as an attempt to manage that tension and reinforce the claim that WTO Dispute Settlement is legitimate.

Keywords: legitimacy; discourse; World Trade Organization; dispute settlement; non-state actors; *amicus curiae*

Introduction

The World Trade Organisation's (WTO) Dispute Settlement Body is an unlikely entity in global politics, given that the panels and the appeals process through which it adjudicates disputes amongst WTO Member-states

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consist of only a small selection of individuals ruling on matters with huge economic and political consequences – challenging conventional norms of state sovereignty in the interests of global trade governance. It provides the ‘teeth’ of the WTO, a respectably high compliance rate enforcing WTO law (Leitner and Lester 2011; Elsig 2007). Yet, this apparent success has also exposed it to criticism – in particular, of lacking legitimacy to both the interests of developing-country Member-states and the societies it affects. The political sensitivity of its work has been made most apparent in those cases where the principles of WTO law appear to run counter to environmental or consumer safety concerns, taking the system into the mass media and making it the subject of street protests. Yet, where rulings have given new access to non-state actors campaigning for these concerns (e.g. *amicus curiae* provisions), there has been further controversy amongst Member-states over whether the Dispute Settlement Body has acted outside its delegated authority by effectively re-writing ‘who’ or ‘what’ is an actor in the system. Whilst WTO Dispute Settlement is intended to only follow WTO law and not add or re-write rules that are formally the outcome of Member-state negotiations, in practice it functions according to the principle of *stare decisis*. That is, in writing WTO Dispute Settlement rulings the persons involved have come to justify their decisions sometimes in reference to earlier rulings taken by the body rather than rest their conclusions exclusively on the Member-state agreements and relevant technical information provided by the states party to a dispute, as will be discussed later. This was never meant to be and, where these rulings have given new powers to non-state parties, that apparent transference of agency has created significant levels of tensions amongst the Member-states as to whether the Dispute Settlement body has acted outside its delegated authority as an agent of the Member-states. This has led to questions over the legitimacy of the WTO's dispute settlement mechanism.

Contestation over the functioning of this specific institutional arrangement needs to be seen as part of a wider struggle over the terms of what is ‘legitimate’ in global governance. Here, the argument sides with those scholars who consider legitimacy to be a context-dependent concept only given meaning within a particular political community between governed and governor(s). Given the importance of relationality here, the (de)legitimation of WTO Dispute Settlement – that goes beyond debate, to include the emergence of new forms of agency (or political subjectivity) – is a discursive process. Questions of legitimacy in global governance should be treated as discursive battles in which alternate articulations compete to become hegemonic. Drawing upon existing findings and interviews with civil servants in the WTO Secretariat and other relevant bodies, the article traces how different actors have shaped the discursive battle over whether or not this key part of global governance is legitimate. For example, the apparent inclusion of new actors within the WTO's Dispute Settlement mechanism – to be discussed later in the article – is understood here as the emergence of new subject positions within a discursive shift between alternate paradigms of ‘good’ global governance.

The enquiry is structured as follows. First, drawing upon existing scholarship on legitimacy in global governance, the article outlines the

discursive basis of this concept. Next, the discussion turns to the empirical case, first briefly introducing the WTO's mechanism for dispute settlement and then tracing its development with the emergence of new agents. Studying the WTO Dispute Settlement mechanism provides, as the third section shows, rich material by which to understand the broader processes through which global governance is (de)legitimated, existing as it does at the intersection between the law and politics. There remains an ongoing struggle to, on one hand, shift global trade governance to the sphere of the law and so erase the political, whilst on the other hand, re-politicise that mechanism and so re-open the space for alternative conceptualisations of 'good' governance in global trade. At the same time, there remains a controversy over whether giving non-state actors such as environmental groups increased access to WTO Dispute Settlement conversely: enhances the system's legitimacy, by making it accountable to those groups; or, weakens the system's legitimacy, by undermining the primacy of Member-states.

The WTO's Dispute Settlement Body exists to not only resolve conflicts between Member-states over the interpretation of WTO agreements but, and more importantly, to also shift the supranational regulation of national policies deemed as relevant to transborder trade flows from the sphere of politics to law. Such a move is highly significant given the de-politicisation involved, isolating decision-making from normative concerns so as to be a largely technocratic affair in which liberalisation takes unquestioned precedence over wider societal projects. Tracing the ongoing discursive process over the terms of its legitimate function, conversely, exposes the 'return of the political' – that is, both the attempts of external actors to re-politicise this wide-encompassing policy field, and potentially also the limits of the law where new political actors have emerged within the system.

Legitimacy and political community in global governance

Although the International Monetary Fund (IMF) and the World Bank have existed since 1946, it was only in the 1980s that public attention came to really notice their role along with that of the increasingly prominent General Agreement on Tariffs and Trade (GATT). New public fame for what had been rather technical bodies little discussed in the mainstream media reached new heights with the creation of the World Trade Organisation (WTO) on the 1st January 1995. The spread of regionalism, exemplified in its most extensive form in the European Union, only added to a growing awareness that domestic policy processes were increasingly subject to decisions made at higher levels. This led commentators to ask a common question: Do these new global forms of governance create a barrier between us and the policy mechanisms through which we are governed (e.g. Elsig 2007; Esty 2002)? In response, a debate emerged around the question of legitimacy within global governance (Bexell et al. 2010; Hurrelman et al, 2007; Buchanan and Keohane 2006; Hurd 1999), centred around two key questions: a) what are the criteria for determining if global governance is legitimate?; and, b) who/what should be responsible for deciding and

enforcing this criteria? Given the commonality with which diverse parties debating the shape of global governance in general have used the term 'legitimacy', one might be forgiven for assuming there is a commonly assumed definition – that is, it has been operationalised in the sphere of how to organise the production of public goods at the global level.

In its simplest form, legitimacy means that the governed consider the governor/s to be the rightful holders of that authority – irrespective of acceptable disagreements over how to rule. What disagreement might be sufficiently unacceptable so as to break the bond between governed and governor/s is down to those respective actors. Harking back to a Weberian tradition, for most scholarship on legitimacy the substance of its central term is purely context-dependent. Whilst frustratingly unclear at a general level, 'legitimacy' becomes bounded and acquires its content through the political community formed between governed and governor/s – that is, in terms of the culture and available set of laws, norms, and expectations by which the actors involved can make sense (Abromeit and Stoiber et al., 2007; Dingwerth 2007; Clark 2005, 2007).

The 'English School' of International Relations has had a particular influence in how legitimacy is thought of at the global level since the concept plays a pivotal role in much of how its subscribers theorise state-to-state relations. States are seen as interdependent, acting in concert as parts of an 'International Society' in which behaviour is structured by a series of shared norms (Clark 2005). In the case of international politics, of course, the same actors (states) play multiple roles – as both governed and governors (with the governance function performed via a series of state-created institutions). The norms framing the terms of 'legitimate' behaviour are not the exclusive product of states. Ian Clark (2007) added the term 'World Society' to acknowledge that, along with International Society, non-state actors play an active part seeking to shape global governance norms. Whilst the International Society of states remains dominant, key norms defining legitimate action in the global arena have their origins in World Society, including: human rights; sustainable development; and, more historically, anti-slavery. World Society is the same as what Jens Steffek has termed 'citizen-led' legitimacy in global governance, where it identifies a societal effect on international norms (2007, 186-9). The point in mentioning this is to make clear some initial attempts within existing literature to mark out the field of relations through which the terms of 'legitimate global governance' are contested. Yet, clearly there are significant problems for those wishing to define these terms in any sense concrete.

Several scholars have argued that for authority to be considered legitimate, those it affects need to feel a shared community identity with their governors (Beetham and Lord 1998, 33-4; Scharpf 1999, 8). Nationhood, for example, provides a clear community and demos.

Yet, nation-state based understandings of legitimacy cannot be directly transferred to the global level (Elsig 2007, 79; Clark 2007, 193). There is no transnational equivalent of the national demos, although there are those who argue the task to create one is not insurmountable (Bohman 2005; Rosenau 2000). For example, Michael Zürn has argued that no demos has substance outside of politics but must be constructed – a process made

harder, but not necessarily impossible, at the global level (2000, 196-200). Indeed, Clark criticizes any assumption that legitimacy hinges on the existence of a pre-existing pre-political demos (Clark 2007, 196). Rather, legitimacy emerges at the same time as the demos – with the former playing a constitutive role in defining the relationship between the latter and its ordering mechanism – the governor/s (e.g. the state).

Two things need to be re-emphasised at this point: first, that the political community of governed and governor/s provides the basis through which legitimacy is discursively articulated; and, second, that political community itself is a discursive construction. Whilst one might claim that, if we follow this logic, there is so little left that is not discursive that the term ‘discourse’ loses its value, this would be an over-reaction. Rather, what we see in the above argumentation is a two-stage process, each of which involves a different set of relations and social practices.

To help us better understand the discursive basis of legitimacy in global governance, it helps to consider what proposals have been made towards building a ‘transnational demos’. For example, to build such an entity requires a transnational public discourse and transnational solidarity – or, what Steffek has termed, a ‘normative consensus’ (2007, 180; Zürn 2000, 203). Faced with the likelihood that few individuals would be sufficiently motivated to spend resources engaging in such a normative consensus, Zürn has suggested policy issues serve as the centrifuge of multiple transnational demoi (2000, 195). This mirrors the reality of global governance that is organized by the principle of functional differentiation as opposed to constituting a single entity (Held and McGrew 2002; Wolf 2002, 38).

Thus far it has been argued that legitimacy in global governance necessitates the identification of political communities linking both governors and governed. However, rather than attempt to create one global demos, legitimate global governance is more feasible if we accept the existence of multiple demoi. Each demoi is differentiated not by geographical territories but functional or issue criteria, e.g. trade, human rights, environment. Each demoi would, in this understanding, include a broad range of actors linked by a common engagement with a governance field like ‘trade’. Clark argues that these communities cannot be pre-defined but are formed via a political process (2007, 208). With perhaps some exceptions (e.g. the World Social Forum), the world society of NGOs and other civil society groups interacting to contest the norms of legitimate global governance do so only when clustered around particular issues, e.g. climate change, HIV medication, whaling. The respective issue provides the nodal point for their convergence and sense of political community (see figure 1). However, the contours of the community only take shape through a negotiated process in which power relations inevitably play a significant part.

There is substantial overlap between whether the focus on legitimacy in these above outlined debates is normative – i.e. that global governance *should* for moral reasons be seen as legitimate by a particular community – and analytical, where legitimacy is treated as a fundamental basis of authority. This overlap is impossible to avoid, though, if we see global

governance as something that is ultimately discursive. In the case of WTO Dispute Settlement, a first implication is that it requires legitimacy to function.

Yet, the argument needs further development if we are to understand the discursive character of legitimacy for an institution such as WTO Dispute Settlement that formally claims its legitimacy as a legalistic entity. Whilst that institution is the product of an earlier political contestation, surely its political community is defined by its constitutional basis? This question overlaps with the neighbouring debate on accountability, heavily influenced by Grant and Keohane's (2005) pivotal contribution in which they distinguished between relations based upon either delegation or participation. In that model, arguments over accountability – which can be read as 'legitimacy' for the purposes of this article – are structured along a divide, or misunderstanding, as to who/what the WTO should be accountable. Should they be accountable to their delegates – that is, usually the states who have legally delegated the organisation authority to fulfil its designated function – or a wider community (i.e. affected 'stakeholder's) who demand participation in their operation? The first position states that a body like the WTO is accountable (again, read 'legitimate' here) if it is responsive to the demands of its delegates. The second position says this is insufficient, and must include a level of responsiveness to a wider community (e.g. environmental NGOs, workers, etc). The danger here is if research treats institutional decision-making rules and the criteria for defining legitimate global governance as the same thing, ignoring the discursive basis of legitimacy. This is clear when critically considering the institutional-based understanding of legitimacy developed by Fritz Scharpf (1999) and others, as discussed next.

FIGURE 1 ABOUT HERE

The discursive foundations of legitimacy

Fritz Scharpf (1999) brought clarity to the concept of legitimacy by disaggregating it into the two sides of decision-making: the *input*, where information and interests are collected; and, the *output* (the decision). A third category to add here concerns the legitimacy of the actual process through which policy decisions are produced – what has been called '*throughput* legitimacy' (Risse et al. 2007; Schmidt 2010a, 2010b, 2013). Yet, what does this mean for a discursive reading of legitimacy?

Neatly phrased by Vivien Schmidt, the legitimacy crisis of governance beyond the nation-state is 'policy without politics' and 'politics without policy' (2010b). Policies are decided without societal input – risking inappropriate policies; society cannot productively vent its politicisation via influencing policy – risking more extreme forms of politicisation. Scharpf's *input legitimacy* requires that those affected by governance feel able to influence – either directly or indirectly via representatives – what goes into the policy engine (1999, 7-13). Institutionally speaking, input legitimacy requires formalised mechanisms ensuring fair representation of those

affected. National elections serve this function at the national level. European parliamentary elections partially serve this function at the EU level. Lacking a single governmental chamber at the global level, input legitimacy must look to the many international organisations in existence.

Input legitimacy is not just about institutions geared towards greater deliberation and pluralism. For deliberation to have substance, there must be societal actors with the ideas and discourse through which global governance can be contested. In the case of the European Union, Schmidt sees a central problem for input legitimacy being the lack of a strong 'European' collective identity amongst citizens governed under the EU (2013, 15-17). Rather, individuals within the EU predominantly still speak in terms of policy as if it were a national affair without sufficient understanding of themselves as 'European citizens'. Without that discourse, it is not possible to reconnect politics and policy. This problem is even more acute in the case of global governance bodies such as the WTO where there is no formal 'world citizenship'.

The importance of identity to input legitimacy is stressed by Beetham and Lord (1998), as well as Scharpf (1999), and ties the discussion back to Zürn's (2000) call for a transnational demos outlined earlier. However, the difficulty of achieving a sufficiently strong identity connecting citizens into supranational political communities has led many to turn to *output legitimacy* (Scharpf 1999, 11). If the governed cannot influence the governors, then the basis of legitimate governance must instead rest on its ability to solve problems.

Problem solving is what Beetham and Lord call the 'performance' side of governance and which they disaggregate into the delivery of security rights, economic and welfare rights, and civil or legal rights (1998, 94-122). For example, whilst few would claim that the WTO is a democratically representative organisation, there is a much more substantial debate concerning if it helps or hinders the economic and welfare rights of individuals. By putting aside participation and emphasising quantifiable goods produced by governance, output legitimacy appears apolitical. However, output legitimacy is complicated by the fact that it is not always clear what policy problems need to be solved for a community to view the solutions as 'right' (and legitimate). For example, calls for the WTO to accommodate greater concern for the negative societal and environmental effects of unfettered trade liberalisation – so-called 'embedded liberalism' – demonstrate the political side of output legitimacy (Elsig 2007, 84-5).

Indeed, as Schmidt writes, 'output policy legitimization for the most part occurs in the communicative discourse of the political sphere' (2013, 10). The output legitimacy of global governance cannot rest on just producing policy solutions, but requires that the governors are able to *tell* the governed that those solutions have been produced. This is particularly important when citizens lack understanding of global governance. For output legitimacy to function at the global level, then, requires that those affected by the governance can appreciate the 'good' it produces (Papadopoulos 2007, 485). It means that governors must justify their actions to the governed, stating how their policies have provided effective solutions (Føllesdal 2007, 216). Even if this does not mean convincing all of

the governed that the governance is 'good', the task remains a significant challenge since there are frequently few if any direct communication channels between governor/s and governed at the global level.

Furthermore, the criterion by which output legitimacy is to be assessed – the desired policy outcomes – is inherently a political process (Mügge 2011). Again, then, it requires some kind of common dialogue to determine outputs if actors are to measure to what extent those outputs have been met and, thus, whether the governance is legitimate.

Therefore, both *input* and *output* forms of legitimacy require that there exists a form of political community linking the governed and governor/s. For Scharpf, the sense of 'being involved' required for input legitimacy is simply impractical in supranational forms of governance where any political community is only thin (1999, 8-11). By comparison, output legitimacy requires only a 'perception of a range of *common interests* that is sufficiently broad and stable to justify institutional arrangements for collective action' (emphasis in original)(Scharpf 1999, 11). Notably, this does not need to be a 'thick' identity but, rather, may be one of many collective identities to which individual members of the constituency belong – whether defined by territory or problem-field, for example. However, as Schmidt (2013) makes clear, output legitimacy does demand a collective discourse in which actors can agree a shared narrative in which policy outputs are both attributed to global governance and deemed as desirable.

Likewise, *throughput legitimacy* necessitates some kind of political community for it to function. Risse and Klein identify three components to throughput legitimacy: 1) legality; 2) transparency; and, 3) quality (2007, 73). For its legality, global governance is subject to a complex network of national and international law. Transparency requires that it is clear *who* takes *what* decision, something that is harder where global governance is complex (Urry 2005).

The 'quality' component of throughput legitimacy overlaps extensively with the deliberative democratic aspect of input legitimacy by demanding both pluralism (access by the governed) but also a public sphere fostering mutual learning between those involved (Risse and Klein 2007, 73-4). For example, providing access for NGOs is not, as Schmidt points out, sufficient where many of those organisations are increasingly 'technocratic' and 'thus removed from actual citizens' (2010a, 27). To foster throughput legitimacy, the bond between governed and governor/s needs to be effectively built into the mechanisms of actual decision-making.

To summarise thus far, input, output and throughput approaches to legitimacy all require political community but to varying degrees. Output legitimacy may appear comparatively simple to achieve, but Schmidt shows that in the case of the European Union it is often not an obvious (or apolitical) matter as to what constitutes 'European' policy solutions (2010a; 2013). At each stage of the policy process requires, the terms of 'legitimate governance' are formed discursively within a political community. To understand legitimacy within global governance - and in the case examined here, of the WTO's Dispute Settlement Body – it is then necessary to look at similar discursive processes through which this is (de)contested. However, what are the boundaries of that political community in which legitimacy is

constituted: do they rest exclusively on the institutional relationship between the WTO and its Member-states, or a wider set of actors as already suggested in the introduction to this article?

Researching legitimacy

The above discussion has argued that legitimacy is discursive, constituted relationally between the governor/s and the governed within a shared political community. Even where the policy process appears to provide a means to systematise how scholars conceptualise legitimacy, each stage remains subject to a discursive process. Legal institutional structures that include rules for decision-making and ensuring accountability claim to provide criteria for determining legitimate global governance. However, these claims have no basis outside of their constituent political communities. Given this, the analysis that follows approaches its subject – WTO Dispute Settlement – by first marking out how the institution states its own legitimating criteria. Drawing upon existing research and interviews with civil servants in the WTO Secretariat and other relevant bodies, the analysis then considers the practice of WTO Dispute Settlement, tracing its development to look for incidents where its legitimating criteria have been contested. The purpose of the analysis is not to determine whether or not such developments make the system more legitimate, but rather to help map the political terrain in which WTO Dispute Settlement is both possible and is subject to change.

The WTO's Dispute Settlement Body and its legitimacy 'crisis'

There is, apparently, a clear political community already existing to guide and develop the terms of what is 'legitimate' in the operation of the WTO's Dispute Settlement Body, demarcated by the legal-institutional arrangement first formalised through the Uruguay Round of nation-state negotiations that led to the overall creation of the WTO. The Dispute Settlement Understanding (DSU) – the legal text undergirding the institution – claims a set of criteria for determining its input (who can be involved), throughput (how the process works, including how decisions should be reported), and output (decisions and their implementation) legitimacy.

The WTO is a political organisation tasked with facilitating collective debate, negotiation, monitoring and adjudication towards the standardisation of domestic trade regulations. Everyday decision-making occurs via the General Council, which consists of delegates representing all the WTO Member-states. The General Council may convene as either the Trade Policy Review Body (TPRB) or the Dispute Settlement Body (DSB). The TPRB provides the eyes and ears of the WTO to the extent that it collects data on new domestic trade regulations. However, there is no direct mechanism allowing the WTO to act on this data. Rather, it is in the DSB that the WTO serves an adjudication function between its member-states.

Member-states possess the exclusive right to be parties within the WTO dispute settlement system and so police WTO law. To launch a dispute, a Member-state must lodge a formal complaint with the DSB, accusing a

fellow Member-state of engaging in trade practices that run in violation of WTO agreements (Kim 1999; see also, Strange 2015). Each stage of the process follows a legally defined timetable, providing a degree of automaticity structuring how the actors interact with one another. The first stage is the *consultation*, at which the Legal Affairs division of the WTO Secretariat brings together the complainant and respondent, both Member-states. These consultation meetings include a mix of information-gathering and potential reconciliation, depending on the particular interests at play with respect to whether the parties are most concerned to produce an easy resolution or develop a stronger case to be carried onto the next stage of the process.

If the consultation stage fails to resolve the dispute, the complainant can request the establishment of an adjudicatory panel. The *panel* stage begins with the selection of three panellists to adjudicate the dispute (Shoyer 2003). The complainant and respondent are presented with a sample of five to seven individuals – suggested by the Legal Affairs division of the WTO Secretariat for their expertise in law or economics. A party is able to propose its own nominees for the panel, though these are usually vetoed by the opposing party, hence why the Secretariat is active at this stage. The Secretariat will continue providing additional samples of potential panellists until the parties accept the full table of three individuals. Once this occurs, the panel may start its work.

The role of the panel is to consider both written submissions and evidence given in oral hearings by the parties to the dispute. The oral hearings are closed and confidential to all but the parties to a dispute. The panel produces a report that first just describes the dispute. The parties may then respond with respect to, in particular, any potential factual inaccuracies. This then feeds into an interim report, with another chance for feedback from the parties, and then a final report that states whether or not a violation of WTO law has occurred.

The parties have the right to appeal the findings. Appeals are lodged with the Secretariat of the Appellate Body – the special appeals procedure designed to limit the powers of the panel process. As with the panels process, the Appellate Body involves a table of 'experts' to whom the parties must provide both written submissions and oral statements. Unlike the panels process, however, the Appellate Body draws its members from a pool of individuals selected by all WTO Member-states meeting as the Dispute Settlement Body.

Unless every Member-state chooses to reject a report – which would include all parties to that dispute – it will be accepted on the basis that there is no negative consensus (McCall Smith 2003). The 'losing' respondent Member-state is then expected to comply with the ruling and its recommendations. It is the responsibility of the successful complainant to report any incidence of non-compliance – in which case, a new dispute is effectively launched. If non-compliance persists, the complainant may be granted the right to impose trade sanctions upon the non-complying party in accordance with the estimated cost of the ongoing violation. The comparatively high compliance rate enjoyed by the WTO Dispute Settlement

rulings greatly enhances the institution's claim on output legitimacy (Leitner and Lester 2011).

To summarise, although WTO dispute settlement creates a formidable institutional mechanism designed to enforce WTO trade agreements upon the Member-states, the mechanism itself is not a police body. The policing function is carried out by the Member-states, who possess the exclusive right to bring cases as well as enforce compliance. If going by the DSU alone, the criteria for determining the institution's legitimacy are clear where there are formally agreed rules on determining who should influence proceedings, the terms of good conduct for proceedings, and what the institution can be expected to produce. Yet, despite its formal intergovernmental character, ever since WTO dispute settlement first began functioning on 1st January 1995 research has increasingly identified the presence of additional agency – non-state actors – in the practise of WTO dispute settlement. The developing and, therefore, fluid character of agency is argued in this article to be symptomatic of a wider discursive process in which the basis of legitimate governance for WTO Dispute Settlement has been regularly re-contested that goes beyond its formal design.

The re-contestation of legitimacy in WTO Dispute Settlement

Member-states are the primary actors in WTO Dispute Settlement. Whilst new forms of agency have emerged, their direct contribution to shaping decisions by panellists or Appellate Body members is hard to measure. This section is not intended to question that, but rather to problematise 'Member-states' as a fixed category and so in the process underline a series of changes that can best be understood as part of a wider re-contestation over the terms of legitimacy in WTO Dispute Settlement. This re-contestation challenges the legalistic attempt to fix the institution's claim to legitimacy within the DSU.

This section presents WTO Dispute Settlement as subject to a continual process of re-contestation over the terms of its legitimate governance. In particular, this process has seen substantial criticism from actors external to the institution – most notably against rulings seen as detrimental to environmental issues – but, and importantly for the argument described above, a struggle amongst institutional actors – including Member-state delegations, individuals tasked with ruling on cases, private legal firms, and others – re-articulating the purpose and identity of the system.

Politicisation and the emergence of new actors in WTO Dispute Settlement

One of the most controversial and publicly known cases ruled upon by the WTO Dispute Settlement Body was *US-Shrimp* that featured prominently amongst the list of criticisms voiced by those protesting against the WTO's Seattle Ministerial Conference in December 1999. The case has particular salience in this article as the key point where WTO Dispute

Settlement became subject to an increasingly wider political community. The case concerned whether US environmental rules restricting shrimp imports caught using practices that threatened turtle populations breached WTO rules. Environmentalists active in the Seattle protests branded themselves as ‘turtles’ – a term used extensively in placards stating an alliance with trade unions against the WTO: ‘Turtles and Teamsters together at last!’

Environmental groups demanded a right to be heard by the panellists adjudicating the dispute, but were initially refused. As non-state actors, they could only formally submit materials for consideration if asked to do so by the Member-states party to the dispute. Whilst the United States Trade Representative included some materials, environmental groups complained publicly at the lack of direct representation. When the United States lost the case at the panel stage and sought appeal via the Appellate Body, the question of access for non-state actors was reconsidered. Whilst the Appellate Body ultimately ruled against the US ban on shrimps on the grounds of non-discrimination – that the same high standards were not demanded of the US fishing fleet – the right of Member-states to discriminate on environmental grounds was upheld, and those environmental groups gained the right to submit information to panels and the Appellate Body independently of Member-states – meaning free of state-censure. In Scharpf’s terms, widening access to the submission process makes most sense in terms of input legitimacy, whereas acknowledging that Member-states can discriminate along environmental grounds would be more relevant to the institution’s throughput legitimacy. However, the argument here is not that these developments make WTO Dispute Settlement necessarily more legitimate, since legitimacy is argued here to be discursive and not fixed upon any apolitical basis. The analysis here is therefore focused on the discursive battle at play in the re-contestation over what is (il)legitimate.

In *US-Shrimp*, the Appellate Body’s ruling created a new legal identity within the WTO dispute settlement system whenever they may make submissions as *amicus curiae* (‘friends of the court’). The identity was not contained within the Dispute Settlement Understanding (DSU) that Member-states had negotiated. Rather, it emerged only as a result of this ruling by the Appellate Body that was provoked by politicisation external to the formal institution (Steger 2002; Reinisch and Irgel 2001, 136-143; Appleton 1999; 2000). Potentially the inclusion of *amicus curiae* is ‘much ado about nothing’, as some (e.g. Mavroidis 2001) have suggested, since there is no requirement that panels and the Appellate Body actually read these submissions.

Conversely, some practitioners engaged in WTO Dispute Settlement have argued that the impact of *amicus curiae* should not be simply dismissed since the submissions they provide sit amongst the pile of data considered by panel and Appellate Body members when ruling on a case.² Furthermore, the *amicus curiae* principle remains a point of significant contention amongst WTO Member-states. Support for its creation originally came from the United States, whilst developing-country Member-states have been

² Based on an interview with a practitioner.

highly critical – criticising it as undermining the primacy of sovereign states. The reason it stands out as most significant in the context of this article, however, is that it evidences the re-writing of WTO law.

This is a body of law that, given its sensitivity to the norm of state sovereignty, is formally intended to do no more than codify the agreements negotiated amongst the WTO Member-states. It differs from domestic law, for example, which runs on the basis of *stare decisis* – where law develops depending upon how it is ruled upon in court decisions. The WTO Dispute Settlement was meant to resolve disagreements between states over the interpretation of WTO law, not to add anything as substantial as a new category of actor to the submission stage. The *amicus curiae* principle first emerged in the context of unprecedented public contestation around *US-Shrimp*, in the later 1990s where the wider legitimacy of the WTO as a body for regulating global trade was subject to high levels of critique with street protests and mass alliances created to contest its role in global governance (Wilkinson 2005).

There is a growing body of literature highlighting the importance of symbols and discourse in understanding the formation and operation of the global trade regime (Strange 2014; 2011; Eagleton-Pierce 2012; Ford 2003). As argued earlier, debates over legitimacy need too to be seen as part of a wider discursive struggle over the terms of good governance. This discursive process does not consist of competing political demands alone, but includes the emergence of new identities as the discourse shifts. Here, the emergence of the *amicus curiae* principle illustrates one such subject position that reflects a discourse over the meaning of legitimacy for the WTO's Dispute Settlement Body.

The discursivity of what constitutes legitimacy in WTO Dispute Settlement is apparent too in the poorly defined but ever-present role played by business interests. For some working in that system, business actors are not only active but amongst the most significant actors pushing disputes.³ In part this is due to legislation within several Member-states – most notably, the European Union and United States – requiring that business actors are given a direct means to request their state trade representative properly consider any request they may make towards filing a dispute (Shaffer 2006; Garrett and McCall Smith 2002). Member-states are already deeply reliant on business interests due to the information often only they can provide, or at least give most cheaply, to fight and defend their interests in WTO Dispute Settlement (Bown and Hoekman 2005; Shaffer 2003). Whilst this is not a new phenomena to trade negotiations overall, it does stretch the category of who or what is an actor in WTO Dispute Settlement where Member-states rely extensively upon business actors in writing their submissions to panels and the Appellate Body. Formally, business actors cannot attend the oral hearings of either stage but, in practice, Member-states can choose which individuals make up their delegations and sometimes business actors have been included.⁴ Often

³ Based on interviews with several practitioners.

⁴ Based on interviews with practitioners.

business actors have an additional role through funding the private legal firms – *private counsel*, as will be discussed next.

As with the *amicus curiae* principle, the provision to allow *private counsel* in WTO Dispute Settlement was not included within the text that came out of the negotiations that created the WTO. Rather, there has been an often-heated debate between Member-state delegations over whether to allow representation by private legal firms. Developing-country Member-states have been overwhelmingly in favour, seeing *private counsel* as a means to supplement their starkly under-resourced trade departments when engaging in WTO Dispute Settlement (Shaffer 2003; Layton and Miranda 2003; Garnett and McCall Smith 2002). In contrast, developed-country Member-states argued that any representation of Member-states by private legal firms risked putting those practices into a conflict of interest, faced with the potential difficulty of working for different Member-states. Since its creation, the *private counsel* provision has seen Member-states of all hues make regular use of international legal firms specialising in WTO law. A gradual shift has occurred, moving the terms of legitimacy away from a conventional understanding of state sovereignty to a more legalistic, technocratic approach in which states need no longer directly represent themselves but can purchase the services of external agents. These agents – the legal firms working as private counsel – are not passive service-providers, but are active in advertising their work to Member-states. In many cases, they offer services to developing-country Member-states on a *pro bono* basis. They also work closely with the range of actors that exist to enhance the capacity of those less-resourced Member-states to utilize WTO Dispute Settlement.

Engaging in WTO Dispute Settlement – whether as the complainant bringing a case, or the plaintiff defending – requires that Member-state delegations are equipped with a high level of technical competence. When the system was first created in 1995, the only service existing to help the less-equipped Member-states to represent their interests was the Legal Affairs division of the WTO Secretariat. However, the higher-than-expected number of cases brought to the dispute system created an excessive burden on this assistance. Furthermore, WTO Secretariat staff experienced a conflict of interest between their duty of impartiality and the demands of less-resourced Member-states for help in enhancing their capability to represent themselves in the dispute settlement mechanism (Van der Borgh 1999). One solution was the 2001 creation of the Advisory Centre on WTO Law (ACWL). Though an intergovernmental body, the ACWL is funded on a relatively *ad hoc* basis where a group of developed-country WTO Member-states voluntarily donate funds which are, in turn, used to help finance a team of lawyers – and, in some cases, private counsel – to assist developing-country WTO Member-states in pursuing or defending a case in the WTO dispute settlement mechanism. Significantly, ACWL legal staff can be asked to represent a Member-state in oral hearings. The emergence of the ACWL underlines the discursive process through which WTO Dispute Settlement has been, and continues to be, made legitimate. That is, the legitimisation of WTO Dispute Settlement is not a fixed, apolitical project, but one that exhibits a regular and constant process of re-articulation in which

competing ideas of 'good' governance appear, and in which new actors emerge.

Likewise, the operation of WTO dispute settlement has relied upon a wider range of actors that include non-governmental organisations (NGOs) that enhance the capacity of Member-states to use the system. Whilst much of this work falls under the topic of 'technical-capacity enhancement' – a topic frequently treated as a relatively straightforward task of strengthening the knowledge of particular Member-state delegations – the argument in this article is that it reflects a wider discursive struggle over the terms of legitimate WTO dispute settlement. In several cases, NGOs have tried to enter the system and so affect that struggle. This was apparent in *US-Shrimp*, as already stated, but also in less combative engagements. For example, in *EC-Sardines* – a case against European Union attempts to ban Peruvian imports of a Sardine-like fish as 'sardines' – the UK Consumer's Association, which supported the case as a means of lowering the price of fish for consumers, provided a dossier that formed part of Peru's complaint submission (Shaffer 2006b). It is significant that a UK-based NGO chooses to formally side with the Peruvian delegation, in order to advance its own interests against the EU's position. That is, a national NGO steps outside of domestic context to align itself with another Member-state. WTO Dispute Settlement, in this example, goes beyond a state-to-state entity to involve a more complex series of interactions in which national lines and levels become blurred. The NGO, here, plays with what is an intergovernmental body to engage in a supranational form of governance. The strength of Peru's winning case was in part built upon its being seen as on the side of the consumer's – or 'publics' – interest.

Since WTO Dispute Settlement began, one NGO has emerged as particularly central as a provider of analysis often intended to enhance the ability of developing country Member-states to use the system – that is, the International Centre on Trade and Sustainable Development (ICTSD). In addition to producing research papers, the ICTSD has sometimes been described as the ambassador of the ACWL – setting up regional dialogues in major cities within Africa, Asia, and Latin America involving meetings between WTO delegations from developing countries with business interests, as well as lawyers from international trade law firms offering *pro bono* work.⁵ These dialogues are intended to help developing country governments better understand how to use WTO dispute settlement, as well as establish closer working relations between legal firms offering private counsel, and local business with the potential to lobby governments to launch a case.

The work of NGOs like ICTSD, including its collaboration with the intergovernmental body the ACWL, might be easily dismissed as just a rationalistic response to the inevitable difficulties of implementing WTO law – that, the WTO Secretariat and the WTO Member-state delegations alone are insufficient. Why, then, is it relevant to talk about the role of the ICTSD as demonstrating a wider discursive struggle over the terms of legitimacy in WTO dispute settlement? In the case of the *amicus curiae* or *private counsel*

⁵ Based on interviews with personnel in both the ICTSD and ACWL.

provision the relevance of discourse is certainly clearer, in that they refer to a re-writing of the WTO's Dispute Settlement Understanding text that goes against its original statecentric identity. In answer, the argument made here is that treating the role of ICTSD as purely an exercise in technical-capacity building misses the political process taking place.

Whilst the ICTSD does not have a formal role in the WTO system, it plays a major role in organising events at which WTO Member-state delegates and Secretariat staff debate both with one another and other actors including politicians, academics, lawyers, and the media. In the case of WTO Dispute Settlement, it becomes apparent that the ICTSD is not an actor limited to contesting the system from outside – with, for example, political demands contained within its research documents – but has over time emerged effectively within the functioning of that system. That this is possible shows, again, how the terms of what is legitimate governance for WTO Dispute Settlement has changed and, treating this process as discursive, allows us to see the process not as finished but still subject to a continuing re-articulation.

Conclusion

The emergence of new identities in WTO Dispute Settlement has led to a debate over if, and how much, these apparently new forms of political agency challenge the system's formal statecentrism. Yet, as with the example of the *amicus curiae* principle, it is debatable as to how much the creation of these new avenues of 'actorness' have altered the structure of agency in WTO Dispute Settlement. In response, the article has argued that the emergence of these new identities should be viewed as the product of a discursive struggle over the terms of what is legitimate in WTO Dispute Settlement. And, as seen in the external political battles that contextualised the emergence of the *amicus curiae* principle, that discursive struggle exceeds the formal institutional structure of the WTO and its Member-states.

Underlying this struggle has been a general concern with representation, including both: how societal concerns (e.g. environmentalism) should be heard; and, how to ensure that the less-resourced Member-states are able to utilize the system to advance their own interests. The politics provoked by these discussions has been central to the constitution of the *amicus curiae* and *private counsel* principles. Likewise, it has provided the context in which it has become legitimate for Member-states to engage closely with civil society actors like the ICTSD in formulating their own 'interests'. Concurrently, the proliferation of subject positions in WTO Dispute Settlement has enabled individuals representing businesses a greater range of access points to the system.

Where new subject positions have been legally codified through Appellate Body rulings, what becomes apparent is a two-way process between de- and re-politicisation. That is, WTO Dispute Settlement exists to de-politicise the management of regulations governing cross-border trade flows, by resolving disputes between Member-states over the interpretation of the agreements they have signed. As a mechanism, it reflects a wider shift towards legalism in global governance – a process that includes the

technocratisation of other policy areas including trade. Yet, each time it is implemented, WTO Dispute Settlement potentially faces the destabilising contradiction – that between its legal-technocratic identity, and a world that is fundamentally political. Within and without the formal institution, the system has been frequently re-politicised.

The WTO Dispute Settlement system is subjected to a continual discursive struggle over its legitimacy – whether expressed in terms of its efficacy, or degree of representation, what matters is that its identity as a purely legal-technocratic body is contested. To maintain that identity, however, a process of re-articulation can be seen that has led to the emergence of new actor identities – some codified within the internal workings of the system (e.g. *amicus curiae*, *private counsel*), and some formally external but nevertheless essential to its operation (e.g. ICTSD). None of these new identities is revolutionary in the sense that WTO Dispute Settlement has been radically altered, yet equally it is clear that the system has changed beyond how it was originally conceived within its founding charter. If those changes are seen simply as apolitical, technocratic decisions then research misses out on the social processes driving what are political developments.

What is legitimate in WTO Dispute Settlement is not pre-determined, but acquires its meaning or context within a particular political community. That community is not static and limited to Member-states alone but, as argued above, includes a much broader social context in which, in some cases, street protests and movements have become relevant. If the apparent inclusion of more actors makes WTO Dispute Settlement appear more democratic, this is only because the political community shaping that system sees the value ‘democracy’ as a condition for legitimate governance.

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