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Chaisse / Balmelli Essays on the Future of the WTO - I

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Essays on the Future of the World Trade Organization

Volume I

Policies and Legal Issues

Edited by

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Volume I
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JULIEN CHAISSE
TIZIANO BALMELLI

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Abstracts

Volume I
Policies and Legal Issues

Can IBSAC emerge as a Major Bargaining Coalition at WTO Negotiations?

Debashis Chakraborty / Pritam Banerjee / Dipankar Sengupta

India, Brazil, South Africa, China (IBSAC) possess the potential to become the drivers of global economic growth in the coming period and can play a significant role at the multilateral negotiations for protecting developing country interests. IBSAC has earlier come closer to each other at the multilateral trade forum under the negotiating umbrella of developing country forum G-20 and have negotiated jointly on several occasions. Analyzing the current profile of the IBSAC countries, the paper argues that the future negotiating agenda of the four countries would be a function of their economic structure. Over the last decade, China has rapidly enhanced its global market share apart from substantially reforming its tariff schedule, while other IBSAC countries lag behind on that front. Moreover, competing trade interest may hurt IBSAC solidarity. The analysis indicates that IBSA is more likely to continue as a bargaining coalition at WTO, with South Africa remaining at periphery and China joining hands only when its interests coincide with others. In addition, given the trade structure of the countries, IBSAC's agenda at WTO is more likely to remain modest in coming future.

Les négociations agricoles à l'OMC: quel cadre multilatéral pour les agricultures mondiales?

Maxime Baudouin

Le défi des négociations agricoles est de concilier le processus de libéralisation progressive et les politiques agricoles des Membres, et de mettre en place des disciplines qui permettent un accroissement des échanges mondiaux de produits agricoles sans remettre en cause la capacité des Membres à développer une agriculture qui réponde aux besoins et attentes de leurs

populations. Mais, les positions des Membres dans le cadre des négociations agricoles dépendent également des négociations sur les produits non agricoles. Par conséquent, la conclusion d'un accord dans le domaine agricole suppose un accord dans le domaine des produits industriels, et vice-versa. Dans ces conditions, les négociations agricoles et le Cycle de Doha ont-ils une chance d'aboutir? Sans prétendre apporter une réponse à cette question, ce chapitre a pour objet de présenter l'état des négociations dans chaque pilier de l'AsA et d'analyser les principales propositions au regard des objectifs de l'AsA, à savoir établir un système de commerce équitable des produits agricoles, par l'établissement de disciplines concernant l'accès au marché et les soutiens en tenant compte de considérations non commerciales et de la situation des PED.

A Look at Services Trade: Implications of the Doha Talks Suspension and Resumption

Rafael Leal-Arcas

This chapter addresses the current World Trade Organization (WTO) negotiations on trade in services in the framework of the Doha Development Agenda. An analysis of the Sixth WTO Ministerial Conference in Hong Kong is provided. Following the suspension of the WTO multilateral trade negotiations in July 2006 – and its subsequent resumption in February 2007 – by WTO Director-General Pascal Lamy, the world trading system must now find ways and means to integrate developing countries. Failing that could be perceived as a danger to the world order. This chapter analyzes the legal and policy implications of the current Doha Round for the two main developed WTO Members, i.e., the United States and the European Community, and the most relevant developing countries of the WTO. Thoughts on alternative ways to move forward in the multilateral trading system are presented in the conclusions.

Foreign Investment Issues and WTO Law – Dealing with Fragmentation while waiting for a Multilateral Framework

Philippe Gugler / Julien Chaisse

This chapter explores the provisions affecting investment in the existing WTO obligations. Worldwide economic integration is not being achieved via expansion of international trade and foreign direct investment acting as separate channels, but rather as two interrelated phenomena that act together and reinforce one another. The previous failures to establish a multilateral framework for investment combined with the increasing volume of invest-

ment and the corollary need for regulation lead back to the existing regulation of investment within WTO. The WTO handles two major agreements that address investment directly: the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Investment Measures (TRIMs). The Agreement on Trade-Related Aspects of Property Rights (TRIPS) provides protection for intangible assets that form the basis of the activities of multinational corporations. WTO investment provisions are however limited in scope and lack coherence. Based on the findings, the policy lessons for future prospects are drawn notably on the GATS form a multilateral agreement on investment could adopt.

Droit de l'OMC et droit de l'investissement: regards croisés

Ioana Tudor

Le droit de l'OMC et le droit des investissements sont deux droits relativement récents, qui évoluent rapidement et sont caractérisés par une haute spécialisation et technicité. Leur structure est proche car ils reposent tous les deux sur deux piliers principaux, à savoir une base conventionnelle très dense et en progrès permanent et une jurisprudence très riche. Ils forment tous deux une partie intégrante du droit international général. De plus, les domaines du commerce et des investissements étant souvent complémentaires au niveau économique, cette contribution analyse les similitudes substantielles à ces deux droits. Sur de nombreux points, notamment sur les principes utilisés et leurs méthodes d'interprétation, les deux droits convergent et pourraient davantage s'inspirer l'un de l'autre. Une coopération plus étroite entre les deux serait non seulement enrichissante mais serait aussi utile pour éviter les possibles conflits de compétence qui pourraient surgir à l'avenir.

How to reform WTO decision-making? An Analysis of the Current Functioning of the Organization from the Perspectives of Efficiency and Legitimacy

Andreas R. Ziegler / Yves Bonzon

In a context of stalled negotiations and strong public protest against the World Trade Organization (WTO), numerous reform proposals have been put forward in recent years to improve the procedures of the WTO. By analyzing the functioning of WTO decision-making, this chapter lays out a framework against which it assesses some of these reform proposals.

After explaining that these proposals are meant to enhance either the efficiency or the legitimacy of decision-making, we consider separately what

we identify as the three components of decision-making: the object, the organ and the procedural mode. We first enumerate WTO powers and define the legitimacy requirements that result from the nature of these powers, pursuant to the idea of a varying legitimacy requirement. Then we take a close look at the WTO procedural modes and the composition of its organs, and assess to what extent the features of these two components fulfill the legitimacy requirements discussed earlier. We then examine some reform proposals and their potential impact on the efficiency and the legitimacy of WTO decision-making, arguing that a balance must be struck between the two imperatives since they can sometimes collide. We conclude that the scope for reforming the WTO organs and procedural modes is limited and that combining the three components of decision-making in a manner that would fulfill legitimacy requirements may imply making some corrections on the object of decision-making; which would mean limiting WTO powers.

Protection du brevet et promotion de la santé publique: Surenchères autour des standards minimums de l'AADPIC au Sud

Samira Guennif

Au moment où l'entrée en vigueur de l'Accord sur les Droits de Propriété Intellectuelle touchant au Commerce dans les pays en développement pose débat en matière d'accès aux médicaments essentiels, depuis quelques années on assiste à la multiplication des accords de libre échange entre PED et Etats-Unis. Si l'AADPIC institue en pratique des standards minimums concernant la protection des brevets dans le monde, les ALE passés entre les PED et les Etats-Unis visent sans surprise la mise en place de standards plus élevés, d'où l'appellation d'« AADPIC plus ». Ce chapitre se propose de montrer comment, surenchérissant sur les dispositions de l'AADPIC, les ALE favorisent une protection effective et forte de la propriété intellectuelle et négligent la promotion de la santé publique au Sud. Précisément, les dispositions des ALE entendent assurer une promotion considérable des positions dominantes des multinationales en obstruant la concurrence exercée par les génériqueurs, l'effet ultime étant de menacer l'accès des populations à des médicaments plus abordables.

Les télécommunications dans le cadre de l'OMC: bilan et perspectives

Mathieu Guennec

Dans les années 1980 et 1990, Etats-Unis et Union européenne en tête, les grandes puissances commerciales ont libéralisé leur secteur des télécommunications. Lors du Cycle d'Uruguay, les pays de l'OCDE ont fait la promotion de ce modèle d'organisation des marchés. A l'issue de ces négociations

en 1995, de nombreux Membres de la nouvelle OMC ont adopté des engagements sur la libéralisation des services de télécommunications à valeur ajoutée. Immédiatement après le Cycle d'Uruguay, ont débuté des négociations sur la libéralisation des services de télécommunications de base, achevées en 1997. Depuis l'échec de Seattle en 1999, les accessions successives de nouveaux Membres ont étendu la portée de ces accords, en particulier celle de la Chine. Surtout, la décision de l'ORD en 2004, dans le cadre du différend entre les Etats-Unis et le Mexique, a consolidé le corpus normatif des télécommunications au sein de l'OMC. Dans le cadre du Cycle de Doha, il est fort peu probable que les négociations débouchent sur une refonte des règles applicables aux télécommunications. Malgré les tentatives de l'Union européenne d'exporter son nouveau modèle règlementaire adopté en 2002 afin d'adapter les règles du secteur aux mutations technologiques, il semble que les Membres de l'OMC ayant les plus grands intérêts offensifs dans le secteur des télécommunications souhaitent conclure un accord *a minima*, sur la base des règles adoptées en 1997.

Anti-Dumping Measures in the Context of Global Competition: Amending a Core Agreement of the WTO

Debashis Chakraborty / KD Raju / Julien Chaisse

The purpose of the WTO Agreement on Anti-Dumping (ADA) is to ensure that the provision is used only as a contingency measure based upon merit, and not as a veiled protectionist mechanism. However, since the establishment of the WTO in 1995, the number of anti-dumping investigations initiated has increased substantially. Given the growing misuse of anti-dumping investigations, there is an urgent need to look into the modification of the procedure, and the current analysis attempts to identify the broad areas of violation of the ADA in world trade and subsequently discusses the potential provisions for future reform.

The Status of the Precautionary Principle in Public International Law

Els Reynaers Kini

The precautionary principle is an important environmental policy tool according to which scientific uncertainty does not justify regulatory inaction. It is well entrenched in international environmental law, and increasingly finds domestic applications. However, its status as a rule of customary international law (CIL) is still disputed. This is relevant since rules of CIL are binding on States independently of whether they are party to a treaty. No international adjudicating body has so far held that it has acquired a CIL

status. To be recognized as a rule of CIL, two elements must be present, a uniform State practice, and the belief that such a practice is undertaken to conform to a legal obligation. It is argued in this paper that despite there being increasing instances of States adopting the principle domestically, there is no indication yet that States in their international relations comply with the precautionary principle out of sense of legal obligation.

UNESCO, the WTO, and Trade in Cultural Products

Christopher M. Bruner

On 20 October 2005, the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted a treaty legitimating legal measures to protect domestic producers of "cultural" products. The Convention represents a major victory for Canada and France – its principal proponents – and a major blow to Hollywood and the United States, audiovisual products being among America's most lucrative exports. This chapter examines the UNESCO Convention's legal and diplomatic significance. Following a brief look at the treatment of cultural products under the WTO system, the chapter discusses UNESCO's history, the Convention's negotiation, and its legal and diplomatic status, concluding that it will have little (if any) legal effect on existing WTO obligations, but a significant diplomatic impact on future negotiations toward greater audiovisual liberalization – a key trade policy goal of the United States.

Volume II
The WTO Judicial System: Contributions and Challenges

Good Faith, Fairness and Due Process in WTO Dispute Settlement Practice: Overcoming the Positivism of International Trade Law

Marion Panizzon

The WTO Appellate Body has drawn from public international principles to intensify the normative impact of good faith duties vaguely described in Articles 3.10 and 4.3 of the Dispute Settlement Understanding. The fact is noteworthy in comparison to the repeated rejection of the good faith principle in WTO substantive law of GATT, GATS and TRIPS. This chapter identifies the concretizations in WTO case law of such "procedural" good faith duties and finds that the importation of this general principle of law has both filled in the gaps of dispute settlement rules, while maintaining the

flexibility required of a Member-driven dispute settlement procedure. It will trace their evolving functions from a balancing tool to a new institutional use of triangular checks and balances controlling the exercise of authority by the Appellate Body with the Panel, as well as the use of policy space by the parties in dispute. In a second time, this chapter will decode the function of good faith compliance, a first-time judicial assertion of good faith's enforceability in WTO practice. By measuring good faith compliance according to the judicially designed standard of fairness, promptness and effectiveness, the WTO judiciary has introduced nothing less than a constitutional component of procedural fairness by which to review conduct in dispute settlement procedures, specifically the use of litigation strategies. In relating procedural good faith jurisprudence to the level of fairness, the WTO judiciary relegates to the past power-oriented, diplomacy-based structures of WTO dispute settlement.

The Universe of State Responsibility in the WTO Dispute Settlement System

Yenkong Ngangjoh Hodu

The questions "to what extent can the rules of international law be multilaterally enforced? And, what are the relevant ingredients that might lead to the conclusion that a particular act committed by individuals or entities in the territory of a WTO Member amounts to that of the Member in question?" do not have anything approaching an agreed theoretical answer. Yet a large cadre of scholars and practitioners in this area share the identification of a set of practices and empirical arguments that constitute the nucleus of the debate on the relevance of the law of State responsibility in the WTO Treaty system. The UN International law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, which has been used in some respects by the WTO judicial organs, although not clinching the issue, provides some insights into this debate. Taking inspiration from the law of State responsibility and examining it in the context of some WTO case law. Part I of this paper explores when and how activities of private individuals/entities can be attributed to those of the WTO Member for the purpose of State responsibility. In the same vein, using the 2001 ILC's Articles, Part II revisits the question of *actio popularis* in the compliance regime of the WTO dispute settlement system.

SPS Measures Adopted in Case of Insufficiency of Scientific Evidence: Where Do We Stand after EC – Biotech Products Case?

Lukasz Gruszczynski

This chapter analyzes the disciplines established by Article 5.7 of the Agreement on the Application of Sanitary and Phytosanitary Measures. The analysis is based both on the text of the SPS Agreement as well as on the existing case law with special consideration given to the panel's ruling in EC – Biotech Products. The chapter criticizes the approach of the case law to the issue of applicability of Article 5.7 as it confuses the applicability with the consistency. The chapter argues that it is more appropriate to view the SPS Agreement as providing for three mutually exclusive paths of compliance (i.e. Articles 3.1, 3.3 and 5.7). On the substantive level, the chapter points out the deficiencies of panel's approach to insufficiency of scientific evidence (insufficiency as the absolute term). This chapter claims, consistently with the case law under Article 2.2, that the task of a panel under Article 5.7 should be limited to the assessment of plausibility of scientific opinions on sufficiency of scientific evidence rather than deciding which scientific view is better. The chapter also recognizes several issues that still need to be resolved under Article 5.7 (the extent of the exclusion under Article 2.2, meaning of pertinent information, applicable standard of Article 5.7, second sentence). In this context, possible interpretations are discussed.

La convergence des critères d'examen dans le cadre du GATT et de l'AGCS: Les notions de restrictions et de limitations quantitatives, et l'utilisation des moyens de défense affirmatifs

Panagiotis Delimatsis / Pauline Lièvre

En véritable équilibriste, le juge de l'OMC veille à garantir l'efficacité du droit de l'OMC, tout en respectant la souveraineté et les sensibilités nationales. Bien que décrits dans des termes plutôt vagues, les pouvoirs qui lui sont conférés lui fournissent les moyens d'accomplir cette délicate mission. Le but de ce chapitre est d'évaluer l'utilisation de ces moyens par le juge de l'OMC. Il devient ainsi possible de mesurer son degré d'interférence dans le droit des Membres, tout spécialement dans le champ réglementaire couvert par les accords GATT et AGCS. Dans la mesure où le degré d'interférence dans la sphère nationale est en tout premier lieu déterminé par la portée donnée aux obligations imposées aux Membres, ce chapitre examine de façon comparative l'interprétation de la notion de restriction quantitative dans ces deux accords (Article XI GATT et XVI AGCS). Après avoir mis en évidence un certain degré de symétrie en ce qui concerne l'interprétation de ces obligations de fond par les organes juridictionnels de l'OMC, ce chapitre examine le critère d'examen dans le cas où un moyen de défense affirmatif a

été invoqué pour justifier une dérogation d'une obligation de fond du GATT et de l'AGCS. En parallèle, il examine la manière dont le jeu procédural arrive à influencer le degré d'interférence du droit de l'OMC dans le pouvoir national de réglementer. C'est notamment sur cette problématique que la recherche d'équilibre entre la libéralisation du commerce mondial et d'autres intérêts reconnus comme légitimes apparaît avec la plus grande acuité dans le cadre de l'application des articles XX GATT et XIV AGCS.

Reforming the DSU: An Indian View

Ravindra Pratap

In the light of India's experience at the WTO dispute settlement system, the chapter discusses India's proposals to improve and clarify WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). While India's proposals correctly focus on the special and differential treatment, its proposals on systemic issues have so far not been able to optimize the opportunity. India must be true to its experience with the DSU and mindful of the dynamics of WTO decision making, generally, while negotiating improvements and clarifications of the DSU.

Repeal of the WTO Appeal Process?

Marc Iynedjian

Contrary to most other international procedural treaties, the World Trade Organization's Dispute Settlement Understanding (DSU) institutes a two-tier system. Trade disputes between WTO Members are adjudicated by panels, the decisions of which may be reviewed by the WTO appellate body. This chapter considers whether the WTO's two-tier dispute settlement system is really desirable and whether the move to a single-tier mechanism would not be preferable.

Private Parties and WTO Dispute Settlement System

Alberto Alemanno

This chapter examines the (non) role that private business operators play in the implementation of WTO Dispute Settlement Reports. More precisely, by analysing the legal status of these decisions in national and regional law, it looks at what individuals are entitled to obtain when a WTO Member ignores the results of a Dispute Settlement Body's ruling. As private business operators bear most of the economic costs of non-compliance, there is an

increasing pressure for a more direct involvement of these parties in the Dispute Settlement System mechanisms. The challenge is therefore to find a way to accommodate their interests within the current settlement system, without reducing the discretion WTO Members enjoy in the implementation of the reports. By building upon the EC case law, it is argued that allowing individuals to seek compensation of damages deriving from non-compliance by the losing Member might be a valuable solution to strike a more fair balance between the interests of the WTO actors: its Members and their private business operators.

Une injustice des sanctions de l'OMC

Henri Culot

Ce chapitre examine un problème particulier que pose, sur le plan de la justice, l'application des sanctions dans le droit de l'OMC.

Lorsque les Etats violent les règles de l'OMC, c'est généralement en imposant des mesures protectionnistes qui empêchent les biens étrangers d'être vendus sur leur territoire. Une fois la violation reconnue par l'ORD, l'Etat préjudicié peut prendre des contre-mesures sous la forme d'une augmentation des droits de douane sur les biens originaires de l'autre Etat. Les marchandises concernées par la mesure protectionniste ne sont pas les mêmes que celles visées par la sanction.

Combinées avec l'absence d'effet direct, ces règles induisent des résultats injustes. Les mesures protectionnistes sont seulement imputées aux Etats, mais elles favorisent certains producteurs (généralement appuyés par un lobby efficace) au détriment des producteurs étrangers de biens similaires. De même, les sanctions sont uniquement dirigées contre les États, mais en fait elles portent préjudice aux producteurs de certains (autres) biens choisis par l'Etat qui sanctionne. D'autres catégories d'agents économiques sont également affectées. Sans effet direct, aucun d'entre eux ne peut obtenir un dédommagement. L'absence de coordination entre la violation du droit et la sanction rend ce système injuste.

Ce problème de justice est une conséquence de l'utilisation du concept juridique de la personnalité morale, et se pose dans d'autres hypothèses où le droit considère qu'un groupe d'individus ne forme qu'une seule personne.

WTO Dispute Settlement Remedies: Monetary Compensation as an Alternative for Developing Countries

Adebukola A. Eleso

When the WTO came into existence formally as an institution in 1995, it was a culmination of the process to institutionalize the General Agreement on Trade and Tariffs (GATT) which had been in operation since 1947. As an institution with Membership of 151 countries to date, it was imperative on the WTO to provide a forum for Members to settle disputes arising among themselves.

The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) of the WTO is probably one of the biggest achievements of the Uruguay Round of negotiations. It aims to provide security and predictability to the multilateral trading system. However, it is a fact that the smaller developing countries have not availed themselves of the procedure.

This chapter argues that the inadequacy and unsuitability of the existing remedies for these countries is responsible, and suggests monetary compensation as an alternative dispute settlement remedy.

How to reform WTO decision-making?

An Analysis of the Current Functioning of the Organization from the Perspectives of Efficiency and Legitimacy

Andreas R. Ziegler / Yves Bonzon

1. Introduction

Most discussions about decision-making in the WTO currently revolve around the issues of legitimacy and efficiency. The issue of legitimacy is linked with the extending powers of the WTO, and is often related to the issue of state sovereignty. Indeed, in line with the growing international cooperation among states, the WTO is being allocated a number of powers that were traditionally the realm of the nation state, leading some scholars to raise the issue of the state's loss of sovereignty as a consequence of this transfer of powers.[1] In addition, the issue of legitimacy relates to the impact that WTO decision-making has on individuals – referred to as democratic legitimacy.[2]

Pursuant to the imperatives of both notions of legitimacy, the scope of this transfer of powers to the WTO as well as the evolution of the type of powers transferred should have an impact on the design of WTO decision-making procedures; indeed, the modalities of these procedures

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1 See: The Sutherland Report (2005), Chapter 3, which addresses the issue of sovereignty, linking it briefly with the issue of legitimacy (the report is labeled *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, and is to be found on the website www.wto.org.

2 State sovereignty and democratic legitimacy are two distinct issues; however, they can in some cases be treated jointly, from a single perspective.

that legitimize the output of decision-making (this being a prerequisite of compliance[3]) have to adapt to the type of powers exercised (according to the idea of a *varying legitimacy requirement*)[4].

Previous contributions addressing the issue of legitimacy in WTO decision-making include the debate on WTO constitutionalization;[5] in this context, some authors have argued that the WTO rules cannot serve a constitutional function in part because of the deficiencies of WTO decision-making procedures with respect to legitimacy. In addition, some scholars who have been calling for more transparency and participation in WTO decision-making, in the form of NGOs or parliamentary participation, have highlighted in their work the weakness of WTO procedures with respect to legitimacy. [6]

In this paper, we make our own assessment of this issue by dissecting the WTO decision-making process and distinguishing what we will call its three components; indeed, like any other decision-making process, WTO decision-making is a combination of three parameters that we identify as the object (nature or type of power), the organ and the procedural mode.

Since the design of the organ and the procedural mode is a function of the type of power exercised (idea of *varying legitimacy requirement*), our first step is to define WTO powers. In a second and third steps, we take a look at the composition of WTO organs and at the procedural modes through which they operate, to allow us to determine to what extent the combination of the three elements in the WTO setting fulfils legitimacy requirements.

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3 On the connection between legitimacy and compliance in general, see FRANCK T. M. (1988), "Legitimacy in the International System", *82 AJIL 705-759*.

4 We concentrate here on the so-called *input legitimacy*, or procedural legitimacy; on the multiple facets of the concept of legitimacy, see ELSIG M. (2006), The World Trade Organization's Legitimacy Crisis: What Does the Beast Look Like?, forthcoming *Journal of World Trade* 41-1.

5 See: KRAJEWSKI M. (2001), "Democratic Legitimacy and Constitutional Perspectives of WTO", *35 JWT 167-186*; HOWSE/NICOLAIDIS, "Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step too Far", in: Porter R. et al. (eds.), *Efficiency Equity and Legitimacy: The Multilateral Trading System at the Millennium*, 227-263.

6 Again, the Sutherland Report addresses the issue of broader participation in WTO decision-making procedures, but without explicitly linking it with the nature of WTO powers. On the issue of broader participation: ESTY D. C. (2002), "The World Trade Organization's Legitimacy Crisis", *World Trade Review*, 1: 1, 7-22, CHARNOWITZ S. (2005), "WTO and Cosmopolitics", *JIEL / (3)*, 675-682.

Efficiency (or operative efficiency) is the second general issue that is raised in connection with WTO decision-making. Since the Ministerial Conference in Seattle in 1999, many authors have expressed concern that WTO decision-making, in particular because of its consensual procedural mode, is no longer functioning properly, and that paralysis is threatening the organization.[7] The cumbersome functioning of the WTO, or the paralysis of its policy-making function, can have various consequences. First is the risk that some players will turn to other forums, therefore threatening the very existence of the multilateral trading system;[8] second, this paralysis can cause an imbalance of powers between the political and the judicial branch of the WTO, affecting the legitimacy of the latter's outcomes.[9]

Using the approach consisting in distinguishing the three parameters of decision-making, we address in the second part of this work various propositions put forward by some scholars to improve the legitimacy and efficiency of the system, and explain how both issues are closely intertwined.

2. The three parameters of decision-making

2.1. The object of decision-making

In the debate on consensus and efficiency in the WTO, one relevant proposal that has been made by several authors is to define a typology of WTO decisions in order to submit these decisions to varying procedural modes. Behind this proposition lies the idea that various degrees of le-

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7 On the evolution of the WTO regime and the Seattle Ministerial Conference as a turning point, see KEOHANE R. /NYE J. (2001), "The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy", in: Porter R. et al. (eds.), *Efficiency Equity and Legitimacy: The Multilateral Trading System at the Millennium.*

8 In chapter 5, the Sutherland Report looks at the mechanisms of negotiations and decision-making in order to consider whether structures and procedures are optimally designed, focusing on the consensus rule. Thus it is addressing the efficiency issue, and further links it with member's political considerations ("political impetus"), spelling out all the external parameters that have a bearing on the process (p. 61-62).

9 See COTTIER T./TAKENOSHITA S. (2003), "The Balance of Power in WTO Decision-Making: Towards Weighted Voting in Legislative Response", in: *Aussenwirtschaft*, 58, 171-214.; VON BOGDANDY A. (2001), "Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship", in: *Max Planck Yearbook of International Law*, Vol. 5, 609-674.

gitimacy requirements exist with respect to various types of decisions. This attempt of defining the object of WTO decision-making is therefore directly connected to the issue of legitimacy[10].

Some suggest a rather vague distinction between decisions on procedural aspects and more substantial decisions.[11] A slightly more detailed proposition is to separate housekeeping decisions, which would cover the internal matters of the organization, as well as day-to-day decisions that would relate to the application and interpretation of existing rules, from decisions by which new rules are created.[12] A further distinction could be made between decisions that affect the rights and obligations of Members and those with no such effect, as referred to in the amending clause of Article X WTO Agreement.

With a view to define different legitimacy requirements in WTO decision-making, we first refer to Article III of the WTO Agreement to draw up a typology of WTO decisions. This article seems to establish a first

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10 We must recall here that issues of legitimacy can be considered through two different perspectives. The first perspective regards the impact of the WTO on the sovereignty of states and informs legitimacy requirements pursuant to the theory of international law (*international perspective*); the second perspective is the impact on the individual and has to do with legitimacy requirements in the national law-making sense, that is democratic legitimacy (*national perspective*). However both kind of legitimacy are often closely intertwined since powers that states transfer to the WTO will often be of a kind that has direct impact on individuals.

11 See The Sutherland Report, p. 64, as well as JACKSON J. H. (2001), "The WTO 'Constitution' and Proposed Reforms: Seven Mantras Revisited', *JIEL 67-78*, the latter mentioning the amending clause (Article X WTO Agreement) as a possible model.

12 In: VAN DEN BOSSCHE P./ALEXOVICOVA I. (2005), "Effective Global Economic Governance by the World Trade Organization", *8 JIEL*, 667-690.

general distinction between the executive,[13] legislative[14] and judiciary[15] functions of the organization.[16]

We attempt in the following to distinguish WTO decisions that would be of a legislative type from those that would rather be of a executive type.[17] We concentrate on the WTO political branch and leave aside its quasi-judicial branch such as performed by the Dispute Settlement Body (DSB).

First we focus on the legal texts and make an enumeration of the WTO formal decision-making powers; second we try to make a material assessment of the impact of WTO decisions.

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13 Paragraph I: "*The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements*".

14 Paragraph 2: "*The WTO shall provide the forum for negotiations among Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference*".

15 Paragraph 3: "*The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (…) in Annex 2 of this Agreement*".

16 Some authors at least are interpreting this disposition as an analogy of the three constitutional powers of states (see FOOTER M. E. (2005), *An Institutional and Normative Analysis of the World Trade Organization*, Martinus Nijhoff Publishers, pp. 25 f., VON BOGDANDY (2001), who both express some reservations on this view).

17 In so doing, we re being inspired by national constitutional theory that uses material criteria to define those state's acts that require parliamentary adoption, pursuant to the material aspect of the legality principle. This material aspect requires that some decisions must be adopted through a democratic procedure because of the impact they have on the individuals. In Swiss constitutional theory, this impact is abstractly defined using the criterion of *importance* (see Art. 164 of the Federal Constitution), which is further concretized by various criteria (see: AUBERT J.-F. / MAHON P. (2003), *Petit commentaire de la Constitution fédérale de la Confédération suisse du 18 avril 1999*, ad Art. 164;, nos 191-196, p. 112-114). This issue is of relevance when the Parliament is delegating some of its decision-making power to the executive.

2.1.1. The legal basis of WTO powers

2.1.1.1. Power allocation based on the disposition about the institutional setting (Article IV of the WTO Agreement)

Article IV on the institutional structure of the organization allocates some general powers to the organs it is establishing. The Ministerial Conference, which is the highest body in the hierarchy, "*shall carry out the functions of the WTO and take actions necessary to this effect* (…), having *the authority to take decisions on all matters under any of the Multilateral Trade Agreement*".

On the second level, the General Council shall conduct the functions of the Ministerial Conference in the intervals between its meetings. Furthermore, it has *general guidance* over the third-level councils (one example of which is the approval of their rules of procedure), and can assign functions to them not provided for by the agreements.

On the third level, the Council for Trade in Goods (CTG), the Council for Trade in Services (GATS Council) and the Council for Trade Related Aspects of Intellectual Property (TRIPS Council) oversee the functioning of their respective agreements. Also on this third level, the Ministerial Conference may establish some additional committees (Committee on Trade and Development, Committee on Balance-of-Payments Restrictions, Committee on Budget, Finance and Administration). These committees shall carry out the functions assigned to them by the agreements and the General Council. They may also establish additional committees with such functions as they deem appropriate.[18]

On the fourth level are the subsidiary bodies established by the three third-level Councils.

2.1.1.2. Power allocation based on the disposition about decision-making (Article IX of the WTO Agreement)

Article X on decision-making refers to particular kinds of decisions. The Ministerial Conference or the General Council should adopt authoritative interpretations of the agreements on the basis of a recommendation by one of the third-level Councils when one of the agreements they oversee is under consideration (paragraph 2). Waivers of an obligation in the agreements may be decided by the Ministerial Conference, on the

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[18] Specifically, the Committee on Trade and Development "*shall periodically review the special provisions in the Multilateral Trade Agreements in favour of least-developed country Members and report to the General Council for appropriate action*" (Article IV par. 7 WTO Agreement).

basis of a report produced by one of the third-level Councils when the agreement they oversee is at issue (paragraph 3).

In addition, according to Article X, the Ministerial Conference may decide to submit an amendment (which can be proposed by a Member or one of the third-level Councils when one of the agreements they oversee is under discussion) to the Members for acceptance. In some cases, the Ministerial Conference may approve amendments without submitting them to the Members for acceptance (paragraphs 6 and 7).

2.1.2. Attributions of power in the side Agreements

The agreements of Annex 1 to the WTO Agreement set up a number of bodies and attribute powers to them. Here we try to characterize these powers and point out the recurrent features contained in these agreements.

2.1.2.1. In general

Generally, many bodies are given the functions of "*allowing Members to consult on any matters relating to the operation of the Agreement or the furtherance of its objectives, and shall carry out such responsibilities as assigned to it under this Agreement or by the Members*" and shall "*establish working parties as may be appropriate, which shall carry out such responsibilities assigned to them by the Committee in accordance with relevant provisions of the Agreement*".

The following bodies have been given such tasks: the TBT Committee on Technical Barriers to Trade (TBT Committee),[19] the CTG in the context of Trade-Related Investment measures (TRIMs),[20] the Committee on Anti-Dumping Practice,[21] the Committee on Customs Valuation,[22] the Committee on Rules of Origin,[23] the Committee on Import Licensing,[24] the Committee on Safeguard,[25] the Committee on Subsidies and

19 Art. 13 of the Agreement on Technical Barriers to Trade (TBT Agreement).

20 Art. 7 of the Agreement on Trade-Related Investment Measures: a Committee on TRIM that shall carry out responsibilities assigned to it by the CTG, afford members consultation opportunities and monitor the operation and implementation of Agreement, for report to CTG.

21 Art. 16 of the Agreement on Implementation of Art. VI of GATT 1994.

22 Art. 18 of the Agreement on Implementation of Art. VII of GATT 1994.

23 Art. 4 Agreement on Rules on Origin.

24 Art. 4 Agreement on Import Licensing Procedures.

25 Art. 13 Agreement on Safeguards.

Countervailing measures,[26] the GATS Council,[27] and the TRIPS Council.[28]

Some of these bodies may grant special and differential treatment to developing country members, such as the Committee on Sanitary and Phytosanitary Measures (SPS Committee),[29] the TBT Committee,[30] the CTG in the context of TRIMs,[31] the GATS Council[32] or the TRIPS Council.[33]

Some bodies shall review the functioning of their Agreement and submit proposals for amendments to higher bodies, such as the SPS Committee,[34] TBT Committee,[35] the Committee on TRIMs,[36] the Committee on Rules of Origin,[37] and the Committee on Subsidies and Countervailing Measures.[38]

2.1.2.2. Review function

Some bodies established by the agreements are charged with reviewing the adequacy of information submitted by the Members.[39] Some other bodies are responsible for reviewing measures taken by the Members and report to higher bodies with proposals for recommendations, such as the Committee on Balance-of-Payment Restrictions,[40] the CTG in the

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26 Art. 24 Agreement on Subsidies and Countervailing Measures.

27 Art. XXIV GATS. See also: Ministerial Decision on Institutional Arrangements for the GATS.

28 Art. 68 TRIPS.

29 Art. 10 SPS Agreement.

30 Art. 12.8 of the TBT Agreement.

31 According to Art. 5 of the TRIMs Agreement, the CTG may extend the transition period for the elimination of notified TRIMs for developing country Members.

32 Art. 66 GATS: the GATS Council may extend the 10-year waiver granted to least-developed countries.

33 Art. 66 TRIPS.

34 Art. 12 para. 7 SPS Agreement.

35 Art. 15 TBT Agreement.

36 Art. 7 para. 3 TRIM Agreement.

37 Art. 6 para. 2 of the Agreement on Rules of Origin.

38 Art. 32.7 Agreement on Subsidies and Countervailing Measures.

39 See, on notification review of state-trading enterprises, the Working Party established by paragraph 5 of the Understanding on the Interpretation of Article XVII of the GATT 1994.

40 Paragraphs 5 and 13 of the Understanding on the Balance-of-Payments Provisions (BOP) of the GATT 1994. The Committee shall carry out consultations in order to review all restrictive measures taken for BOP purposes and report to the General Council with proposals for recommendations aimed at promoting implementation of Article XII GATT.

context of safeguards measures,[41] the Committee on Safeguards,[42] the Committee on Subsidies and Countervailing Measures,[43] and the GATS Council.[44] Likewise, a working party shall examine notifications of the decisions to enter a customs union or free-trade area (and report to the CTG).[45]

Other bodies have the task of reviewing the progress made in the implementation of commitments made by the Members (Committee on Agriculture).[46]

2.1.2.3. Concretization function

Some bodies shall concretize notions contained in the Agreements, like such as the CTG regarding the criteria of "parties primarily concerned" or that have a "substantial interest", in the context of the modification of schedules.[47]

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41 Art. 13 Agreement on Safeguards: the Committee on Safeguards shall examine, upon request, whether the procedural requirements of the Agreement have been complied with in connection with a safeguard measure (13.1.b), and to review whether proposals to suspend concessions are "substantially equivalent" and report to the CTG.

42 Art. 8 para. 2 Agreement on Safeguards: the CTG can disapprove of the suspension by a Member of concessions under the GATT to the trade of another Member applying a safeguard measure for which no agreed compensation has been found.

43 Art. 8.4 Agreement on Subsidies on Countervailing Measures. The Committee should review notifications about subsidies and determine whether or not the conditions and criteria laid down in paragraph 2 have been met. Art. 9.4: the Committee shall determine if an adverse effect exists (pursuant to Art. 9.1), and recommend to the subsidizing Member to modify his programme or authorize the requesting Member to take countermeasures. Art. 27.4: the Committee determines whether an extension of the eight-year period for phasing out export subsidies is justified. Art. 29.4: the Committee can give Members in the process of transformation departures from their notified programs, measures and time frames.

44 Art. V GATS: the GATS Council may establish working parties to examine agreements on economic integration between the Members. Based on these reports, the Council makes recommendations to the Members on the implementation of any of these agreements (para. 1).

45 Paragraph 7 of the Understanding on the Interpretation of Article XXIV of GATT 1994.

46 Art. 18 of the Agreement on Agriculture.

47 Paragraph 1 of the Understanding on the Interpretation of Article XXVIII of GATT 1994.

2.1.2.4. Forum function

Some bodies serve as a forum for consultations between Members, carrying out the functions necessary to implement provisions of the relevant agreements with respect to harmonization, such as the SPS Committee,[48] the Committee on Rules of Origin,[49] and the GATS Council.[50]

Others, such as the GATS Council, have the same task in the context of progressive liberalization.[51]

2.1.2.5. Interpretation function

Some bodies are responsible for ensuring, at a technical level, uniformity in the interpretation and application of their agreement, for example, the Technical Committee on Customs Valuation,[52] Technical Committee on Rules of Origin,[53] and the Permanent Group of Experts in the context of subsidies.[54]

2.1.3. The material impact of WTO decisions

Some of the powers allocated to the WTO organs, as enumerated above, can be seen as a legislative type. This is the case with respect to the power of the Ministerial Conference and General Council to adopt legally binding decisions in the form of primary rule-making or secondary

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48 Art. 12 SPS Agreement: the SPS Committee shall develop a procedure to monitor the process of international harmonization and use of international standards. In conjunction with relevant international organizations, it should "establish a list of international standards, guidelines or recommendations relating to SPS measures which the Committee determines to have a major trade impact" (paragraph 2).

49 Art. 6 para. 3 and Article 9 Agreement on Rules of Origin.

50 Art. VI para. 4 GATS: the GATS Council shall develop any appropriate disciplines, through appropriate bodies it may establish, with a view that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services. See also: Ministerial Decision on Professional Services.

51 Art. XIX para. 3 GATS: the GATS Council shall carry out assessment of trade in services in overall terms for the purpose of establishing negotiating guidelines and procedures, as well as to establish some procedures for rectification or modification of schedules (para. 5). See also: Ministerial Decision on Negotiations on Basic Telecommunications.

52 Article 18 para. 2 and Annex II of the Agreement on Implementation of Article VII of GATT 1994. The Technical Committee examines technical problems, studies practices of the Members, and then gives advisory opinion or prepares reports.

53 Article 4 para. 2 and Annex I of the Agreement on Rules of Origin.

54 Article 24.3 Agreement on Subsidies and Countervailing Measures. It should deliver advisory opinions and has a surveillance function (examines notifications; Art. 26).

rule-making. Also, we see that some lower bodies can develop rules on the basis of their forum function with respect to harmonization. On the other hand, functions of WTO organs such as review, interpretation and concretization are closer to what we refer to as an executive function.

The capacity of the WTO to adopt legal rules (its quasi legislative function) has often been referred to in the doctrine as *positive integration*.[55] Regarding the possible impact of these rules, COTTIER / OESCH have used the notion of a third generation of trade barriers regulation that starts with the negotiations of the Uruguay Round, and which addresses trade in agriculture, services and intellectual property, all of which rely heavily on domestic regulation.[56] KRAJEWSKI emphasizes that these norms define detailed individual rights and public obligations that limit the political choices of national law-makers. [57]

In reality however, the WTO political organs make very scarce use of this rule-making function, this being a consequence of the WTO consensual mode of decision-making that often ends up in paralysis. Therefore, it is mostly the decisions of the DSB that have an impact on the policy-making capacity of states. These decisions are based on rules that have been adopted as package deals after the conclusion of lengthy negotiation rounds taking place mostly outside the institutional structure of the organization, or on rules adopted by standard-setting organizations outside the WTO such as the Codex Alimentarius Commission (CAC), the International Office of Epizootics (IOE), or the International Plant Protection Convention (IPPC) pursuant to the practice of rule-referencing.[58] For that reason, authors have noted that in fact no independent law-

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55 Comparing to *negative integration*, which entails negative obligations for states (obligations not to raise trade barriers for example), *positive integration* translates in positive obligations as a result of law harmonization. Some authors identify this positive integration as part of the *regulatory layer* of international law-making, noting that "*its subject matter tends to be more towards what was traditionally considered low politics, in opposition to high politics, that have far greater 'direct' or 'indirect' effect on individuals, markets, and come more directly into conflict national values*". See: WEILER J.H.H./MOTOC I. (2003), "Taking Democracy Seriously: The Normative Challenges to the International System", in: Griller S. (ed.), *International Governance and Non-Economic Concerns. New Challenges for the International Legal Order*, p. 61 ff.

56 COTTIER T./OESCH M. (2005), *International Trade Regulation*, p. 74.

57 KRAJEWSKI (2001), p. 170.

58 See VON BOGDANDY (2001), pp. 621-2.

making body with regulatory powers is formally established within the WTO.[59]

As examples of rules adopted through the treaty-making process and on which DSB decisions are based, Article 2.2 TBT Agreement contains a code of good conduct that enumerates legitimate policy objectives, thus restricting the policy autonomy of the Members, while Article 2.4 TBT introduces the practice of rule-referencing, enjoining Members to apply international standards, thus suppressing their policy-making capacity. As well, the SPS Agreement prescribes positive action to be taken by governments, calling for the harmonization of measures on the basis of existing standards (Article 3.3), prescribing modalities of risk assessment (Article 5.1) and risk management (Articles 5.5, 5.6 and 5.7). Other examples include the procedural rules of the GATT Agreement regarding publication requirements (Article X), customs regulations (Article VIII) and rules of origin (Article 9 Agreement on Rules of Origin). Further, the production and consumption of services are subject to domestic regulations for which WTO rules provide some disciplines that mostly cover transparency requirements and unfair application of rules. In addition, WTO rules regulate exceptions that Members may apply to reconcile the objective of trade liberalization with other societal values (Articles XX and XXI GATT, Articles XIV and XIV bis GATS).

Therefore we see that although the decision-making powers of the WTO political branch have the potential to perform a kind of legislative function that have an impact on the policy-making capacity of states, it is rarely exercised and most decisions having such an impact originate in the DSB.[60]

2.1.4. Comments on legitimacy requirements

Many authors in discussing the specific nature of WTO powers have claimed the existence of a democratic deficit in WTO procedures, arguing that the traditional sources of international law-making's legitimacy are not proper to legitimize WTO decisions.[61] In this traditional setting,

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59 COTTIER/OESCH (2005), p. 100.

60 See: COTTIER / TAKENOSHITA (2003), p. 172: these authors are distinguishing the issue of rulings from the issue of substantive WTO rules and disciplines that result from the political process, and recall that it is mostly the rulings of the Appellate Body that become increasingly intrusive, putting democracy at home at risk.

61 Others have taken an opposite view: BACCHUS J. (2005), "A Few Thoughts on Legitimacy, Democracy, and the WTO", *JIEL 7 (3)*, 667-673; ADLUNG R.

which relies on the principles of state's consent and sovereign equality between states, democracy is not a concern, and the consensual mode of WTO decision-making, according to which each state that gives powers to the WTO has consented to do so, tends to legitimize WTO decisions.[62]

Departing from this conception, KRAJEWSKI argues that WTO law needs to meet national democratic constitutional standards and uses the *chain of legitimacy* concept to explain that these standards are far from being effectively applied.[63] As well, HOWSE refers to the *legitimacy gap* theory, distinguishing between formal legitimacy that is met pursuant to the standards of international law, and social legitimacy that is not met in the WTO context;[64] he also refers to the *agency cost* theory to explain why democratic features of WTO decision-making are insufficient.[65]

In the following sections, we analyse the procedural modes and the composition of the organs of WTO decision-making, and then take a look at some reform proposals that have been made regarding their design with a view to improve the legitimacy and efficiency of the process.

(2004), who spells out conditions that make constraints on national policy-making acceptable: relevant areas are clearly specified; participation is voluntary and reversible; the governments and legislators concerned are duly legitimized to bind their country (p. 134). He argues that the policy constraints of the GATS are weak, that they are *without bite* (p. 136). Speaking of the sanctions, he points out that the only consequence for a country that fails to correct a disputed measure or to agree on compensation would be the suspension of a concession, and that there is no possibility for a WTO body to override national policy decisions and to intervene directly (p. 138).

62 Some have explicitly stated states' incentives to transfer some of their powers to the WTO, thus downplaying the sovereignty issue. See: Sutherland Report, p. 32, and MESSERLIN P. A. (2005), "Three Variations on the Future of the WTO", *8 JIEL*, 299-309, in line somehow with the arguments of Petersmann's theory of WTO constitutionalization (PETERSMANN E. -U. (1991), *Constitutional Functions and Constitutional Problems of International Economic Law*, Fribourg University Press.

63 See KRAJEWSKI (2001).

64 See: HOWSE (2000), pp. 36-7; also: WEILER J.H.H. (1999), "The transformation of Europe", in: *The Constitution of Europe, "Do the New Clothes have an Emperor?" and other Essays on European Integration*, Cambridge University Press.

65 See: HOWSE R. (2003), "How to Begin to Think About the 'Democratic Deficit' at the WTO", in: Griller S. (ed.), *International Governance and Non-Economic Concerns. New Challenges for the International Legal Order*.

2.2. Procedural modes of decision-making

2.2.1. The legal rules

The WTO Agreement contains several provisions on procedural modes of decision-making.

First, Article IX provides that "*the WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting*", stating further than each Member of the WTO shall have one vote. Thus, the WTO Agreement formally recognizes the practice of decision-making by consensus, prescribing voting as a subsidiary means. Some decisions must be taken by consensus according to the WTO Agreement (mandated consensus).[66] In addition, WTO Members took several decisions prescribing that certain decisions would be taken by consensus instead of voting (consensus in lieu of voting).[67]

Some other provisions about decision-making procedures can be found in the Rules of Procedure of each body,[68] as well as in some WTO Multilateral Agreements and their Annexes.[69]

A common feature of the Rules of Procedure of the various organs is Article 33 which states that a decision that cannot be reached by consensus in a lower organ should be referred to the higher body.

2.2.2. Comments on the formal rules

We observe that some rules of the WTO agreements reflect the principle that different legitimacy requirements shall be fulfilled depending on the

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66 These are the decisions of the DSB (reverse consensus: note 3 to Article IX:3 and Article 2.4 DSU), as well as the decisions of the Ministerial Conference to waive an obligation subject to a transition period (note 4 to Article IX: 3 WTO Agreement), to amend Annex 2 of the DSU (Article X:8 WTO Agreement), or to add a Plurilateral Trade Agreement (Article X: 9 WTO Agreement).

67 These are the decisions on waivers (Article IX:3 WTO Agreement) and decisions on accessions (Article XII: 2 WTO Agreement).

68 The Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council (WT/L/161, adopted 25 July 1996) serve as a template for the Rules of Procedures of most bodies.

69 For instance, Annex II of the Agreement on the Implementation of Article VII GATT (Technical Committee on Customs Valuations) contains detailed dispositions on the dates of the sessions, the setting of the agenda, the powers of the Chairman, quorum and voting, languages and records.

type of decision to be adopted, thus expressing the idea of a *varying legitimization requirement*.

For instance, Article X WTO Agreement provides for different majority requirements, depending on the type of amendment to be adopted.[70] Generally, we observe that some decisions, like authoritative interpretations and waivers, only require the formal acceptance of the WTO representatives of a certain majority of Members, while others, like the decisions amending the treaties, must be submitted to the Members for acceptance, which means they need to be ratified by their constituencies. Further, amendments that do not alter the rights and obligations of the Members can be imposed on Members that have not accepted them.

By means of these distinctions, we can identify different types of decisions taken by the Ministerial Conference and General Council.

We could consider the decisions amending the articles mentioned in Paragraph 6 as being of a constitutional type, while the decisions on amendments that alter the rights and obligations of Members could be seen as being of a legislative type, and those that do not alter the rights and obligations of Members as being of a "soft" legislative type. Finally, decisions on authoritative interpretations and waivers could be seen as being more executive in nature.

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[70] As a general principle, paragraph 4 of Article X states that amendments shall take effect for all Members upon acceptance by two-thirds of them. However, the amendment of certain clauses requires specific treatment. According to Paragraph 3, amendments that would alter the rights and obligations of the Members take effect only for the Members that have accepted them (in such cases the Ministerial Conference may decide by a three-fourths majority if the Members that have not accepted the amendments are free to withdraw from the Organization or if they can remain a Member).
Pursuant to Paragraph 2, five provisions require the acceptance of all Members to be amended: these are Article X of the WTO Agreement itself (provisions on amendments), Article IX WTO Agreement (rules on decision-making), Articles I and II GATT (Most-Favoured-Nation Treatment and Schedules of Concessions), Article II: 1 GATS (Most-Favoured-Nation Treatment) and Article 4 TRIPS (Most-Favoured-Nation Treatment). Article X: 6, by reference to Article 71:2 TRIPS, applies to amendments to multilateral agreements outside the WTO serving the purpose of adjusting to higher levels of protection of intellectual property rights and provides that such amendments may be adopted by the Ministerial Conference, on the basis of a consensual proposal of the TRIPS Council, without further acceptance process if these amendments are achieved, in force and accepted by all WTO Members under those agreements. Finally, Article XII WTO Agreement states that the Ministerial Conference shall approve the agreement on the terms of accession by a two-third majority of the Members.

A second type of WTO procedural rules that reflect legitimacy concerns is Rule 33 of the Rules of Procedure of most bodies. By prescribing that a decision that cannot be reached by consensus in a lower organ should be referred to the higher organ, this rule assumes on the one hand that when a consensus is reached, the decision is deemed legitimated even if it is adopted in a lower organ;[71] whereas on the other hand, it assumes that higher organs are endowed with higher legitimacy since the step towards other modes of decision-making (voting) may occur only at this level. In the next section, we try to explain how this can be justified, by analysing the composition of WTO organs.

2.2.3. In practice

In practice, voting in the WTO never takes place. COTTIER / TAKENOSHITA believe that "*the main reason for avoiding voting lies in the fact that the principle of one member one vote does not reflect economic interests and real powers within the multilateral trading system*"; these authors then show the imbalance and material inequality of representation between Members that exist in terms of voting rights with respect to their shares of financial contributions to the WTO, gross domestic products (GDP) and voting rates.[72] We will return later to the consequences that consensus decision-making has on legitimacy with respect to the balance of power within the organization.

What we want to address here are the informal practices that lead to the formal adoption of a decision by consensus in one of the WTO bodies. We will distinguish between consensus as the formal means of adopting a decision and consensus as the process of reaching that decision. The former consists of a "non-objection" and is referred to as "passive consensus", while the latter is referred to as "active consensus".[73]

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71 KUIJPER who supports this view, considers that this creates " *a certain tension between efficiency and legitimacy"* (p. 109). The question that arises here is whether a decision reached by consensus by the lower body is definitive (p. 86). See: KUIJPER P. J. (2002), "Some institutional issues presently before the WTO", in: Kennedy D.L.M./ Southwick J.D. (eds.), *The Political Economy of International Trade Law: essays in honor of Robert E. Hudec*, Cambridge University Press.

72 COTTIER/TAKENOSHITA (2003), p. 179; further argue that "current voting rules in WTO fail to respond to the requirement that majority voting procedures need to be able to assure that major trading partners in the system keep an interest in dealing with each other on the basis of the WTO law", with the risk that they will leave the system.

73 See FOOTER (2005), p. 138.

Active consensus (or consensus-building) transforms the decision-making process into a negotiating process that aims at reaching a bargain made of mutual concessions, which are often of a "crossing" character as a consequence of the single undertaking principle.[74]

Some of these informal consultations potentially involve the entire membership, for example, the meetings of the Heads of Delegations (attended by senior diplomats or specialists coming from capitals), although smaller groups are sometimes convened.

This smaller group feature is a response to the principle of efficiency since a technique is required to reconcile the diverging views of a broad membership,[75] which BLACKHURST has well described as a "concentric circles model".

This model includes the well known "green room meetings" where the most powerful countries participate first. These meetings can be held during the Ministerial Conferences or they can take place in Geneva at the ambassadorial level.

Linked to such meetings is the phenomenon of alliance building, which may consist of geographical groupings (economic integration)[76] or interests groupings,[77] and which allow countries to increase their bargaining power and get specific items onto the agenda.

2.2.4. Comments on the practice of WTO decision-making

In this section, we consider the effects of consensual decision-making in the WTO on legitimacy issues. Here we must distinguish between the

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74 The single undertaking principle implies that the whole result of a negotiation will be adopted by the entire membership, in other words that a Member cannot pick those parts of the bargain that are acceptable and leave others aside. Crossing concessions means that a package deal can cover different issue-areas (for example, concessions in the field of service are balanced with concessions in the agriculture field).

75 This feature can lead to the marginalization of a number of countries, notably developing countries, and can collide with the principle of inclusiveness. This point is linked to the "internal transparency debate" (or "effective participation"). See: VAN DEN BOSSCHE (2005), *The Law and Policy of the World Trade Organization*, Cambridge University Press. p. 151.

76 E.g. the EU or, less formally, the ASEAN.

77 E.g. the Cairns group interested in the liberalization of agricultural trade, the Group of 10 defending more protectionist position on agriculture, the ACP Group (Caribbean and Pacific) or the LDC Group (Least-Developed Members).

international law perspective that takes into account the state sovereignty issue, and the democratic perspective.

Differing views are expressed on the issue of state sovereignty. Some authors argue that consensus amounts to giving each member a right of veto and that this is consistent with the principle of equal sovereignty of states, therefore enhancing the legitimacy of decisions.[78] This increase of legitimacy will translate into a better implementation of WTO rules since no Member will have to implement a decision against its will.

On the other hand, some argue that this equality between states is only formal and that consensus in fact reflects the underlying power relationships between Members, taking the form of an implicit weighted voting system pursuant to the major interests' norm;[79] some refer to the varying "consensus-resistance" capacity of states.[80]

For FOOTER,[81] "*consensus decision-making for all its flaws sustains the delicate balance between equality of voting power and parity of (economic) interest among the Members*". Furthermore, some claim that consensus corresponds to the very nature of WTO obligations, which as a consequence of the single undertaking principle are contractual, meaning that they must be mutually beneficial and agreed on both sides.

Second, consensus decision-making may have an impact on democratic legitimacy. Many authors have been calling for reforms that would enhance the efficiency of the WTO political branch to counter an eventual legal activism of the WTO judiciary branch that occurs without any legitimacy check. These reform proposals are addressed in a subsequent section of this article.

Further, one important feature of the consensus practice is the reinforced role of the chairperson of meetings, who structures discussions and decides whether certain issues will be discussed separately and how to resolve deadlocks.[82] Because of this broad influence, it is recognized that

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78 See: VAN DEN BOSSCHE (2005), 148.

79 See: FOOTER (2005), p. 106.

80 See: EHLERMANN C.-D./EHRING L. (2005), "Are WTO Decision-Making Procedures Adequate for Making, Revising, and Implementing Worldwide and Plurilateral Rules?", in: *Reforming the World Trading System: Legitimacy, Efficiency, and Global Governance*, edited by Ernst-Ulrich Petersmann, Oxford University Press.

81 FOOTER (2005), p. 162.

82 On the role of the chair, see ODELL J. S. (2005), "Chairing a WTO Negotiation", *JIEL (2)*, 425-448; KRAJEWSKI M. (2000), *Verfassungsperspektiven und Legi-*

there should be some parity in the nomination of chairpersons; also, some of their formal functions are set up in the Rules of Procedure of several bodies.

Finally, since the process of consensus-building takes place outside formal meetings of WTO organs, it can allow a wider range of actors to participate, including non-state actors or non-member countries.

2.3. The organ of decision-making

Again, we shall distinguish here whether we assess the composition of WTO bodies from the perspective of state sovereignty (international law conception of legitimacy) or from the perspective of democratic legitimacy.

From the perspective of state sovereignty (membership's representation), the rule is that all bodies of the WTO are bodies of the whole.[83] There are, however, some formal exceptions.

First there can be bodies of limited composition drawn from the membership, such as the former Textiles Monitoring Body.[84] Second, some bodies of limited composition are made up of experts from outside the organization who are chosen by the Members, such as the Permanent Group of Experts (PGE) under the SCM Agreement.[85]

Notably, the WTO has not established a body of limited composition that would exercise some kind of executive function, as was the case for a limited time during the GATT era with the Consultative Group of Eighteen.[86]

Here it is important to consider how these formal rules perform in practice. First, it should be noted that many countries do not have the capac-

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timation des Rechts der Welthandelsorganisation (WTO), Duncker & Humbolt, p. 84; and FOOTER (2005), p. 170.

83 See for instance Art. IV WTO Agreement, Art. 13 Agreement on Safeguards, Art. 24.1 Agreement on Subsidies and Countervailing Measures.

84 Established by Art. 8 of the Agreement on Textiles and Clothing (ACT), its mandate was to monitor the implementation of the ACT. It was dismantled since the ACT is no longer in force.

85 See Art. 24.2 SCM Agreement: the PGE consists of five highly qualified independent specialists in the field of subsidies and trade relations, who may at the request of the SCM give an advisory opinion on the existence and nature of a subsidy.

86 The Consultative Group of Eighteen was established by a decision of the Council of 11 July 1975. Some authors have recently proposed the introduction of such a body (See: Sutherland Report, 70-71, para. 323-327).

ity to send representatives attend every meeting;[87] in combination with Rule 33 of the Rule of Procedures referred to above, this can have serious consequences on the equal sovereignty of states principle as we explained earlier that decisions adopted by consensus in lower bodies may be definitive.[88]

We note also that the informal practices leading to the adoption of decisions involve the emergence of groups of limited composition that are sometimes self-elected, thus excluding some countries from participation.[89]

From the democratic legitimacy perspective, the composition of the Members' delegations must be scrutinized with respect to representation of national constituencies. In this respect, we observe that the Ministerial Conference is composed of the ministers from the Member countries, whereas the General Council gathers higher-level ambassadors and the lower bodies representatives of the states who may be technical experts.[90] Further, the practice of rule-referencing means that the composition of bodies outside the WTO should also be scrutinized.[91]

We note that the logic lying behind Rule 33 of the Rules of Procedure as well as the broad powers given by the agreements to the Ministerial Conference and General Council suppose that these organs are capable of conferring higher legitimacy than lower bodies to the decisions they adopt. This is relevant with respect to the reform proposals that follow.

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87 See BLACKHURST R. (2001), "Reforming WTO Decision Making: Lessons from Singapore and Seattle", in: Deutsch K./Speyer B. (eds.), *The World Trade Organization Millennium Round: Freer Trade in the Twenty-First Century*, Routledge.

88 In principle, lower bodies cannot adopt binding decisions. However, some controversial instances have shown that they sometimes do. See: KUIJPER (2002).

89 This is referred to as the issue of "internal transparency".

90 For a detailed analysis of the composition of delegations, see KRAJEWSKI M. (2000), *Verfassungsperspektiven und Legitimation des Rechts der Welthandelsorganisation (WTO)*, pp. 88 ff.

91 In this respect, VON BOGDANDY has looked at the operative level of the Codex Alimentarius Commission (CAC) and its rule-making practice. He points out the various instruments, procedures and membership that are largely tailored to fit with private interests, and therefore undemocratic. See: VON BOGDANDY (2001), pp. 633 f.

3. Reform proposals – Conclusion

Using as a framework the approach consisting in distinguishing the three parameters of decision-making, we consider in the following various reform proposals put forward by some authors to enhance either the legitimacy or the efficiency of WTO decision-making; we also explain how both issues are closely intertwined.

Regarding the procedural mode of decision-making, most reform proposals aim first at improving efficiency. Some authors propose to give up consensus and replace it with a weighted voting system.[92], while others suggest some "fine tuning" of the consensual mode. From this latter perspective, the idea of a "critical mass" would imply that a Member should refrain from blocking a decision which is supported by a significant amount of countries[93]; as well, another proposal prescribes that a Member who is blocking a decision that otherwise enjoys broad support would have to declare in writing that the matter on which the decision is being taken is of vital interest to it.[94]

Moreover, some authors have suggested departing from the single undertaking principle in order to enhance efficiency,[95] while others have also argued that the way powers are distributed within the hierarchical structure of the organization bodies can have an impact on efficiency.[96]

Concerning the impact of these proposals on legitimacy, we note that enhancing efficiency can on the one hand simultaneously enhance legitimacy; this is the case regarding the balance of powers' issue. In this context, enhancing the efficiency of the WTO political branch would allow some legitimacy check to be made on the judiciary branch's output.

On the other hand, efficiency and legitimacy can sometimes collide. When enhancing efficiency implies formally departing from the consensus mode of decision-making, it has a negative impact on legitimacy from the perspective of the sovereign equality of states. In this respect, we have seen however that even the consensus mode of decision-making

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92 See: COTTIER/TAKENOSHITA (2003).

93 See: JACKSON (2001), p. 74

94 See: Sutherland Report, 64, paras. 287 and 289.

95 See HOWSE (2003).

96 Generally, it appears that, in the proceedings of international organizations, States will be less likely to object to decisions taken in lower organs when these decisions require the subsequent approval of a higher organ before they become final. See: SCHERMERS H. G./ BLOKKER N. M. (2003), *International Institutional Law*, Nijhoff, p. 472.

in its present design, with all the informal practices it entails, does not promote legitimacy in that sense; that form of legitimacy could be enhanced by formalizing the practices of consensus decision-making and increasing its transparency, as advocated in several reform proposals.

In addition, proposals that aim at rationalizing the work of the WTO by distributing powers more optimally to the lower organs can have a negative impact on both forms of legitimacy (in the sense of the sovereign equality of states and in the sense of democratic legitimacy) since lower bodies are often neither representative of the membership of the organization nor of the national constituencies of the members. Here, a balance must be found.[97]

Regarding the composition of WTO organs, some authors have suggested the creation of a limited-size subgroup of members that would steer the WTO political process based on the model of the Consultative Group of Eighteen under the GATT, therefore enhancing efficiency. This group would be established on a transparent, predictable, equitable, as well as legitimate basis in the eyes of all Members, formalizing in some way the actual decision-making practices. It would be composed of self-selected groups of countries that would help to compensate for the shortage of resources in some least-developed countries.[98]

Another proposal is to reinforce the involvement of high-ranking political leaders to give greater impulse to the process.[99] To some, greater involvement of political leaders would also enhance the democratic legitimacy of decision-making;[100] we note that this is pursuant to the logic of the WTO institutional structure that we have discussed above.

Regarding democratic legitimacy, proposals have been made to involve to a greater extent national parliaments and non-state actors at the WTO level.[101]

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97 See: KUIJPER (2002).

98 BLACKHURST R., HARTRIDGE D. (2005), "Improving the Capacity of WTO Institutions to Fulfill their Mandate", in: Petersmann E.-U. (ed.), *Reforming the World Trading System: Legitimacy, Efficiency, and Global Governance*, and Sutherland Report, chapter 8.

99 See: Sutherland Report, chapter 8.

100 In this respect, see the proposal of candidate for French presidency Sarkozy, in "Nicolas Sarkozy veut changer les règles de l'OMC", in: *Le Monde*, 9.03.2007.

101 On the involvement of national parliaments, see the series of articles in: PETERSMANN E.-U. (ed.), *Reforming the World Trading System: Legitimacy, Efficiency, and Global Governance*. On the participation of non-state actors: CHARNOWITZ S. (2000), "Opening the WTO to non-governmental interests", *24 Fordham Int'l L. J. 173*, and ESTY D. C. (1998), "Non-Governmental Organi-

We argue that the participation of non-state actors should be regulated and that mechanisms should be established to increase its transparency.[102]

At the national level, HOWSE advocates extraordinary mechanisms of democratic consent, such as plebiscites on results of the Doha round, with strict campaign rules. Further, he suggests ending the use of package deals, in order to prevent take it or leave it situations that weaken national procedures of legitimization, and to work to create some kind of "ownership" of the results.[103]

Finally, some authors have put the focus on the object of decision-making and have suggested not increasing the powers given to the WTO, thus recognizing that the scope of reform on the two other components of decision-making is limited.

After noting that since the very conditions of democracy (deliberation and rational discourse) are not met in the WTO, KRAJEWSKI argues that one solution is either to increase the supply of or decrease the demand for legitimacy. Assuming that the first solution is not feasible, he suggests limiting the WTO mandate and agenda, which would mean refraining from regulating on issues of environmental protection, labour standards, investment protection or competition rules.[104] In line with this proposal, HOWE / NICOLAÏDIS advocate the practice of *institutional sensitivity.*[105]

Furthermore, in order to remedy what he calls the missing legislator, VON BOGDANDY (pp. 651 f.) is pushing the *coordinate independence model*, which gives high priority to the regulatory autonomy of WTO Members and focuses substantive WTO law solely on concretizing the principle of non-discrimination.[106] As to HOWSE, he suggests making more room for reversibility in service commitment (opt-outs and safeguards).[107]

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zations at the World Trade Organization: Cooperation, Competition, or Exclusion", *JIEL 1, 123-147*.

102 On rules for the participation of non-state actors in the WTO, issues of external transparency and de-restriction of official WTO documents, see VAN DEN BOSSCHE (2005).

103 See: HOWSE (2003).

104 See: KRAJEWSKI (2001), pp. 171 f.

105 See: HOWSE/NICOLAÏDIS (2001). Institutional sensitivity would imply taking into account the superior credentials of other institutions to address values trade-off entailed in domestic measures, thus placing WTO law in the general framework of public international law.

106 See: VON BOGDANDY (2001), pp. 651 f.: under this model, the impact of the measures of other states is emphasized; this implies that in situations of procedural vagueness, WTO provisions are to be interpreted in a procedural way that would force states to take account of the legitimate foreign interests in their pol-

Finally, PAUWELYN links reforms on both the procedure and the object of decision-making. He perceives consensus decision-making as a kind of participation and political input that is part of *voice* mechanisms and argues that these voice mechanisms should be reinforced in order to maintain equilibrium with the WTO's *high levels of legalization and discipline*. Reforms on the law side (object of decision-making) imply providing some limited exit options to the Members as well as lower discipline; further, the judiciary branch needs to be politically sensitive, sufficient membership control must be maintained, and quality checks on the personnel active in dispute settlement must be increased. Reforms on the politics side (procedure) imply giving up the single undertaking principle.[108]

To conclude this analysis, we want to recall that one of the main challenges of WTO reforms is applying the very concept of democratic legitimacy at the international level. We leave the reader with some thoughts from WEILER / MOTOC who suggest "*repacking [democracy] as part of a broader discourse of legitimacy*", recalling that legitimacy encompasses elements other than democracy. These authors explain that "*the issue is how in the face of international community which appropriate and defines common material and spiritual assets and in the face of international government which increasingly appropriate administrative functions of the state, we can establish mechanisms which, in the vocabulary of normative political theory, would legitimize such governance*"[109], and suggest "*rethinking the very building blocks of democracy to see how these may or may not be employed in the international system and to search for alternative legitimating devices which would make up for the non-application of some of the classical institutions of democracy where that is not possible*".[110]

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icy-making, which otherwise have no standing in the domestic political and legal processes.

107 See: HOWSE (2003).

108 See: PAUWELYN J. (2005), "The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO", *8 JIEL*, 329-346. Also: PAUWELYN J. (2005), "The transformation of World Trade", *Duke Law Legal Studies Research Paper Series*, No. 66.

109 See: WEILER/MOTOC (2003), pp. 62 ff. and 70.

110 On other sources of legitimacy, see: See HOWSE R. (2001), "The Legitimacy of the WTO", in: Coicaud J.-M. /Heiskanen V. (eds.), *The Legitimacy of International Organizations*; MORAVCSIK A. (2004), "Is there a 'Democratic Deficit' in World Politics? A framework for analysis". *Government and Opposition 39:2*, pp. 336-363.