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By
Panagiotis Delimatsis

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Transparency in the WTO Decision-Making

PANAGIOTIS DELIMATIS*

ABSTRACT: In its less than 20 years of existence, the WTO has managed to draw public attention. Transparency in the WTO decision-making has been in the agenda of the multilateral trading system for several years. Pressures from developing countries and non-governmental organizations in particular have led to significant improvements towards more openness and participation in the WTO decision-making. This paper is intended to posit the WTO within the current debates about more institutional transparency in international organizations (IOs). It discusses the current features of good governance in the WTO and the consensus rule in particular, in an attempt to identify the pros and cons of this voting tradition in a modern IO. A central view of the paper is that input and output transparency of the WTO could be further enhanced by increased participation of non-governmental organizations. As the WTO is gradually becoming a genuine IO in terms of membership and gets involved in global discussions relating to finance, climate change or poverty eradication, public scrutiny will only increase and thus more good governance in an irreversible process. Some thoughts about the future prospects of and possible avenues for the WTO system are also identified.

Keywords: WTO; decision-making; input transparency; output transparency; good governance; legitimacy; non-governmental organizations; institutional reform; consensus.

JEL Codes: F02; F13; F51; F53; F59; K33

* Associate Professor of Law and Co-Director, Tilburg Law and Economics Center (TILEC), Tilburg University, the Netherlands. Many thanks go to Petros Mavroidis and Manfred Elsig for insightful comments. Possible errors and misconceptions are of the author's sole responsibility. Comments are welcome at: p.delimatis@uvt.nl.

The WTO needs to be efficient, decisive, inclusive in its deliberations, attuned to the world outside and trusted.¹

A. Introduction

Created only in 1995, the World Trade Organization (WTO) and its potentially broad scope rapidly attracted the attention of international law scholars, export-oriented companies, State authorities (be it regulators or policymakers) and the public. The WTO is the institutionalized umbrella of the multilateral trading system for trade liberalisation succeeding the previous diplomacy-based General Agreement on Tariffs and Trade (GATT).² In principle, the WTO is a semi-autonomous regime in that it displays a certain degree of self-sufficiency in terms of procedures, be it administrative, legislative or judicial.³ At the same time, the WTO features various traits that one can identify in other international organizations (IOs) in terms of, inter alia, everyday activities, institutional structures and decision-making.⁴ In addition, general international law applies to the WTO unless there is a WTO rule going explicitly to the contrary.⁵ Thus, to all intents and purposes, the WTO is an international treaty (the international equivalent of a contract) concluded among States, which is to be interpreted in accordance with general international law.⁶ In this sense, possible gaps in the WTO institutional structure are filled by having recourse to the corpus of general international law, confirming the view that, at equipoise, WTO is yet another contextualised regime of international law, indeed an immediate derivative of the development of global society. Nor have the WTO adjudicating bodies regarded the WTO as an isolated island within an international legal order. Rather, in the early *US – Gasoline* case, the Appellate Body found that the WTO law cannot be viewed in clinical isolation from public international law.

The WTO results from increasing global economic interdependence, but has also been instrumental in accentuating this phenomenon. With the advent of the WTO,⁷ the rule of law was enshrined in international economic and trade relations.⁸ Rule of law here should be understood as the application of a set of good governance principles (participation, openness, transparency, peaceful settlement of disputes) in the relations among WTO Members, as well the relations between the WTO in its capacity as IO and other subjects of law, including other IOs or the civil society. Through its manifest paradigm shift towards higher levels of rule-

¹ Peter Sutherland/Jagdish Bhagwati/Kwesi Botchwey/Niall FitzGerald/Koichi Hamada/John Jackson/Celso Lafer/Thierry de Montbrail, *The Future of the WTO – Addressing institutional challenges in the new millennium* (the ‘Sutherland Report’), 2004, p. 69.

² For the negotiating history leading to the creation of the GATT, see Douglas Irwin/Petros Mavroidis/Alan Sykes, *The Genesis of the General Agreement on Tariffs and Trade* (Cambridge: Cambridge University Press, 2008). See also J. Jackson, ‘The Evolution of the World Trading System – The Legal and Institutional Context’ in: Daniel Bethlehem/Donald McRae/Rodney Neufeld/Isabelle van Damme (eds.), *The Oxford Handbook of International Trade Law* (Oxford: Oxford University Press, 2009), 30-53.

³ Cf Pieter Jan Kuijper, ‘The Law of GATT as a Special Field of International Law’, *Netherlands Yearbook of International Law* (1994), 227.

⁴ Panagiotis Delimatsis, ‘The Fragmentation of International Trade Law’, *Journal of World Trade* 45:1 (2011), 87-116.

⁵ In that case of course the WTO rule would prevail in accordance with the *lex specialis* rule.

⁶ Cf Joost Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’, *American Journal of International Law* 95 (2001), 535-578, at 538.

⁷ For a study on the antecedents of the WTO (ITO, GATT), see John Jackson, *The World Trade Organization: Constitution and Jurisprudence* (Routledge, 1998), 12.

⁸ Arthur Watts, ‘The international rule of law’, *German Yearbook of International Law* 36 (1994), 14; also Ernst-Ulrich Petersmann, ‘How to Promote the International Rule of Law? Contributions by the World Trade Organization Appellate Review System’, 1 *Journal of International Economic Law* 1 (1998), 25-48, at 31.

orientation,⁹ the WTO has arguably instigated reform in IOs whose activities may constitute inputs for the WTO activities or which may otherwise be somehow connected to the WTO. This has been, for instance, the case with international standard-setting organizations such as the Codex Alimentarius Commission or the International Organisation for Standardisation (ISO).

Owing to this shift towards a rules-based (as opposed to power-based)¹⁰ system and the increasing pace of globalization, the WTO quickly became a target for stakeholders seeking higher levels of openness than the one that the GATT had displayed thus far. This is no coincidence: the legitimacy of the WTO, and notably of its judicial branch,¹¹ was questioned fairly early in the wake of controversial rulings delivered by the WTO adjudicating bodies and notably the new Appellate Body (WTO's last instance standing court) over politically charged and highly mediatised disputes, particularly in the developed world. Such rulings, for instance, condemned, the EU ban on genetically modified products (GMOs), the EU preferences for the importation of bananas from the EU former colonies (the so-called ACP countries) or the US import prohibition of shrimps based on environmental grounds. Ironically, it was the most powerful countries, and the US in particular, that insisted in the inclusion of an effective dispute settlement system during the Uruguay Round negotiations.¹² Notably after the infamous Ministerial Conference of 1999 in Seattle failed, a new era of closer look at WTO activities by NGOs was heralded.

The fundamental principle of transparency finds its place within the World Trade Organization (WTO) in two main distinct, albeit interconnected, settings: the first relates to the WTO decision-making procedures, whereas the second is concerned with the level of transparency reflected in the WTO dispute settlement procedures as laid down in the Dispute Settlement Understanding (DSU). The latter mainly focuses on issues such as access to documents, openness of hearings and choice of the individuals comprising the WTO judiciary. To properly delimit this study we should clarify at the outset that transparency within the dispute settlement system of the WTO falls outside the scope of this study. Rather, the paper is aimed at dealing with internal (or input) transparency in the framework of the WTO decision-making procedures and how this is perceived by the public. Thus, external transparency, or else, how the message of trade liberalization is conveyed to the public, is also relevant for our purposes.

The discussion relating to the transparency of the WTO decision-making procedures is mainly a subset of the broader discussion relating to the legitimacy of the WTO and, more generally, the good governance of IOs.¹³ Due to the recognition of the importance of commercial matters and the powerful dispute settlement system comprising a sophisticated enforcement mechanism leading to compliance in most cases, the legitimacy of the WTO is at the epicentre of ever-lasting debates in the academic community and civil society. As WTO membership has grown to become truly international and decisions on commercial matters have a growing outreach, people become increasingly fascinated with the WTO decision-making system.

⁹ Cf. Joseph Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', Harvard Jean Monnet Working Paper 9/00, 2000.

¹⁰ For an excellent review of the role of power in international law, see Richard Steinberg and Jonathan Zasloff, 'Power and International Law', *American Journal of International Law* 100:1 (2006), 64-87.

¹¹ Cf. Robert Howse, 'The Most Dangerous Branch? The WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power', in Thomas Cottier and Petros Mavroidis (eds), *The Role of the Judge in International Trade Regulation* (Ann Arbor, MI: University of Michigan Press, 2001).

¹² Cf. J. Trachtman, 'The Constitutions of the WTO', *European Journal of International Law* 17 (2006), 623-646, at 634.

¹³ Among many others, Allen Buchanan and Robert O. Keohane, 'The Legitimacy of Global Governance Institutions', *Ethics and International Affairs* 20 (2006), 405-437, at 405.

Viewed from this angle, the fact that voices for increased transparency and broader participation in the decision-making processes of the WTO is, in a sense, a manifestation of the success of the WTO.¹⁴ In its about fifteen years of existence, the WTO has indeed managed to be established in people's minds as one of the most important IOs today. However, this success has had an enormous impact on the previous decomposable hierarchy of GATT,¹⁵ which was used into informal discussions and negotiators, along with insider networks – the GATT epistemic community – that somehow managed to keep the system in motion.¹⁶

This paper is structured as follows. Section B reviews the discussion of transparency in contemporary IOs and its link with good governance and legitimacy. An analysis of the good governance features of the WTO decision-making procedures is made in Section C. Section D constitutes a tentative attempt to critically approach the issue of how to improve internal and external transparency in the WTO decision-making procedures. Section E concludes with some thoughts about the future prospects of the WTO.

B. Transparency as a Fundamental Principle of Contemporary IOs

The current unprecedented speed of information flows and significant technological developments have resulted in a highly mediatised, up-to-the-minute coverage of domestic and international politics. The surfeit of information creates pressures for more transparency by domestic and international players, including IOs. Thus, IOs increasingly contemplate on ways to improve their internal legitimacy by strengthening internal mechanisms that facilitate the release of information about policies, capabilities, and preferences to external stakeholders and interested parties. Due to the possible impact on the external legitimacy of an IO, a steady flow of internal information becomes quintessential. This is all the more so, if one takes into account the current level of fragmentation that characterizes international law, with similar or interrelated issue-areas covered by several institutions.¹⁷

Transparency is a fundamental tenet of IOs that brings about commitment and compliance. For the multilateral trading system, compliance with the rules that are enshrined in the WTO contract is a *conditio sine qua non* for everyday trade and the viability of the organization. As the GATT former DG Arthur Dunkel observed, the global trading system is based on a 'balance of terror', as the short-term interest of States in cheating is outweighed by the long-term interest of everyone in predictable behaviour and rule compliance. This is of course the case with general international law as well. Indeed, as Franck suggested, the compliance pull of international law is premised on the expectation that most States, most of the times, will obey the law.¹⁸ Compliance with certain rules, in turn, is inextricably linked with legitimacy.

¹⁴ Cf Marcos Orellana, 'WTO and Civil Society', in Daniel Bethlehem et al (eds.), 671-694, at 683.

¹⁵ Cf Robert Keohane and Joseph Nye, Jr, 'The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy', The John F. Kennedy School of Government – Visions of Governance in the 21st Century, Working Paper No 4 (using the term of Nobel laureate Herbert Simon).

¹⁶ Cf. Robert Howse, 'From Politics to Technocracy – And Back Again: The Fate of the Multilateral Trading Regime', *American Journal of International Law* 96 (2002), 94-117.

¹⁷ In a treatise influenced by the school of realism, it was argued that the current level of fragmentation constitutes the outcome of an effort on the part of powerful states to maintain their dominance by creating confusion and relativizing compliance. See Eyal Benvenisti and George Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', Global Administrative Law Working Paper 2007/6. In a similar vein, it was submitted that international law, more generally, is limited by the configurations of state interests and the distribution of state power. See Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford University Press, 2005).

¹⁸ Thomas Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium', *American Journal of International Law* 100:1 (2006), 88-106, at 90.

In other words, a law-making process perceived to be illegitimate is likely to be disregarded or undermined.¹⁹

Nowadays it is commonplace that the legitimacy of any IO is a function of the level of transparency in terms of processes, deliberative mechanisms and output. Globalization has increased the role of law and has led to an unparalleled expansion of the corpus of international law.²⁰ This, however, has also resulted in the emergence of an international rule of law. Legalization of international relations is here to stay. To be sure, the elimination of arbitrariness in international arena benefits every State, but particularly those States which do not play an influential role in the international scene. Thus, just as in any domestic legal order, rule of law and transparent mechanisms empower predominantly the weakest or the most recently emerging parties involved, be it individuals – or States, in this case. In other words, the currently high level of power diffusion in international relations brings about a paradigm shift in the governance of IOs – and the WTO cannot remain unaffected. For the WTO, such developments mean that, admittedly, these new constellations may cause deadlock more easily than the previous club model of governance, whereby informal networks were ensuring that the GATT would progress through the guidance of few countries.

Transparency is not only about the publication of formal rules and decisions, and the communication of relevant information to the interested stakeholders. It also means that deliberative processes *leading to* rules, decisions and judgments are public. Furthermore, transparency promotes voluntary compliance and thus can be highly effective in reducing costs from excessive litigation or ever-lasting negotiations. In addition, public support of IOs can increase because of transparency, as the absence of secretive decision-making and adjudicative procedures creates confidence that due process is adhered to within the IO in question. Transparency can also lead to increased – and so much-needed – global cooperation, by increasing trust among actors about the security, predictability and equal treatment with respect to the rules of the game. Closer forms of cooperation, along with aggregate expertise at the supranational level, require restraining national sovereignty or even transferring the locus of regulatory authority to supranational fora or IOs. This varies among organizations, with States transferring more powers to certain IOs than others, depending on the relative importance of the subject matter and the net positive effects of such a transfer.²¹ Transparency and the rule of law, along with expertise that promotes social welfare,²² legitimize such a restraint or transfer of sovereignty.

A contemporary theory of legitimization of global regulatory authority underlines the importance of adherence to principles stemming from domestic administrative law such as transparency, participation, reasoned decision and decisional review as foundations for procedural legitimacy of an IO.²³ In this case, the underlying consideration is that procedural rigour can substitute for problems that arise from the absence of democratic legitimacy for all

¹⁹ Cf Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007), at 25.

²⁰ Cf David Kennedy, 'The Mystery of Global Governance' in Jeffrey Dunoff and Joel Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009), 37-68, at 55. Also Judith Goldstein; Miles Kahler; Robert Keohane; and Anne Marie Slaughter, 'Introduction: Legalization and World Politics', *International Organization* 54:3 (2000), 385-399.

²¹ For instance, Grant and Keohane find that the WTO has been very successful in this respect, and this increases the accountability of the institution: Ruth Grant and Robert Keohane, 'Accountability and Abuses of Power in World Politics', *American Political Science Review* 99:1 (2005), 29-43, at 39.

²² The importance of technocracy as a source of legitimacy was underlined by Max Weber. See Ian Hurd, 'Legitimacy and Authority in International Politics', *International Organization* 53 (1999), 379-408, at 388.

²³ See Daniel Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law', *Yale Law Journal* 115 (2006), 1490-1562, at 1521ff.; also Benedict Kingsbury; Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law' *Law and Contemporary Problems* 68:3 (2005), 15-61.

institutions active at the international level, as principles of administrative law are germane to the ideal of democracy.

Transparency is also a constitutive factor of efficient (ie aggregate-welfare-increasing) governance. Empirical studies have linked transparent and accountability mechanisms in a domestic setting to higher economic growth. Calls for more transparency and accountability nowadays transcend domestic and international politics. Along with the rhetoric for higher transparency in the developing world articulated by the donor (developed) countries, a similar advocacy for increased transparency and rules-based systems to render IOs more efficient and open has developed, this time by developing countries and NGOs dealing with development issues.²⁴ In this respect, transparency and other liberal political principles such as accountability and participation serve a strategic function of constraining abuses of power.

At the same time, excessive transparency may cause delays in the negotiations or prompt trade negotiators to posture by taking uncompromising positions and thus causing more frequent breakdowns in negotiations.²⁵ This is particularly so if one assumes that the State representatives have considerable reputational concerns and therefore will choose to be on the 'safe side'. This is because domestic constituencies are assumed to monitor such international developments which result in the State representative being more careful in its articulations. Interestingly, such behaviour is to be expected even when the representatives also care about the final policy outcome. This may, however, undermine processes and the smooth functioning of IOs. Finding ways to ensure that gains from an open and participatory decision-making process will be reaped without undermining the capacity to make decisions in a representative but still efficient manner becomes quintessential.

C. Good Governance Features of Decision-Making within the WTO

The WTO Agreement (WTOA) establishes an IO with legal personality and endows it with explicit authority to develop and maintain relations with other IOs. Three major agreements are annexed to the WTOA, ie the GATT (trade in goods), the GATS (trade in services) and the TRIPs (intellectual property). Pursuant to Article III:5 WTOA, the WTO is called upon to cooperate in particular with the IOs in charge of monetary and financial matters and thereby achieve coherence.²⁶ Based on this mandate, the WTO signed agreements with both the IMF and the World Bank.²⁷ As to non-state actors, quite interestingly, the WTO Agreement innovates by authorizing the organization to consult and cooperate with NGOs.²⁸ In 1996, the General Council adopted general guidelines for arrangements on relations with NGOs and referred to the important role that NGOs can play to increase awareness of the public with respect to WTO activities.²⁹ Thus, NGOs would be considered as PR vehicles of the WTO work rather than non-WTO institutions that would be allowed to have a say in the WTO

²⁴ Cf the 2005 World Summit Outcome, whereby developing countries acknowledged that 'good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger'. Resolution adopted by the United Nations General Assembly, A/RES/60/1, 24 October 2005, para 11.

²⁵ See David Stasavage, 'Transparency in Domestic and International Bargaining', *International Organization* 58 (2004), 667-703, at 668.

²⁶ Also Art. V:1 WTOA. Compare the Uruguay Round Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking ('The Coherence Mandate'), 1994; also Marc Auboin, 'Fulfilling the Marrakesh Mandate on Coherence: Ten Years of Cooperation Between the WTO, IMF and World Bank', WTO Discussion Paper No 13, 2007.

²⁷ See WTO, 'Agreements Between the WTO and the IMF and the World Bank', Decision adopted by the General Council at its meeting on 7, 8 and 13 November 1996, WT/L/194, 18 November 1996.

²⁸ Art. V:2 WTOA.

²⁹ WTO Document WT/L/162, 23 July 1996.

activities. Overtime, NGOs have managed to exert considerable influence in some areas (such as the current negotiations on fisheries subsidies), whereas they are regular senders of amicus curiae briefs at the WTO dispute settlement organs. More generally, more inclusiveness and openness to non-governmental interests has been called for,³⁰ also because they could contribute to assessing the impact of proposals discussed by Members.³¹ Again, the red line appears to be the possibility for NGOs to have something more than an observer status.³²

The WTO's supreme organ is the Ministerial Conference (MC), which is tasked with taking decisions in all matters under any WTO agreement, if requested by a Member. The MC meets in regular intervals, in principle at least once every two years. However, after the MC of 2005 in Hong-Kong, which by the way was the most recent negotiating MC, Members avoided organizing an MC in view of the stalemate in the Doha negotiations and the seemingly unbridgeable divergence of negotiating positions. The MC met again in 2009 in Geneva amidst the most severe financial crisis of recent years, only to agree that there are diverging views along WTO Members about the way forward. As a sign of the divergence among Members, the recent MC of 2009 did not adopt a declaration at its closure.³³ In practice, the Ministerial Conference decides upon a pre-established agenda of items that is prepared by the General Council (GC) and through regular meetings of Heads of Delegations (HoDs) several months ahead of the MC. Such preparations may include a series of both publicly available and informal documents.³⁴ In other words, not all documents of the WTO are publicly available at the time of their circulation to Members.³⁵ While documents submitted by Members can in principle be restricted for up to 90 days, Members often decide during a meeting to switch to informal mode. In the latter case, the minutes of the meetings only reflect the main positions without attributing these to specific Members. As one can infer, one inherent challenge the WTO organs and Members face is walking the tightrope between functioning according to contemporary governance principles and at the same time facilitating negotiations, with all the secrecy, discretion and confidentiality that this may entail.³⁶

The GC is the everyday decision-making body of the WTO, ensuring the smooth functioning of the organization. Very often the competences of the MC and the GC overlap. For instance, while in theory waivers are to be granted by the MC pursuant the Article IX:3 of the WTO Agreement (WTOA), in many cases the GC took over this responsibility. However, upon the launching of the new negotiating round in Doha, it was the MC that granted the ACP waiver with regard to the preferential access of ACP exports of bananas to the EU market. Similarly, in the case of accession to the WTO, whereas the Treaty invests the MC with such authority (Article XII of the WTOA), in several cases accession of a given country to the WTO was approved by the GC.

³⁰ Daniel Esty, 'The World Trade Organization's Legitimacy Crisis', *World Trade Review* 1 (2002), 7-22, 7; and Jeffrey Dunoff, 'Public Participation in the Trade Regime: Of Litigation, Frustration, Agitation and Legitimation', *Rutgers Law Review* 56 (2004), 961-970, at 970.

³¹ Thomas Cottier, 'Preparing for Structural Reform in the WTO', *Journal of International Economic Law* 10 (2007), 497-508, at 503.

³² Cf. Steve Charnovitz, 'The WTO and Cosmopolitanism' in Ernst-Ulrich Petersmann (ed), *Reforming the World Trading System – Legitimacy, Efficiency, and Democratic Governance* (Oxford: Oxford University Press, 2005), 438-445, at 444.

³³ Having said this, the MC agreed to extend two previously decided moratoria, one on the non-imposition of duties on e-commerce and the second on the non-filing of non-violation complaints under the TRIPS.

³⁴ See, for instance, WTO, General Council, 'Minutes of Meeting Held on 27 July 2011', WT/GC/M/132, 21 September 2011, para. 68ff.

³⁵ However, all official WTO documents shall be unrestricted. See WTO, 'Procedures for the Circulation and Derestriction of WTO Documents', WT/L/452, 16 May 2002.

³⁶ Cf. Julio Lacarte, 'Transparency, Public Debate, and Participation by NGOs in the WTO: a WTO Perspective' in Petersmann (ed), *Reforming the World Trading System*, 2005, 447-451, at 447.

Consensus is the form of WTO decision-making *par excellence*, deriving from the nature of the WTO being a Member-driven organization and from the bounded rationality of its Members. The WTOA confirms as much: the WTO is bound to continue the practice of consensus of the GATT 1947.³⁷ Consensus in the WTO does not mean unanimity, but rather is met when no Member present in the meeting formally objects the decision to be taken.³⁸ For the WTO drafters, continuity is a very important objective: the WTO Preamble makes clear that WTO Members are determined to ‘preserve the basic principles’ underlying the multilateral trading system. Pursuant to Article IX WTOA, absent consensus, various qualified majority voting procedures may come at play. For instance, an authoritative interpretation of any provision of the WTO Agreements requires a three-fourth majority,³⁹ just as any decision to waive an obligation upon a WTO Member (the so-called ‘waiver’). In addition, a two-third majority is required for an amendment of the WTO Agreements to take effect. However, for an amendment of Article IX WTOA and the modification of the very essence of the WTO, ie the non-discrimination provision, unanimity is warranted. Thus, the provision relating to decision-making is shielded the same way as the cornerstone of the multilateral trading system. Ironically, the modalities of Article IX are amended by the practice of Members, inasmuch as the qualified majority provisions have never been applied.⁴⁰ On the other hand, it bears noting that the qualified majority procedures relate to the entire membership and not just of the Members that are present. This would mean that, in theory at least, it is possible that a qualified majority procedure may require more votes in absolute numbers than the consensus of the Members present, since in the latter case Members may be absent or simply abstain.

Be this as it may, consensus remains the informal voting rule in the WTO. Thus, consensus as a voting method has remained hale and hearty throughout the years, as exemplified by the ongoing Doha negotiations.⁴¹ By way of illustration, in a statement of February 2002 to the Trade Negotiations Committee, the Chairman of the General Council suggested that Chairpersons ‘should aim to facilitate consensus among participants and should seek to evolve consensus texts through the negotiation process.’⁴² The latter statement in particular confirms one of the weaknesses that consensus displays: it involves a bias towards lowest-common-denominator outcomes.⁴³ On the other hand, one of the main traits of consent is that it discourages any attempt of hijacking of decision-making and agenda-setting procedures. This has been a concern in the GATT already in the 50s in the wake of the accession of

³⁷ Although Article IX WTOA suggests so, the legal text of GATT 1947 did not explicitly refer to consensus. As a matter of fact, Art. XXV:4 GATT provides that decisions shall be taken by majority of the votes cast.

³⁸ Art. IX WTOA and the accompanying footnote.

³⁹ As another piece of evidence of the WTO Member-driven ethos, the WTO adjudicative function has recognized that only Members have the exclusive authority to interpret the WTO agreements in a definite manner. See Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13.

⁴⁰ However, the rules of procedure for the MC in theory do allow such qualified majority voting. Rule 29 provides that: ‘...’where in accordance with the WTO Agreement a vote by a qualified majority of all Members is required to be taken, the Ministerial Conference may decide, upon request from a Member or the suggestion of the Chairperson, that the vote be taken by airmail ballots or ballots transmitted by telegraph or telefacsimile in accordance with the procedures described in Annex 1 to these Rules.’ See WTO, ‘Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council’, WT/L/161, 25 July 1996, Rule 29 (MC) and Rule 33 (GC).

⁴¹ See for instance WTO, General Council, Minutes of Meeting Held on 17 and 19 July 2000, WT/GC/M/57, 14 September 2000, para. 134 (‘There was also a strong commitment of the Members to reaffirm the existing practice of taking decisions by consensus’).

⁴² Doha Declarations, p. 78.

⁴³ Cf Patrick Low, ‘WTO Decision-Making for the Future’, WTO Staff Working Paper ERSD-2011-05, May 2011.

various developing countries.⁴⁴

Contrary to similar organizations such as the IMF or the World Bank, the WTO does not have an executive organ of restricted composition. On the other hand, the WTO has an almost disproportionate number of committees and other working parties, which multiply during negotiating rounds. Such a structure can easily cause a sclerosis to the functioning of the institution. How then the GATT contracting parties managed to reach decisions? In the GATT years, decisions were reached by consensus, but only a like-minded minority among membership was leading the process, the so-called Green Room process.⁴⁵ Even if the WTO is based on the one-country-one-vote principle,⁴⁶ thereby giving each Member a veto right, it has become clear over the years that vetoes are rare and agenda is virtually pre-determined through early meetings among those countries whose consent is considered indispensable for reaching consensus at the plenary. This is so either because that Member is powerful in terms of trade or because its stance may be adopted by a group of WTO Members.⁴⁷

During the informal 'Green Room' process, a small number of self-selected developed and developing countries convene to decide on divisive issues.⁴⁸ Once agreement is reached in the Green Room, the decision is conveyed to the WTO membership for final decision. This is yet another indication of the GATT/WTO power politics.

It is a truism that the Green Room process, initially reserved to the big developed-country delegations, grew within time to involve an increasing number of countries, both developed and developing, notably in the aftermath of the MC failure in Seattle. Along with the usual suspects (ie EU, US, Japan and Canada), such meetings cannot be convened nowadays without the participation of India, Brazil and China. Depending on the point of view, one could mention as a possible sign of indirect representativeness and participation that these Members are also members of at least one coalition of WTO Members. Such coalitions (for instance the Cairns group, G-20, G-30 or the so-called 'friends' of a given subject matter) have their own internal networks with respect to transparency, coordination, communication of positions, participation and inclusiveness.⁴⁹

The maintenance of such an intransparent mechanism whereby only a group of countries meet to discuss and decide upon important issues exemplifies the need for greater transparency, representativeness and accountability at the highest decision-making level within the WTO. This can be done by developing a structure of constituencies organized along regions or common interests. Participants in the meetings that represent coalitions shall be fully transparent and accountable to those that they represent so that they are fully aware of the issues discussed during the minimal-format meetings. In this respect, a more active role of the Secretariat would be highly desirable.⁵⁰

⁴⁴ See Richard Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', *International Organization* 56:2 (2002), 339-374, at 344.

⁴⁵ Green Room refers to the informal name of the conference room of the GATT (now WTO) Director-General.

⁴⁶ Art. IX:1 WTOA.

⁴⁷ Patrick Low notes that '[l]arge countries have been willing to accept a one-country one-vote arrangement on the assumption that voting would not be used and that the veto would only be applied with great moderation.' See Low, 'WTO Decision-Making for the Future', 2011, at 5.

⁴⁸ Richard Blackhurst and David Hartridge, 'Improving the Capacity of WTO Institutions to Fulfill their Mandate', *Journal of International Economic Law* 7:3 (2004), 705-716.

⁴⁹ It bears noting that NGOs may be actively involved in such coalitions, thereby increasing their indirect participation – and thus influence – in WTO decision-making. See Pedro da Motta Veiga, 'Brazil and the G-20 Group of Developing Countries' in Peter Gallagher; Patrick Low; and Andrew Stoler (eds.), *Managing the Challenges of WTO Participation* (Geneva and Cambridge: World Trade Organization and Cambridge University Press, 2005), 109-119.

⁵⁰ See also Sutherland Report, p. 72. Evidence suggests that the role of the WTO may have actually decreased

Another option would be to create a consultative or executive Board within the WTO. Pre-established, objective criteria for participation and representativeness shall be established to ensure the broad acceptance of the views expressed within such an organ. In theory, it could include a number of permanent Members based on their trade volume (eg, the Quad) and a number of rotating countries based on their trade volume; population; geographical position; or a combination of these criteria. The composition of this organ should also be flexible to accommodate the requirements for reaching representative decisions. For instance, the composition cannot be the same when discussing agriculture and, say, development. This would allow for a more effective organization of the currently loose scheme of coalitions within the WTO. To be sure, the creation of such an organ would mean that the Green Room process is institutionalized. With this institutionalization, transparency and due process need to be factored in as essential prerequisites.

Obviously, most WTO Members, even the most vulnerable ones, do not really mind having club-model processes such as the Green Room or the proposed Board. Rather, they want to have their views heard.⁵¹ Such structures are rather common in international relations. For instance, during the Durban conference, the organizers of the conference saved the game by inviting a small group of countries (China, India, the US, UK, France, Sweden, Gambia, Brazil and Poland) to bridge their differences. This allowed striking a deal which may lead to a new global climate agreement by 2020.⁵² Then, instead of abandoning the small group meetings overall, the input legitimacy of the WTO can still be safeguarded provided that transparent and participatory mechanisms with respect to negotiations are in place. Feeling concerned by the mechanisms and the decisions is a major contemporary challenge of an enlarged institution such as the WTO.

D. Change Dynamics in the WTO Decision-Making – Participation, Due Process and Outreach

The inception of the WTO is regarded as having increased transparency of domestic policies affecting trade to the benefit of everyday traders. Along with the domestic-interest-driven desire to attract foreign investments, the Trade Policy Review Mechanism as a top-down transparency mechanism has played a central role in this regard. The focus on transparency came by the recognition that transparency plays a pivotal role for the facilitation of trade in general.⁵³ Not only does it increase predictability and legal certainty, but it also improves the accountability and legitimacy of regulatory authorities at all stages of regulatory policymaking.⁵⁴ At the same time, transparency in the WTO parlance has been narrowly conceived to include a requirement to provide sufficient information (through notifications or

over time, accentuating the ‘endless cycling dilemma’. See Manfred Elsig, ‘WTO Decision-Making: Can We Get a Little Help from the Secretariat and the Critical Mass’, in Debra Steger (ed.), *Redesigning the World Trade Organization for the Twenty-First Century* (Wilfrid Laurier University Press, 2010), 67-90, at 72.

⁵¹ Keohane and Nye, ‘The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy’, at 6.

⁵² Sutherland Report, p. 71. The creation of such a steering body is arguably in line with the Warwick Report. The Warwick Commission, ‘The Multilateral Trade Regime : Which Way Forward ?’, 2007.

⁵³ See Panagiotis Delimatsis, *International Trade in Services and Domestic Regulations – Necessity, Transparency, and Regulatory Diversity* (Oxford: Oxford University Press, 2007), 255.

⁵⁴ Compare, for instance, at the European Union level, the *Interporc* case where the ECJ implicitly confirmed that the principle of transparency is intended to enable citizens to participate more closely in the decisionmaking process, to guarantee that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen, and to contribute to strengthening the principles of democracy and respect for fundamental rights. See Case C-41/00 P *Interporc Im- und Export GmbH v Commission* [2003] ECR I-2125, paras 39. It bears mention that the principle of transparency has not yet been recognized by the ECJ as a general principle of Community law.

otherwise) and to administer the relevant rules reasonably and non-discriminatorily. Thus, the use of the term ‘transparency’ in the WTO has been less normative than is found in public policy discourse, whereby transparency refers to the fairness and openness of a given regime.⁵⁵

At the institutional level of the WTO, transparency became an agenda issue in the late 90s in the wake of controversial rulings and ill-prepared MCs. While admittedly successful, the trade regime has fulfilled its mission of liberalizing trade in the shadow of organized opposition.⁵⁶ After the MC in Seattle, the signs were clearly alluding to the need for more internal transparency as a precondition for any advancement in the WTO. Within this context, the launch of the Doha Development Round was regarded as a success in the short WTO history.⁵⁷ The Doha Declaration acknowledged the transparency challenge, first, by recognizing that internal transparency in the WTO remains unsatisfactory and shall be addressed in view of the expanded membership, and, second, that effective participation of all Members is indispensable.⁵⁸ Transparency in the WTO at the internal level means more chances for effective participation and deliberation. Improving the external transparency of the WTO means more direct communication with the broader public.

I. Internal transparency

Just as other IOs based on the representative democracy model, the WTO entails important agency costs which may accentuate its ‘democratic deficit’. More often than not, package deals are presented to the domestic legislatures of Members for an ex post acceptance, which is almost automatic due to the single undertaking approach.⁵⁹ At the institutional level, agency costs can be addressed through increased transparency in negotiations and other discussions as well as more intensive participation. At the internal level, in reality, the fact remains that effective participation is closely associated with longer negotiations and higher transaction costs. If deliberative processes are thereby served, this is rather good news for the proponents of global democratic institutions; however it affects negatively the WTO institutional performance and delivery of results, notably because the WTO lacks deal-brokering processes.⁶⁰ The current Doha impasse has resulted to an increase of voices calling for reform of the WTO decision-making procedures. Such dissatisfaction may originate not only in developing countries, which were disappointed with the welfare repercussions of the Uruguay Round, but also from developed countries,⁶¹ which are displeased with the slow pace and burdensome manner of decision-making. The former EU trade commissioner and now WTO DG, Pascal Lamy, had criticized procedures as being ‘medieval’ and in urgent need of reform, frustrated by the failure of the MC in Cancún. Similar sentiments were expressed by the United States Trade Representative (USTR). Coincidence or not, proliferation of preferential

⁵⁵ Cf WTO, Working Group on the Relationship between Trade and Investment, ‘Transparency’, Background Note by the Secretariat, WT/WGTI/W/109, 27 March 2002, p. 3.

⁵⁶ Cf. Judith Goldstein and Lisa Martin, ‘Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note’, *International Organization* 54:3 (2000), 603-632, at 614.

⁵⁷ Cf The ‘Sutherland Report’, p. 61.

⁵⁸ See paras 10 and 49.

⁵⁹ See Robert Howse, ‘How to Begin to Think About the “Democratic Deficit” at the WTO’ in Stefan Griller (ed.), *International Economic Governance and Non-Economic Concerns – New Challenges for the International Legal Order* (Springer, 2003).

⁶⁰ Cf. Yves Bonzon/Manfred Elsig/Marina Foltea/Thomas Messerli/Andreas Ziegler, ‘Reflections on modes of decision-making in the World Trade Organization’ in Thomas Cottier and Panagiotis Delimatsis (eds.), *The Prospects of International Trade Regulation – From Fragmentation to Coherence* (Cambridge University Press, 2011), 103-135, at 110.

⁶¹ Cf Michael Finger and Philip Schuler, ‘Implementation of the Uruguay Round Commitments: The Development Challenge’, World Bank Policy Research Working Paper No 2215, 1999.

trade agreements (PTAs) has kept growing apace. At the same time, the current state of affairs in the WTO has witnessed higher levels of participation by developing countries – not only the emerging economies, but also least-developed countries, individually or as a group. This is a rather welcome incremental transformation of the WTO.

A comparative institutional perspective of the international legal landscape leads to the conclusion that the WTO is regarded as one of the most highly legalized international institutions.⁶² Legalization means, among others, relatively more precise rules and obligations, and consequently, more transparency as to what needs to be adhered to. This is one of the features that relatively few IOs currently display.

On-going consent by democratic states constitutes the democratic channel of accountability. The smooth functioning of this channel is generally necessary for legitimacy.⁶³ Having said this, consensus, along with the single undertaking approach, has been pinpointed as a potential hindrance to the further pursuit of the objective of liberalizing trade.⁶⁴ State consent is a necessary but not sufficient condition for confirming the legitimacy of IOs. The consensus rule, with its imperfections, can improve transparency with regard to the preferences of the weaker WTO Members, which the more powerful Members must take into account when designing the final deal or the final draft text to be submitted for Members' consideration to avoid deal-breakers. Consensus also implies that the more active WTO Members will be testing the intentions and preferences of the other Members, notably the weaker and thus more defensive ones, by tabling proposals or informal documents (so-called room documents) early in the decision-making process. Such preferences may be expressed individually or through representatives of coalitions such as G-20, G-33 or the LDC Group. This is one of the most compelling justifications for the current delay in concluding the Doha Round in an IO that counts over 150 Members. However, the adequacy of weighted, majority-based voting as a mechanism that would improve the efficiency of the WTO still needs to be proven.⁶⁵

Demands for openness and participation cannot be satisfied with the old GATT mechanism only. WTO critics argue that the WTO is deficient on grounds of both *procedural* fairness of its mechanisms and *substantive* fairness of its decisions.⁶⁶ Decision-making within the WTO has many facets and thus the level of transparency may vary in an uneven manner. When compared to an actual negotiating round, transparency may actually be much more satisfactory in the everyday work of the WTO committees. A case at issue is procedures within the Committee on Sanitary and Phytosanitary Measures (SPS Committee).⁶⁷ Again, examples of unsatisfactory practices and absence of institutional sensitivity when it comes to the WTO relations with other IOs abound.⁶⁸

Regarding procedural transparency, one could envisage introducing the possibility of review of WTO decisions by the WTO adjudicating bodies.⁶⁹ Due to the fact that the WTO is a

⁶² Kenneth Abbott/Robert Keohane/Andrew Moravcsik/Anne-Marie Slaughter/Duncan Snidal, 'The Concept of Legalization', *International Organization* 54:3 (2000), 401-419, at 405.

⁶³ Buchanan and Keohane, 2006, 405.

⁶⁴ Sutherland report, at 64.

⁶⁵ See Thomas Cottier and Satoko Takenoshita, 'The Balance of Power in WTO Decision-Making: Towards Weighted Voting in Legislative Response', *Aussenwirtschaft* 2 (2003) pp. 171-214.

⁶⁶ Claims concerning substantive unfairness relate to the WTO dispute settlement mechanism.

⁶⁷ See also Andrew Lang and Joanne Scott, 'The Hidden World of WTO Governance', *European Journal of International Law* 20 :3 (2009), 575-614, at 590.

⁶⁸ See Marina Foltea, *International Organizations in WTO Dispute Settlement: How much Institutional Sensitivity?*, PhD Thesis, University of Berne, 2010 (on file with the author).

⁶⁹ Cf Klaus Armingeon/Karolina Milewicz/Simone Peter/Anne Peters, 'The constitutionalisation of international trade law' in Cottier and Delimatsis (eds.), *The Prospects of International Trade Regulation*, 2011, 69-102, at

Member-driven, intergovernmental organization, there is currently no such possibility for judicial review. Such a possibility would enhance the overall institutional cohesion of the WTO and would add a review layer to ensure some tentative checks and balances. This type of constitutional-like claims would be adequate to reassure Members and constituencies of the procedural rigour of the WTO. The WTO adjudicating bodies are already familiar with the transparency and good governance discourse through the interpretation of the WTO transparency provisions such as Article X GATT.⁷⁰

In more generalized terms, for those criticizing the WTO as being undemocratic and illegitimate, an influential theory developed by Andrew Moravcsik suggests that IOs should not be juxtaposed to a democratic ideal that is missing already at the domestic level. Philosophical analyses of *demos* and its participation are useful and intellectually stimulating, but lose sight of the second-best world that we live. Thus, what should WTO scholars rather do is an evaluation of the functioning of the WTO vis-à-vis current mechanisms, limits and deficiencies of domestic democracies.⁷¹

II. External transparency

More transparency brings with it more interest in the activities of the WTO and thus more interest in influencing those activities. Enhanced transparency brings about mobilization of a variety of groups.⁷² In that sense, openness in the WTO decision-making is an irreversible process. This means that it can only be the result of a well-thought and determined action by the WTO Members – in cooperation with the Secretariat as far as the technicalities are concerned. The attribution of observer status to NGOs has been a first step. Loosening the standards for participation of NGOs in the WTO decision-making would also allow overcoming some public choice concerns present in any political institution such as the WTO.⁷³ In addition, empirical evidence suggests that NGOs may be less critical once they become ‘part of the system’, thereby contributing to enhancing public support for trade liberalization.⁷⁴

Additionally, in various cases, NGOs have been more active and their participation in the work of WTO committees was welcomed because they had (or managed to build quickly) considerable savvy in the relevant technical issues which can provide additional viewpoints to those expressed by the Secretariat in the background documents that it prepares. This applies with particular force in the so-called ‘trade and...’ issues (such as environmental protection) with which WTO officials (particularly the old generation thereof) may be less familiar. Thus, by involving the NGOs more in its work along functional lines, the WTO and its Members receive a valuable support, which can enhance the WTO legitimacy, authority and effectiveness.⁷⁵ Sticking with States is increasingly becoming old-fashioned and imprudent.⁷⁶

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⁷⁰ Cf. Appellate Body Reports, *US – Shrimp*, paras. 180-183; and *EC – Selected Customs Matters*, para 302.

⁷¹ Andrew Moravcsik, ‘Is there a “Democratic Deficit” in World Politics? A Framework for Analysis’, *Government and Opposition* 39:2 (2004), pp 336-363. For a similar line of argument, see Samantha Besson, ‘The Democratic Legitimacy of WTO Law – On the Dangers of Fast-food Democracy’, NCCR Working Paper No 2011/72, December 2011, available at: www.wti.org.

⁷² Goldstein and Martin, ‘Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note’, 2000, at 608.

⁷³ Cf. James Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor, MI: University of Michigan Press, 1962).

⁷⁴ Cf Daniel Esty, *Greening the GATT: Trade, Environment, and the Future* (Institute for International Economics Press, 1994), pp. 27-28 (discussing the role of environmental NGOs in the NAFTA).

⁷⁵ See Daniel Esty, ‘Linkages and Governance: NGOs at the World Trade Organization’, *University of Pennsylvania Journal of International Economic Law* 19:3 (1998), 709-730, at 716.

Such support is all the more important if one considers the rather limited financial resources of the WTO and the relatively small WTO Secretariat. NGOs are more used to competitive conditions which oblige them to become increasingly specialized in certain areas to ensure public attention and raise funds. Thus, while competing with WTO institutions, collaboration with them may be highly beneficial.⁷⁷ Bringing this collaboration up to a more sophisticated level would also enhance WTO's deliberative legitimacy in the Habermasian sense.⁷⁸

Critically, it seems that not only NGOs, but also unorganized, ordinary people do worry and even mistrust the WTO, as exemplified by the demonstrations during MCs or other high-level meetings at the WTO. This constitutes a possible source of concern, as what is conventionally termed 'global civil society' has been confounded with NGOs for years. Arguably, these people do not feel to be represented by any State official nor NGO. There seems to be an overall perception that State representatives join WTO negotiations or meeting with a significant bias to the detriment of the people on the ground. If this is indeed the case, openness, that is, open-door bargaining, decision-making, and dispute settlement, may be the only possible and sustainable *modus operandi* for the WTO if the organization wants to gain public support.⁷⁹ Public hearings of cases are now reality and additional initiatives towards this direction such as the WTO Public Forum or the WTO Open Doors Initiative can only be praised. The same goes for live webcasting or press releases where non-technical language is used. Indeed, what is sought after is not transparency in the form of increased communication of technical documents, which few outside the WTO are able to assess and act upon.⁸⁰ This type of transparency may actually be perilous and have the opposite effect if it produces piles of documents that few understand and thus read.

E. Future prospects

The future of the WTO as an IO is not insecure. Admittedly, the WTO has managed to fulfil the tasks that States and scholars have expected, notably in reducing transaction costs; increasing access to information; providing for an independent forum for managing international commerce; mediating disputes and enforcing sanctions.⁸¹ It has also improved regulatory governance and overall enhanced the use of best practices both in commercial transactions and administrative processes domestically. Arguably, the institutionalization and increased rules-orientation of the multilateral trading system led to higher legalization and, with it, enhanced transparency. In addition, the paradigm shift towards higher levels of power diffusion has equally resulted in pressing demands for more transparency. Transparency, however, may have a negative impact on the negotiation and conclusion of deals at the multilateral level for two reasons: First, because it increases the transaction costs (negotiating costs or other costs). Second, because it brings about better and more accurate information regarding the distributional effects of the proposed agreements, thereby mobilizing groups that may be hurt by more liberalisation.⁸² The current Doha impasse is revealing in this

⁷⁶ Cf Andrew Kuper, *Democracy Beyond Borders – Justice and Representation in Global Institutions* (Oxford University Press, 2004), pp. 164-165.

⁷⁷ Cf. Daniel Esty and Damien Geradin, 'Regulatory Co-opetition', *Journal of International Economic Law* (2000) 235-255, at 253.

⁷⁸ Cf Jürgen Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society* (Boston: Beacon Press, 1981), at 286-7.

⁷⁹ Cf Stasavage, 'Transparency in Domestic and International Bargaining', at 680.

⁸⁰ Cf Kuper, *Democracy Beyond Borders*, 2004, at 180.

⁸¹ Cf. Kenneth Abbott and Duncan Snidal, 'Why States Act through Formal International Organizations', *Journal of International Conflict Resolution* 42:1 (1998), 3-32; Also José Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005), at 338ff.

⁸² Cf. Goldstein and Martin, 'Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note',

respect.

Indeed, increased transparency may be undermining the WTO's culture of compromise. Nevertheless, there are additional factors to blame for the current stalemate of Doha negotiations. There seems to be a general feeling vis-à-vis the WTO that State representatives may not be sharing the policy preferences of their constituents. In that case, transparency is the only available way forward for a publicised IO like the WTO, as the expected benefits from constraining the actions of biased officials exceed the expected costs of prompting unbiased officials to posture.

In this context, it is rather the judiciary of the WTO and the technocrats of the WTO Secretariat that rise in prominence. Thus, quite paradoxically, transparency may amplify the imbalance between the judicial branch and the other WTO branches. When considering the legitimacy of the WTO, one should among others consider the extent to which it effectively achieves its mission, which is to facilitate trade liberalization. Thus, even absent transparency and participation, the WTO can be regarded as legitimate because it largely achieved its objective, even without due respect of transparency and participation.

When assessing the legitimacy of the WTO, one should also make a counterfactual analysis: Had the WTO not existed, would trade liberalization have been achieved more effectively and in a more streamlined manner? The fact that economic theory supports the existence of a multilateral institution regulating state behaviour over trade policies does add to the legitimacy of the WTO.⁸³ By promoting cooperation among democratically elected (for the most part) politicians and their governments, the WTO empowers them. This is yet another element that enhances the legitimacy of a global institution. As Keohane *et al* correctly observe, the choice is not between international cooperation and domestic autonomy, but rather between complementary activities of institutions at the international and domestic levels, on one side, and uncoordinated state action, on the other.⁸⁴

Having said this, there is a legitimacy issue that arises whenever the balance between the political organs and the judiciary is disturbed. As Trachtman observes,⁸⁵ legal rules are both products and producers of constitutional change. With the benefit of hindsight, the asymmetry between the powerful compulsory adjudication system, on one hand, and the relative weak treaty-making and treaty-modifying functions of the WTO legislative, on the other hand, is the main factor that renders pressing the upgrading of the WTO legislative functions. As it is virtually inconceivable to soften the WTO dispute settlement system, the discussion about WTO reform naturally revolves around matters relating to institutions and decision-making. Judicial law-making is just around the corner.

As to the decision-making mode, consensus is important if one considers the WTO as an IO which is premised on the principle of sovereign equality. On the other hand, consensus can be a hindrance if one views the WTO as a negotiating forum. Decisions are delayed, transaction costs multiply and countries are discouraged from investing any energy in the multilateral trajectory, preferring the easier-to-negotiate-and-conclude bilateral deals. This is admittedly exacerbated by the now broad WTO membership. For the sake of comparison, the Uruguay Round was negotiated among 86 GATT contracting parties, while currently the WTO has over 150 Members.

2000, 619.

⁸³ Kyle Bagwell and Robert Staiger, *The Economics of the World Trading System* (Cambridge, MA: MIT Press, 2004).

⁸⁴ See Robert Keohane/Stephen Macedo/Andrew Moravcsik, 'Democracy-Enhancing Multilateralism', *International Organization* 63 (2009), 1-31, at 23.

⁸⁵ Trachtman, 'The Constitutions of the WTO' 2006, at 638.

In my view, the WTO shall serve its dual function in a balanced manner: neither more cost-efficient negotiations nor preserving the IO character of the WTO can be the prime objective. Majority voting rules *à la* EU have been proposed. However, the WTO is a negative integration contract. Arguably, the tentative steps for positive integration as exemplified in the TBT and the SPS failed. Then, if the central WTO mission remains the combat against protectionism, decision-making reform towards majority voting-based legislative structures would be a step too far. In addition, such structures may have an irreversible impact on the political character of the institution which is as important as the rules-based one. Less politics in the WTO may not be the magic recipe. In the end, it is not even about the decision-making rules that will be adopted to reform the multilateral trading system. The system is rather in dire need of improving its public image. The WTO has an interest in more transparency to avoid biased communication of documents by NGOs or other groups (eg states that want to delay progress or advance their own interests). Currently, many documents which are ostensibly restricted (JOB or room documents) are available in various websites hours after their first circulation in a WTO meeting.

Furthermore, more active involvement of the WTO in current challenges such as addressing climate change, achieving the Millennium Goals and notably eradicating poverty appears to be the route to go. The same applies to the ongoing reflection about the new financial architecture under the aegis of G20. The WTO participates in these proceedings and periodically informs the G20 of current trade policies and possibly protectionist measures that have been adopted. However, this exposure and openness of the WTO does not come without consequences. The more exposed the WTO becomes, the more severe the scrutiny from the side of civil society will be. Recent decades have seen an increasing integration of the developing world in the global trading system. Such integration has, however, been highly unequal, with some benefitting more than others.⁸⁶ The adoption of redistribution mechanisms and the participation of domestic constituents in the deliberation process of the WTO can only be beneficial. Such initiatives do not necessarily entail direct money transfers from the WTO to specific groups or countries. Indeed, the WTO is not a development agency nor does it have the financial capacity to act in this manner.⁸⁷ With an annual budget of about US\$80 million, much of the WTO activities depend on the goodwill of its Members to maintain and expand the activities of the organization.⁸⁸ An extensive part of the WTO literature has focused on the constitutionalization of the institution. However, constitution without distributional effect cannot be conceived. Global distribution of benefits is perhaps addressed for the first time through the Cotton initiative, involving four cotton-producing countries, Benin, Burkina-Faso, Chad and Mali, but the final deal is yet to be concluded.

This brings me to a crucial point as to the role of developing countries: One of the most serious errors in the architecture of the global trading system that emerged from the Uruguay Round was the adoption of transitional periods during which developing countries and LDCs were exempted from application of certain rules. This has arguably led to an undesirable phenomenon, ie the alienation of several Members vis-à-vis the key WTO objective of achieving liberalization and restructuring the domestic market to allow for this. With respect to decision-making in particular, these Members have lost interest in shaping the rules, as they felt that they were not concerned. Thus, participation and inclusiveness and, consequently,

⁸⁶ Having said this, one should refer to recent evidence suggesting that the GATT/WTO managed to spur the trade of developing economies. See Judith Goldstein/Douglas Rivers/Michael Tomz, 'Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade', *International Organization* 61 (2007), 37-67, at 57.

⁸⁷ Cf Sutherland Report, at 61.

⁸⁸ Cf James Bacchus, 'A Few Thoughts on Legitimacy, Democracy, and the WTO' in Petersmann (ed), *Reforming the World Trading System*, 2005, 429-435, at 430.

legitimacy of decisions taken at the WTO were severely affected. In addition, rather than shrinking the gap among the developed and the developing world, such special treatment provisions have arguably had the opposite effect. More active advocacy is slowly becoming the everyday reality in the WTO and demands for liberalisation in sectors where the poorer countries could compete should accompany the more active engagement of the developing countries in the WTO project.

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