

## Do Non-State Actors Enhance the Accountability of Global Governance? – The case of WTO Dispute Settlement

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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 as part of a general critique from civil society groups concerned that global trade governance has become unaccountable to the societies it affects. Could the growing presence of NGOs and other non-state actors in WTO dispute settlement – empirically identified within a growing body of literature – solve this apparent accountability deficit? Drawing upon existing findings and new research, the article argues that non-state actors have significant consequences for the accountability of WTO dispute settlement, but to whom the system is accountable and whether these consequences are good or bad is not pre-determined. Rather, as the burgeoning literature on accountability shows, the term itself is multi-faceted. Only by engaging with specific cases, as is done here in the case of WTO dispute settlement, can research properly draw out the shape of accountability in global governance.

**Keywords:** Accountability - Non-state actors - World Trade Organization - WTO Dispute Settlement - Global governance

### Introduction

The World Trade Organization's (WTO) dispute settlement mechanism provides the global trade regime with enforcement powers far greater than any comparable international organisation. It has been described as the 'jewel in the crown' of the WTO – a uniquely ambitious institutional form that has seen far more cases than initially envisaged but with a respectably high compliance rate (Elsig 2007; Leitner and Lester 2011). It has also made the WTO controversial. Critics have accused WTO dispute settlement of being unaccountable – to both the societies it affects, and the interests of developing-country Member-states. At the same time, the range of actors active in WTO dispute settlement appears to have increased since its creation – a growing body of literature having identified an expanding role for non-state actors within the system (Shaffer, Ratton Sanchez and Rosenberg 2008; Reinisch and Irgel 2001). Does this apparent

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broadening of agency in WTO dispute settlement help ameliorate its alleged accountability deficit, or does it only add to the problem by making it even harder to understand who is deciding what? In exploring this question, the article develops current understandings of how accountability relations function in global politics to produce an analytical approach well-suited to exploring new forms of accountability in global governance.

In the era of representative democracy, governance must be seen to be accountable. The demand for accountability is repeated at the global level, expressed in calls for reform to the distribution of votes between countries in the World Bank, and greater access for civil society to the International Monetary Fund. Such prominent multilateral organisations are frequently criticised as unaccountable – to both the societies they affect, and the interests of weaker nation-states.

The article therefore asks: what implications do non-state actors have for the accountability of WTO dispute settlement. The enquiry is structured as follows. Section one introduces WTO dispute settlement as an intergovernmental system, before listing the range of non-state actors that the literature has identified as somehow active within that system. Section two operationalises the concept of accountability in relation to multilateral institutions, outlining its multi-faceted character. Section three combines existing literature with new empirical material, including interviews with practitioners, to explore what implications different non-state actors have had for the varied mechanisms through which WTO dispute settlement is held to account. The article shows that whilst non-state actors can ‘crowd-out’ existing accountability holders (i.e. Member-states), in practice they actually enhance the capacity of Member-states to hold WTO dispute settlement to account. Several non-state actors are specifically focused on also levelling the playing-field between Member-states by ensuring developing-countries are better equipped to understand WTO dispute settlement. At the same time, the material considered in this article shows that in a complex political environment such as WTO dispute settlement the practice of accountability is subject to change. What are introduced in this article as information and stakeholder accountability provide just two novel ways in which non-state actors are acquiring accountability over multilateral institutions such as WTO dispute settlement.

### **Non-state actors in WTO dispute settlement**

Non-state actors are present in World Trade Organization (WTO) dispute settlement. Which non-state actors this includes and what character their presence takes will be outlined in this first section of the article. However, to begin, it is necessary to introduce the function of the dispute settlement system within the WTO.

### **WTO Dispute Settlement**

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. In specific instances, 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). 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 complainant and respondent – who are Member-states – are brought together by the Legal Affairs division of the WTO Secretariat. 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 panelists to adjudicate the dispute (Shoyer). 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 full table of three individuals is accepted by the parties. 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 which 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 which 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.

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. Despite its formal intergovernmental character, however, ever since WTO dispute settlement first began functioning on 1<sup>st</sup> January 1995 research has increasingly identified the presence of additional agency – non-state actors – in the practise of WTO dispute settlement. The next part of this section considers the various shapes and forms in which such agency has been identified.

### *Types of non-state actors in WTO dispute settlement*

There are at least seven different categories of non-state actors active in either facilitating or contesting WTO dispute settlement, with each their own particular role, which existing studies have identified as: 1) *amicus curiae* ('friends of the court') – where typically non-state actors may directly submit information for consideration in the legal process; 2) *private counsel* – where legal firms may directly represent Member-states; 3) the *Advisory Centre on WTO Law* (ACWL) – an intergovernmental organisation that provides legal advice and representation for developing-country Member-states; 4) *business* – which, for example, provide resources that help Member-states to initiate cases in WTO dispute settlement; and, 5) *NGOs* – that both publicly lobby WTO dispute settlement and, in some instances, facilitate network exchanges between Member-states and other non-state actors towards also aiding increased use of WTO dispute settlement.

The extent to which these actors exhibit agency which is distinct or perhaps in competition with that of the Member-states remains a highly contentious point within the WTO dispute settlement mechanism, whose legal authority formally rests on the sovereignty of its Member-states. Any claim that actors like the WTO Secretariat – which acts as a trustee of the Member-states – have acquired agency themselves potentially undermines the ability of Member-states to hold WTO dispute settlement to account. If NGOs are able to run public campaigns critical of WTO dispute settlement, this may likewise undermine the accountability relationship between the system and the WTO Member-states, but in the process create new mechanisms by which different publics may hold WTO dispute settlement to account. Combining existing literature with new research, including interviews with practitioners and fieldwork, the remainder of this section discusses in what way each of the non-state actors listed above may be said to have emerged as an agent within WTO dispute settlement.

#### 1) *Amicus curiae*

First, non-states have acquired a legal identity within the WTO dispute settlement system wherever they may make submissions as *amicus curiae* ('friends of the court'). The *amicus curiae* principle was never originally envisaged within the legal text establishing WTO dispute settlement mechanisms – the Dispute Settlement Understanding (DSU) – but emerged through a series of rulings made by the Appellate Body in response to non-state actors demanding the right to submit documents independently of Member-states (Appleton 1999; 2000; Steger 2002; Reinisch and Irgel 2001, pp.136-143). This development occurred through some of the most politically controversial cases the mechanism has had to adjudicate, including US-Shrimp which featured in the Seattle protests. Environmental groups demanded that the panellists accept the submission of data they had collected which supported a ban placed by the United States on imports of shrimp caught with nets deemed as harmful to turtle populations. Although the ruling made by the Appellate Body favoured those disputing the ban on the grounds that US fishing fleets were not subject to the same high standards, the right of Member-states to discriminate on environmental grounds was upheld. Those environmental groups gained the right to submit information to panels and the Appellate Body independently of Member-states – meaning free of state-censure.

Since the US-Shrimp case there have been several other dispute settlement cases where the *amicus curiae* provision has been further outlined, although without any requirement that panellists or the Appellate Body take these submissions into consideration it is unclear whether or not they actually make a difference to proceedings. Support amongst the Member-states for the creation of the *amicus curiae* provision has largely come only from the United States. Other

Member-states have been highly critical, seeing it as a threat to their own ability to hold the system to account. Some have dismissed the *amicus curiae* provision as ‘much ado about nothing’ (Mavroidis 2001) for the reason that panels and the Appellate Body are not obliged to read these submissions and, further, no *amicus curiae* submission has yet been directly referenced as providing the basis for any rulings. However, some practitioners argue that it is unlikely that the submissions do not have at least a limited impact since they form part of the information before the panellist and Appellate Body members.<sup>1</sup>

## 2) *Private counsel*

The *private counsel* provision created another new avenue through which non-state actors may be active in WTO dispute settlement. Not originally envisaged in the original text establishing the mechanism, in a number of cases developing-country Member-states argued that they should be able to be physically represented by private legal firms in oral hearings as a means to ameliorate their otherwise limited trade departments (Layton and Miranda 2003; Garnett and McCall Smith 2002; Shaffer 2003). Several developed-country Member-states, including the US, opposed giving access to private counsel on the grounds that external legal firms may experience a conflict of interest as well as difficulties maintaining client-confidentiality where they may work for multiple Member-states. However, since the provision was created, the United States has actually become one of the most active users of private counsel in WTO dispute settlement.

At the very least, private counsel adds a level of complexity to how research may trace what is a Member-state in WTO dispute settlement. Potentially much interesting information is lost if political analysis of the process is limited to accepting the Member-states as the sole agents where the individuals physically representing them are not tied to that Member-state beyond the particular case. The private counsel provision suggests greater agency on the part of international trade lawyers where they do not passively wait for clients but actively seek out new work by, for example, offering *pro bono* (unpaid) services to Member-states inexperienced with the system.

## 3) *ACWL*

The legal costs of engaging in WTO dispute settlement have been somewhat eased by the creation of the Advisory Centre on WTO Law (ACWL) in 2001. Though an intergovernmental body and funded by a mix of different WTO Member-states, it provides services exclusively to developing countries that are Members of the WTO (Van der Borgh 1999). Originally it was thought that the Legal Affairs division of the WTO Secretariat would be sufficient to provide the necessary technical resources for those Member-states least able to afford the expertise demanded by dispute settlement proceedings. However, this quickly created a conflict between the WTO Secretariat’s obligation to be impartial and the need of several Member-states for assistance in strengthening their representation in dispute processes.

The ACWL emerged as a separate institution to the WTO, equipped with its own team of lawyers available to assist developing countries in launching a dispute, as well as prosecuting and defending a case via preparing written submissions and offering representation in the oral hearings. Where the full scope of the ACWL’s services are requested, the ACWL gets to provide the physical representation of that Member-state within the dispute settlement proceedings.

<sup>1</sup> Based on practitioner interview.

#### 4) *Business*

Businesses are not only present in WTO dispute settlement but, for some practitioners working in the system, they are the most important actors driving any one dispute.<sup>2</sup> This exceeds the role businesses may play as *amicus curiae*. For example, several Member-states – the United States and the European Community, in particular – have passed legislation that gives private firms an institutional avenue through which to demand the United States Trade Representative or the European Commissioner for Trade consider launching a particular dispute (Shaffer 2006; Garrett and McCall Smith 2002).<sup>3</sup> Secondly, trade governance requires not only expertise in law and economics, but also knowledge of the specific field at stake. If Member-states are to make use of WTO dispute settlement – whether as complainants, respondents or third parties – then they require significant knowledge-based resources on which to stake their case.

Private firms, as mass producers and purchasers, have consequently acquired an important facilitating role in global trade governance via the resource requirements of WTO dispute settlement (Bown and Hoekman 2005; Shaffer 2003). This role stretches to include the actual dispute settlement proceedings to the extent that a private firm might provide input to a Member-states' written submission. This might be in the form of either an attached amendment explicitly produced by the private firm as evidence, or less visibly in the form of advice affecting what is formally the product of the Member-state represented. However, private firms are not formally allowed to be present during the oral hearings of either the panel or Appellate Body process. This becomes somewhat complicated with respect to a Member-states's right to choose who makes up its delegation. Although not formally present as representatives of private firms, in practice it does sometimes happen that individuals associated with private firms are present during hearings.<sup>4</sup> Private firms are also active during the oral hearings where they have funded the private counsel sometimes employed to aid representation of a Member-state, though this remains equally non-transparent.<sup>5</sup>

#### 5) *NGOs*

In addition to acting as *amicus curiae*, NGOs may request that a Member-state includes its information within a submission, as has happened in several cases. Where NGOs operate outside their national borders, they may also cooperate with Member-states other than the one in which they are based. For example, in EC-Sardines the UK Consumer's Association worked with the Peruvian delegation in supporting its case against the EC (Shaffer 2006b). The NGO *International Centre on Trade and Sustainable Development* (ICTSD) has gone further by producing research on WTO dispute settlement intended to improve the ability of particularly developing-country Member-states to utilize the system.

The ICTSD is a Geneva-based non-governmental organisation that, with respect to WTO dispute settlement, has set up a series of regular national and regional-level workshop-style meetings in parts of Latin America, Asia and Africa to which have been invited representatives of developing country governments, as well as academia, non-governmental organisa-

<sup>2</sup> Based on practitioner interviews.

<sup>3</sup> In the United States, this is known as the 'Super 301' legislation. In the European Union, this is the 'Trade Barrier Regulation'.

<sup>4</sup> Based on practitioner interviews.

<sup>5</sup> Based on practitioner interviews.



tions, and the private sector. These dialogues exist to help encourage developing countries to become more active users of WTO dispute settlement by providing a meeting point between not only governmental civil servants, but also the private firms able to supply the necessary information with which a dispute may be launched. Private law firms are able to offer technical legal guidance and, where further services are promised on a pro bono basis, help prepare potential cases for launch. Although the ICTSD is unable to confirm that these dialogues have led to the launch of any specific case that might not have occurred otherwise, individuals who have helped put together successfully launched cases for developing countries have actively attended these dialogues, and certainly ICTSD believes its efforts have helped develop a number of cases currently moving towards formal launch.<sup>6</sup> These dialogues are accompanied by research papers commissioned by ICTSD that promote particular proposals typically geared up to improving the participation of developing countries in WTO dispute settlement.

At other points, however, NGOs may actively campaign against WTO dispute settlement. Where the Appellate Body appears to have been sensitive to environmental NGOs' concerns in US-Shrimp, it would seem that their presence complicates the political terrain by adding more actors to the game and so crowding-out some weaker Member-states. To conclude this first section, non-state actors appear in a wide variety of shapes and forms in WTO dispute settlement. Yet, what do they mean for the accountability of that system? For example, does this apparent broadening of agency help re-connect WTO dispute settlement to some of the actors whom critics claim the system has become unaccountable, such as the societies it affects and developing-country Member-states? To provide a basis from which to explore these questions, the next section briefly outlines what the concept of accountability means in relation to a multilateral institution such as the WTO dispute settlement mechanism.

### Accountability and multilateral institutions

In its simplest form, accountability means that those performing a particular action may be held to account via some form of sanction. Accountability functions as a relationship between a forum (*the accountability holders*) able to hold another actor (*the accountability holdee*) to account via the threat of sanction (see Bovens 2006; Bovens et al 2008). Accountability is distinct to power because it does not equate to direct control but rather rests on the threat of sanction. Beyond this basic definition, different forms of accountability vary greatly depending upon which actors perform the role of holder and holdee, as well as what form the sanction takes. Logically, those sanctions most able to harm the holdee will create stronger accountability relations, though the strength of any sanction depends upon factors particular to the actors and their relationship. For example, in some cases the strong sanction might be a material loss of funding, whereas in other cases the holdee is more dependent upon their reputation with the consequence that public criticism constitutes a strong sanction.

As a growing array of policy areas have shifted away from the exclusive domain of nation-states to be decided within a series of transnational political arenas – the WTO being but one example – a burgeoning literature has tried to map what this development means for accountability (Benner et al 2004; Bäckstrand 2008; Grant and Keohane 2005; Koenig-Archibugi 2010). In particular, who are the holders and holdees, and what is an effective sanction? Lacking any single overarching institutional structure to determine accountability relations, in global politics accountability is both multi-faceted and subject to tension where

<sup>6</sup> Based on practitioner interviews.

often it is not just nation-states that demand the right to be accountability holders in global governance but also many others, including, for example: businesses; NGOs; and global social movements.

In the case of multilateral institutions, the legal agreements on which they are founded typically stipulate a series of accountability relations running between the secretariats responsible for everyday affairs and the nation-states who are members or contracting parties to the institution. In some cases, these texts may also define a series of relations running to non-state actors, such as other multilateral institutions or civil society. For example, the International Labour Organization (ILO) is formally responsible to the business sector and trade unions, as well as its member-states. In a few rare cases, non-state actors are the main principals with states only playing a peripheral role (Matttli and Büthe 2005).

Accountability acquires substance in multilateral institutions wherever the founding texts outline, for example, the policies for hiring and firing secretariat personnel, or where domestic courts should monitor the actions of the institution. Multilateral institutions are further subject to accountability relations where actors, typically nation-states, may threaten to withhold funding. In such cases, accountability works via a principal-agent relationship in which staff employed to administer the multilateral institution act within parameters defined by the members. How much flexibility secretariat officials are allowed depends on how the principal-agent relationship is defined, i.e. what powers have been delegated (Grant and Keohane 2005).

The question of who is an accountability holder in multilateral institutions cannot be answered by just looking at who/what has delegated it authority. Sometimes being a stakeholder – an actor affected by the actions of the agent – provides an important criteria for being an accountability holder. The right to exercise accountability over multilateral institutions is a frequent demand made by social movements protesting against, for example, what they see as an ‘anti-democratic’ tendency where governance shifts from nationally-elected politicians to distant supranational technocrats. What Grant and Keohane have described as the demand for ‘participation’ (2005, p.31) gives actors an effective means to sanction multilateral institutions wherever, for example, either their help is required to ensure implementation (e.g. the World Bank relies on NGOs with local knowledge) or a prevailing normative culture demands that particular actors are engaged (e.g. indigenous communities). However, how do we know who is affected by multilateral organisations? The range of actors potentially affected by multilateral organisations, and so staking a claim to be an accountability holder, includes a broad spectrum in which issue-groups (e.g. environmentalists) are joined by interest groups representing labour but also private capital and even religious communities. Likewise, the range of sanctions available to these accountability holders is potentially infinite depending upon the particular governance context and relationship between the holder and holdee.

In the case of WTO dispute settlement, the authority granted to the Secretariat staff as well as the panellists and Appellate Body members is delegated by the WTO Member-states (*qua* nation-states). However, as has been demonstrated, non-state actors have acquired some agency within WTO dispute settlement. In exploring what implications non-state actors have for the accountability of WTO dispute settlement, the article therefore focuses on two key issues: 1) whether they hinder or enhance existing accountability relations between the system and its Member-states based upon delegation; and, 2) if they signal the emergence of new accountability relations based upon participation.



## Non-state actors and the accountability of WTO dispute settlement

As outlined above, the empirical analysis presented in this section understands WTO dispute settlement to be subject to a series of accountability relationships based upon both principal-rights and stakeholder demands. Principals are granted formal rights through delegating authority, but may not always have equal capacity to exercise these rights. Stakeholders demand rights to be accountability holders, but have to utilize more ambiguous relations like normative pressure. Existing literature and new material based on interviews with key practitioners conducted within a 2 year project is used to draw out what implications non-state actors have for the accountability of WTO dispute settlement.

The driving mechanism of any accountability relationship is the sanction available to the accountability holder, e.g. loss of authority, financial penalties, etc. The material presented below is disaggregated by what the article argues to be the seven core accountability mechanisms with potential relevance to WTO dispute settlement, each utilizing a distinct form of sanction, based upon: 1) the regime; 2) fiscal relations; 3) public reputation; 4) market force; 5) peer-pressure; 6) the need for information; or, 7) the demand for engagement with stakeholders. At this point it should be made clear that not all of these accountability mechanisms are equally effective in WTO dispute settlement, but are considered here as either direct or indirect means by which different actors may sanction how the system functions. The analysis is summarised in table 1 below.

### *Regime accountability*

WTO dispute settlement is most clearly held to account via sanctions provided by the rules, practices and decision-making procedures constituting the institution. Drawing upon regime theory (Krasner 1983), what the article defines as regime accountability refers to the explicit (e.g. rules) and implicit (e.g. norms) principles through which actors are structured into accountability relations as holder and holdee. It includes legal frameworks through which, for example, nation-states and their national agencies may monitor and formally comment upon the function of WTO dispute settlement.<sup>7</sup> Regular meetings of government ministers and heads-of-state assert a relationship based upon hierarchical supervision in which the institution is positioned as submissive to the sovereignty of its Member-states. Institutional chains-of-command – including the WTO's Ministerial Conference where governmental ministers and heads-of-state are present – provide an important means of further regime accountability through which Member-states may collectively exercise sanctions over the Secretariat staff and so hold them to account via a hierarchical chain. Everyday accountability is enacted by the Member-state delegations based in Geneva. WTO dispute settlement's rules, as laid out in the Dispute Settlement Understanding and later amended by the Appellate Body, provide a clear role through which the WTO Member-states are accountability holders.

<sup>7</sup> Regime accountability is used instead of 'legal accountability' – a term commonly used to describe wherever legal instruments serve to enforce accountability – since certainly in the case of WTO dispute settlement there is a substantial amount of overlap between legal accountability and other mechanisms including hierarchical and supervisory accountability (e.g. Grant and Keohane 2005). Regime accountability serves as a meta-term covering all these lesser mechanisms based upon the rules, norms, and decision-making procedures contained within a particular multilateral institution. Regime accountability is also applicable to other forms of multilateral institution wherever implicit and explicit principles define a series of accountability relationships.

As discussed earlier, the Member-states may collectively reject the rulings made by panelists and the Appellate Body. Rejection of rulings requires a full consensus that includes those Member-states acting as complainant and respondent, making it a relatively weak and so far unused means by which to sanction WTO dispute settlement. However, the institutional body of the Dispute Settlement Body to which all Member-states have access has on several occasions allowed large numbers of Member-state delegations to collectively criticise rulings. Without consensus such criticism has not translated into formal rejection of rulings, but it does indicate a regime-based means through which Member-states may undermine the legitimacy of rulings.

In considering the role of the different non-state actors identified as present in WTO dispute settlement, it can be seen that they have *mixed consequences* for the ability of Member-states to exercise regime accountability in WTO dispute settlement – both hindering and enhancing their role as accountability holders. In addition, the creation of the *amicus curiae* and private counsel provisions signal a shift in regime accountability where non-state actors have acquired a limited role within the legal framework of WTO dispute settlement.

Many Member-states saw the creation of the *amicus curiae* provision as a threat to their sovereignty over WTO dispute settlement, undermining their own ability to utilize regime accountability. There was a fear that giving non-state actors the right to make submissions to panelists and the Appellate Body would side-step Member-states as the gatekeepers to the process. Member-states not directly party to a dispute settlement case as complainant or respondent may act as a Third party, but only with the permission of the disputing parties. Therefore, the *amicus curiae* provision, in principle, gives non-state actors a right not granted to Member-states. There is uncertainty, however, because there is no formal obligation that panelists and Appellate Body members take those submissions into consideration when writing rulings. Practitioners engaged with WTO dispute settlement have complained that this ambiguity makes it extremely difficult to make transparent what information is actually being used in making dispute settlement rulings.<sup>8</sup> A lack of transparency further undermines regime accountability. Overall, the presence of non-state actors made possible via the *amicus curiae* provision may be said to hinder the ability of Member-states to utilize regime accountability mechanisms in WTO dispute settlement.

Employed directly by Member-states to strengthen their representation in oral hearings, *private counsel* have the potential to enhance the capacity of Member-states to utilize the highly complicated legal system and advance their interests. Since the multilateral trade regime first became established in 1948 with the General Agreement on Tariffs and Trade, the developing practice of dispute settlement has seen nation-states draw on the services of private lawyers in writing their submissions. The private counsel provision is significant because it gives these lawyers permission to be physically present in the actual hearings. Justified on the grounds that private counsel are needed to assist Member-states who rarely use the system and so cannot afford full-time international trade lawyers, the provision was framed as favouring the developed-country Member-states. Private counsel might then level the playing field, strengthening the ability of those weaker Member-states to hold the system to account via being equipped with the necessary technical expertise. In practice, however, it is the developed-country WTO Member-states who have made most use of private counsel in bolstering their already comparatively well-resource delegations. Therefore, whilst private counsel enhance the regime accountability of WTO dispute settlement to the Member-states, this favours those Member-

<sup>8</sup> Based on practitioner interview.

states already well-equipped to hold the system to account. Some practitioners have noted that whilst private counsel represent Member-states, their funding and other resources (e.g. data) may come from non-state actors such as private business who may also employ them for other services.<sup>9</sup> There is then the potential that private counsel help establish new avenues through which non-state actors may utilize regime accountability mechanisms, complicating how research understands which actors can exercise this particular accountability mechanism in WTO dispute settlement. However, this point should not be over-exaggerated since all lawyers acting as private counsel are bound by their bar associations to represent the interests of the Member-states by which they are employed, and who observe their actions closely.

Where private counsel may be employed by any Member-state, the role of the *Advisory Centre on WTO Law* (ACWL) in providing legal services exclusively to those developing-country WTO Member-states who subscribe to its organisation has greater promise to level the playing field where the vast majority of cases are dominated by developed-country Member-states. Therefore, it has the potential to not only enhance the ability of Member-states to utilize regime accountability mechanisms in holding WTO dispute settlement to account, but to also ensure that access to this mechanism is more evenly distributed amongst the Member-states.

*Business actors* are able to provide Member-states with resources (e.g. data) essential if they are to win and defend cases in WTO dispute settlement – giving them the capacity to exercise the various rules, norms, and decision-making procedures present in WTO dispute settlement to enforce their role as accountability holders. Business actors may themselves exercise regime accountability mechanisms over WTO dispute settlement to the extent they act as *amicus curiae*. Where Member-states provide institutional mechanisms by which businesses may effectively initiate the launch of dispute settlement cases, business actors acquire what can be seen as a secondary order of a regime accountability mechanism. In this respect, business actors enhance the abilities of both Member-states and non-state commercial interests to utilize regime accountability mechanisms over WTO dispute settlement.

Likewise, *NGOs* may also exercise regime accountability if acting as *amicus curiae*. However, as has been shown already, this may also hinder the Member-states' own ability to use this mechanism. In US-Shrimp as well as EC-Sardines, for examples, NGOs have been able to assist Member-states in preparing submissions and so may also enhance Member-states' use of regime accountability. Overall, then, NGOs have mixed consequences for WTO dispute settlement's exposure to regime accountability mechanisms.

### *Fiscal accountability*

Member-states may potentially sanction WTO dispute settlement by withholding the financial dues they pay to the WTO Secretariat as members, based upon their share of world trade. Fiscal accountability provides an effective threat of sanction where a multilateral institution is dependent upon member-states for its finances (Chan 2003; Grant and Keohane 2005, p.36). In addition, programmes such as technical-capacity building for developing-country member-states are based, as with the case of the WTO, on irregular donations provided by individual member-states. Such donations provide an extra avenue by which fiscal accountability may then be exercised. The distribution of access to fiscal accountability mechanisms varies greatly

<sup>9</sup> Based on practitioner interviews.

between member-states in respect to their individual capacity to provide or decline finance, emphasising that accountability is not about equality but who holds who to account. Fiscal accountability may strengthen regime accountability where it supports the organisational structure – whether defined by rules or norms. However, fiscal accountability may also undermine regime accountability where, for examples, the explicit chain of command between officials and member-states runs in opposition to the way member-states independently choose to fund the multilateral organisation. Where non-state actors provide finance to multilateral institutions – such as donations by philanthropists, access to fiscal accountability mechanisms is not exclusive to member-states.

However, a scenario in which Member-states even made the threat of such a sanction seems highly unlikely given the likely repercussions within the broader context of WTO trade agreements and nation-states' dependence upon global trade flows. Therefore, fiscal accountability functions as a means of last resort, only loosely framing the function of WTO dispute settlement.

Non-state actors have *no discernible effect* upon the capacity of Member-states to use fiscal accountability. The WTO is not financed by non-state actors. None of the non-state actors identified in this article can be said to exercise fiscal accountability over WTO dispute settlement. However, where businesses fund private counsel, they could be seen as acquiring in-direct access to fiscal accountability via the Member-states. Any sanction this might grant business actors could only be directly used against the Member-state in question. Therefore, business actors may be said to indirectly broaden the range of actors able to utilize fiscal accountability over WTO dispute settlement.

### Public reputation accountability

This third accountability mechanism is relevant where the operation of WTO dispute settlement is affected by its public reputation. Public reputation accountability offers an avenue through which actors lacking any form of regime or material hold over WTO dispute settlement may still exercise accountability (Bernstein and Cashore 2007, p.353). Public reputation matters when there remains a significant gap between what the institution is tasked to do and their material resources – where their power is determined by the extent to which other actors are willing to implement the rules they host. Relevant here is the question of which reputation matters, being that multilateral institutions may well be perceived differently amongst national publics.

Public reputation accountability rests on the existence of an accountability relationship between WTO dispute settlement and a public. Member-states are bypassed as the gatekeepers to WTO dispute settlement where the system becomes somehow sensitive to the opinion of either national publics or a transnational public. Both national and transnational publics have at various times been mobilised in criticism of WTO dispute settlement. Some of those marching against the WTO in the landmark Seattle protests in 1999 dressed as turtles – a direct reference to a highly contentious dispute settlement ruling against the United States' particular use of environmental safeguards to restrict the import of shrimps caught with nets deemed as lethal for turtle populations (Appleton 1999). Public reputation matters to the WTO dispute settlement indirectly via influencing how Member-states utilize the system, but also more directly if those producing rulings choose to be sensitive to such publics.

Some commentators see the Appellate Body as sensitive to its public reputation (Appleton 1999; Smith 2004), with the *amicus curiae* provision cited as a significant concession made to

environmental concerns voiced by the broader public. In creating the *amicus curiae* provision, the Appellate Body arguably *enhanced* the WTO dispute settlement's exposure to public reputational accountability mechanisms. Which public may exercise this mechanism is less clear, although the general impression is that it is publics based in those Member-states dominant in the WTO – the United States and the European Community.

By campaigning to different publics, *NGOs* have a clear role in both utilizing and *enhancing* mechanisms of public reputational accountability, although the problem remains that access to this mechanism is not equally distributed. For public accountability to function, the 'public' – however defined – must be sufficiently aware to have an opinion on WTO dispute settlement. NGO campaigning around, for example, a case in which the United States used WTO dispute settlement to challenge the European Union's policy on imports of genetically-modified foodstuffs greatly broadened the scope of public attention given to what remains an otherwise highly abstract institution due to its legal-technical nature.

### *Market accountability*

Market accountability may be exercised by both private firms and *NGOs*, but in different ways. Private firms able to relocate facilities to alternative territories are able to threaten national governments with the threat of disinvestment (Benner et al 2004, p.199). This option is strengthened for firms based in multiple territories, such that they may effectively hold multilateral organisations to account via influencing the representation of several member-states at once. Advocacy groups may likewise campaign to consumers, whose collective purchasing power provides a similar market-based mechanism for holding multilateral organisations to account (e.g. threatening to boycott production within countries that abuse human rights).

WTO dispute settlement is vulnerable to sanctions imposed via market accountability mechanisms but only indirectly through the Member-states, where economic actors may threaten to shift their resources to other territories. Businesses are the most obvious actor able to impact upon the system's exposure to market accountability mechanisms. For practitioners involved in the system, often cases are known not by their formal title of the respondent Member-state and the trade in question but, rather, the firms respectively driving the case on either side of the dispute.<sup>10</sup> By lobbying different publics, *NGOs* may also exercise market accountability via the Member-states through influencing consumer preferences. In summary, however, market accountability mechanisms cannot be directly applied to WTO dispute settlement.

### *Peer accountability*

Peer accountability is relevant where multilateral organisations may be sanctioned by like-actors, and so only occurs where other multilateral organisations may hold them to account through, for example, the threat of non-cooperation (Bäckstrand 2008, p.81). Multilateral organisations do not operate in isolation from one another but, rather, have a series of both formal and informal relations ranging from formal observer status at one another's meetings to joint press statements and publications.

The only actors able to exercise any form of peer accountability over WTO dispute settlement

<sup>10</sup> Based on practitioner interviews.

are fellow multilateral organisations, which would include the Advisory Centre on WTO Law. However, the ACWL has not exercised this mechanism. Overall, the non-state actors identified as present in WTO dispute settlement do not appear to have had any effect upon its exposure to peer accountability mechanisms.

### *Information accountability*

As the scope of multilateral organisations has increased, impacting upon an ever-broader array of domestic issues, so too has their need for specialist local-knowledge to facilitate both policy formation and implementation. It is for this reason that the article introduces the term ‘information accountability’. Informational accountability occurs wherever non-state actors may sanction multilateral organisations via withholding information (e.g. World Bank programmes in which locally-collected demographic data is crucial).

The practise of WTO dispute settlement is dependent upon legal and factual information, which is needed for both the Member-states to advance their interests but also so that the panellists and Appellate Body may produce their rulings. Business actors are most able to offer information required by the system, the threat of not providing information giving them the possibility to exercise informational accountability. The same, but reduced, possibility exists for NGOs who may be asked to provide information on the non-trade aspects of cases. However, there is no evidence of non-state actors exercising this sanction and so the value of informational accountability in the case of WTO dispute settlement seems low. By serving as information providers, however, whether as *amicus curiae* or supporting Member-state submissions, NGOs and business may be said to enhance what little informational accountability can be exercised over WTO dispute settlement.

### *Stakeholder accountability*

A final mechanism sometimes available to non-state actors occurs wherever multilateral organisations must be seen as engaged with particular ‘stakeholders’ (e.g. representatives of indigenous communities) – what the article argues should be defined as ‘stakeholder accountability’. In addition to material resources, a key factor determining the scope of a multilateral organisation’s governance is the degree of legitimacy they have within the particular territories they operate. Where the demand for legitimacy is that the multilateral organisation considers, for example, local interests, it becomes important that Secretariat officials are seen to be talking with representatives of those interests (e.g. International Monetary Fund structural adjustment programmes). Furthermore, where a range of non-state actors are seen as having agency distinct from nation-states in global politics, it has become common that multilateral organisations are seen to develop regular relations with these actors (e.g. the United Nations’ Global Compact with business; or, the WTO’s annual Public Forum at which NGOs otherwise critical of the organisation may organise panels with Secretariat staff and member-state delegations present). In such cases, the non-state actors designated as relevant stakeholders acquire a certain capacity to hold the organisation to account by threatening to reject such contacts, and so enact stakeholder accountability.

WTO dispute settlement is exposed to stakeholder accountability mechanisms where the legitimacy of its governance hinges on the inclusion of particular interests. Where non-state actors (typically NGOs and business) may make *amicus curiae* submissions, the accountability



of WTO dispute settlement should be improved to those non-state actors with a stake in the rulings. In practice, however, it has been little used by non-state actors with the consequence that it does not offer a meaningful opportunity by which they might exercise stakeholder accountability over WTO dispute settlement.

Business actors and NGOs, where active in publicly lobbying in support or against WTO dispute cases, have strengthened their own credibility as stakeholders and so enhanced their capacity to exercise stakeholder accountability over the system.

**Table 1** The implications of non-state actors for the accountability of WTO dispute settlement

|  | <b>Amicus curiae</b>  | <b>Private counsel</b>                                | <b>ACWL</b>   | <b>Business</b>  | <b>NGOs</b>                               |
|--|---|---|---|--|---|
| Do they hinder of enhance member-states as accountability holders? | Hinder  | Enhance   | Enhance   | Mixed  | Mixed                                     |
| Do they broaden accountability relationships?                      | Expand regime accountability to non-state actors, though weak<br>Enhance public reputational accountability | Expand fiscal accountability to business, though weak | Expand peer accountability<br>Enable some NGOs like the ICTSD to utilize stakeholder accountability | Exercise indirect fiscal accountability via private counsel. Most effective via informational accountability | Expand public reputational accountability |

### **Conclusion – Not all accountability mechanisms are equal, nor complementary**

As stated in the introduction, critics of WTO dispute settlement have accused it of being unaccountable on two fronts – to the interests of the developing country Member-states; and, to the broader societies its rulings affect. At the same time, WTO dispute settlement appears to have shifted away from its formal intergovernmental basis to include a growing role for non-state actors. The puzzle, then, was to explore what implications non-state actors have for WTO dispute settlement. In particular, the article set out to ask: 1) do non-state actors enhance or hinder the capacity of the WTO Member-states to sanction WTO dispute settlement?; and, 2) do non-state actors create new relations through which WTO dispute settlement may be held to account?

In respect to the first question, the article concludes that non-state actors mainly enhance the capacity of WTO Member-states to act as accountability holders. Several of the non-state actors also specifically enhance the capacity of developing-country WTO Member-states to utilize regime accountability mechanisms. Although regime accountability is based on normative power, ironically the capacity to utilize rules, norms and decision-making procedures to one's advantage requires technical expertise which, for Member-states, comes down to material resources. Non-state actors such as the Advisory Centre on WTO Law (ACWL) or the International Centre for Trade and Sustainable Development (ICTSD) then play a vital role in, however minimally, ameliorating these imbalances in the accountability of WTO dispute settlement. Non-state actors may threaten the WTO Member-states as accountability holders, such as where they offer a competing source of credible accountability demands. However, examples such as the amicus curiae provision which potentially gives non-state actors regime accountability over WTO dispute settlement are important to note but, in practice, are weak at best.

In answering the second question, the article has shown that non-state actors do create new relations through which WTO dispute settlement may be held to account, thus broadening the range of actors able to act as accountability holders. The capacity of businesses to utilize information accountability and NGOs to mobilize public reputation accountability demonstrates accountability to be a multi-faceted and adaptive concept.

In reaching these general conclusions, the article has approached accountability as a multi-faceted and potentially contradictory concept. Accountability only has meaning to the extent that accountability holders may credibly threaten sanctions against behaviour they deem as unacceptable. These sanctions take many forms – including both material and normative. Seven central accountability mechanisms are shown in this article to be relevant in the case of WTO dispute settlement, though their effectiveness varies greatly. Three of these mechanisms are newly defined within the context of the article, though all the mechanisms discussed draw upon the rapidly increasing body of literature on accountability in global politics.

Non-state actors have broadened the range of holders able to utilize different accountability mechanisms, with some being relatively ineffective (e.g. the regime accountability available to non-state actors as *amicus curiae*) and others promising more impact (e.g. businesses able to exercise information accountability). Not all forms of accountability are equal, as becomes evident when comparing the different accountability mechanisms in relation to WTO dispute settlement. Regime accountability appears as the most apparent mechanism through which, typically Member-states, may act as accountability holders. However, not all Member-states have equal access to regime accountability.

The effectiveness of the accountability mechanisms defined here is context-dependent as well as being determined by the relative resources of the actor enacting them, typically giving Member-states a distinct advantage over non-state actors. Accountability cannot be pre-defined since it can take multiple forms utilizing very different types of sanctions. As said, accountability does not require that all actors are equally capable as accountability holders. To ‘get things done’ often requires that those actors most able to influence the outcome of global decision-making are given first-row seats as the primacy accountability holders (Koppell, 2011).

Multilateral institutions face a stark decision between which form of accountability they should help facilitate, where there is a tension between the member-states’ accountability relationship and that claimed by other actors (Grant and Keohane 2005). Sometimes, as critics of WTO dispute settlement point out, this tension also falls between different WTO Member-states. Accountability is not a homogenous concept but, as shown here, takes many forms which can undermine one another (Papadopoulos 2007, p.482). For example, the public reputation accountability exercised by advocacy groups may challenge the ability of WTO Member-states to enact regime accountability over WTO dispute settlement. This is particularly likely where those advocacy groups are active within the more dominant Member-states and the other Member-states seeking to maintain their regime-based hold over the institution are comparatively weak.

Overall, those wishing to enhance the accountability of WTO dispute settlement need to acknowledge not only the variety of different accountability mechanisms, but also how they interact. As this article has shown, in practice there is no obvious tension between the role of non-state actors in WTO dispute settlement and the capacity of the Member-states to act as accountability holders. On the contrary, non-state actors actually strengthen Member-states as accountability holders, as well as easing tensions caused by imbalances in the capacity of individual Member-states. If WTO dispute settlement becomes more sensitive to its public reputation by producing rulings influenced by societal discussions, the intergovernmental basis of

the institution would be undermined. Such a shift would undermine regime accountability, with negative results for the ability of Member-states to hold the system to account. Given the current dominance of regime and fiscal forms of accountability in WTO dispute settlement, it seems unlikely that the Member-states – as accountability holders – would allow such a development to occur. Rather, the search for accountability in WTO dispute settlement is most profitably pursued if focused on the Member-states themselves, with non-state actors aiding such a quest by balancing out the distribution of access to accountability mechanisms amongst those states whilst also ensuring the Member-states are accountable to their own national societies.

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