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How to Begin to Think About the "Democratic Deficit" at the WTO[1]

I. Introduction: Disaggregating the Democratic Deficit

There is an increasingly widespread intuition that the World Trade Organization lacks adequate democratic legitimacy, or has a "democratic deficit" to use an expression derived from debates about the European Union. Views on the issue of the WTO and democracy range from the dismissal of the "democratic deficit" based on the notion that since the WTO rules are approved by national governments they must be democratic or adequately so, to claims that the WTO along with other institutions and actors of globalization as essentially destroyed democracy as we have known it (*Noreena Hertz*).

Despite the intensity with which the issue of democracy and the WTO is contested there is essentially no literature aimed at bringing analytical clarity to the problem. As *Susan Marks* notes, democracy itself "is a hugely contested concept".[2] In other work, I have identified a range of conceptions of "democracy" that is at play in debates about democracy and governance beyond the nation state, including representative democracy, deliberative democracy, corporatist or consociational democracy, republican or communitarian democracy, and democracy as decentralization.[3] All of these views of democracy have salience in determining democratic legitimacy, and they are in important ways inter-related. For example, while representative

[1] Many thanks to *Sylvia Ostry*, *Andrew Moravscik*, *Armin von Bogdandy*, *Kalypso Nicolaidis*, *Claude Barfied*, *Marco Bronckers*, *Debra Steger*, *Joseph Weiler* and *Claus Ehlermann* for stimulating conversations on some of the issues discussed in this paper. All of the many shortcomings are entirely my responsibility, of course.

[2] *Marks* (2000) 2.

[3] *Howse* (2000).

democracy is identified with formal representative institutions, such as elected parliaments, the legitimacy that flows from such processes surely presumes elements of deliberative democracy, such as the possibility – and reality – of debate and confrontation of different points of view on public policy. Not only dreamy academics but politicians and activists for secession and regional autonomy movements, among others, invoke republican conceptions of democracy to justify their cause, despite the reality that representative institutions in modern democracies appear to offer on a daily basis little of the collective self-determination of which *Rousseau* waxed eloquent in his more poetic moments.

A further complication, often forgotten, is that democracy is not the *only* source of legitimacy for policy outcomes.[4] Decisions of a constitutional court to constrain majority will, for example, may be legitimated in significant measure by deontological conceptions of human autonomy or equality.[5] Decisions of autocratic or authoritarian regimes may have a certain legitimacy, even in the absence of "democracy", if they are respectful of social diversity, and reflect a process of *consultation* with the people.[6]

As if the complexity, interrelationship, and contestability of salient alternative conceptions of democracy didn't make the task of analytical clarity hard enough, the perception of a democratic deficit in institutions of globalization such as the WTO occurs at a time when there is significant disillusionment with *domestic* democratic institutions and practices, indeed with domestic governance.[7] Thus, it is not sufficient to address the "democratic deficit" from a static perspective, merely asking to what extent outcomes in the WTO are

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4 I have discussed the multiple sources or claims of legitimacy in the WTO context in *Howse* (2001).

5 See an excellent paper on the "Democratic Deficit" in the EU by *Andrew Moravscik*, from which I have learnt much. "Reassessing the Fundamentals of Legitimacy in the European Union, Or: How We Learned to Stop Worrying and Love the 'Democratic Deficit'", 40th Anniversary Conference of the Journal of Common Market Studies, Fiesole, Italy, 9 April 2002.

6 See *Rawls* (2001?).

7 See *Ostry* (2002).

less democratically legitimate than policy outcomes within domestic polities. Many of the most outspoken critics of the WTO are also outspoken critics of the real world of democracy within the nation state – of course, it isn't the fault of the WTO that the goal posts, as it were, are being moved, but to some extent they are, and if the claims for a higher standard of legitimation domestically are well-founded, then it is besides the point, or at least somewhat inadequate, to point out that the WTO doesn't fare that badly measured against the arguably low *domestic* "status quo".

Within the confines of this essay, it is possible only to begin to suggest what sort of analytical framework could clarify issues of this complexity. Thus, I have proceeded by looking at one model of democracy, representative democracy, as it has been actually practiced in the "West" in the post-war period, as well as how its practice has been conceived ideally by scholars of democracy. In order to attempt to refine the inquiry into the existence of a democratic deficit, I have identified four separate issues or questions that are of relevance, which often get elided or confused with one another, in debates about the WTO and the democratic deficit.

The first, which is the most obvious, relates to whether WTO rules are sufficiently underpinned by democratic consent. A second concern is whether the substance of the rules themselves is democracy-enhancing or undermining. A third kind of concern relates the nature of WTO rules as pre-commitments – assuming *arguendo* that there is an adequate initial act of consent to the rules, today's majority is purporting to bind tomorrow's. WTO rules are not reversible without cost, should there be a change in popular will in a given Member country – nor would such rules have much value, if they could be abandoned freely. There is nothing inherently undemocratic about democratic pre-commitment – most liberal democratic constitutions purport to bind and constrain the majority will in the future. Yet such pre-commitments usually require special or extraordinary procedural justifications – super-majority votes in the legislature, referenda and plebiscites – or extraordinary substantive ones (such a deontological accounts of the primacy of certain rights over any expression of popular will). The question is whether such justifications exist with respect to WTO rules, and whether they are strong enough, given what appear to

be the costs of reversibility in response to a change in the direction of the popular will in a Member State. A forth concern arises from the character of democracy as not merely a set of legitimating institutional mechanisms, but also as a set of values or behaviors. Among the values often plausibly associated with democracy are openness, accountability, equality, value pluralism and inclusiveness. One dimension of the issue of democracy at the WTO is whether the behaviors and attitudes of the actors in the system, or closely associated with it, are appropriately reflective of such values.

II. Democratic "Consent" and the Legitimacy of WTO Rules

Under the model of representative democracy, consent for particular policies and actions of the government is almost always indirect (however, the occasional use of referenda or plebiscites is not inconsistent with the representative model, and indeed reflects often the special situation involved where today's majority seeks to bind tomorrow's, i.e. constitution-making). Consent of the people's representatives normally substitutes for a direct expression of popular will. Thus representative democracy is fundamentally constituted by a principal-agent relationship, that of the people to their representatives. In the case of multilateral trade negotiations, as in other areas, these representatives themselves then delegate to others – officials, experts, etc. – the task of bargaining with other "states".

As *Coglianese* and *Nicolaidis* suggest, given that representative democracy operates through principal-agent relationships, there is no reason why agency theory, although developed in the context of explaining economic institutions, should not be applicable to political institutions as well. They usefully summarize the key propositions of agency theory as follows: "The challenges in the principal agent relationship arises from two sources: (1) differences in interests between agents and principals which lead them to prefer different goals and strategies; and (2) information asymmetries which come from the fact that agents "typically know more about their task than their principals do, though principals know more about what they want accomplished". [footnote omitted] As a result, the agent may be able to

perform tasks in ways which do not conform the goals of the principal while the latter might not be able to do much about it."[8]

Under a representative democracy model, the problem of "democratic deficit" is essentially a problem of agency costs. To the extent to which their attitudes and behavior has been studied, the experts involved in the negotiation of WTO rules can be said to have some interests and goals not necessarily shared, at least not to the same extent, by their principals: they may well have a personal commitment, for example, to free trade or to the good of international cooperation as such.[9] As members of what *Anne-Marie Slaughter* calls a "government network",[10] these agents of different governments also have an interest in maintaining good working relationships with each other over time – they tend to be repeat players in these negotiations. We know from studies in the risk regulation area that experts perceive risk very different than do lay people, and in trade negotiations that relate to rules on domestic health and safety policies, for example, these differences in perceptions and perhaps also preferences about risk as between agents and principals may lead to agency costs, of a kind that are not often fully recognized by standard agency theory, which focuses on divergence of interests between agents and principals; there may be also differences of perception and value that can lead agents to act differently in making delegated decisions than would principals if they had full or as full information in the circumstances.

GATT/WTO law is also an area where information asymmetries have traditionally been very severe – there is very little understanding about trade rules and how they function, even among other agents of the people, such as legislators and senior bureaucrats concerned with domestic matters directly affected by trade rules. Negotiations have taken place in secret, making the account by negotiating agents of what went on in the room very difficult to verify independently. Further, governments (and ultimately citizens) have been highly dependent in

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8 *Coglianese* / *Nicolaidis* (2001) 281. On agency theory generally see *Pratt* / *Zeckhauser* (1985).

9 See *J. Weiler* / *Drake* / *K. Nicolaidis* (I'm sorry but I wasn't able to check the quotation. Which book/paper do you mean?). See also *Perez* (1996).

10 *Slaughter* (2000).

most cases on the expert community to which the negotiating agents belong in making judgments about what the rules being negotiated "mean", or, more precisely, the future consequences of those rules for various relevant interests.

It is thus not difficult to make an intuitively plausible case that there will be significant agency costs entailed in delegation of negotiating authority for multilateral trade rules. The real issue is whether the existing institutional mechanisms for managing these agency costs are adequate or not.

Those who believe that the WTO is adequately "democratic" usually point to the process of *ex post* legislative approval of negotiated WTO rules as an appropriate and effective democratic safeguard.[11] However, those who have examined the role of *ex post* legislative control in the case of the Uruguay Round Agreements tend to the conclusion that in all jurisdictions aside from the United States, *ex post* legislative scrutiny of negotiated rules was largely perfunctory.[12]

The mere fact, however, that such scrutiny was perfunctory in this case does not itself show that it was not optimized in the Uruguay Round, nor that it is *in principle* ineffective to control agency costs. For instance, one reason why such scrutiny might have been perfunctory and yet optimal is that legislators might have perceived agency costs to be small – that is to say they might have trusted negotiators to have closely reflected the interests of citizens in bargaining to an agreement. Legislators have scarce resources – it could well be that the opportunity cost of using legislative time and money to closely scrutinizing the Uruguay Round bargain was simply too high. There are *many* international negotiations where legislative oversight is minimal, just as legislative oversight of domestic agency rule-making varies greatly from agency to agency and regulatory context to regulatory context.

Here, it makes a great deal of difference how one perceives the choices of trade negotiators as they make WTO rules. Is this a matter

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[11] See for example statement of three former DGs of the GATT/WTO at Davos.

[12] See *Petersmann* (2001) 98, citing the various country studies in *J. Jackson / A. Sykes* (eds.), Implementing the Uruguay Round, Oxford 1997; *Bellman / Gerster* (1996).

largely of applying some kind of expertise – technical economics, for instance – to further a relatively uncontested conception of the public interest? Or do the rules in question, or the choices about the content of the rules, engage directly competing public values and constituencies? Especially after the Uruguay Round WTO rules have been increasingly perceived, and rightly so, as more conforming to the latter description. Because this essay is aimed not at taking sides in the debate over the "democratic deficit" as in clarifying what is at stake, and alternative remedies, I cannot prove this point here. I have attempted to do so elsewhere, however.[13] Agency theory must be considered here along with a conception of politics or the political. Legislatures are not just one link in the chain between principals, the people, and subordinate agents, such as expert trade negotiators. The legislative process, at least ideally, is *political* in a manner that makes it appropriate to the determination, or at least scrutiny, of policy choices that involve contested values and warring constituencies.[14]

One explanation for the absence of meaningful legislative oversight and control in the case of the Uruguay Round outcomes, is that the

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[13] *Howse* (2002). See also *Stein* (2001).

[14] The conception of "politics" I am attempting to articulate here is admittedly underdeveloped and partly intuitive – it is really a notion of the sorts of processes and institutions appropriate to making decisions that cannot be derived from a universally recognized higher authority, whether divine or natural law, scientific or technical expertise. I do not think this reduces to democracy as majority rule or the aggregation of preferences, but that something of a conception of deliberative politics has been built into the ideal of the legislature in the theory of representative government. These concerns have often come to be expressed today in terms of another model of *democracy*, the deliberative. Perhaps this is in part a reflection of the gap between the ideal of the legislative process and its reality. Perhaps also in the tendency to reduce *political* legitimacy to democratic legitimacy. But the emphasis on rationality in deliberation in the deliberative model suggests that decision by politics is not reduced simply to reflection of mass or popular will. *But* at the same time, it differs greatly from the manner of decision based on the *Wissenschaft* or *techne* claimed by experts. On the distinctiveness of politics as a mode of collective choice among competing values or ideals, see *Weber* (1965). On the "political" deficit of the WTO, see *Bogdandy* (2001).

public and the legislators were not yet adequately sensitized to the extent to which the rules engaged competing or contested public values. In other words, the implications were not well-understood, and obviously the "experts" were not well-positioned to explain them – given that the "experts" still believed that in many respects what they were doing was applying a rational economic policy model.

At the same time, a disincentive to legislative activism may be the limited effectiveness of *ex post* legislative scrutiny of outcomes negotiated by agents. First of all, there is the fact that legislators face a stark choice of either approving an entire package as is, without amendment, or rejecting it. They have no possibility, at least taking the law-making structure operated in recent multilateral trade rounds as paradigmatic, to reshape the package in a manner that makes it better reflect voter preferences. This kind of structure gives agents considerable capacity to increase the costs of an ultimate rejection of their package, since agents have considerable agenda-setting ability, including the linkage of issues, and (as the Uruguay Round demonstrates) even the ability to establish negotiating parameters that tie the continued enjoyment of benefits from existing rules to agreement to new rules. Agents know that a legislature will be hard put to reject a rule that poorly reflects the preferences of citizens, if in so doing they have to reject many other rules, or even entire agreements, that are popular with citizens. Moreover, if they are able to load enough matters of importance into a single "package", agents may be able to create a sense that catastrophic consequences would ensue from legislative rejection of the "package". If agents know that principals can only reverse their choices *ex post* at catastrophic cost, they will consider themselves relatively free to act autonomously from principals' preferences.

A further reason why *ex post* legislative scrutiny of outcomes negotiated by agents may be ineffective to control agency costs, is that there are significant information asymmetries between legislators and negotiating agents. Legislators whose only real involvement in WTO matters is a periodic examination of the results of negotiating rounds, will come to this task with few analytical tools and a very limited knowledge base, with which to assess critically the claims of agents as to the costs, benefits, and more generally the consequences, of

accepting or rejecting the negotiated outcome. In the case of the Uruguay Round Agreements, the texts themselves were in many cases not available to legislators in native languages.

Since negotiating agents tend to be invested in the outcomes that they have negotiated, they face strong incentives to exaggerate the benefits, and minimize the costs, or negative consequences of the deal. Moreover, since negotiating agents tend to be in most jurisdictions career civil servants with a strong presumption of lifetime job tenure, it is very difficult to discipline agents, when their statements about the implications of legal rules turn out to be erroneous. And even if they could be disciplined, there would be the very difficult task of distinguishing good faith interpretations or predictions about the effects of legal rules, from self-interested misrepresentations. It is likely therefore that agents face few disincentives not to self-interestedly put the best face on the outcomes they negotiate.

These observations suggest that other mechanisms may be necessary to control the agency costs that arise from multilateral trade negotiations. One such mechanism, which addresses the ability of negotiating agents to set agendas and tie issues in a manner that makes *ex post* legislative control ineffective, is *ex ante* hands tying of negotiating agents. Indeed, the current practice of "fast track" in the United States appears to reflect a recognition that, if it is put in a position where the only effective *ex post* control over a negotiated outcome involves the power to vote it up or down as a package, the legislature should attach *ex ante* constraints on the exercise of discretion by negotiating agents.

Formulating *ex ante* constraints that are effective is not an easy task. The US 1988 Omnibus Trade and Competitiveness Act, for instance, set out certain parameters for US negotiators in terms of US negotiating priorities, among which was labor standards, also stated as a priority in the 1974 trade bill. However, in the Uruguay Round, US negotiators came up empty handed on labor.[15] It seems that, unless expressed in terms of legal directives that mandate or prohibit certain outcomes in precise terms, agents can relatively easily avoid such constraints, perhaps stating claims (largely unverifiable in secret negotiations), that

[15] *Aronson* (2001).

they made best efforts to make the negotiated outcome conform to the instructions in a legislative mandate, but failed due to the intransigence of other parties. Negotiating agents may also resort to window-dressing – the inclusion of relatively meaningless legal provisions that nevertheless give the appearance of fulfilling the mandate. The adequacy of such provisions could be hard to question, unless one has a very fine understanding of the operation of international law in general and trade law in particular.

On the other hand, *ex ante* constraints in the form of precise legal directives have the obvious disadvantage that they substantially limit the capacity of negotiating agents to achieve compromise with the positions of other member states. It may be possible to meet the underlying concerns of the legislature using a different formula of words, or a different structure of disciplines that give other member states less difficulty. In such a situation, too specific *ex ante* constraints would impede a negotiated outcome that might closely reflect the preferences of principals. Moreover, very specific mandates or instructions may create a problem for negotiating agents of other Member states – they may appear like ultimatums, the acceptance of which could well carry the optics of having "caved". Here, one need only think of the recent example of the "rider" placed on "fast track" (Trade Promotion Authority) for the US President in the Senate that essentially makes it a condition of the smooth functioning of "fast track" that the executive not agree to any treaty provisions that would require changes to US trade remedy law.

A third approach to controlling agency costs is monitoring of agents' on-going activities. As *Odell* suggests, writing in the context of multilateral trade negotiations, "tighter institutional requirements to hear changing constituent demands and interim reactions will calibrate the agent more exactly as the negotiation evolves".[16] According to *Odell*, beginning with the Trade Act of 1974, the US Congress has required extensive consultation of legislators, and directly with interest groups, *throughout* the negotiating process.[17] Indeed, consistent with the concern about information asymmetries that exist due to a secret

[16] *Odell* (1997) 159.
[17] Ibid. 176-178.

negotiating process, negotiators have been required to share confidential information with legislators and interest group representatives. *Odell* claims that the result of such requirements has been a much better alignment of principals' interests and agents' behavior in the Uruguay Round. The United States appears to be an exceptional case, however, in the involvement of legislators extensively in the negotiating process.[18]

Monitoring may be facilitated by a greater role for NGOs in the negotiating process; open access to negotiating offers or proposals; and regular public reports by WTO officials and by governments to the public on the future of negotiations. Current attitudes of secrecy and the continuing "Club" approach to negotiations, to use the expression of *Keohane* and *Nye*,[19] frustrate the use of monitoring as a means of reducing agency costs. WTO Members cannot even agree concerning the presence of other *intergovernmental* organization representatives as mere observers in for a such as the WTO Committee on Trade and Environment. This stands in sharp contrast to, for example, the recent negotiations on the Biosafety Protocol.[20] There has been some marginal progress with respect to transparency of negotiating proposals. For example, proposals concerning the structure of negotiations on services were posted to the WTO web site. However, the actual offers that Members are making with respect to commitments on market access are not a matter of public record. Despite these limitations, NGOs with considerable competence in trade law and policy have been playing an important role in monitoring what negotiating agents have been doing and saying in Geneva, and informing domestic constituencies of the possible impact on their values and interests. Critics of NGO involvement in the WTO such as *Claude Barfield*,[21] who argue that NGOs run interference as it were with the formal mechanisms of accountability in representative democracy, which entail the brokerage of interests at the *domestic* level, simply ignore the problem of agency

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18 *Bellman* / *Gerster* (1996) 41-45.

19 *Keohane* / *Nye* (2001).

20 See the discussion in depth of the role of NGOs in this negotiation process, in *Bail* / *Falkner* / *Marquard* (2002) chs. 27-30.

21 *Barfield* (2001), especially ch. 6.

costs and therefore are unable to see that, in their monitoring function, NGOs that are present at the level of the negotiations themselves, can help to reduce agency costs, and therefore make classic *representative* democracy function *better*.

III. Are WTO Rules Democracy-Facilitating or -Undermining?

It is trivial that WTO rules constrain governments from acting in the future. We know that not all legal constraints on government action are democracy-undermining, however. Constitutional rules guaranteeing freedom of association and expression and periodic free elections are, for instance, widely regarded as democracy-enhancing.

In the case of the WTO, the kind of rules characteristic of the GATT could plausibly be presented as largely democracy-enhancing, on the theory that these rules largely constrain trade *protectionism.* Since protectionism is often considered by trade economists and policy analysts to be almost always an inefficient instrument for achieving legitimate public aims, it is often assumed that protectionism is a result of distortions or imperfections in the democratic process that allow concentrated interest groups to capture government policymaking and win rents. To the extent that GATT-type rules either constrain protectionism, or require a justification of trade protection as a necessary or legitimate public policy in the circumstances, they could be argued to prevent the corruption of the democratic process of special interests.

Elsewhere I have been critical of the notion that one should assume that whenever a government resorts to trade protection as a policy instrument it is captive to special interests. This debate cannot be resolved in this brief essay. However, it is clear that many of the newer WTO rules cannot be understood this way, for example the rules on intellectual property protection. Indeed, in the case of patents, these rules could themselves be understood as a product of special interest group capture at the WTO itself, namely in that case the pharmaceutical industry.

A complex example is that of the rules embodied in the Agreement on Sanitary and Phytosanitary Measures, which were at issue in the infamous *Beef Hormones* case. These rules impose scrutiny on non-discriminatory domestic health and safety regulations where these

affect trade. As such they threaten the ability to make such choices on the basis of democratic will. However, when read properly, the rules can be understood mostly as requiring a procedure of public justification for such regulations, including the gathering of scientific evidence, which may enhance democracy, by allowing fuller public debate of the issues, and better public information.

In the *Hormones* case itself, the European Community of course was found to be in violation of the WTO rules, suggesting the capacity of those rules to frustrate the democratic expression of citizen concerns through regulation. It should be noted however that the Appellate Body of the WTO was faced with a situation where the EC had not tabled even a single relevant scientific study as a basis for its regulations, while the EC lawyers themselves refused to rely on a clause in the SPS Agreement that would allow provisional measures pending further scientific investigation. The Appellate Body went to great lengths to emphasize that it would not second-guess a WTO Member's regulatory choices, provided there was some scientific evidence on the record concerning the risks in question, and even stated that a Member could act on the basis of "non-mainstream" science, thereby ensuring that "science" does not become an orthodoxy precluding democratic contestability in the area of risk regulation.

One could similarly view the Agreement on Technical Barriers to Trade as primarily aimed not at constraining democratic regulatory choices, but disciplining the *process* by which those choices are arrived at, including requiring policymakers to have at least turned their minds to alternatives less restrictive of trade. Understood in this way, again as with SPS rules that appear democracy-threatening when they are understood as inviting WTO tribunals to second guess democratic regulatory *outcomes*, may be understood as democracy-enhancing with respect to regulatory *processes*.

Rules on services and particularly the binding of market access commitments have the potential to be especially democracy-threatening. Such commitments are often tantamount to the "lock in" at the international level of domestic experiments with regulatory reform and / or privatization in services industries with "public goods" or network aspects. Moreover, many of the policies in question could be at the regional or local level, where the implications of a WTO market

access commitment are even less likely to be fully understood and democratically debated. One needs only to think of examples like electricity reform in California to realize that even if justified at some level of generality in terms of economic theory the precise design of regulatory reform may well need to be fine tuned as the effects of the original experiments on the public interest become known. The freezing of early approaches to the design of regulatory reform an demonopolization and / or privatization in WTO market access commitments obviously frustrates the possibilities for such fine-tuning.

Finally there are provisions in the WTO Agreements that require transparency of domestic laws and regulations, such as Article X of the GATT. These could be potentially democracy-enhancing. Relatively little attention has been paid to such provisions, however. In the case of the Trade Policy Review mechanism, where trade and related policies are put under review at the WTO on a periodic basis, the democratic potential of such review has not been realized, due to the narrowness of the policy perspective adopted in examining Members' policies and a failure to realize the potential of broad civil society input. Appropriately reformed, the TPRM could enhance domestic democratic accountability for trade and related policies and their affects on citizens.

IV. Pre-Commitment and Reversability

Adhesion to international agreements is a mechanism by which today's government, or today's majority, can bind tomorrow's. This is a straightforward result of the basic public international law rule of state responsibility that treaty obligations are not extinguished – nor is there a right to modify or re-negotiate them when a government changes. Pre-commitment of this nature is, of course, a common feature of domestic constitutionalism in liberal democracies. What is pre-committed is usually basic structural rules for the processes of government, or division of competences, as well as individual rights (and in some instances minority and collective rights). Pre-commitment exists inasmuch as a new government, or even a shift in majoritarian opinion under the existing government cannot easily result in the rules being suspended or abandoned. This requires some kind of extraordinary democratic process, such as a supramajority vote of both

houses of the legislature, in a federal state approval of all or most of the federal sub-units and so forth.

Pre-commitment outside the constitutional context can be dangerous for democracy. A government waning in popular appeal could sign a trade agreement that locks in an ideological agenda that is already becoming illegitimate or not broadly supported by citizens.

When such pre-commitment occurs at the international level, what are the options when the polity changes its mind, a new government comes to power, and so forth? The rule that a government is bound by the international obligations undertaken by previous governments must be understood in light of the traditional, decentralized approach to interpretation and enforcement in international law. Getting a state to abide by its international legal commitments has generally required the cooperation of that state itself, both in terms of an acceptance that it has in fact acted in contravention of its obligations, and the appropriate remedy. In this respect, from the point of view of democracy, there is a sense in which international law involves in *Renan*'s sense "une plébiscite de tous les jours". Many contemporary international lawyers lament this fact about traditional international law, and are keenly interested in mechanisms for creating more centralized interpretation and enforcement, with a view to "compliance". Many social scientists have been skeptical as to whether international law is really law at all, given the absence of automatic or relatively automatic identification and sanctioning of non-compliance.

The WTO operates, or purports to operate, in stark contrast to this traditional picture of international law. Judicial dispute settlement is both compulsory and binding. Whether the measures a Member found to be in violation has taken to remedy the violation are adequate is also a matter of binding judicial arbitration. And failure to comply triggers a right of the aggrieved Member to take retaliatory action in the form of withdrawal of trade concessions of "equivalent commercial effect" to the violation.

Where a WTO rule, or its interpretation, has come to be seen as democratically illegitimate, or unduly constraining of the democratic will, non-compliance remains of course an option of sorts. Some WTO scholars, most notably *Alan Sykes*, even suggest that the provisions of the WTO Dispute Settlement Understanding that provide for, and limit,

retaliation, constitute a kind of "efficient breach" mechanism. They fix a price at which a Member is within its rights in walking away from WTO legal commitments. As a matter of interpretation of the WTO rules, as well as the general international law rules of state responsibility, I do not agree with *Sykes*.[22] However, from the perspective of democracy, it is significant that the cost of reversing or suspending pre-commitment, albeit through what I would described as "civil disobedience" has been fixed. In some instances, such as the case of Europe's hormone ban, the price has been obviously not prohibitive.

When a WTO ruling lacks legitimacy or the rules lose legitimacy the options for that Member within what I understand to be the law, are to apply for a waiver or an authoritative interpretation by the Membership that supports a democratically legitimate meaning for the rule, to negotiate an amendment of the WTO treaty, or finally to withdraw from the WTO. All but the last option require consent of a supra-majority, and in practical terms, probably consensus of the entire WTO Membership. The last option would probably have very serious, if not catastrophic consequences for many Members, given the dependence of private economic actors on the rules in question and their binding character.

Thus, the fact is that WTO rules, or even interpretations of those rules, are not reversible within the law in any kind of way that is analogous to the ability of domestic polities to change all but a small number of constitutional rules through a routine expression of democratic will within that country.

To my mind, these costs of and constraints on reversibility, combined with the impact of new era trade rules in freezing or limiting regulatory choices in many policy areas depending on how they are interpreted, constitute the most troubling aspect of the WTO's "democratic deficit". One answer to the problem is to simply argue that WTO rules are like many domestic constitutional rules, a kind of "higher law", the substantive normative content of which justifies a mechanism that creates high costs for reversibility. This is, in substance, the argument of *Ernst-Ulrich Petersmann*. *Petersmann*'s

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[22] *John Jackson* and *Marco Bronckers* have explained persuasively, I believe, why the interpretation is flawed. Cite.

view of the WTO law as constitutional "human rights" is however subject to certain powerful difficulties. *Petersmann* himself admits that such rights are nevertheless subject to limits, and that some rights need to be balanced against others. The question then becomes whether it makes sense for a domestic polity to confer upon the dispute settlement organs of the WTO, which in any case don't seem to have particular credentials to deal with "human rights", the ultimate authority in deciding such balances or limits, at a very high cost of reversibility.[23]

Petersmann admits that one implication of the constitutional status that he claims for WTO rules, is a need for greater democratic legitimacy. But his proposals in this regard – greater involvement of domestic parliamentarians in the WTO and NGO advisory committees – are weak and seem highly manipulate by those, whether in the executive branch of government in many cases, or in the WTO, who will be selecting the parliamentarians and the NGOs who have these participatory rights.

In my view, one can address the problem of the high costs of reversibility either by returning to a system that is more flexible, diplomatic[24] and less legally compelling (building more room for reversibility into services commitments, i.e. opt outs and safeguards or considering alternatives to legally binding judicial dispute settlement in new areas of considerable policy sensitivity such as environment or competition). Instead, one could move forward as it were, in recognition of the implications of pre-commitment, and start employing extraordinary mechanisms of democratic consent that are used domestically in constitutional contexts where today's majority is purporting to bind tomorrows. Thus, serious consideration should be given to a referendum or plebiscite at the national, or even at local and regional levels, on the outcome of the Doha Round of negotiations. To be meaningful, this would require a campaign governed by appropriate rules and procedures, including access to national media – especially electronic media – for opposing groups or parties. The proposals would

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[23] See *Petersmann*'s latest articulation of his point of view and my response to it, both in the forthcoming issue of the *European Journal of International Law*. See also *Howse* / *Nicolaidis* (2001).

[24] See *Barfield* (2001).

need to be translated into local languages and widely distributed to the public.

But the problem even here is that the decision is of a take it or leave it nature. The public can ultimately veto a pre-commitment, but that is a blunt instrument, applied to a large package of rules. Perhaps then a further implication is to no longer negotiate new WTO rules in such "packages", a point of view that had some favor among *Clinton* Administration officials, while it was and is quite antithetical to the EU approach to new negotiations. However, a referendum or plebiscite requirement would, theoretically at least, provide an incentive for governments to make increased efforts to engage public opinion in the negotiating process itself, to create "ownership" of the result, and thereby reduce the likelihood of an eventual rejection.

V. Do the Actors in the WTO System Exemplify or Practice Democratic Political Ethics?

Among the most original and important contributions of *Alexis de Tocqueville* to democratic theory was to locate democracy and its legitimating force not only in a set of institutions, procedures or rules for decision-making, but also in the habits of soul or ethics that form and are formed by such institutions, procedures or rules. *Joseph Weiler* has offered a compelling description of the range of actors that has traditionally dominated the evolution and operation of the post-war multilateral trading regime: "A dominant feature of the GATT was its self-referential and even communitarian ethos explicable in constructivist terms. The GATT successfully managed a relative insulation from the 'outside' world of international relations and established among its practitioners a closely knit environment revolving round a certain set of shared normative values (of free trade) and shared institutional (and personal) ambitions situated in a matrix of long term first name contacts and friendly personal relationships. GATT operatives became a classical 'network' … Within this ethos there was an institutional goal to prevent trade disputes from spilling over or, indeed, spilling out into the wider circles of international relations: …".[25] These observations are broadly consistent with what *Keohane*

[25] *Weiler* (2001).

and *Nye* have identified as a "club" atmosphere in multilateral trade negotiations and regime management.[26]

Many of the values that can be identified as at the core of democratic political ethics are antithetical to this kind of closed club or network approach. The problem here is not that networks can't be held accountable through normal representative processes: subject to agency costs, observers such as *Anne-Marie Slaughter* are generally speaking right that they can. The problem is that being subject to accountability mechanisms of representative democracy does not excuse them from the expectation that their own conduct will reflect democratic values and attitudes.

Some of the key values and attitudes are inclusiveness, transparency, and value pluralism. On all three scores the trade policy network fails miserably. It clings to traditions of cloak-and-dagger diplomacy, has had to be led kicking and screaming to the modest de-restriction of documents that was insisted upon by the United States, particular the *Clinton* Administration. It is reluctant to let other intergovernmental organizations, including environmental health and human rights organisms of the United Nations participate even as observers in WTO processes that directly concern or affect the interests and constituencies that those organisms are preoccupied with. It even defends secrecy in dispute settlement proceedings, whereas secret trials have long been discredited as inconsistent with liberal democratic values essentially everywhere.

There is however one agent within the WTO system that is an exception to this characterization – the Appellate Body. Particularly in its manner of interpreting open-ended or general provisions of the WTO Agreements in cases where there are contested values, the Appellate Body has been sensitive to value pluralism, in a manner appropriate to a public law adjudicator in a pluralistic liberal democratic society.[27] The approach of the Appellate Body is well-expressed by its remark in the *Hormones* case that WTO treaty provisions may represent a "delicate and carefully negotiated balance

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[26] *Keohane* / *Nye* (2001).

[27] See *Sunstein* (1996).

… between … shared but sometimes, competing interests …".[28] In interpreting the text, the political ethics of democracy – as appropriate to the judicial branch[29] – demand a sensitivity to and acceptance of the pluralism of legitimate values and constituencies at stake.

Along similar lines, the Appellate Body has also displayed the value of inclusiveness in its decision to interpret its broad discretion over its own operations as a judicial body to accept *amicus curiae* briefs from Non-Governmental Organizations.[30]

It should be said that generational change within the WTO Secretariat, for instance, is yielding some incremental advance towards the embrace of the political ethics of democracy. These changes are hard to notice, since these younger people operate within a formal structure that still reflects the old "club" ethics. But, at a personal level, and consistent with the instructions of their superiors, they do prove open to and sensitive to groups and values previously excluded for consideration or dialogue by the trade "club".

Lord *Dahrendorf* has suggested – and this an insight of *Eric Stein*, too – that formal institutional change or development is not easy to imagine, at least in the foreseeable future as a response to the democratic challenge posed by institutions of globalization. But as Lord *Dahrendorf* argues, one can have "Democrats without Democracy" to the extent to which those who decide within or influence the system have the political ethics of democrats. It is thus worth shifting some of the immense attention from mechanisms and institutions that might "democratize" the WTO (parliamentary assemblies etc.) to the challenge of establishing or widening a political ethics that reflects democratic values in existing institutions of global economic

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[28] Para 177.

[29] Thus my observation of this sensitivity should not be confused with the irresponsible and indeed defamatory allegation, for instance by *Jagdish Bhagwati* that in some cases the Appellate Body has actually corrupted the law under political pressure from particular constituencies. On the sensitivity of the Appellate Body to value pluralism, see *Howse* (2000a). For an examination of a single case in this light, see *Howse* / *Tuerk* (2001).

[30] *Shrimp-Turtle* and *Carbon Steel* cases.

governance.[31] At the same time, the kind of practices of transparency and inclusiveness that would result from the entrenchment of such a political ethics would help reduce agency costs, and therefore also strengthen the role of existing domestic institutions of representative democracy in ensuring the democratic legitimacy of the WTO.

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[31] See *Dahrendorf* (2001). See also on the idea of a political ethics of supranational governance, *R. Howse* / *K. Nicolaidi*s, "This is my Utopia …" The EU, the WTO, Global Governance and Global Justice: Synergies of Crisis, Narratives of Projection, paper prepared for the 40th Anniversary Conference of the Journal of Common Market Studies, European Union Institute, Fiesole, Italy, April 2002.

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