

COMMENT

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The creative evolution of world trade

This month, in an unprecedented step, a World Trade Organisation dispute panel decided to open its hearings to the public. This move, in a politically charged dispute concerning the European Union's ban on hormone-fed beef, is groundbreaking, as WTO diplomats have ferociously resisted it. The ruling will enhance the legitimacy of the WTO, bringing its practices more in line with today's values of good governance, transparency and accountability.

WTO rules on disputes provide for secrecy and proposals to change them remain controversial among many government delegations. Because the parties in the hormone case – Europe, the US and Canada – agreed to waive secrecy, it was possible for the WTO panel to allow closed-circuit television cameras into the courtroom. The public will be able to view the proceedings in the WTO's Geneva headquarters.

Lack of transparency has been a stock criticism of anti-globalisation activists, which they have used to considerable effect, especially when the WTO disputes, such as that involving beef hormones, addressed sensitive issues of health and the environment. Rightly, the public views trials behind closed doors with suspicion, except in extraordinary circumstances (for example, where national security and personal safety are at stake). Secret processes in the WTO have tarnished its legitimacy and led to misunderstanding and mistrust of outcomes that are impartial and usually balanced.

Many government delegates who oppose public hearings fear that openness will undermine the flexibility and subtlety needed for a diplomatic solution. However, if parties wish to pursue private settlement, there is nothing to prevent them from doing so. And when a trade conflict has proceeded as far as a panel hearing, it means the avenues for political compromise have been exhausted, at least temporarily. While open hearings raise genuine issues about the protection of

confidential commercial information and national security, WTO panels can draw from the procedures used in domestic courts where aspects of the hearing are closed to the public. A similar procedure has already been employed in an investment dispute panel under the North American Free Trade Agreement.

There are other examples of the WTO moving forward by incremental change and experimentation, without the consensus of all 148 WTO members needed to amend the rules. The appellate body of the WTO has allowed non-governmental organisations to file

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written submissions in WTO disputes, so-called *amicus curiae* (friend of the court) briefs, even though many governments remain opposed to formalising this practice as a "right". In addition, governments that are parties to WTO disputes are increasingly making public their written submissions to the WTO judicial authorities; other countries, however, jealously guard their prerogative to keep these under wraps.

While developing countries have been the most resistant to change in this area, they should have the most to gain: openness in WTO dispute proceedings can afford developing countries with limited resources and experience more exposure to the dispute process, enhancing their ability to pursue a WTO case should the need arise. As experimentation in this direction has shown many countries' fears to have been overstated, the resistance has started to subside: in one dispute, Morocco filed its own *amicus curiae*

brief with the WTO appellate body.

It would be disturbing if the only way the WTO could evolve were through a formal trade negotiating round, which requires consensus among all 148 members. Only the week before the hormone beef panel's ruling on open hearings, the news from Geneva was all doom and gloom, with negotiators in the Doha round leaving for holidays with a sense of frustration that they had not met their July targets for movement in the talks. If completing the Doha round now seems like a daunting task, it is worth exploring whether at least part of the problem is a tendency to throw every unresolved issue onto the negotiating agenda, stretching to the limit the resources of many WTO member countries.

It would also be regrettable if the WTO could only progress by all member countries moving in lockstep. It is natural that members of such varying levels of development and readiness cannot move forward on every issue at the same time. As the decision on open hearings illustrates, it might be possible to move forward on certain issues in a spirit of experimentation, rather than the "all or nothing" approach of the negotiating round. Experimentation allows countries to see whether their fears will be realised and to adapt decision-making accordingly.

The decision to open the hearings in the hormones case shows how some countries can take the lead for change, even where others are not ready to follow. The WTO's multilateralism, when practised creatively, can display the flexibility that has often made bilateral and regional approaches to trade seem attractive.

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