

International Law, Dispute Settlement and Autonomy

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There have been many criticisms of the World Trade Organization (WTO) in recent years. People claim that the WTO works against democracy and culture, lacks equality and accountability, and that it needs to be more legitimate. For an organization that embodies trade rules that have been around for sixty years, one might ask: With such a bad reputation, why would countries ever choose to sign on to agreements of the WTO? Most people would assume that the WTO's impact and influence over countries has increased, but how precisely does it do so, and to what extent will this affect the individuals who are citizens of those nation-states? In attempting to answer these questions, we can better understand how much globalization affects autonomy, or the actual power a nation-state possesses to articulate and achieve policy goals independently. For WTO Members, there must be something to be gained by surrendering some level of policy choice to participate in a global body of rules that exist beyond the nation-state. The case of Canada's participation in WTO dispute cases is a useful way to examine whether policy-making autonomy is compromised, provides other benefits, or is strengthened.

On 1 January 1995, the World Trade Organization (WTO) came into existence. It was created as part of the results of the General Agreement on Tariffs and Trade (GATT) Uruguay Round of multilateral trade negotiations that concluded in December 1993. A total of 124 countries joined the WTO, including its far-reaching trade agreements covering, among other things, agriculture, services, trade rules, industrial tariffs, and intellectual property. These agreements profoundly changed trade relationships across the world, and strengthened the rules-based nature of international trade.

The WTO Agreements formalized various procedures and created a system that was both automatic and compulsory, meaning countries that join must participate and obey the rules. In particular, WTO dispute settlement is now legally binding when deciding whether a country is playing by the rules or not. The Dispute Settlement Understanding (DSU) became the main WTO agreement on settling disputes.

Despite the historical foundations upon which the WTO dispute settlement system has been built, the system still represents a sharp break from the past. One possible explanation might be that this change has been due to globalization — the term often given to many of the rapid changes that are now occurring in the world. International trade is certainly a place where these changes occur and may then be part of a broader transformation.

Canada has initiated twenty-six complaints under the DSU, making it the most frequent user of dispute settlement after the United States and the European Union. By comparison, Canada has not often been on the receiving end of WTO legal challenges, although the complaints it has received have led to high-profile cases. Six of these high profile cases are: Magazines, Patent Pharmaceuticals, the Auto Pact, Dairy, Aircraft, and Wheat. A detailed review of these cases brought against Canada allows us to draw attention to some important common themes.

The first of these themes is that the cases have been very politically sensitive. This has resulted from a different approach by the Canadian government for creating and defending certain illegal trade policies versus other countries' legal arguments of how those policies infringe WTO law. In the magazines case for example, one of the key issues was whether Canada was fighting the case to protect its domestic publications in the face of global competition, or legitimately protecting cultural identity. There was a difference of opinion over what constituted barriers to competition (the WTO's responsibility) and whether or not cultural products could be protected from it under WTO rules (Canada's concern). Michael Hart, former Canadian trade negotiator, has said about such cases: "It makes for rough short-term politics... the political fallout from the WTO rulings could be loud and uncomfortable for the government...".

A second major theme emerging from the cases is that Canada actively promotes a rules-based trading system that can benefit all countries, although it occasionally fails to abide by the rules itself. Having lost outright in the Magazines, Dairy, Auto Pact, and Aircraft disputes, and partially lost in the Pharmaceuticals case, the WTO rulings have come as a blow to Canada's old ways of managing some of its industries. This, however, is not only a Canadian problem, as many WTO Members have also found it difficult to adjust domestic political considerations to WTO rulings.

A third theme provides some perspective on the impact that the WTO dispute settlement mechanism has had on WTO Members. The rules Canada was accused of breaking were mainly trade rules created in the GATT of 1947, and not the new agreements introduced in the WTO in 1995. The stronger dispute settlement rules of the WTO now obligate Canada (and other countries) to pay more attention to the old GATT rules, and in some cases to do things differently than in the past.

In order to evaluate the impact these changes have actually had on the ability of nation-states to articulate and achieve policy goals independently, it is necessary to determine what is actually lost in the WTO versus what states can gain by participating in international organizations like the WTO to achieve their goals.

Stephen Clarkson refers to the intrusive effects of the WTO on Canada's ability to govern itself as an *external constitution or supraconstitution*. Clarkson suggests that the WTO enshrines rights and obligations that prescribe acceptable behaviour for states. These include norms such as national treatment, the rights it arguably gives to corporations over citizens, and its strong adjudication and enforcement powers. Where Canadian policies were deemed by the DSU to be inconsistent with WTO rules, existing domestic laws and policies were required to be altered. It should thus be clear from the results of the cases involving Canada that some level of collective autonomy has been surrendered.

However it may make more sense to speak of the *transformation* of state power, which results in a state that can better fight for its needs. All countries that became Members of the WTO did so through a legally voluntary act, and retain the legal right to leave the WTO at any time. As with much rule-oriented behaviour in society, it is probably the case that the participants in the WTO rules-based system accepted the rules not so much because they themselves wanted to be bound, but because it was distinctly in their national interest to have other participants also bound to the rules. Trading through the WTO can in fact *strengthen* autonomy: namely, by reclaiming collective autonomy, by allowing states to better respond to citizen's demands, and by limiting domestic private interests.

First, participating in the WTO serves as a way for countries to reassert or reclaim autonomy. Indeed, one reason states join international economic institutions is precisely to lock-in more predictable laws

and regulations in order to govern more effectively. This includes the ability of weaker states to challenge stronger states in dispute settlement cases on a level playing field. The capacity to enter into international agreements and the requirement that states observe such binding rules can give states more control over their own situation than they might have had in the absence of international agreements.

Second, in many respects membership in the WTO permits states to manage international trade more effectively. Membership in good standing in the agreements that make up the international system — that is, being an active player in the world — is also important.

Third, the strengthening of autonomy by participating in the WTO entails de-politicizing policy choices, or removing certain policy choices from the state, thereby stripping them away from those who might enjoy privileged access to government. Arguably, these special interests (such as high profile industries) can dominate and deform the political process, with the result that policy becomes more faithful to them at the expense of breaking international trade rules.

We have found that while the system does result in some loss of collective autonomy, autonomy is also gained in other unforeseen ways — ways that may allow the state to better respond to the individual and collective needs of its citizens. Over the course of history, one of the greatest sources of instability in countries has been the pressure of the international system itself. Now, with the globalization of the international economy, there is even greater risk to national autonomy from instability than in previous decades. The WTO dispute settlement system is an attempt to apply global rules to a global economy that few countries would be prepared to turn away from. That dispute settlement system is an application of the wisdom of various philosophers, most recently Hayek, that without law there is no freedom.