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Humanistyka i Przyrodoznawstwo 19, 139-152

2013

Artykuł został opracowany do udostępnienia w internecie przez Muzeum Historii Polski w ramach prac podejmowanych na rzecz zapewnienia otwartego, powszechnego i trwałego dostępu do polskiego dorobku naukowego i kulturalnego. Artykuł jest umieszczony w kolekcji cyfrowej bazhum.muzhp.pl, gromadzącej zawartość polskich czasopism humanistycznych i społecznych.

Tekst jest udostępniony do wykorzystania w ramach dozwolonego użytku.

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THE WTO'S LEGITIMIZATION STRATEGY*

Strategia uprawomocnienia Światowej Organizacji Handlu

Słowa kluczowe: Światowa Organizacja Handlu, uprawomocnienie, demokracja, wolny rynek.

Key words: World Trade Organization, legitimacy, democracy, free trade.

Streszczenie

Artykuł wyjaśnia, dlaczego Światowa Organizacja Handlu (WTO) zмага się z problemem swego własnego uprawomocnienia oraz w jaki sposób wpływa to na proceduralne i rzeczowe argumenty oraz jak staje się źródłem napięcia między nimi. Artykuł przybliża także dyskusje toczące się wewnątrz WTO wokół jej własnych uwarunkowań, a przede wszystkim jej wewnętrznych sprzeczności.

Abstract

This article explains why the World Trade Organization struggles with the problem of its own legitimacy, how it puts forward both procedural and substantial arguments and remains trapped in the tension between them. This paper focusses on the WTO's own discourse to shed light on its presuppositions or, rather, its internal contradictions.

1. Introduction

Is good governance opposed to, or at least in tension with, democracy? The former refers to a political organization designed to achieve substantial goals. The concept of democracy is focussed on procedural rules enacted to ensure that rulers take into account the will of the people affected by their decisions¹.

* An earlier version of this paper was presented at the workshop on "Good Governance" and Democracy: *Competing or Complementary Models of Global Political Legitimacy?*, held at Merton College, Oxford, on 10th–11th March 2006. The author greatly benefited from insightful comments from the participants and from Prof. Philippe Coppens, but is responsible for any remaining error.

¹ There are others ways to express the opposition, where governance is a concept used for rules decided outside a constitutional system. R. Nickel, *Participatory Transnational Governance*, (in:) Ch. Joerges, E.-U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Hart, Oxford 2006, p. 159.

The purpose of this article is not to discuss the theoretical relevance of this distinction, which could be put into question notably because it hardly takes into account the role of courts in the legitimacy debate and because the status of the preconditions necessary for a democratic discussion remains unclear. Be that as it may, a fair decision-making procedure and the achievement of desirable substantial goals can be taken as two main roads to legitimacy, in much the same way as “patterned” theories of justice can be opposed to procedural ones. Manfred Elsig similarly distinguishes input legitimacy (procedures and processes to reach a decision, with subdivisions according to the type of procedure) and output legitimacy (based on the results achieved by the institution, its performance and efficiency)².

In practice, a complete separation of goals and procedure is not realizable, as they are permanently mixed in the political debates. The challenge of our democratic systems is to match permanently, to the greatest possible extent, the will of the people with efficient and just policies. In fact, the best legitimization strategy is to reconcile both perspectives, as much as possible, and thus to promote desirable goals by democratic means (independently of which eventually prevails in case of conflict). Another reason why achievements and procedure cannot be separated is the contradictory effect of the latter on the former: increased transparency and participation may impair efficiency in decision-making, but a norm adopted through a more legitimate procedure usually achieves a better compliance rate³.

In this article, I would like to present a case study explaining why the World Trade Organization struggles with the problem of its own legitimacy, how it puts forward procedural and substantial arguments (which will be referred to as “democracy” and “good governance” respectively) and remains trapped in the tension between them. I will not analyse whether the WTO *is* legitimate or not, but rather focus on the WTO’s own discourse to shed light on its presuppositions or, rather, its internal contradictions.

In the next section, I present two documents published by the WTO, which synthesize its legitimacy argumentation and on which my analysis is based. Section 3 focuses on two of the WTO’s arguments more specifically related to good government and democracy. In section 4, I show the unresolved tension between these two arguments. First, the WTO cannot effectively combat state protectionism if it bases its legitimacy on internal democratic processes (which implies that the WTO must defer to its members’ will). Second, free trade and democracy do not always go hand in hand. If the people do not want free trade, the WTO must either revise its ultimate objective or give up democracy. Section 5 explores ways to reduce the contradiction.

² M. Elsig, *The World Trade Organization’s Legitimacy Crisis: What Does the Beast Look Like?*, “Journal of World Trade” 2007, no. 41(1), p. 81–86.

³ *Ibidem*, p. 88–89.

2. 10 benefits + 10 misunderstandings = 20 good reasons to support the WTO?

Various methods could be used to approach the WTO's legitimization strategy. I chose to concentrate on the analysis of two pamphlets published by the WTO and entitled *10 benefits of the WTO trading system*⁴ and *10 common misunderstandings about the WTO*⁵. These publications are freely available on the WTO website and are intended to be read by a large public⁶.

With the publication of these documents, the WTO attempts to justify its existence, prove its usefulness in contemporary international economic relations, and refute the criticisms it usually faces. Both endeavours are the flip side of the same coin and they share a common conclusion: contrary to the supposed prejudices of the readership, the WTO should be supported.

The structure of both documents is similar: ten assertions, with a brief explanation of their meaning, followed by a one-page-long text justifying the assertions.

The "benefits" document focuses on results pursued or achieved by the WTO system: it "helps to keep the peace" (1) and "stimulates economic growth" (7); it "cuts the costs of living" (4) and at the same time "raises income" (6); it "provides more choice of products and qualities" (5); it "makes life easier for all" (3) and also "more efficient" (8). Other benefits relate to institutions rather than welfare: the WTO helps to handle disputes "constructively" (2), it shields national governments from lobbying (9) and it "encourages good government" (10). The overall picture presents the WTO as desirable in the system of world governance because of its effects on peace, wealth and growth.

The so-called misunderstandings are, in fact, criticisms more directed against the WTO decision-making process. The WTO would be "undemocratic" (10), it "dictates policy" (1), it forces weaker countries to join in (9) but, once they are members, they are powerless (7), it favours free trade "at any cost" (2), i.e. its agenda is not debatable. But some misunderstandings also relate to the results achieved by the world trading system: it destroys jobs (6), it allows commercial interests to "take priority over" development (3), the environment (4), health and safety (5). It seems, therefore, that criticisms are targeted both against the WTO's achievements and against its decision-making process.

⁴ WTO, *10 benefits of the WTO trading system*, Geneva 2008.

⁵ WTO, *10 common misunderstandings about the WTO*, Geneva 2008.

⁶ The use of such "popular" documents sometimes carries with it an oversimplification of the discourse. A more in-depth study should analyse the positions taken by the WTO in different contexts, including dispute settlement. However, the materials chosen for this paper reflect the overall structure of the WTO discourse.

A complete analysis of both documents would be too big a task to tackle here, although it would probably give a better overview of the main arguments used by the WTO to legitimize its existence and its action. Hence, I focus on contrasting the last item of both documents. Benefit # 10 of the WTO argues that it encourages good government, while the tenth misunderstanding relates to the alleged undemocratic nature of the WTO.

3. “The system encourages good government” and/but “The WTO is NOT undemocratic”

How does the WTO encourage good government? According to the WTO document, “under WTO rules, once a commitment has been made to liberalize a sector of trade, it is difficult to reverse. The rules also discourage a range of unwise policies. For businesses, that means greater certainty and clarity about trading conditions. For governments it can often mean good discipline”⁷.

For the WTO, good government includes avoiding unwise policies, which are simply – to put it in a nutshell – protectionism. Accordingly, free trade is a good policy which has to be promoted, although not “at any cost”⁸. It is not surprising to hear such discourse from the WTO.

The WTO rules “include commitments not to backslide into unwise policies”⁹. Governments, it seems, used to be unwise, but departed from that position; they were (once) convinced by arguments in favour of free trade, and resolved to join the WTO. Now, they are impeded from turning back to their previous policies, for the case they would find them attractive again.

Protectionism is bad government, the document goes, not only because it is economically inefficient, but also because it favours undesirable methods of (internal) government such as “lobbying”, “corruption”, “arbitrary decision-making” and “cheating”. It is suggested, in other words, that protectionism is an opportunity for the government to take decisions which do not correspond to the will of its population but which, rather, favour vested interests.

Quotas are cited as the main example, probably because they are “unwise” in many respects. In economic theory, quotas are considered as worse than tariffs because they are coupled with an inefficient allocation of import licences (in most cases) and because they may strengthen the market power of firms in a dominant position¹⁰. Further, in the political sphere, the allocation of quotas

⁷ WTO, *10 benefits of the WTO trading system...*, p. 14.

⁸ WTO, *10 common misunderstandings...*

⁹ WTO, *10 benefits of the WTO trading system...*, p. 14.

¹⁰ P.H. Lindert, T.A. Pugel, *Économie internationale*, 10e édition, Economica, Paris 1997, p. 192.

constitutes an incentive for lobbying or corruption, hence for arbitrary decision-making and bad government. The same could be said (maybe to a slightly lesser extent) for decisions about tariffs.

The discussion around lobbying shows that, notwithstanding the WTO's allegations, the "good government" argument is not intrinsically linked to the WTO's goals, but only to its existence as an international organization. The WTO does not point to the fact that lobbying or corruption may also affect government decisions in the field of tariff cuts, liberalization, or indeed any kind of decision (wise or unwise)¹¹. Similarly, the argument about certainty and clarity for businesses does not seem to acknowledge that legal certainty comes from the existence of legal rules more than from their content, whether it is protectionist or not¹². If the WTO pamphlet holds true, it is only because when a state is bound by a treaty, its government may no longer decide alone on topics covered by the treaty. Therefore, the possibility of successful lobbying or corrupting at state level is greatly reduced. The difficulty to change the rules entails a greater stability and, therefore, legal certainty. Whether the content of the treaty is wise or not is actually quite another question.

Nevertheless, it appears that the WTO's argument is not confined to the realm of substantial goals. "Good government" is interesting, in a legitimacy perspective, precisely because it links substantial goals (free trade and economic efficiency) with a vision of democracy. This kind of democracy denies the relevance of interests groups, thus adopts a liberal and atomistic perspective, which is coherent with the economic side of the argument.

We now turn to the discussion on the democratic nature of the WTO. When trying to refute Misunderstanding # 10 about its alleged undemocratic nature, the WTO bases its arguments on state consent. Trade rules are democratic because the Marrakech Agreements were negotiated by the member states and ratified by their parliaments, and because all subsequent decisions are taken by consensus, which is even said to be "more democratic than majority rule"¹³. Misunderstanding # 1 develops the same idea, to prove that "the WTO does NOT tell governments what to do". The text emphasises that the WTO is a "member-driven" organization.

This is quite another vision of democracy at the international level than the liberal one of the "good government" argument. To be considered as democratic, the WTO has to show that it is supported by the population it affects.

¹¹ J.O. McGinnis and M.L. Movsesian (*The World Trade Constitution*, "Harvard Law Review" 2000, no. 114, p. 528) mention explicitly lobbies in favour of free trade, which they view as a necessary and desirable counterweight to protectionist interest groups.

¹² See H. Culot, *Risque et sécurité dans le nouveau droit des marchés financiers: le rôle de l'information*, "Revue pratique des sociétés" 2002, p. 405-420.

¹³ WTO, *10 common misunderstandings...*, p. 10.

However, in the current state of affairs in international relations, with no formal and direct expression of the people at the international level, the WTO feels compelled to rely on its member states as the only place for democratic expression. The WTO has been created (and its rules have been adopted) by a free act of governments, which were themselves democratically elected (Misunderstanding # 10). It is a two-level democracy, with a democratic society of states, each of them also constituting a democratic society¹⁴. Such a “two-step” reasoning allows to trace back the existence of the WTO, and the content of its policies, to the will of the affected peoples.

The inconsistency is not obvious. In both cases, the WTO relegates democratic expression to the national sphere, first by claiming to improve the internal democratic systems (impediment of lobbies), then by relying on national democratic processes to establish its own democratic legitimacy.

4. Tensions in the WTO’s position, or is good government compatible with democracy?

However, the WTO’s discourse is marked by two main tensions. The first tension stems from the fact that the documents confine democracy to its national dimension, with the WTO presented as a mere gathering of (democratic) states, which it is not. The second tension arises when one considers that free trade – or, more broadly, an economically optimal allocation of resources, of which free trade is a condition among others, according to standard economic theory – may not always match the preferences of the people.

4.1. Democratic expression in the international realm

The WTO discourse is based on suppositions which cannot be accepted as such. This impedes the endeavour to base the democratic nature of the WTO solely on democratic expression at the national level.

Firstly, the WTO presupposes that member states are democratic, which is true for many of them, but cannot reasonably be said to be the case for all its members¹⁵.

Secondly, it suggests that all decisions within the WTO are effectively taken by officials accountable to their fellow citizens. Agency theory shows that agen-

¹⁴ See also Consultative Board, *The Future of the WTO – Addressing institutional challenges in the new millennium*, Geneva 2004, 29 sq.

¹⁵ On this question, see J.O. McGinnis, M.L. Movsesian, *The World Trade Constitution...*, p. 588 sq.

cy costs and asymmetries of information introduce a discrepancy between the principal's will (or interests) and its expression by the agent¹⁶. Moreover, decisions taken at the WTO cannot be abstracted from the WTO's context and that of international relations in general. Are we really sure that trade experts or negotiators appointed by a government (ultimately, but marginally) controlled by an elected parliament always act according to the democratic will? Trade representatives, even of democratic states, may possibly depart from their constituencies' will when negotiating in the WTO context. This means that there is a gap between "formal democratic legitimacy" and "social legitimacy"¹⁷.

Thirdly, notwithstanding its often-repeated official discourse, the WTO is not totally "member driven". Of course, (powerful) states retain a large power over the organization and its policies. However, organs of the WTO, above all panel and Appellate Body members, but also committees¹⁸ and officials in the secretariat¹⁹, also take decisions which, contrary to the assertions of the WTO, cannot be reduced to a mere implementation of what has been agreed in the treaties. The WTO can no longer be considered as a contract between states, with no will of its own. It is an institutional framework, subject to various influences which make it evolve over time, certainly with the consent of its main members, but according to its own dynamic. This is a consequence of the institutionalization and "judicialization" of international economic institutions. This autonomous power of the WTO, albeit weak compared to that of member states, has to be democratically legitimized, and this cannot be done by invoking national democratic processes.

Fourthly, even if one admits *arguendo* that there can be a democratic society of states, democracy can hardly be based on a principle of consensus. Of course, consensus implies that no state formally objects on the decisions taken by the organization. But the consequence is also that one single member can block the adoption of any modification to the rules²⁰. In fact, this veto power applied to all decisions is not democratic at all. Consensus is a contractual mode of decision, whereby all parties to a contract must agree to modify it. It is not suitable for an institutional context where a democratic process can develop. If every decision is

¹⁶ In this context, J. Meltzer, *State Sovereignty and the Legitimacy of the WTO*, "University of Pennsylvania Journal of International Economic Law" 2005, no. 26, p. 706–707; J.O. McGinnis and M. L. Movsesian, *The World Trade Constitution...*, p. 357.

¹⁷ R. Howse, *The legitimacy of the World Trade Organization*, (in:) J.-M. Coicaud, V. Heiskanen (eds.), *The Legitimacy of International Organizations*, U.N. University Press 2001, p. 361.

¹⁸ A. Lang, J. Scott, *The Hidden World of WTO Governance*, "European Journal of International Law" 2009, no. 20(3), p. 575–614.

¹⁹ H. Nordström, *The World Trade Organization Secretariat in a Changing World*, "Journal of World Trade" 2005, no. 39(5), p. 819–853.

²⁰ Consultative Board, *The Future of the WTO...*, p. 63.

taken by consensus, it is in fact the result of a negotiation in which powerful countries inevitably have more bargaining power.

The practical effect of consensus rule applied in today's WTO is to block any substantive evolution of the rules decided by ministerial conference and/or the member states, i.e. the "legislative" branch of the WTO where state consent is supposed to apply²¹. As a consequence, adaptation of the rules, if any, comes from the "judicial" branch of the organization (panels and Appellate Body), where the consent of member states has virtually no impact. In other words, consensus causes immobility or strengthens judicialization. One can think of no better way to undermine state consent as a source of legitimacy.

Fifthly, there is, at least about some issues, a legitimacy circle, by which states invoke their international obligations to justify their actions, while the international organization which supposedly enacted the obligation denies having any power and claims to be "member-driven"²².

These five elements imply that state consent cannot be the sole basis of the WTO's "democratic" legitimacy. Of course, state consent is part of it, but it must be completed by some more direct means of democratic expression or participation at the international level.

4.2. Free trade and democracy

As explained earlier, the WTO still bases its democratic legitimacy, to a great extent, on national democratic processes.

To reduce the power of lobbies and, more generally, to fight protectionism, the WTO uses a method which some consider undemocratic because it deprives states (where the expression of the democratic will supposedly takes place) of the ability to decide on a wide range of policies. The WTO is trapped in the legitimacy challenge faced by many international organizations: it relies on states for democracy – which implies that states must be able to act freely in the international sphere – while its core objective is to limit the liberty of states when they act internationally²³. This challenge – which Hobbes was aware of – is rooted in the traditional understanding of sovereignty with which internatio-

²¹ T. Broude, *The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO*, "Columbia Journal of Transnational Law" 2006, no. 45(1), p. 236.

²² R. Howse, *op. cit.*, p. 356.

²³ J.O. McGinnis and M. L. Movsesian (*The World Trade Constitution...*, p. 569) seem to resolve the question with an affirmation that WTO rules are not binding: "Of course, members may choose to keep their laws, whatever the WTO decides, and accept retaliation from their trading partners". Even if this were true, i.e. if legal rules may be trespassed by a state that is ready to pay, the problem would reappear in the form of another question: how, then, is the WTO system able to impede protectionism or to implement multilateralism?

nal coordination is difficult to conceive²⁴. However, the goal of the WTO, and therefore the source of its “output” legitimacy, is precisely the opposite of an international state of nature, i.e. to discipline international economic relations, according to the general intention of member states but occasionally by coercing them to comply with the common rules.

If we leave it at such a paradox, respect of democratic expression is really not the effect – let alone the goal – of the existence of a World Trade Organization. It seems, rather, that the notion of “good government” used by the WTO refers to a result to be achieved (liberalization) rather than to a democratic process. When it invokes democracy, the WTO should be considered as paying lip-service to some of its opponents’ concerns, but without any intent to sacrifice free trade for the sake of democracy.

Yet this does not sound like a reasonable interpretation of Benefit # 10 of the WTO document. One has to acknowledge that the WTO is indeed convinced to promote democratic expression by barring the road to lobbies and corruption and by promoting a transparent system of rules.

Ultimately, the WTO’s endeavour to overcome the tension is based on a deep conviction, and unsurprisingly a very liberal²⁵ one: citizens are rational economic agents, and they vote according to their economic interests. This implies in turn that governments (should) only decide according to the economic interests of the nation. With such a hypothesis, which is shared by other authors²⁶, the WTO discourse gains coherence. As free trade is more efficient than protectionism according to mainstream economic theory, a real democratic expression can only be in favour of free trade, and protectionism only comes from the undemocratic action of lobbies intriguing to obtain benefits that the general will would never grant them.

Keeping this conviction in mind, it makes no sense to say that the WTO deprives states of some decision-making power. In fact, states decide more freely because they are liberated from the influence of lobbies. Their action (on their own or through international institutions such as the WTO) corresponds to the will of their population, because it maximises national welfare. Neither is it

²⁴ See the nuanced opinion of J. Combacau, *Pas une puissance, une liberté: la souveraineté internationale de l’État*, “Pouvoirs” 1993, p. 47-58 ; idem, *Le droit international: bric-à-brac ou système?*, “Archives de philosophie du droit” 1986, p. 85-105, in particular p. 102–105.

²⁵ This liberal character is acknowledged by J.O. McGinnis, M.L. Movsesian (*The World Trade Constitution...*, p. 526), who refer to the Madisonian tradition.

²⁶ R. Keohane, J.S. Nye Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, (in:) R.B. Porter, P. Sauvé, A. Subramanian, A. Beviglia Zampetti (eds.), *Efficiency, Equity, and Legitimacy – The Multilateral trading System at the Millenium*, Brookings Institution Press & Center for Business and Government, Washington 2001, p. 268.

a problem in itself if some decisions are taken or influenced by unelected bodies (the DSB, NGO's or even lobbies) as long as they are compatible with the presumed democratic will, i.e. free trade.

This subtle reasoning enables the WTO to base its democratic legitimacy on internal processes, while at the same time dismissing as "undemocratic" the internal processes leading to protectionism. It seems the perfect way to reconcile good government and democracy: good government (free trade) is true democracy, while unwise policies must come from some democracy failure. A too perfect way, maybe, and the reader is left with the uncomfortable impression of a circular reasoning.

J.O. McGinnis and M.L. Movsesian develop a similar argument, focussed on interest groups, presented as common enemies of both free trade and democracy²⁷. In turn, this argument serves to promote the idea that the WTO should not have its power extended to international regulation, as this would create an incentive to lobby at WTO level and ultimately lead to increase the power of global lobbies (instead of a decrease in the "antidiscrimination" model)²⁸.

In fact, the argument is based on a wrong premise. One cannot simply affirm that voters are pure rational economic agents. Most of us admit that the choice of voters, especially if they are well-informed (which should be, but is not always, the case), is partly dependent on economic reasons. But even more observers would disagree with the idea that there are no other determinants to people's choices. Therefore, the possibility always remains that democratic choice does not correspond to economic efficiency, whether at national or at international level. Defenders of free trade imagine that the rest of the world is as convinced as they are, which is but a wish. Even perfectly informed citizens could vote against mainstream economic theory, for there is more than one economic theory; but more profoundly because social life, which does not take place in a "social vacuum", cannot be reduced to economic interactions²⁹.

Some hard cases submitted to the WTO are interesting examples of both tensions described above. They reveal the power of the WTO judiciary to take

²⁷ "Free trade and democratic government face a common obstacle – the influence of concentrated interest groups. Because free trade creates wealth for each nation, one would expect national majorities to favour free trade policies over policies that benefit special interests at the majority's expense" (J.O. McGinnis, M.L. Movsesian, *The World Trade Constitution...*, p. 515).

²⁸ J.O. McGinnis, M.L. Movsesian, *The World Trade Constitution...*, p. 556; idem, *Against Global Governance in WTO*, "Harvard International Law Journal" 2004, no. 45(2), p. 357.

²⁹ R. Nickel, *Participatory Transnational Governance...*, p. 160. On the links between market economy, liberal democracy and globalization, see also J. Verhoeven, *Souveraineté et mondialisation: libres propos*, (in:) E. Loquin, C. Kessedjian, *La mondialisation du droit*, Litec, Paris 2000, p. 43–57, in particular p. 49–50.

decisions which go beyond the mere application of the agreed rules (if only because technology evolves). They also show that the will of citizens (independently of lobbies and national economic interest) is not entirely determined by economic motives, nor always favourable to free trade.

These cases involved state decisions which were broadly supported by the population, but had a protectionist effect (if not intent). The problem is particularly crucial in the case of trade effects of value-based policies: development or “responsibility” for past actions (EC – Bananas III), protection of the environment (US – Shrimp; EC – Approval and Marketing of Biotech Products) or of human health (EC – Hormones; EC – Approval and Marketing of Biotech Products).

In deciding these cases, the judiciary organs of the WTO had a wide margin of appreciation to determine whether the defendant complied with the WTO rules, although they are formally forbidden from adding to or diminishing the rights and obligations of members (art. 3.2. DSU). They faced quite general rules, which had to be applied to a very specific and complex situation. Other interpretations would have been as reasonable. Moreover, it was clear that the decisions were also influenced by other unelected actors, and especially NGOs, who filed *amicus curiae* briefs, not to speak of private businesses which always hide behind WTO disputes³⁰.

These cases also demonstrate that democratic choices are sometimes based on values other than economic efficiency. For instance, Europeans do not want hormones-bred beef to be sold in their supermarkets, even if the price of beef would fall, and independently of where the beef is produced. This undermines the hypothesis – on which the WTO reasoning is ultimately based – that voters behave like rational economic agents.

By the way, these examples show that the legitimacy does not necessarily have the same grounds according to the WTO rules concerned. Economic efficiency seems a much stronger argument to legitimize non-discrimination principles, while its relevance decreases when dealing with “rules” or international standards³¹.

³⁰ WTO Disputes: European Communities – *Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26 and WT/DS48 (EC – Hormones); European Communities – *Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27 (EC – Bananas III); United States – *Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58 (US – Shrimp); European Communities – *Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, WT/DS292 and WT/DS293 (EC – Approval and Marketing of Biotech Products).

³¹ See R. Howse, *op. cit.*, p. 370.

5. What the WTO does (or should do) about it

As long as it remains based on internal democracy, the WTO's legitimization strategy will face the same difficulties. The WTO will keep trying to show its commitment both to "good government" and to democracy, but it will be unable to convince. At some point, it will have to give priority to one over the other. In that respect, Misunderstanding and Benefit # 10 are clear enough: while recognizing in principle the importance of democracy (applied to interstate relationships), the WTO accepts non-democratic elements as long as they are favourable to the principles of free trade. Priority is given to the result over the process, to "good government" over democracy. As protesters are more concerned with democracy than with economics³², the WTO's legitimization endeavour is bound to fail.

A possible solution would be to reduce international economic relations to simple interstate contracts. In my view, globalization makes this impossible.

The other way out consists in designing ways of international democratic legitimization, independently of national states' intervention. The goal is not, in today's world, to replicate the state system of democratic legitimization at the global level, but we could at least try to "narrow the legitimacy gap"³³ through the promotion of some kind of international democratic participation³⁴.

The WTO is aware that its "member-driven" theory may strengthen an absolute vision of state sovereignty which could jeopardise the enactment and enforcement of international rules. Being "member-driven" may arguably enhance the WTO's legitimacy in the general public, but at the same time it undermines its authority to constraint states to keep away from protectionism. The same goes for solutions of "comity", whereby the organs of the WTO show more respect for the wishes of the member states³⁵. Hence the need for democratic expression at the international level in a way compatible with the international obligations of states even associated with sanctions. The European Parliament is such an endeavour, but little similar exists to control the action of the WTO.

Interestingly, small steps have been taken to introduce a democratic expression in the WTO itself, independently of the member states. As it becomes less "member-driven" and more institutionalized³⁶ notably since the introduction of a real judicial system, the WTO is both compelled and able to allow for some international democratic expression.

³² R. Keohane, J.S. Nye Jr., *op. cit.*, p. 272.

³³ R. Nickel, *Participatory Transnational Governance...*, p. 161.

³⁴ *Ibidem*, p. 177 sq.

³⁵ See *ibidem*, p. 175 sq.

³⁶ See Consultative Board, *The Future of the WTO...*, p. 43.

As far as the first tension is concerned, inclusion of representatives of civil society has been much disputed, but participation has undoubtedly increased over the last years³⁷. Additional steps could be envisaged, of course, including a kind of more direct involvement of national parliaments³⁸. Transparency in general has been improved³⁹. The WTO website is heavily used to keep the public informed of the organization's activities⁴⁰. NGOs are recognized as legitimate observers (not to say actors) of the WTO's activities, especially the ministerial conferences⁴¹. The WTO even distributes position papers written by NGOs⁴².

Interestingly, progress in transparency and participation also affects dispute settlement, where institutional power is mostly exercised. The practice developed to open panel and appellate body hearings to the public, at least in cases involving major developed countries⁴³. *Amicus curiae* briefs, filed by NGOs, but also university professors and research centres, have been principally accepted by the panels and the Appellate Body, first as an appendix to a state's submission, then independently – which is significant.

More generally, in some of their important decisions, WTO panels and Appellate Body have opted for solutions reinforcing their legitimacy. As studied in greater details by Howse⁴⁴, these include the insistence on equitable procedure and due process (fostered by the presence of private lawyers), the Appellate Body's severe control over "objective assessment", an effort to bring about coherence in the case-law, and the decision to interpret WTO law as a part (and not independently) of public international law – as a matter of principle, at least. Sometimes, these efforts (deference to member states, literary interpretation, etc.) limit the ability of the judiciary to implement the substantial goals of the organization, which shows that the tension between "democracy" and "good governance" can be reduced, but not eliminated.

³⁷ On this issue, see R. Nickel, *Participatory Transnational Governance...*, p. 191 sq.; Consultative Board, *The Future of the WTO...*, p. 41 sq.

³⁸ See the timid proposal of the Consultative Board, *The Future of the WTO...*, p. 46.

³⁹ On transparency, which enhances democratic participation but may also impede the negotiation of efficient policies, see Keohane & Nye, 2001, p. 276; Elsig, 2007, p. 79-80.

⁴⁰ G.C.A. Junne, *International organizations in a period of globalization: New (problems of) legitimacy*, (in:) J.-M. Coicaud, V. Heiskanen (eds.), *The Legitimacy of International Organizations*, U.N. University Press 2001, p. 207; Consultative Board, *The Future of the WTO...*, p. 42.

⁴¹ M. Elsig, op. cit., p. 86.

⁴² On NGOs, see G.C.A. Junne, op. cit., p. 214 and R. Nickel, *Participatory Transnational Governance...*, p. 192 sq.

⁴³ The first case with a public hearing was United States – *Continued suspension of obligations in the EC – Hormones dispute* (WT/DS320) and Canada – *Continued suspension of obligations in the EC – Hormones dispute* (WT/DS321), Communication from the chairman of the panels, WT/DS320/8 and WT/DS321/8, 2 August 2005. See Elsig, 2007, p. 87.

⁴⁴ R. Howse, op. cit., p. 376 sq.

To sum up on this first aspect, rather than rely on the formal, weak and possibly counterproductive argument of national democratic processes, the WTO would be more convincing if it put forward the various ways by which it takes into account the interests of its various stakeholders. Of course, this remains far from the classical democratic legitimation of the nation state, but it is a pragmatic attempt to adapt the basic democratic principles to the international level and to the particular situation of the WTO. Besides, a careful analysis of the internal decision-making processes (in particular the role of experts, of the judiciary and of the administration) would show that the functioning of states is less “democratic” (thus closer to what is practised at the WTO) than we generally think⁴⁵.

The second tension could be reduced by addressing more directly the “linkage” questions (labour and social rights, environment, health, development...), in order to reach a balance between the economic interests and interests of other kinds. This should not necessarily take the form of a global regulation, which would not always be adapted to the diverse situations of today’s world. Still, a clearer discourse on those issues should demonstrate that the WTO has regard for non economic interests, especially if they are expressed in a democratic way.

In other words, more-involved stakeholders want to see the effect of their participation on the achievements of the organization. This is all the more so that the importance of democratic participation grows as decisions have a greater impact on people’s life. This may hamper the organization’ ability to (further) liberalize international economic relations⁴⁶ and shift its action towards new domains, in particular development, as announced (but to date not realized) in the Doha round. But should we complain, if this is the result of a greater respect for the people’s will?

⁴⁵ M. Elsig, *op. cit.*, p. 79.

⁴⁶ *Ibidem*, p. 87 sq.