

# **The World Trade Organization's Legitimacy Crisis: What Does The Beast Look Like?**

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## ABSTRACT

*The concept of legitimacy has many facets. The article reviews from a politics and law perspective the diagnosis of an “institution in crisis” and calls for a more rigorous assessment taking into account dominant philosophical conceptions on the optimal design and functioning of an international organization. This article is divided into three parts. It starts with a cautionary note on existing fallacies about assessing multilateral intergovernmental cooperation and discusses competing schools of thought that approach the WTO with varying perceptions of democracy and legitimacy. The second part of the article takes up the actual debate on re-designing the WTO and directs attention to the question of balancing input and output legitimacy. The third part discusses potential avenues of research that have been neglected in the past.*

# The World Trade Organization's Legitimacy Crisis: What Does The Beast Look Like?

Manfred ELSIG<sup>1</sup>

## I. INTRODUCTION

When trade ministers meet during the bi-annual ministerial meetings, protesters gather just around the block. Since the infamous Seattle meeting in 1999, the World Trade Organization (WTO) has been faced with an unprecedented and accelerating surge in civil society interest in its workings. The WTO has ascended to become a prime target of anti-globalization movements. With the exception of the Doha meeting in 2001, often-violent street protests have become a trademark of the WTO gatherings. Among the most vocal and eye-catching protesters during the sixth WTO Ministerial in Hong Kong in December 2005 were angry farmers from South Korea who clashed with police forces on the streets and jumped into the cold water of Victoria Harbour in an attempt to swim to the conference centre.

At the first WTO ministerial gathering in Singapore in 1996 following the conclusion and adoption of the Uruguay Round (UR), a large number of trade diplomats were able to savour the successful closure of a long and laborious trade round. Trade ministers took pride in what they had achieved; many legal trade experts applauded the artfully drafted dispute settlement system as the “jewel in the crown”, international relations scholars from the neo-liberal institutionalism camp celebrated the institutional turn in global politics and neo-realists searched for explanations to fit this intergovernmental organization (IGO) into the anarchic world of power politics. Singapore came to be known as the first and (so far) last WTO Ministerial meeting at which national trade ministers enjoyed the club-like ambience that had come to characterize its forerunner, the General Agreement on Tariffs and Trade (GATT) over many years (Keohane and Nye 2001). The points on the agenda were not particularly

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<sup>1</sup> Manfred Elsig, a former trade diplomat, is a senior research fellow at the World Trade Institute, Berne and the Graduate Institute of International Studies, Geneva (manfred.elsig@wti.org). He taught courses on global trade policy and diplomacy at the University of Zurich and the London School of Economics. He is indebted to Maya Hertig, Philipp Stucki and Nikolas Stürchler for valuable comments. He acknowledges the support of the NCCR “International Trade Regulation” of the Swiss National Science Foundation.

controversial, public criticism was largely absent and media attention was still moderate.<sup>2</sup> Few participants of “executive multilateralism” (Zürn 2004) anticipated at this stage the emerging challenges to a declining model-type polity for state-driven governance beyond the nation-state.

From Seattle, Doha, Cancun to Hong Kong, most criticism has been directed where the WTO engages in rule-making and rule interpretation on a number of “new trade issues”, thus intruding into those policy domains that formerly fell under quasi-exclusive national regulatory sovereignty.<sup>3</sup> In addition, work on “old issues” such as agriculture, textiles and trade remedies has remained highly controversial. The UR agreement has increasingly led to the melting of nationally constructed buffer zones that coped with gradual trade liberalization. Whereas many developed nations have simply altered their tools to accommodate to change (i.e. the structure of side payments, the nature of safeguard, direct vs. indirect protection), most developing countries lack sufficient means of controlling the impact of these changes (with the exception of the use of high tariffs and the increasing use of remedies, i.e. antidumping legislation). Additional concerns have been raised that trading partners are directly challenging domestic institutions and policies and that basic GATT-inherited principles (i.e. non-discrimination, national treatment) pay little attention to a number of non-trade issues.<sup>4</sup> Moreover, studies on the “unbalanced” outcome of the UR have contributed to a growing perception of a zero-sum game in global trade regulation (Finger and Nogués 2002, Ostry 2002). Growing dissatisfaction with the output has also provoked a second glance at how decisions have been made among the bureaucratic entities that have enjoyed limited attention from the public (and their elected representatives) in the past. In other words, the failure to adequately satisfy the growing number of stakeholders has led to increased focus on processes.

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<sup>2</sup> The Ministerial meeting in Singapore spearheaded the inclusion of (additional) trade-related topics on the multilateral trading agenda: the so-called Singapore issues (competition, investment, government procurement, trade facilitation). Due to widespread criticism from developing countries and civil society activists only issues related to ‘trade facilitation’ finally made it into the scope of the Doha trade talks.

<sup>3</sup> The new trade issues include the field of services, intellectual property, investments, human rights, and the environment. Perceived and factual intrusiveness differs greatly from agreement to agreement.

<sup>4</sup> Others have argued that the principle of non-discrimination runs the risk of becoming hollowed out as exceptions to non-discrimination have multiplied (i.e. Srinivasan 2005).

Generally, overall satisfaction has decreased and the “voice” of interested stakeholders in the workings of the global organization has evidently intensified.<sup>5</sup>

What underlies most of the criticism directed at the WTO is an explicit (or at least implicit) argument that there is a democratic deficit. An often observed pattern of criticism is to draw on anecdotal evidence to make a case for concerns of legitimate governance, for example, on access for and accountability to stakeholders, the mode of decision-making in ministerial meetings, the effects on domestic institutions and thus pressure on democratically defined norms to change. Scholars from various fields of political science, international relations (IR) and law have joined the call for more democracy (i.e. Esty 2002).<sup>6</sup> Who would not agree with such a call? These proponents of a growth industry that advocates more democracy beyond the nation-state also contribute to a perception of an insufficient degree of legitimacy, a necessary condition for the stability of a democratic polity. Yet, the jury is still out.

A number of jury members in the field of traditional IR theories have only recently turned to questions of legitimacy triggered by limited progress being made in the WTO to tackle global externalities.<sup>7</sup> Cooperation under anarchy in the GATT era seemed easier to achieve than in the more norm-guided environment of today. Cooperation obstacles to the reciprocal lowering of tariffs in goods (negative integration) were far less obstructive than today’s distributional challenges in the effort to harmonize rules (positive integration). The GATT regime was mainly seen as an extension of the Westphalian system providing necessary public goods through an efficient trading regime controlled at the outset by a hegemonic power, and later backed by a number of strong sponsors of the regime (Gilpin 1987).<sup>8</sup> IR scholars tried to come to grips with the growing influence of the GATT and its successor, the WTO. From a realist perspective, institutions are created to represent the power of certain sponsors (Grieco 1988, Mearsheimer 1994). Participants sign the agreements they are willing to comply with and they install control mechanisms to monitor the

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<sup>5</sup> The most extreme voices do call for an end to the institution.

<sup>6</sup> For an opposing view, see Henderson 2002.

<sup>7</sup> See Robert Keohane’s interest in questions of accountability (Keohane 2003, Grant and Keohane 2005).

<sup>8</sup> From an international relations perspective the GATT regime is compatible with the Westphalian conception as intrusiveness into national politics through elimination of tariff barriers was marginal. From an international law reading based on Wolfgang Friedmann’s taxonomy, the GATT is often depicted as distinct from the Westphalian system. It is characterised as a system of co-existence, whereas the GATT regime is defined as a system of coordination (for a critical view on the differentiations, see Abi-Saab 1998).

organization closely. Powerful actors can leave the organization, at any time, if it doesn't produce satisfactory results. They have the option of turning to other settings (forum-shopping phenomenon). In contrast, from a functionalist-liberal perspective, institutions overcome a classical prisoner's dilemma situation. Repeated games help to tackle cooperation limits by lowering transaction costs, increasing information and creating additional incentives to tackle the enforcement problem (Keohane 1984). The regime theory literature took up these questions and focused on how cooperation was possible over time, why institutions were created and how they developed (Hasenclever et al. 1997).

IR scholars and regime theorists did not pay particular attention to democratic issues, as co-operation in an anarchic world could not be democratically organised anyhow (Dahl 1999).<sup>9</sup> In the past, the majority of IR scholars highlighted the differences between international and national politics and therefore created a discipline inward-orientation. In the 1980s, theoretical work in IR, in particular manifest in the neo-neo debate (neorealism vs. neoliberalism), still centred on the questions of power and structure. The end of the cold war and the unfolding legalization of international politics, however, have caught many IR scholars by surprise.<sup>10</sup> Thinking about governance beyond the nation-state and tracing different spheres of authorities along the domestic–international frontier (Rosenau 1997) gave birth to the “global governance” literature. The distinction between national and international has become blurred as methodological tools to analyze multi-level governance have fused (Milner 1998).<sup>11</sup> Moreover, the globalization debate that started during the 1990s reflected a growing discontent among stakeholders about how global public policy was conducted which led to a new wave of literature focusing on how to understand and eventually institutionally react to globalization processes (Held and McGrew 2003).<sup>12</sup> In terms of the global economy, calls have intensified to find a new consensus to replace or re-invent “embedded liberalism” as a leading paradigm for legitimate global governance.<sup>13</sup>

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<sup>9</sup> Many WTO contracting parties still fail to meet a number of democratic standards developed in liberal democracies.

<sup>10</sup> On the concept of “legalization”, see Goldstein et al. 2000; Finnemore and Toope 2001.

<sup>11</sup> In the analysis of international trade law, we have witnessed a convergence of constitutional and public international law (Cottier and Hertig 2003).

<sup>12</sup> For a critical account on the Global Governance literature, see Whitman 2005.

<sup>13</sup> The embedded liberalism concept (Ruggie 1983) characterized the trade regime until the end of the Uruguay Round. The dominant role of neoliberal ideas (as illustrated by the Washington (+Geneva)-Consensus) in the 1990s has contributed to the redefinition of the embedded liberalism

I argue in this article that the concept of legitimacy has many facets and the diagnosis of an “institution in crisis” needs a more rigorous assessment in light of dominant philosophical conceptions on the optimal design and functioning of an international organization. This article is divided into three parts. I start with a cautionary note on existing fallacies about assessing multilateral intergovernmental cooperation in light of democratic notions. In light of these general biases, I present and discuss competing schools of thought that approach the WTO with varying perceptions of democracy and legitimacy. The second part of the article hints at the actual debate on re-designing the WTO and directs attention to the question of balancing input and output legitimacy. The third part discusses potential avenues of research that have been neglected in the past.

## II. HOW DEMOCRATIC IS THIS POLITY?

### A. SOME CAUTIONARY REMARKS

Applying democratic concepts to multilateral economic institutions is a tricky task, as a number of fallacies need to be avoided. First, the yardstick of comparison is often too ambitious. IGOs should not be assessed according to democratic principles developed and shaped in the realm of nationally defined arenas of deliberations, whose implementation records are far from convincing. This point advocated by Andrew Moravcsik who states that “rather than comparing international organizations to idealized ancient, Westminster-style, or imaginary political systems, the baseline should be the real-world practices of existing governments acting imperfectly under complex constraints” (2004:362). One needs to distinguish the disordered polities of international cooperation from domestic governance structures, where *demos* is more clearly discernible, deliberation is better structured and parliamentary-driven and where *raison d'état* has been shaped, defined and brushed up over many decades of the respective *polis*' existence. Moreover, echoing this cautious note, Kahler argues that an aspect often overlooked is how contemporary democracies have strengthened the role of technocratic bodies and delegated rule-making to “non-majoritarian

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paradigm (see Stiglitz 2002; on the notion's original meaning, see Williamson 2000, see also Naím 2000). The neoliberal paradigm has been more dominant in the Washington based intergovernmental financial institutions than in the Geneva-based WTO. The latter still exhibits a number of mercantilist elements, as market access is often used as the “currency” of negotiations.

institutions (NMIs), such as the judiciary (whose accountability to electorates and governments varies widely) and central banks (...)" (2004:133).<sup>14</sup> Second, many interested citizens (including scholars) in the developed nations have a tendency to overrate the political systems they have been socialized in.<sup>15</sup> Therefore it is important to specify one's own perception and values held (*Werthaltung*) of democratic principles and be responsive to arguments derived from overlapping or even competing schools of democratic thought. Third, there is a tendency to opt for a partial view. The WTO lends itself perfectly to being named and shamed for not meeting certain (not clearly defined) democratic standards. However, a more holistic view when assessing processes and outcomes of emerging polities is needed. The WTO for instance is a membership driven organization that needs to meet a multitude of expectations and concerns of legitimate governance (see Grant and Keohane 2005). Trying to fix one aspect of the polity will not automatically lead to more democracy. Re-design might unintentionally produce democratically equivocal repercussions for other procedural or structural elements (see also Pauwelyn 2005), e.g. increased transparency in deliberation processes within an international organization could – under a particular set of conditions – hamper output efficiency. Fourth, one should not overestimate the importance of the institution in the current debate on democratic governance in transnational relations; we shouldn't fall into the n-1 (single case-study) trap that has characterized EU integration theories for far too long (Caporaso 1997, Moravcsik 1997, Risse 1997). Whereas, the increased bindingness of the dispute settlement mechanism portrays peculiar characteristics in the international realm (Goldstein and Martin 2000), deliberation, bargaining and coalition building in rule creation should not be de-emphasized and lend themselves to being analyzed from a comparative perspective (see also Moravcsik 2004:343). Finally, one should not cling to a type of model that had its heyday in the past, when the GATT was still predominantly characterized as a club (see Keohane and Nye 2001). It doesn't help to lament that the general equilibrium the GATT model successfully produced for many

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<sup>14</sup> Esty advocates an opposing view. "Until recently, the trade regime benefited from a sense that international economics and trade policy making were highly technical realms best left in the hands of an elite cadre of qualified experts" (Esty 2002:10). The moment the wider public perceived that trade experts were no longer working just on technical or scientific matters, the politicization set in. Therefore, the comparison to domestic practice of delegating in highly technical areas, such as competition or monetary policy decisions, might not be persuasive.

<sup>15</sup> I would argue that interviewing randomly selected British or Swiss citizens on the optimal form of political organization, the Westminster model or the Consociational Democracy model accordingly, would reveal high acceptance levels in relation to other forms of democratic organization.

years in the second half of the 20<sup>th</sup> century is no longer attainable (i.e. Barfield 2001, Sally 2003).<sup>16</sup>

In the following I discuss a number of philosophical perceptions drawing from theories on democracy, IR and law in order to illustrate the diverging conceptions held by practitioners and scholars when they describe or proscribe the “nature of the beast”. The origins of philosophical views need to be clearly traced to avert a debate characterized by the “ships-that-pass-in-the-night” phenomenon.

## B. PERCEPTIONS

If one attributes a territorially bound conception or the existence of corresponding *demos* to democratic societies, then by definition many governance structures in the international and regional realm fail the test (Dahl 1999, Weiler 1999). In short, such a conception rules out the existence of democratic IGOs. In this article, I don't abandon democratic concepts as they shape the observer's perception; however, I attempt to direct the debate to analyzing international organizations through the prism of concepts related to 'legitimate governance'.<sup>17</sup>

Moravcsik lists four dominant sources or conceptions from which criticism has been directed towards IGOs. These perspectives comprise a deliberate conception of democracy to improve political capacity of the citizenry; a pluralist conception concentrating on accountability, a libertarian conception as a means to protect individual liberties and a social-democratic conception to offset the power of concentrated wealth (2004:338). In international law, different concepts of a legitimate WTO can be traced in the so-called “constitutionalization debate”. A significant number of contributions in this discipline follow the tradition of positive legal theory, where legitimacy is derived from the process defined by the legal order and which is characterized by a higher order norm to validate the system (Kelsen 1945, Hart 1961, Cass 2005:32). In such a reading the notions of legality and legitimacy are often used interchangeably.<sup>18</sup> In Deborah Cass's systematic description of the debate, she pinpoints a number of elements, which exhibit a normative

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<sup>16</sup> This is not to be confounded with lessons to be learned from the past.

<sup>17</sup> This article shares a concept of legitimacy as defined by Nanz and Steffek: “Legitimacy can be understood as a general compliance of the people with decisions of a political order that goes beyond coercion or the contingent representation of interests” (2004:315).

<sup>18</sup> On various existing views of constitutionalization, see Cass (2005:17), see also Cottier and Hertig (2003). For earlier work on constitutionalization, see Jackson 1998, Petersmann 1997.

predisposition for a “positive state-based theory” (Cass 2005:19). These elements include the limitation of economic or political behaviour, the belief in the emergence of a *Grundnorm* that leads to a coherent set of rules, the existence of an active political community, a deliberative law-making capacity which triggers greater process-induced social acceptance and an additional dose of legitimacy (Cass 2005:19).<sup>19</sup> In Franck’s contributions, elements of process and outcome are linked. Legitimacy is dependent on the process underpinned by a contractarian understanding and a belief in procedural fairness (Franck 1988, 1995). He doesn’t stop there and adds additional factors that lead to more compliance (compliance-pull) such as textual determinacy (unambiguous messages), symbolic validation to increase authority, coherence of the rules, and adherence of states (1995:25-46). In terms of output, he focuses on equity as a proxy for fairness, which overlaps with philosophical conceptions developed in political science.

In the following I will use the conceptions described above, separate these into structure/processes (input) and outcome (output) and supplement them with additional conceptions, which have received less attention in the academic debate on WTO reform. Building upon Fritz Scharpf’s work on the European Union, the dual perception of input and output legitimacy lends itself to discuss the IGCs’ policy processes, design and outcome.<sup>20</sup> In addition, it is important to note that normative views and empirical experience influence the choice of issues to be singled out (and rated) for democratic scrutiny. Most of the forms are ideal positions, which in discourse are presented in combination with other types of perceptions leading to mixed forms.

### 1. *Input Legitimacy*

Input conceptions can be broadly distinguished according to whether they focus primarily on processes or the guiding structure of the polity. The most prominent ideal-type democratic perspectives focusing on the process are the deliberative and pluralist models.

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<sup>19</sup> She distinguishes three dominant visions of WTO constitutionalization: institutional managerialism, right-based constitutionalization and judicial norm-generation (Cass 2005). Most of the work under these labels understands constitutionalization more from a *finalité* perspective than a procedural perspective (see also Peters 2006).

<sup>20</sup> See Scharpf (1999) on input and output legitimacy; Weiler (2000) separates structural (process) from material (outcome) issues.

The deliberative model directs attention to access to the system, an open and information-rich decision-making environment and non-hierarchical arguments (Verweij and Josling 2003). Special emphasis is placed on increasing the legitimacy of the system by increasing means of deliberation. One way of doing this is by creating “appropriate public spheres” which do not serve to aggregate self-interests, “but rather to foster mutual learning, and to eventually transform preferences while converging on a policy choice oriented toward the public interest” (Nanz and Steffek 2004:319). These ideas are largely influenced by Habermasian conceptions of procedural environments towards improving “authority free discourse” and non-hierarchical steering (see also Risse 2004). “Deliberate democrats” are very sceptical of representative elements (i.e. delegation to technocratic institutions) and push for increased participation through improved inclusion of stakeholders and greater transparency in rule-making (e.g. Krajewski 2001). Public deliberation is depicted as a key variable as “the authoritative decisions imposed by governments demand justification to those burdened by authority, and justification must appeal to evidence and argument acceptable to reasonable citizens” (King 2003:26). Legitimacy can be improved by “a process of careful and informed reflection on facts and opinions, generally leading to a judgment on the matter at hand” (King 2003:25). Deliberative models strongly emphasize the primacy of processes of public reasoning and the inclusion of diverse ideas. They neglect concerns over the goods of public interest to be produced. Translated in the context of the WTO, a deliberate perspective might advocate the creation of a WTO assembly or parliament in order to decrease the distance between the rulers and the ruled.<sup>21</sup> In addition, proposals are put forward to improve the participation and expertise of the least developed countries (internal transparency). Yet, equally important are ideas to strengthen the interface between political institutions and civil society by ameliorating the amount and quality of information and access to the system for non-governmental groups (external transparency).<sup>22</sup>

Pluralist conceptions emphasize competition among interest groups and direct accountability of the people’s representatives. Pluralism has been very influential as a theory of policy aggregation and governance in the US (i.e. Lindblom 1977, Dahl

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<sup>21</sup> On improving parliamentary involvement in the WTO from a practitioner’s perspective, see Mann (2003).

<sup>22</sup> See Shaffer’s (2003) excellent contribution on increasing parliamentary oversight with a particular emphasis on developing countries.

1999). Democracies are perceived as systems of bargaining among various interest groups in which the governmental actors are intermediaries or referees at best. The system is characterized by active citizens and assumed equality in opportunities in voice (Moravcsik 2004). Decision-making is depicted as “a complex process of conflict, negotiation, and compromise” (King 2003:32). An important feature is electoral accountability by which representatives of various interests can be sanctioned or replaced. Translated to the WTO, a pluralist conception supports institutional settings that allow for the representation of diverse interests and sanctioning of run-away representatives or bureaucrats. The rule-making process is pictured as “*political* in a manner that makes it appropriate to the determination, or at least scrutiny, of policy choices that involve contested values and warring constituencies” (Howse 2003:85, *italics in original*). In opposition to deliberate conceptions, pluralists, however, are reluctant to offset power imbalances and are much more competition-oriented.

Structural concepts look at the optimal design of representation and the relationship between political authorities located on different levels or layers of governance. Political systems in democracies differ in the degree of representation, delegation and control. Some systems, such as the classical Westminster model rely on delegated powers to people’s representatives and periodic electoral accountability, whereas a model of direct democracy highlights direct participatory rights and “voice” by affected citizens (Lijphart 1999, Grant and Keohane 2005). The former concept values the important role of politicians (members of parliaments and governments) through a *governance for the people* perspective, whereas the latter concentrates more on constant voter’s oversight (*governance by the people*) and critically assesses negative side effects of delegation to experts or non-elected officials. For the latter group “democracy is an ideal of self-government, of a group of actors ruling themselves as members of a political community” (King 2003:25). Delegation costs are strongly stressed by proponents of direct democracy (but also deliberative models) when applied to the international level, as the chain of delegation often increases whereas direct control through national parliaments or citizen decreases (see also Howse 2003).<sup>23</sup> Grant and Keohane (2005) attempt to bridge these two concepts by providing new visions of accountability flowing from a participation

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<sup>23</sup> Howse (2002) goes so far as to advocate the right of ratification by the people through means of referendum.

and delegation model and presenting a number of mechanisms that would hold state and non-state authorities increasingly accountable in the global arena.

An overlapping structural debate unfolds between ‘centralists’ (to which many constitutionalists would subscribe) and what I call ‘subsidiarists’ (see Howse and Nicolaïdis (2003)).<sup>24</sup> What underlies these concepts is a different assessment of the problem-solving capacities and thus of where decisions should be carried out (and eventually enforced). The centralist school follows a functionalist logic in problem solving. They argue that lower levels of authority fail to take into account general interests for providing optimal public goods.<sup>25</sup> In the context of WTO reform, centralists don’t aspire to create a world government, but rather pledge for an increase in sovereignty transfer from the subnational and national levels to the international level. The subsidiarist school reckons that policy innovation is most likely in a competitive environment among equal national and subnational entities. They argue that legitimacy will increase through empowering lower levels of governance (a bottom-up approach). Decisions should be coordinated and taken at the level most likely to exhibit the greatest problem-solving capacities. The international level should focus more on providing information, monitoring and supporting – through a peer pressure process – spill-overs across polities.

## 2. *Output Legitimacy*

Conceptions of legitimate governance can also be situated on the output side. A political system is judged as a function of what it produces. What is the public good to be produced and how well does the system score against this benchmark? What are the costs of action or inaction (Conceição 2003)? Applying Moravcsik’s taxonomy, the liberal model and the social-democratic model are output-oriented perceptions. The libertarian view stands for the protection of specific rights of its members and is often characterized by a critical view of governmental actors trying to limit liberal values. The citizen has to be protected from an active Leviathan that attempts to

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<sup>24</sup> The debate between centralists and subsidiarists focuses on concerns of exclusive or shared sovereignty. It could also be termed the “federalist” debate. However, as federalism is a politically charged term, I will abstain from using the federalist-antifederalist, or federalist-confederalist terms as analogous notions.

<sup>25</sup> In the literature on WTO constitutionalisation Cass’s notion of “institutional managerialism” overlaps with the centralist school’s optimism about the institutions’ key role in increasing legitimacy (Cass 2005, see also Jackson 1998).

impose its will on the people (a critical position that also partly draws from Weber's writings).<sup>26</sup> Translated to the WTO this includes the right to trade, the right to market access, the protection of civil liberties, and the protection of properties (i.e. Barfield 2001). The liberal school primarily defends the WTO as an institution that protects the right to trade (McGillivray 2000) or an institution where decision-makers attempt to lock in liberal reforms and counter rent-seeking pressures (Messerlin 2004). For some liberals, the state has to be protected from a WTO run-amok that tries to regulate trade-related policy issues. According to Cass's categorization, "right-based constitutionalization" yields elements from a liberal model in relation to specific rights (e.g. property rights, right to trade), but also draws from concepts that strengthen WTO legalization by granting its law direct effect, increasing judicial review and constraining certain types of power. A strong proponent of this school has been Petersmann (1991). His early work concentrated on questions of keeping protectionism in check, moving from state to individual rights and direct invocability of WTO law. Subsequently, Petersmann (2000) has linked trade to non-trade concerns as part of a wider human rights approach, thus distinguishing his approach from traditional liberal ones.

The social-democratic model of legitimate governance is also largely principle-oriented. For proponents of this school, the purpose of the system is to offset power asymmetries and correct imbalances. In addition, minorities need to be protected. A strong element is the solidarity among actors in the system (Held 2004b). Held's vision of a cosmopolitan democracy strongly reflects such principles. In the WTO reform debate, social-democratic concepts refer to the need for helping losers of liberalization processes in the tradition of the 'embedded liberalism' consensus. In terms of output they call for instruments to level the playing field and protect consumer rights as the principles are biased towards the interests of producers. Overall they perceive the liberalization agenda of the WTO as a direct threat to social democracy and the European type of welfare state. Elements of the social-democratic model have been manifest in the increasing calls for making the WTO more development-friendly. Similarly, Cass strongly argues – implicitly applying an anti-

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<sup>26</sup> In line with Max Weber there is a common uneasiness about bureaucratic organizations pursuing their own instead of the general interests, see Verweij and Josling (2003:2). Whereas this argument has been mainly directed at the Washington based IMF and World Bank, the criticism directed at the WTO is less focused on bureaucrats of the secretariat, than on the limited transparency and power-led procedures controlled by nationally delegated bureaucrats.

constitutionalization approach – for prioritizing output legitimacy (what she calls trade democracy) to increase standards of living in the developing world and to include health, environment, and safety concerns within the domain of economic policy (Cass 2005:26-7). She refers to a potential drawback related to the constitutionalization debate in the trade law community. “By worrying incessantly about *whether and when the WTO will be constitutionalized* we have turned our attention from *what sort of trading system we might want*” (Cass 2005:27, *italics in original*). A particular institutional feature of the WTO, which has attracted ample interest in the debate on output legitimacy, is the strong role attributed to the judicial branch of the WTO: the dispute settlement body (DSB). In the last few years, judicial decision-making has become much politicized. Liberal and social-democratic views largely differ in their assessment of how the DSB has interpreted the guiding rules and norms and how it has balanced the guiding principles.

In addition, there has been increasing consensus among scholars coming from different IR traditions that the issue of inadequate external accountability is a major obstacle to legitimacy. Keohane acknowledges that the key normative issue of legitimate governance can be defined as failing external accountability, “accountability to people outside the acting entity, whose lives are affected by it” (2003:141).<sup>27</sup> Following from this work, Grant and Keohane (2005) attempt to cross the input–output divide by using the concept of accountability as a benchmark for legitimate governance. They draw attention to the tools at disposal to constrain the abuse of power by applying a Weberian notion of limiting authorities’ power. “The problem of abuse of power is particularly serious in world politics, because even the minimal types of constraints found in domestic governments are absent on the global level” (2005:30). The (mis-)use of power, however, has often been exercised by states and not the global economic multilaterals themselves, which leads Grant and Keohane to conclude with a view to unilateralism: “Ironically for those who attack the WTO as unaccountable, it represents one of the few attempts in world politics to formalize legal and supervisory accountability over the actions of sovereign states” (2005:39).<sup>28</sup> Similarly, Smythe advocates assessing the WTO’s legitimacy from a state-level

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<sup>27</sup> Risse (2004) attempts to blend Scharpf’s concepts of legitimacy with Keohane’s notion of internal and external accountability; Held (2004a) provides an analysis based on achieving equivalence between those deciding and those affected by a certain policy.

<sup>28</sup> Following from the argument of unilateral abuse of power Grant and Keohane observe that in such a context “domestic democracy is insufficient. Even democratic states will act in a biased way towards noncitizens” (2005:40).

perspective as legitimacy “is also derived from its sovereign member states which make the decisions” (2005:4).<sup>29</sup>

### III. THE RE-DESIGN OF THE WTO AS A BALANCING ACT

In a recent report by an appointed group of eminent persons (the so-called Sutherland Report) a number of reform proposals have been put forward (Sutherland et al. 2004). The clear message from the report is that no quick fix is in sight, not to speak of a “constitutional moment”. This report’s diagnosis and the proposed reforms have been discussed in great depth in the law community, less so in the economics and IR communities.<sup>30</sup> Most commentators critically review specific proposals against a benchmark rooted deeply in their philosophical conceptions, but few take up the challenge to approach reform from a dynamic perspective in which input and output are linked and philosophical boundaries transcended.<sup>31</sup> Pauwelyn – interpreting his mandate more broadly than his peers – advocates an improved framework for reform that would take into account “the fluid equilibrium between law and politics, discipline and participation and the bi-directional relationship that brings it about” (2005:338). In addition, the report has been rightly criticized for its narrowness in concentrating on the WTO and failing to provide for a more holistic view of international politics and overlap with other policy objectives and regimes or as Finger puts it, the reports puts forward “detailed instructions on how to set the sails of the good ship *WTO*, but no knowledge of wind, tide or the sea on which she sails” (Finger 2005:803, *italics in original*).

From a pragmatic perspective, one could advocate addressing the most pressing legitimacy issues the WTO/GATT regime is confronted with. Grant and Keohane’s contribution can be read in such a light as they concentrate on accountability mechanisms that cut across input and output. When assessing the gradual attempts of the WTO to open up to the public in a move to increase external transparency, the

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<sup>29</sup> James Bacchus, a former member of the Appellate Body, argues that legitimacy is derived from, “and is inseparable from, the *individual legitimacy* of each of the individual ‘nation-states’ that, together, comprise ‘the WTO’” (2004:669, *italics in original*).

<sup>30</sup> See *Journal of International Economic Law* JIEL 8(2) and 8(3) 2005; Finger (2005). There was little coverage in the media (i.e. *The Economist*, 22 January 2005).

<sup>31</sup> Petersmann (2005) for his part proposes a number of institutional changes on the input and output sides, but does not address trade-off issues.

WTO record seems not as bad most critics claim.<sup>32</sup> The WTO as an institution has increasingly engaged with civil society groups, has opened up the Ministerial negotiations to a large number of non-governmental organizations and has provided far more access to documents that used to be restricted in the past (for an overview, see Smythe 2005). Member countries have been more reluctant to open up to the public. Notwithstanding an increasing number of countries switching to a more open system of consultation in the policy formulation process (see Hocking 2004), the limited right to exercise “voice” in the domestic policy setting in many contracting parties, creates a tangible expectations–capacities gap undermining the organization’s legitimacy. As described above international organizations are very much member-driven. Norm change occurs primarily through member-induced decisions. As a consequence, accountability deficits are more often a phenomenon of the “result of choices by the most influential national governments than a symptom of the dysfunctions of international bureaucracies” (Kahler 2004:141).<sup>33</sup> A new standard to increase transparency was set by the parties involved in the *hormone case*. They decided to have hearings openly diffused to the interested public.<sup>34</sup> This is the first time that debates in the judicial branch have been “declassified” in real time to the public. This decision represents a symbolic quantum leap from the times when the member states still tried to block outside interference in judicial rule-interpretation (i.e. information from non-governmental organizations). The infamous *amicus curiae brief* debate (see Mavroidis 2001) is a good illustration for understanding the reluctance of many members to interact with civil society.<sup>35</sup> More reform potential has been located in the area of internal transparency (and accountability), as the least developed countries still cannot act as equal partners in the system for a number of reasons (see Smythe 2005, Smythe and Smith 2006). This creates important legitimacy concerns for the institution from the angle of most of the democratic perspectives outlined above.

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<sup>32</sup> Applying the benchmark set by the democratic perspectives discussed above, most of these would be rather silent on this issue. Exceptions are found in the deliberative school, which advocates further non-hierarchical debate and the liberal school which cautions against too active participation of the non-elected civil society groups.

<sup>33</sup> The WTO is member-driven to a greater extent than its Washington-based Bretton-Woods sisters (IMF/World Bank).

<sup>34</sup> Moves to increase transparency have been openly supported by former members of Appellate Body (e.g. Lacarte 2004). James Bacchus in a speech given during a WTO Public Symposium reiterated the call for more openness and transparency, April 2004, Geneva.

<sup>35</sup> The contentious issue of accepting written contributions from non-governmental organizations overlapped with the members’ wish to control an active and gap-filling judiciary.

Notwithstanding progress or stagnation in reforming the input side, there seems to be an increasing consensus that the litmus test for legitimacy is directly linked to the effectiveness of the system (output legitimacy). One major call is to help developing countries to reap more benefits from the system by making the organization more development-oriented. In the context of the current WTO negotiations (the so-called Doha Development Agenda), there is growing consensus among representatives of developing countries that effective outcomes should be more in the limelight of reform debate; or as Smythe put it: “if the development aspect of the current round turns out to be nothing more than a cynical re-branding exercise it will only further erode legitimacy of the WTO in the eyes of many of its members and the broader international community” (2005:23). In the end, *demos* demands welfare-enhancing policy decisions and disregard issues on input processes that do not fully live up to some democratically defined ideal case.

What follows from the above discussion of legitimate governance through international governmental organizations is that we need to apply a dynamic view of input and output legitimacy to overcome a rigid dichotomy. A categorization that focuses either on processes/structures or output runs the risks of segmenting the problem, cutting it into small salami slices and losing the broader picture. Input and output are clearly linked (Scharpf 1999). Scharpf’s work on European integration has alluded to potential trade-offs between input and output legitimacy that makes the relation more contentious than is often assumed. As briefly noted in the first part of the article, an increase in input legitimacy could come at the cost of outcome effectiveness. The message here is that increasing democracy in the process carries the danger of undermining the system’s overall performance. In other words, openness could turn out to be a double-edged sword. “Under the Club Model, governments operating behind closed doors can cut deals to lower tariff barriers and to open markets for the benefit of the general public out of sight of rent seekers, protectionists, and other special interests” (Esty 2002:11). As Stasavage (2004) shows in his contribution, the call for increased transparency could potentially have a negative effect on the bargaining outcome. “Bargaining that takes place in public helps ensure that representatives propose policies preferred by their constituents. But open-door bargaining also encourages representatives to posture by adopting overly aggressive bargaining positions that increase risks of breakdown in negotiations” (2004:695). Goldstein and Martin (2000) argue along similar lines. The process of

increased legalization leads to improved information on the pay-offs of ongoing negotiations, thus strengthening protectionist forces vis-a-vis free trade interests which in turn decrease the likelihood of further liberalization. Further arguments can be found in the literature that caution against the increase of voice by channelling more politics into the system. Increased participation of politicians in highly technical negotiations could not only slow down the negotiation process but eventually lead to inefficient outcomes due to lack of knowledge on the substance (and the rules and tactics of negotiations) or as Aberbach et al phrase it, “policymaking by bureaucrats and policymaking by politicians exhibit different weaknesses. (...) The moral dilemma posed by bureaucratic policymaking is power without responsibility; the dilemma of policymaking by politicians is power without competence (...)” (Aberbach, Putnam and Rockman 1981:4).<sup>36</sup> Finally, stagnant processes could lead to “missing” output adversely affecting members’ satisfaction with the system, leaving the strong parties with the option of signalling their discontent and eventually exiting (see Hirschmann 1970).<sup>37</sup>

Other scholars exhibit a less pessimistic view of the relations between input and output and call for more politics and more law (Pauwelyn 2005). Steinberg (2004) goes a step further by alluding to the system’s inherent self-correcting capacities to limit imbalance. This can be illustrated by the shift of de facto rule-making capacities that characterize the post UR period. The UR led to an increase in judicialization but has left legislative rule-making modes largely unchanged.<sup>38</sup> The unfolding tensions due to the privileged role of the dispute settlement system have brought the proclaimed institutional “jewel in the crown” under intense public scrutiny. The fear that governments would turn to the WTO to adjudicate unresolved issues was widespread (see Hudec 2002, Barfield 2001). In the first six years after the creation of the WTO the number of cases brought before the WTO’s judiciary surged. As a consequence, there has been an increasing gap opening up between rule-making and rule interpretation. Yet, since 2002 the number of trade disputes brought to Geneva has decreased. The main trade actors have become more reluctant to put controversial

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<sup>36</sup> This argument needs to be further qualified in the sense that those politicians that quickly build expertise on the issues and participate in the negotiations for some time can increase their standing and influence in the negotiations by offering leadership.

<sup>37</sup> One way of partial exit is seen in turning towards bilateral and regional preferential trade agreements.

<sup>38</sup> Notwithstanding proposals to change to weighted voting, the system’s consensus rule was even strengthened, see Ehlermann and Ehring (2005).

issues to the WTO tribunal and the panels and appellate body (AB) have shown a high degree of judicial self-restraint (i.e. Ehlermann 2002). The AB's activism has been limited by legal discourse, more politics and constitutional rules that provide for checks and balances (Steinberg 2004). Steinberg argues that this has automatically led to a new equilibrium in which the gap between legislative and judicial lawmaking is controlled for.<sup>39</sup>

Focusing on output legitimacy might be defensible from a rational point of view; however, there is a strong argument to be made that input legitimacy should not be neglected as the belief in fair processes potentially increases the rate of compliance with negotiated treaties, thus increasing output legitimacy (Franck 1988).<sup>40</sup> What follows from the above is that there is an implicit balance to be achieved between input and output, which is important for the stability of the system in the long term.

#### IV. THE MISSING PIECES

Future research on the balance and dynamics of input and output legitimacy in the WTO needs to focus on comparative social scientific analysis. We need to ask how reforming elements of the system affects the overall functioning of the institution.<sup>41</sup> We need to base our analysis in a comparative setting and draw from real-world experience in national policy arenas. "In order to assess the extent to which a given insulation or delegation of power in an international organization is democratically legitimate, we may ask whether a similar institutional adaptation is widely accepted in existing democratic systems" (Moravcsik 2004:347). Besides the national benchmark, we need to draw from insights developed in other global economic multilateral organizations, such as the World Bank, IMF or regional economic organizations, such as the European Community. In particular, a rich literature on legitimate governance in EU politics already exists.

Of the static analyses that focus on either input or output, there are relatively few on the *output side*. Research has been dominated by contributions concentrating largely on the *input side*, focusing on domestic factors influencing trade policy-

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<sup>39</sup> Others put it less optimistically by acknowledging, "the imbalance between the WTO judiciary and its political branch is here to stay" (Pauwelyn 2005:345).

<sup>40</sup> See also Zürn (2004:261) who draws on Seymour Lipset's work on how the empirical belief in the legitimacy of an institution is linked to normative validity of a political order.

<sup>41</sup> See the proposal by the Sutherland Report (Sutherland et al. 2004) to strengthen the role of the WTO Director-General and thus the Secretariat.

making, various aspects of decision-making in the WTO and the role of non-governmental organizations. With the exception of substantive contributions related to compliance with the dispute settlement system (e.g. Hudec 1993, Büttler and Hauser 2000, Busch and Reinhardt 2001, Reinhardt 2001) and the role of economic strength and power in litigation (e.g. Horn et al. 1999, Guzman and Simmons 2005) research on outcome is either largely fragmented or converges around the classical poles of IR theories (e.g. Mearsheimer 1994, Chayes and Chayes 1995).<sup>42</sup> There have been a number of attempts to overcome the old dichotomy between those who believe the WTO matters and those who deny any substantial influence. There is need for a better understanding of how the WTO matters, going beyond the null hypothesis that treaties do not constrain parties.<sup>43</sup> Generally, we need to steer away from a research agenda too narrow on compliance and ask how efficient and effective the system really is.<sup>44</sup> Studies – applying “most unlikely case design” (Zangl 2005, Busch et al. 2005, Allee 2004) – indicate that even strong actors find themselves increasingly constrained by international norms. In other words, policy autonomy has decreased through the process of an emerging international rule of law. These contributions offer useful empirical information but need to be connected and deepened so as to enable us to understand when constraints matter and how. The puzzle remains as to what conditions determine the degree of constraining effects of international trade law. What factors influence the intention and capacity of actors to comply (see Brown and Jacobson 2000)?

From a vertical dimension, we need to ask how international institutions affect state behaviour generally (Martin and Simmons 1998). How do international norms and interaction within institutions influence domestic preferences (Claude 1966, Finnemore 1996, Johnston 2001, Simmons and Elkins 2004) and compliance (Franck 1988, Chayes and Chayes 1995)? Moreover, what are the conditions that support and constrain the outside-in effect on legitimate governance domestically (Pevehouse

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<sup>42</sup> See also the study by Rose (2004) in which he argues that being a member of the GATT/WTO system does not increase trade-flows in any statistically significant way.

<sup>43</sup> This hypothesis is based on the argument that commitments do not compel actors to abide by rules as they would have complied – in the absence of a treaty – to these rules anyway (Downs et al. 1996, Martin and Simmons 1998); see the debate on whether treaties constrain or screen (Simmons 2000, von Stein 2005, Simmons and Hopkins 2005).

<sup>44</sup> Young and Levy (1999) outline different forms of effectiveness: problem-solving, legal, economic, normative and political. Iida (2004) discusses different areas where the effectiveness of the WTO dispute settlement system could be measured, including dispute solving capacities, fending off unilateralism, assuring a level playing field, taking into account non-trade concerns and balancing legislative and judicial functions.

2002, Wolfe 2003)? In a horizontal dimension, we need to ask how does a WTOization process affect policies in neighbouring fields; how has WTOization changed the balance among international governmental organizations and what have been the institutional responses to the overlapping regimes? How does regime outcome score according to concepts of external accountability (Keohane 2003)?

From a more dynamic viewpoint, there is demand for an analysis of how WTOization creates compliance-pull, changes domestic processes and structures, affects the balance of interest group competition and feeds back into the system. For this, we need a better understanding of the dynamics of legalization processes. How does increased legalization (i.e. the aspect of bindingness) affect contracting parties' long-term interests in the GATT/WTO system? In this light, can the WTO be modelled as an "efficient breach contract" (*clausula rebus sic stantibus*) or is it guided by the obligation to comply (*pacta sunt servanda*)? How do these different conceptions and the empirically observable behaviour affect the stability of the system (Rosendorff 2005) or the likelihood of liberalization in the post trade negotiation period (Goldstein and Martin 2000)? How does the process import new legal cultures into the system spilling back to other national legal systems (Weiler 2001)?

Finally, we need a better empirically based understanding of how participants' views of a legitimate organization are constructed and react to exogenous factors? We need to go beyond single case-studies where some actors felt marginalized in the process and disapproved the outcome and assess more systematically the overall satisfaction of the shareholders directly involved in policy-making and of the stakeholders affected by decisions taken at the international level or at the national level by powerful parties to the agreement.

## V. CONCLUSION

This article has argued that shortcomings related to legitimacy have many facets. Therefore, the story of WTO reform is not as straightforward as many scholars and practitioners in the field of trade law and policy suggest. The optimal form of the WTO – not starting from scratch but from the perspective of an evolving institution carrying the weight of 60 years of trade politics – is far from obvious. The treatment of the alleged shortcomings is dependent on the diagnosis which again is largely

conditioned on philosophical conceptions described in this article. Moreover, treatment is a tricky task, as it needs to control for the many dynamic effects flowing from changing aspects of input or output-related functions of the GATT/WTO system. In addition, in the past we might have overemphasized the study on the effects of legalization to the detriment of focusing on the challenges posed by the distributional effects of cooperation or as Martin and Simmons put it, “unless the problem of equilibrium selection is resolved, all the third-party monitoring in the world will not allow for stable international cooperation” (Martin and Simmons 1998:745).

The article has advocated a more science-based and open approach for tackling legitimacy concerns. However, in the short term, we should neither be carried away by aspirations of “cosmopolitanism” (Held 2004a) – without giving it up as a possible long-term vision – nor give in to the sirens’ calls to accompany reform discussion with a cynical attitude. As no “constitutional moment” seems to be in sight, we should focus on pragmatic steps. Engaged discussions on the re-design of “embedded” liberalism as the driving philosophical rationale for multilateral economic governance (see Zürn 2004) are an optimistic sign of a growing world *demos* that actively engages in deliberation, communicative action, pluralist competition and contestation. These are positive signs in light of an often-perceived increased passiveness of the citizens of the world.

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