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A Two-Tier Approach to WTO Decision Making

Thomas Cottier*

* Thomas Cottier is Professor of European and International Economic Law, Managing Director, World Trade Institute, University of Bern.

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Thomas Cottier*

World Trade Institute, University of Bern, Switzerland

I. Background

A. *Matching Substance–Structure Pairings*

Institutions, structures and procedures are not ends in themselves. They serve the attainment of substantive goals. Domestic political processes are shaped by constitutional law with a view to achieving and securing fundamental goals of justice of a given society; to some extent these goals are equally defined in constitutional law. The situation is not different in international law and organizations. Processes of decision-making serve the overall attainment of legitimate outcomes commensurate with the substantive goals of the organization. They provide the input legitimacy on the basis of which outputs and output legitimacy and thus the overall authority and respect for the institution is based. Structures and procedures thus need to be shaped in manner conducive to substantive goals. They need to match, and be in line with each other. They are mutually dependent. The authority and legitimacy of the institution relies, in other words, upon appropriate substance–structure pairings.¹ With the evolution of substance, structures and procedures equally need to change, adapt and evolve.

The World Trade Organization does not escape this fate. Members need to review the relationship of substance and structures and to assess whether, and how, it needs reform. As much as trade liberalization, appropriate structures are a means to an end: a means to successfully achieve the goals of the organization, depicted in the preambles of the various agreements. Following the tradition of GATT 1947, Member States recognize in the preamble to the Marrakesh Agreement Establishing the World Trade Organization that relations “in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while

* Professor of European and International Economic Law, Managing Director, World Trade Institute, University of Bern. I am indebted to Tetyana Payosova for research assistance and to Susan Kaplan for editorial improvements.

¹ Thomas Cottier, *Constitutional Trade Regulation in National and International Law: Structure-Substance Pairings*, in 8 *National Constitutions and International Economic Law* 409, 411 (Meinhard Hilf and Ernst-Ulrich Petersmann eds., 1993), Thomas Cottier, *Preparing for Structural Reform in the WTO*, 10 *JIEL* 497 (2007), reprinted in Davey W.J., Jackson J.H. eds. *The Future of International Economic Law*, 59-70 Oxford: Oxford University Press 2008.

allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking to protect and preserve the environment and to enhance the means of doing so in a manner consistent with their respective needs and concerns at different levels of economic development." More than any other text, the preamble recalls that the operation of international trade regulation is obliged to serve different and partly competing goals. It is required to strike a balance between different objectives and maximize the attainment of them. Inherently, this is complex, and institutions and processes need to be able to cope with these complexities. The authority of the WTO and thus of the multilateral trading systems depends upon it, and structures and procedures are of key importance.² The challenges are well-known. They are of a constitutional nature and entail institutional issues within the organization, as well as horizontal and vertical problems relating to other fields of international law and domestic law, respectively.

Within the WTO, the mutual relationship of the political and judicial process is at stake. The issue also includes the proper role and function of the Secretariat in both avenues. It covers the effectiveness of decision-making, the role of stakeholders, the relationship of trade rounds and regular activities in the process of law-making. Horizontal issues entail the problem of fragmentation and coherence in relation to other international organizations and domains of international law. Vertically, the relationship of WTO law and domestic law, the impact of WTO law in trade policy formulation, implementation and enforcement within Members are at the heart of the matter. It includes the relationship of WTO law to regionalism and preferential trade which is supposed to operate within the bounds of the multilateral framework but increasingly suffers from inflation and non-compliance with WTO rules. How can we achieve a better balance between law-making and judicial refinement of WTO law in and by case law? How can we achieve better policy coordination in addressing borderline issues among trade and other fields governed by other institutions, such as culture, human rights, investment protection, finance, monetary affairs, and development assistance? How do we make sure that WTO rules are taken seriously at home, by legislators and domestic courts alike? How can we, in turn, assure that rule-making responds to the needs for transparency, accountability and legitimacy? What are the possible legal tools to bring about a proper, well-balanced two-tier system? How can the WTO best be structured to cope with these issues and challenges?

It is striking that underlying institutional issues, despite these challenges, are not addressed by Members. A wide range of studies and reports, containing suggestions and food for thought, are essentially ignored in diplomacy and capitals.³ Calls of the International Law Association to establish a committee or working group dealing with institutional issues at the WTO have

² John H. Jackson observed in 1969: "In the long run, it may well be the machinery that is most important (i.e., the procedures), rather than the existence of any one or another specific rule of trade conduct." World Trade and the Law of GATT 788 (1969).

³ This is true both for the Sutherland Report and the Warwick Report: Sutherland Peter et al., *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, Report of the Consultative Board to the Director-General Supachai Panitchpakdi, Geneva 2004: WTO; *The Multilateral Trade Regime: Which Way Forward*, The Report of the First Warwick Commission, The University of Warwick 2007.

remained without official response.⁴ Within the Doha Development agenda, institutional issues have been discussed since 2001 merely in the context of reforming dispute settlement – perhaps the area where reform is least required. Some efforts were made to address the relationship to preferential agreements and to enhance transparency.⁵ Yet, disciplines were not substantially enhanced, and no common will to strengthen conditions for preferential trade was found.

Overall, the taboo may be explained by expediency and concerns that it may further delay, complicate and impede the conclusion of the current Doha Development Agenda under the 2005 Hong Kong Ministerial programme.⁶ Institutional reform may be seen as a further pretext to prolong the debate. It may even be seen as a means to filibuster the process. I do not purport that institutional change should be undertaken with a view to concluding the Agenda.⁷ It can and must be completed with the given set of institutional rules and procedures.

The main problems and hurdles are of a substantive nature in agriculture. They relate to classical issues of market access which GATT and the WTO have successfully dealt with before in a process of claims and responses. Reductions of tariffs and domestic measures entail substantial structural adjustment which takes time to negotiate and to implement. Fifty years of arrears in agriculture are difficult to address, and the process is bound to take time. The round has not yet lasted its decade. The thrust of the resulting negotiations focuses on agriculture, non-agricultural market access and services. The July 2008 package was limited to these areas and to certain rules.⁸ They will decide the fate of the Doha Agenda. These issues can and must be dealt with under current procedures.

In addition, the current agenda on rule-making is relatively modest. It is limited to implementation and marginal improvements of existing agreements in rules, intellectual property and trade facilitation. Aid for trade is not likely to result in a new legal framework but is likely to work with funding and donor programmes within and outside the WTO. More ambitious tasks, in particular negotiations on trade and investment and trade and competition were not taken up.

The difficulties in concluding the current Doha Development Agenda are often ascribed to outdated modes of negotiations. This is only partly true. While it is not the case for core concerns and the present agenda, it explains why more ambitious plans in the field of rule-making have failed. Some the issues inscribed into the Doha Agenda show structural

⁴ International Law Association, Toronto Conference (2006), International Trade Law, Seventh Report of the Committee, para 38(b), see: <http://www.ila-hq.org/download.cfm/docid/B8DE7062-B7A2-4BA3-92F38D46C61FA203>

⁵ Transparency Mechanism for Regional Trade Agreements, Council Decision of 14 December 2006 WT/L/671 (18 December 2006).

⁶ See Doha Work Programme WT/MIN(05)DEC (22 December 2005), Ministerial Conference Sixth Session, Hong Kong, 13-18 December 2005.

⁷ See also Peter Sutherland, The World Trade Organization at Ten Years, 4 World Trade Review 341, 353 (2005).

⁸ See http://www.wto.org/english/tratop_e/dda_e/meet08_texts_e.htm (14 February 2009).

deficiencies. The reform of the dispute settlement system came to a halt because it was addressed in isolation and without linking the debate to the political process of decision-making, which was left untouched. Negotiations on trade and environment (EGS) largely failed to expand beyond market access in disguise. They failed, despite an explicit mandate, to take into account services and matters pertaining to technology transfer and intellectual property rights.⁹ It is here that the structural limits of the present modes of negotiating separately on goods, services and intellectual property are faced. The WTO was not able to face complex issues which require the interface of different regulatory areas even within the jurisdiction of the Organization. The down-sizing of the Doha Agenda in rule-making is partly due to structural deficiencies.

These deficiencies need to be addressed with a view to taking up the challenges on the horizon of a post Doha agenda.¹⁰ Leftovers, unresolved under the current modes of operation, are likely to be carried over. The future is likely to entail complex issues beyond market access: the challenges of climate change mitigation and adaptation and of the financial crisis will require addressing these problems in their full complexity, possibly involving the reregulation of tariffs, production and process methods (PPMs), subsidies in industrial and agricultural products, and transfer of technologies. It is likely to encompass labour standards and social issues. It will probably involve new approaches to the regulation of financial services and cooperation with other international organizations, in particular the International Monetary Fund (IMF), the World Bank (IBRD) and the Bank of International Settlements (BIS). Trade and investment as well as trade and competition are likely to be included. The world will need to see more, not less, positive integration and rule-making in meeting these challenges.

The global recession of 2009 renders effectiveness of decision-making both in the political and judicial arena imperative in the coming years. It requires more sophistication in dealing with the constitutional, horizontal and vertical issues with which the WTO is confronted. Reasons, however, go beyond climate change and current events. They relate to profound underlying changes in the substance and context of international trade regulation and international economic relations.¹¹

B. The Changing Substance and Context of WTO Law

The days are long gone when the goals of GATT 1947 and the World Trade Organization – in light of extensive post World War II tariff-based protectionism – essentially focused on reducing border protection and enhancing market access for goods traded. True, trade liberalization remains at the heart of the toolbox of the WTO. Market access remains of

⁹ Ministerial Declaration, adopted 14 November 2001, Para. 31 and 32, WT/Min(01)/Dec/1 (20 November 2001).

¹⁰ See also: Joost Pauwelyn, *New Trade Politics for the 21st Century*, 11 *JIEL* 559 (2008) stressing the need for reform of the operating system after sixty years.

¹¹ See in particular: Debra Steger, *The Culture of the WTO: Why it needs to Change*, in: Davey W.J., Jackson J.H. eds. *The Future of International Economic Law*, 45-57 Oxford: Oxford University Press 2008; Debra Steger, *The Culture of the WTO: Why it needs to Change*, 10 *JIEL* 484, at 484 et seq. (2007).

paramount importance entailing both border and domestic measures. There was never a clear-cut distinction between the two. National treatment, from the very beginning, related to domestic regulation and conditions of competition on markets. Much of the present Doha Development Agenda still belongs to the classical domain of WTO law relating to border measures: non-agriculture market access negotiations (NAMA), reducing agricultural tariffs, improving disciplines on trade remedies, progressive expansion of national treatment in services under GATS, Aid for Trade, Special and Differential Treatment and Graduation and the General System of Preferences (GSP) focus on market access. The main difficulties in the negotiations are still faced in these classical areas of multilateral and bilateral negotiations on trade concessions. Yet, important changes have taken place. They amount to a parallel of what Wolfgang Friedman, in his time, termed the changing structure of international law when it moved from a law of coexistence to a law of cooperation under the aegis of the post-war United Nations Charter.¹²

Firstly, with the progressive reduction of tariffs and the ban on quantitative restrictions on agriculture, the emphasis of regulatory work has shifted to areas pertaining to domestic regulation and securing fair conditions for investment in many fields. Non-tariff barriers addressed in the agreements on Technical Barriers to Trade and on Phyto- and Phytosanitary Measures, standards on intellectual property in the TRIPS Agreement, domestic support in the Agreement on Agriculture, disciplines on subsidies in the Agreement on Subsidies and Countervailing Duties, domestic regulation in GATS, and government procurement all essentially serve as a benchmark for domestic law operating within the jurisdiction of Members. Much of the work in GATT since the Tokyo Round and in the Uruguay Round has been of a legislative, law-making, prescriptive nature. Future negotiations are likely to see the realm of rule-making reinforced. Clear distinctions between negative integration (prescribing limits to national sovereignty) and positive integration (prescribing what Members are obliged to do) have been blurred. But the latter is increasing. The challenges of climate change, work on various linkage issues beyond the environment, in particular human rights, the linkage to investment protection, intellectual property and the regulation of services, in particular financial services, will further enhance complex rule-making negotiations. These negotiations will need to take into account elements pertaining to different fields, combining goods, services and intellectual property alike.

Secondly, the advent of binding dispute settlement has changed the relationship of rule-making and adjudication. While panel and results could be blocked under GATT 1947, Members are today bound by DSU decisions, and subject to majority ruling. No longer is there a power of veto in dispute settlement. At the same time, decisions taken by dispute settlement are difficult to review in succeeding legislation. Albeit the instruments of authentic interpretation and of revision of treaty provisions formally exist, the tradition of working and negotiating in trade rounds extending on average to a decade practically exclude the possibility of legislative response.¹³ In fact, the Appellate Body has the last word on

¹² Wolfgang Friedmann, *The Changing Structure of International Law* 365-369 (1964).

¹³ For a detailed account see Claus-Dieter Ehlermann, Lothar Ehring, *Are WTO Decision-Making Procedures Adequate for Making, Revising, and Implementing Worldwide and 'Plurilateral' Rules?*, in E.U. Petersmann & James Harrison eds., *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance*, Oxford University Press 2005, p 497-502; Robert Wolfe, *Can the Trading System be Governed? Institutional Implications of the WTO's Suspended Animation*, *The Centre for*

interpreting the agreements within the WTO. In turn, this creates an imbalance between law-making and adjudication, placing a heavy responsibility on the case law in developing WTO law.

Thirdly, leadership has changed. GATT negotiations in 1947 and successive rounds were launched during the Cold War and led by the United States. The modes of negotiations were developed with a single power dominating the process and others following suit. Eventually, trade negotiations developed into a bipolar model with the growth and emergence of postwar Europe, negotiating at the table in Geneva with a single voice under a common commercial policy. The core of the Uruguay Round agreement was agreed by the US and the EC and eventually multilateralized. Others played an important, but not decisive role, at the time. This was even true for Japan and large developing countries. With the advent of emerging economies, the WTO today faces a multipolar world. Since the Ministerial Conference in Cancun, major decisions require the consent of a number of countries, including Brazil and India. The accession of China to the WTO in 2001 fundamentally altered the picture. It amounted to the most profound shift. While China still prefers a discrete voice in multilateral negotiations, it is evident that no major agreement can be achieved without its consent. The future accession of Russia will further change the political economy at the WTO. But things not only changed due to large players. Medium and small countries significantly increased their participation and seek to influence the process through ideas and coalition building. Efforts at capacity building gradually offer returns. Members increasingly operate in a context of flexible, interest-driven coalitions.¹⁴ They may belong to more than one grouping, depending on their interests. It is no coincidence that the WTO has seen a growing number of informal coalitions with coordination going beyond the former formula of groups of friends common in the Uruguay Round.

Fourthly, information technology has significantly improved the transparency of WTO work and documentation. Information about the WTO and its activities is broadly accessible and allows for much wider participation of non-governmental organizations in the life of the Organization.¹⁵ The practical role of non-governmental organizations and academic work has significantly enlarged the constituency of the WTO beyond traditional producer interests. More people than ever before take a keen interest in the work of the organization which, for many years, had been a matter of specialists and government officials working outside the limelight of international diplomacy and relations.

International Governance and Innovation, Working Papers No. 30 (September 2007), <http://www.cigionline.org> (visited 3.10.2008), Andreas Ziegler, Yves Bonzon, How to reform WTO decision-making? An Analysis of the Current Functioning of the Organization from the Perspectives of Efficiency and Legitimacy, NCCR Working Paper 2007/23 (May 2007).

¹⁴ For a survey of WTO coalitions see Robert Wolfe, Can the Trading System be Governed? Institutional Implications of the WTO's Suspended Animation, The Centre for International Governance and Innovation, Working Papers No. 30 (September 2007) p. 46, <http://www.cigionline.org> (visited 3.10.2008).

¹⁵ See Debra P. Steger (ed.), Mini-Symposium on Transparency in the WTO, 11 JIEL 705-826 (2008).

C. Incremental Change and Evolution

While the substance and context has evolved, the formal structure of the organization has largely remained the same as it was under GATT 1947, except for the WTO being a single undertaking and the fundamental structural changes undertaken in dispute settlement. The modes of daily business and routine of committees and the General Council have not substantially changed over the years. The mantra of a member-driven organization, a forum of negotiation rather than a multilateral body, still prevails.

The process of negotiations, organized in trade rounds, and appropriate to tariff reductions, has essentially remained the same since the inception of GATT in 1947. It is hardly framed by international agreements.¹⁶ The letter of Article XXVIII GATT on tariff negotiations was left behind a long time ago, and the cycles of multilateral trade negotiations developed their own customary modes and informal conventions. Detailed voting rules, based upon one-State one-vote in GATT 1947, were also included in the Marrakesh Agreement, but are not applied even when consensus fails. Specific structures of negotiations are established to meet the challenges of a particular round. The work is undertaken in formal and informal committees on the basis of consensus. Problems encountered are addressed informally, bilaterally, and discussed in ad hoc processes, guided by the chair of committees and negotiating groups, and the Director-General of the WTO. The green room process with tailor-made participation of usually some 25 ambassadors of interested and hand-picked Members is critical to bring about compromise. The process is flanked by informal talks and coordination among delegations in Geneva and support by the Secretariat and NGOs. The role of trade ministers largely depends upon initiatives by Members and the strategies of the acting Director-General. While mandatorily meeting on a biannual schedule, informal negotiations take place in between ministerial meetings, both within the WTO, and outside on the initiative of Members. Linkages between agenda items are made on the level of strategy, but rarely in operational terms. Negotiations are not structured in a manner conducive to interfacing different areas, such as goods and services, or intellectual property. The structure is characterized by organizational fragmentation and negotiations are essentially conducted in parallel.

While the basic modus operandi has not changed, GATT and the WTO have not been static. Changes have taken place over time and incrementally within the bounds of the existing structure. To some extent, diplomacy was able to adjust to new challenges. Bilateral tariff negotiations have been gradually replaced by multilateral approaches applying formula-based tariff reductions since the Tokyo Round and sectoral initiatives based upon critical mass since the Uruguay Round. A comparable evolution may be observed in negotiations on services which increasingly turn to sectoral agreements and critical mass. Negotiations relating to rule-making have been conducted with structures originally designed for negotiating market access concessions. Up to the Uruguay Round, this avenue was successful. It brought about substantive disciplines with GATT and the TRIPS Agreement and successfully created a

¹⁶ There is a wide literature on the political functioning of GATT and the WTO, for a survey see Thuo Gathii, *The High Stakes of WTO Reform: Behind the Scenes at the WTO: the Real World of Trade Negotiations*, 104 *Michigan Law Review* 1361-1386 (2006), reviewing Fatoumata Jawara & Aileen Kwa, *Behind the Scenes at the WTO. The Real World of Trade Negotiations – The Lessons of Cancun*, London: Zed Books 2004; Robert Wolfe, *Informal Political Engagement in the WTO: Are Mini-Ministerials a Good Idea?*, in: Curtis J.M & Ciuriak Dan eds., *Trade Policy Research 2004*, Canada 27-91 (2004).

number of side agreements under GATT. Importantly, the possibility to undertake legislative work in between rounds has been used. The agreements on telecommunication, financial services and information technology, following the conclusion of the Uruguay Round, are successful examples of completing an agenda set by the Round. The revision of the TRIPS Agreement, following the Doha Declaration on Health and a corresponding waiver decision is another example in point. Decisions on waivers are taken independently of the agenda of a particular round. Yet, the pattern does not show structures of a stream of constantly ongoing work, comparable to the legislative process in other fora. The WTO is far from a proper legislative process of deliberation and decision-making comparable to law-making processes in domestic law. It is rather the exception to the rule. And even auxiliary instruments, in particular, authentic interpretation have not been used, in particular in response to decisions in dispute settlement.

Importantly, however, the major reform of the dispute settlement system remained without impact and implications on the working modes of the political process. It resulted in a new relationship of political and judicial processes. While dispute settlement evolved, negotiations stalled. Some argued that the resulting imbalance should translate into a return to the former non-binding dispute settlement. The impact on sovereignty and the prerogatives of domestic legislators is not supported by weak legitimacy of the WTO.¹⁷ Others, including this author, argued in favour of strengthening multilateralism and the political process instead. A balance should not be achieved by reducing the impact of dispute settlement, but by enhancing the potential of legislative action and response.¹⁸ None of this has happened. Further refining dispute settlement, in particular the creation of professional chairs, a college of standing panelists to draw from, the possibility to remand cases in refining the relationship of panels and the Appellate Body, have not found sufficient support. Rather, a new balance is sought outside the Organization. Legislators or domestic courts continue to deny the potential of direct effect and of a more nuanced theory of justiciability. Even judicial respect and implementation of specific rulings of the DSU are barred from entering and affecting domestic law in the United States and the European Union, in particular. The imbalance of political process and judicial review translated essentially and in practical terms into a return to a dualist school, delinking further international and domestic law.¹⁹ Legalization at the WTO is met with de-legalization of international law in domestic fora.

¹⁷ In particular Claude Barfield, *Free Trade, Sovereignty, Democracy*, Washington: The AEI Press 2001.

¹⁸ Claus-Dieter Ehlermann, Lothar Ehring, *Are WTO Decision-Making Procedures Adequate for Making, Revising, and Implementing Worldwide and 'Plurilateral' Rules?*, in E.U. Petersmann & James Harrison eds., *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance*, Oxford University Press 2005, p 497-502; Thomas Cottier, Satoko Takenoshita, *The Balance of Power in WTO Decision-making: Towards Weighted Voting in Legislative Response*, 58 *Aussenwirtschaft* 171 (2003); *ibid.*, *Decision-making and the Balance of Powers in WTO Negotiations: Towards Supplementary Weighted Voting*, in Griller St. ed. *At the Crossroads: The World Trading System and the Doha Round*, Springer: Vienna 2007 p. 181-231.

¹⁹ This in particular can be observed in the case of the European Court of Justice which, unlike US Courts, is not legally barred from applying WTO law in a domestic context; see Geert A Zonnekeyn, *Direct Effect of WTO Law*, London: Cameron May 2008.

In conclusion, the structures of GATT and the WTO were shaped at different times, and for a different agenda. They were shaped for a process of periodic tariff reductions and not law-making over time. They adjusted incrementally, but the framework has reached its limits. New structural elements, combining past experience and success with regulatory challenges ahead need to evolve. The debate, which will be taking place after the completion of the Doha Agenda, calls for preparation and discussion. The suggestion is to work towards a two-tier approach to negotiations and rule-making, incrementally building upon past experience and constitutional thought.

II. Towards a Two-Tier Approach

A. Rounds and Permanent Fora of Negotiations

The tradition and success of negotiating tariff concessions and reducing levels of domestic support shows that trade rounds have been able to create the necessary momentum and political pressure. The same is likely to apply to concessions exchanged in the field of services, albeit no long-term experience exists so far. Both areas are able to respond to diverging needs of progressive liberalization and individual levels of commitments. Processes based upon specific requests and offers depend upon a framework which allows going in cycles. Tariff and services negotiations conceived as an ongoing process, short of deadlines and moments of intensive pressure, could hardly succeed. They depend upon give and take, and the possibility to achieve overall package deals in terms of benefits and concessions made in what essentially has remained a mercantilist approach.

It is the shift to negotiating disciplines relating to domestic regulation in WTO law which calls for a review of the negotiating process. These matters differ from individualized concessions. Rules are inherently uniform for all Members alike, independent of levels of social and economic development and market size. It is much more difficult to accommodate individualized needs in setting international standards. These matters are complex, evolve at different speeds, and induce different levels of interest on the part of Members. It is here that an interest in variable geometry of rights and obligations and membership to instruments arises. Rule-making in WTO law thus should be shaped differently from the process of claims and response in tariff and non-tariff concessions. Ideally, these matters should be dealt with under the agenda of ongoing and continuous work undertaken in different standing fora of the organization.

The question, of course, is whether a dual approach could work or whether ongoing legislation and rule-making inherently depends upon pressure and the outcomes of market access negotiations. Would it have been possible to conclude the TRIPS Agreement, or the basic framework of GATS and the TRIPS Agreement outside the Uruguay Round? While there were few operational linkages, it is evident that they were essentially dependent upon the overall dynamics of the Round. Thus, it is hardly possible to build a two-tier approach upon a complete distinction of concessions, on the one hand, and rule-making on the other hand. We need to take into account the political importance of the agenda item. Basic rule-making, setting the scene and making basic decisions cannot be dissociated from the dynamics of trade rounds. Negotiations on framework agreements, setting the stage for decades to come, are bound to be undertaken within the momentum and drive of trade rounds. How can we combine the momentum of trade rounds, the climaxes they require, and the need for ongoing rule-making? How can we assure that basic principles, rules, rights and

obligations are shared by all Members as the core of multilateralism while allowing for differentiation, graduation of legal standards, commensurate with levels of social and economic development, and largely diverging economic interests among Members? How do we avoid divergences further increasing, as some will be bound and contained by disciplines curbing protectionism while other opt out and are eventually left behind. How can we avoid the situation that those assuming fewer obligations are taken seriously? What can we learn from past experience?

The definition and allocation of different regulatory fields to different regulatory levels with possibly diverging modes of decision-making is a major challenge. Some may argue that the task is futile, as Members will never be able to agree, in particular in a multipolar world with traditions of liberal democracy no longer able to impose its ideals and tenets. Yet, these objections cannot and must not prevent academic discourse on the matter. It is only when a number of viable options are on the table that diplomacy may be able to take the matter up and find ingenious compromises during long nights of negotiations. We have not explored these options. Some suggestions may be put forward at this stage to stimulate debate.

B. Constitutional and Secondary Rules

WTO law, in line with the tenets of public international law and the law of treaties, so far operates with a single type of international agreement. Whether it is the Marrakesh Agreement establishing the organization, whether it is the GATT with its profound and fundamental principles of non-discrimination, whether it the framework of GATS, or the detailed rules of the TRIPS Agreement, and whether it is an understanding or an agreement implementing particular disciplines relating to GATT, whether it is tariff or a services schedule, they all are of the same standing and legal nature.²⁰ WTO law does not distinguish different and hierarchical sources of law. They all emerge essentially in the same process, and the mutual relationship of the agreements is a horizontal and often unclear one. Likewise, all the instruments alike enjoy the same status in domestic law forming international agreements of the same type, whether they are dealt with as treaties are, or like sometimes the former GATT, as executive agreements.

The time has come to learn from distinctions of primary and secondary sources of law. While primary or constitutional rules setting out basic obligations and the framework for specialized regimes need to be set in an overall bargaining process having the political momentum of a round, the implementation of agendas agreed could be left to a secondary process in between rounds. The distinction is firmly established in domestic law with basic distinctions of constitutional law, legislation and executive orders and administrative regulation. It is well established in EC law with the distinction of primary law and secondary rules of regulations and directives. Different sources of law allow the allocation of different modes of decision-making. In international law, the concept of secondary rules is normally used for decisions and acts adopted by the bodies of an international organization. The same is true for the WTO.²¹ The concept is used here in a different way. It stands for the proposition of introducing different categories of international agreements within the constitutional

²⁰ Petros C. Mavroidis, No Outsourcing of Law? WTO Law as Practiced by WTO Courts, 102 AJIL 421, 427 (2008).

²¹ Ibid. at 429.

framework of multilateral trading system, without necessarily turning the organization into a body of supranational law. The approach allows reducing high-level negotiations to core elements and issues within a package deal, and leaving other issues to subsequent and well-framed negotiations.

Basic agreements set out fundamental rights and obligations of a constitutional nature. They are essential and binding on all Members alike. Today, they comprise the Agreement establishing the WTO, the GATT 1994, GATS and TRIPS. Tomorrow, it could be limited to a single constitutional WTO Agreement comprising the structure and organization; different sources of law and respective modes of decision-making, basic substantive and procedural obligations, in particular non-discrimination, basic disciplines, exceptions and transparency requirements. The basic agreement is binding upon all Members of the WTO alike. Modes to amend the agreement will assure that it remains a truly multilateral instrument and a single undertaking. Modulations among Members, currently pursued by means of largely ineffective Special and Differential Treatment (S&D) could be effected by means of graduation, i.e. linking the operation of rules to economic thresholds and indicators of competitiveness of a Member or even of specific industries.²²

Specific instruments, on the other hand, could be shaped in the form of secondary rules, subject to the constitutional agreement, and not necessarily binding upon all Members alike. Today they comprise Members' schedules and plurilateral agreements. Tomorrow, they could extend to agreements and understandings implementing particular concepts set out in GATT 1994. It is here that the single undertaking could be left behind and variable geometry could take over. Combinations of single undertaking and variable geometry are conceivable.²³ Solutions may be tailor-made, sometimes binding all Members, sometimes not. Under a new WTO Agreement, different categories of instruments could be created and linked to specific procedures and membership requirements, ranging from single undertaking to bilateral, plurilateral or unilateral obligations.

Importantly, the WTO de facto is not devoid of such structures and experiences accrued in the process of incremental change. The examples of negotiations on financial services and telecommunication, mentioned above, are to the point. While these negotiations were perceived as leftover issues, they could have been prospectively designed as a matter based upon the results achieved in the Uruguay Round. The GATS Agreement called for subsequent negotiations on a number of issues, in particular subsidies and safeguards. Efforts might have been more successful if they could have been deliberately pursued on the basis of variable geometry. The elaboration of new rules on access to essential drugs and the amendment of the TRIPS Agreement can be perceived as an exercise in secondary legislation and treaty reform within a given framework. It is worth considering whether it was necessary to undertake the effort as a matter for all Members, or whether it would be sufficient to include those most concerned. Finally, we note that the process of accession of new Members follows the route of individualized commitments. These traditions could form the basis of a new legislative approach, setting out different and distinct avenues of partly shared and partly distinct rights and obligations among Members. It is conceivable to agree on core rights and obligations, and

²² Thomas Cottier, *From Progressive Liberalization to Progressive Regulation*, 9 JIEL 779 (2006)

²³ Pierre Sauvé, Craig VanGrasstek, *The consistency of WTO rules: can the single undertaking be squared with variable geometry?*, 9 JIEL 837, at 851 et seq (2006).

leave other to variable geometry. For example, the TRIPS Agreement could have been limited to fundamental rules, but have left the elaboration of more specific obligations to a longer term and better informed process. It would have offered the possibility to bring about graduation instead of uniform rules applicable to all countries alike, independently of levels of social and economic development. In the future, sectoral negotiations in services, in investment and competition could be conducted on such a basis.

It is submitted that a two-tier approach built upon framework agreements and implementing rule-making would enhance the quality of well-informed outcomes and results. It would better serve the needs of learning processes of governments, including those of smaller countries and developing countries which have been unable to follow a large and detailed agenda of negotiations. It would allow graduation and the needs of developing countries to be taken into account. In retrospect, a study could be made to determine whether negotiations on GATT side-agreements, implementing specific provisions ever since the Kennedy Round, did not contain elements of secondary legislation. They were bound to stay within the framework of GATT. They were not binding upon all Members, but allowed key problems among those mainly concerned to be addressed. The codes may indicate that the idea of secondary legislation does not exclude variable geometry when it comes to follow-up and detailed rules on a subject matter. It allows for more graduation than the monolithic approach of the Uruguay Round and the Doha Agenda.

C. Linking by MFN and Graduation

Fundamental rules in the constitutional framework will offer the basis for linking results achieved in secondary rules. Importantly, the obligation to grant most-favoured-nation (MFN) treatment would apply to all Members, whether or not signatory to a particular rule of secondary order. The basic philosophy of the multilateral system obliges Members to grant MFN to all other Members alike, irrespective of whether they adhere to a particular instrument of secondary order. The principle implies free-riding which needs to be addressed in defining the critical mass of membership required.²⁴

Secondary rules may leave others aside, while granting rights to all third parties representing smaller trade flows in a particular field. Not committing these countries is tolerable from a point of view of conditions of competition. Yet, once outsiders reach competitiveness, mechanisms need to be designed to include them. It is here that the concept of graduation is required. While a Member may not form part of an agreement in the first place, it may eventually be obliged to join if certain conditions are met in real economy terms. Members of the multilateral system therefore are obliged to potentially join. These prospects should give them the right to determine whether they want to take part in the negotiations in the first place or be prepared eventually to accept the results. The situation is thus similar to the tradition of plurilateral agreements, in particular the GPA, yet combined with graduation. Yet, no longer would a Member be entitled to benefit from rights without eventually joining in when competitiveness is reached. This flows from the logic and experience of a truly multilateral system, as opposed to preferential agreements and bilateralism. The approach of working with thresholds defining obligations to join could overcome the inherent weaknesses of variable geometry witnessed under the Tokyo Round Codes.

²⁴ Manfred Elsig, Learning from Sutherland and Warwick: With a little Help From the Secretariat Using Critical Mass [in this volume: check]

D. Allocating Different Modes of Decision-Making

The two-tier approach is meaningful only if it is linked to differentiation in decision-making and adoption of instruments. There is no compelling need to apply the very same rules on decision-making to all matters of WTO negotiations and law. It should be recalled that fundamental reliance upon consensus in dispute settlement – a specific mode of decision-making – no longer applies in specific disputes and the process of assessing rights and obligations between two or more Members.

It is thus conceivable to distinguish modes of decision-making in relation to primary and to secondary rules. Primary rules could continue to operate under a rigid principle of consensus, or alternatively with consensus-minus or weighted voting with a particular quorum required, building upon existing WTO provisions. Secondary rules could be subject to alternative means, such as consensus based upon critical mass or weighted voting. In some instances, voting on the basis of one vote one State could be feasible, e.g. within an executive committee. The two-tier approach offers the potential to adopt varied strategies of decision-making on the level of basic obligations and of secondary norms. It also allows the adoption of different variants even within these basic categories. We should no longer think in terms of a single approach to decision-making. Working with different modes will facilitate finding future agreement on these most sensitive issues.

1. CONSENSUS

The principles of consensus emerged as the main principle of agreement in WTO, as well as in other international fora. It generally rules the process in international organizations.²⁵ The principle relies upon equal representation of Members under the principle of sovereign equality. States see their interests best defended by consensus diplomacy. It has been most suitable for trade rounds and package deals. Of course, consensus does not imply that Members are of equal importance and weight. Consensus implies an informal system of weighted voting, as powerful members are able to block consensus more easily than small and medium-sized countries. In essence, it allows large players to block decisions in political processes while the same remedy is available to others only at great political cost. It purports powers which in reality do not exist for most. The recourse to alleged democratic legitimacy of consensus therefore is merely formal and does not offer a true and transparent account of power relations.

In decision-making the crucial question is whether large WTO Members need to retain veto powers in order to work within the Organization. More precisely, the question is whether single large Members need to be in a position to block the adoption of a particular decision. Realists certainly would say so, as control of international organizations is one of the main motivations for hegemonial powers to participate. A debate should take place on whether this is equally true in a multipolar world. Blocking decisions today comes at high political cost and may no longer be a tempting option. Successful decision-making requires coalitions, and blocking may thus be limited to such coalitions, but not done by a single Member. Thus, the

²⁵ This is not unique to the WTO, see Erica Gould, When do IO Voting Rules Matter?: A comparative Analysis of International Organizations' Formal Decision-Making Rules, draft paper November 2007 (on file with author) (summarizing that formal rules are applied to unimportant matters only). [seek permission to include – e-mail with request was sent].

United States and the European Union jointly, or Brazil and India or China jointly, may be able to block, but none of them could do so in their own right. In positive terms, a principle of consensus-minus could become the core feature of a reasonable stable system in a multipolar world. Consensus-minus will be highly contentious, and its use may be limited to issues of secondary legislation discussed above. While trade rounds and negotiations of framework agreements may continue to depend upon consensus, consensus-minus may apply failing consensus in matters of implementing framework agreements and programmes adopted. Again, it is possible to modulate consensus rules for primary and secondary rules, or even within these categories. A new balance for the principle of consensus-minus in dispute settlement could thus be found. Both are forms of decision-making operating on a secondary level and are subject to fundamental agreement and consensus on underlying treaties. Consensus-minus may furthermore be positively formalized by adopting a system of weighted voting.

2. WEIGHTED VOTING

Weighted voting reflects the past experience in WTO and other international organizations that formal voting on the basis of equal sovereignty and equal voting rights has not taken place in rule-making. Sovereign equality does not sufficiently respond to existing power relations. If formal voting is to be applied and transparency achieved, voting rights therefore should be shaped in a manner that appropriately reflects the relative importance of the Member within the multilateral system. The principle was widely applied in international organizations in the postwar architecture, way beyond Bretton Woods.²⁶ Studies show how the principle can be formalized in terms of weighted voting, allocating voting rights on the basis of trade shares, GDP, dependence upon foreign trade and population size.²⁷ Simulations show a balanced allocation of voting rights and powers to industrialized, emerging and developing countries. In practical terms, it implements the principle of consensus-minus, as major powers are not able to block the adoption of a decision on their own. And since decision-making in the WTO is generally a matter of coalition building, weighted voting also gives voice to medium-sized and smaller countries. It is wrong to reject weighted voting simply based upon past experience in the Bretton Woods system.²⁸ There are alternatives

²⁶ See Stephan Zamora, Voting in International Economic Organizations, 74 AJIL 566 (1980), cf. also Debbie A. Efrain, Sovereign (In)equality in International Organizations, 34 Legal Aspects of International Organizations (2000).

²⁷ Thomas Cottier, Satoko Takenoshita, The Balance of Power in WTO Decision-making: Towards Weighted Voting in Legislative Response, 58 Aussenwirtschaft 171 (2003); *ibid.*, Decision-making and the Balance of Powers in WTO Negotiations: Towards Supplementary Weighted Voting, in Griller St. ed. At the Crossroads: The World Trading System and the Doha Round, Springer: Vienna 2007 p. 181-231.

²⁸ Cf. Hector R. Torres, Reforming the International Monetary Fund – Why its Legitimacy is at Stake, in: Davey W.J., Jackson J.H. eds. The Future of International Economic Law, 5-22 Oxford: Oxford University Press 2008; Frank J. Garcia, Global Justice and the Bretton Woods Institutions, *id.*, 23-43, Ariel Buira, Should the Governance of the IMF be Reformed?, IMF Book Forum, February 5, 2004, <http://www.imf.org/external/np/tr/2004/pdf/buira.pdf> (visited 18.9. 2008); Richard N. Cooper, Edwin M Truman, The IMF Quota Formula: Linchpin of Fund Reform, Policy Briefs in International Economics, No. PB07-1, February 2007, <http://www.iie.com/publications/pb/pb07-1.pdf> (visited 18.9.2008).

available which render the system reasonably attractive and equitable to all Members alike. Weighted voting can be applied in matters pertaining to primary rules as well as to secondary rules. It also can be used in adopting instruments of limited membership and thus complements the critical mass approach.

Weighted voting still is generally considered as an option outside the box, and lacking the potential to be implemented.²⁹ Yet, these conclusions have been drawn without careful examination of modalities and the potential to modulate the principle for primary and secondary sources. Political scientists, moreover, should look into the benefits of the system for governments balancing competing interests. Results adopted on the basis of weighted voting and thus in a transparent manner allow governments to concede defeat at home and protect them from pressures to block consensus.

3. CRITICAL MASS

Critical mass is an approach to bring about variable geometry on the level of secondary rules to which not all Members need to adhere. Members may agree to negotiate a particular legal obligation provided that the main markets and thus the main partners are included.³⁰ The inclusion of key players is a prerequisite while other may abstain. We recall that the results of such negotiations are subject to MFN; thus all Members of the WTO benefit, even though they do not participate in the agreement and are not subject to obligations. The past experience with sectoral initiatives in tariff reductions in the Uruguay Round shows that this certainly is a viable avenue for addressing trade concessions. As long as the main markets are included, free-riding by those absent the agreement is a lesser burden than the risk of failing to achieve agreement under the consensus rule.

The impact of critical mass in rule-making requires careful consideration. There is a risk of ending up with too wide a variety of asymmetric rights and obligations. It may also encourage parties to abstain, thus avoiding the costs and benefits of locking-in, potentially further widening the gap between those subject, and those not subject, to international disciplines fostering competition. It should be recalled that the main incentive to opt for a single undertaking in the Uruguay Round was to avoid the disadvantages of variable geometry inherent to the code approach of the Kennedy and Tokyo Rounds. The concern could be addressed by defining those areas where critical mass negotiations may take place and those that would be excluded. Again, the two-tier approach allows different modes of decision-making to be combined and an overall balance to be sought which would render the overall system more flexible.

E. Institutional Issues

Ever since their inception, GATT and the WTO have worked with flat hierarchies, reflecting their single form of legal undertakings. All Members are represented in the General Council

²⁹ E.g. Peter Norgaard Pederson, *The WTO Decision-Making Process and Internal Transparency*, 5 *World Trade Review* 103, 131 (2006), Peter Sutherland, *The World Trade Organization at Ten Years*, 4 *World Trade Review* 341-354 (2005).

³⁰ Manfred Elsig, *Learning from Sutherland and Warwick: With a little Help From the Secretariat Using Critical Mass* [in this volume: check].

and Committees. Unlike most other international organizations, the WTO does not have a formal Executive or Steering Committee with appointed and rotating membership. The steering function is assumed by informal green-room processes under the guidance of the Director-General, and by informal conferences of ministers and high officials from capitals.³¹ The informal mode renders access to negotiations a volatile affair except for the main powers. Small and even medium-sized economies, let alone least developed countries, risk being sidelined.³² Members are forced to work within a system of flexible coalitions. The system has worked reasonably well albeit it is criticized for lacking transparency and accountability. Members and domestic constituencies face frustration when omitted from the informal inner circles and excluded from negotiations.

Efforts at institutional reform could be built upon the two-tier approach and the availability of a number of decision-making modes as discussed above. Different bodies may operate on the basis of different decision-making processes. Some may continue to operate on the basis of consensus, or consensus-minus (as in the DSB). Some may be subject to weighted voting. Others may be suited to operate under a one Member one vote model. The powers of the Ministerial Meeting, the Council, and the committee could be shaped accordingly. The two-tier approach would allow examination of the potential role of a parliamentary assembly and the assignment of specific functions not only of an advisory nature, but also possibly entailing decision-making powers in an effort to enhance the democratic legitimacy of the organization.³³ It would be conceivable to establish a Consultative Committee, or an Executive Committee or Council, which includes major powers and represents other Members on the basis of their size, geography and level of development based on rotating membership fixed for a number of years.³⁴ The Executive Committee would need to ensure that all pertinent interests and regions have a voice decision-making. It would be composed to include all regions and levels of development, including least-developed Members. Criticism voiced about former efforts to create a steering body (G-18) and the difficulties in bringing about effective representation need to be taken into account.³⁵ The Executive Council could be

³¹ Robert Wolfe, Can the Trading System be Governed? Institutional Implications of the WTO's Suspended Animation, The Centre for International Governance and Innovation, Working Papers No. 30 (September 2007) p. 46, <http://www.cigionline.org> (visited 3.10.2008).

³² Oxfam, Institutional Reform of the WTO, Oxfam Great Britain Discussion Paper, March 2000, http://www.oxfam.org.uk/resources/policy/trade/downloads/wto_reform.rtf (visited 9.10.2008)

³³ See Markus Krajewski, Democratic Governance as an Emerging Principle of International Economic Law, Society of International Law Inaugural Conference Geneva, 15-17 July 2008, Panel XI: Legitimacy, Human Rights and Sustainable Development, <http://www.sielnet.org/Default.aspx?pageId=160208> (visited 18.9.2008).

³⁴ A Consultative Board is suggested by Richard Blackhurst and David Hartridge, Improving the Capacity of WTO Institutions to Fulfill their Mandate, in Petersmann E.U. & Harrison J. eds. Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance, Oxford: Oxford University Press 454-467 (2005), 7 JIEL 705 (2004); Jeffrey Schott, Jayashree Watal, Decision-making in the WTO, in Schott J. ed. The WTO After Seattle, Washington DC Institute for International Economics 2000.

³⁵ See Kent Jones, Regionalism and the Problem of Representation in the WTO, September 19, 2007 (on file with author) discussing underlying agency problems.

responsible for preparing major procedural decisions to be taken by the General Council and the Ministerial Meeting. It would decide upon issues relating to the agenda of an ongoing Round, work on secondary legislation and housekeeping matters, including appointment of key personnel of the Secretariat. A number of matters may be allocated to the Executive Council for final determination; others may be subject to referendum in the General Council. In other functions, it may be limited to providing advice and consultation. Decision-making would be by consensus, but subject to voting, which on this level would allocate each Member one voice of equal importance. Comparative studies on international organizations may assist in learning from the experience of other organizations which show a much higher level of organization and structure than the WTO.

Finally, institutional reform should also address the status and role of the Secretariat.³⁶ Again, the two-tier approach allows functions to be defined in more specific terms. While it may continue to work under established modes and perceptions in some areas, its role in others may be defined more precisely commensurate with the legal framework and instrument at hand. Both in the process of law-making and that of dispute settlement, its functions could entail limited powers to take initiatives and defend the common concern of the multilateral trading system.

III. The Way Forward

A. Formal or Incremental Reform?

The GATT and the WTO were built upon experience. The 1947 Agreement was modeled after bilateral trade agreements of the United States. It provided the basis for an incremental evolution both of the negotiating process and of dispute settlement within a broadly defined framework. The latter emerged in practice and was codified for the first time only in 1979. Decision-making and the structures of rounds evolved in diplomacy and do not find expression in binding legal documents. The powers of the Secretariat depend much more on its expertise and skills than statutorily defined functions and tasks. Perhaps the flexibility offered in past and present structures, and the ease of developing customary practices, amounts to the great strength of the Organization. Its success in bringing down tariff and non-tariff barriers may well be assigned to a structure which allows for trial and error. We are faced with the question whether reform should continue to take place under this philosophy. Is it possible to absorb the changing structure of international economic law by changing practices under the current WTO Agreements? Suggestions to work with an informal directorate, critical mass, restrictions on veto practices in the tradition of a Luxembourg compromise, enhanced recourse to authentic interpretation of existing agreements, enhancing informal initiatives of the Secretariat, building better relations with other international organizations in daily life, all seem to belong to a philosophy building upon incremental change.

³⁶ The role of the Secretariat is explored by Manfred Elsig, *The World Trade Organizations' Bureaucrats: Runaway Agents or Masters' Servants*, NCCR Working Paper No 2007/19, and Robert E. Hudec, *The Role of the GATT Secretariat in the Evolution of the WTO Dispute Settlement Procedure*, in Bhagwati J. & Hirsch M. eds., *The Uruguay Round and Beyond: Essays in Honour of Arthur Dunkel*, 101-120, Springer 1998. Cf. also John Odell, *Chairing a WTO Negotiation*, 8 *JIEL* 425-448 (2005).

Or, have we reached the limits in the quest for appropriate structure–substance pairings? Do we need formal reform? Should decision-making be formally reviewed? Should an executive body be established? Should the powers and role of the Secretariat be better defined? Should relations to other international organizations be more formally defined? What measures should be taken to further enhance the transparency of the negotiating process? What is necessary to render legislative response to a dispute settlement decision a viable option, contributing to a better sharing of responsibilities between the political and the judicial process?

Given the difficulties in reaching agreement, the informal avenue is attractive.³⁷ On the other hand, a deliberate effort to change the rules provides more transparency and is better placed to restore and enhance the legitimacy of the organization.³⁸ Debra Steger concludes that the “WTO needs major surgery in order to respond effectively to the new political realities in the international economic system. The WTO is not the old GATT, and members should abandon the mantras, myths and misunderstandings that are no longer relevant”.³⁹ The idea of a two-tier approach, allocating diverging models of decision-making allows a wide range of options to be explored and offers a critical mass for negotiations and compromise. Whether a formal or informal route is to be pursued, it is important to explore possible options in the first place. Foremost, it is important to discuss the issues above and to define the goals of a reform. Whether, in the end, it is implemented formally or incrementally, is a secondary issue. It may be possible to develop a two-tier approach within the existing framework, and the basis of diplomatic convention and practice. Yet, given the impact of its rules on daily life, issues of legitimacy, transparency and accountability are key and need to be taken into account in designing an appropriate path for reform. It will be important to respond to these needs in reforming and reshaping decision-making processes.

B. Defining Goals of Reform

Whatever avenue, or combination of avenues, is chosen, a debate on goals of reform is imperative in order to secure commonly agreed directions for the multilateral system in a globalizing and multipolar world. It is not a matter of redesigning institutions in the first place. We need to define goals as to input legitimacy in terms of transparency and representation in the decision-making process. The goals set forth in the preamble of the WTO will carry today in times of globalization. However, they need support by more specific targets. Answers to substance–structure pairings will depend on more specific answers given

³⁷ Such as the conclusion by Claus-Dieter Ehlermann, Lothar Ehring, Are WTO Decision-Making Procedures Adequate for Making, Revising, and Implementing Worldwide and ‘Plurilateral’ Rules?, in E.U. Petersmann & James Harrison eds., *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance*, Oxford University Press 2005, p 497-502.

³⁸ Joost Pauwelyn, *New Trade Politics for the 21st Century*, 11 *JIEL* 559 (2008); Markus Krajewski, *Democratic Governance as an Emerging Principle of International Economic Law*, Society of International Law Inaugural Conference Geneva, 15-17 July 2008, Panel XI: Legitimacy, Human Rights and Sustainable Development, <http://www.sielnet.org/Default.aspx?pageId=160208> (visited 18.9.2008).

³⁹ Debra Steger, *The Culture of the WTO: Why it needs to Change*, in: Davey W.J., Jackson J.H. eds. *The Future of International Economic Law*, 45-57, at 57 Oxford: Oxford University Press 2008; Debra Steger, *The Culture of the WTO: Why it needs to Change*, 10 *JIEL* 483, at 495 (2007).

to a host of questions which need to be raised and discussed: how to bring about and secure output legitimacy of rules? What is the role of WTO in a perception of multilayered governance, the need to offer checks and balances against protectionism while allowing for appropriate policy space? To what extent should the WTO enjoy enhanced autonomy in supporting these goals? How does one properly define the relationship of multilateralism and preferential agreements? How does one properly define the relationship with other organizations in horizontal relations? How does one define the relationship to domestic law? Should it be entirely left to constitutional law, or is there a shared interest in finding common ground within a doctrine of multilayered governance? How does one redefine sovereignty to the benefit of people?⁴⁰ These are basic questions. They need to be asked. People will have different responses, and so they will adopt different but informed attitudes to institutional reform. We cannot expect common perceptions but only a shared understanding that the quest for appropriate substance–structure pairings cannot take place without assessing and defining the fundamental goals which the process of reform should achieve one way or the other.

C. Launching the Debate

The ideas sketched out above merely indicate that there is room to think about alternative options. All of this requires in-depth studies of options and foremost, an intensive debate. The debate should clearly be delinked from the fate of the Doha Development Agenda. It is not appropriate to change the rules of the game while gambling is going on. The debate should focus on post-Doha, whether a given success, or a failure, as the case may be. The problems touched upon exist either way, perhaps not to the same degree. A successful conclusion will create the impetus to improve the multilateral system. A failure will create the need to make efforts to save it. The underlying problems remain common to both outcomes.

It is suggested that further debate on the potential and options for implicit and explicit institutional reform primarily takes place in academia and that this is used to assist in preparing discussions among governments. At the WTO, it would be feasible to create a Standing Consultative Committee which bridges academia, NGOs, governments and the Secretariat, essentially assuming the role of a think tank. In due course, and with a view to preparing post-Doha structures, a Standing WTO Committee on Legal and Institutional Affairs should be set up, building upon the lost traditions of the FOG Committee during the Uruguay Round. The calls of the International Law Association to create such a Committee should be taken seriously by capitals. The present state of affairs, the lack of attention and interest paid to issues of decision-making, and structures of decision-making outside the field of dispute settlement is one of the main factors explaining the lack of options sufficiently elaborated and ready for debate.

⁴⁰ See John H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law*, Cambridge: Cambridge University Press 2006.