The democratization of international organizations

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edited by
Giovanni Finizio
Lucio Levi
Nicola Vallinoto

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CENTRE FOR STUDIES ON FEDERALISM
World Trade Organization
by
Alexia Herwig

First International Democracy Report 2011

Centre for Studies on Federalism
1. Introduction
With the creation of the WTO, global trade governance has been strengthened, notably through the reformed dispute settlement system and the more detailed rules with greater remit. Because of the ensuing greater control of national measures, the question of the democratization of the WTO has posed itself with greater urgency. The following contribution assesses the state of democracy along a set of indicators of clear relevance to the democratization of international organizations. These are procedural and substantive in nature. An adequate account of democracy will necessarily involve procedural and substantive elements of legitimacy. It is impossible to negotiate substantive rules that would be a complete contract. As a result, the rules need to be adapted, reformed and interpreted through processes that can derive their legitimacy only from the observance of appropriate procedures. By the same token, perfect procedural justice is impossible to attain in practice. As a result, fair procedures need to be supplemented by legitimate substantive rules. While this contribution gives some insight into the state of democracy at the WTO by using these benchmarks it is not a complete assessment though, as this would require developing a comprehensive normative theory of democracy for the global economic order that also takes account of the contribution made by other international organizations to democratic governance and that allocates competences between levels of governance, depending on the issue concerned.

2. History of the WTO
2.1. From the ITO to the GATT 1947
Countries have entered into bilateral agreements to liberalise trade between them as early as the seventeenth century (Lester and Mercurio 2008: 66). However, it was not until the aftermath of World War II that a multilateral agreement on trade liberalization was concluded. The origins of the WTO therefore go back to the post-war effort at building international institutions.

When the establishment of the International Monetary Fund and the Bank for Reconstruction and Development were agreed at Bretton Woods in 1944, there was a

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1 Many thanks are due to Ayse Top for her able research assistance.
perceived need to create another multilateral organization for the liberalization of trade between countries (Lester and Mercurio 2008: 67). Initially, the negotiating countries had an ambitious plan to adopt an agreement for the reduction of tariffs and some non-tariff barriers and an agreement for the establishment of an International Trade Organization (ITO) with a far-reaching remit (ibid.). The charter for the ITO foresaw commitments for countries in foreign investment, labour standards, restrictive business practices, international commodity arrangements and dispute settlement through the referral of disputes to the International Court of Justice (ibid.).

The countries could agree relatively easily on the provisions relating to tariff reductions and other non-tariff barriers in the form of the General Agreement on Tariffs and Trade (GATT) (Van den Bossche 2005: 79). But by 1951, the US ceased to support the establishment of an ITO with the more far-reaching remit and strong institutional structure. President Truman submitted the ITO charter to Congress, but the Republicans won control of Congress in the 1948 election. In 1950, the Truman administration announced that it would no longer seek congressional approval for the ITO (Matsushita, Schoenbaum and Mavroidis 2006: 2). With the support of the US lacking, there was no longer any point in pursuing negotiations on the ITO for the time being. The GATT, which had been considered an integral part of the effort to establish an ITO, came into being on its own as eight of the 23 signatories to the GATT decided to apply the agreement provisionally between them as of 1 January 1948 (pursuant to the Protocol of Provisional Application) (Van den Bossche 2005: 80). The agreement to apply the GATT had been labelled “provisional” because it was thought that the establishment of the ITO would soon be agreed and the GATT would then receive its definite organizational structure. Other countries later acceded to the Protocol of Provisional Application and the GATT turned out to be far from temporary as it provided the basis for multilateral trade liberalization until 31 December 1994.

The GATT 1947 contained provisions for the binding of tariffs on a most-favoured nation basis and prohibited quantitative restrictions and discriminatory internal taxes and regulations, amongst others (GATT 1947: Articles I, II, III, XI). At the time, high tariffs were the principal obstacle to international trade and there was consensus on the need to reduce them. The rules on internal taxes and regulations were thought of as disciplines necessary to prevent the circumvention of the tariff bindings through
non-tariff barriers. However, the rules of the GATT were weakened by several factors. The permission of grandfathering considerably reduced the impact of the GATT as it essentially made it applicable to future laws only (Lester and Mercurio 2008: 68). Grandfathering allowed contracting parties for which the GATT was in force to exempt existing laws from the prohibition of quotas and discriminatory taxation and regulation. Another debilitating factor for the GATT was its weak dispute settlement. In order to be adopted a GATT panel or working party report had to be agreed to by all contracting parties, including the loosing party (Lester and Mercurio 2008: 69). Because of the potential veto of the loosing party, panels and working parties adopted a very diplomatic and conciliatory approach. Finally, the contracting parties adopted practices that contravened the aims and spirit of the GATT. Because of its dissatisfaction with the GATT dispute settlement, the US used its own way to sanction foreign trade barriers (Winham 1998, reproduced in Lester and Mercurio 2008: 71). The problem with unilateral enforcement measures against foreign restrictive trade practices was that they could be misused for protectionist purposes in order to prevent foreign competition to domestic industries. Another restrictive trade practice contracting parties adopted were voluntary export restraints. The GATT prohibited quantitative restrictions on export and import in the form of governmental laws or decrees. Voluntary exports restraints (VERs) consisted in the importing country seeking “voluntary” concessions from trading partners to limit exports to it. The demand for VERs was often backed up by the threat to use unilateral enforcement in the alternative and the VERs were not voluntary in any true sense. VERs were used extensively by the US to limit exports from Japan and other emerging markets in Asia.

Despite being institutionally ill-equipped for promoting the liberalization of trade, the GATT was remarkably successful in reducing tariffs among the contracting parties, in settling disputes non-contentiously and in attracting further membership. When, as result of low tariffs, the importance of non-tariff barriers to trade became more apparent, however, further liberalization was more difficult to achieve. Ultimately, the GATT was institutionally too weak to handle these politically more salient barriers amidst a greater diversity of contracting parties (Lester and Mercurio 2008: 68).
2.2. The creation of the WTO in 1994

As tariffs were progressively reduced, it became clear that the GATT’s disciplines on other trade barriers and unfair trade practices were insufficient. In the Kennedy and the Tokyo Round the contracting parties adopted additional disciplines (called Codes) on topics such as anti-dumping, subsidies and technical barriers to trade (Van den Bossche 2005: 82). These Codes were plurilateral (i.e. binding only on the subset of the contracting parties that had actually accepted them) and had specific dispute settlement provisions. Not only were the Codes inconsistent with the MFN principle but they also rendered the international legal environment for international trade complex, messy and non-uniform. It also soon became clear that the GATT dispute settlement mechanism was not able to resolve the more politically-laden cases of non-tariff barriers. There was a wide-felt need to tidy up the GATT’s Codes and reform the dispute settlement system.

Initially, the creation of an international organization for the liberalization of trade was not an issue in the Uruguay Round negotiations, which had a heavy focus on dispute settlement reform and new areas of liberalization (agricultural trade, intellectual property and services) (Winham 1998, reproduced in Lester and Mercurio: 71). The EC argued (i) that the GATT needed a proper legal basis; (ii) the Tokyo Round codes, and the forthcoming Uruguay Round accords, needed a common institutional framework; (iii) a single dispute settlement system would be advantageous; and (iv) the GATT needed a role beyond its limited contractual nature to conduct internal reviews of members’ trade policies and to negotiate externally with other international organisations (ibid.). While Canada and the EC proposed the establishment of a multilateral trade organization, the US was opposed to it, concerned about preserving consensual decision-making and its domestic sovereignty (ibid.). The Uruguay Round negotiations soon faltered over the liberalization of agricultural trade (ibid.). When the EC and US were finally able to settle their differences over the liberalization of agricultural trade in the Blair House agreement, there was an expectation that the US would now endorse the establishment of an international organization (ibid.). The US continued to hold out on agreeing to the establishment of a World Trade Organization until late 1993 (ibid.). In spite of the United States’ efforts at dissuasion, by early 1993 most participants in the Round were prepared to agree to
the establishment of a Multilateral Trade Organization, and the United States became increasingly isolated on this issue. This perhaps explains the turnabout in the US position in the course of 1993 when the new Clinton Administration dropped its outspoken opposition to a new international trade organisation. The United States formally agreed to the establishment of the new organisation on 15 December 1993. To the surprise of many, however, the United States demanded a change of name as a condition for giving its consent (Van den Bossche 2005: 85). With the Uruguay Round successfully concluded, the new agreements and organisation became operation in 1995.

The changes introduced by the Uruguay Round were quite far-reaching. The negotiating countries created the World Trade Organization as an international organization with legal personality (WTO Agreement, Article VIII:1). They negotiating countries also reformed the dispute settlement mechanism, *inter alia* by creating a standing appellate tribunal (the Appellate Body), by giving the WTO dispute settlement mechanism compulsory jurisdiction over all disputes arising under the covered agreements of the WTO, by removing the possibility for blocking the adoption of reports unless all WTO members agree to it (the so-called reverse consensus rule) and by strengthening the mechanism for overseeing the implementation of WTO dispute settlement reports (DSU, Articles 2.4, 16.4, 17, 21, 22, 23.1). They also transformed the many plurilateral agreements into a single undertaking (in order to be a member of the WTO, a country had to accept a large number of agreements) (WTO Agreement, Article II:2). Finally, they also expanded the substantive coverage of trade liberalization and added considerably detailed rules in areas such as agricultural trade, domestic health and food safety legislation, services liberalization and intellectual property protection.

### 2.3. The Doha Development Round

Although the trade liberalization achieved in the Uruguay Round was substantial overall, significant liberalization in agriculture and services could not be achieved, creating a need for a further negotiations. In the services area, the in-built liberalization agenda of the GATS already committed members to negotiate further liberalization (GATS, Article XIX:1). Members intended to launch a new round by agreeing on a
negotiating mandate in Seattle in 1999. Disrupted by massive anti-globalization protests, the Seattle meeting failed to produce agreement on a negotiating mandate. It was not until the next meeting in Doha in 2001 that the WTO members could finally agree on a work package and start actual negotiations. The purpose of the 2003 Cancún conference was to get members to agree on what was needed to complete the negotiations (WTO, Understanding the WTO). The conference failed to achieve its goal due to disaccord between developing and developed countries over agricultural trade liberalization and the so-called Singapore issues (the Doha mandate foresees work to establish modalities for future negotiations on new rules on trade and competition, investment, trade facilitation and transparency in government procurement) (Doha Declaration). Eventually, the members agreed to pursue negotiations on trade facilitation alone. Nevertheless, the members have been unable to achieve agreement on crucial issues up to now.

At Doha, the mandate for the Negotiation Round was baptized the Doha Development Agenda (DDA) and was meant to focus heavily on concerns of developing countries. Implementation-related concerns of developing countries are therefore part of the DDA (Doha Declaration, para. 12). “Implementation” refers to the difficulty of developing countries in being subject to the same rules on trade liberalization as developed countries (WTO, Understanding the WTO: The Doha Agenda). It comprises issues such as longer transition periods for developing countries to comply with WTO rules, exemption from or restraint in imposition of measures to combat unfair trade practices when developing countries are concerned and technical assistance (ibid.). Crucially, the negotiations on implementation aim at identifying which special and differential treatment provisions in favour of developing countries are mandatory and to consider the implications of turning non-mandatory ones into mandatory ones (ibid.). The developed countries have agreed to giving duty and quota-free access to products of least-developed countries and the Doha Development Agenda Global Trust Fund with a 24 million Swiss francs to finance the WTO’s technical assistance to developing countries has been created (ibid.) Another important concern for developing countries is the liberalization of agricultural trade. In the 2004 framework, members have agreed substantial improvement in market access for agricultural products, the setting of a date for the elimination of all export subsidies
and substantial reductions in trade-distorting domestic subsidies with an upfront reduction of 20% by developed countries (WTO, Understanding the WTO: The Doha Agenda). In the area of market access for non-agricultural goods, negotiations are to focus on the reduction of elimination of tariff peaks and tariff escalation on products of export interest to developing countries (ibid.). As part of the negotiations on TRIPS, the Doha conference produced the Declaration on TRIPS and Public Health, which affirms and clarifies the right of developing countries to use compulsory licensing and parallel importing to respond to public health crisis (ibid.). The members were also able to agree on allowing non-developing countries to manufacture drugs under a compulsory license if the developing country has insufficient manufacturing capacity to produce generics. Members disagree on whether negotiations on geographical indications are not products other than wines and spirits are called for (Ibid.). Other parts of the DDA focus on improving existing WTO disciplines regarding unfair trade practices, regional trade agreements, the relationship between WTO rules and multilateral environmental agreements and dispute settlement (Doha Declaration, paras. 28-33).

3. The WTO's governance structure
The function of the WTO is to facilitate the implementation, administration and operation and to further the objectives of the WTO Agreement and its other covered agreements and to provide a forum for negotiation amongst the WTO members on existing agreements and new issues concerning their multilateral trade relations (WTO Agreement, Article III:1, 2). The WTO also administers the DSU, the TPRM and cooperates with the IMF and IBRD (WTO Agreement, Article III:1:3-5).

3.1. WTO bodies
The top decision-making body of the WTO is the Ministerial Conference, which meets at least every two years (WTO Agreement, Article IV:1). It can take decisions on any matter arising under the multilateral trade agreements and negotiates on further rules (ibid.). This includes the power of the Ministerial Conference to adopt interpretations and amendments of the WTO Agreements, to grant waivers of obligations and accept the accession of new members (WTO Agreement, Articles IX, X and XII).
Negotiations on further rules are carried out in Negotiating Rounds, subject to a mandate that has been approved by the members. The negotiations are overseen by the Trade Negotiations Committee (TNC), which is either a special session of a WTO council or committee or a specifically created negotiation group. The TNC is chaired by the Director-General of the WTO.

In between meetings of the Ministerial Conference, the General Council carries out the function of the Ministerial Conference (WTO Agreement, Article IV:2). The General Council also acts as the Trade Policy Review Mechanism and as the Dispute Settlement Body (WTO Agreement, Article IV:3, 4) but with two different chairpersons. The General Council directs the Council for Trade in Goods, the Council for Trade in Services and the TRIPS Council and Committees on Trade and Environment, Trade and Development, Balance of Payments Restrictions, Regional Trade Agreements and on Budget, Finance and Administration, as well as the working parties on accession and two further working groups (WTO Agreement, Article IV:5, 7 and WTO Organization Chart). The Trade Negotiations Committee of the Doha negotiations reports to the General Council as well (WTO Organization Chart). The General Council is composed of representatives of the WTO member states who are government officials (WTO Agreement, Article IV:2) and are generally located full-time in Geneva. Representatives of national parliaments or NGOs do not participate directly in these nor any other WTO body and there is no supranational parliamentary body. However, the Director-General of the WTO briefs parliamentarians of the Steering Committee of the Parliamentary Conference, the Inter-parliamentary Union (IPU) and the European Parliament) on WTO matters and the Doha negotiations. The former are organized twice a year. The WTO also organizes seminars to encourage dialogue between parliamentarians and the WTO.

Two of the three WTO Councils in turn direct committees and working parties (WTO Agreement, Article IV:6 and WTO Organization Chart). These include the Committees on Market Access, Agriculture, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Subsidies and Countervailing Measures; Anti-dumping Practices, Customs Valuation, Rules of Origin, Import Licensing, Trade-Related Investment Measures and Safeguards and the Working Party on State-Trading Enterprises (under the Council for Trade in Goods) and the Committee on Trade in
Financial Services, Specific Commitments and the Working party on Domestic Regulation and on GATS rules (under the Council for Trade in Services. The Councils, Committees and working parties are also composed of government representatives of the WTO members (WTO Organization Chart).

The WTO Secretariat has a largely auxiliary function. It provides technical support for the various WTO governing bodies, technical assistance for developing countries, advice and organizational support for accession negotiations, conducts trade policy analyses, collects statistics and provides legal advice and assistance to dispute settlement panels and the Appellate Body (Van den Bossche, 2005, 138). The Secretariat is headed by the Director-General of the WTO who is appointed by the General Council (WTO Agreement, Article VI:1). As head of the Trade Negotiations Committee, the Director-General oversees the conduct of negotiations in the Doha Ministerial Round. Although having no formal decision-making power, the Director-General and the Secretariat staff assisting panels and the Appellate Body have an important informal influence. The Director-General can steer negotiations, set negotiation deadlines and influence the conduct of negotiations via public statements. The officials in the Legal Affairs and Appellate Body Division play a substantial de facto role in the conduct of dispute settlement proceedings as they provide legal expertise to the panellists and also participate in writing the findings.

Members of the Secretariat are appointed as international officials and the WTO Agreement makes clear that their responsibilities shall be exclusively international in character and that they shall not act under instruction from members or any other authority external to the WTO (WTO Agreement, Article VI:4). Formally, the Director-General appoints the WTO officials. The actual selection of candidates working in the Divisions is done by a panel of WTO officials that includes the director of the Division. The selection procedure consists of a written exam and interview.

Finally, the WTO has a two-tiered system of dispute settlement with jurisdiction of over all matters arising under the WTO agreements (DSU, Article 23.1). The first level of dispute settlement is the panel, composed of three ad-hoc panellists who are not officials of the Secretariat. Panellists for the case are drawn from a pre-established roster indicating names of well-qualified individuals (DSU, Article 8.1, 8.4). The roster includes private lawyers, academics and current or former representatives of
governments. Panellists serve in their individual capacity and can be removed in cases of conflict of interest and must be removed if they are nationals of the disputing parties (DSU, Articles 8.9, 8.3, 8.2). The parties to a dispute can select the three panellists themselves by mutual agreement (DSU, Article 8.7). They can also appoint five panellists if they so mutually agree (DSU, Article 8.5). Failing their agreement, the Director-General appoints the panellists (DSU, Article 8.7). This happens in more than 50% of the cases (Lester and Mercurio 2008: 160).

Panel reports can be appealed to the Appellate Body on issues of law (DSU, Article 17.6). The Appellate Body has a standing membership of seven (DSU, Article 17.1). Three members sit on a case but they discuss their views with the other members of the Appellate Body (DSU, Article 17.1). Members of the Appellate Body are appointed in their individual capacity and should not accept instructions from any international, governmental or private source (DSU, Article 17.3 and Working Procedures for Appellate Review, Rule 2 (3)). The members shall be broadly representative of the membership of the WTO and they should possess recognized authority and a demonstrated expertise in law, internal trade and the subject matter of the WTO Agreements (DSU, Article 17.3). They serve a four-year term and may be reappointed once (DSU, Article 17.2).

The Dispute Settlement Body adopts reports unless the members decide by consensus not to adopt the report. The Dispute Settlement Body, panels and the Appellate Body also keep under review the implementation of WTO dispute settlement reports. A loosing defending member has to report to the Dispute Settlement Body about its implementation. If it fails to implement within a reasonable period of time, the Dispute Settlement Body authorizes the winning complaining member(s) to take countermeasures, if it/they so request. If there is disagreement about measures taken to comply with a dispute settlement report, the parties have to refer their dispute to the original panel with again a possibility of appeal to the Appellate Body (DSU, Article 21.5). The DSU foresees arbitration over the time period for implementation and over the amount of retaliation that can be imposed. The DSU foresees good offices, conciliation, mediation and binding arbitration as alternatives to dispute settlement panels but their actual use has remained very minor.
3.2. Decision-making procedure

In the WTO, consensual decision-making prevails in practice. The WTO Agreement affirms that members shall continue the GATT-practice of consensual decision-making (WTO Agreement, Article IX:1). Consensus is deemed to exist if no member present at the meeting where the decision is taken formally objects to it (WTO Agreement, footnote 1). The WTO Agreement provides that a decision can be taken by a majority if consensus cannot be reached (WTO Agreement, Article IX:1). The simple majority rule is the default decision rule, unless other majority requirements are stipulated (WTO Agreement, Article IX:1). A ¾ majority is required for decisions on interpretations and waivers and a 2/3 majority is required for decisions on accession of new members. Any member of the WTO or any Council may submit a proposal to amend provisions of the WTO Agreements. If consensus on the acceptance of the proposed amendment cannot be reached, 2/3 of the members can decide to submit the proposal for amendment for acceptance to the members. Special rules of acceptance apply for the entry into force of amendments, depending on whether basic principles (MFN, WTO decision-making), rights-altering and non-rights-altering amendments are concerned. In practice, the WTO takes all decisions by consensus and retains a strong intergovernmental element.

4. Supranationalism

For the purpose of this analysis, supranationalism will be understood as referring to any authority, whether political or legal, above the member states of an international organization that is capable of influencing their preferences or actions or changing them (similarly, Krajewski 2001a: 171). It therefore encapsulates the existence of higher level policy-making bodies with majority voting, direct effect or supremacy of international law (strong de lege supranationalism that leaves states no realistic option but to conform their conduct to supranational norms) but also the existence of authorities capable of shaping state conduct in virtue of their legal position and effective enforcement mechanisms (weak de lege supranationalism), their expertise, their institutional position or their high profile (de facto supranationalism).

The extent of supranationalization of an international organization is important for setting the parameters for the assessment of its democratization and can be a direct
indicator of the democratic quality of an organization as well. The more supranational an organization is, the less weight the member states have in its decision-making. Democratic legitimation via internally democratic member states will therefore be insufficient as the sole mode of legitimation of the decisions of an organization with supranational elements (Krajewski 2008: 4). Conversely, the less supranational an organization, the more democratic deficits of the member states matter for a democratic deficit of the organization.

The extent of supranationalism of an organization will be a direct indicator of its democracy inasmuch as the organization is necessary for dealing with problems of common concern to everyone or for solving common action problems (Herwig and Hüller 2008: 227). It is suggested that the WTO deals with both. Trade liberalization is a typical common action problem because it is more rational for governments with an interest in their re-election to protect their domestic industries even if overall utility is thereby reduced and other states are also induced to protect their industries (domino effect) (ibid.). Moreover, trade has implications for human rights protection as well because the revenue generated from trade may allow repressive governments to stay in power or firms may decide to source products from suppliers that do not respect human rights standards. It is therefore suggested that a degree of supranationalism is a necessary element of democracy for the WTO.

The WTO is constituted by and part of general public international law as nothing in the WTO agreements indicates that it derogates from or contracts out of this body of law (Pauwelyn 2001: 535-552. An in my view convincing argument has been made that WTO obligations are not *erga omnes* or law-making in nature but rather *inter partes* or contractual in nature (Pauwelyn 2003a; Pauwelyn 2001). As a matter of general public international law, any two WTO members could therefore change their obligations between themselves as long as they do not affect the legal rights of the other WTO members (Vienna Convention on the Law of Treaties, Article 41). Further, as per WTO rules, any member can withdraw from the WTO through simple notification of the Director-General (WTO Agreement, Article XV:1).

2 According to Pauwelyn, WTO obligations are contractual because a WTO member must show that its own trade interests are affected by actions of another WTO member as a precondition for standing.
possibilities have remained theoretical but they indicate that WTO law lacks strong de lege supranationalism.\(^3\)

Using the above definition of supranationalism, the supranational character of the WTO rests on its dispute settlement mechanism (weak de lege supranationalism), its international legal personality and on mechanisms and bodies that are supranational de facto. As described above, consensus decision-making prevails in the WTO. Unlike EU law, WTO law lacks direct effect and supremacy, that is, individuals cannot rely on WTO law in domestic courts and WTO law does not trump domestic law. There is therefore no strong de lege supranationalism. However, it would be mistaken to consider that its rules are actually consented to by every state member to the WTO for several reasons: First, draft rules are generally negotiated among the key players (Canada, EU, Japan, USA and several big developing countries), leaving individual, small countries dependent on multilateral rules for market access with little option but to accept them (Krajewski 2001b)). Second, most rules of the WTO have to be accepted as a package (the so-called single undertaking). Countries that accept the package may still find individual agreements objectionable. These factors confer a de facto supranational element on WTO rules.

The most important element of supranationalism in the WTO is without doubt the dispute settlement mechanism. It comprises panels, the Appellate Body, the Dispute Settlement Body and the Understanding on the Settlement of Disputes, which lays down the basic rules for WTO dispute settlement. Some have even gone as describing this development as one of constitutionalization, implying a high degree of supranationalism (Cass 2001). The actual adjudication of disputes brought to the WTO is carried out, at the first-instance level, by ad hoc dispute settlement panels, composed of three (exceptionally five) well-qualified individuals (Van den Bossche 2005: 231). Appeals of panel reports are made to the Appellate Body. The Appellate Body is a standing body composed of seven persons (Lester and Mercurio 2008: 161). In comparison to international tribunals such as the International Court of Justice, the WTO panels and Appellate Body have had a heavy caseload. Members have consented

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\(^3\) The only element of public international law that states cannot easily change at will by concluding another treaty is ius cogens. These are peremptory norms accepted and recognised by the international community of states as a whole from which other international law cannot derogate. Vienna Convention on the Law of Treaties, Article 53.
to the compulsory jurisdiction of the WTO dispute settlement mechanism over disputes arising under the covered agreements of the WTO and dispute settlement reports become adopted automatically unless the WTO membership decides by consensus not to adopt the report (the so-called reverse consensus rule) (DSU, Articles 2.4, 16.4 and 23.1). Although the Dispute Settlement Understanding foresees more diplomatic means of dispute resolution, almost all matters that remained contentious after initial consultations have resulted in the establishment of a panel (Lester and Mercurio 2008: 175). Panels and the Appellate Body have thus obtained the possibility to review acts that hitherto fell into the sole domestic jurisdiction of WTO members. Their jurisdiction allows them to declare that domestic acts are inconsistent with WTO Agreements and to make suggestions for implementation but they cannot annul the domestic act (DSU, Article 19). The jurisdiction of panels and the Appellate Body extends to tariffs and quantitative restrictions but also various internal regulatory measures, such as the justification and proportionality of product regulations, domestic taxes, the transparency of domestic laws and the extent of commitments to liberalise trade in a service sector, including the extent to which a service sector is exempt from WTO law as a public service (“service supplied in the exercise of governmental authority”) (DSU, Article 1.1). Panels and the Appellate Body have no jurisdiction to hear cases on human rights violations. However, indirect links between trade and human rights matters are possible. In the EC – Tariff Preferences case, the Appellate Body found that it is consistent with the Enabling Clause to condition more favourable treatment for developing countries provided the conditions respond to positive development needs of developing countries and all similarly-situated countries can be included (ABR, EC – Tariff Preferences, paras. 151-176). It is quite conceivable that the observance of human rights and good governance are positive developments needs and that more favourable tariff and trade conditions can be limited to developing countries with a satisfactory human rights record. Another link between trade and human rights matters can come up in dispute settlement when a member invokes exceptions allowing for discriminatory treatment for reasons of public morals, public order and the protection of human life and health. In such a dispute, a panel or the Appellate Body has to consider whether an interest invoked as a human right falls under the protection objective, whether the national act actually
achieves the protection objective and whether it is proportionate. There has not been any dispute that invoked human rights in this manner.

WTO dispute settlement also has a relatively strong enforcement mechanism. A loosing party has to implement the recommendations of the report (this generally requires it to remove the inconsistency with WTO law by either removing the measure altogether or amending it) and has to report on its implementation to the Dispute Settlement Body. If it fails to implement, the winning party can either seek the authorization to take countermeasures against the loosing party (in the form of imposing higher tariffs or erecting other barriers to trade) or seek concessions from it (in the form of increased market access in other sectors), subject to the loosing party’s agreement (DSU, Articles 19, 21, 22).

The dispute settlement mechanism confers a significant degree of de lege supranationalism on the WTO. Its supranational character de facto is further strengthened by the judicial style of the proceedings (Weiler 2001: 342) and the fact that the treaty language leaves the interpreter some interpretative choice, which panels and Appellate Body have on occasion filled through creative interpretation and a selective use of rules of interpretation. In addition, the record of compliance with dispute settlement recommendations is good (Davey 2006: 11).

The supranational character of WTO dispute settlement is mitigated by the fact that only the WTO members have standing to initiate dispute settlement proceedings. Private actors or the WTO Secretariat ex officio cannot start dispute settlement proceedings. Furthermore, there are no fines or the threat of expulsion to enforce compliance with WTO dispute settlement recommendations. Small, import-dependent countries can also find it difficult to retaliate against large, diversified economies, which reduces incentives for large, developed countries to comply with WTO dispute settlement recommendations.

Some other bodies with a weak supranational element also deserve mention here. In the Committees of the WTO, special trade concerns can be discussed while the Trade Policy Review Mechanism analyses the trade policies of WTO members periodically. There is evidence that their multilateral character can induce policy changes in members (Lang and Scott 2009: 584). The Secretariat of the WTO exerts some member-independent influence, as when officials of the Legal Affairs or Appellate
Body Division assist the panels and Appellate Body in preparing the findings. Qua his institutional role, the Director-General also enjoys authority to steer WTO policy and negotiations. The WTO also gains in supranational character through institutional linkage: Some WTO agreements call on WTO members to use international standards as a basis for certain regulatory measures unless they can justify their setting of a higher level of protection (Agreement on the Application of Sanitary and Phytosanitary Measures, Article 3, Agreement on Technical Barriers to Trade, Article 2.4). It is possible for these standards to become accepted by majority voting pursuant to the rules of the relevant international standardisation body. Via the linkage to international standards, WTO law has gained somewhat in supranational character.

5. Democracy at national level

By the standards of Freedom House, the WTO counts amongst its members some of the best and some of the worst-scoring countries as regards their internal democracy. Examples of countries with the best score of 1 for both civil and political liberties in 2010 are Canada, the US, Switzerland and several EU Member States such as Sweden, Germany and France (Freedom House 2010). Burma (Myanmar), China and Cuba are the members that score a seven for civil and political liberties in 2010 and are thereby amongst the worst-performing countries that are members of the WTO (ibid.). Chad, Saudia Arabia, The Democratic Republic of Congo, Iran, Iraq and Zimbabwe, also WTO members, score only slightly better with a score of six or higher for the two indicators combined (ibid.).

However, a country’s internal democracy becomes a strong indicator for the democratic pedigree of WTO rules for that particular country primarily when it is coupled with effective national mechanisms for controlling executive action in WTO Ministerial negotiations, dispute settlement proceedings and other WTO bodies. Here, the record varies: the US congress has been able to achieve some degree of control over the US executive by establishing a precise negotiating mandate when granting “Fast Track” negotiating authority (Hilf 2005; Hilf 1997). The same does not hold for parliamentary control of the executive in other internally democratic WTO members. For instance, for the case of Germany, it has been argued that the parliamentary screening of the results of the Uruguay Round upon ratification has been perfunctory.
and too late because it no longer permits the modification of the treaty texts (ibid. and Howse 2001). What is more, there are significant information-asymmetries that inhibit *ex post* control and on-going monitoring (Howse 2001). National parliamentary or citizen control is hampered by additional factors: the setting of a tight *ex ante* mandate prevents negotiators from making deals and can easily lead to deadlock of negotiations between 154 countries (Ibid.). This lack of effective parliamentary control of the executive may be compensated by the accountability of national representatives to civil society and the media but such accountability is partial and, at least in case of the former, likely to be limited to only the most salient issues.

However, the positive contribution to legitimation of the WTO resting on internally democratic WTO members is tempered by the importance of consensual decision-making in the WTO. Consensual decision-making as the only real decision role structurally privileges positions that seek to maintain the *status quo* over those that desire more or different WTO rules (Herwig and Hüller 2008: 239-40). Given the current prevalence of consensual decision-making without a realistic option for majority voting, it is suggested that democracy at national level contributes relatively little to the procedural legitimacy of the WTO, except for some of the largest countries but that the absence of internal democracy weighs in negatively.

**6. Input legitimacy**

There is widespread agreement among commentators that the WTO stands to gain in input legitimacy from being accountable to civil society organizations (Charnovitz 2002: 329-44; Charnovitz 1996: 331; Orellana 2009: 675; Shell 1996: 359; Van den Bossche 2008: 717, 721, 748-49). NGOs may represent transnational, as opposed to national interests (Van den Bossche 2008: 720) and enhance the accountability of the WTO to a broader community than just the trade community. Related to this, NGOs may be able to improve the output legitimacy of WTO governance by providing information, analyses and policy statements that eventually find their way into WTO rules (Ibid.). Van den Bossche also considers that they can compensate for the non-representation of citizens from non-democratic states (Ibid.). From the perspective of input legitimacy, this may be true for moderately undemocratic states that do not repress freedom of expression and association but not for repressive states or states in which poverty
hinders the participation of citizens in public life. Even in these cases, NGOs can be important for enhancing the output legitimacy of the WTO by placing on its agenda issues these people would want the WTO to consider had they the possibility of participate in politics.

The WTO is monitored by several international non-governmental organizations in various policy fields. Some of them, like ATTAC (Association for the Taxation of Financial Transactions for the Aid of Citizens) and Our World Is Not For Sale are critical of globalization and want to promote fair trade rules and limits on trade liberalization (ATTAC, What is ATTAC?; OWINFS, Themes). They monitor the WTO and the Bretton Woods institutions. Several NGOs, such as Third World Network, campaign for changing the TRIPS Agreement that brings intellectual property protection under the auspices of the WTO (TWN, Rethinking TRIPS in the WTO). They criticize that it allows biopiracy, the patenting of life, threatens food security (via the patenting of seeds) and undermines access to essential medicines for developing countries. Other international NGOs focus on specific WTO policies. Environmental NGOs such as FIELD Greenpeace lobby against trade in genetically modified organisms and consider that the WTO needs to tackle fisheries subsidies (Greenpeace, Trade and the Environment; Orellana 2009: 677). NGOs like Oxfam International submit that the WTO needs to do more for the development and criticize that WTO rules favour the interests of developed countries as, for instance, trade in agricultural products remains subject to high barriers while subsidization remains permitted (Oxfam, Boxing Match). The International Trade Union Confederation monitors the impact of WTO rules on labour rights (ITUC, Global Economy). NGOs representing business interests also participate actively in lobbying and monitoring the WTO. Some business organizations have a broad horizontal focus, such as the International Chamber of Commerce (ICC, Customs and Trade Regulations). Other like the US Coalition of Service Industries and the European Services Forum focus on specific WTO Agreements: they campaign to liberalize the provision of services across sectors (USCI, About CSI). Other business NGOs have a sector specific focus. For instance, Crop Life International supports the TRIPS Agreement and greater liberalization of agricultural trade (Crop Life, International Trade). The International Federation of Agricultural Producers is in favour of increased market access and the elimination of export subsidies but stresses
The need for supplementing farmers’ income through non-trade distorting subsidies (IFAP, Agricultural Trade and the WTO Negotiations: 4-5).

The civil society organizations that monitor the work of the WTO are generally independent of state control (Orellana 2009: 675) and are financed from contributions of their members or member organizations. However, several factors reduce the impact of NGO influence on WTO decision-making and affect the input legitimacy linked to civil society monitoring. First, the fact that the decision-making process in the WTO proceeds according to the consensus rule means that the WTO is often the wrong addressee for NGO claims because the members hold it back. Informal negotiations between a subset of WTO members further complicate effective NGO monitoring. Second, there is a predominance of NGOs from the industrialised North and relatively advanced developing countries (Van den Boosche 2008: 721). While several NGOs from developing countries were indeed accredited to Ministerial Meetings, the ones that regularly follow WTO policies and submit position papers are generally from Northern industrialised countries or represent developing countries’ interests only indirectly, such as Oxfam International. Third, the input legitimacy derived from NGOs hinges on their internal accountability structure (Ibid.). Fourth, not all interests can organised in civil society organizations with equal ease, especially if they are diffuse rather than concentrated interests.

However, these factors affect the input legitimacy based on NGO involvement differentially. Orellana has provided evidence that developing countries formed ad-hoc coalitions with NGOs in the Cancún Ministerial and through this way, were able to enhance their voice in the negotiations (Orellana 2009: 676). Even an imperfectly representative civil society can still enhance the output legitimacy of the WTO. Orellana gives the example of the WWF’s success in making substantive contributions to the negotiations on fisheries subsidies in the Doha Round (Orellana 2009: 688).

7. Participation

According to Article V:2 of the Agreement Establishing the World Trade Organization, “[t]he General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.” The WTO Agreement therefore does not foresee any direct
formal decision-making right of NGOs but it can be interpreted to allow for the active participation of NGOs in WTO meetings and bodies (Van den Bossche 2008: 724). The Council adopted guidelines that call for faster derestriction of non-confidential documents and greater contacts with NGOs and the WTO Secretariat through the organization of symposia, receipt of information from NGOs and provision of information to them (WTO, Guidelines for Arrangements on Relations with Non-governmental Organizations, WT/L/162). However, the guidelines also confirm that it would not be appropriate for NGOs to participate directly in the work of the WTO or its meetings and emphasize that NGOs should seek influence via national channels (ibid.). Accordingly, there is no formal consultative status for NGOs in WTO decision-making and Ministerial negotiations that would give them the right to participate directly in WTO meetings.

This limited role for civil society representatives is reflected in the WTO’s overall approach to participation, which focuses on informal information exchange and debate between NGOs and individual WTO officials (Van den Bossche 2008: 733-734) but does not allow them access to the real negotiations of the government representatives. Thus, NGOs can only attend plenary sessions of Ministerial Conferences and are not allowed into meetings of WTO bodies (Orellana 2009: 685, 687). NGO attendance at WTO Ministerial Conferences is based on a basic set of registration procedures established by the General Council. Under these Procedures: (i) NGO’s are allowed to attend the Plenary Sessions of the Conference; and (ii) NGO registration applications are considered by the WTO Secretariat on the basis of Article V:2, i.e., NGO’s need to demonstrate that their activities are “concerned with matters related to those of the WTO” (WTO Annual Report 2007: 60). Since 2001, the WTO has organised an annual symposium and several ad-hoc symposia on specific issues, some of them informal, attended by various representatives of the public interest (Van den Bossche, 2008: 733-4; WTO Website, For NGOs). Director-General Panitchpakdi also organised an Informal NGO Advisory Board and the Informal Business Advisory Board (Van den Bossche 2008: 734). In the 2005 selection of a new Director-General of the WTO, three of the four candidates accepted to meeting and discussing their views on trade with NGO representatives (Orellana 2009: 686). The WTO makes available on its websites all position papers received by NGOs that relate to matters of
the WTO as well (Ibid.). This facilitates access by interested national delegations to information and positions provided by NGOs, amounting to a potential increase in their informal influence on WTO decision-making. Nevertheless, the WTO’s view that civil society ought to channel its views through national governments is rightly criticised because citizens from non-democratic countries lack this opportunity (Orellana 2009: 687). The informal and ad-hoc nature of some of the symposia also complicates effective participation of NGOs that are not based in Geneva (Van den Bossche 2008: 733-4). The greatest limitation arises from the fact that there is no effective pressure on governmental delegates to engage with NGO positions.

The other important way through which civil society and individuals could in theory participate in matters before the WTO is through the submission of *amicus curiae* briefs on a pending WTO dispute to the panel or the Appellate Body. The Appellate Body has interpreted the right of panels in Article 13 of the Dispute Settlement Understanding to seek information from any relevant source to include the right of the panel to accept unsolicited information submitted by *amicus curia* (ABR, US – *Shrimp*, paras. 99-110), while others localise the *ratio* of that case in the panel’s duty to make an objective assessment of the facts (Umbricht 2001: 784, with further references). For itself, the Appellate Body has found that its right to lay down additional rules for the conduct of appellate proceedings also gives it the freedom to accept *amicus* briefs (ABR, US – *Lead and Bismuth II*, paras 39-42).

It is important to be clear about the legal and factual limits of state-independent civil society participation in WTO adjudication. As the task of panels and the Appellate Body is to interpret and apply law, *amicus curiae* submission should either offer a legal interpretation only (before the Appellate Body) or legal interpretation and/or some factual information (at the panel stage). General policy statements are only relevant if they can be considered as legal interpretation. Arguments for a change of WTO rules cannot be considered in adjudicatory proceedings. The rules on burden

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4 Any WTO member is, of course, free to consult civil society when it is engaged in a WTO dispute settlement proceedings and to include civil society representatives in their delegations to the panel meeting, subject to not divulging confidential information.

5 According to the rules of interpretation of international law in Article 31.1 of the Vienna Convention on the Law of Treaties, a treaty interpreter should take into account the object and purpose of the treaty terms to be interpreted. Statements of policy play a role here inasmuch as they pertain to legal interpretation.
of proof in WTO dispute settlement that require each party to make its case restrict
the ability of a panel or the Appellate Body to base its finding that the burden of proof
has been/has not been met solely or decisively on arguments in an amicus brief if the
disputing party in question does not take up the argument (Mavroidis 2001: 15). More
importantly, individual and civil society participation in WTO dispute settlement is de
facto ineffective (Mavroidis 2001). Fuelled by harsh criticism from some WTO
members, panels and the Appellate Body have usually rejected amicus briefs as not
being useful without much explanation. The only brief that was ever accepted was
from Morocco, a state party to the WTO, which could equally have chosen to
participate in the proceedings as a third party (ABR, EC – Sardines, para. 167).

The WTO Secretariat includes women and nationals from developing countries
although there is no gender or national quota system. Women and national from
developing countries have held important positions in the WTO Secretariat structure,
including positions of Director-General, Deputy Director-General, Division Director,
including of the Appellate Body Division and member of the Appellate Body (WTO,
Appellate Body members; WTO, The Deputy Director-Generals). Several
chairpersons of WTO committees are also female or nationals from developing
countries. However, there is still a predominance of EU, Japanese and US presence in
key WTO positions. All three have had at least one member in the Appellate Body
since its inception in 1995 and EU and US nationals also occupy key positions as
Deputy Director Generals (or Director General) and Directors of the Legal Affairs
and Appellate Body Division (WTO, Appellate Body members).

Overall, formalised civil society participation in WTO matters is limited. From the
perspective of democracy, this is problematic in two ways: first, opportunities for
making the WTO indirectly accountable to the wider transnational public organised in
civil society organizations are missed (Ahlborn and Pfitzer 2009: 3, Charnovitz 1996;
Charnovitz 2002; Nanz 2006; Shell 2005; Shell 2006). This is all the more important as
the WTO also lacks a representative parliamentary body and oversight by national
parliaments is difficult to achieve. Second, the lack of significant formalised access

6 By including arguments from an amicus brief in the panel’s or Appellate Body’s questions to
the parties, the panel or Appellate Body could get the disputing parties to engage sufficiently
with the argument in the amicus briefs to base in findings decisively on them.
promotes imbalances in the \textit{de facto} participation of certain civil society organizations through informal ways.

However, it is important to emphasize that more meaningful formalised opportunities for participation of individuals and civil society organizations will enhance the democracy of the WTO only if they are part of a package of other measures that ensure sufficient accountability of the participating actors and make up for the limited participation of developing countries and NGOs from that region.

\textbf{8. Control}

Transparency of an organization’s decision-making is crucial for the ability of stakeholders to hold the organization accountable. Access to documents and public meetings enables citizens to verify whether their governmental representatives act within the mandate indirectly conferred on them by the electorate. Transparency also enables public participation in rule-making because stakeholders can stay abreast of developments and decide whether and how to intervene. Finally, access to documents and webcasts of WTO meetings enable developing countries whose small delegations are unable to participate in all WTO meetings to stay informed. Depending on when access is provided and to whom, transparency promotes internal (to the WTO members) or external (to other stakeholders) and \textit{ex ante} or \textit{ex post} accountability.

Generally speaking, the WTO has achieved a high level of transparency even if possibilities for improvement remain. The WTO makes available all official WTO documents (Procedures for Circulation and De-restriction of WTO Documents, para. 1). These include preparatory reports, decisions and the minutes of council and committee meetings. Documents which are initially classified as restricted become de-restricted automatically after 45 or 60 days, depending on the type of document (Procedures for Circulation and De-restriction of WTO Documents, para. 2). The only exceptions to this are documents submitted by a WTO member, for which the member can request continued confidentiality (Procedures for Circulation and De-restriction of WTO Documents, para. 2(a)). For journalists accredited on the WTO’s website, special rules apply. They can get advance access to documents before their de-restriction, which gives them faster access than the general public (WTO, For journalists). However, two important types of documents remain restricted until the
final decision, thus considerably reducing transparency vis-à-vis stakeholders. The are documents relating to the modification or renegotiation of concessions and commitments under the GATT and GATS and documents related to working parties of accession. Both types of documents are important because they lay the ground for how much a country agrees to liberalisation, including in politically sensitive or economically important areas such as trade in cultural products and public services.

In addition to these ex post transparency mechanisms, WTO officials brief NGOs and business associations on meetings of WTO bodies, including daily briefings during the Ministerial Conference in Geneva in 2008 (Van den Bossche 2008: 732, 734).

The schedule of WTO meetings is also published on the website, giving stakeholders the possibility to contact members of the committees or council in advance (WTO Programme of Meetings for 2010). The WTO also makes public position papers by NGOs received by the Secretariat but does not respond to them (WTO, For NGOs). In addition, it publishes discussion papers prepared by professionals working in outside organization, special papers to help structure the discussion of economic issues of relevance to the WTO and working papers of WTO staff members that evaluate economic and legal aspects of WTO policies (WTO, Economic Research and Analysis). The WTO is therefore considerably open with respect to the critical appraisal of its activities, which also enables individual stakeholders to inform themselves.

Transparency of WTO dispute settlement proceedings has increased considerably over the last years to a relatively high level. However, it is not consistently high for all stages of dispute settlement. WTO dispute settlement reports have always been made public on the website of the WTO. However, neither the submissions of the disputing parties nor the proceedings were public. This is now in the process of change. Several disputing parties decided to make their submissions publicly available as they were made during the proceedings (Ahlborn and Pfitzer 2009: 7). This gives interested stakeholders the possibility to try to influence their government’s position in the proceedings. The countries that now generally make their submissions public include Canada, the EU and US but some other countries continue to oppose the idea of making their submissions public.
Several WTO members have also taken the initiative to request that panel and Appellate Body meetings in which they are disputing parties be opened to the public (Ahlborn and Pfitzer 2009: 12-16). Several panels have now opened the meeting with the parties (the hearing) to the public by real time videolink and one has even allowed the public into the room (Ibid.). Another panel in which significant amounts of confidential business information was considered opted for recording its proceedings at the request of the parties to open its meeting with the parties to the public (Ahlborn and Pfitzer 2009: 14). The Appellate Body has also issued a formal procedural ruling that it can hold public meetings if so requested by the parties, notwithstanding Article 17.10 of the DSU, which stipulates that “the proceedings of the Appellate Body shall be confidential” (Ahlborn and Pfitzer 2009: 21-25). As a result, the US/Canada – Continued Suspension case was the first WTO dispute settlement proceeding in which all meetings with the panel and the Appellate Body were open to the public at the request of the main parties. Several third parties hitherto opposed to the idea of public meetings also chose to make their oral statements in public. Surprisingly, many of those who attended public meetings of the panels and the Appellate Body were delegates of WTO members that had never or seldom participated in WTO dispute settlement (Ahlborn and Pfitzer 2009: 14). Public hearings therefore proved to be important for internal and external accountability.

Stages prior to the establishment of a panel and the retaliation phase of dispute settlement are less transparent but at these stages, the WTO is not the driving force. Instead, the WTO members are the primary actors. Most WTO members do not have transparent procedures for deciding on whether to launch a complaint. The US and EU are exceptions because they have a formalised way for private parties to request their governments to file a complaint with the WTO (Ahlborn and Pfitzer 2009: 5). Once a complaint has been filed with the WTO, there is a mandatory consultation phase but the consultations between the parties are not made public nor are the members’ notifications of mutually agreed solutions sufficient (Ahlborn and Pfitzer 2009: 6). When a winning complaining party decides to retaliate against a loosing party that has

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7 In the US, the procedure takes place under Section 301. In the EU, the Trade Barriers Regulation governs these procedures.
8 The parties can settle their dispute via a mutually agreed solution during the consultation phase and no panel will then be established.
not implemented the recommendations of the panel it is up to that party to decide on which products and sectors to impose retaliatory tariffs or suspend IP rights. Whether or not this decision is taken in a transparent manner depends entirely on that country’s domestic law and political tradition. The WTO contains no procedural rules in this respect.

The overall picture that emerges is that the WTO privileges transparency through access to documents, rather than public meetings. As discussed above, some key negotiating documents become public only ex post. The transparency of WTO dispute settlement proceedings depends very much on the willingness of the disputing parties.

9. Inter-state democracy

In the WTO as an international organization, states are represented in numerous bodies according to the sovereign equality principle. The General Council, the Dispute Settlement Body, the Trade Policy Review Mechanism, the Goods, Services and TRIPS Council and the WTO committees are all composed of representatives of states. National delegations also compose the Doha Working Groups and the Trade Negotiations Committee (the latter chaired by the WTO’s Director-General).

Although states are formally equal in the negotiations and WTO decision-making, several large economies (the so-called “Quad,” including the Canada, the EU, Japan and the US and Brazil, China and India) exercise a de facto predominance (Krajewski 2001b). They have sufficient resources to monitor negotiations and decision-making and are less dependent on multilateral trade liberalization for market access of their products as they can equally obtain trade concessions from smaller economies in bilateral agreements (Herwig and Hüller 2008: 230). This de facto inequality clearly limits the procedural legitimacy derived from having state representatives decide in the WTO.

In the final analysis, inter-state democracy in the WTO may have been taken too far, preventing effective policy-making and law reform in the WTO (Ehlermann and Ehring 2008). Strong supranationalism in the form of simple majority voting will not confer adequate procedural legitimacy on WTO decision-making given great heterogeneity of members and the existence of a significant and likely permanent minority constituted by developed countries. Nevertheless, other alternatives exist: a
realistic chance for qualified majority voting as a fallback decision-rule coupled with more variable geometry (flexibility or plurilateralism) or the limitation of a single state’s veto power to certain essential interests (e.g. national security, constitutional rights, crucial sectors of the national economy) seem feasible alternatives that balance the need for the representation of states with the need for effective decision-making.

10. Power limitation

In the WTO, powers are separated to an extent on the horizontal axis (i.e. at the level of the organization) but an imbalance in the weight of the powers exist. On the vertical axis (powers of the organization vs. powers of the state), the separation of powers is not clear-cut. The WTO members, acting in the Ministerial Conference, the General Council, the other WTO Councils and Committees and the TNC, fulfil functions of the legislative power. Panels, the Appellate Body and the Dispute Settlement Body fulfil functions of the judiciary but the WTO Secretariat cannot really be considered as an executive power, which is still exercised by states.

However, the effectiveness of the WTO’s legislative power is hampered by the fact of consensual decision-making, which privileges the status quo and has resulted in very few reforms or novel interpretations of WTO law outside of Ministerial Rounds (Ehlermann and Ehring 2008; Herwig and Hüller 2008). The absence of effective ongoing law-making has increased the importance of the WTO’s judiciary in filling gaps in the legal texts and updating them. The US – Shrimp case, in which the Appellate Body adopted an evolutive interpretation to “update” Article XX (g) so as to include species conservation is perhaps the most striking example of this (ABR, US – Shrimp, paras 129, 135-145). Many commentators see the WTO’s dispute settlement mechanism as the engine of the WTO’s constitutionalization. Some stress its norm-generating and

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value-integrating function (Cass 2001: 52-72), others its supranational character (Schloemann and Ohlhoff 1999: 424). Jackson refers to the WTO agreements as a constitution and stresses the fact that it allocates powers between members and the WTO and has resulted in a rule-oriented foreign trade policy, ushered in by the dispute settlement body (Jackson 1998: 87-89, 97-100, 102). However, as argued above, the extent of supranationalization of the WTO still remains limited because WTO law lacks direct effect and its enforcement therefore remains weak – even though it is considerable compared to that of other international regimes.

WTO panels and the Appellate Body have a degree of jurisdiction to review “legislative” acts of the WTO for their consistency with the provisions on decision-making in the WTO Agreement and other provisions (e.g. the MFN principle), unless members have also decided, using the required decision-rules, to amend the applicable decision rule or other WTO principle (DSU, Appendix I and WTO Agreement, Article IX). Whether a panel or Appellate Body will assume direct jurisdiction over e.g. an interpretation or an amendment decision by the General Council depends on two issues. First, whether the WTO act will be considered as a “matter” or a “measure” in the sense used in the DSU (DSU, Articles 3.3, 7, 11, 26). To date, there is no jurisprudence on exactly this point. Second, whether a WTO body can be named as a disputing party. There are several indications in the DSU that dispute settlement is state-to-state. If my interpretation is correct, a body of the WTO (such as the General Council) cannot be a defending party but the other WTO members that act in the relevant WTO body can be because the jurisdiction of panels and the Appellate Body extends to the WTO Agreement (DSU, Article I and Appendix I). It is clear as well that panels or the Appellate Body can have indirect jurisdiction over the compliance with e.g. the MFN principle of WTO acts when the other WTO members implement WTO acts in their national laws (DSU, Articles I, 3.3 and Appendix I). As outlined above, any panel or Appellate Body report will become adopted automatically at the next DSB meeting unless all WTO members agree not to adopt the report. As this would require the consent of the complaining party it is unlikely to happen in practice but a theoretical possibility is there that members could turn a WTO dispute settlement report into a mere advisory opinion.

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10 DSU, Articles 3.1, 3.3, 4.2, 21.3 and 26.
The WTO Secretariat fulfils at best very limited executive functions in that the
director-general acts as the head of the organization. However, the Secretariat does
no have a right of legislative initiative and, unlike the European Commission, no power
to bring actions against WTO members for the infringement of WTO law. Complaints
under the DSU can only be brought by states that are WTO members. Moreover, the
implementation of WTO law occurs through states.

The discussion shows that the state’s and the organization’s powers are
intertwined from a functional perspective. The states in fact enforce WTO law for the
organization and they collectively act as the legislature for the organization, without
there being any supranational legislative chamber independent of state control. With
respect to the formal legal allocation of competences, the WTO Agreement
establishes a limitation of competences in its Article II:1 because it states that “[t]he
WTO shall provide the common institutional framework for the conduct of trade
relations among its Members in matters related to the agreements and associated legal
instruments included in the Annexes to this Agreement.” This clearly limits the
competence of the WTO to regulate multilateral trade relations. This competence is
not exclusive but shared with the Members who can continue to conduct their own
trade policy. As the evolution of the EU has shown, the rule-making of an organization
limited to trade matters will eventually spill over into flanking policies such as
environmental protection, health and safety and social policy. The WTO is already
active in some of these fields. For instance, the SPS and TBT Agreements regulate
health and safety. There is reason to believe that the organization’s competences
would be interpreted widely if there ever were a legal dispute: The preamble of the
WTO Agreement refers to objectives of the WTO that give it a role in economic
policy, development and environmental protection inasmuch as they pertain to trade
matters.11

11 The preamble of a treaty can be used as context or an indication of purpose in the
interpretation of treaty terms in accordance with Article 31 of the Vienna Convention on the
Law of Treaties. The first two recitals of the preamble of the WTO Agreement refer more
specifically to raising standards of living, ensuring full employment, a large and steadily growing
volume of real income and effective demand, expansion of production, optimal use of the
world’s resources in accordance with sustainable development, environmental protection and
preservation and development.
It would be misleading, though, to focus only on the legal provisions here. In practice, states often act bilaterally or in other inter- and transnational organization regarding matters that pertain to trade and other policy areas. Examples of this are the International Standardization Organization, the Convention on Trade in Endangered Species or the Biosafety Protocol. Some commentators are concerned that this fragmentation increases the potential for unaccountable management of conflicts between regimes by the organizations or powerful actors and leads to the de- formalization of international law (Koskennimi 2007: 6-9). Others see the overlaps between regimes in a more positive light because they prevent the dominance of the restricted objectives of strong international organizations over other societal interests and lead to a system of checks and balances between different organizations and governance mechanisms (Krisch 2006; Teubner and Fischer-Lescano 2004).

The overall picture that emerges is that of an organization with weak legislative powers where intertwined competences between the organization and the members and the fragmentation of international law complicate the possibility for effective monitoring and participation of interested actors and where no principled mechanism exists for deciding on the allocation and exercise of competences between different international organizations and governance mechanisms.

11. Human rights

The relationship between trade and human rights is a complex and multifaceted one. On the one hand, trade and investment liberalization can have positive ramifications for human rights protection. The increased exposure to international markets may lead traders to demand better and more open domestic governance and foreign direct investment can contribute to changing local practices in respect of workers’ rights, the employment of women and others. On the other hand, access to international markets may also increase finances available for repressive governments or militias, particularly when they control access to natural resources (Pauwelyn 2003b: 1179, 1186). Trade and human rights are in a direct relationship as well, for instance if trade rules conflict with human rights objectives.

It is clear that WTO law would be void if it conflicted with *ius cogens* (Vienna Convention on the Law of Treaties, Article 53). It is also clear that the members of the
WTO are bound by the human rights obligations they have accepted, and some make the case that this obliges them to respect human rights in their foreign relations policies as well. According to Krajewski, Article 28 of the UDHR stipulates that human rights need to be protected at the international level as well (Krajewski 2008: 6). However, this does not make international organizations a direct addressee of human rights obligations. The UDHR remains addressed to states because its preamble refers to the human rights as “a common standard of achievement for all peoples and all nations” and calls on every individual and every organ of society to promote their observance, “both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction (UDHR, Preamble).” This suggests that the addressees are states and persons within them and that the targets where human rights protection is to be realized are states or their peoples. Article 28 therefore creates a transnational human rights obligation on states to do their part to ensure that the international order is such that human rights can be realized. Because of the sovereign equality principle prevalent in many international organizations an individual state can do very little to ensure that international organizations act in conformity with human rights. Even if the UDHR does not ground a human rights obligation for international organizations, such obligations could arise as a matter of customary international law if there were sufficient uniformity of practice and a belief that such conduct is obligatory as a matter of law among international organizations. While Krajewski detects considerable uniformity of practice with respect to democratic and accountable international governance he does not go as far as arguing that there is the required opinio iuris as well (Krajewski 2008: 10).

Others go further and consider that human rights obligations apply to international organizations (Clapham 2010: 570-72 and Tomuschat, cited therein, 570; Orellana 2009: 681). Their argument is based on the International Court of Justice’s statement that international organizations are subject to the rules of general international law and the findings in Behrami and Behrami v France and in Saramati v France, Germany and Norway (Ibid.). Here, the court found that the relevant action could not be attributed

12 Article 28 provides that “[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized.”
13 This is even clearer in the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights as their obligations apply to the states parties to the relevant convention.
to the states that deployed units to KFOR and UNMIK as the actions fell within the
mandate of both that had been conferred by the UN and its Security Council.
According to Clapham, this implies that the court thought the UN and the Security
Council to be the correct addressee of the claim (Ibid.: 570). However, the extent of
international organizations’ human rights obligations remains limited in two respects.
First, the action has to be attributable to the organization and not the states. This
makes it difficult to bring claims against organizations for failure to act to carry out
their mandate where these are governed by consensus-decision-making and the states
failed to agree. Second, an international organization will be responsible within the
confines of its mandate. It is therefore not possible to bring an action against the WTO
and claim that it should have acted to protect human rights even though it has no
competence to do so.

Even if the human rights obligations of international organizations remain limited,
human rights matter indirectly to the WTO. The Kadi case shows that regional courts
scrutinizing national implementing acts of decisions by international organizations (in
casu the UN Security Council) will also indirectly examine the consistency of the
decision of the international organization with human rights norms (CFI, 21 September
2005 Case T-315/01, Yassin Abdullah Kadi v Council of the European Union and
Commission of the European Communities, E.C.R. II-3649, paras 282-289.).

As argued above, some WTO rules can be interpreted in accordance with
international human rights law to allow WTO members to take domestic measures to
safeguard the protection of human rights within their jurisdiction and possibly also
abroad. This applies in particular to measures necessary to protect the life and health
of persons and for the protection of public order and public morals (GATT, Article
XX (a), (b) and GATS, Article XIV, (a), (b)). In such a dispute, a panel or the Appellate
Body has to consider whether an interest invoked as a human right falls under the
protection objective (i.e. public morals, order, life or health), whether the national act
sufficiently achieves the protection objective and whether it is proportionate and
complies with the requirements of the chapeau, which applies to the manner a national
act is applied.

It is suggested that the terms “public order” and “public morals” can be
interpreted so as to encompass human rights. According to a footnote to Article XIV
(a) of the GATS, the invocation of the public order exception requires a genuine and sufficiently serious threat to a fundamental interests of society. Arguably, human rights are such fundamental interests. The panel in US – Gambling interpreted the concept of “public morals” as denoting standards of right or wrong conduct maintain by or on behalf of a community or nation (Panel Report, US – Gambling, para. 6.465). Again, human rights impose standards of right or wrong conduct and therefore fall within this exception. National measures implementing the ILO Forced Labour Convention with an effect on international trade could also possibly be justified as relating to prison labour (GATT, Article XX(e)). Just a textual interpretation of the GATT and GATS therefore suggests that national measures taken to protect human rights are in principle capable of being justified under WTO law.

Whether or not an actual national measure will be accepted as being consistent with WTO law depends on further on whether it is proportionate and complies with the chapeau. This is a heavily fact-specific assessment in which the effectiveness of the measure, the relative importance of the interests protected and its trade-restrictive effects are assessed (Appellate Body Report, Korea – Beef, para. 164). Arguably, human rights are of the highest importance and the assessment of whether other, less trade-restrictive alternatives are available to protect this interest should then not be too stringent. However, even if a national measure protecting human rights in international trade fails the proportionality assessment or the chapeau, this does not mean that a measure to protect human rights cannot be taken. It only means that the design of the measure may need to be modified, for instance to remove trade-restrictive effects on products that do in fact comply with human rights standards or to extend the same regulation to non-conforming products hitherto not subject to the national measure.

Decisions of the Appellate Body in cases such as EC – Asbestos, US – Shrimp and US - Gambling confirm that it accepts the need to protect certain societal interests and that it will fine-tune how regulations are applied to ensure that like cases are treated equally and fair regulatory procedures are observed. Measures a WTO member takes in order to protect its own population against human rights violations arising through

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14 This would hinge on whether a panel or the Appellate Body accepts that the term “prison labour” has to be interpreted broadly to include forced labour outside of prisons. An evolutive interpretation similar to the one carried out in US – Shrimp may confirm that this is the case. See Appellate Body Report, US – Shrimp, paras. 128-131.
trade in products or services are therefore in principle capable of justification under the GATT or GATS. The decisions of the Appellate Body in *US – Shrimp* and *Korea – Beef* also lend some support to the position that certain measures seeking to protect human rights extraterritorially (i.e. in the WTO member of import) can be justified.\(^{15}\)

This would particularly apply to laws that regulate products or services which were actually produced in violation of human rights standards. Whether the same reasoning applies to trade sanctions imposed against another human-rights-violating WTO member regardless of whether or not the products or services at issue were actually produced in accordance with human rights norms is more doubtful.

The TRIPS Agreement also provides for certain exceptions to the obligation to protect intellectual property rights, which allows members to act to protect human rights. For instance, they can exclude inventions from patentability where the commercial exploitation of the invention would be contrary to public order or morality, including where it threatens human, animal or plant life or health (TRIPS Agreement, Article 27.2). The so-called “fair use” exemptions may also allow WTO members to interfere with the exclusive enjoyment of IP rights by the right holder in order to take positive action for the protection of human rights (e.g. copying of copyrighted materials for educational purposes) (TRIPS Agreement, Articles 13 and 30). Finally, the TRIPS Agreement allows for the compulsory licensing of medical patents, notably in order to respond to public health emergencies (TRIPS Agreement, Article 31). A waiver of the TRIPS obligations removes the prohibition on the export of generics in order to enable countries without manufacturing capacity of pharmaceuticals to obtain generics (Declaration on paragraph 6 of the Doha Declaration on TRIPS and public health). Of course, the member issuing the compulsory license has to pay adequate remuneration to the right holder but with the waiver, a more effective system for the protection of public health has been put in place.

\(^{15}\) In *US – Shrimp*, the Appellate Body accepted that the way a product is produced can be regulated even if a considerable part of the interests being protected by the regulation are located outside of the jurisdiction of the importing WTO member. See Appellate Body Report, *US – Shrimp*, para. 133- 142. This case was decided under Article XX (g) of the GATT and is therefore of no direct relevance to Article XX (a) or (b) but it is suggested that the balancing standard in para. 164 of the Appellate Body Report in *Korea – Beef* may allow for accepting extraterritorial measures as necessary.
Another linkage between trade and human rights arises because it is suggested that trade preferences by developed countries can be conditioned on the developing country’s observance of human rights as well.\textsuperscript{16} Lastly, some WTO norms promote a practice of good and accountable governance by WTO members which may facilitate the transition to more democratic regimes. However, this is limited to certain areas and restricted in scope as the rules constrain arbitrary and unjustified decision-making on social regulation, require the publication of draft legislation and create certain due process rights for traders.\textsuperscript{17} Finally, common citizenship and criminal law do not exist at the level of the WTO.

12. Output legitimacy

For the following analysis, it is important to distinguish an assessment of the WTO’s output legitimacy using an internal perspective (i.e. the extent to which the WTO delivers on the mandate the states have accorded to it) from an external perspective (i.e. whether the WTO should be active in other policy areas in order to gain output legitimacy). Output legitimacy will be assessed using both perspectives.

If we take the WTO’s mandate as expressed in Article II:1 and the preamble of the WTO Agreement as the starting point for an internal analysis, the WTO’s record of achievement is mixed. In several areas, the trade policies WTO law permits today do not enhance standards of living and fail to integrate developing countries into the world economy. The WTO’s Agreement on Agriculture is the most notorious example. Its permission of domestic and export subsidies protects the agricultural sector in the developed economies at the expense of that in developing countries. Given the importance of the agricultural sector for many developing economies, it seems incongruous that the WTO should allow these practices at all. At present, the Agreement on Agriculture only sets ceilings on the amount of export and domestic subsidies (Agreement on Agriculture, Articles 6.4, 6.5, 9.2(b)). In comparison, the granting of export subsidies for non-agricultural products is prohibited by the Agreement on Subsidies and Countervailing Measures and specific domestic subsidies

\textsuperscript{16} See the discussion of the \textit{EC – Tarriff Preferences} case on page 12 of this contribution.
\textsuperscript{17} See for instance, GATT Article X, the SPS Agreement, in particular Articles 5.1, 5.7, 5.5 and 5.6 and the decision on the chapeau of Article XX by the Appellate Body in \textit{US – Shrimp}, paras. 160-186.
can be countervailed, i.e. the benefit they confer can be offset by a duty levied on the subsidized product (Agreement on Subsidies and Countervailing Measures, Articles 3.1(a), 5, 19).

Other areas where WTO law has partially failed to achieve the objectives set out in the preamble to the WTO Agreement are non-agricultural market access for goods of developing countries and services liberalization. As discussed in section 2.3, developed countries apply tariff peaks to products of interest to developing countries and engage in tariff escalation, i.e. they apply higher tariffs to semi-finished and finished products than to raw materials. This latter practice hinders the establishment of a viable manufacturing industry in developing countries, although the latter might be competitive due to lower labour costs. This is arguably inconsistent with the recognized need for measures to integrate developing countries into international trade and to promote the objective of sustainable development consistent with developmental needs (cf. WTO Agreement, preamble). In the areas of services liberalization, modes of supply of interest to developing countries (in particular mode, the temporary presence of natural persons supplying services in the territory of another member) are practically not liberalized.\(^{18}\)

Although the WTO’s output legitimacy as judged from the internal perspective suffers because of all the above-mentioned protectionist or unfair trade practices, it must also be noted positively that the WTO was able to liberalize trade in textile products despite the political difficulty of doing so. Textiles had been subject to very restrictive quotas and were placed outside of the GATT rules (which prohibit quantitative restrictions, unless they can be justified under public policy objectives in Article XX). The Agreement on Textiles and Clothing achieved the gradual phase-out of the quotas over a ten year period ending in 2005 and brought textiles under GATT rules (Agreement on Textiles and Clothing, Article 1.1, 2.8(c), 9).

If one adopts an external perspective, two features strike one limiting the degree of output legitimacy the WTO enjoys. Although the WTO has no explicit mandate to do so, one might think that it should adopt more redistributive policies to address problems of underdevelopment, poverty and public health crises. For one, even political philosophers who are sceptical of egalitarian redistribution on a global scale

\(^{18}\) Several members permit business visitors and the presence of executive and management personnel of a foreign service supplier. The mobility of other workers is not allowed.

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recognize poverty or the lack of subsistence as a moral bad that developed countries have a moral duty to eradicate (Miller 2007; Rawls 1999). Second, poverty, public health crises and underdevelopment hamper the full participation of stakeholders and representatives from developing countries in WTO decision-making (Herwig and Hüller 2008: 230). To be sure, the WTO already contains some provisions designed to help developing countries in specific ways, such as technical assistance, capacity-building and preferential trade (GSP 1971; Differential Treatment 1979; LDC waiver 1999). However, the former are insufficient to meet the needs by reasons of quantity and the latter are voluntary, discretionary (as to the product-range) and focus on the economically active.

Further, WTO law foresees no mandatory provisions for members that consistently violate basic human rights, democracy or norms of *ius cogens*. Inasmuch as trade permits illiberal regimes to stay in power, the WTO imposes harms on people that need to be rectified according to some political philosophers.¹⁹ As many others, including myself, have argued, WTO law contains provisions that can be seen as fostering democratic accountability between states and within them (for instance, in the area of risk regulation by requiring well-justified and researched regulation) (Herwig and Hüller 2008: 249-52; Joerges 2005; Von Bogdandy 2001: 632, 658, 666). These provisions are of minor importance, though, considering the far-more weighty problem of how rights-violating non-democracies should be treated by the WTO.

Overall, the WTO’s record of liberalization has been remarkable but it has to be concluded that it fails take development concerns sufficiently serious under the internal and external perspective and should do more to promote the respect for human rights and democracy.

13. Conclusions

The WTO has become more and more democratic over the years, notably in the areas of transparency and participation. The pattern of legitimation focuses on *ex post* accountability but keeps stakeholder’s at arm’s length with respect to their formal involvement in decision-making. The WTO has also been successful in delivering on the mandate given to it by the members and it has some supranational elements which

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¹⁹ This argument has been made for other international structures by Pogge (2008).
erode the relevance of consensual decision-making by states. I have suggested that the latter is inappropriate as the sole basis for the procedural legitimacy of international organizations with a large, heterogeneous membership governing politically controversial matters. However, several factors make the WTO insufficiently democratic still. These are the lack of a legitimate decision-making rule, the absence of formalised, deliberative interaction with civil society, an insufficient insistence on making the members more democratic and liberal and the need for more pro-development policies of trade liberalization and redistribution. It may well be that the WTO is not the most suitable organization for pressing a good governance and human rights agenda on its members. However, inasmuch as WTO policies allow illiberal regimes to stay in power, the WTO is under direct responsibility for mitigating at least these effects.

Two other remarks are in order to put this analysis into perspective. This analysis has treated the WTO as an isolated institution for the purpose of making a detailed assessment of it. However, the WTO is part and parcel of the inter- and transnational order. The other organizations, bodies and governance mechanisms may complement or detract from the WTO’s legitimacy. A full assessment of the state of democracy at the WTO would therefore have to take into account these other institutions. What is more, the WTO stands in a vertical relation to its members. Because of this, a complete analysis of whether the WTO is democratic requires an assessment of whether competences are exercised at the appropriate level of governance, which has not been undertaken here in a detailed manner.
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