

# Transparency in the WTO's Decision-Making

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## Abstract

In almost 20 years of existence, the World Trade Organization (WTO) has managed to be at the forefront of public discussions on international organizations (IOs). Transparency in the WTO decision-making has been on the agenda of the multilateral trading system for several years. Pressures from developing countries, non-governmental organizations (NGOs) and the civil society in particular have led to significant improvements towards more openness and participation in the WTO decision-making. This article posits the WTO within the current debates about more institutional transparency in IOs. It discusses the current features of good governance in the WTO decision-making and the consensus rule in particular, in an attempt to identify the pros and cons of this voting tradition in a modern IO. It also discusses the recent selection of the new WTO Director-General. A central insight of the paper is that input and output transparency of the WTO could be further enhanced by increased, managed participation of NGOs. As the WTO is gradually becoming a genuine IO in terms of membership and gets involved in global discussions relating to finance, climate change, or poverty eradication, public scrutiny will only increase and thus improved governance is an irreversible process. However, divergences in the views of WTO Members as to the proper scope of WTO input and output transparency will most probably lead to extended negotiations. Some thoughts about the future prospects of and possible avenues for the WTO system are also identified.

## Key words

good governance; legitimacy; non-governmental organizations (NGOs); transparency; World Trade Organization (WTO)

## I. INTRODUCTION

On 14 May 2013 the General Council (GC) of the World Trade Organization (WTO) appointed Mr Roberto Carvalho de Azevêdo, the Ambassador of Brazil to the WTO, as the sixth Director-General (DG) of the WTO, starting on 1 September 2013, for a period of four years. For the first time in the history of the WTO, nine candidates, including three women, with considerable experience on trade matters expressed their willingness to replace Pascal Lamy as the WTO chief.<sup>1</sup> There had been an overwhelming feeling that the new DG should come from a developing country and

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1 There is relatively detailed coverage of the WTO DG selection process at the WTO website <[http://www.wto.org/english/thewto\\_e/dg\\_e/dg\\_selection\\_process\\_e.htm](http://www.wto.org/english/thewto_e/dg_e/dg_selection_process_e.htm)>.

this was reflected in the list of candidates: eight out of the nine candidates came from developing countries, whereas seven of them had professional experience at the ministerial level.

In contrast to the other Bretton Woods institutions, whereby the position is reserved to a particular country or region, the WTO has relatively transparent procedures for the selection of its DG, which were agreed upon in 2002.<sup>2</sup> The successful selection of a new DG creates hope for more determination towards advancing the multilateral trading agenda and underlines the significant steps that the WTO has made in its short history to ensure more transparency and openness in its decision-making as a whole. However, can this be regarded as indicative of a high level of transparency in the WTO's decision-making?

Rule of law within an international organization (IO) should be seen through the lens of internal conflicts, power politics, and the current imperfect construct of international law and IOs in particular, which, in the case of the WTO, is characterized by significant path dependence<sup>3</sup> and structural bias.<sup>4</sup> Internal struggle and fundamental differences among the membership as to the proper *modus operandi* is a rather common phenomenon and this will only increase as the number of WTO members grows. Nonetheless, the General Agreement on Tariffs and Trade's (GATT) long-standing institutional culture, which applies in various instances of the WTO's rule-making, does not help to confront these differences and build trust.<sup>5</sup> Such differences also had an impact on the selection of WTO DGs: for instance, back in 1999, unbridgeable differences among members did not allow for the smooth transition between DGs, resulting, inter alia, in bad preparation and, ultimately, the failure of the WTO Ministerial Conference (MC) in Seattle.

Surely, transparency in the WTO, and notably its decision-making prong, is an incident rather than an attribute of the world trading system. The GATT *qua* provisional trade forum has been inextricably linked with obscurity and confidentiality, ostensibly allowing the multilateral trade agenda to progress. As non-Western countries have also applied for accession and become parties of the GATT/WTO community, the merits of and advocacy for more transparency have also become less self-evident. These countries could hardly lend an ear to principles and rules which, for many among them, were not part of their legal tradition and domestic governance structures. On the other hand, the increase in membership saw new members advocating for more open, flatter, and thus more inclusive institutional structures. However, with two groups of thought, which are not necessarily complementary, in constant interaction, the progressive transformation of the WTO is not accompanied by coherent discussions on the reform of the WTO's rule-making.

2 WTO, 'Procedures for the Appointment of Directors-General adopted by the General Council', adopted 10 December 2002, WT/L/509 (hereinafter 'the 2002 DG selection procedures').

3 See P. Pierson, 'Increasing Returns, Path Dependence, and the Study of Politics', (2000) 94(2) *The American Political Science Review* 251.

4 See M. Koskenniemi, 'The Politics of International Law – 20 Years Later', (2009) 20(1) *EJIL* 7.

5 Art. XVI:1 of the WTO Agreement in fact requires WTO members to do exactly that, i.e. follow the GATT tradition.

Any discussion about transparency in the WTO takes for granted that the status quo is unsatisfactory in at least some respects.<sup>6</sup> But no further common ground can be found from this point onwards. A basic proposition at the outset is that transparency cannot have an unconditionally positive meaning under all circumstances. This is because transparency cannot be assessed in the abstract, but needs to be contextualized for any discussion on this principle to be meaningful. For instance, should it be presumed that whatever relates to state (public) institutions should be visible and accessible? Or rather, a given context such as specific institutional dynamics can relativize the pervasive nature of transparency in that transparency can be required if good reasons for this are given?<sup>7</sup>

This article puts transparency in the WTO decision-making procedures in the spotlight. To be more specific, it does not aim to address every individual feature of the WTO's decision-making,<sup>8</sup> but rather to examine the level of openness and inclusiveness thereof, referring to certain examples of everyday institutional work at the WTO. It aims to deal with internal (or input) transparency in the framework of the WTO decision-making procedures and how the message of trade liberalization is conveyed to the public through the current WTO institutional structure (output or external transparency). Crucially, the discussion relating to the transparency of the WTO's decision-making procedures is mainly a subset of the broader discussion relating to the legitimacy of the WTO and, more generally, the good governance of IOs, offering insights and helpful lessons for the future of global institutional design.<sup>9</sup>

This article is structured as follows. Section two entails a few introductory thoughts on the incremental transformation of the WTO, as it becomes a global IO, and section three reviews the discussion of transparency in contemporary IOs and its link with good governance and legitimacy. An analysis of the good governance features of the WTO's decision-making procedures is also made in section three. Section four constitutes a tentative attempt to critically approach the issue of how to improve internal and external transparency in the WTO's decision-making procedures. Section five concludes with some thoughts about the future prospects of the WTO.

## 2. A PRIMER ON THE WTO AS AN IO

Created in 1995, the WTO and its potentially broad scope rapidly attracted the attention of international law scholars, export-orientated companies, import-competing

6 See E. Fisher, 'Transparency and Administrative Law: A Critical Evaluation', (2010) 63(1) *Current Legal Problems* 272, at 275.

7 On the discussion about the limits of transparency that the revelations of Mr Edward Snowden relating to the spy program of the US National Security Agency (NSA) provoked, see M. Sherer, 'The Geeks who Leak', *TIME Magazine*, 24 June 2013.

8 For this, see C. D. Ehlermann and L. Ehring, 'Decision-Making in the World Trade Organization – Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?', (2005) 8(1) *Journal of International Economic Law* 51.

9 Among many others, see A. Buchanan and R. O. Keohane, 'The Legitimacy of Global Governance Institutions', (2006) 20 *Ethics and International Affairs* 405.

groups, state authorities (regulators and policymakers), and the public. In principle, the WTO is a semi-autonomous regime in that it displays a certain degree of self-sufficiency in terms of procedures, whether administrative, legislative, or judicial.<sup>10</sup> However, the WTO also features various traits that one can identify in other IOs in terms of everyday activities, institutional structures, and decision-making.<sup>11</sup> In the early *US – Gasoline* case, the Appellate Body (the WTO's last instance standing court) found that the WTO law could not be viewed in clinical isolation from public international law. The Appellate Body has, for instance, faithfully used the customary rules of treaty interpretation enshrined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ever since.<sup>12</sup> Thus, on balance, WTO is yet another contextualized regime of international law.

The WTO results from increasing global economic interdependence, but has also been instrumental in *accentuating* this phenomenon. The fundamental principle of transparency finds its place within the WTO in two main distinct settings: the first relates to the WTO's decision-making procedures, whereas the second is concerned with the level of transparency reflected in the WTO dispute settlement procedures. The latter mainly deal with issues such as access to documents, openness of hearings, and choice of the individuals comprising the WTO judiciary. Quite importantly, the WTO Agreements are also brimful of provisions calling for transparent domestic regulations affecting trade and require members to notify and discuss such regulations with their trading partners within WTO committees, formally or informally. This is the case in particular for the SPS and TBT Committees. Such mechanisms allow for conflict avoidance.<sup>13</sup>

Through its manifest paradigm shift towards higher levels of rule-orientation, the WTO has instigated reform in IOs whose activities may constitute inputs for the WTO activities or which may otherwise be connected to the WTO. This has been, for instance, the case with international standard-setting organizations (ISSOs) such as the Codex Alimentarius Commission or the International Organization for Standardization (ISO). Due to this shift towards a rules-based (as opposed to power-based)<sup>14</sup> system and the increasing pace of globalization through trade liberalization, the WTO quickly became a target for stakeholders seeking higher levels of openness than the GATT had displayed thus far.

Additionally, as the WTO membership has grown to become truly international and decisions on commercial matters have a growing outreach, people have become increasingly fascinated with the mechanics of the WTO decision-making system.

10 See P. J. Kuijper, 'The Law of GATT as a Special Field of International Law', (1994) *Netherlands Yearbook of International Law* 227.

11 P. Delimatsis, 'The Fragmentation of International Trade Law', (2011) 45(1) *Journal of World Trade* 87.

12 See Appellate Body Report, United States-Continued Existence and Application of Zeroing Methodology, (4 February 2009) AB-2008-11, WT/DS350/AB/R, at [267]-[268]; also Appellate Body Report, China-Measures Affecting Trade Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, (12 August 2009) AB-2009-3, WT/DS363/R at [396].

13 H. Horn, P. Mavroidis, and E. N. Wijkström, 'In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees', IFN Working Paper No. 960 (8 March 2013).

14 For an excellent review of the role of power in international law, see R. Steinberg and J. Zasloff, 'Power and International Law', (2006) 100(1) *AJIL* 64.

Notably after the failure of the infamous MC of 1999 in Seattle, a new era of closer scrutiny of WTO activities by NGOs was heralded. This comes as no surprise: the legitimacy of the WTO, and notably of its judicial branch,<sup>15</sup> was questioned fairly early in the wake of controversial rulings delivered by the WTO judiciary over politically charged and highly mediatized disputes.

All in all, due to the recognition of the importance of commercial matters and the powerful dispute settlement system comprising a sophisticated enforcement mechanism leading to compliance in most cases, the level of legitimacy that the WTO enjoys is at the epicentre of everlasting public debates. As the WTO expands, identifying the adequate levels of transparency and participation in the WTO's decision-making processes becomes a daunting task.<sup>16</sup> However, the mere fact of reflecting on this issue even outside the WTO manifests, in a sense, the success of the WTO. In less than twenty years of existence, the WTO has indeed become established in people's minds as one of the most important IOs of our times. However, this success has had an enormous impact on the previous decomposable hierarchy of GATT,<sup>17</sup> which, along with insider networks (the GATT epistemic community) has managed to keep the system in motion through informal discussions and secretive negotiations.<sup>18</sup>

### 3. TRANSPARENCY IN CONTEXT: A FUNDAMENTAL PRINCIPLE OF CONTEMPORARY IOs

The current unprecedented speed of information flow and significant technological developments have resulted in a highly mediatized, up-to-the-minute coverage of domestic and international politics. Furthermore, the high level of power diffusion in international relations brings about a paradigm shift in the governance of IOs. The surfeit of information and the new power dynamics create pressures for more transparency by domestic and international players, notably due to fears relating to inept controls over the production and dissemination of information. Thus, IOs increasingly contemplate ways to improve their internal legitimacy by strengthening internal mechanisms that facilitate the release of information about policies, capabilities, and preferences to external stakeholders and interested parties. Due to the possible impact on the external legitimacy of an IO, a steady flow of internal information within the IO and towards the broader public becomes quintessential. Possible deficiencies in the flow of information may also bear reputation costs for the most powerful countries, as such situations nourish accusations that the latter feel

15 See R. Howse, 'The Most Dangerous Branch? The WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power', in T. Cottier and P. Mavroidis (eds.), *The Role of the Judge in International Trade Regulation* (2001).

16 See WTO, 'The World Trade Report 2013: Factors Shaping the Future of World Trade' (2013) at 284.

17 See R. Keohane and J. Nye, Jr., 'The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy', The John F. Kennedy School of Government – Visions of Governance in the 21<sup>st</sup> Century, Working Paper No. 4 (using the term of Nobel laureate Herbert Simon).

18 See R. Howse, 'From Politics to Tecocracy – And Back Again: The Fate of the Multilateral Trading Regime', (2002) 96 AJIL 94.

comfortable with (or even promote) an international system that creates confusion and relativizes compliance.<sup>19</sup>

Transparency ranks among the most basic *desiderata* in the grammar of governance of IOs. Crucially, it brings about commitment and compliance, as it gives an impression of equal opportunity in shaping the agenda of an IO and its rule-making. For the multilateral trading system, compliance with the rules that are laid down in the WTO contract is a *conditio sine qua non* for everyday trade and, indeed, the viability of the organization. The global trading system is based on a 'balance of terror', whereby the short-term interest of states in cheating is outweighed by the long-term interest of everyone in predictable behaviour and rule compliance.<sup>20</sup> This also applies to the powerful states *qua* WTO Members: the desire to be unconstrained is trumped by the interest in successfully regulating the behaviour of others.<sup>21</sup> Compliance with certain rules, in turn, is inextricably linked with legitimacy.

Nowadays it is commonplace that there is a link between the legitimacy of any IO and its level of transparency in terms of processes, deliberative mechanisms, and output. Globalization has increased the role of law and rules and has led to an unparalleled expansion of the corpus of international law with the ensuing legalization of international relations.<sup>22</sup> The demand for more transparency in the functioning of IOs is quasi-universal, as lack thereof has become synonymous to abuse of power.<sup>23</sup>

However, transparency is not a singular concept, but is highly dependent on which of the three relationships is actually examined: between the IO and its members/contracting parties; between the IO and other IOs; or between the IO and private parties (NGOs, civil society, traders etc.). The elimination of arbitrariness in the international arena benefits every state, but particularly those states which do not play an influential role in the international scene. Just as in any domestic legal order, transparent mechanisms empower predominantly the weakest or the most recently emerging parties involved, as the costs for the acquisition of information diminish.<sup>24</sup> Inter-IO transparency is a reciprocal matter which may under certain circumstances increase awareness of each other's mission, build trust, and allow for synergies.<sup>25</sup> Finally, transparency vis-à-vis private parties is asymmetric and thus IOs may have

19 E. Benvenisti and G. Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', Global Administrative Law Working Paper 2007/6. In a similar vein, it was submitted that international law, more generally, is limited by the configurations of state interests and the distribution of state power. See J. Goldsmith and E. Posner, *The Limits of International Law* (2005).

20 See also T. Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium', (2006) 100(1) AJIL 88 at 90.

21 N. Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order', (2005) 16(3) EJIL 369 at 379.

22 See D. Kennedy, 'The Mystery of Global Governance' in J. Dunoff and J. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009), 37 at 55. Also J. Goldstein et al., 'Introduction: Legalization and World Politics', (2000) 54(3) *International Organization* 385.

23 A. Bianchi, 'On Power and Illusion: The Concept of Transparency in International Law', in A. Bianchi and A. Peters (eds.), *Transparency in International Law* (2013). This may not be applicable to all IOs across the board. See Steven Ratner's contribution in the same edited volume.

24 In this case, institutional transparency can be regarded as a subsidy to those parties who are unable to obtain certain pieces of information.

25 An example would be the co-operation between the WTO and ISO or the fact that various intergovernmental bodies have an observer status at the WTO: See <[http://www.wto.org/english/thewto\\_e/igo\\_obs\\_e.htm](http://www.wto.org/english/thewto_e/igo_obs_e.htm)>.

few incentives (other than perhaps reputation costs) to disclose information without any explicit decision to this effect by the membership.

Transparency is not only about the publication of formal rules and decisions, and the communication of relevant information to the interested stakeholders. It also means that deliberate processes *leading to* rules, decisions, and judgments have to be open and ensure a fair chance to those willing to participate in the development of trade rules. Any obscurity may actually damage the jurisgenerative character of rules.<sup>26</sup> Indeed, any output can only be regarded as the expression of the will of those parties that must obey it – and thus be legitimate – only if those parties have participated effectively throughout the process. Furthermore, as transparency promotes voluntary compliance, it can be highly effective in reducing costs from excessive litigation or everlasting negotiations. Additionally, public support of IOs can increase because of more transparency, as the absence of secretive decision-making and adjudicative procedures creates confidence that due process is adhered to within the IO in question.

Transparency can also lead to increased – and so much-needed – global co-operation, by increasing trust among actors about the security, predictability, and equal treatment with respect to the rules of the game. Closer forms of co-operation, along with aggregate expertise at the international level, inevitably entail some form of transferring the locus of regulatory authority to international fora or IOs. This varies among organizations, with states transferring more powers to certain IOs than others, depending on the relative importance of the subject matter and the net positive effects of such a transfer.<sup>27</sup> Transparency and the rule of law, along with expertise that promotes social welfare,<sup>28</sup> legitimize such shifts of authority. Transparency is also a constitutive factor of efficient (i.e. aggregate-welfare-increasing) governance.

A contemporary theory of the legitimization of global regulatory authority underlines the importance of adherence to principles stemming from domestic administrative law such as transparency, participation, reasoned decisions, and decisional review as foundations for the legitimacy of an IO.<sup>29</sup> In this case, the underlying consideration is that procedural rigour can be a substitute for problems that arise from the absence of democratic legitimacy for all institutions active at the international level, as principles of administrative law are germane to the ideal of democracy.

Calls for more transparency and accountability nowadays transcend domestic and international law-making. Along with the rhetoric for higher transparency in the political scene of the developing world articulated by the donor (developed) countries, a similar advocacy for increased transparency and rules-based systems to render IOs more accessible and open has developed, this time by developing

26 See B. Kingsbury, 'The Concept of "Law" in Global Administrative Law', (2009) 20 *EJIL* 23 at 49.

27 For instance, Grant and Keohane find that the WTO has been very successful in this respect, and this increases the accountability of the institution: R. Grant and R. Keohane, 'Accountability and Abuses of Power in World Politics', (2005) 99(1) *American Political Science Review* 29 at 39.

28 The importance of technocracy as a source of legitimacy was underlined by Max Weber. See I. Hurd, 'Legitimacy and Authority in International Politics', (1999) 53 *International Organization*, 379 at 388.

29 See B. Kingsbury; N. Krisch, and R. Stewart, 'The Emergence of Global Administrative Law', (2005) 68(3) *Law and Contemporary Problems* 15.

countries and NGOs dealing with development issues.<sup>30</sup> In this respect, transparency and other liberal political principles such as accountability and participation serve a strategic function in constraining abuses of power.

Again, excessive transparency has the paradoxical effect of nourishing more back-door decision-making in a consensus-based institution. Transparency in the form of final output dissemination may accompany such practices, but it is doubtful whether this really satisfies demands for more transparency within IOs. Furthermore, transparency may cause delays in the negotiations or prompt trade negotiators to posture by taking uncompromising positions and thus causing more frequent breakdowns in negotiations.<sup>31</sup> This is particularly so if one assumes that the state representatives have considerable reputational concerns and therefore will choose to be on the 'safe side'. As it is assumed that domestic constituencies monitor such international developments, this may result in the state representative being more careful in its articulations if they are made in public. Thus, decision-making becomes overly politicized,<sup>32</sup> whereby voting becomes an expression of passion rather than reason due to the fact that transparency will most likely increase the need to pander to domestic constituents.<sup>33</sup> This may, however, undermine processes and the smooth functioning of IOs. Finding ways to ensure that gains from an open and participatory decision-making process will be reaped without undermining the capacity to reach decisions in a representative but still efficient manner becomes quintessential.

#### 4. GOOD GOVERNANCE FEATURES OF DECISION-MAKING WITHIN THE WTO

The WTO Agreement (WTOA) establishes an IO with legal personality and endows it with explicit authority to develop and maintain relations with other IOs.<sup>34</sup> According to Article III:5 WTOA, the WTO is called upon to co-operate in particular with the IOs in charge of monetary and financial matters and thereby achieve coherence.<sup>35</sup> Based on this mandate, the WTO signed agreements with both the IMF and the World Bank.<sup>36</sup> As to non-state actors, quite interestingly, the WTO Agreement is innovative

30 See the 2005 World Summit Outcome, whereby developing countries acknowledged that 'good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger': General Assembly, 'Resolution adopted by the United Nations General Assembly: 2005 World Summit Outcome', UN Doc. A/RES/60/1 (24 October 2005) [11].

31 See D. Stasavage, 'Transparency in Domestic and International Bargaining', (2004) 58 *International Organization* 667 at 668. See also R. Baldwin, 'Trade Negotiations within the GATT/WTO Framework: A Survey of Successes and Failures', (2009) 31 *Journal of Policy Modeling* 515.

32 A. M. Slaughter, *A New World Order* (2004) 220.

33 J. Morgan and F. Várdy, 'Mixed Motives and the Optimal Size of Voting Bodies', (2012) 120(5) *Journal of Political Economy* 986 at 1009.

34 Arts. VIII:1 and V:1 WTOA, respectively.

35 Compare the Uruguay Round Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking ('The Coherence Mandate'), 1994; also M. Auboin, 'Fulfilling the Marrakesh Mandate on Coherence: Ten Years of Cooperation Between the WTO, IMF and World Bank', WTO Discussion Paper No. 13, 2007.

36 See WTO, 'Agreements Between the WTO and the IMF and the World Bank', Decision Adopted by the General Council at its Meeting on 7, 8 and 13 November 1996, WT/L/194 (18 November 1996).



in authorizing the organization to consult and co-operate with NGOs.<sup>37</sup> With respect to the latter form of co-operation, the GC adopted in 1996 general guidelines for arrangements on relations with NGOs and referred to the important role that NGOs can play to increase awareness amongst the public of WTO activities.<sup>38</sup> Thus, NGOs would be considered as 'public relations' vehicles of the WTO work rather than non-WTO institutions that would be allowed to have a say in the WTO activities. The guidelines explicitly allude to the asymmetric relationship between the WTO and NGOs. Over time, NGOs have managed to exert considerable influence in some areas (such as the current negotiations on fisheries subsidies), and they are regular senders of *amicus curiae* briefs at the WTO dispute settlement organs. Additionally, more inclusiveness and openness to non-governmental interests has been called for,<sup>39</sup> due to NGOs' ability, amongst other things, to contribute to assessing the impact of proposals discussed by members.<sup>40</sup> Again, the red line appears to be the possibility for NGOs to have something more than an observer status within the WTO.<sup>41</sup>

The WTO's supreme organ is the MC, which decides in all matters under any WTO agreement. The MC meets in principle at least once every two years. However, after the MC of 2005 in Hong Kong, the MC met again in 2009 in Geneva amidst the most severe financial crisis of recent years, only to agree that there are diverging views among WTO members about the way forward. In the recent MC of 2013 in Bali, amidst renewed optimism after the successful election of a new DG, members agreed on the Bali package covering selected agricultural issues and a new agreement on trade facilitation, thereby restoring confidence on the MC's ability to deliver tangible outcomes.

The MC decides upon a pre-established agenda of items that is prepared by the GC and through regular meetings of Heads of Delegations (HoDs) several months ahead of the MC. Such preparations may include a series of both publicly available and informal documents.<sup>42</sup> In other words, not all WTO documents are publicly available at the time of their circulation to members.<sup>43</sup> While documents submitted by members can in principle be restricted for up to 90 days, members often decide during a meeting to switch to informal mode which means that the minutes of the meetings only reflect the main positions without attributing these to specific members. Thus, an inherent challenge the WTO organs and members face is walking the tightrope between functioning according to contemporary governance principles

37 Art. V:2 WTOA.

38 WTO, 'Guidelines for Arrangements with on Relations with Non-Governmental Organizations', WT/L/162 (23 July 1996).

39 D. Esty, 'The World Trade Organization's Legitimacy Crisis', (2002) 1 *World Trade Review* 7; and J. Dunoff, 'Public Participation in the Trade Regime: Of Litigation, Frustration, Agitation and Legitimation', (2004) 56 *Rutgers Law Review* 961 at 970.

40 T. Cottier, 'Preparing for Structural Reform in the WTO', (2007) 10 *Journal of International Economic Law* 497 at 503.

41 See S. Charnovitz, 'The WTO and Cosmopolitics' in E. U. Petersmann (ed.), *Reforming the World Trading System – Legitimacy, Efficiency, and Democratic Governance* (2005) 438 at 444.

42 See, e.g., WTO General Council, 'Minutes of Meeting Held on 27 July 2011', WT/GC/M/132 (21 September 2011) [68ff].

43 However, all official WTO documents shall be unrestricted. See WTO, 'Procedures for the Circulation and Derestriction of WTO Documents', WT/L/452 (16 May 2002).

and facilitating negotiations, with all the secrecy, discretion, and confidentiality that these may entail.

The GC is the everyday decision-making body of the WTO that ensures the smooth functioning of the organization. Very often the GC may assume functions of the MC. For instance, in many cases the GC granted waivers, although in theory this is the responsibility of the MC pursuant to Article IX:3 WTOA. Likewise, in several cases accession by a given country to the WTO has been approved by the GC, although the WTOA invests the MC with such authority.<sup>44</sup>

Consensus is the dominant form of the WTO's decision-making, deriving from the nature of the WTO as a member-driven organization and from the bounded rationality of its members. The WTOA confirms as much: the WTO is bound to continue the practice of consensus of the GATT 1947. Consensus in the WTO exists when no member present in the meeting formally objects to the decision to be taken.<sup>45</sup> For the WTO drafters, continuity is a very important objective: the WTO Preamble makes clear that WTO members are determined to 'preserve the basic principles' underlying the multilateral trading system.<sup>46</sup>

Pursuant to Article IX of the WTOA, absent consensus, simple majority, or various qualified majority (QM) voting procedures exist. For instance, an authoritative interpretation of any provision of the WTO Agreements requires a three-quarters majority of members, as does any decision to waive an obligation upon a WTO member. In addition, a two-thirds majority is required for an amendment of the WTO Agreements to take effect. However, for an amendment of Article IX of the WTOA and the modification of the very essence of the WTO, i.e. the non-discrimination provision, unanimity is warranted. Thus, the provision relating to decision-making is shielded the same way as the cornerstone of the multilateral trading system. For votes to take place, a simple majority of members present is warranted (quorum).

Ironically, the modalities of Article IX are amended by the practice of members, inasmuch as the voting provisions have never been applied.<sup>47</sup> Consensus remains the informal voting rule in the WTO. Again, the QM procedures seem to take as basis the *entire* membership and not just the members that are present. This would mean that, in theory at least, it is possible that a QM procedure may require more votes in absolute numbers than consensus of the members present, since in the latter case members may be absent or simply abstain due to lack of sufficient financial resources or other reasons.

Consensus as a voting method has remained hale and hearty throughout the years, as exemplified by the ongoing Doha negotiations.<sup>48</sup> By way of illustration, in a statement of February 2002 to the Trade Negotiations Committee, the Chairman

44 Art. XII WTOA.

45 Art. IX WTOA and the accompanying footnote.

46 See the Preamble of the WTOA.

47 However, the rules of procedure for the MC in theory allow such QM voting. See WTO, 'Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council', WT/L/161 (25 July 1996), Rule 29 (MC) and Rule 33 (GC).

48 See, e.g., WTO General Council, 'Minutes of Meeting Held on 17 and 19 July 2000', WT/GC/M/57 (14 September 2000) [134] ('There was also a strong commitment of the Members to reaffirm the existing practice of taking decisions by consensus').

of the GC suggested that Chairpersons 'should aim to facilitate consensus among participants and should seek to evolve consensus texts through the negotiation process'.<sup>49</sup> This statement in particular confirms one of the weaknesses of consensus voting: it involves a bias towards lowest-common-denominator outcomes.<sup>50</sup> On the other hand, one of the main traits of consent is that it discourages any attempt to hijack decision-making and agenda-setting procedures. This was a concern in the GATT in the 1950s in the wake of the accession of various developing countries.<sup>51</sup>

Even if the WTO is based on the one-country-one-vote principle,<sup>52</sup> thereby giving each member a veto right indirectly, it has become clear over the years that vetoes are rare and the agenda is virtually pre-determined through early meetings among those countries whose consent is considered as indispensable for reaching consensus at the plenary. This is so either because that member is powerful in commercial terms or because its stance may be adopted by a group of WTO members (for instance, a regional leader).

Contrary to similar organizations such as the IMF or the World Bank, the WTO does not have an executive organ of restricted composition.<sup>53</sup> However, the WTO arguably has a disproportionate number of committees and other working parties, which multiply during negotiating rounds. Such a structure can easily cause a sclerosis to the functioning of the institution.

In the GATT years, decisions were reached by consensus, but only a like-minded minority among membership led the process, known as the 'Green Room' process. During this informal process, a small number of self-selected developed and developing countries convene to decide on divisive issues.<sup>54</sup> Once agreement is reached in the Green Room, the decision is conveyed to the WTO membership for final decision. This is yet another indication of the GATT/WTO mix of a rules-based system with power politics.

The Green Room process, initially reserved for the big developed-country delegations, grew over time to involve an increasing number of countries, both developed and developing, notably in the aftermath of the MC failure in Seattle.<sup>55</sup> Along with the usual suspects (i.e. EU, US, Japan, and Canada), today such meetings cannot be convened without the participation of India, Brazil, and China. Possibly as a sign of indirect representativeness and participation one could mention that these members are also members of at least one coalition of WTO members. Such coalitions

49 WTO Trade Negotiations Committee, 'Statement by the Chairman of the General Council', TN/C/1 (4 February 2002).

50 See P. Low, 'WTO Decision-Making for the Future', WTO Staff Working Paper ERSD-2011-05, (May 2011).

51 See R. Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', (2002) 56(2) *International Organization* 339 at 344.

52 Art. IX:1 WTOA.

53 See A. Alvarez-Jiménez, 'Improvements to the WTO Decision-Making Process: Lessons from the International Monetary Fund and the World Bank', in D. Steger (ed.), *Redesigning the World Trade Organization for the Twenty-First Century* (2009) 91 at 95.

54 R. Blackhurst and D. Hartridge, 'Improving the Capacity of WTO Institutions to Fulfill their Mandate', (2004) 7(3) *Journal of International Economic Law* 705.

55 For the sake of comparison, in the MC in Singapore only 34 members participated in the consultative process that led to the Ministerial Declaration. See WTO, 'World Trade Report 2007 – Six Decades of Multilateral Trade Co-operation: What Have We Learnt?' (2007) at 324.

(for instance the Cairns group, G20, G30 or the so-called ‘friends’ of a given subject matter such as anti-dumping or fisheries) may be more or less formal and have their own internal networks with respect to transparency, co-ordination, communication of positions, participation, and inclusiveness.<sup>56</sup> Formation of coalitions and groups increased rapidly after the launch of the Doha Round. Such coalitions became a realistic option in view of various members’ difficulty to maintain a functional Geneva-based representation. Such coalitions are quite fluid in that they are not formed along the rigid North–South fault line.<sup>57</sup> Critically, NGOs may be actively involved in such coalitions, thereby increasing their indirect participation – and thus influence – in the WTO’s decision-making.<sup>58</sup>

Such an opaque mechanism exemplifies the need for greater transparency, representativeness, and accountability at the highest decision-making level within the WTO. This can be done by developing a structure of both private and public constituencies with agenda-setting powers, organized along regions and/or common interests. Participants in the meetings that represent coalitions shall be fully transparent and accountable to those that they represent so that they are fully aware of the issues discussed during the minimal-format meetings. In this respect, a more active role of the Secretariat would be highly desirable and indeed necessary.<sup>59</sup> Furthermore, domestic politics should be somehow represented in this structure. The more the WTO enters into the sensitive waters of non-trade values, the more subsidiarity concerns will be raised. Such concerns can only be remedied through the participation of representatives of domestic bodies.

Another option would be to create a consultative or executive board within the WTO. Pre-established, objective criteria for participation and representativeness would need to be agreed upon to ensure the broad acceptance of the views expressed within such an organ. In theory, it could include a number of permanent members based on their trade volume and a number of rotating countries based on their trade volume, population, geographical position, or a combination of these criteria. The composition of this organ should also be flexible to accommodate the requirements for reaching representative decisions. For instance, the composition cannot be the same when discussing agriculture and, say, development. Before final agreements are reached, a certain period of notice and comment to all members should be introduced. Members that have serious objections should be allowed to express their views and justify their opposition. This would allow for a more effective organization of the currently loose scheme of coalitions within the WTO and would incentivize such

56 See C. D. Birkbeck and M. Harbour, ‘Developing Country Coalitions in the WTO: Strategies for Improving the Influence of the WTO’s Weakest and Poorest Members’, GEG Working Paper 2011/63 (July 2011).

57 A. Narlikar and J. Odell, ‘The Strict Distributive Strategy for a Bargaining Coalition: The Like Minded Group in the World Trade Organization, 1998–2001’ in J. Odell (ed.), *Negotiating Trade: Developing Countries in the WTO and NAFTA* (2006), at 115–44; also M. Diego-Fernandez, ‘Trade Negotiations Make Strange Bedfellows’, (2008) 7(2) *World Trade Review* 423, at 431.

58 See P. da Motta Veiga, ‘Brazil and the G-20 Group of Developing Countries’ in P. Gallagher, P. Low, and A. Stoler (eds.), *Managing the Challenges of WTO Participation: 45 Case Studies* (2005), at 109.

59 See also P. Sutherland et al., *The Future of the WTO – Addressing Institutional Challenges in the New Millennium* (the ‘Sutherland Report’), 2004, at 72; also M. Elsig, ‘WTO Decision-Making: Can We Get a Little Help from the Secretariat and the Critical Mass?’, in Steger (ed.), *supra* note 53, 67, at 72.

coalitions to reflect on their representation strategy. Structures along themes would also lead to the further empowerment of issue-based coalitions, which, contrary to region-based coalitions, are more in line with the single-undertaking legacy, allowing for trade-offs among different subject areas.

The creation of such an organ would mean that the Green Room process is institutionalized. With this institutionalization, transparency and due process at all stages need to be factored in as essential prerequisites. At least a number of the meetings of this board would have to be public, and external stakeholders, including NGOs, export-orientated companies and transnational regulators should be requested (and probably required) to participate and express their views.

Such restricted structures are rather common in international relations. For instance, during the Durban conference, the organizers of the conference saved the game by inviting a small group of countries (China, India, the US, UK, France, Sweden, Gambia, Brazil, and Poland) to bridge their differences. This culminated in the countries striking a deal which may lead to a new global climate agreement by 2020.<sup>60</sup> Obviously, many WTO members, even the most vulnerable ones, do not really mind having club-model processes such as the Green Room or the proposed board. Rather, they want to have their views heard. Then, instead of abandoning the small group meetings overall, the input legitimacy of the WTO can still be safeguarded provided that transparent and participatory mechanisms with respect to negotiations and decisions are in place. Feeling concerned by the mechanisms and the decisions is a major contemporary challenge of an enlarged institution such as the WTO. This applies particularly at the periphery, whereby developing countries have little interest in actively engaging in multilateral trade discussions.

## 5. THE DYNAMICS OF CHANGE IN THE WTO DECISION-MAKING

The inception of the WTO is considered to have increased the transparency of domestic policies affecting trade to the benefit of everyday traders. Along with the domestic-interest-driven desire to attract foreign investment, the Trade Policy Review Mechanism (TPRM) as a top-down transparency mechanism has played a central role in this respect. The traditional focus on transparency came as a result of the recognition that transparency plays a pivotal role in the facilitation of trade in general.<sup>61</sup> Not only does it increase predictability and legal certainty for traders, but it also has positive effects on democracy by improving the accountability and legitimacy of regulatory authorities at all stages of regulatory policymaking.<sup>62</sup>

60 The Warwick Commission, *The Multilateral Trade Regime: Which Way Forward?* (2007).

61 See T. Collins-Williams and R. Wolfe, 'Transparency as a Trade Policy Tool: The WTO's Cloudy Windows', (2010) 9(4) *World Trade Review* 551, at 552. See also The Report of the Panel on Defining the Future of Trade convened by the WTO DG Pascal Lamy, 'The Future of Trade: The Challenges of Convergence' (24 April 2013), at 29.

62 In the context of the EU, see Case C-41/00 P, *Interporc Im- und Export GmbH v. Commission of the European Communities* [2003] ECR I-2125 at [39]. See also Joined Cases C-39/05 P and C-52/05, *Sweden and Turco v. Council of the European Union* [2008] ECR I-4723 at [59]. Strong statements with regard to the requirements of openness in the EU decision-making have been made. See, e.g., Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145 [2001] 43, recitals 2, 6 and 11.

Transparency in the WTO parlance has been narrowly conceived to include a requirement to provide trade-related information (through notifications or otherwise) and to administer the relevant rules reasonably and non-discriminatorily. For instance, the term ‘transparency’ was used very late in the GATT years in a document referring to notification procedures with a view to contributing to the transparency of trade policies of the GATT contracting parties.<sup>63</sup> Thus, the use of the term ‘transparency’ in the inter-governmental setting of the WTO has been less normative than is found in domestic policy discourse.<sup>64</sup>

While admittedly successful, the trade regime has fulfilled its mission of liberalizing trade in the shadow of organized opposition, which benefited from an ever-increasing information flow.<sup>65</sup> Nevertheless, such opposition has been for a long time producer-driven, that is, different *producer* lobbies were competing for protection domestically, but also in Geneva. In those instances, the role of the GATT/WTO has been to bring trading partners together which, away from domestic pressures and in all secrecy and confidentiality, can agree on managed liberalization of their respective terms of trade (tariffs and later non-tariff barriers).

Transparency (particularly at the internal level) became an agenda issue for the WTO in the late 1990s in the wake of contentious judicial rulings and ill-prepared MCs. Within this context, the launch of the Doha Development Round was regarded as a success in the short WTO history. However, the dynamics of the multilateral trading system have changed for good. Currently, over two thirds of the WTO membership are developing countries. New coalitions and more assertive players suggest that deadlock can occur more easily than within the previous club model of governance.

The Doha Declaration acknowledged the transparency challenge, first, by recognizing that internal transparency in the WTO remains unsatisfactory and should be addressed in view of the expanded membership, and, second, that effective participation of all members in decision-making is indispensable.<sup>66</sup> Such political statements are dead letter if not translated into actual changes in the practices and the functioning of the institution. Transparency in the WTO at the internal level means more chances for effective participation and deliberation. Improving the external transparency of the WTO means more direct communication with the broader public.

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The new Art. 15 of the Treaty on the Functioning of the European Union (TFEU) provides that the Union's institutions shall be as open and transparent as possible ‘in order to promote good governance and ensure the participation of civil society’. Arts. 10 and 11 of the Treaty on the European Union (TEU) equally tell about the importance of openness, suggesting that broad consultations with the civil society will ensure policy coherence. See, more generally, D. Curtin, ‘Judging EU Secrecy’, (2012) 2 *Cahiers de Droit Européen* 459.

63 GATT Decision on Notification Procedures, LT/UR/D-1/5 (15 April 1994).

64 This is probably a trait of all IOs. See M. Donaldson and B. Kingsbury, ‘Power and the Public: The Nature and Effects of Formal Transparency Policies in Global Governance Institutions’, in Bianchi and Peters, *supra* note 23, 502 at 517.

65 J. Goldstein and L. Martin, ‘Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note’, (2000) 54(3) *International Organization* 603 at 614.

66 See Doha Declaration, adopted 14 November 2001, WT/MIN(01)/DEC/1 (20 November 2001) at [10] and [49].

### 5.1. Of internal transparency, consensus, and fairness?

Empirical evidence viewed from a comparative institutional perspective suggests that the WTO is a highly legalized international institution.<sup>67</sup> Legalization means, among other things, relatively precise rules and obligations, and consequently, more transparency as to the standards to be adhered to. This is one of the features that relatively few IOs currently display. Nonetheless, this does not say anything about the very nature or quality of the current WTO rules in terms of ensuring effective participation throughout the WTO law-making trajectory. As in other IOs based on the representative democracy model, the WTO entails important agency costs which may accentuate its 'democratic deficit'. More often than not, package deals are presented to the domestic legislatures of members for an ex post acceptance, which is almost automatic due to the single undertaking approach.<sup>68</sup>

At the institutional level, agency costs can be addressed by increased transparency in negotiations and other discussions as well by as more intensive participation. Indeed, transparency in this regard does not only entail visible and unconcealed procedures, but also effective possibilities for *access* to such procedures. At the internal level, in reality, the fact remains that effective participation is closely associated with longer negotiations and higher transaction costs. Ensuring effective participation negatively affects the WTO institutional performance and delivery of results, notably because the WTO lacks deal-brokering processes.<sup>69</sup> However, if deliberative processes are thereby served, this is good news, as effectiveness should never be synonymous to 'hidden from public scrutiny'.

The current state of affairs in the WTO has witnessed higher levels of participation by developing countries – not only by the emerging economies, but also by the least-developed countries, individually or as a group. This is a rather welcome incremental transformation of the WTO. It also shows the willingness of various under-represented members to participate provided that financial resources and technical assistance are available. If participation is considered as the only way to sustain the WTO's democratic legitimacy, then facilitating participation for all members is essential.

Ongoing consent by democratic states constitutes the democratic channel of accountability. The smooth functioning of this channel is generally necessary for legitimacy.<sup>70</sup> Having said this, consensus, along with the single undertaking approach, has been pinpointed as a potential hindrance to the further pursuit of the objective of liberalizing trade.<sup>71</sup> State consent is a necessary but not sufficient condition for

67 K. Abbott et al., 'The Concept of Legalization', (2000) 54(3) *International Organization* 401 at 405.

68 See R. Howse, 'How to Begin to Think About the "Democratic Deficit" at the WTO', in S. Griller (ed.), *International Economic Governance and Non-Economic Concerns – New Challenges for the International Legal Order* (2003). In the US, the so-called 'fast-track' authority has been criticized by various circles.

69 See Y. Bonzon et al., 'Reflections on Modes of Decision-Making in the World Trade Organization', in T. Cottier and P. Delimatsis (eds.), *The Prospects of International Trade Regulation – From Fragmentation to Coherence* (2011), 103 at 110.

70 See Buchanan and Keohane, *supra* note 9 at 405.

71 See Sutherland Report, *supra* note 59, at 64. In favour of the single undertaking approach, see R. Wolfe, 'The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor', (2009) 12(4) *Journal of International Economic Law* 835. For a subtler approach, see S. Rolland, 'Redesigning the Negotiating Process at the WTO', (2010) 13(1) *Journal of International Economic Law* 65.

confirming the legitimacy of IOs. Rather than demonizing consensus, streamlining the channels of co-operation and discussion so that at the very beginning of a given decision-making process all members are on an equal footing can have very positive effects on the acceptance of the final outcomes, thereby facilitating consensus later in the process. In addition, more effective co-operation and the establishment of continuous communication channels with other IOs may facilitate decision-making as well. To date, complaints about the lack of institutional sensitivity when it comes to the WTO relations with other IOs abound.<sup>72</sup> Experience shows that, just by granting observer status, inter-institutional cooperation is not well served. In assessing the feasibility and the need for certain action *ex ante* or the impact of a given WTO agreement or piece of law *ex post*, for instance, other forms of co-operation should be envisaged.

The consensus rule, with its imperfections, can improve transparency with regard to the preferences of the weaker WTO members, which the more powerful members must take into account when designing the final deal or the final draft text to be submitted for members' consideration to avoid deal-breakers. Consensus implies that the more active WTO members will be testing the intentions and preferences of the other members, notably the weaker and thus more defensive ones, by tabling proposals or informal documents (so-called room documents) early in the decision-making process. Such preferences may be expressed individually or through representatives of coalitions such as G20, G33 or the LDC Group. This is one of the most compelling justifications for the current delay in concluding the Doha Round in an IO that counts 159 members. However, alternative methods of decision-making are far from offering a genuine remedy to the current dysfunctions of the consensus rule. For instance, the adequacy of weighted, majority-based voting as a mechanism that would improve the efficiency of the WTO still needs to be proven,<sup>73</sup> particularly within an institution which to date does not have any aspirations to becoming something more than an intergovernmental body. Again, members currently embark upon plurilateral approaches, whereby only a fraction of members negotiate deals binding only to them.<sup>74</sup> From an economic viewpoint, such 'impure' collective action may have benefits similar to unanimity.<sup>75</sup>

Another proposal aimed at enhancing input legitimacy suggested the creation of a Consultative Parliamentary Assembly, composed of parliamentarians of WTO members. A parliamentary dimension in the WTO already exists. The WTO Parliamentary Conference, which is organized jointly by the Inter-Parliamentary Union (IPU) and the European Parliament, adopted its Rules of Procedure in 2004, which were

72 See M. Foltea, *International Organizations in WTO Dispute Settlement* (2012).

73 See T. Cottier and S. Takenoshita, 'The Balance of Power in WTO Decision-Making: Towards Weighted Voting in Legislative Response', (2003) 2 *Aussenwirtschaft* 171; also J. Tijmes-Lhl, 'Consensus and Majority Voting in the WTO', (2009) 8(3) *World Trade Review* 417.

74 This is the case with the Trade in Services Agreement (TiSA) currently negotiated by over 20 WTO Members. Importantly, Brazil and India do not participate in the negotiations, and China only recently asked to join. The Bali Ministerial Declaration seems to tolerate such initiatives. See WTO, 'Bali Ministerial Declaration' WT/MIN(13)/DEC (11 December 2013) at [1.12].

75 See G. Maggi and M. Morelli, 'Self-Enforcing Voting in International Organizations', (2006) 96(4) *American Economic Review* 1137.



amended in 2008.<sup>76</sup> Several meetings of national members of parliaments took place on the occasion of WTO MCs.<sup>77</sup> While a worthwhile effort, as noted earlier, a more inclusive structure would be better suited to address global subsidiarity concerns.

In more generalized terms, for those criticizing the WTO as being undemocratic and illegitimate, it seems that it is inadequate to juxtapose IOs generally with a democratic ideal that is already missing at the domestic level.<sup>78</sup> Philosophical analyses of *demos* and its participation are useful and intellectually stimulating, but lose sight of the second-best world in which we live. Thus, what WTO scholars should do is an evaluation of the functioning of the WTO vis-à-vis current mechanisms, limits, and deficiencies of other IOs and domestic democracies.

The old GATT institutional setting which was created to serve international trade diplomacy cannot satisfy demands for openness and participation. WTO critics argue that the WTO is short of both *procedural* fairness in its mechanisms and *substantive* fairness in its decisions.<sup>79</sup> Only by improving the former can the latter become more satisfactory. Decision-making within the WTO has many facets and phases and thus the level of transparency may vary in an uneven manner, but improving the administrative law of the WTO would be a first step towards achieving higher levels of fairness.

Levels of transparency may actually be much more satisfactory in the everyday work of the WTO committees than in a negotiating round. A case at issue is the procedures within the Committee on Sanitary and Phytosanitary Measures (SPS Committee).<sup>80</sup> Again, there are numerous examples of unsatisfactory practices. For instance, the Chairpersons of some WTO committees were occasionally accused of being too enthusiastic with consensus-building thereby superseding their powers. Similar accusations were also made against the Secretariat.<sup>81</sup> However, the closed consultations that the Chairpersons typically hold are essential in order to create momentum and are deemed to exert a significant bridge-building role.<sup>82</sup> The most problematic of such features is their ad hoc nature: there are no clear-cut rules as to the role and limits of the parties involved in the different phases. While such flexibility is important during negotiations, it may be less so when the WTO is in law-making mode.

Procedural transparency could increase through the introduction of a review mechanism of WTO decisions by the WTO adjudicating bodies. The lack of such

76 Available at <<http://www.ipu.org/splz-e/trade08/rules.pdf>>.

77 See H. Rommetvedt, 'The Institutionalization of a *Parliamentary* Dimension of an Intergovernmental Organization: The WTO', (2011) 10 *World Trade Review* 423.

78 A. Moravcsik, 'Is there a "Democratic Deficit" in World Politics? A Framework for Analysis', (2004) 39(2) *Government and Opposition* 336.

79 Claims concerning substantive unfairness mainly relate to the WTO dispute settlement mechanism.

80 See A. Lang and J. Scott, 'The Hidden World of WTO Governance', (2009) 20(3) *EJIL* 575, at 590.

81 For some early complaints, see WTO, 'Memorandum on the Need to Improve Internal Transparency and Participation in the WTO', (2003) available at <[http://www.google.com/url?sa=t&rc=tj&q=wto%20decision-making%20and%20internal%20transparency%2C&source=web&cd=2&ved=0CfcQFjAB&url=http%3A%2F%2Fwww.twinside.org.sg%2Ftitle%2Fpar%2FMEMORANDUM\\_ON\\_THE\\_NEED\\_TO\\_IMPROVE\\_IT\\_Final\\_version.doc&ei=BpDQT8\\_WJ8iW-waUnJSbDA&usq=AFQjCNHDr-M9TByUrAMoTSSwdgDp2Bz9tw](http://www.google.com/url?sa=t&rc=tj&q=wto%20decision-making%20and%20internal%20transparency%2C&source=web&cd=2&ved=0CfcQFjAB&url=http%3A%2F%2Fwww.twinside.org.sg%2Ftitle%2Fpar%2FMEMORANDUM_ON_THE_NEED_TO_IMPROVE_IT_Final_version.doc&ei=BpDQT8_WJ8iW-waUnJSbDA&usq=AFQjCNHDr-M9TByUrAMoTSSwdgDp2Bz9tw)>.

82 See P. Pedersen, 'The WTO Decision-Making Process and Internal Transparency', (2006) 5(1) *World Trade Review* 103 at 107.

a mechanism perpetuates current exclusionary practices against the letter of the WTO decisions at the institutional level, but also against the spirit of a member-driven consensus-based IO which abides by the rule of law. Possibility of judicial review would enhance the overall institutional cohesion of the WTO and ensure some tentative checks and balances. The existence of this type of constitutional-like claim would likely reassure members and constituencies of the procedural rigour of the WTO. The WTO adjudicating bodies are already familiar with the theoretical foundations of transparency, due process, and good governance generally through the interpretation of the WTO transparency provisions such as Article X of the GATT.<sup>83</sup> They could also get inspiration from other courts which have routinely dealt with the margin of manoeuvre that political institutions have when exercising their functions.<sup>84</sup>

### 5.2. Of legitimacy or relevance? External transparency as a managed process

More transparency brings with it more interest in the activities of the WTO with a view to influencing those activities. Enhanced transparency mobilizes a variety of groups. Such mobilization traditionally takes place at home with intensive lobbying by the constituents vis-à-vis their competent authorities that negotiate in Geneva. According to the current WTO texts, there is no general right to transparency that is bestowed to anyone other than WTO members. Thus, transparency relating to commercial matters should be ensured and in fact is warranted using the domestic legal framework as a basis, thereby offering the possibility to private parties to express their views on trade matters and indirectly influence the WTO agenda-setting and decision-making.<sup>85</sup>

For WTO members, the WTO treaty and subsequent decisions and declarations call for more transparency without, however, setting an absolute target or benchmark, as noted previously. An explanation may be that external transparency in the WTO varies. For instance, the level of transparency when the WTO acts as a negotiating forum within a negotiating round as opposed to when the WTO acts in its legislative capacity should not necessarily be the same. In the latter situation, openness and public access, at least with respect to the prompt dissemination of information, is warranted; and not only vis-à-vis WTO members, but also the civil society.<sup>86</sup>

While in theory the intergovernmental character of the WTO may lead to the exclusion of certain private actors from the WTO's decision-making, in reality, various NGOs have indirectly been part of it through their co-operation with WTO members in order to help them participate more meaningfully in the WTO activities

83 See Appellate Body Report, United States-Import Prohibition of Certain Shrimp and Shrimp Products, (12 October 1988) AB-1998-4, WT/DS58/AB/R at [180–183]; and Appellate Body Report, European Communities-Selected Customs Matters, (13 November 2006) AB-2006-4, WT/DS315/AB/R at [302].

84 See also Y. Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?', (2005) 16(5) *EJIL* 907; cf. Opinion of Advocate General Cruz Villalón in Case C-280/11 P, *Council of the European Union v Access Info Europe* [2013].

85 See J. Helmer and R. Wolfe, 'Trade Policy Begins at Home: Information and Consultation in the Trade Policy Process', 2007 available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1365111](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1365111)>.

86 Compare the similar argumentation used by the EU General Court: Case T-233/09, *Access Info Europe v. Council of the European Union* [2011] ECR II-1073 at [56ff].

over the years. Additionally, in various instances, NGOs have been more active in the work of WTO committees. Their participation was welcome because they had (or managed to build quickly) considerable savvy in relevant technical issues which provided additional viewpoints to those expressed by the Secretariat in the preparation of background documents. This applies with particular force in the so-called 'trade and . . .' issues (such as environmental protection) with which WTO officials (particularly the old generation thereof) may be less familiar.

Moreover, when one reflects on the potential participation of private actors, the emergence of private authority domestically (typically through self-regulation or other types of transfer – even partial – of regulatory power) and the delegation of powers that is the reality in various sectors of the economy such as professional services or standard-setting inevitably comes to mind. Thus, when developing the international dimension of rules prescribing certain behaviour for those actors, they shall be involved in the law-making process due to their expertise, and the fact that they already are the *de facto* regulators at the national level. Thus, their involvement or not may determine the ultimate legitimacy (through acceptance and use) of the rules developed within the WTO in a given area. In that sense, openness in some instances of the WTO's decision-making towards private actors is a matter of time.

However, increasing external transparency for all activities of the WTO can only be the result of a well-thought out and determined action by WTO members – in co-operation with the Secretariat as far as the technicalities are concerned. Arguably, the WTO does not need to increase its levels of external transparency in order to be regarded as *legitimate*. Rather, it should increase it in order to remain *relevant* and engage with real concerns in the real world that commercial transactions may nourish.<sup>87</sup> The attribution of observer status to NGOs has been a first step. As well as overcoming some public choice concerns present in any political institution such as the WTO through the participation of NGOs in the WTO decision-making, NGOs may be less critical once they become 'part of the system'.<sup>88</sup>

Furthermore, NGOs as well as civil society groups and business associations may provide valuable and systematic feedback to pinpoint persistent trade-restrictive policies. For instance, such feedback could be collected if some meetings of the Trade Policy Review Body were public.<sup>89</sup> Thus, by increasingly involving the NGOs in its work along targeted, functional lines, the WTO and its members receive valuable support, which can enhance the WTO's relevance, authority, and effectiveness.<sup>90</sup> Sticking with state-only participation is increasingly becoming old-fashioned and imprudent,<sup>91</sup> particularly if one also takes into account the emergence of private authority globally.

87 See also Doha Declaration, *supra* 66, at [10].

88 See D. Esty, *Greening the GATT: Trade, Environment, and the Future* (1994) at 27–8 (discussing the role of environmental NGOs in the NAFTA).

89 Webcasting of such meetings with the collection of feedback taking place in another room or electronically is also a possibility.

90 See D. Esty, 'Linkages and Governance: NGOs at the World Trade Organization', (1998) 19(3) *University of Pennsylvania Journal of International Economic Law* 709, at 716.

91 See A. Kuper, *Democracy Beyond Borders – Justice and Representation in Global Institutions* (2004) at 164–5.

Such support is all the more important, as the WTO has limited financial resources and a relatively small WTO Secretariat.<sup>92</sup> After all, NGOs have played a very important, if only informal, role in the multilateral trading system at least since its inception in the mid-1990s.<sup>93</sup> NGOs are more accustomed to competitive conditions which oblige them to become increasingly specialized in certain areas to ensure public attention and raise funds. Thus, while competing with WTO institutions, collaboration with them in areas agreed *ex ante* may be highly beneficial.<sup>94</sup> Bringing this collaboration to a more sophisticated level would also enhance WTO's deliberative legitimacy,<sup>95</sup> as it would improve the coherence and robustness of its output. This does not mean that NGOs will be placed on a par with states. State consent for law creation within the WTO – and IOs, more generally – will remain the prevailing method.<sup>96</sup>

Such openness may not be sufficient as disorganized, ordinary people worry and even mistrust the WTO exemplified by the demonstrations during MCs or other high-level meetings at the WTO. This constitutes a possible source of concern, as what is conventionally termed 'global civil society' may not necessarily be regarded as encapsulating the views of majority or minority groups of people at the periphery. Arguably, there are groups of people who do not feel that certain trade-related NGOs or civil society groups act on their behalf or that they manage to defend these people's interests (particularly non-trade concerns such as those relating to poverty, environment, core human rights, or culture) satisfactorily. There seems to be an overall perception that certain state representatives join WTO negotiations or meetings with a significant bias to the detriment of the ordinary citizens on the ground.

In the absence of openness, the current Doha deadlock rather gives the negative impression of a continuous introspection by the WTO. Wider openness, that is, open-door bargaining, decision-making, and dispute settlement, may be the only possible and sustainable *modus operandi* for the WTO if the organization wants to gain public support.<sup>97</sup> If the WTO is at crossroads because of transparency and lack of more effective participation, this is a message that should be conveyed to – and will certainly be well received by – the public. Inconvenient though it may be in terms of effectiveness, openness should be hailed if it slowly becomes part of the WTO tradition. Otherwise, at a minimum, instances of intransparency should be subject to public deliberation, pre-established and well explained.

Widening rather than narrowing the political debate and open possibilities for contestation is indeed warranted if the WTO is to have broader outside support, but also allow for effective participation and proportional representation of the civil

92 See R. Blackhurst, 'The Role of the Director-General and the Secretariat', in A. Narlikar, M. Daunton, and R. Stern (eds.), *The Oxford Handbook of the World Trade Organization* (2012) 141, at 146.

93 J. Dunoff, 'The WTO in Transition: Of Constituents, Competence and Coherence', (2001) 33 *George Washington International Law Review* 979.

94 See D. Esty and D. Geradin, 'Regulatory Co-Operation', (2000) *Journal of International Economic Law* 235 at 253.

95 See J. Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society* (1981) at 286–7.

96 See A. Roberts and S. Sivakumaran, 'Lawmaking by Non-state Actors: Engaging Armed Groups in the Creation of International Humanitarian Law', (2012) 37(1) *Yale Journal of International Law* 108.

97 See Stasavage, *supra* note 31, at 680.

society.<sup>98</sup> The latter can be achieved through targeted actions such as the creation of bodies adjunct to the WTO with precise rules on membership that ensure fair representation of interests both geographically and economically.

Live webcasting of meetings or press releases where non-technical language is used also deserve praise. Such initiatives increase the visibility of the WTO and its activities but also enhance the legitimacy of WTO organs *within* the WTO. What is sought after is not transparency in the form of increased communication of technical documents, which few outside the WTO are able to understand and act upon. This type of transparency may actually be perilous and have the opposite effect if it produces piles of documents that few understand and ever fewer read.

### 5.3. In the spotlight: the selection of the new WTO DG

Just as in any institution, transparency in the WTO is an incremental process and is very much a 'work in progress'. In addition, it involves high levels of learning-by-doing, as at present there is no sophisticated model organization at the international level by which the WTO could be inspired. One of the WTO's most publicized instances is the selection of the WTO DG. There is controversy as to whether the DG selection process generally is a transparent one.<sup>99</sup> However, as noted earlier, the DG selection process that started in December 2012 could be deemed the most open and inclusive selection process of any consensus-built IO chief to date. In terms of inclusiveness in particular, the 2002 DG selection procedures provide that candidatures for the WTO's top post should reflect the regional diversity of WTO members. They further stipulate that such diversity should also be reflected in successive appointments to the DG post.

The first three WTO DGs were elected through ad hoc processes. In 1999, in one of the most critical turns in the WTO's short history, there was an agreement that the new DG should come from a non-European country. After intensive, yet inconclusive consultations, members agreed that the two candidates, Moore (New Zealand) and Panitchpakdi (Thailand) would have to share successive three-year non-renewable terms in the top WTO position. They were the first non-Europeans to lead the GATT/WTO. However, dismay about the lack of predictability and legal certainty regarding the procedures used was apparent. Through the 2002 DG selection procedures, the next DGs would be appointed by means of a detailed and more open and streamlined process.<sup>100</sup> In 2005, Lamy (France) succeeded Panitchpakdi in the top WTO post. While imperfect, the very adoption of those procedures also shows the capability of the WTO to adjust and ultimately reinvent itself to override differences and public criticism.

98 M. Piewitt, 'Participatory Governance in the WTO: How Inclusive Is Global Civil Society?', (2010) 44(2) *Journal of World Trade* 467 at 485. Interestingly, Piewitt suggests that there is a persistent North–South divide in global civil society in the WTO and a dominance of the business sector.

99 See, e.g., J. Politi, A. Thomson, and J. Leahy, 'Brazil in Tight Race with Mexico to Head WTO', *Financial Times* (6 May 2013). Kenya, which nominated a candidate, also complained formally about a procedural matter relating to the confidential consultations. See ICTSD, 'Candidate Field Narrows for WTO Director-General's Race', (2013) 17(3) *Bridges Weekly Trade News Digest*.

100 Interestingly, the term 'consensus' is mentioned ten times in the adopted procedures: See WTO, *supra* note 2.

Ahead of the critical WTO MC in Bali in late 2013, nine candidates were nominated by their countries in a high-profile race at the end of 2012 to succeed Lamy in the DG post.<sup>101</sup> According to the DG selection procedures, the new DG had to be elected within a six-month timeframe, *in casu*, by 31 May 2013. Members had one month at their disposal to nominate candidates. All nine candidates were given three months to ‘make themselves known’, after which the consultation phase started. They were requested to present and defend their candidacy in public.<sup>102</sup> Whereas the early phases of the selection process are quite open and public, because of the ‘consensus’ tradition of the organization, the consultation phase that ultimately leads to the selection of the new DG is not. However, the consultation phase is still transparent at the internal level.<sup>103</sup> This two-month phase was administered by a *troika* (the so-called ‘facilitators’) consisting of the GC Chair, assisted by the Chairs of the Dispute Settlement Body and the Trade Policy Review Body, and aiming at narrowing down the field of candidates to ultimately arrive at a choice for appointment. The *troika*’s essential task has been to encourage and facilitate consensus-building.

The selection was made through a process of exclusion, that is, members started by identifying, through confidential individual consultations with the *troika*, the candidate who is least likely to attract consensus.<sup>104</sup> In the first two rounds, members, including those delegations which were not resident in Geneva, were asked to express their preferred candidates; those who received low levels of support were asked to withdraw. It bears noting that negative preferences were not accepted. The third and final round found two Latin American candidates, Blanco (Mexico) and Azevêdo (Brazil), to compete for the post. In the end, Azevêdo prevailed and his name was put forward by the *troika* on 8 May 2013, despite reports that both the US and the EU preferred the Mexican candidate. This can be regarded as evidence of the shifting dynamics within the WTO, but also as an indication that members felt that an insider would have better chances of delivering at this difficult point in the WTO’s history. It appears that both candidates had a large support basis in the developing world.<sup>105</sup> In any case, both the EU and the US made clear that, in their view, either nominee would be a suitable candidate for the DG post.

Overall, the recent DG selection process proved members’ determination to proceed to managed transparency of decision-making. In other words, every effort was made by the actors involved to ensure internal transparency, due process, and effective participation throughout the process. With respect to external transparency, most of the information relating to the DG selection process was made available

101 See WTO, *supra* note 2, para. 8. The candidates were: Azevêdo (Brazil); Blanco (Mexico); González (Costa Rica); Kyerematen (Ghana); Mohamed (Kenya); Pangestu (Indonesia); Hindawi (Jordan); Groser (New Zealand); and Bark (South Korea).

102 See WTO General Council, ‘Minutes of Meeting Held in the Centre William Rappard on 29–31 January 2013’, WT/GC/M/142 (16 May 2013).

103 See WTO, *supra* note 2 at [17–18]. Also WTO, ‘Appointment of the next Director-General – Further Progress: Informal General Council Meeting at the Level of Heads of Delegations’, Statement by the Chairman, JOB/GC/39, (19 March 2013).

104 See WTO, *supra* note 2 at [17].

105 See ICTSD, ‘WTO Members Choose Brazil’s Azevêdo as Next Director-General’ (2013) 2(2) *Bridges Africa Review*.

through the WTO website and the minutes of the various meetings of the GC. The minutes of WTO meetings are available at the WTO website typically about 2–3 months after the date of the meeting. In addition, the candidates received much publicity through interviews where they shared their vision about the WTO.<sup>106</sup>

## 6. CONCLUSION

The future of the WTO as an IO is not insecure. The WTO has exerted an important role as facilitator and information disseminator, significantly reducing transaction costs and the costs of obtaining information on trade practices and domestic regulations. It also managed to gradually reduce power asymmetries and stabilize trade conditions.<sup>107</sup> Admittedly, the WTO has fulfilled to a great extent the tasks that states and scholars have expected and thus is largely a legitimate IO under this lens.<sup>108</sup> Indeed, an output- or results-based approach would suggest that the WTO has been quite effective in achieving its mission. Furthermore, it has improved regulatory governance and enhanced the overall use of best practices both in commercial transactions and administrative processes domestically. Arguably, the institutionalization and increased rules-orientation of the multilateral trading system led to higher legalization and, with it, enhanced transparency both domestically (for instance, in trade formulation policy) and at the WTO level.

In addition, the paradigm shift towards higher levels of power diffusion has equally resulted in pressing demands for, and is gradually leading to, more transparency. This also is in line with our times. Transparency is positively correlated with the contemporary exercise of power in international law and is important regardless of the institutional or power structure; it is a meta-principle that is relevant for every possible form of governance.<sup>109</sup> It is also a public good that is supplied by both the WTO as an institution and the members *jointly*. In an institutional setting of this kind, the availability of this good holds exit at bay and increases loyalty to a given institution. Additionally, increased transparency shows respect for the exercise of free voicing, giving an impression of a largely egalitarian institution.<sup>110</sup>

Indeed, the fact that developing countries now constitute about two thirds of the WTO membership makes ever-increasing transparency a self-fulfilling prophecy. Interestingly, the same representatives of WTO members arguing for more transparency, participation, and inclusiveness *within* the WTO also argue for less openness towards outsiders and the public. It appears that, for those countries, transparency is a zero-sum game at the expense of the outside world. Nevertheless, this monolithic view fails to grasp the magnitude of non-state actors and stakeholders that today exert influence in a pluralistic world and participate in commercial transactions.

106 See, e.g., B. Hoekman and P. Mavroidis (eds.), *Race for the WTO Director-General job – Seven Candidates Speak* (2013); also R. Meléndez-Ortiz (ed.), *Global Challenges and the Future of the WTO* (2013).

107 See K. Bagwell and R. Staiger, *The Economics of the World Trading System* (2002), 39.

108 See K. Abbott and D. Snidal, 'Why States Act through Formal International Organizations', (1998) 42(1) *Journal of International Conflict Resolution* 3; Also J. Alvarez, *International Organizations as Law-Makers* (2005) at 338 ff.

109 See Fisher, *supra* note 6 at 276.

110 See A. Hirschman, 'Exit, Voice and the State', (1978) 31(1) *World Politics* 90 at 106.

Additionally, it does not take into account that in the domestic orders of various developed countries and definitely those of the currently two most influential WTO members, the EU and the US, transparency is an essential component of their legal tradition and a fundamental factor for any government to sustain its legitimacy domestically.<sup>111</sup> Viewed from this angle, a compromise as to the direction that action toward openness should take appears plausible. Transparency cannot be equated to a zero-sum game. Overall, transparency is a necessary but not sufficient condition for a well-functioning and legitimate IO. It is multifaceted and often involves substantial reform.<sup>112</sup>

Having said this, intra-institutional transparency may have a negative impact on the negotiation and conclusion of deals at the multilateral level for two reasons: first, because it increases the transaction costs (negotiating costs or other costs). Second, because it brings about better and more accurate information regarding the distributional effects of the proposed agreements, thereby mobilizing groups that may be hurt by more liberalization. The current Doha impasse is revealing in this respect.

The WTO negotiators have difficulties coming to terms with increased transparency internationally as well as the enhanced domestic consultations processes that come with it. Put differently, transparency appears to be undermining the WTO's culture of compromise. Nevertheless, there are additional factors to blame for the current stalemate of Doha negotiations. There seems to be a general feeling vis-à-vis the WTO that state representatives may not be sharing the policy preferences of their constituents. In that case, transparency is the only available way forward for a publicized IO like the WTO, as the expected benefits from constraining the actions of biased officials exceed the expected costs of prompting unbiased officials to posture.

In assessing the legitimacy of the WTO, one should also make a counterfactual analysis: Had the WTO not existed, would trade liberalization have been achieved more effectively and in a more streamlined manner? The fact that economic theory supports the existence of a multilateral institution regulating state behaviour over trade policies adds to the legitimacy of the WTO. By promoting co-operation among democratically elected (for the most part) politicians and their governments, the WTO empowers them. This is yet another element that enhances the legitimacy of a global institution. As Keohane et al. correctly observe, the choice is not between international co-operation and domestic autonomy, but rather between complementary activities of institutions at the international and domestic levels, on one side, and uncoordinated state action, on the other.<sup>113</sup>

In this context, it is rather the judiciary of the WTO and the technocrats of the WTO Secretariat that rise in prominence. Thus, quite paradoxically, transparency may amplify the imbalance between the judicial branch and the other WTO

111 See B. Hocking, 'Changing the Terms of Trade Policy Making: From the "Club" to the "Multistakeholder" Model', (2004) 3 *World Trade Review* 3.

112 See, e.g., the reforms that accompanied the EU Better Regulation Initiative.

113 See R. Keohane, S. Macedo, and A. Moravcsik, 'Democracy-Enhancing Multilateralism', (2009) 63 *International Organization* 1 at 23.



branches.<sup>114</sup> Having said this, there is a legitimacy issue that arises whenever the balance between the political organs and the judiciary is disturbed. As Trachtman observes,<sup>115</sup> legal rules are both *products* and *producers* of constitutional change. As it is virtually inconceivable to soften the WTO dispute settlement system, the discussion about WTO reform naturally revolves around matters relating to institutions and decision-making. Judicial law-making is just around the corner.

As to the decision-making mode, on the one hand, consensus is important if one considers the WTO as an IO which is premised on the principle of sovereign equality. On the other hand, consensus can be a hindrance if one views the WTO as a negotiating forum. Decisions are delayed, transaction costs multiply and countries are discouraged from investing any energy in the multilateral trajectory, preferring the easier-negotiate-and-conclude bilateral deals. This is admittedly exacerbated by the now broad WTO membership, which has almost doubled since the Uruguay Round negotiations.

In my view, the WTO shall serve its dual function in a balanced manner: neither more cost-efficient negotiations nor preserving the IO character of the WTO can be the prime objective. Majority voting rules *à la* EU have been proposed. However, the WTO is a negative integration contract. Arguably, the tentative steps for positive integration as exemplified in the TBT and the SPS are unsatisfactory. Then, if the central WTO mission remains to combat protectionism, decision-making reform towards majority voting-based legislative structures would be a step too far. In addition, such structures may have an irreversible impact on the political character of the institution which is as important as the rules-based one. Fewer politics in the WTO may not be the magic recipe. In the end, it is not even about the decision-making rules that will be adopted to reform the multilateral trading system. The system is rather in dire need of improving its public image. The WTO has an interest in more transparency to avoid biased communication of documents by NGOs or other groups (for example states that want to delay progress or advance their own interests). Currently, many documents which are ostensibly restricted (JOB or room documents) are available in various websites hours after their first circulation in a WTO meeting.

Furthermore, more active involvement of the WTO in current challenges such as addressing climate change or establishing an effective financial architecture, achieving the Millennium Goals, and, notably, eradicating poverty appears to be best possible route. However, if the WTO moves towards becoming a global player and is sought to express views on issues beyond trade, then pressures for more efficient decision-making processes may grow, in line with adjustments in other IOs such as the IMF.

Recent decades have witnessed an increasing integration of the developing world in the global trading system. Such integration has, however, been highly unequal,

<sup>114</sup> For a more nuanced view, see J. Pauwelyn, 'The Transformation of World Trade', (2005) 104 *Michigan Law Review* 1, at 34.

<sup>115</sup> J. Trachtman, 'The Constitutions of the WTO', (2006) 17 *EJIL* 623 at 638.

with some benefitting more than others.<sup>116</sup> The adoption of redistribution mechanisms and the participation of domestic constituents in the deliberation process of the WTO can only be beneficial. Such initiatives do not necessarily entail direct money transfers from the WTO to specific groups or countries. Indeed, the WTO is not a development agency nor does it have the financial capacity to act in this manner. With an annual budget of about US \$80 million, much of the WTO activities depend on the goodwill of its members to maintain and expand the activities of the organization.<sup>117</sup> However, constitutionalization of the WTO without distributional effects cannot be conceived. Global distribution of benefits is perhaps addressed for the first time through the WTO Cotton initiative, involving four cotton-producing countries, Benin, Burkina-Faso, Chad, and Mali.

This brings me to a crucial point as to the role of developing countries. One of the most ineffective instruments in the architecture of the global trading system that emerged from the Uruguay Round was the adoption of transitional periods during which developing countries and LDCs were exempted from application of certain rules. With respect to decision-making in particular, these members have lost interest in shaping the rules, as they felt that they were not concerned or expectations were created that such exemptions would last for an indefinite period of time. Thus, participation and, consequently, legitimacy of decisions taken at the WTO were severely affected. Furthermore, such special treatment provisions have arguably widened the gap between the developed and the developing world.<sup>118</sup> More active advocacy by developing countries is slowly becoming the everyday reality in the WTO and demands for liberalization in sectors where the poorer countries could compete should accompany their more active engagement in the WTO project. The WTO treaty leaves room to diffuse reciprocity and this should be explored more actively. Potential trade-offs abound, not only across sectors and WTO agreements, but also within agreements.

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116 Having said this, one should refer to recent evidence suggesting that the GATT/WTO managed to spur on the trade of developing economies. See J. Goldstein, D. Rivers, and M. Tomz, 'Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade', (2007) 61 *International Organization* 37 at 57.

117 See J. Bacchus, 'A Few Thoughts on Legitimacy, Democracy, and the WTO', in Petersmann, *supra* note 41, 429 at 430.

118 Here I refer particularly to those countries which are at the outskirts of the developing world, with few possibilities of affecting terms of trade.