The Legitimacy of WTO Law

Thomas Cottier

* Thomas Cottier is Professor of European and International Economic Law, Managing Director, World Trade Institute, University of Bern, Switzerland. I am most indebted to Lena Schneller, Research Fellow, for valuable comments and assistance in preparing the paper.

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I. Introduction

The eighth GATT cycle of Multilateral Trade Negotiations (Uruguay Round 1986–1993) brought about a substantial increase and expansion of multilateral rules and disciplines in international trade regulation. Beyond refining existing agreements, new regulatory areas were added, in particular the Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). A new framework agreement, establishing the World Trade Organization, created new legal foundations under which Members, the Secretariat and dispute settlement have been operating since 1995 (WTO 1999). Most importantly, the GATT dispute settlement mechanism was strongly reinforced. For the first time in international law, a two-tier system with the possibility of appealing the decision was introduced, removing the requirement for a positive consensus of Members, found to be in violation of WTO law. Incentives to comply were reinforced. Failing the implementation of rulings, complainant Members are not only entitled to obtain compensation in terms of market access rights; they are also entitled, subject to additional proceedings, to suspend market access rights and thus exercise economic sanctions within the multilateral framework of the WTO (Cottier and Oesch 2005: 143-194). These mechanisms both contain unilateral actions, but also reinforce multilateralism as they enjoy the blessing of Members. These achievements of the Uruguay Round have contributed greatly to the overall and impressive growth of world trade in the past decade. Millions of daily transactions are based upon the rules which have emerged over the past fifty years, offering legal stability and predictability in international trade relations. At the same time, the results of the Uruguay Round raised issues of legitimacy of WTO rules. Two main lines can be observed. On substance, they mainly relate to the issue of distributive justice in industrialised and developing countries alike. On procedures,

* Professor of European and International Economic Law, Managing Director, World Trade Institute, University of Berne, Switzerland. I am most indebted to Lena Schneller, Research Fellow, for valuable comments and assistance in preparing the paper.
arguments mainly address the shortcomings of the negotiating process and its unbalanced relationship to judicial dispute settlement. They challenge the legitimacy of WTO law mainly from the point of view of democratic accountability.

It may be argued that the multilateral system, for all the above reasons, is in serious crisis, if not in decline. Have the fundamentals of the *Pax Americana*, established after World War II, come to an end? Is the world falling back to bilateralism and perhaps unilateralism in the 21st century, putting at risk what has secured prosperity and peaceful relations among Members during the past fifty years of international trade? Is the world forgetting the lessons learnt from the failures of the League of Nations and the Versailles Treaty which John M. Keynes expounded in his profound criticism of the power-based and retributive Post World War I order in 1919 (Keynes 1919)? Has civil society lost faith in multilateralism and its philosophy of creating equal conditions of competition? Do we truly face a crisis of legitimacy of the WTO, or are the causes to be found elsewhere? How can problems best be addressed in a forward-looking manner?

It is important to address these issues during a period when the WTO risks falling apart due to lack of support and widespread and diffuse public beliefs in its unfairness in light of enhanced global competition and its impact on society around the world. The issue of legitimacy of the multilateral trading system of the WTO is therefore of profound importance. It has been widely discussed from different angles, law, economics and international relations without conclusive results (Elsig 2007). This paper takes up the matter from the perspective of multilayered governance, essentially looking at domestic and international processes and outputs in tandem. It offers a viewpoint and some suggestions for incremental structural reform from the point of view of constitutional theory.

**II. The Challenges**

International trade regulation drew little public, or even academic, attention during the post war period and the GATT years. Tariff negotiations were a matter for specialists. They were happy to conduct their business out of the limelight of world politics and the global stage. Things began to change with the advent of disciplines and rules on non-tariff measures, following the Kennedy Round and subsequent cycles. It culminated upon the adoption of the WTO and the Uruguay Round Agreements. The debate up until the Ministerial Meetings of Seattle and Singapore may be characterised by fears of a fatal attraction of the WTO: the advent of powerful dispute settlement and enforcement threatened to intrude into related policy areas, such as the protection of the environment, and to enlarge the jurisdiction of WTO rules to encompass labour standards, competition and investment law and policies. The difficulty of clearly separating different policy areas ran the risk of encroaching upon other
fields of international law. Environmental, cultural and human rights lawyers were afraid that standards henceforth would be defined by ignorant trade lawyers and economists (Cottier, Pauwelyn and Buergi 2005). Developing countries were afraid of losing flexibility and what came to be called policy space in shaping appropriate economic policies. They refused to adopt the so-called Singapore issues and declined to participate in negotiations on multilateral disciplines on competition and investment protection. A wide range of trade-and issues has been discussed in the literature, way beyond trade and environment; they have been largely left to be dealt with by case law of panels and the Appellate Body without substantially involving competent international organisations in the process of decision-making. In this debate and under enhanced scrutiny, the legitimacy of the WTO has been questioned on several grounds. The debate may be briefly summarised as follows.

On substance, the main arguments mainly relate to the status of, and impact on, developing countries, and in particular, the poor and the impact on least developed countries. These countries question the benefits resulting from the Uruguay Round, criticism comparable to that voiced vis-à-vis the Bretton Woods institutions and the Washington consensus of unilateral liberalisation and privatization in the past. Such criticism partly addresses the results of the Uruguay Round and the obligations to implement them at home in developing countries (e.g. Raghavan 1990). The WTO does not live up to its goal of promoting welfare and prosperity. Gains do not necessarily trickle down and the WTO thus contributes to an increasing divide between the rich and poor within countries as much as between countries. The structures implied by the WTO prevent countries from reducing poverty (Pogge 2005: 725). WTO law does not offer adequate differentiation between industrialised and developing countries. Special and differential treatment remains formal and without much impact on the ground. While the GATT and GATS follow the principle of flexible and progressive liberalisation, minimal standards set in the field of intellectual property are considered illegitimate as they prevent countries in development from benefiting from welfare enhancing, creative activities commensurate with their level of development. Developing countries, it is argued, are subject to levels of protection which industrialised countries only adopted gradually and not at the outset. Also, it is argued that intellectual property protection is anathema to free trade and that it was an error to inscribe monopoly rights into the framework of the WTO in the first place.

Partly, and more vigorously, the scepticism of developing countries has translated into objections to further expansion and liberalisation upon completion of the Round. Subsequent Ministerial Conferences witnessed the refusal to address labour standards, competition, investment and general rules on government procurement. The so-called Singapore issues faced challenges from developing countries and non-governmental organizations alike; also, they did not enjoy full support in industrialized countries. It was strongly felt that the WTO should stay within its existing boundaries. The Doha Development Agenda, adopted in December 2001, suffers comparable difficulties, albeit they are mainly caused by reluctance
to substantially liberalize market access in agriculture and reduce domestic support on the part of industrialized countries, in particular the United States, the European Union and Japan. Short of adequate commitments in an area that suffers from fifty years of arrears following a de facto exclusion of agriculture from trade rounds, developing countries likewise are unwilling to undertake further market access commitments in non-agricultural products and services. Overall, they are under the impression that the WTO system does pay adequate attention to their needs and aspirations. In addition, the entry of the People’s Republic of China to the WTO in 2001 has altered the fundamentals of trade and adds to the current reluctance to liberalize further in a period of booming international trade and pressures from Chinese imports. As a result, Members have turned away from pursuing their interests within the multilateral system and have largely been engaged in negotiating bilateral preferential agreements in the last decade. Most of these agreements are not fully compatible with the disciplines and conditions set out by the GATT and GATS.

Criticism and doubts are also being voiced in industrialized countries. Workers losing jobs due to restructuring and outsourcing of production to more competitive regions face the downside of globalization and question the legitimacy of open markets. Competition is accepted within a given community, but rejected in relation to countries operating under lower social standards and salary structures. Competition among unequals is perceived unfair, and calls for enhanced protection for goods and services are being heard. Farmers are exposed to similar challenges, but are much more protected at borders and benefit from extensive programmes of domestic support.

In procedural terms, the main objections relate to a lack of democratic legitimacy of the WTO and the imbalance created between negotiations and dispute settlement. The shift from addressing tariffs to second- and third-generation issues of non-tariff barriers including domestic regulation greatly expanded the number of stakeholders who did not form part of the inner circles of the GATT clubs. It raised increasing concerns as to the legitimacy of the WTO from the point of view of deliberate democracy (Krajewski 2001). Firstly, it is argued that Government officials negotiate far-reaching obligations which unduly restrict the freedom of democratically elected legislators – the more so as WTO law tends to encroach upon other regulatory fields which are not sufficiently represented in trade negotiations. Secondly, the WTO is characterized by highly inefficient and uneven negotiations. They do not produce timely results with more than 150 Members negotiating on average. At the same time, the system lacks democratic accountability as major decisions tend to be taken by a small group of leading countries. This used to be the United States and the European Union. It now includes Brazil and India and as key players. China is bound to join this group soon. Others are more or less condemned to follow in multilateralizing results, despite the consensus principle which in theory allows all Members alike to block decisions, but which in reality, cannot be used by all to the same extent. Thirdly, the elaborate and efficient system of dispute settlement has created an imbalance between negotiations and judicial decision-making.
Members are not in a position to effectively react to precedents set by way of appropriate legislative response. The concept of trade rounds renders incremental changes of the law virtually impossible. Moreover, it is argued that developing countries are at a disadvantage in dispute settlement as they still lack expertise and the necessary resources to use the system fully to their own benefit. Moreover, the system is biased towards large trading partners as only they have at their disposal the necessary market size and power to impose effective trade sanctions authorized upon failure of another party to adjust its regulations and practices to WTO law. Finally, within countries, trade policy formulation often remains a matter for the executive branch. It is strongly influenced by producer interests and lobbies. The WTO does not require governments to take all pertinent domestic positions into account in trade policy formulation. Views expressed, and interests defended, by diplomats in Geneva, are by no means necessarily those reflecting the interests of large segments of the population. Finally, the challenges to WTO law also translate into the refusal of courts to grant direct effect to WTO law in most jurisdictions around the globe. Both the United States and the European Union have barred such effect in general terms.

This paper will deal with the main arguments in due course. Before doing so, it is important to address and clarify the understanding of the concept and notion of legitimacy, and how it relates to legality and the law.

III. Perceptions of Legitimacy

A. Trust and Voluntary Compliance with the Law

The pairing of legality and legitimacy is relevant since the operation of the law essentially depends upon the match between the two. Overall, law essentially relies upon the trust and confidence of a given community. In the long run, it can work only where such trust and confidence in a given system exists, and thus rules are followed on a voluntary basis, short of coercion and the use of force. Most rules, both domestic and international, depend upon voluntary compliance in daily life. Coercion and constraint back them up; they are – other than in the Austinian tradition of legal theory – not a prime, but an additional qualification of law. Trust and confidence and thus voluntary compliance in return depend upon the perception that the law responds to basic precepts of justice and fairness and draws its inner authority from these qualities.¹

¹ Tom Tyler masterfully summarized the relationship. “If people view compliance with the law as appropriate because of their attitudes about how they should behave, they will voluntarily assume the obligation to follow legal rules. They will feel personally committed to obeying the law, irrespective of whether they risk punishment
This is particularly true for the decentralized structure of international law. Thomas Frank emphasizes the importance of fairness, entailing legitimacy and distributive justice for the largely voluntary operation of international law (Frank 1988; 1995: 25). States comply with their obligations because they see the benefits of doing so. In weighing the pros and cons of compliance, the legitimacy perceived is a major factor. Binding rules considered to be unfair and unjust tend to be ignored in international relations unless pressures to comply are exerted. This is equally true for the multilateral trading system. It cannot effectively work and operate on a daily basis, providing the foundations of millions of transactions, without being perceived to be basically fair, and thus legitimate.

B. Legality and Legitimacy

On substance, law is considered legitimate to the extent that it is in line with prevailing basic moral views in a given society, most of which find expression in basic principles and fundamental rights. Tensions between legality and legitimacy of a rule are therefore often solved within the law by taking recourse to overriding rights, the concept of equity and the protection of good faith. The doctrine of abuse of law, preventing the formal application of a rule beyond its very scope and purpose, amounts to an important last resort in bringing legality in line with legitimacy. Vice versa, law also contains moral perceptions and protects people from being exposed to moral judgements negatively affecting legal positions. For example, we may condemn the content of speech, but freedom of speech and thus the law protects persons from prosecution and legally imposed disadvantages.

Lawyers are mainly concerned with the legality of rules within a given constitutional system. The legitimacy of a rule is assessed as a matter of legality against overriding legal and constitutional principles, including human rights and general principles of law. Legitimacy and legality therefore mostly coincide, as illegitimate rules are constitutionally unlawful at the same time. Questions of legitimacy beyond the realm of constitutional law arise in legal philosophy when it comes to tyranny and recourse to natural law and justice, and the right to resistance when formal law and values fundamentally differ and the legal order breaks down during periods of revolution.

In the contractual, non-hierarchical and highly fragmented field of international law, the relationship of law and morality is more complicated. A constitutional framework is lacking, and none of the basic categories of natural law offer a suitable framework to analyse the legitimacy of rules in international law and of the WTO in particular. Vice versa, international

or breaking the law. This normative commitment can involve personal morality or legitimacy. Normative commitments through personal morality means obeying the law because one feels that the authority enforcing the law has the right to dictate behaviour”, Why People Obey the Law 3-4 (1990), quoted by Frank (1995: 25).
law offers less protection against moral-based judgment and action taken by governments. For example, protection of self-determination and intervention is difficult to sustain under strong public and moral-based pressures on governments to take action.

Thomas Frank discusses legitimacy in international law within a framework of the four paradigms of a required community, social contract, free assent and compliance (pacta sunt servanda). Legitimacy of a rule is essentially understood in terms of a given quality which is assessed in terms of determinacy, symbolic validation (communication of authority), coherence and adherence or respect for basic rules (such as the Vienna Convention on the Law of Treaties), and principles, including *jus cogens*, both in terms of substance and procedures (Frank 1998: 25-46; 1988). In doing so, it would seem that Frank reverts to categories inherent to the nature of good law, and derived from experience in domestic law in a constitutional context. Robert Howse emphasises that legitimacy in international law transgresses the formal principle of consent and an enquiry into underlying values is required (Howse 2001: 600-604), what Joseph Weiler termed social legitimacy of rules as a “broad, empirically determined, societal acceptance of the system” (Weiler 1999: 80-81). The lawyer, trained in a positivist tradition of international law, thus needs to turn to domestic law principles, philosophy, economics, political science and international relations theory. Assessing legitimacy inherently requires an interdisciplinary approach. It rapidly reaches the limits of a particular discipline. This also makes it a difficult task to undertake.

In international relations theory, legitimacy largely depends upon underlying theories which in turn are strongly influenced by different traits of political philosophy as applied and adapted to international relations (Elsig 2007). Political scientists have established the distinction between input and output legitimacy (Scharpf 1999; Keohane and Nye 2001: 282-287).

Input legitimacy assesses procedures by which rules and decisions are made and adopted. It is here that in my view issues of democratic legitimacy loom large, albeit they cannot be strictly separated from output legitimacy. Tests of inclusiveness and participation, and fairness of discourse are applied in pluralist conceptions of accountability ideally established in domestic Western constitutionalism. In Europe, the debate on input legitimacy informs the critique of decision-making in the European Union and the quest to enhance democracy. It has been one of the intellectual foundations of the gradual increase in the role and functions of the European Parliament. It is equally applied to assess the legitimacy of international organizations such as the WTO.

Output legitimacy, on the other hand, assesses the effect of rules on society at large (Scharpf 1999; Schimmelpfennig 1996). Yardsticks applied include justice, fairness, welfare and the respect for human rights. They strongly depend upon underlying political and economic philosophies and vary. The realist schools, largely ignoring the impact of law, assess
international relations in terms of power relations. Institutions are created to represent the power of certain sponsors and assist in controlling international relations. Realism tends to disregard the issue of legitimacy as largely irrelevant. Idealist schools, on the other hand, operate within a framework of established and aspirational values of regional and global governance. Fairness and justice and thus legitimacy, are of major importance to them (e.g. Pogge 2005; Caney 2005). In economics, legitimacy is essentially assessed in terms of the welfare-enhancing effects of a particular system, beyond the philosophy of division of labour, comparative advantage and free trade (Smith 1776; Ricardo 1819). It essentially builds upon economic theory and needs to stand up to empirical verification and testing. Liberal schools stress the protection of civil liberties and property (e.g. Petersmann 1997; Frankel 2000). Translated into the field of international economic relations, market access, equal conditions of competition and protection of intellectual property rights loom large (Elsig 2007: 83). Social democratic and cosmopolitan schools emphasize the importance of redistribution of wealth and of cosmopolitan values in the process of globalization (e.g. Pogge 2005; Beitz 1979; Barry 1973, 128-133). The effects of distributive justice are an important factor informing the legitimacy of international relations. The effects on distribution of wealth of a particular system are concerns which are essentially shared with moral philosophy (Caney 2005: 102-141). The way a system treats its poorest members amounts to a critical yardstick for assessing the legitimacy of international economic law and the multilateral trading system (Pogge 2005: 717).

In reality, policies often combine different strands of political theory (Moravcsik 2004). It is fair to say that legitimacy in international relations is informed by all the factors discussed above: the impact of power, the dependence of international law upon voluntary compliance and limited enforcement, input methods of inclusive, deliberate and accountable decision-making, output responding to liberal and social-democratic principles and values. They all frame the – often competing – yardsticks against which the legitimacy of the WTO system will be assessed.

Given this panoply, we are left with a number of underlying conceptual problems. Legitimacy may relate to a particular rule, or to a system as a whole. When discussing the legitimacy of WTO law, should we look at individual rules, examining to what extent they comply with the qualities of good law? Or, should we look at the system as a whole? While the former adopts a constitutional approach, the latter places a particular legal system in a broader societal and economic context. Both can be observed. In assessing the legitimacy of the WTO, Robert Howse looks at the underlying welfare economics and theory of free trade as well as undertaking a detailed examination of Appellate Body rulings according to the criteria of coherence and consistency (Howse 2001). It is submitted that an examination of legitimacy of WTO law should primarily focus on the system as a whole. There are inevitably winners and losers, and legitimacy cannot depend upon the eye of the individual beholder. Assessing legitimacy has to be undertaken from a long-term viewpoint, and must take into account long-
term implications and dynamics of the system of WTO law as a whole or of its major parts or subsystems, such as non-discrimination or the protection of property rights. The examination of legitimacy of individual rules in turn may be better assigned and left to constitutional theory and law, from which, in the long run, international law will be not be excluded in an overall coherent system of multi-layered governance. Thus, the interpretation and application of specific rules in the WTO relates to the overall system and its underlying legitimacy, as such, it remains within the bounds of law.

C. The Doctrine of Multilayered Governance

We are also puzzled by the problem of the extent to which we are entitled to apply the same criteria in assessing the legitimacy of domestic and international law (Elsig 2007: 79). The two appear to belong to different worlds. International law rules emanate from a complex process involving a great variety of different actors: powerful and weak States, and democratic and authoritarian governments. Contemporary international law does not prescribe domestic structures of States. Rather it treats them as a black box under the doctrine of sovereignty and self-determination. Power plays a key role in shaping positive international law. In assessing the legitimacy of rules of international law, we need to take the complex and imperfect nature of international law into account. We cannot simply refer to concepts of legitimacy developed for mature domestic systems, such as the Westminster model of deliberate democracy, or even to those of direct democracy where final decisions rest with the majority of citizens. International law operates in a harsh environment where power continues to play a key role. It functions in an environment where many of its subjects do not fully live up to the ideals of democracy. Moral perceptions, e.g. responsibility vis-à-vis fellow humans cannot be uniformly defined independently of proximity and distance. Thus, the ideal benchmark cannot be set. When assessing the legitimacy of a particular international organization, we need to relate it to the realities of underlying systems of governance, taking into account all their deficiencies.

At the same time, international law tames power and shares the main virtues of law in containing the exercise of power, in creating legitimate expectations as to conduct and in stabilizing human interaction. Discussions of legitimacy of international law cannot abstract from prevailing ideals and goals of good governance in general: government based upon the rule of law, separation of powers, the protection of human rights and responsiveness to democratic accountability. Citizens exposed to the impact of international law will not be prepared to apply entirely different standards from those against which they judge the legitimacy of domestic or regional governance. Human conduct is not judged fundamentally differently whether or not it belongs to domestic or international realms. Human nature does not alter whether it plays out at home or abroad. Social legitimacy of norms does not fundamentally differ and relies upon the origin of a particular rule or system. The standards
and yardstick underlying legitimacy in a given society – including the international community of WTO Members – thus cannot be fundamentally different in domestic and international law. Rather, it is a matter of graduation within an overall framework responding essentially to the same criteria and yardsticks of legitimacy. This is a strong argument for bringing about coherence between domestic and international law. The perception of graduation supports an overall and coherent constitutional approach to assessing legitimacy, yet takes into account the different nature of community and the level of decentralized governance.

Confronted with the challenges of the WTO, international lawyers have set out to assess the underlying problems in terms of constitutional theory (Cottier and Hertig 2003; Petersmann 1995, Peters 2007a). The effort is part of a broader movement to overcome the classical and conceptual divide between international and domestic law of the Westphalian system of nation states. It essentially comprises the field of human rights and international economic law. In both areas, a controversial debate on constitutionalisation of international law is taking place. While many and competing concepts of constitutionalism are employed and some suggest refraining from using the term (Howse and Nicolaïdis 2003; Cass 2005), the effort shares the common concern of looking at international law and domestic law in a coherent manner (Cottier and Mavroidis 2003: 353-356; Cottier and Hertig: 2003). Influenced by the traditions of federalism, lawyers focus on the interaction and the allocation of powers between different layers of governance. It is essentially a matter of finding appropriate criteria for the allocation of regulatory powers to different layers of governance – global, regional, domestic, and local – and of defining the proper interaction of these layers (Jackson 2003; 2006). This model of constitutionalisation offers an appropriate framework of analysis, without prejudging one way or the other as to how powers should be allocated in the end. The crucial point is to conceive international, regional and domestic levels as a single and ideally coherent regulatory architecture of multilayered governance. Multilayered governance stands for the proposition of a process and direction. It does not stand for the idea of a world government, or world legislature. But it builds upon potential spillovers between the domestic and international spheres and seeks what Eric Stein called “creative, idiosyncratic arrangements commensurate with the respective level of integration” (Stein 2001: 534).

From a legal and constitutional law perspective, it is proposed to assess the legitimacy of international law rules on the basis of a doctrine of multilayered governance. The point here is that legitimacy should not be, and cannot be, assessed for the WTO in isolation. Rather, rules and regulations on the level of international law are seen as part of an overall regulatory system which operates on and within different layers. These layers, comprising local, sub-national, national, and possibly regional, and global rules, can be looked upon as a five-storey house (Cottier and Hertig 2003: 261). These layers of governance interact and are complementary to one another. The upper floors generally exert control over the lower floors and make sure that they behave within certain bounds. The model, however, is not necessarily
centralist, but leaves ample room for decentralization and for safeguards to preserve essential values on all floors alike. Taken together, these layers form a complex system of vertical checks and balances, seeking to compensate on one layer for deficiencies inherent to another. The issue of legitimacy of the WTO therefore needs to be assessed within a broader framework and cannot be separated from issues of legitimacy affecting the Members and the nation state or regional arrangements, such as the European Union.

Given the fundamentals of domestic democratic governance, democratic legitimacy is often placed exclusively, even as applied to international organizations. The transposition of domestic structures to both regional and international organizations appears to reflect democratic ideals as the sole rational source of proper legitimacy. This can certainly be observed in debates on the European Union, and it is no coincidence that democratic accountability looms as a prime challenge of theory to the present day WTO. A closer look, however, reveals that the law on all layers of governance is not exclusively based upon democratic accountability even in fully developed democracies operating under a constitution. Many of the yardsticks of legitimacy discussed relate to substance and outcomes, and not to procedures that determine how outcomes are brought about. Some may even reduce or off-set input-driven legitimacy based upon participation and political deliberation. The protection of fundamental rights, while crucially dependent upon democracy in the long run and an essential prerequisite for democracy, runs counter to majority votes and rulings in conflict. The protection of individuals and of minorities is at the heart of human rights protection, sourcing its legitimacy from individual values, in particular the protection of human dignity, rather than democracy. The same holds true for the application of general principles of law. They are essentially judge-made and reflect longstanding patterns of human experience. If ignored, justice cannot be served. They do not depend upon majority ruling of a demos. We recall in this vein the doctrine of separation of powers and of checks and balances as a major organizational source of law. Also, there is customary law, albeit to a decreasing degree. It derives its legitimacy from a common belief in the legal community, informally formed and brought about outside the organized channels of decision-making. Finally, the law also derives legitimacy from its stability and the fact that it allows for predictability and stability, quite independent of its content. Keeping peace has been one of the key functions of law, in particular of international law, irrespective of how the settlement was brought about. We recall that important post-war constitutions, in particular in Germany and Japan, were imposed. They stood the test despite an almost total lack of input legitimacy in terms of the categories discussed today. Besides democracy, the law therefore derives legitimacy from additional sources of fairness and functions. To summarise, it entails human and fundamental rights, general principles of law, the rule of law, legal security and keeping the peace.

These different sources of law can be found on all layers of governance, albeit to a varying degree. Democratic majority rule is most prominent in a local domestic context, while preserving peace, stable relations and protection of human rights is more prominent on the
level of international law, with democratic accountability limited to derived and indirect responsibilities of the diplomatic process. Agreements and consensus are more frequent on the international level, but are not absent in a domestic context. The role of general principles and judge-made law will be of less importance to the local and domestic levels where the law emanated from directly elected and accountable bodies under a given constitution. And yet, it also exists. Much as the yardsticks of legitimacy cannot be neatly separated between domestic and international spheres, it is also impossible to categorically distinguish separate forms and sources of human conduct. We should take this into account as we turn now to the functions and legitimacy of the WTO, properly speaking.

IV. The Functions of the WTO within Multilayered Governance

A. Progressive Liberalization and Non-Discrimination (Negative Integration)

The constitutional framework of the WTO operates as an instrument of progressive liberalization of goods and services regulated on other layers of governance (Cottier and Oesch 2005). Neither the GATT nor the GATS and thus the WTO as a whole amount to free trade agreements. Tariffs and preferential treatment for domestic producers in services are the lawful instruments of trade regulation and protection. Members, in a process of claims and responses, gradually reduce tariffs on goods and work towards the creation of level playing fields by granting national treatment in services. The binding of commitments exerts constitutional functions, as Members are prevented from unilaterally withdrawing concessions short of compensation in other areas, with a view to maintaining general levels achieved in terms of market access. The regime allows countries to adopt and agree to country-specific solutions, commensurate with needs and levels of development. To what extent this can be achieved depends upon political will. It also depends upon pressures exerted by powerful demandeurs. Provisions protecting non-trade concerns allow Members to limit the application of general principles and the operation of quantitative restrictions and non-tariff barriers. Rules on transparency ensure that legislation and important decisions, both administrative and judicial, are properly published; in the field of technical barriers to trade, transparency even includes the right to comment on draft regulations of Members. The principles of non-discrimination assure both horizontal and vertical equality of domestic and foreign products. The principle of most-favoured nation obliges Members to grant the same level of market access to all Members alike, subject to exceptions under Article XXIV GATT and Article V GATS. The principle of national treatment obliges Members to grant treatment no less favourable to foreign goods upon customs clearance in domestic markets. In the field of services, such obligations only extend to commitments positively made in lists of concessions. National treatment, like other provisions of the WTO, is subject to a number of exemptions which allow Members to pursue other and equally legitimate policy goals. In addition,
Members are entitled to take recourse to safeguard measures should imports threaten domestic industries under well-defined criteria.

The fundamental principles emanating from the principle of equality can be seen as coordinating principles between States. The WTO prevents Members from arbitrarily discriminating among their peers. The principles, however, can also be explained in terms of multilayered governance, exercising checks and balances in relation to nation states. From this perspective, WTO law is essentially an answer to the failure of other layers of governance properly to address external relations unilaterally without falling into the rent-seeking protectionism called for by domestic producers and powerful lobbies at home. It essentially seeks to prevent and correct such practices. By doing so, it seeks to stabilize international relations. The promotion of peaceful relations has been at the heart of promoting multilateral disciplines since World War II. Placing WTO law thus, in a context of multilayered governance, also clarifies that legitimacy of rules is not exclusively based upon democratic accountability and participation. Such an understanding of the general principles of WTO is reflected in economic theory, stressing the lock-in effect of the WTO agreements for governments, protecting them against protectionist claims. This is inherent in a rights-based approach stressing market access rights and equal conditions of competition (Petersmann 1995: 178-182; Stoll 1997: 113-114). Others explain it in terms of a combination of a conflict management strategy of keeping the peace and a rights-based approach, resulting in what he calls political liberalism (Howse and Nicolaïdis 2003). In his critical appraisal of legitimacy of the WTO, Howse attributes essential merits and legitimacy to the principles of non-discrimination in the struggle against protectionism. “From this viewpoint, protectionism represents a xenophobic response to one’s own political/economic challenges, a tendency to blame the ‘other’ for our troubles and to impose the costs of our own choices on the ‘other’. Free trade rules find substantive legitimacy in disciplining such xenophobic, discriminatory responses” (Howse 2001: 370).

It is interesting to note that the function of non-discrimination in WTO is comparable to the functions of non-discrimination in EU law as well as under constitutional liberties in domestic constitutions (Peters 2007). The Four Freedoms in EU law, as well as economic liberty (Wirtschaftsfreiheit in German or Swiss constitutional law) and the interstate commerce clause of the US Constitution share comparable functions of limiting powers to discriminate on subsequent regulatory levels in federal states, albeit they go beyond non-discrimination and equally entail the requirement of proportionality: restrictions should not go beyond what is necessary to achieve a stated regulatory purpose. In WTO law such requirements are partly enshrined in applying restrictions to national treatment. The point is that these parallels support the perception of comparable, albeit different levels of governance, each seeking to exert certain restrictions on autonomous and possibly arbitrary regulations of commerce. The legitimacy of these provisions is essentially drawn from historical experience. Absent such
disciplines, legislative processes tend to favour domestic constituencies, which often control legislative powers.

The principles of the WTO, much as those of EU law and constitutional guarantees, thus derive legitimacy from the fundamental principle of equal conditions of competition and from historical experience that short of such principles, policies and domestic law risk producing protectionist, rent-seeking effects which cannot be justified by other equally legitimate policy goals (Heiskanen 2004). The emphasis therefore is upon the idea of vertical checks and balances (Peters 2007a: 273). The principles compensate for deficiencies in domestic democratic processes as these do not inherently take into account the interests of those not represented by the electorate. WTO law, in other words, addresses a structural failure inherent the principles of representation. It ensures that democratic processes take into account interests that are not formally represented. WTO law, much as GATT and its bilateral predecessors were designed to avoid a repeat of Smoot-Hawley tariff policies, which was logically and unilaterally developed to protect the interests of domestic producers in the 1930s (Cottier and Oesch 2005: 14-23). Structurally, the constellation is comparable to international and constitutional protection of human rights and fundamental liberties. It parallels the compensatory functions of constitutional courts in preserving rights of those not, or not strongly, represented in the legislature (e.g. prisoners or foreigners) (Ely 1980:135-180). It is found, on the international level, in the doctrine and concept of compensatory constitutionalism. It assigns to international instruments constitutional functions, which properly cannot be assumed by such constitutions, fully taking into account policies of subsidiarity and decentralization to the strongest extent possible (Peters 2007a: 279).

The operation of constitutional guarantees on equal conditions of competition does not depend upon democratic legitimacy in terms of deliberative bargaining processes. They are essentially protected by courts. The same holds true for the WTO. The fundamental principles of the WTO are essentially protected by way of dispute settlement. It is no coincidence that the main rulings of the first decade of the Appellate Body relate to the operation of basic principles of non-discrimination. These rules enjoy a high level of legitimacy even among critical observers such as Robert Howse (Howse 2001: 374-394). Importantly they enjoy legitimacy even though they do not depend upon consensus and consent by Members affected and may even be brought about by majority rulings within panels and the Appellate Body. It is remarkable that the judicial branch of WTO governance emerged as the mainstay of contemporary legitimacy and thus of trust and confidence in the system, rather than the political bargaining process.

In terms of output, it should be noted that the principles and processes of the WTO have led to enhanced shares of foreign trade for developing countries (WTO 2008; WTO 2007). Their share has been steadily growing in recent years relative to the growth in high income countries. Developing countries today account for some 34 per cent of world trade, in addition to some 8 per cent generated by Chinese exports (WTO 2008). In terms of growth rates, the
average rates of growth in exports of developing and developed countries exceed those of industrialized countries (WTO 2008). Over the last 10 years developing economies have grown faster than in any period since 1965 (World Bank 2007: 1). From 2002 to 2006, they amounted to some 15 per cent, and 25 per cent for China. The same holds true for least developed countries with 20 per cent growth, albeit their share has remained minimal, amounting to less than 1 per cent of world trade (WTO 2008; see also WTO 2007). The point is that development and trends overall have been in the right direction. The system has produced the results which can realistically be expected from the WTO framework and its principles. Obviously, the small shares of the least developed countries remain a major concern, and efforts to enhance their shares require additional and special efforts of affirmative action beyond the application of WTO principles.

The main objection to WTO legitimacy relies upon the observation that the principles and rules of WTO do not bring about distributive justice (Pogge 2005). In the long run, they allow countries to develop and enhance trade shares and prosperity. The post-war experiences of Europe and of Japan are cases in point. Today, we observe similar patterns in emerging economies, in particular Brazil, China and India (WTO 2008; The BRIC-club also includes Russia, an impending Member of the WTO). WTO rules, however, are not designed to steer domestic processes of distributive justice. This is partly due to the limits of international law, respecting all forms of government alike. International law in general has been weak in redistribution, and the concept of equity has essentially been limited to territorial and marine allocation and to procedural principles of fairness (Jenks 1964; Kolb 2003). Social and economic rights, guaranteed under international conventions, are notoriously weakly implemented and enforced. The failure to bring about domestic redistribution is a weakness of traditional and contemporary international law. It is essentially linked to the underlying concept of sovereignty and self-determination which to a large extent bars foreign intervention beyond treaty obligations. Problems of legitimacy are thus attributable to the nature of public international law. They are not specific to the WTO. It is difficult to challenge the WTO in this respect without challenging, at the same time, the fundamentals of contemporary public international law, challenging the resources privilege which is based upon the principle of sovereignty, self-determination and permanent sovereignty over natural resources (Pogge 2005: 737).

The challenges relating to losses of jobs due to international competition rest on similar complaints focusing on the impact on distribution. Change and adjustment are inherent to a society based upon division of labour and competition. The dilemmas of free trade are well-known and changes affect persons whether they be workers, consumers or citizens in different ways (Stiglitz, 2006; Cottier and Oesch 2005: 3; Moon 2000: 27-29). In comparing gains and losses, Howse opines that the benefits may not justify the losses incurred, in particular if they are linked to the loss of personal identity, which cannot easily be offset by financial measures or retraining. At the same time, he argues that non-trade related measures may be more efficient in compensating negative effects. Despite a very critical attitude, Howse ultimately subscribes to the principles of the WTO faute de mieux (Howse 2001).
From the point of view of legitimacy, the key question is whether WTO law prevents Members from pursuing distributive policies at home. This is partly the case, and constraints exist (Cottier 2007: 587-614). National treatment does not allow for local content rules under the TRIMs Agreement. There are limits to the use of subsidies for purposes of redistribution, provided that the subsidy exerts a trade-distorting effect. The abolition of non-actionable subsidies, mainly under pressure from developing countries, should be reviewed from this angle. Importantly, the system as a whole is capable of undertaking the necessary adjustments. For example, it was necessary to adjust the TRIPs Agreement with a view to facilitating access to essential drugs (Abbott et al. 2007: 199-207). The effort effectively combating climate change and bringing about mitigation and adaptation requires a review of the interpretation of a number of provisions, in particular those relating to production and process methods (PPMs) (Howse and Regan 2000: 253-261). The same holds true in defining the relationship to other international agreements and organizations (Cottier and Oesch 2005). Coherence is far from being achieved, again partly due to insufficient foundations in international law to interface different regimes. It is also a matter of bringing about appropriate concepts of graduation in terms of defining obligations to sign on to instruments, in defining possible variable geometry or in shaping rules in a manner commensurate with levels of social and economic development. These changes can be made within the existing system and do not raise fundamental questions of legitimacy if Members show a willingness to up take these issues. Refraining from doing so, however, may impact on the system as a whole and jeopardize its long-term sustainability in the triangle of social, economic and ecological goals.

In general, however, WTO law does not prevent countries from adopting adequate safety networks, and providing welfare benefits and assistance during structural adjustment. It is submitted that adequate networks are in fact a political precondition for liberalization. It is no coincidence that in post-war history, trade liberalization has been most successful when linked to the evolution of the welfare state. And it is no coincidence that trade liberalization stalls under neo-liberal policies that seek to reduce safety nets for workers and citizens. The equation of open market and social policies in tandem also explains why developing countries, in the absence of such networks and of effective internal systems of taxation, have been more reluctant to accept liberalization than industrialized countries, with the exception of trade in agriculture.

B. **Standard Setting (Positive Integration)**

The main objections relate to rules positively prescribing domestic regulations and conduct of government (Esty 2002; Howse 2001). It is impossible to draw a clear line between the traditional patterns of negative integration, discussed above, and positive integration. Many rules delineating room for manoeuvre, for example in the field of trade remedies, cannot be clearly ascribed to one or the other category suggested by political science Agreements generally contain elements of both negative and positive integration. This is true for disciplines on anti-dumping which has been mainly of interest to developing countries.
suffering arbitrary market access restrictions. The same holds true for food standards under the SPS Agreement. Its thrust is not to render market access more difficult, but to facilitate it by taking recourse to internationally agreed and harmonized standards. The problem for developing countries is not one of principle, but of lack of resources and know-how to effectively defend their interest in front of international standardization bodies.

The field that has faced the most serious challenges to legitimacy has been the protection of intellectual property rights, which the TRIPs Agreement, in combination with the Berne and Paris Conventions, essentially defines on the basis of laws adopted in industrialized countries (Cottier 2005). Members are obliged to implement these provisions together with minimal standards in domestic law accordingly. As a matter of principle, the critique is not sustainable. The lack of appropriate protection as well as excessive protection of intellectual property both create trade distortions and result in market access restrictions. It is therefore not appropriate to argue that IPRs have no place in a system promoting freer trade. Moreover, the adoption of intellectual property standards amounts to a long-term investment in creating fair conditions of competition from which domestic producers will also eventually benefit. It will, in the long run, close gaps in legal cultures and create level playing fields. The problem, however, is one of degree and timing. A strong argument can be made that the TRIPS Agreement does not adequately reflect levels of development of countries and imposes uniform standards irrespective of levels of competition. Efforts to seek better rules and graduation, replacing the insufficient concepts of special and differential treatment, should therefore be developed by taking into account economic indicators in defining whether or not a particular rule on IPR should be implemented in domestic law (Cottier 2006). For the time being, developing countries may note that industrial countries pursue policies of benign neglect. No complaints have been brought against developing countries except where serious problems have been caused by competitive industries beyond their infant stage. With these qualifications, the TRIPS Agreement plays a meaningful part within the structure of multilayered governance.

The same line of reasoning, it is submitted, would hold true for rules on competition and investment protection. Establishing minimal standards for competition would assist developing countries in implementing effective remedies against the abuse of intellectual property rights. It is likely that these goals will not be readily achieved without international support as domestic private sectors often tend to oppose or hamper the autonomous adoption of competition rules. Minimal standards on investment protection as well as minimal labour standards linked to such rules would assist in reducing pressures on beneficial arrangements for investors which governments today are often unable to avoid in promoting economic development. Again, it is a matter of looking at positive integration from the viewpoint of multilayered and mutually complementary governmental structures. It is difficult to see how they would illegitimately impair social and economic development.
C. Negotiations and Dispute Settlement

In assessing input legitimacy, it is important to state that the WTO operates as an intergovernmental organization. By its very nature, it has not been conceived as a body of democratic decision-making, and clearly the two are not in love at first sight (Stein 2001). Yet, intergovernmental negotiations are a deliberative process par excellence. They largely respond to a process of claims and responses, entailing consultation, learning, convincing and pressuring (Odell 2005). Delegations negotiate trade concessions bilaterally and multilaterally. The process of rule-making follows stages of fact finding, defining negotiating positions, consultation and bargaining. Inclusiveness is extensive and often protracts the negotiating process. Negotiating powers essentially follow market size, geopolitical impact and the power of the pen which, in return, is based upon the quality and quantity of the human resources a Member is able to make available. Power inevitably plays an important role, essentially defined by market size. The system depends upon the lead taken by major trading partners, and agreements are often prepared by a small group, formerly even the US and the EC alone. The problem of leadership, however, is not different from any polity. Powerful players are influential under any system of decision-making; it may be tempered but not fundamentally altered. The problem thus is not one of the WTO, but of the relationship between power and law in general. Addressing it will require the strengthening of constitutional structures within the organization. We shall come back to this point when discussing possible reforms.

Democratic accountability of international organizations depends upon domestic democratic accountability of Members (Keohane and Nye 2001). Delegations operate under instructions of governments and are therefore accountable. Representatives of democratic governments enjoy derived and indirect democratic legitimacy as they are accountable to a democratically elected government. The lack of accountability, where it exists, is a matter of domestic structures and cannot be attributed to the Organization and its legitimacy as an intergovernmental body. Rather, challenges to lack of accountability relate to the problem that civil society, in particular NGOs, as well as other affected international organizations (IGO) are not sufficiently involved in light of the impact of decisions made and rules adopted. Again, this is a problem which is difficult to solve within existing structures and requires substantial constitutional reform.

We argue that the principles of negative integration assume important constitutional functions which find legitimacy in exercising checks and balances. They do not call for particular democratic legitimacy and stand in their own right as legal principles emanating from the principle of equality. It is a different matter when it comes to positively setting regulatory and uniform standards. Efforts at harmonization of the law amount to positive integration. Compared to domestic law, this is much closer to legislation than the operation of constitutional principles. As a corollary, democratic participation enters the field. Indeed, it
was with the advent of positive integration, such as the elaboration of the TRIPS Agreement that the criticism of democratic deficiencies in the WTO process was mainly voiced. It did not occur to the same extent during the GATT years. The main objections to positive integration relate to the asymmetrical structures of negotiations. The principles of negative integration have been in place for a long time. They are mainly applied and refined in dispute settlement in a process of trial and error. Negotiations on matters relating to positive integration are often based on and sourced from domestic law and regulations in industrialized countries. Developing countries lack domestic experience in the field and therefore seek to postpone international negotiations until such experience has been gained at home. The problem is a real one, and needs to be addressed in designing appropriate support and undertaking research efforts and cooperation of like-minded countries. We shall come back to this in reviewing the role of the WTO Secretariat.

Finally, the structure of dispute settlement clearly offers fair and equitable procedures to all Parties to the dispute alike. Developing countries, moreover, enjoy the benefit of judicial assistance from the advisory centre on WTO Law in Geneva (ACWL), an international organization dedicated to supporting these countries in trade disputes.\(^2\) The possibility of hiring legal advice and law firms in dispute settlement provides for arms-length dispute settlement procedures. The problem of high costs of attorney fees, inherent to complex international disputes, should, with all due respect, be compared to the economic stakes of a dispute and the potential gains to be made from having trade barriers removed by the defendant party. Power and market size, however, influence dispute settlement when it comes to adopting trade sanctions in response to failed compliance. The effectiveness of such sanctions (withdrawal of concessions) essentially depends upon the market size. Smaller countries – developed and developing alike – therefore suffer from systemic disadvantages. The problem is real and needs to be addressed in structural reform.

V. Home-made Problems

The functioning of the WTO reveals a number of problems which need to be addressed in reform. Overall, however, it is difficult to expect more within the existing, classical structures, as an intergovernmental organization. As long as we remain within the traditional paradigm, it is difficult to challenge its legitimacy. Such findings do not preclude moving ahead, seeking a new paradigm within the doctrine of multilayered governance. Before doing so, however, it is important to assess the extent to which problems are home made and need to be addressed first by the governments of Members.

\(^2\) See [http://www.acwl.ch/e/index_e.aspx](http://www.acwl.ch/e/index_e.aspx) (last visited August 6, 2008).
A. Distributive Justice

It was seen that WTO law partly restricts distributional policies at home and should be reviewed to this effect. By and large, however, increasing gaps in terms of income and wealth are much more attributable to national law and policies and to trade policies pursued by Members, rather than to the effects of WTO law properly speaking. It should be recalled that GATT has not prevented States from developing welfare policies. To the contrary, it may be argued that trade liberalisation was successful because it has been accompanied by the welfare state and social security networks in industrialized countries. Studies of the advent of neoliberal policies in recent decades should not ignore that the architecture of the Post World War II order was based upon the philosophy of the New Deal in the United States and emerging welfare States in Western Europe. Compared to levels of protection in the field of agriculture, it is indeed amazing to see that governments have so far largely failed to respond adequately to such challenges. Much of the reaction to globalization, which increasingly informs politics in industrialized countries, for example by restricting migration, or efforts to prevent outsourcing, is due to a lack of imaginative domestic policies towards a new deal appropriate to meet the challenges of globalization other than by imposing restrictions on trade and falling back into protectionism.

Problems of legitimacy of the WTO mainly arise in relation to developing countries that have lacked the means to accompany trade liberalization with welfare policies. The reduction of tariff rates in successive rounds eroded existing taxation without being replaced by proper domestic and non-discriminatory tax systems. The same problem arises when newly acceding developing and transitional economies are forced to substantially reduce tariffs and liberalize services without being offered complementary support in building domestic welfare structures. To a large extent, this is the responsibility of demandeurs, simply seeking to improve market access rights without looking at long-term costs and the potential for destabilization and the perceived erosion of legitimacy of the WTO which is unable to translate within a reasonable period into better living conditions for the majority of the population. Likewise, the refusal of industrialized countries to substantially lower levels of protection in agriculture hampers the pursuit of distributive policies in developed countries. The agricultural policies of the West lack a cosmopolitan perspective and hold millions of poor farmers hostage to subsistence. Trade, not aid, is what is required, but this call remains unheard within the democratic constituencies of the West. Liberalizing agricultural policies is at the heart of the WTO agenda and principles. Members, however, do not allow this to happen and take effect. By so doing, they undermine the legitimacy of the WTO law, albeit it is caused by nationalistic domestic policies at home.

To some extent, the responsibility also rests with developing countries. The imposition of neoliberal policies, the neglect of agriculture and the needs of rural populations, the failure to use existing scope and space for social policies and adjustment at home are causes which
cannot be ascribed to WTO law, but remain within the responsibilities of national governments. True, they were partly induced by the lending policies of international organizations, in particular the IMF and the World Bank, and donor governments operating under what has been termed the Washington consensus of unilateral trade liberalization and privatization without taking into account the specific needs of developing economies. To a large extent, however, the governments of developing countries themselves are to be blamed for policies undermining the potential of the international trading system to enhance welfare at home. Again, the refusal to negotiate investment protection standards and competition policies in international law, accompanying and flanking the exclusive rights of the TRIPS agreement, as well as the refusal to negotiate on labour standards has been a missed opportunity to this effect. While it is understandable in terms of defending national sovereignty and the interest of governments, the policy shows a lack of concern for distributive goals which the international system could assist by pursuing fairness at home. The same is true when it comes to refuting negotiations on transparency in government procurement. It amounts to a refusal to work towards principles of good governance to the benefit of domestic tax payers. Most of the problems giving rise to criticism and challenges of the legitimacy of the multilateral trading system are therefore home-made. The same can be observed for the rule of law and for democratic participation.

B. Democracy begins at Home

WTO law, operating within weak structures of international law and subject to power relations, has not been strong enough in international law to overcome these shortcomings of detrimental national power politics. It is not the legitimacy of WTO law which should be questioned, but how governments use existing policy spaces in terms of purely national interests and refrain from taking into account cosmopolitan values. We argue that this is mainly due to the domestic structures of decision-making in Members countries of the WTO, both industrialized and developing. The agendas of governments are essentially defined by producer interests. They often fail to take into account other concerns to a sufficient degree. Authoritarian governments, in addition, often define policies without consulting the private sector and fail to rally even producers to the cause of trade liberalization. These structures reflect badly on the legitimacy of the WTO as they call into question the input legitimacy of the Organization which leaves domestic decision-making entirely to domestic constitutional structures and procedures. It pays a price for treating sovereigns in terms of a black box. The question thus arises of whether WTO law should address the issue of input legitimacy by way of defining minimal procedural standards of domestic participation and debate which Members are obliged to respect and translate in domestic decision-making relating to the subject matter of international trade regulation.
C. The Rule of Law begins at Home

Apart from an obligation to provide transparency and make available courts to deal with international trade, the judicial implementation of WTO law is entirely left to Members (Cottier and Nadakuraken Schefer 1998: 84-88). Generally, it is a matter for courts to decide to what extent principles of consistent interpretation or of giving direct effect to WTO should be followed or not. Partly, such as in the case of the United States, such recourse is barred by legislation. There are many reasons for the reluctance to grant direct effect in leading jurisdictions, including the EC. In effect, they also limit legal protection and the reinforcement of the judicial branch and the rule of law in developing countries.

Firstly, courts fear major battles with the executive branch and the legislator, mainly in view of the fact that agricultural policies are often not compatible with WTO law. The implementation therefore is left to legislators, including the filters which accompany it to soften rough edges. Separations of power and checks and balances are a legitimate concern which could however be addressed in a much more differentiated manner than wholesale rejection of direct effect. It would be perfectly possible to give direct effect to appropriate rules while denying it to others with the argument that implementation, due to political and financial implications, needs to be left to the political process (Cottier 2007). Well developed doctrines of monism applicable outside the field of WTO law offer ample guidance to this effect. Secondly, judicial policies are informed by mercantilist principles, seeking to secure reciprocal access to the law. Finally, reluctance to grant direct effect – besides flawed arguments that WTO is not sufficiently precise – rests on an implied assessment that the law lacks appropriate democratic legitimacy. Direct effect places WTO law beyond domestic law, and judges are reluctant to grant such authority to rules elaborated within a purely intergovernmental process (Cottier 2007). The issue of direct effect therefore boils down to a pertinent test of legitimacy of the law. There is, in the end, a lack of trust and confidence, limiting voluntary judicial compliance in the field. The limits of democratic legitimacy have imposed limits to judicial review. Under a doctrine of multilayered governance, both therefore need to be developed in tandem in coming years.

VI. Enhancing Participation of Stakeholders

Challenges to the legitimacy of the WTO partly need to be addressed on the level of WTO law; partly they are matters of domestic law and policy. The question arises of the extent to which these challenges can be taken up within existing structures and the extent to which more radical steps towards reform should be contemplated within a philosophy of multilayered governance. We look first at regulations seeking to remedy regulatory deficits on the level of domestic law and procedures. We then turn to structural reform of WTO
proceedings with a view to strengthening the process and to bringing about new designs of checks and balances within the system of multilayered governance. Some of the suggestions remain within the structure of intergovernmental cooperation others transgress it and incrementally move towards constitutional structures.

A. Rights of Domestic Participation

The quest for democracy at the level of international law again runs into the difficulty of facing a number of fundamentals of contemporary international law which render meeting such goals a structurally difficult task. The advent of parliamentary assemblies in the Council of Europe and subsequently in the European Union offer important exceptions to the general principle that governments represent States in international organizations. International law operates under the assumption that democracy takes places at home, and processes of policy and decision-making draw legitimacy from domestic deliberation and structures of majority voting. This holds equally true for the WTO. The prime effort to bring about democracy and thus legitimacy in particular in areas of positive integration therefore must start with domestic procedures of Members. The legitimacy of WTO law in that respect thus mainly depends upon domestic structures of WTO Members, and in particular of key players. Structures of governance in the Members, in particular in the United States, the European Union, Brazil, India and Russia by and large will define overall levels of democratic legitimacy of WTO law. The WTO simply reflects the realities, shortcomings and achievements of democratic governance at home (Bacchus 2005). The prime responsibility rests with domestic constitutional law to assure that all stakeholders are appropriately able to participate in trade policy formulation. Diplomats in Geneva are bound to defend interests defined in legitimate domestic processes. The more this is the case, the more legitimate are interests defended and compromises reached. The less this is the case, the less likely is WTO law be considered legitimate and undermined in democracies. Doctrines on the domestic effect of its rules, in particular whether or not direct effect should be granted overriding domestic law in the long run, will largely depend upon the play of democratic governance in the membership at large. Primary efforts therefore should be undertaken to enlarge democratic participation under domestic constitutional law which, as it was seen, has traditionally been the domain of the executive branch. Ideally, it may be argued that all concerns of democracy and input legitimacy should be realized by means of domestic procedures. Yet, given the state of affairs in many Members and the lack of democratic traditions, it is necessary to proceed in parallel both in prescribing domestic rules, and in defining appropriate rules of participation on the level of the WTO in tandem.

Conceptual difficulties under contemporary international law, however, do not preclude seeking to support democracy at home by means of additional WTO disciplines. Much as WTO law prescribes rules on transparency and on judicial review, it should also turn to
prescribing minimal requirements of democratic participation in domestic trade policy formulation. Efforts to this effect can be based upon basic precepts of a right to democracy as argued for in modern international law (Franck 1998). The trade policy review mechanism therefore should address the issue of the extent to which trade policy formulation at home is transparent and inclusive of stakeholders, and how diverging interests are expressed. Procedures and processes could be monitored by the international community and the WTO Secretariat in particular. Recommendations could be made to governments and legislators. WTO law could provide for an obligation to hear different stakeholders, producers, investors, workers and consumers. In shaping such procedural rules, the role of national NGOs should be properly reflected (Charnovitz 2005). WTO law should oblige Members to offer fair hearings to relevant NGOs and take arguments put forward by these organizations into account, as much as they consider producer interests. As a matter of WTO law, they should have standing before domestic courts assessing procedures and trade policy measures taken. The process should also entail a procedural obligation to assess the implications and effects of policies on other Members and on international stability. The violation of such rights would render measures incompatible with obligations under international law and may give rise to dispute settlement and the withdrawal of concessions. Development and training programmes could support inclusive trade policy formulation and offer capacity building and technical assistance to this effect.

B. The Role and Position of IGOs and Global NGOs

Trade regulation inherently affects, and encroaches upon, other regulatory areas. Within governments, policy coordination is a prime goal and requirement, and conflicts may be anticipated by proper interagency cooperation. However, the expertise and knowledge available in other specialized intergovernmental organizations should be put to work more effectively in assessing proposals and regulations adopted. The present practice of granting observer status, essentially excluding access to negotiating fora, does not offer a satisfactory solution. Organizations should be called upon to provide evidence and advice, and to be involved in impact assessment (Charnovitz 2005; Keohane and Nye 2001). To this effect, the structures of these other organizations need to be designed in such a manner as to allow the management and secretariat to speak for the membership with some authority. Recourse to such organizations in dispute settlement for the purposes of fact-finding offers a good starting point and should be further developed to encompass negotiations as well. Hearings could be held before negotiating fora and experts should cooperate with the secretariat and delegations advising Members in the negotiating process. More extensive rights could be contemplated in the long run within a system of weighted voting as described below, recognizing a self-standing function of international organizations in the conduct of international relations.
A comparable and parallel regime could be designed for NGOs defending the interests of the global commons and thus not particularly focusing on the domestic affairs of Members. They should be heard before WTO in the process of trade negotiations. Given their expertise, they can play a useful role in the process of impact assessment of proposals made and in the review of policies implemented. In parallel, globally active NGOs in policy areas under dispute before the WTO should obtain standing in dispute settlement, be entitled to bring cases and to intervene on the side of claimants and defendants. There will, of course, be many objections to this course of action and enlargement of the WTO community. Firstly, NGOs are not subjects of traditional international law limited to States and governmental organizations. Opening up the system to NGOs inherently entails the corollary need to explicitly include business interests and thus to give standing to multinational enterprises. Governments may lose control over trade policy formulation as a consequence, and it will be even harder to reach agreement on the basis of consensus. Secondly, it is difficult to define criteria for eligibility and legitimacy of relevant private actors and players in the field. At this juncture, we again are faced with the dilemma that traditional perceptions of international law are no longer able to reflect the complexity of the modern world. An organization which is limited to governmental control, short of taking into account concerns and voices of the private sector at large, is no longer able to bring about levels of input legitimacy and involvement which will sustain structures and policies in the long run. It is time for a paradigm shift. We cannot argue in favour of open and transparent policy-making at home without developing appropriate and corollary disciplines operating on the international level itself. There are two sides to the coin, and they need to be complementary. We may well end up with procedures and dispute settlement open to the private sector. Instead of playing behind the scenes, private operators may be overtly involved in negotiations and dispute settlement. Once we realize the long-term benefits of such involvement, it will be a matter, not impossible to achieve, of defining proper rules for securing an overall balance of power between different actors. It will be possible to learn from domestic legal systems the legitimacy of which is essentially based upon access to politics and access to courts by private actors competing between themselves and with the government on the basis of the rule of law.

C. A Parliamentary Assembly in WTO

These efforts may also be accompanied by the creation of a Parliamentary Assembly in the WTO (Shaffer 2005; Mann 2005; Hilf 2005).³ Less a matter of replacing decision-making in the diplomatic process, it may serve as a forum for interaction and exchange among national parliamentarians and their international networks. The benefits of such contacts, in terms of

education and knowledge transfer, should not be underestimated. It may greatly assist in
democratic trade policy formulation at home. It fosters know-how and knowledge on trade
related matters in parliament as some members may acquire special expertise and
understanding. International contacts among their peers allow them to form independent
opinions. It may help to create cosmopolitan understanding for the problems and concerns of
others, so often lacking when it comes to serve a particular electorate. It may, in due course,
be ascribed certain powers which may expand as experience grows. The evolution of the
European Parliament as well as the experience of the Council of Europe in forming policies
offers prospects which are equally valid for long-term evolution in global international
organizations. Experience shows that exposure to common problems in such fora feed back
into national parliamentary and political processes (Council of Europe) or it enhances the
legitimacy of law and results achieved (European Parliament).

VII. Checks and Balances within the WTO

Enhanced participation both at home and within the WTO in terms of democratic deliberation
and accountability cannot be achieved without reform of the political process at large. Simply
increasing the number of players under the present structures will suffocate the negotiating
process and the WTO, and must be met with utmost caution. If legitimacy calls for greater
involvement of stakeholders, it is evident that checks and balances require reform at the level
of the secretariat as well as in the process of decision-making in the WTO (Cottier 2007a).

A. Secretariat and WTO Commission

Working in what has been described as a Member-driven organization, the WTO secretariat
has been operating under the assumption of a strictly serving body. This assumption, which is
far from reflecting the real and implicit impact of the body of experienced professionals
securing the institutional memory of the organization, should be reviewed. The Secretariat of
the WTO should be given the mandate and the right to develop appropriate initiatives, to table
proposals, to review policies and to initiate dispute settlement in the defence of the
multilateral system. Much could be learned from the experience of the EC Commission in
terms of appointing executive staff members and defining responsibilities. It is submitted that
the systemic interest of a majority of Members would be better served with an active
secretariat under the supervision of what could be a commission composed of individuals
recruited from Members on a rotating basis, dedicated and obliged to serve the interests of the
multilateral system, and not those of their countries of origin. The model is different from
suggestions to create a directorate composed of major Members due to a mandate to serve the
goals of the multilateral system, and not to represent national governments. Secondly, the
formula would allow including medium-sized and smaller trading nations in rotation.
Commissioners would be mandated to jointly make proposals to the membership, to steer the negotiating process, and to manage different branches of the organization, including extensive operations on aid for trade and technical assistance programmes.

B. Weighted Voting

Consensus-based diplomacy at the WTO is widely viewed as a mantra of democratic governance of the multilateral organization. It is widely seen as an important factor legitimizing the WTO. Indeed, all Members enjoy the right to block a decision, whatever the subject matter and whatever the level. On the surface, it appears as the epitome of sovereign equality and is close to the ideals of one state one vote, whatever the size and political impact (Ziegler and Bozon 2007: 15). Members therefore are reluctant to review this mantra. A closer look, however, reveals a number of shortcomings, and a high price to be paid. Firstly, trade negotiations are held hostage to tacit agreement of all Members which inevitably adds to the time it takes to come to an agreement. Trade Rounds are bound to run for a decade and do not allow for substantial interim results. Pending such results, governments are under pressure to pursue the avenue of preferential agreements. Today, these agreements extend way beyond the original idea of regional integration. They encompass a host of transcontinental agreements with interested and interesting partners. The policy not only erodes MFN and multilateralism. It also erodes the position of the least developing countries left aside. Moreover, it is much more difficult for target developed countries to tame special requests from bilateral agreements which have been barred in and by the multilateral forum of the WTO. Secondly, consensus does reflect real powers in the Organization. Breaking or upholding it is possible for major players at all times, but not for medium and smaller countries. They may block once or twice, and will then find themselves isolated in due course. Consensus in reality is a system of informal weighted voting which gives core competence to a small group of essential key players, currently the United States, the European Union, Brazil and India. Tomorrow, it will include China. Thirdly, the right to block consensus entails serious policy dilemmas at home. Governments may be under pressure to block a decision, but unable to do so taking into account the overall interests of the country and economy. It may be difficult to explain the non-use of blocking power to a powerful constituency without losing essential support. Finally, consensus diplomacy renders legislative response to dispute settlement decisions virtually impossible.

For all these reasons, a review of consensus diplomacy should be contemplated. The WTO has left behind consensus in the field of dispute settlement with great success. Panels and the Appellate Body decide by majority. A losing party is no longer in a position to block the adoption of a Panel report. What was not conceivable during the GATT years has become reality. Perceptions and attitudes have changed. It is not impossible to achieve a similar process in the field of political decision-making. It may be introduced gradually, leaving
major decisions still to consensus, and gaining support over time as confidence and trust in the system grow. Models taking into account the percentage of world trade in goods and services, the openness of the economy (the ratio of imports to domestic production) and the size of the population in defining voting rights and assessing voting powers are able to bring about a fairly balanced system between industrialized and developing countries (Cottier 2007: 217-260; Cottier and Takenoshita 2003; Cottier and Takenoshita 2007). Moreover, it is important to recall that trade policy does not follow block politics, but operates on the basis of variable geometries and variable coalitions commensurate with the interests at stake in a particular sector. Weighted voting therefore offers a more rational and transparent model of decision-making. It allows governments to defend their interests, but also to accept defeat in the best of democratic traditions based upon majority ruling. Again, it is a matter of converging patterns of domestic traditions and political culture and the international level and working towards an overall system which operates under comparable premises of democratic governance. People will benefit from a reinforced and more stable multilateral system, from the possibility of a continued stream of decision-making and agreements, and legislative response to dispute settlement rulings. Governments will no longer see a need to engage in transcontinental preferential agreements in order to promote the trade agenda to the same extent as they do today, creating and distorting trade at the same time.

C. **Multilateral Trade Sanctions**

Reform should also address the structural imbalances in enforcing dispute settlement decisions. Medium-sized and small Members have little incentive to take up cases due to lack of retaliatory powers. The system currently operates as a purely bilateral system of dispute settlement, although Members may jointly bring cases as a group of complainants. Reform should allow to join cases at the level of implementation and to join in the withdrawal of trade concessions failing the removal of legislation or measures which are detrimental to parties not originally claimant to the dispute. When the Dispute Settlement Body of the WTO, based upon findings by a panel or the Appellate Body, decides that the law and practices of a Member is in violation of WTO obligations, third parties equally affected by that legislation should also be entitled to impose the withdrawal of concessions up to a certain amount to be defined in arbitration, if the losing member does not comply the ruling within the reasonable period of time defined. An accumulated recourse and use of such a right is likely to have preventive effects and encourage members to compliance. It equally may encourage smaller nations to bring complaints and see their chances for successful outcomes and implementation improved. The right would thus rebalance the current bias in favour of large trading partners and enhance the possibility for smaller nations to successfully obtain the removal of trade barriers having a negative effect on a larger group of exporting countries. It would improve the legitimacy of the overall system.
D. Prescribing Direct Effect of WTO Law

Finally, enhanced participation in democratic processes and the development of checks and balances within the WTO commensurate with principles of constitutional law will allow the problem of domestic judicial implementation to be addressed. It is conceivable to define areas of direct effect as a matter of WTO law which today, with the possible exception of Article XX of the Government Procurement Agreement, are entirely left to national law. Obligations to grant direct effect could be compensated for by trade concessions and made part of the bargaining process. This would solve the underlying problem of reciprocity and strongly reinforce the presence of WTO law in the daily life of the law around the world in accordance with constitutional principles of multilayered governance and more effective legal protection to the benefit of legal security of private operators and traders (Cottier 2007:305-330).

VIII. Conclusions

In assessing the legitimacy of the WTO, we encounter different non-exclusive strands and traits. These include the contribution of WTO law to economic growth and prosperity among nations, the contribution to stability and peaceful relations, the impact of transparency and of relations based upon the rule of law and the possibility of peaceful dispute settlement, and the ideals of participatory decision-making and democratic accountability. These strands and traits are not unique to the WTO. They are inherent and common to all legitimate legal regimes, but they may vary in terms of predominance and importance. While democratic governance and accountability are of particular and predominant importance in domestic systems of democratic governance, the functions of securing peaceful relations and growth on a rule-based system are predominant in the WTO. It is important not to see the issue of legitimacy of the WTO in splendid isolation. The WTO forms part of a system of multilayered governance. It cannot be separated from domestic structures, either on the national or the regional level, as the case may be. Together, they form a system of multilayered governance which, as a whole, needs to respond to the different strands of legitimacy.

From this perspective, the current WTO enjoys and deserves high levels of legitimacy when we look at it from the point of view of outputs over time. Most of the challenges to legitimacy – defined in terms of trust and confidence and voluntary compliance – are not substantiated. The principles of negative integration – essentially delineating what governments are and are not allowed to regulate – is directly based upon functions of keeping peaceful relations by securing mutual access to markets. Case law relating to equal conditions of competition and non-trade concerns enjoys a high level of legitimacy and trust. Unresolved problems exist,
and examples relate to climate change or labour standards and human rights. They can be solved in negotiations or by case law.

Substantial problems are encountered where WTO enters into regulation of positive integration, positively prescribing rules of conduct to be implemented in domestic affairs. With the decline of tariff barriers and the shift towards non-tariff barriers and domestic regulation, issues of democratic legitimacy and accountability have arisen and will not go away. This paper argues that most of the problems relating to input legitimacy are home-made in WTO Members. The tradition of trade policy as a matter of foreign policy traditionally under the prerogative of the executive branch, the predominance of producer interests, often combined with a lack of other private sector participation. These structures and deficiencies equally form part of the system of multilayered governance. They negatively impact upon the legitimacy and reputation of the WTO representing the global trading system. The question therefore arises of the extent to which WTO can and should seek to influence domestic procedures in trade policy formulation and implementation. Much as the GATT has prescribed rules on domestic transparency and judicial protection, minimal standards relating to democratic trade policy formulation and impact assessment should be developed. In addition, it is suggested that democratic governance on the level of the WTO be reinforced, in particular with a view to addressing positive integration: the participation of IGOs, NGOs and the private sector, and the creation of a Parliamentary Assembly. Importantly, reinforcement of deliberative modes beyond intergovernmental interaction and cooperation requires enhanced leadership in the organization with a stronger proactive role for a rotating WTO Commission and the Secretariat. A shift to weighted voting among Members, replacing the current forms of informal weighted voting, is vital to balance more extensive participation with efficient management and conclusive decision-making. Overall, the effort seeks to further strengthen the legitimacy of the WTO, support domestic processes in policy-making and in courts, and overall to contribute to a more coherent system of multilayered governance of which democracy amounts to a crucial, but not an exclusive, factor of legitimacy in regulating a globalized economy. Partly, suggestions can be pursued within existing structures. Partly they envisage a new constitutional framework able to cope with the challenges of the 21st century beyond an outdated Westphalian system of nation states. Historians will recall the past: John Maynard Keynes outlined in 1919 a post-war order which was utopian at the time, and dedicated his book to a future generation (Keynes 1919). It took yet another war with the loss of more than 50 million human lives to overcome the realist perceptions of the day and to implement his ideas on multilateralism and trade regulation. We must not wait for another shock before further developing and enhancing the legitimacy of the WTO. Indeed, the adoption of a two-tier system of binding dispute settlement, not at all anticipated in the Uruguay Round and held utterly utopian at the time, demonstrates that short of a major shock Members of the WTO and the political process are able to bring about a
proper paradigm shift. It is time to follow-up in reforming political decision-making with a
view to further enhance the overall legitimacy of the WTO.

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