



THE CHALLENGES TO THE WORLD TRADE ORGANIZATION: IT'S ALL ABOUT LEGITIMACY

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INTRODUCTION: THE WORLD TRADE ORGANIZATION AND A CHANGING GLOBAL ECONOMY

According to the World Trade Organization, trade liberalization achieved since its establishment in 1995 has raised global income by as much as \$510 billion. Since its creation, WTO rules, its dispute settlement mechanism and the work of its secretariat have also become central to the management and smooth functioning of global trade. During the 2008 global financial crisis when plunging economies and rising unemployment created pressures to protect domestic industries, the WTO was credited for stopping a descent into the type of tit-for-tat protectionism that countries engaged in during the Great Depression. Despite the WTO's undeniable success, a changing international economic environment creates a series of significant challenges for the organization.

The most obvious challenge is that the Doha Development Round—the current round of multilateral trade negotiations to further liberalize trade and reform the WTO. After a decade of talks, it still remains to be concluded. The Doha Round is focused on reducing important trade barriers in sectors, such as agriculture, industrial goods and services. This would encourage businesses around the world to specialize in the production of goods and services, achieve economies of scale, and increase their efficiency and productivity, which would allow them to deliver improved and cheaper products to global consumers. As importantly, the Doha Round is particularly focused on providing increased market access to goods and services from developing countries. In the end, the WTO estimates that the Doha Round could increase global GDP by \$150 billion per year.¹

However since the launch of the Doha Round, countries have turned to free trade agreements (FTAs) in order to gain significant trade access in new markets and to explore new trade-related issues that are currently not addressed within the WTO. As more FTAs have been concluded, the central role of the WTO in liberalizing trade has been called into question. In addition, the WTO has played a very limited role in helping address other global issues related to trade, such as food security, climate change and global trade imbalances.

The economic growth of large developing countries has also created a new set of challenges for the WTO. How these countries are integrated into the global trading system and specifically how China - as the world's second largest economy - engages with the WTO is crucial not only for the Doha Round but for the future of the organization. China's support for a successful conclusion of the Doha Round has now become indispensable.

As the world's largest economy, the United States continues to be a key source of support for the WTO and the Doha Round, but rapid growth in large developing countries is testing the U.S. position on liberalizing trade and its views on the capacity of the WTO to effectively address trade disputes. In particular, the growing U.S.-China trade deficit has led to frustrations in the U.S. that China has not been playing by the rules. As a result, there have been domestic pressures in the U.S. to restrict Chinese imports. Whether these trade disputes can be resolved under WTO rules will be a touchstone for U.S. support for the WTO.

In order for the WTO to respond to these new challenges, it must focus on its capacity for global economic governance. This capacity is derived from the WTO's ability to exercise power and the WTO's dispute settlement mechanism, rules and secretariat are a central part of this process. However, as with all forms of governance, the ability of the WTO to exercise governance effectively depends largely on its own legitimacy—the acceptance by those people or entities being governed. Thus, for the WTO to secure a key role for itself in global economic governance, it needs to address concerns regarding its legitimacy.

THE DOHA ROUND: FROM NEGOTIATING TO LITIGATING

Up to now, multilateral trade rounds have been the main vehicle for liberalizing trade and reforming the WTO so it better reflects the new challenges of the global economy.

The current negotiating round launched in Doha in 2001 aims to better integrate developing countries into the global trading system. The round has been focused on improving market access for agricultural goods, reducing domestic support of agriculture products, and reducing tariffs on so-called non-agriculture market access goods. Improving market access for services, intellectual property issues, the relationship of the WTO to multilateral environmental agreements, improving market access for environmental goods, and reform of the organization's dispute settlement mechanism are also on the agenda.

The increased weight of large developing countries such as China, but also India and Brazil, has complicated efforts in completing the Doha Round. These countries were at the forefront of the creation of the G-20 negotiating bloc (not to be confused with the recently established G-20 leaders' meetings) at the WTO ministerial meeting in Cancun in 2003 and they played a key role in demanding greater agricultural liberalization from developed countries.

Yet despite the economic benefits of completing the Doha Round and continued statements of political support - most recently at the Asia-Pacific Economic Cooperation (APEC) ministerial meeting in Japan and the G-20 Summit in Korea - the Doha Round is now the longest multilateral trade round in negotiations since the inception of the General Agreement on Tariffs and Trade (GATT) in 1947. It remains to be seen whether the round can be successfully completed.

According to the so-called bicycle theory of trade rounds, progressive trade liberalization sustains political support for the WTO. From this perspective, failure to complete the Doha Round could begin to call into question the commitments of countries to multilateral trade liberalization as a whole.²

Certainly one of the immediate consequences of not successfully completing the Doha Round has been the move to achieving trade liberalization through other forums, such as free trade agreements. However, FTAs undermine support for trade liberalization at the multilateral level because it leads to trade diversion and increased costs for businesses.

Another side-effect of the lack of progress in the Doha talks has been that countries have turned to the WTO appellate body to achieve outcomes that would normally be negotiated through trade rounds. This has begun to

undermine the WTO's implicit balance between achieving market access through trade negotiations and WTO dispute settlement.

Litigating cases at the WTO that should actually be addressed through multilateral negotiations is problematic for a number of reasons. For one, WTO rules and not political sensitivities are the basis for appellate body decisions.

The WTO's dispute settlement mechanism is arguably the most widely used and effective international tribunal today. Since its inception in 1995, 405 complaints have been filed, leading to approximately 130 panel decisions, of which about half have been appealed to the WTO appellate body. Most of these decisions have also been complied with.

Under the WTO's dispute settlement mechanism, governments can challenge whether another member has breached its WTO commitments. The decisions of a panel or the appellate body are in effect automatically binding on the disputing parties as these decisions are adopted by the WTO unless all members (including the winning party) vote against it.

While the WTO dispute settlement mechanism was established to allow trade disputes to be settled according to the rule of law, it was not designed to resolve issues that should be subject to international negotiations. Nevertheless, many countries are using the dispute settlement mechanism to do exactly that. For example, under the so-called peace clause, WTO member countries agreed to exercise restraint in litigating agricultural subsidies cases at the WTO since these issues were still subject to negotiations in the Doha Round. However, the failure to conclude the Doha Round has led many countries to use the WTO dispute settlement mechanism to challenge subsidies, like the U.S. subsidy on cotton and the European Union subsidy on sugar.

Increased use of the WTO dispute settlement mechanism also highlights the binding nature of decisions and the limited flexibility that members have to alter a decision that is politically unsustainable. When compared with domestic systems, where judicial decisions can be overturned by legislation, the WTO's so-called negative consensus rule requires all WTO members (including the winning party) to agree to overturn an appellate body decision.

Finding a way for the WTO to give countries the flexibility to deal with appellate body decisions that they cannot live with is crucial. In circumstances where issues are particularly political, there may be enough domestic opposition to a WTO ruling that causes the losing country to feel compelled to not comply with the decision. For example, the European Union has still failed to comply with a 1998 WTO appellate body decision on EU restrictions on hormone-treated beef imports. The lack of compliance with WTO decisions not only undermines the decisions but it also undermines the entire dispute settlement mechanism.

If the Doha Round fails, the need for flexibility could include allowing the use of a super-majority vote to overturn a decision. Alternatively, the WTO could encourage or even require countries to engage in mediation beforehand with a professional WTO appointed mediator. This process might allow disputing parties to come to a favorable solution for everyone rather than facing the zero-sum outcome from the WTO panel process.

FREE TRADE AGREEMENTS: IMPLICATIONS FOR THE WTO

Since the launch of the Doha Round, there has been a proliferation of free trade agreements. Whereas the U.S. only had FTAs with four countries in 2000, it has now concluded FTAs with 17 countries and has signed another three. Since 2002, Japan has gone from having one FTA with Singapore to 11 FTAs. Additionally, regional FTAs are also on the rise. The Association of Southeast Asian Nations (ASEAN) has entered into FTAs with China, Japan, South Korea, India, and most recently with Australia and New Zealand. In an effort to establish free trade among pacific-rim countries, the U.S. is currently negotiating the so-called Trans-Pacific Partnership with Australia, Chile, Vietnam, New Zealand, Brunei, Singapore, Malaysia and Peru.

The proliferation of FTAs presents a number of challenges for the WTO's mandate to liberalize trade multilaterally. The most profound change impacting the WTO is that FTAs have increasingly become the means for liberalizing trade. Currently, there remain numerous large bilateral trade relationships not governed by FTAs for which the WTO remains the focus; the U.S.-EU, the U.S.-Japan and the U.S.-China are three of the most significant. However, if Japan manages to join the Trans-Pacific Partnership negotiations, the U.S. will have an FTA with its fourth largest (Japan) and largest (Canada) trading partners.

The market access gains that countries have achieved under FTAs have reduced the economic value of an outcome from the Doha Round, thereby making its completion less significant. In fact, it is estimated that approximately half of world trade now occurs under preferential tariff rates or zero tariff rates granted on a most-favored nation basis.³ Negotiating FTAs also requires the investment of political capital by world leaders and the resources of trade negotiators. This leaves less energy and capacity to focus on the Doha Round. Also, once countries have negotiated preferential market access arrangements, there is less interest in reducing these potential gains through a multilateral outcome.

FTA negotiations also raise concerns about equity, particularly when FTA rules are strategically used to develop WTO rules. Without suggesting that WTO negotiations have always been fair, they have provided opportunities for smaller countries, usually in coalitions with other like-minded countries, to carry enough weight in order to achieve outcomes on particular strategic issues. For example, least developed countries managed to have included in the Doha Round a special consideration on the negative impact of agriculture subsidies on cotton. In contrast, bilateral FTA negotiations provide no avenue for coalition building and instead their outcomes usually reflect the relative power of the negotiating countries. For the U.S., the EU, China and Japan, bilateral and even regional FTAs maximize their ability to get their own way. Were these outcomes to become templates for future multilateral trade rounds, then a two-level game that leverages FTA outcomes into the WTO might undermine the WTO's legitimacy.

In addition to detracting from the WTO, FTAs have their own costs for businesses and governments. When a country has different FTAs with other countries, it creates a so-called spaghetti effect of trade rules, which raises costs for companies as they are forced to navigate competing FTA commitments.⁴ In some cases, countries may end up having more than one FTA apply to trade with the same country. For instance, the U.S. already has bilateral FTAs with Australia, Singapore, Chile and Thailand and has indicated that these FTAs will continue to apply alongside the Trans-Pacific Partnership.

Another concern is that the development of regional FTAs will lead to a world divided by competing economic blocs. Calls for U.S. participation in the development of Asia's economic integration have been partly driven by a desire to avoid this outcome. A world divided by economic blocs could also increase international strategic and military competition.

FTAs can also reduce global welfare if they end up diverting trade instead of promoting it. This arises when preferential market access granted under an FTA ends up displacing imports from the most efficient producers located in a country that is not part of the agreement.

We should, however, expect to see more rather than fewer FTAs in the future, irrespective of a positive outcome from the Doha Round. This is because once a country enters into FTA negotiations, third countries become concerned that the preferential access granted under that agreement will undermine the competitiveness of the third country's exports. Therefore, the commencement of FTA negotiations by one country has often been followed by requests from that country's trading partners to also negotiate FTAs with them. This dynamic was recently on display as the White House and Congress urged the passage of the Korea-U.S. FTA in order to avoid U.S. exporters from losing market share in Korea from the passage of the Korea-EU FTA. In addition, some in Congress have urged the Obama administration to finalize the Colombia-U.S. FTA in order to address the market share loss of U.S. agricultural products to Colombia—a result of the preferential access granted to Argentina under the Colombia-Mercosur FTA.

The rush to negotiate FTAs has also been motivated by the opportunity for trade diversion. We know that economics is global but politics is local. Therefore, the opportunity that FTAs provide for businesses to improve their competitiveness through preferential trade access has created demand for FTAs among domestic stakeholders. While enhancing global economic efficiency and welfare through multilateral trade liberalization is certainly a goal worth pursuing, we should not be surprised when the demands of local stakeholders trump the interests of global welfare.

Furthermore, FTAs include a range of market access provisions and disciplines on issues such as investment, trade facilitation and e-commerce that are currently not up for negotiation in the WTO. These provisions certainly compliment and facilitate the market access achieved through reduced barriers to trade in FTAs.

The repeated affirmation by governments of their commitment to the Doha Round might also be contributing to the negotiation of too many free trade agreements. This is because these statements of support have rein-

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forced the belief that the WTO is too big to fail. This has created a form of moral hazard leading to too many FTAs as countries have avoided internalizing the full cost of FTAs for the WTO.

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First, the WTO agreement should be amended to more comprehensively address free trade agreements. Currently, the role of the WTO in disciplining FTAs is quite limited. Another way to improve the WTO-FTA relationship is for the institution to expand its rules on FTAs. At present, WTO rules apply only to trade in goods and services and say nothing about the range of other issues being addressed under FTAs, such as intellectual property, investment and government procurement. Elaborating a set of guidelines or principles that address how FTAs should approach these issues might reduce unnecessary diversity among FTAs, while leaving countries some flexibility to experiment with different approaches.

The WTO agreement should also be amended to permit the WTO panel and appellate body to hear disputes that arise from FTAs. The ability for countries to settle disputes using WTO panels and for questions of law to be appealed to the WTO appellate body has been one of the signature achievements of the Uruguay Round. Moreover, despite the incorporation of bilateral dispute settlement provisions in many FTAs, countries have overwhelmingly preferred to settle disputes under the WTO. Allowing the WTO appellate body to hear FTA disputes would start defining and creating a relationship between the WTO and FTAs. It would also start providing legal coherence across the WTO and FTAs and between FTAs. Furthermore, the expectation that a WTO decision regarding one FTA would be applied by a WTO panel to another FTA would increase the certainty and predictability about the meaning of FTAs, which could enhance global trade and investment.

We could also conceive of the relationship between the WTO and FTAs as a federal trading system. From this perspective, the WTO could provide the legal architecture and institutional structure, such as the dispute settlement mechanism and secretariat support. FTAs then become places where groups of countries experiment with different rules and undertake deeper levels of trade liberalization than otherwise possible under the WTO. Like the opportunity for U.S. states to be policy laboratories for the federal government, FTAs could provide the opportunity for countries to develop and test new international trade rules on a range of issues.

Experience gained from FTAs has also made countries more willing to support the development of these rules in the WTO. For example, Singapore, Chile, Australia and Morocco became familiar with the U.S. approach to trade facilitation through their FTAs with the U.S. Therefore, they supported a U.S. proposal in the Doha Round on trade facilitation that was modeled on their FTAs with the U.S. This feedback interaction between FTAs and the WTO can be viewed as self-reinforcing instead of zero-sum.

The capacity for free trade agreements to build momentum around new rules has also meant that FTAs have become an arena of strategic competition as countries use these negotiations to establish the new global norms. For example, the recently concluded Korea-EU FTA has included protection for geographical indications (GI)

that goes further than the GI negotiations in the Doha Round. The U.S. has responded with a proposal on GIs in the Trans-Pacific Partnership negotiations that limits protections for GIs.

FTAs also provide an opportunity for countries to experiment with liberalizing highly protected sectors, which could be a step toward broader liberalization under the WTO. For instance, the Australia-Japan FTA negotiations might provide Japan with an opportunity to experiment with agriculture liberalization. With properly phased in tariff reductions and domestic assistance from the Japanese government to facilitate the structural reform such liberalization would require, this could allow Japan's agriculture sector to adjust before opening its markets more broadly under other FTAs or multilaterally at the WTO.

THE UNITED STATES AND CHINA: IMPLICATIONS FOR THE WTO

As the world's two largest economies, the development of the economic relationship between the United States and China, and their respective views on liberalizing trade, will have important ramifications for the World Trade Organization as a whole. The way in which the U.S. and China engage with the WTO will determine whether the institution can remain a key player in global economic governance.

For the United States, trade liberalization presents a mix of opportunities and challenges. With unemployment hovering around 9 percent and the U.S. still recovering from the so-called Great Recession, the Obama administration has come to see global trade as an engine for creating jobs and generating growth.⁵ Just last year, President Obama proposed doubling U.S. exports by 2015. There has also been a renewed focus on trade in Congress following the 2010 elections where Republicans took control of the House of Representatives. Conventional wisdom in the U.S. has been that Republicans are more supportive of trade deals than Democrats. However, support for international trade among the newly elected Republican Tea Party members remains to be seen. Nevertheless, the main Tea Party members of Congress recently refused to sign a letter opposing the Korea-U.S. FTA, which suggests that they might actually support the trade deals.

Whether Congress ratifies the recently concluded Korea-U.S. Free Trade Agreement will be a window into the U.S. position on trade liberalization. The White House also appears ready to seek Congressional approval of the Columbia-U.S. Free Trade Agreement, following Columbia's implementation of a labor action plan that has placated U.S. concerns about labor rights in Colombia.

The main obstacle to U.S. support for international trade liberalization is its trade deficit, particularly its growing trade deficit with China. The U.S. trade deficit with China reached a record \$273 billion in 2010 and is viewed domestically as a reason behind the slow economic recovery and high unemployment rate in the U.S. A November 2009 Pew Research Center survey showed that support for free trade agreements like the North American Free Trade Agreement (NAFTA) and the WTO was at its lowest point in 13 years; over half of the public see free trade agreements as leading to job losses in the U.S.

Many U.S. policymakers also see the U.S. trade deficit as an example of China's manipulation of the rules of the game. In particular, the undervaluation of the Chinese renminbi (RMB) is viewed as evidence of China's

willingness to manipulate the system to gain an unfair advantage by keeping the prices of its exports artificially low and making American exports less competitive. Intellectual property theft in China is another perennial concern for U.S. policymakers. The U.S. government has expressed to China its concerns on issues from piracy to so-called indigenous innovation policies that give preferences for the procurement of technologies that are locally developed in China.

All these issues have readily played into fears that the U.S. is in a state of competitive decline. Chinese public sector investment in clean energy technologies and infrastructure, such as light rail, has been identified as a top priority in the country's five year plan. This stands in stark contrast to the poor and deteriorating state of U.S. transportation infrastructure. While President Obama has prioritized new investments in clean energy technologies and infrastructure, concern with the size of the U.S. budget deficit has limited the funding available for these investments.

These issues have created domestic pressure in the United States to respond to China's trade practices. Where possible the U.S. has tried with some success to use WTO rules to push China to change certain trade policies. For example, the U.S. has brought a range of cases to the WTO and challenged a host of Chinese laws, such as subsidies for wind power and measures that limit U.S. steel imports into China. The U.S. government has also applied anti-dumping and countervailing duties on the import of Chinese goods, including tires. Thus, it would seem for the U.S. that the WTO is the most effective institution for addressing at least some of the economic challenges posed by China.

However, there are critical issues that at this stage cannot be addressed through the WTO. For example, China is not a party to the WTO Agreement on Government Procurement, which China's indigenous innovation policies would likely have violated. The U.S. has been pushing China to join this agreement, which China agreed to do following its accession to the WTO in 2001. However, the issue was resolved bilaterally through the U.S.-China Joint Commission on Commerce and Trade. China has now agreed that its government procurement will no longer discriminate based on the origin of the intellectual property.

As for China's undervalued currency, it is unlikely that it is in breach of any of its WTO commitments. For some, this demonstrates the limits of the WTO in addressing issues that matter. The inability of the U.S. to achieve any traction so far on the Chinese currency issue has led members of Congress to propose various protectionist bills that would allow the value of the RMB to be included in the calculation of anti-dumping duties. Some proposals have even deemed China's undervalued currency as a government subsidy that could factor into the U.S. calculation of countervailing duties on Chinese imports.

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How the U.S. ends up balancing its domestic concerns over China and its support for an open global trading system will be of signature importance for the WTO. This is because the U.S. remains the main nation whose ongoing support for the WTO is crucial for the institution's long-term viability. As the U.S. will use whatever channels necessary to address its trade issues with China, ensuring that major trade issues can be addressed within the WTO's framework is vital for demonstrating to the U.S. the value of the organization, particularly given the challenges of the Doha Round.

The growth of China and other large developing countries has led to a shift in the global balance of economic power. The U.S. has responded by encouraging their voice and asking them to take more responsibility in the global economic affairs. As President Obama stated at the 2010 G-20 meeting in Seoul, "just as emerging economies have gained a greater voice at international financial institution...so, too, must they embrace their responsibilities to open markets to the trade and investment that creates jobs in all our countries."

The U.S. has pushed to give China a greater voice in international economic affairs by supporting the G-20 leaders' process that includes China, India, Brazil and South Africa, among other developing countries. The U.S. also pushed for amendments to the voting rights in the International Monetary Fund to give developing countries a larger share.

The idea that large developing countries should take some responsibility for the global economic architecture including the WTO, which underpins the open trading regime that these countries have gained so much from, does not seem controversial. However, a statement in the U.S. president's *2010 Annual Report on the Trade Agreement Program* suggests that this will require China and others to take into account global economic interests beyond their own. Therefore, China needs to realize that in securing its own economic interests, it must also look to take a responsible international role in promoting global economic growth and ensuring the sustainability of the WTO. China is now too large to free ride off of international institutions like the WTO.

There will certainly be potential challenges even if China chooses to take more responsibility in supporting the global economy and the WTO. While China will one-day become the world's largest economy in terms of overall GDP, its GDP per capita will still remain a fraction of that of the U.S. This suggests that the type of leadership role that the U.S. has played since the 20th century in supporting the international trading system will not be a kind of role China can readily fulfill. The possibility of a world where the largest economy does not exercise leadership is something we should be concerned about. Lessons from the interwar period, when the United Kingdom lost its capacity to lead and the U.S. had not yet developed a taste for leadership, provide a stark warning of the potential risks to global economic health of a leaderless world.

The extent of China's support for the WTO going forward will depend on the institution's legitimacy and in particular whether the outcome from the trade rounds and the WTO's rules are seen as fair. As WTO rules go to the heart of a government's regulatory responsibilities, such as providing its people with access to health care, medicine, water and education, we need to accept that these rules will present economic and political challenges for member countries.

Agreeing to the WTO plus rules—obligations for a China-specific expansive national treatment commitment, new commitments on foreign investment and additional commitments on transparency and judicial review—was China's price for WTO membership.⁶ However, it has created a feeling among Chinese policymakers that the process was unfair and has raised questions about the WTO's legitimacy in China's eyes. The Chinese government has actually complained that some of these obligations have created significant burdens for the country. Moreover, creating different WTO rules for China also runs counter to the rule of law, which has helped transform the WTO into a rules-based organization.⁷

Asking China to take responsibility for upholding the WTO is a formula for incorporating the country's rise into an open rules-based, non-discriminatory trading system.⁸ Indeed, this will be one of the key benefits for all WTO members going forward. China's engagement with and support for the WTO should expose Chinese officials to a range of international norms that the U.S. would like China to embrace. However, for these norms to become accepted by China, it will require China to view the WTO as legitimate. The WTO will be most effective when countries believe that the institution and its rules and norms should be supported.

One of the most important norms is the settling of trade disputes by the WTO dispute settlement mechanism. Following China's accession to the WTO, it participated in disputes as a third party, which allowed it to become comfortable with the process. Today, China is actively participating as a claimant and defendant in a range of WTO disputes. Allowing China to become comfortable with international dispute settlements at the WTO might also have other benefits for the international rule of law.

It is in this light that the U.S., when assessing how far it should go to conclude the Doha Round, should consider what failure to Doha would mean for China's further integration into the world economy and support for the WTO.

THE CHALLENGE OF THE WTO'S LEGITIMACY

The challenges in completing the Doha Round, the proliferation of FTAs, the growth of large developing countries and the globalization of the world economy require creative thinking about how the international community can strengthen the WTO as the key international institution for managing global trade. In contrast to other forums and institutions like the G-20 and the IMF, the WTO is the only international organization focused on international trade with legally binding rules and the power to enforce them.

For the WTO to address the challenges identified above, international policymakers must enhance the WTO's role in global economic governance. However in order to do this, the WTO needs to be seen as legitimate.⁹

It is often argued that the WTO derives a sufficient level of legitimacy from the consent of its members. However, there is a problem with relying on members' consent for legitimacy. For instance, governments provided inadequate levels of consultation and transparency when formulating their negotiating positions during the Uruguay Round. Before countries consented to the final agreements of the Uruguay Round, there was limited opportunity for public comment and debate about the outcomes and implications of the round. Instead, public

access to trade officials was restricted and the opportunity to follow the developments in the negotiations was made difficult by the secrecy of the process.¹⁰

Pointing to members' consent as being sufficient to legitimate the WTO also ignores the agency costs that arise between trade officials and the broader government and legislative body. Agency costs arise when national officials adopt a position or accept an outcome in a trade round that might not reflect the wishes of the country.¹¹ This might happen in cases where career advancement of officials is tied to completing the trade round. In other cases, the negotiations may be so complex that officials do not fully understand the implications of the deal, as was the case in the Uruguay Round.¹² Specifically, the negotiations for the WTO's rules on intellectual property were so complex that developing country negotiators often did not have the resources to assess what these rules would mean for their respective countries.¹³ The complexity of the deal and the difficulty of identifying the final trade-offs required to complete the Uruguay Round made it practically impossible for countries to assess whether the deal was ultimately the best for them.¹⁴

In many countries, national legislation had to be passed in order to implement the Uruguay Round, which provided a further opportunity for scrutiny. However, the complexity of the Uruguay Round texts made it particularly difficult and time consuming for legislators to understand the implications. In the U.S., Congress was limited to an up or down vote on the issue. Therefore, unless a Congressional member was prepared to veto the Uruguay Round entirely, there was little incentive to spend resources scrutinizing the implications of the deal.

The fact that the WTO cannot gain sufficient legitimacy from members' consent highlights whether the WTO's exercise of power is in fact legitimate. Indeed, legitimating such power could help address some of the defects in member consent.

Coming to terms with how the WTO can legitimate its power is often met with claims that the institution has no power of its own since it is completely member driven. Yet conceptualizing the WTO as an institution that purely responds to the wishes of members alone is too narrow a view of how it actually exercises power. While the WTO cannot compel a member to act against its will, the institution does raise the costs associated with a member's actions. For example, a country that chooses not to comply with an appellate body decision might end up facing serious reputational costs or trade sanctions by the other party.

The exercise of power by the WTO through altering costs to members of particular courses of action is also complimented by the buy-in and acceptance by trade officials and other actors of the WTO's norms and rules. From this perspective, the WTO influences outcomes as trade officials internalize the norms and behavior that

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the WTO expects from its members.¹⁵ Thus, compliance with WTO rules and appellate body decisions also becomes something that should be done.

The WTO's power is manifest through its secretariat, its rules and its dispute settlement mechanism. For example, the WTO secretariat exercises power through agenda setting and framing the issues under consideration. The role of the WTO secretariat in choosing panelists for a dispute and providing legal advice to panels certainly influences the outcomes of WTO disputes. The secretariat's analysis of member compliance with commitments is also another example of its exercise of power since this analysis is often used to apply pressure on members to change the laws and regulations that are inconsistent with WTO rules.

The power of the WTO is also derived from the scope of the organization's rules that can discipline members' policies ranging from the use of genetically modified organisms and access to medicines to regulations that govern new standards for solar energy or hybrid vehicles. Moreover, for most of these so-called behind-the-border regulations, there is no clear line that differentiates whether a measure to say prevent the spread of a disease or pest is actually about protecting human health or is in fact a disguised trade restriction. In most cases, this assessment will be made by the WTO appellate body.

Compounding concerns about the scope of WTO rules and the delegation of these domestic decisions to an international body for arbitration is the frustration among many developing countries that the benefits of the Uruguay Round are not equally balanced and fair. For example, it is not clear whether the incentive for R&D from stronger intellectual property rights in the WTO Agreement on Trade-Related Intellectual Property Rights offset the costs to those in developing countries who cannot afford expensive branded medicines and can no longer have access to cheaper generic versions.

These limits to the WTO's legitimacy need to be addressed through the Doha Round and reform of the WTO. This means ensuring that the Doha Round negotiating process and its outcomes are viewed as legitimate. The WTO has sought to address some of these process issues by being more transparent about the negotiations and engaging directly with civil society. Ensuring that the interests of developing countries are adequately taken into account is also important for legitimating the Doha Round—particularly as this is meant to be the Doha Development Round. This should help alleviate some of the concerns felt by developing countries that the benefits from the Uruguay Round were biased toward developed countries.

Member countries need to spend more time explaining the implications of the Doha Round and international trade more generally to their citizens. For example, only 19 percent of Americans believe that free trade can contribute to economic growth. Therefore, merely repeating that the Doha Round will increase global welfare is not enough to convince a public that is concerned about job security and sees global trade as a threat instead of an opportunity.

Along with increased public outreach, governments around the world need a targeted set of policies aimed at assisting those most impacted by trade liberalization. For instance, many developed countries have policies that help the structurally unemployed. In developing countries, for example, the ability of farmers to adjust to the liberalization of agricultural trade will depend on a range of factors, such as access to adequate infrastructure.¹⁶

Ensuring that developing countries are able to take advantage of trade liberalization is important for all countries and providing development assistance to do this should be part of the Doha negotiations.

Giving legitimacy to the Doha Development Round and the WTO means that agricultural sector liberalization must be a central focus. Should developed countries provide increased market access in areas such as services this would help developing countries take advantage of their lower cost labor to increase their services sectors.¹⁷

The WTO's exercise of power also needs to be legitimated. For instance, the WTO secretariat must be seen as accountable to its members and civil society.¹⁸ Ensuring that the panel and appellate body process is conducted according to rules of due process and in a transparent manner will also go a long way in strengthening the WTO's legitimacy.¹⁹ Thankfully, the appellate body has been dealing with these issues. In numerous decisions, it has found that the WTO texts incorporate a range of due process norms, such as a right to legal representation and a right of the defendant to be notified of the case against it and the legal basis of the claim.²⁰

Reform of the dispute settlement process is part of the Doha Round, including developing rules for opening panel and appellate body hearings to the public and the use amicus briefs—submissions by non-parties to the dispute, such as civil society and businesses. Also, since the WTO appellate body adjudicates issues that impact public policy—such as how governments manage issues relating to human health—transparency of the process is especially important. The appellate body has found that it has the power to accept amicus briefs, but has tended to reject them as being not relevant to the dispute. Formalizing these reforms would affirm transparency in the WTO's dispute settlement process and give the wider public a chance to be heard in WTO disputes. This would certainly further enhance the legitimacy of the WTO.

Another important aspect of securing legitimacy for the WTO requires understanding and agreeing the limits of what the WTO can and should do. The need for WTO rules to prevent behind-the-border measures being used to protect domestic industries and erode market access gains from tariff reductions has made it increasingly difficult to draw a clear boundary around what laws the WTO should discipline. A similar mission creep has occurred at the international level, where compliance with environmental or human rights treaties has been raised to the WTO because of their impact on trade. While there might be no straightforward way of defining the proper scope of WTO's responsibility, one way forward would be to encourage greater dialogue between it and other international organizations. The WTO has taken some steps in this direction. For example, it has encouraged engagement with the secretariats of other international institutions and the Doha Round includes negotiations on the relationship between the WTO and multilateral environmental agreements.

However, a more systematic approach is desirable and should be extended to include other international bodies. For example, the global financial crisis has demonstrated that when it comes to regulating the financial sector, greater coordination is needed not only between the WTO and the World Bank and the IMF, but also with other international arrangements such as Basel Committee on banking supervision.

CONCLUSION

Since its establishment, the WTO has delivered significant global economic benefits through the liberalization of world trade. As a key institution for global economic governance, the WTO has also stabilized the rules on trade and provided an effective dispute settlement mechanism to manage trade conflicts. This has given businesses the confidence to engage in the type of global trading strategies that have allowed a company like Apple to have iPod components manufactured and assembled in different countries and then shipped back to the U.S., generating greater profits for Apple and ultimately providing a cheaper product to consumers.

Despite its indisputable benefits, the WTO currently faces a range of serious challenges. The most obvious challenge to the WTO is that it is losing its role as the primary vehicle for liberalizing trade. This has been driven by the difficulty in concluding the Doha Round and the proliferation of free trade agreements. In fact, for some countries, FTAs will deliver deeper and broader trade liberalization than would be possible, at least at the moment, within the WTO. As outlined, the proliferation of FTAs is a fact and the Doha Round has effectively stalled.

As gains from trade liberalization occur elsewhere, the focus of the WTO needs to shift toward its role in managing international trade and settling trade disputes.

The shift in global economic power caused by the increased economic clout of China and other major developing countries also has important implications for the Doha Round and the WTO more broadly. These countries have assumed a greater voice in the Doha Round than in previous rounds and have demanded greater concessions from developed countries. How this new dynamic unfolds will determine the fate of the Doha Round and ultimately the WTO more broadly. Clearly, compromise between the divergent positions that exist between developed and developing countries and within negotiating blocs is required to complete the round.

A successful conclusion to the Doha Round would ensure that China, India and Brazil in particular take ownership of this outcome. This would contribute to the willingness of these countries to undertake a leadership role in supporting the WTO. Their support will increasingly determine the ability of the WTO to manage and deepen international economic relations.

How the two largest economies in particular approach trade will have a decisive impact on how the international trading system evolves. For one, the size of the U.S. trade deficit with China has the potential to affect U.S. views on trade liberalization and its support for the WTO. The U.S. has sought to address unfair Chinese trade practices, such as intellectual property theft and discriminatory government procurement practices through the WTO. However, some of China's policies that have been most important to the U.S., such as the undervaluation of the RMB, are not directly able to be addressed through WTO rules. This has prompted the U.S. to raise the RMB issue in other international forums like the G-20. The inability of the WTO to deal with issues that matter most for the U.S. is of serious concern, particularly given the difficulty of achieving further trade liberalization under the Doha Round. The support of the world's largest economy for the WTO continues to be extremely important in enabling it to be an effective international institution for global economic governance.

The WTO's need to exercise power—to engage in global economic governance in order to address these challenges—requires concerns about the WTO's legitimacy to be addressed. Up until now, the WTO secretariat and appellate body have been most sensitive to concerns about the institution's legitimacy and they have taken steps to address this issue. For example, the engagement by the WTO secretariat with civil society during the Doha Round stood in welcome contrast to the secrecy and lack of openness that characterized previous trade rounds. Numerous decisions of the appellate body that have developed norms of due process have also addressed some of the concerns about the legitimacy of the dispute settlement process. However, there is only so much the WTO secretariat and the appellate body can do. WTO member support and engagement with the legitimacy issue is crucial if the WTO is to effectively fulfill its role as the only international institution capable of holding countries accountable to their global trade commitments.

ENDNOTES

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