

INPUT AND OUTPUT LEGITIMACY IN WTO LAW

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SUMMARY

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This thesis provides an analysis of the complex relationship between law and legitimacy in the WTO. It focuses on the notional dichotomy between ‘Member-driven’ (input-based) and ‘results-oriented’ (output-based) narratives of the WTO’s legitimacy, and how such narratives are both framed by, and reflected in, WTO law. It demonstrates how these narratives are used to legitimate the exercise of legal power in ways that exceed the reach of their internal normative claims; how they are used to displace responsibility for decision-making in the WTO; and the consequences of choosing to emphasize particular forms of legitimacy for our understandings of the WTO’s place in the world. In the process, the thesis also seeks to destabilize these legitimacy narratives by highlighting their partial, contingent and often mutually contradictory natures.

The thesis proceeds in three parts. The first part (Chapter Two) clarifies what is meant by the terms ‘power’ and ‘legitimacy’ as used in the thesis and stresses their significance for WTO law. The second part (Chapters Three and Four) addresses two key input-oriented narratives of legitimacy associated with WTO law — those of consent and democracy. It argues that although consent has been central to understanding the legitimacy of WTO law as it is, and democracy is increasingly advanced in relation to WTO law as it should be, both narratives suffer from serious normative and descriptive limitations. The third part delves further into the concept of output legitimacy and its limits (Chapter Five), before exploring its application in relation to the legal-institutional dynamics of WTO negotiation rounds (Chapter Six) and the treatment of economic evidence in WTO dispute settlement (Chapter Seven). This part ultimately concludes that a more critical engagement with the concept of output legitimacy could open up productive avenues for rethinking the law and practice of the WTO.

PREFACE

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration.

It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution.

This thesis, including footnotes, does not exceed the permitted length.

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LIST OF ABBREVIATIONS

ACP	African, Caribbean and Pacific Group
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
CIDSE	<i>Coopération Internationale pour le Développement et la Solidarité</i> / International Cooperation for Development and Solidarity.
Customs Valuation Agreement	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Communities
EU	European Union
FAO	Food and Agriculture Organization (UN)
FAPRI	Food and Agricultural Policy Research Institute
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GSP	Generalized System of Preferences
ICJ	International Court of Justice (UN)
ICTSD	International Centre for Trade and Sustainable Development
ICTY	International Criminal Tribunal for the Former Yugoslavia (UN)
ILA	International Law Association
ILC	International Law Commission (UN)
ILO	International Labour Organization
IMF	International Monetary Fund
IPPC	International Plant Protection Convention
IGO	Inter-Governmental Organization
ISO	International Standards Organization
ITO	International Trade Organization
ITTC	Institute for Training and Technical Cooperation

LDC	Least-Developed Countries
MFN	Most Favoured Nation
NGO	Non-Governmental Organization
OECD	Organization for Economic Cooperation and Development
OIE	<i>Office International des Epizooties</i> / International Office of Epizootics (since May 2003 the World Organization for Animal Health, operating under the same abbreviation)
PCIJ	Permanent Court of International Justice
PTA	Preferential Trade Agreement
Standards Code	Agreement on Technical Barriers to Trade (Tokyo Round)
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SDT	Special and Differential Treatment
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TNC	Trade Negotiations Committee
TPRB	Trade Policy Review Body
TPRM	Trade Policy Review Mechanism
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
USTR	Office of the United States Trade Representative
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization (UN)
WIPO	World Intellectual Property Organization (UN)
WTO	World Trade Organization
WTO Agreement	The Marrakesh Agreement Establishing the World Trade Organization
WTO Agreements	The World Trade Organization covered agreements, collectively.

CHAPTER ONE:

INTRODUCTION

I CONTEXT

‘It is easier to make certain things legal than to make them legitimate.’¹

The last hundred years have seen the rapid and unprecedented proliferation of international institutions wielding powers with deeply intrusive implications for the autonomy of states, economies and individuals. States’ decisions as to how they package cigarettes for public health purposes are now made in the shadow of WTO law and international investment rules; the UK decided by referendum to leave the EU; the UN Security Council may impose sanctions that target individuals directly. Although in formal terms international institutions are notionally only capable of performing acts to which states (generally speaking) have consented, in substance it is clear that, in many areas, these institutions have taken on a life of their own. These developments have had a profound impact on the legal positions of various types of actors, including states, individuals, corporations and other international institutions. The manifestation of such power in the international order, both framed by and reflected in law, has generated significant and heated debate over the legitimacy of these institutions and their laws.²

In (Western) liberal democracies, there is a broad consensus on the legitimate exercise of power centring on democratic processes, constitutionalism and human rights.³ Questions about what constitutes a legitimate exercise of power in the international sphere, however, remain comparatively under-explored and under-scrutinized. There has been a move away from traditional forms of state-based political and legal authority to more fragmented and

¹ *‘Il est plus facile de légaliser certaines choses que de les légitimer’*: de Chamfort 1968, 134.

² See, eg, Franck 1990; Cutler 2001; Afilalo 2004; Kagan 2004; Franck 2005; Gray 2007; Wolfrum & Röben 2008; Meyer 2009; Charlesworth & Coicaud 2010; Brunnée & Toope 2010; Wheatley 2010.

³ Some argue that even at the domestic level the question of legitimacy has not received sufficient attention. Richard Flathman notes that ‘[m]uch past and present political philosophy either subordinates the question of legitimacy or implicitly treats its possibility and desirability as philosophically and politically unproblematic. It is widely assumed that the politically organized association in which some persons rule others is the divinely, naturally or ontologically ordained state of human affairs’: Flathman 2007, 678.

diffuse forms in which significant parts are played by intergovernmental institutions, transnational networks and multinational corporations; even as the more powerful states exert more and more influence beyond their territorial borders. There has also been a breakdown of the traditional distinction between the national and the international, as attempts to transfer notions of democracy and constitutionalism from the national to the international and global levels have raised more questions than they have answered. As such, there are presently many active debates about what may constitute the legitimate exercise of power beyond the state. Yet while the question of legitimacy has long been addressed in international relations, political science and philosophy, it is only relatively recently that international lawyers have started to pay the concept much attention.

The WTO has often found itself at the centre of this nascent multidisciplinary literature, for good reason. Even with its perceived effectiveness as a global rule-making institution at something of a low point, the WTO and its rules exert a substantial influence on world affairs in a way that is matched by only a handful of other international institutions. At the time of writing,⁴ the WTO has 164 Members,⁵ up from 75 at the time of its founding on 1 January 1995,⁶ and up from 23 signatories at the time of the founding of its predecessor, the GATT, on 1 January 1948.⁷ A further 21 states are currently negotiating accession.⁸ The rules embodied in the WTO Agreements have been interpreted and applied in ways that affect Members' rights to regulate with respect to the environment, public health, innovation and labour rights, among other issues. Indeed, they affect the very manner in which Members go about such regulation. The scope of the WTO's powers and the breadth of its membership are themselves testament to the perception of the WTO as a locus of power, whether wielded autonomously or merely as an instrument for its membership (or at least a select few of the Members).

⁴ This thesis is current until 30 July 2016.

⁵ WTO Website, 'Members and Observers'.

⁶ Another 52 Members who had previously been GATT Contracting Parties were to 're'-join over the next two years: *ibid.*

⁷ WTO, *World Trade Report 2007*, iii.

⁸ WTO Website, 'Accessions'.

There are, however, sharply divergent views about the legitimacy of the WTO and its laws. The WTO has been variously assessed as simply illegitimate,⁹ as facing a crisis of legitimacy,¹⁰ as being unproblematically legitimate,¹¹ and even as being ‘too legitimate’.¹² For some, the creation of the WTO in 1995 was a triumph of international negotiation, and a step forward for a rules-based international trading order. Indeed, roughly a decade ago, there were even those who argued for transforming the WTO into a World Economic Organization¹³ with a vastly broader remit. Others, however, have been much more wary about the WTO’s contribution. Anxiety over where law-making authority is located has led to extensive debates about ‘regulatory autonomy’, ‘policy space’ and ‘collective preferences’. Developing countries have pointed to lacklustre progress on agriculture negotiations, and expressed concerns about new rules for investment, competition, labour and intellectual property rights. Unease about globalization in the late 1990s and early 2000s saw the arrival of mass civil society protests, including the ‘Battle of Seattle’ which coincided with the WTO’s Seattle Ministerial Conference — and manifests today in the form of Donald Trump’s threats to make the US leave the WTO if he becomes President.¹⁴ Controversial dispute settlement decisions, including those relating to hormone-treated beef and genetically modified organisms, have also fuelled disagreement over the legitimacy of WTO law and its application. More recently, the 2008-09 global financial crisis, the regular disappointments associated with the Doha Round and the widespread turn to regional trade agreements have provoked further criticism.

These debates have led to the development of a range of narratives about what does or what should make the WTO legitimate; including narratives of consent, public participation, deliberative democracy, expertise and constitutionalization, among others. These narratives may provide frameworks for either apology or critique in relation to the exercise of power by and through the WTO and its laws. They provide reasons for compliance with (or resistance against) WTO law, as well as foundations for legal-institutional design and reform. These narratives of legitimacy thus have an intimate and complex relationship with WTO law. Such

⁹ See, eg, quotes from NGO representatives in Transnational Institute 2009.

¹⁰ See, eg, Esty 2002; Wiener 2005; Elsig 2007b; Herwig 2014.

¹¹ See, eg, Bacchus 2004.

¹² See, eg, Subramanian 2013.

¹³ See Bronckers 2001; Guzman 2004; *contra* McGinnis & Movsesian 2004.

¹⁴ Dyer 2016.

narratives may be invoked in isolation, or in combination with others. Indeed, it is not uncommon for various kinds of actors — trade negotiators, politicians, lobbyists, WTO Secretariat members, NGOs — to jump back and forth between different legitimacy narratives to justify their positions in a way that is wholly self-contradictory. In this, these narratives simultaneously hold out the promise of a legitimate WTO even as their lack of common foundation highlights just how far people are from even broad consensus about what a legitimate WTO (or legitimate WTO law) may mean.

II AIM AND CONTRIBUTION

This thesis does not attempt to provide a definitive answer to the normative question of whether or not the WTO is morally or politically legitimate. Nor does it claim to undertake a comprehensive empirical study of why different actors consider WTO law, or the WTO as an institution, to be legitimate. Rather, it explores the parameters of the debates over the WTO's legitimacy with a view to illuminating the complex relationship between the various narratives of legitimacy advanced in these debates and WTO law. In the process, it seeks to reorient the debate about the WTO's legitimacy away from purely input-oriented (Member-driven) legitimacy narratives and towards a more rigorous focus on output-oriented (results-oriented) narratives. The thesis also seeks to destabilize these legitimacy narratives by highlighting their partial, contingent and often mutually contradictory natures.

Much of the response to the legitimacy 'crises' of the WTO's two decades has focused on improving input legitimacy, with a strong emphasis on consent and the participation of Members in law-making and dispute settlement.¹⁵ These input legitimacy narratives, however, are often neither normatively capable of fulfilling the demands placed on them nor are their claims reflected in practice. Output legitimacy narratives, by contrast, although regularly invoked at a superficial level, have not received the same level of attention from academics or lawyers. Although WTO rules and practices are frequently justified in vague terms by appeal to their outputs — global welfare or prosperity, better governance outcomes, and the like — the questions of how output legitimacy is generated, whether claims to output legitimacy are justified, and how law is implicated in those processes, have received far less scrutiny. A focus on input legitimacy alone neglects important aspects of how law, legitimacy and power operate in relation to the WTO. As such, this thesis argues for a rethinking of the relationship

¹⁵ The concepts of input and output legitimacy are defined more rigorously in Chapter Two, Part III(B)(3)(ii).

between input legitimacy, output legitimacy and WTO law which is more sensitive to the limits of input legitimacy and which engages critically and productively with the relationship between law and output legitimacy. How can law help to harness useful knowledge and capable analysis to improve the conditions of the global economy? How can law be used to hold actors and institutions accountable which fall short of the standards of expertise and objectivity that they claim to uphold? How does law shape the way that particular outputs come to be seen as necessary or desirable? And how can we emphasize questions of efficiency and effectiveness without sacrificing ideals of democracy and consent?

To achieve these aims, the thesis investigates the most prominent of the legitimacy narratives advanced by various actors in relation to the WTO and considers their normative and descriptive limits in light of WTO law and practice. It shows how each of these narratives has different implications for how WTO law is shaped, interpreted and understood, and how the law in turn shapes perceptions of what is considered legitimate. The narratives have been identified based on an extensive survey of various legal, institutional and scholarly texts, including WTO dispute settlement reports, WTO treaties, WTO publications, statements of key WTO officials, NGO publications and the writings of trade insiders and academics.

These texts have not been generated in a vacuum. Rather, they regularly invoke pervasive, well-established legitimacy frameworks relating to concepts of consent, democracy and effectiveness. These frameworks can strengthen or weaken the perception of how binding laws are and how much respect laws and institutions deserve.¹⁶ As such, to complete the picture of the narratives in question it is also necessary to more clearly identify the political philosophical traditions to which they refer. As such, several of the chapters also engage with the political philosophical literature surrounding the nature of political legitimacy, especially as applied to the international sphere. This helps to more clearly outline the origins and limits of these legitimacy narratives.

In this way, the thesis aims to draw attention to the normative roots of the WTO's various legitimacy narratives. It stresses the place of these narratives in their broader political philosophical context, and highlights the essential connection between the idea of legitimacy and political justification. This connection, which is often neglected in the literature on international institutions in favour of a focus on compliance, provides the definitional point of departure between legitimacy and other reasons for compliance with (or support of) the law.

¹⁶ See also Brunnée and Toope 2010, 7-8.

In this sense, a focus on legitimacy draws attention to how WTO law comes to operate in, and be shaped, by politics and ideas in a way which cannot be explained merely by reference to rational self-interest, coercion or habit. Rather, a focus on legitimacy emphasizes the importance of the normative foundations for adherence to a legal-political order. Along the way, it demonstrates how these narratives are used to legitimate the exercise of legal power in ways that exceed the reach of their internal normative claims; how they are used to displace responsibility for decision-making in the WTO; and the consequences of choosing to emphasize particular forms of legitimacy for our understandings of the WTO's place in the world.

Before proceeding further, it is worth noting that this thesis does not attempt to cover all of the various narratives of legitimacy that have been advanced in relation to the WTO. In particular, the thesis does not focus on inherently 'judicial', 'adjudicative', or 'legal'¹⁷ narratives of legitimacy. These are narratives that are specifically concerned with how the judicial character, legal form and/or legal reasoning *in themselves* contribute to legitimacy. How these legitimacy narratives may manifest in the WTO, and their influence on how the WTO is perceived, has been addressed extensively elsewhere.¹⁸ Howse, for instance, highlights the contribution of 'fair procedures', 'coherence and integrity in legal interpretation' and 'institutional sensitivity',¹⁹ while Brunnée and Toope argue that legitimacy may be derived from eight Fullerian 'criteria of legality' that are inherent in the legal form.²⁰

Similarly, the thesis leaves the legitimating narratives of constitutionalism largely to one side. Although legitimacy is generally relevant to the concept of constitutionalism, constitutionalism, particularly in its more baroque formulations, is not necessarily relevant to the concept of legitimacy. The analysis of constitutionalism and the WTO is rich and extensive, and again the contribution to legitimacy of constitutionalism *qua* constitutionalism has already been addressed elsewhere.²¹

¹⁷ For an analysis of the legitimacy of the legal form as considered in relation to international law in general, see Brunnée and Toope 2010.

¹⁸ See, eg, Howse 2000a; Weiler 2001; Howse & Nicolaïdis 2003a, 331-41; Howse & Nicolaïdis 2003b; Howse 2003b; Piccioto 2005; von Bogdandy & Venzke 2012.

¹⁹ Howse 2001a, 376.

²⁰ Brunnée and Toope 2010, 27.

²¹ See, eg, Cass 2005, 63-70 and 99; Dunoff 2009; Besson 2009b, 389-92; Krisch 2010, ch 1.

Setting these forms of legitimacy to the side for the purposes of this thesis does not mean that these types of legitimacy are unimportant, or that the questions they raise have been resolved conclusively; far from it. Indeed, the tensions explored in the coming pages between input-oriented and output-oriented approaches to legitimacy may also have intriguing implications for how to conceptualize and apply legal and adjudicative expertise and knowledge within the WTO. Overall, however, the relationship between WTO law and specifically legal, adjudicative or constitutional forms of legitimacy implicates a cognate but qualitatively different set of questions to those addressed in this thesis. This thesis does not reject these narratives, but rather notes that they represent a distinct strand of investigation, derive from different political philosophical foundations, and are deployed in different contexts. Their study is complementary, but not essential, to this thesis.

III CHOICE OF FRAMEWORK

A *Why Legitimacy?*

There are several reasons why legitimacy is worthy of sustained attention from international lawyers. First, the ubiquity of the discourse on legitimacy, which extends across law, political philosophy and international relations but finds a recent focus in relation to WTO law, in itself provides a reason for scrutinizing that discourse further. Such scrutiny brings further clarity to the exchange of ideas, makes it easier to hold those making legitimacy claims accountable, and provides a better understanding of the function of these legitimacy claims in the world trade order. Given this, by virtue of its prevalence, the discourse of legitimacy is just as deserving of attention as other prominent discourses, such as those concerned with justice, liberty, equality, or the rule of law, which have been directly addressed elsewhere.²²

Second, legitimacy is worthy of study in its own right, beyond the fact of its discursive omnipresence. Other philosophical notions such as justice, liberty, equality and the rule of law are each broad concepts that can be directed towards a range of questions. In particular, each provides a different range of answers to the question of whether a particular set of power relations can be justified according to an associated set of normative criteria. But legitimacy

²² Regarding justice, equality and the WTO, see, eg, Garcia 2003 and Garcia 2013. Regarding liberty and the WTO, see McGinnis 2004 and Gerken 2004. The concept of the rule of law and the WTO have not received as much dedicated, sustained attention, but see ILA 2000 and Wolfe 2001 for initial treatments of some of the issues.

not only considers the question of whether power is justified — it also considers the question of whether power is justified to such an extent that it is worthy of obedience or support. Indeed, this provides the essential basis for Thomas Franck’s seminal exploration of the relationship between legitimacy and international law, in which he focused on legitimacy as the basis for international law’s ‘pull toward compliance’.²³ Legitimacy looks directly at how compliance with WTO law and support for the WTO as an institution are affected by shared understandings about how the exercise of power is justified. This focus on compliance and support differentiates legitimacy from concepts such as justice and equality for which questions of obedience and support are of only ancillary, rather than definitional, concern.

Legitimacy may be treated as a metaconcept capable of addressing the question of how power relations are justified in the abstract, without necessarily requiring a commitment to an underlying set of normative criteria. It is also used in narrower sense, referring not to the broader *concept* but to more limited *conceptions*.²⁴ In these cases, it can be harder to discern the distinction between questions of legitimacy and those of justice, but the distinction is nonetheless there and it is an important one. John Rawls notes that a ruler may be legitimate but not rule justly, or alternatively rule justly even if illegitimate.²⁵ He argues that legitimacy makes ‘weaker’ demands than justice and has a more direct institutional focus.²⁶ Justice is, in this sense, less shackled by the questions of what is politically achievable and what people are willing to accept. More recently Philip Pettit has advanced a contemporary republican approach to the distinction between legitimacy and justice, which defines ‘the justice question’ as whether ‘a coercively *imposed* order is acceptable or justifiable or desirable’ and ‘the legitimacy question’ as ‘whether the coercive *imposition* of the order is acceptable or justifiable or desirable’.²⁷ For Pettit, then, justice is predominantly a question of ends while legitimacy is a question of means, including the manner in which power is allocated and wielded. Carrying over these distinctions into the international sphere allows that a legitimate world trade order and a just world trade order need not be coextensive.

²³ Franck 1990, 24.

²⁴ This distinction is further discussed in Chapter Two, Part III(A).

²⁵ Rawls 2005, 427.

²⁶ Ibid.

²⁷ Pettit 2012, 60 [emphasis added]. Pettit advanced this distinction in relation to the coercive imposition of a social order by a state, rather than the international sphere, but the distinction may be translated between the two contexts.

Legitimacy therefore combines a series of questions together — concerning justification, obedience, compliance and institutional design — into a single, distinctive conceptual framework. These questions are particularly pressing at the international level due to the experimental nature of many international institutions, the lack of consensus about the basis for legitimate power at the global level, the disconnect between political and economic boundaries, and the quest for better adherence to international law worldwide.

B *Legitimacy and Global Governance*

A strongly related, but again conceptually independent, discourse is that of global governance. The notion of global governance arises repeatedly throughout this thesis, so it is important to demarcate the relationship between legitimacy and governance. Global governance has a far more recent intellectual pedigree than legitimacy. ‘Global governance’ emerged as a term of art in the 1990s following the release of the World Bank report *From Crisis to Sustainable Growth*.²⁸ As a concept it is frequently used to transcend the divide from the national to the international or transnational planes. Whereas ‘government’ is generally tied to the state or political entities contained therein (including provinces and local councils), ‘governance’ is also considered to cover a broader range of diffuse, non-hierarchical processes such as those undertaken by intergovernmental institutions and transnational networks, and even certain domestic administrative bodies. Lawrence S Finkelstein provides one of the most commonly asserted definitions relating specifically to global governance:

Governance should be considered to cover the overlapping categories of functions performed internationally, among them: information creation and exchange; formulation and promulgation of principles and promotion of consensual knowledge affecting the general international order, regional orders, particular issues on the international agenda, and efforts to influence the domestic rules and behavior of states; good offices, conciliation, mediation, and compulsory resolution of disputes; regime formation, tending and execution; adoption of rules, codes, and regulations; allocation of material and program resources; provision of technical assistance and development programs; relief, humanitarian, emergency, and disaster activities; and maintenance of peace and order.²⁹

²⁸ World Bank 1989.

²⁹ Finkelstein 1995, 370-1.

‘Global governance’ as a discourse, then, relates to the instantiation of various forms of power relations in the global order. It addresses how those relations are structured, what functions they perform, what effects they have and how they interact with one another. Many of the legal and institutional arrangements addressed in this thesis, whether relating to trade negotiation rounds, the functioning of the WTO dispute settlement organs, or decision-making by WTO committees may be considered as representing instances of global governance.

As global governance mechanisms have become increasingly prominent across a range of areas so has it become necessary to question their legitimacy. The legitimacy of democratic government at the national level enjoys a degree of general consensus (albeit one frequently under threat), but the varied, multilevel and often experimental nature of contemporary global governance lacks this stable foundation. In this sense global governance and legitimacy provide complementary discourses for one another. While the discourse of global governance draws attention to the varied and multi-level mechanisms of global power relations, legitimacy addresses the question of how and whether those power relations are justifiable in a manner that should or does command obedience or support.

Occasionally legitimacy and governance are conflated in the concept of ‘good governance’, which imports a more explicitly normative component to the governance literature. ‘Good governance’ is also a fairly recent addition to the conceptual armory;³⁰ in the international context it has largely burgeoned in the literature concerning development, the World Bank, the IMF and the UN. The WTO website itself highlights the WTO’s capacity to ‘encourage good governance’.³¹ The terminology of ‘good governance’ alone is, however, question begging. In the absence of a properly articulated framework of legitimacy defining ‘the good’, it lacks a rigorous foundation. It is here that questions about how legitimacy narratives are framed, what impact they have on the development of the law, and how the law in turn affects how legitimacy is perceived all find their place. As such legitimacy and global governance are not clashing paradigms, but complementary analytical frameworks. Whereas global governance provides a largely descriptive analytical framework for the exercise of power at the global level, legitimacy concerns the justification of that power and the extent to which those justifications attract support.

³⁰ See Rothstein 2012, 143.

³¹ WTO, *Ten Things the WTO Can Do* (2012), point 5.

C Governance and Legitimacy in the WTO

This thesis examines various narratives of legitimacy as they have manifested in relation to the WTO and WTO law. The WTO has been at the centre of debates over the interface between national sovereignty and global norms, often framed in terms of both governance and legitimacy. It is a complex institution, taking on rule-making, dispute settlement, knowledge-generation, and compliance monitoring functions, among others. Both its centrality and its complexity make it a rich and worthy object of study. Moreover, while some other international institutions operate much more informally, the WTO is an institution that is heavily structured by law. It is also oriented towards the production, interpretation and application of law — and that law affects an enormous range of human endeavour, reaching beyond ‘pure’ trade concerns to include public health, the environment and human rights.

In addressing input and output legitimacy narratives in the WTO, this thesis makes reference to many of the WTO’s different aspects and functions. In Chapters Six and Seven, however, it focuses on two specific case studies to illustrate the relationship between law and output legitimacy in the WTO: trade negotiation rounds and dispute settlement. These case studies have been selected because they provide excellent fora in which to demonstrate the limits of input legitimacy narratives as well as the value of dedicating additional (but not exclusive) attention to output legitimacy narratives. It is in these contexts that the debates about legitimacy are at their most sophisticated and provide the most material for analysis. It is also in these contexts that the operation of power in and through the WTO is most manifest. Binding rules are formulated and formalized in negotiation rounds, while they are given meaning and bite in the context of dispute settlement. It is here that the exercise of power is most definitively realized and poses the greatest need for justification. Moreover, these are also contexts which most directly raise questions of compliance and support with legal norms, and thus most directly raise questions of legitimacy.

There are other contexts in which a similar analysis could be conducted in future. One such possibility would be the TPRM, where Members’ commitments to their WTO obligations are reviewed and where the implementation of WTO law may be carefully scrutinized. It has yet to receive the same degree of attention as negotiation rounds and dispute settlement, but its knowledge-generation, information exchange and monitoring functions, and how those functions may operate differently with respect to developing and developed countries, warrants further attention. A second possibility would be to consider how legitimacy narratives function in relation to the WTO committee system. The governance

implications of this system, and their relationship to notions of legitimacy, have been addressed already in part by Andrew Lang and Joanne Scott in their analysis of the SPS Committee and the subsidiary committees to the Services Council.³² There is still room for further analysis relating to other Committees (especially the TBT Committee and the Committee on Trade and Development), as well relating to how the functions of these bodies have changed over time in response to various external and internal stimuli. These analyses, however, lie outside of the bounds of this thesis.

IV OUTLINE OF THE THESIS

This thesis proceeds in three parts. The first part, as set out in Chapter Two, is an exercise in conceptual ground-clearing which aims to clarify what is meant by the uses of the terms ‘power’ and ‘legitimacy’ in this thesis. The aim here is to provide a more helpful analytical framework for understanding how the concepts of power and legitimacy operate in relation to WTO law, while arguing for the value of legitimacy as an analytical concept. It considers how law can be made to reflect but also constitute legitimacy claims relating to the WTO.

The second part of the thesis, comprising Chapters Three and Four, addresses two predominantly input-oriented narratives of legitimacy strongly associated with WTO law — those of consent and democracy. These input-oriented legitimacy narratives are largely concerned with ensuring that the subjective interests and preferences of the subjects of the law (whether conceived as WTO Members, states, individuals, or otherwise) are properly reflected in both the creation and the implementation of the law. Such narratives tend to see the proper role of law as the channelling and maintenance of the will of the law’s subjects. While acknowledging the continued power of these legitimating narratives in the WTO, and indeed international law more generally, the focus here is on the *limits* of these languages as guarantors for the WTO’s legitimacy.

Consent (addressed in Chapter Three) provides the traditional language of legitimization for the multilateral trade regime, just as it does for much general international law, and continues to be regularly invoked by the WTO and its commentators. Despite their impeccable pedigree in the international law context, narratives of consent alone struggle to carry the legitimating burden for the WTO and capture only a partial view of the relationship between WTO law and legitimacy. Democratic legitimacy narratives (addressed in Chapter

³² Lang & Scott 2009, 601-14.

Four) are often advanced in relation to the WTO by those who seek to address some of the deficiencies of the consent narratives. They are seen as less Member-centric, less rigid, and more in line with contemporary mores. Nonetheless, there remains extensive disagreement over what democratizing the WTO would entail, and the demands of the democratic narratives are difficult to implement in practical terms.

The third part of the thesis turns to narratives of output legitimacy; that is, narratives that emphasize WTO law's capacity to deliver desirable outputs efficiently and effectively. Output legitimacy narratives have enjoyed less rigorous scrutiny than input legitimacy narratives in relation to international institutions in general, and to the WTO in particular.³³ This part considers the role played by law in ensuring that the rules as formulated have the effects desired; if those effects are realised efficiently; and if those effects, once realised, are as desirable as initially thought.

Chapter Five delves further into the philosophical foundations and limits of output legitimacy. It highlights the centrality of output legitimacy narratives at the domestic and international levels, before considering specifically how these narratives have justified the law and practice of the WTO as a 'results-oriented institution'. In stressing the importance of a renewed critical focus on output legitimacy narratives, it does not seek to idealise such narratives nor to overstate the role that they can play in legitimating WTO law. Rather, it recognizes that such a renewed critical focus requires precisely an awareness of the dangers posed by such narratives. It thus calls for more careful scrutiny of the WTO law and practice as it affects and is affected by output legitimacy narratives. Chapters Six and Seven then explore, respectively, how such critical scrutiny of output legitimacy mechanisms may be applied in relation to the two contexts mentioned above: WTO negotiation rounds and the production of expert knowledge in WTO dispute settlement. Chapter Eight concludes.

³³ With the exception of the literature on the SPS Agreement. This literature, however, is generally constrained to the SPS Agreement and the discussion of the biological sciences, and tends to emphasize dispute settlement rather than other aspects of law-making, interpretation and application. This thesis seeks to consider how output-oriented legitimacy relates to WTO law more broadly, outside of the SPS context, in relation to non-biological modes of expertise, and beyond dispute settlement alone.

PART ONE

Clarifying Key Concepts

CHAPTER TWO:

CLARIFYING KEY CONCEPTS — POWER AND LEGITIMACY

I INTRODUCTION

Before proceeding to the rest of the thesis there are two preliminary conceptual questions that must be addressed: what does it mean to speak of power in relation to WTO law, and what does it mean to speak of legitimacy? Both concepts are strongly intertwined in the public imagination. Power without legitimacy is considered tyrannical and abhorrent, while legitimacy without power is ineffective and immaterial. Yet even a cursory glance over the literature shows a wide divergence in how these concepts are understood, including in relation to the WTO.

This chapter begins by demonstrating the multiplicity of meanings assigned to the term ‘power’, and how power may be understood as being exercised by and through the WTO in more ways than are commonly acknowledged. Traditionally, few attempts were made to examine the legitimacy of international institutions as they were not considered to exercise any quantum of power that required political justification (beyond that provided by consent). Part of the aim of this chapter is to demonstrate that this way of thinking about power at the international level is unduly limited, particularly in relation to the WTO. To this end, Part Two of this chapter breaks down the concept of power into three major components: the forms of power, the agents of power, and the settings of power. Breaking down the idea of power in this way makes it easier to understand how various actors put these components together in different ways to reach apparently contradictory conclusions about power and the WTO. It also provides an opportunity to think more methodically about the relationship between WTO law and power, and how this might raise additional problems of legitimacy.

From there, the chapter turns to the concept of legitimacy, and seeks to disambiguate the various meanings of legitimacy to facilitate a more rigorous treatment of the concept. It seeks not only to clarify, but also to complicate, how legitimacy may be understood in relation to the WTO and international law more generally. To that end, it provides an initial conceptual sketch of three ways of approaching legitimacy — the legal, the moral and the social — that are commonly used by WTO actors and international lawyers. For each, it highlights how these different approaches to legitimacy can enrich our understandings of WTO law and its

place in the world. It then highlights three elements of legitimacy (its object, subject and basis) that may be used to cut through and contextualize the disparate uses of legitimacy. From there, it seeks to defend the relevance of legitimacy to international law as distinguished from other explanatory frameworks for obedience or compliance including coercion, self-interest and habit. Ultimately this chapter argues that legitimacy is a useful analytical concept for WTO lawyers and general international lawyers alike, which can have profound practical implications for how law is made, enforced and understood.

II POWER AND THE WTO

Before one can turn to the complex relationship between legitimacy and the WTO, one must first establish that there is some form of power being exercised by or through the WTO that makes the question of legitimacy worth raising in the first place.¹ In reflecting on some of the early debates about the legitimacy of the WTO, Robert Hudec noted that:

The key issue is whether the WTO is really a separate institution of governance to which higher standards of legitimacy must be applied. And that issue, in turn, depends on whether the WTO really does exercise power of its own—that is, power that is outside the control of the governments upon which it is employed. Most critics who argue that the WTO must meet higher, “governance” standards of legitimacy do not confront this issue head on. To the extent they do, the well-informed critics usually concede that the WTO does not “govern” in the true sense of the word, but then they go on and apply the higher standard anyway. The issue cannot be finessed in this way.²

This Part attempts to ‘confront this issue head on’³ by considering the different ways in which power can be understood as being exercised by or in relation to the WTO. It also aims to show that many of the claims that the WTO does not exercise any power that requires legitimation derive from unnecessarily limited visions of the forms that such power can take (Part II(A)), what kinds of entities are capable of exercising power (Part II(B)), and when and where power can be exercised (Part II(C)).

¹ For a thoughtful discussion of how different ideas about power, especially symbolic power, can apply to the WTO, see Eagleton-Pierce 2012, ch 2.

² Hudec 2001, 298.

³ Ibid.

A *The Forms of Power*

Claims that the WTO does not exercise any power worthy of legitimating often take one of two configurations. First, the WTO is said not to exercise any meaningful or significant power because its powers are not directly coercive.⁴ The WTO's rules are the products of Member consensus, and, at most, dispute settlement organs only have the power to authorize the suspension of concessions against a losing party to a dispute.⁵ Second, what power the WTO does exercise is argued to be merely 'technical', and thus does not demand any detailed scrutiny.

Both of these narratives about power (or the lack thereof) have deep roots. Traditionally, power has been very closely associated with coercion and the need to overcome resistance.⁶ This has been reflected in Max Weber's classic definition of power as 'the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance'.⁷ It is similarly reflected in Robert Dahl's 'intuitive' understanding of power, that 'A has power over B to the extent that he can get B to do something that B would not otherwise do'.⁸ In *The Changing Structure of International Law*, Wolfgang Friedmann noted that the prevalence in the mid-twentieth century of a more directly coercive definition of power 'as the assertion of one's will over that of another by the use of coercion'.⁹

But coercion, particularly willed coercion, need not exhaust the forms that power can take. In *Power: A Radical View*, Steven Lukes identified three 'faces of power'. First is the

⁴ See, eg, '[A]n examination of how the WTO really works reveals that no such threat exists to US sovereignty. [...] The WTO wields no power of enforcement. It has no authority or power to levy fines, impose sanctions, change tariff rates, or modify domestic laws in any way to bring about compliance. If a member refuses to comply with rules it previously agreed to follow, all the WTO can do is approve a request by the complaining member to impose sanctions — a "power" that member governments have always been able to wield against each other': Lash & Griswold 2000. Armin von Bogdandy and Ingo Venzke also note that the exercise of power by international institutions has often been considered to not require extensive justification because such institutions do not wield directly coercive powers: von Bogdandy & Venzke 2012, 17-18.

⁵ See DSU Article 22. Cf Charnovitz 2001, who argues that WTO authorization of suspension of concessions should properly be considered a sanction.

⁶ Hannah Arendt labelled this approach to power as the 'command-obedience' model: Arendt 1970, 36-40.

⁷ Weber 1968, 53.

⁸ Dahl 1957, 202-203.

⁹ Friedmann 1964, 49.

power to impose one's will or policy preferences in a given decision-making context, despite resistance — a version that closely resembles the definitions above. Second is the power to control the agenda, including ensuring that certain items are kept off the agenda and that certain decisions do not happen.¹⁰ This more subtle sort of power is arguably exercised on a day-to-day level by the WTO Secretariat and by the chairs of WTO negotiating committees, as well as on a structural level by the major powers. A particularly controversial application of this second face of power in the WTO context was highlighted when a group of developing countries criticized Stuart Harbinson, then Chairman of the General Council, for keeping issues important to developing countries off the Doha agenda.¹¹ Similarly, Faizel Ismail criticized the Chair of the Non-Agricultural Market Access group at the Potsdam Ministerial for 'biasing the outcomes against the interests of developing countries and thus contributing to the collapse of the ministerial meetings at the end of July 2008'.¹² This suggests that Lukes's second form of power may have important implications for the design of both formal and informal rules and practices in relation to WTO negotiations.

The third form of power identified by Lukes is the power to manipulate the preferences of others, even to the point where they make decisions that operate against their 'real interests'.¹³ This aspect of power resonates with the work of two other major thinkers: Antonio Gramsci and Michel Foucault. For Gramsci, an 'invisible' form of power that was not directly coercive operated through the establishment and maintenance of hegemony. The spread of cultural norms and ideas would help constitute individuals' subjective preferences in such a way as to manufacture their consent to the exercise of power, even if it operated against their interests.¹⁴

¹⁰ Lukes 1974.

¹¹ 'The text [of the Doha draft declaration] does not take our interests into account. We will not have a third draft, not because we have no time. The text came in on Saturday. By Monday, we sent a letter signed by 20 developing countries to make changes in implementation. And he [the Chair of the General Council, Stuart Harbinson, ambassador of Hong Kong] simply said no. We all know why he said that, because our Ministers will have a difficult time'; 'We are in the worst possible situation, and it is a question of politics, not a lack of arguments': anonymous delegates quoted in Kwa 2001. See also Odell 2005.

¹² Ismael 2009, 1148.

¹³ Lukes 1974, 24-5 and 34-5. See also Clegg 2001, 11934.

¹⁴ See generally Gramsci 1992. See also Fry 2008.

Foucault took these ideas in another direction by dispensing altogether with the idea of objective or ‘real’ interests against which such preferences could be juxtaposed. For Foucault, power constructs ‘the order of things, the regimes of rationality, and the subjects and their daily practices’.¹⁵ It constructs preferences and identities without allowing for any standpoint from which objective interests may be measured. Power for Foucault is thus not merely coercive or constraining of interests and preferences. It is also productive, in that it allows for the realization of preferences and interests. Importantly, it is even constitutive — it is the operation of power that helps to create interests, preferences, and the relationships between them all in the first place.¹⁶ This, in turn, draws attention to how specific goals and outcomes are classified as desirable or undesirable.

This takes us back to criticism that the power exercised by the WTO is merely technical. Former Appellate Body member James Bacchus, for instance, dismisses the idea that the WTO Secretariat wields any form of significant power on the grounds that it only provides ‘technical assistance’. In his words:

About half are translators. About half of the rest are clerical workers. The remainder are lawyers or economists or international civil servants of some other technical sort who work for ‘the WTO’.¹⁷

Here, again we face a limited understanding of the potential forms of power, in which merely ‘technical’ work is not seen as warranting much attention. Certainly, there is much that the WTO does may be thought of as implementing Member’s wishes in a relatively

¹⁵ Buchstein & Jörke 2012, 286.

¹⁶ ‘[P]ower produces; it produces reality, it produces domains of objects and rituals of truth’: Foucault 1977, 194. In Susan Marks’s words: ‘For Foucault, then, truth and power are mutually dependent, or at any rate mutually reinforcing. What counts as truth is produced through “forms of constraint”. That is to say, it is the outcome of structured social processes. At the same time, truth itself induces “effects of power”. It helps to establish and sustain the social structures within which validity is secured. Thus, truth is constituted through power, and power is partly constituted and reproduced through truth’: Marks 2000, 133-4. For a discussion of how law has played a constitutive role with regard to the construction of the international trade regime, see Lang 2011; Lang 2013; Lang 2014. Similar insights have also been examined by constructivist scholars: see, eg, Wendt 1999. See also Eagleton-Pierce 2012, ch 2, and Bourdieu 1989, 22, in which Bourdieu argues that symbolic power is ‘world making’ and represents the power to ‘organize the perception of the social’.

¹⁷ Bacchus 2004, 668.

straightforward manner. But technical power — which may be taken to include both a kind of epistemic power and an associated professional capability — is power nonetheless. Such power helps to set the terms on which the world is understood.¹⁸ This is particularly so when such technical power is married to WTO law.¹⁹ This is because WTO law has the capacity to privilege certain types of knowledge in specified situations, and to allocate power to certain types of experts. Moreover law may go beyond this allocative function to actually help constitute distinctive regimes of knowledge.²⁰ More specifically, ‘technical knowledge’ may help alter the outcomes of WTO disputes by shaping understandings of the facts and the law.

Finally, one may consider the idea of distinct ‘legal power’. Wesley Hohfeld, for instance, defined a power as ‘one’s affirmative “control” over a given legal relation as against another’.²¹ Although the present thesis focuses on WTO law specifically, it seeks to draw on a broader understanding of the relationship between power and law than that advanced by Hohfeld; a broader understanding which is informed by the agenda-setting and knowledge-constituting forms outlined above. As such, it concerns not only formal powers to make, apply, and interpret WTO law, but also how power may affect and influence such law-making, application, and interpretation on a more informal basis. It deals not only with how

¹⁸ Foucault argues that ‘[n]o body of knowledge can be formed without a system of communications, records, accumulation and displacement which is in itself a form of power and which is linked, in its existence and functioning, to the other forms of power. Conversely, no power can be exercised without the extraction, appropriation, distribution or retention of knowledge’: Foucault 1971, 283, cited in Sheridan 1980, 131. Michael Barnett and Raymond Duval take an expansive approach to power by defining it as ‘the production, in and through social relations, of effects that shape the capacities of actors to determine their own circumstances and fate’: Barnett & Duval 2004, 8. See also: ‘In other words, power can be understood as either an attribute that agents possess and may use as a resource to shape the actions of others, and to affect what agents take to be valid knowledge, or the socially diffuse control of agents by means of previously created rules and institutions’: Adler & Bernstein 2004, 294 and 298.

¹⁹ Foucault considered legal rules and judicial practices to provide an important site for the analysis of power/knowledge — ‘Judicial practices [...] all these practices that were indeed governed by rules but also constantly modified throughout the course of history, seem to me to be one of the forms by which our society defined types of subjectivity, forms of knowledge, and, consequently, relations between man and truth that deserve to be studied’: Foucault 1994, 5.

²⁰ Lang 2009; Lang 2013. See also Peel 2010, 265: ‘law may well represent a privileged and central venue for the constitution of regimes of knowledge’.

²¹ See Hohfeld 1913, 55; Hohfeld 1917.

legal powers may ‘determine’ the legal situations of others, but also how law is itself determined by the exercise of power.²² Indeed, Robert Howse notes that the power of transnational trade policy networks is often not formal in character, and rather derives from informal practices — putting items on the agenda, keeping items off the agenda, preparing reports and assessments that influence understandings of treaty obligations, monitoring trade policies, facilitating training for trade officials and the like.²³ He notes that through these processes, these experts exert ‘a kind of epistemic power to define what should and should not have attention in the WTO forum’.²⁴ In this sense, the informal practices associated with WTO law hold just as much importance in considering the relationship between power and WTO law as the formal practices.

This thesis therefore conceptualizes power as concerned not merely with the coercive imposition of the will, but also in its agenda-setting and knowledge-constituting senses. This opens up a much broader range of ways in power may be understood as pervading and altering the terms of how law is made and interpreted in relation to the WTO, suggesting that there is more here that requires legitimation than has traditionally been accepted.

B *The Agents of Power*

Another common refrain that underplays the operation of power in relation to the WTO is that the WTO does not exercise power itself, but is merely an instrument for its Members. Robert Hudec, for instance, went on to note that:

²² The word ‘determines’ is here borrowed from von Bogdandy, Dann & Goldmann 2010. In defining the exercise of ‘international public authority’, they define ‘authority’ as ‘the legal capacity to determine others and to reduce their freedom, ie to unilaterally shape their legal or factual situation. An exercise is the realization of that capacity, in particular by the production of standard instruments such as decisions and regulations, but also by the dissemination of information, like rankings. The determination may or may not be legally binding.’ Consequently this version of authority comes into play not only if its exercise modifies the legal status of a legal subject in a formal sense, but also if it merely ‘conditions’ a legal subject in a way that ‘builds up pressure for another legal subject to follow its impetus’: at 11-12. See also von Bogdandy & Goldmann 2008, 263 (limiting their discussions to specifically ‘legal’ authority).

²³ Howse 2001a, 371.

²⁴ Ibid 371-2. Howse nonetheless notes that the Secretariat’s power has diminished in the transition from the GATT to the WTO, as its influence over the selection of panelists for disputes and the drafting of panel reports has waned (although certainly not disappeared). See also Howse 2002a.

The World Trade Organization is a member-driven organization, and the force of its orders is the product of a process in which governments agree to participate and which they ultimately control. Unless that fact can be disproved, I cannot see any basis for asking the WTO to meet the legitimacy standards of an institution with powers of governance.²⁵

Similarly, James Bacchus denies the agency of the WTO when he claims that ‘[t]he WTO is nothing more or less than — at last count — 147 sovereign countries and other customs territories working together as something they have chosen to call “*the WTO*”’.²⁶ In the international relations literature, these arguments are often engaged in terms of principal-agent theory, which examines international organizations as agents that have been delegated authority by their Members and are responsible to them in turn.²⁷

One response to these claims is to argue that the WTO does in fact exercise autonomous power. Principal-agent theory, for instance, acknowledges that international organizations such as the WTO will still enjoy a measure of discretion, or ‘slack’, in carrying out their delegated tasks.²⁸ Various actors in the WTO, especially the Appellate Body members, operate with a level of discretion which allows them to operate independently from Members’ immediate preferences (albeit within prescribed limits). Joel Trachtman neatly sums up one of the flaws of the argument that the WTO exercises no autonomous power thusly: ‘if the WTO were merely a conduit for member-state action, there would be no need to cloak member-state action in the WTO’.²⁹ Similarly, Richard Steinberg notes that ‘[a]nalysis of international institutions and law is shifting from earlier concerns of whether institutions matter to questions of which aspects matter, how, and in what contexts’.³⁰

²⁵ Hudec 2001, 298.

²⁶ Bacchus 2004, 668 (emphasis in original).

²⁷ ‘What unites specific theories under the umbrella of “principal-agent theory” is a focus on the substantive acts of principals in granting conditional authority and designing institutions to control possible opportunism by agents’: Hawkins et al 2006b, 7.

²⁸ See, eg, Bernstorff 2010, 780-9.

²⁹ Trachtman 2009, 207.

³⁰ Steinberg 2002, 339.

A second response takes things further by noting that international organizations may exercise power in a way that shapes the preferences of their Members and other actors. In this vein, Michael Barnett and Martha Finnemore argue that:

[International Organizations ('IOs')] are powerful not so much because they possess material and informational resources but, more fundamentally, because they use their authority to orient action and create social reality. [...] As authorities, IOs can use their knowledge to exercise power in two ways. First, they regulate the social world, altering the behavior of states and non-state actors by changing incentives for their decisions. [...] Second, we can better understand the power IOs wield by viewing them as bureaucracies. IOs exercise power as they use their knowledge and authority not only to regulate what currently exists but also to constitute the world, creating new interests, actors, and social activities.³¹

Thus it is not only that the WTO may act beyond the immediate control of the Members; it may also act in such a way that alters how those Members perceive their interests and preferences.

A third response to the claims that the WTO is merely an instrument is to note that, even if one were to focus on the WTO's status as an instrument rather than an actor in its own right, this would still make it an important locus of power.³² As an instrument, it extends, limits and modifies the powers of its Members and other actors, leading to new power configurations that are only possible as a result of the existence of the law and practice of the WTO. For instance, the WTO provides a space for negotiation of and discussion of laws and their implementation. But this negotiating space is carefully structured by formal norms and informal practices — including the single undertaking and consensus principles — that help to shape the outcomes of such negotiations. Similarly, the WTO's dispute settlement system provides incentives for Members to channel their behaviour in specific ways that would not be possible in its absence, thereby discouraging unilateral actions with the potential to harm

³¹ Barnett & Finnemore 2004, 6-7 (footnotes omitted). See also Venzke 2010, 68: 'This contribution [...] discards an exclusively instrumental view of international institutions that portrays them as tools in the hands of their creators or as mere instruments in pursuit of global goals. In conclusion, it emphasizes law's constitutive role in providing a space for legal and political contestation as an indispensable prerequisite for the normative desirability of autonomous international bureaucracies'.

³² See generally Abbott et al 2015.

other Members' economies. As such, it is important to bear in mind not only how power is exercised *by* the WTO, but also how power is exercised *through* the WTO.

This point becomes all the stronger when recognizing that power is not exercised through the WTO equally by all of its Members. Benedict Kingsbury, for instance, notes that 'from the perspective of smaller developing countries, global regulatory institutions including the WTO [...] might already appear to be "administering" them at the bidding of the industrialized countries'.³³ It is no secret that multilateral negotiations have long been dominated by a small number of the more powerful economies, whether in the form of the US and the EU, the old 'Quad' (which also included Canada and Japan), or the 'G-6' of Australia, Brazil, the EU, India, Japan and the US. Daniel Drezner argues that threats to national sovereignty derive less from international institutions like the WTO than they do from the major powers, including the US and the EU, noting that in the WTO context, 'US sacrifices of democratic sovereignty pale in comparison to the compromises other countries have had to make'.³⁴ A further variant argues that the WTO merely provides an instrument for powerful lobbies within certain Members, a claim that has been directly denied by the WTO.³⁵

Finally, the WTO may also act as an arena for power even in the absence of the clear exercise of will. Although it is important to recognize the personal and group responsibility of those tasked with WTO rule- and decision-making, the specialized and fragmented nature of rule- and decision-making in complex fields such as multilateral trade can result in situations where no one actor takes, or can take, responsibility. Foucault, for instance, recognized the operation of power through disciplinary networks that did not rely on any particular will for their development and evolution.³⁶ This is not to say that individuals cannot make use of such disciplinary networks for their own ends; far from it. Rather it is merely to recognize an

³³ Kingsbury, Krisch & Stewart 2005, 27.

³⁴ Drezner 2001, 323.

³⁵ See WTO, *Ten Common Misunderstandings about the WTO* (1999).

³⁶ It is worth noting that Foucault's conception of power largely dispensed with the notion of agency. This was in part because his focus on the productive and constitutive aspect of power undermined the idea that pre-established agents were capable of exercising power independently. In this sense, even leaving its instrumental function aside, the WTO may be thought of as a nexus for certain professional/disciplinary networks through which certain norms and ideas are promulgated, further influencing the development of the law: see Foucault 1998, 92-6.

additional and subtle manner in which power is propagated at a structural level which can have significant impacts on the autonomy of various actors.

Acknowledging both the autonomous power of the WTO, and its power as an instrument for others in shaping Member preferences, raises questions of how such power is being used and to what end. This invites consideration of matters beyond whether or not ‘the Membership’ has consented in broad terms to WTO rules, to include investigation of the WTO’s knowledge practices in generating ideas about the world and about the WTO’s role in that world. This in turn has important implications for how we think about law and the legitimacy of the WTO.

C The Settings of Power

1 The Institutional Dimension

Another key feature in narratives about power, law, and the WTO is what will here be termed the *setting* of power. The setting includes both an institutional dimension and a temporal dimension. As far as the institutional dimension is concerned, it is important to remain aware of the many sites in which the various forms of power can be exercised, and how these different sites may relate to each other in a broader setting. These sites are important not because of their geographical location, but rather because of how they are legally constituted in different ways and operate in accordance with distinct sets of rules and practices that affect how decisions are made. Generally, discussions of WTO law and power to date have centred heavily on the WTO dispute settlement system and, to a lesser extent, its negotiation rounds. The various interstitial decision-making sites in the WTO, however — including the WTO committees,³⁷ the General Council and its various emanations,³⁸ and the WTO Secretariat — have received far less attention. There has also been a relative neglect of the WTO’s interaction with other IGOs,³⁹ how the WTO interacts with national bodies implementing WTO rules and decisions, and the relationship between the WTO and the private sector. These spaces have continued to form what David Kennedy has termed the ‘background’ of international decision-making,⁴⁰ while most of the focus remains on the ‘foreground’

³⁷ See, eg, Lang & Scott 2009; Shaffer 2001.

³⁸ Including the Goods Council, the Services Council and the TRIPS Council.

³⁹ Although see Foltea 2012; and Kelly 2008.

⁴⁰ Kennedy 2005, 7-10.

institutions of the dispute settlement organs and the Ministerial conferences. Looking more broadly at the various institutional processes in the WTO — including not only its dispute settlement system and negotiation rounds, but also its Councils and committees, as well as the influence of non-institutionalised expert networks — has the potential to open up a different view of the relationship between power, law and the WTO.

2 *The Temporal Dimension*

Finally, turning to the temporal dimension of power; the exercise of power is often ignored, particularly in legal circles, if it is not directly associated with the moment of legislation or legally authoritative interpretation. It is not just that the focus is concentrated on particular institutional settings, such as the dispute settlement system. It is also that the focus largely remains on the words of treaty texts set down at the moment of collective agreement, or on the final texts of panel or Appellate Body reports. To this extent, the focus is generally on moments of formal prescription.

Yet the exercise of power may also affect how law is created, shaped, interpreted and eliminated at many different times before and after these formal moments. Andrew Lang and Joanne Scott have noted that ‘important work is often done *before* we get to the stage of intergovernmental bargaining, and that the politics of international trade is found just as much in everyday routines of global economic governance as it is in its eye-catching moments’.⁴¹ Looking at the GATT/WTO agenda-setting process, Richard Steinberg identifies three distinct stages:

advancing and developing *initiatives* that broadly conceptualize a new area or form of regulation; (2) drafting and fine-tuning *proposals* (namely, legal texts) that specify rules, principles, and procedures; and (3) developing a *package* of proposals into a “final act” for approval upon closing the round [...].⁴²

Political scientists have addressed the distinct stages of such processes for decades. Harold Lasswell, for instance, broke down the policy process into seven stages: intelligence,

⁴¹ Lang & Scott 2010, 1074. Cf Steinberg 2009, 1069; see also Lang & Scott 2009.

⁴² Steinberg 2002, 354 (emphasis in original). Although Steinberg points to research suggesting that, in domestic legislative settings, agenda-setting processes have more explanatory power than plenary voting processes, he discounts the value of this insight in relation to organizations that are governed by decision-making processes that emphasize sovereign equality (including the WTO): at 354.

recommendation, prescription, invocation, application, appraisal, and termination.⁴³ Other breakdowns of the policy process emphasize the iterative and recursive nature of such processes, portraying them in terms of a policy cycle.⁴⁴ Different stages of such policy cycles call for different forms of power and legitimacy, and are worthy of attention in their own right.

Overall, then, it is possible to build a complex picture of how power relates to the WTO as an institution and more specifically to WTO law. Power may take many forms, including coercive, agenda-setting, epistemic and formal. It may be constraining, productive and even constitutive. Power may be wielded by the WTO, by others acting through the WTO, and its exercise by others may be shaped by WTO law. Moreover, power can have an impact on the development of WTO law in many different institutional settings and beyond moments of formal decision-making. In turn, the varying forms of power exercised by and through the WTO necessitate careful consideration of whether such exercise may be considered legitimate. A sharper awareness of how the forms, agents and settings of power operate in relation to WTO law helps to strengthen safeguards against abuses of such power.

III THE CONCEPT OF LEGITIMACY

A *Defining Legitimacy*

With so many different permutations of power on offer, it is no surprise that legitimacy, so concerned with the justification of power, also has many meanings and uses. ‘Legitimacy’ has been deployed by actors at all levels of the multilateral trading system, from activists to academics, from politicians to the press, from Appellate Body Members to bureaucrats, each of whom ascribe different meanings to the word. Indeed it is not unusual for any given author to use the word multiple times in the one setting while ascribing different meanings to it every time. The plurality of these meanings, and the frequency with which the word itself is used, make it a difficult concept to systematize.

Following the publication of Thomas Franck’s seminal work *The Power of Legitimacy among Nations* in 1990, there has been a wave of scholarship linking legitimacy and

⁴³ See McDougal & Lasswell 1959. While there is a certain logic to the sequence in which these have been listed here, they do not necessarily follow in strict chronological order from each other.

⁴⁴ See, eg, Althaus, Bridgman & Davis 2013, ch 3.

international law. This wave has prompted a backlash from eminent international lawyers with vantage points as diverse as James Crawford and Martti Koskenniemi. A central criticism relates to legitimacy's semantic ambiguity⁴⁵ and its capacity to be used strategically with little regard for consistency.⁴⁶ Strongly related to this is an assumption of the subjectivity of legitimacy — that, in direct contrast to law, it provides a license to privilege personal moral intuitions at the expense of the system as a whole.⁴⁷ Political actors may call something legitimate or illegitimate not because they have made a considered philosophical reflection on whether that thing aligns strictly with a particular normative framework, but rather because they like or do not like it and are grasping for an authoritative way to express that emotion. Another criticism claims that legitimacy discourse seeks to supplant legal discourse,⁴⁸ a concern that is not entirely unjustified considering the Goldstone report's memorable verdict that the NATO military intervention in Kosovo was 'illegal but legitimate'.⁴⁹ In addition, legitimacy is criticized for lacking any meaningful normative content despite its claims to do so.⁵⁰ Finally, Crawford suggests that reflection on legitimacy lies beyond the proper realm of the international lawyer: 'Of legitimacy it is for others to judge'.⁵¹

⁴⁵ "“Fairness” and “legitimacy” are mediate words, rhetorically successful only so long as they cannot be pinned down either to formal rules or moral principles”: Koskenniemi 2009a, 409. See also Crawford 2004, 271, referring to its ‘fuzziness and indeterminacy’.

⁴⁶ ‘In recent discourse there has been very little attempt to use it in a discriminating way’: Crawford 2004, 271.

⁴⁷ Ibid 271-2. David Caron argues that ‘perceptions that a process is “illegitimate” are difficult to describe because they reflect subjective conclusions, perhaps based on unarticulated notions about what is fair and just, or perhaps on a conscious utilitarian assessment of what the process means for oneself’: Caron 1993, 557.

⁴⁸ Crawford describes it as being ‘used as a loose substitute for “legality”’: Crawford 2004, 271. Koskenniemi claims that ‘the vocabulary of “legitimacy” itself tends to turn into a politically suspect claim about the existence of a meta-discourse capable of adjudicating the claims unresolved in its object-discourses, and thus, inaugurating legitimacy experts as a kind of world tribunal’: Koskenniemi 2005, 591 n 81.

⁴⁹ International Independent Commission on Kosovo 2000, 4.

⁵⁰ ‘Legitimacy is not about normative substance. Its point is to *avoid* such substance but nonetheless to uphold a *semblance* of substance’: Koskenniemi 2009a, 409.

⁵¹ Crawford 2004, 273.

If approached carefully, however, the concept of legitimacy can prove illuminating for international law scholarship and practice. In the WTO context, an awareness of the main narratives of legitimacy can help to clarify the nature of disagreements over, among other things, proposals for institutional reform, allocating authority between different expert groups, or the persuasiveness of specific dispute settlement reports. It can also make it easier to identify when actors are moving back and forth between contradictory legitimacy claims in order to justify their positions, so as to better hold them to account.

To begin, Arthur Applbaum helpfully distinguishes between the *word* legitimacy, the *concept* of legitimacy and *conceptions* of legitimacy.⁵² The specific *word* has been used to denote various ideas across disciplines, time and space. Legitimacy as a *concept* is a kind of meta-definition that seeks to encompass as many of the different *conceptions* for legitimacy as possible. The majority of the literature on legitimacy is concerned with particular conceptions of legitimacy — associated with some variant of democracy, or justice, or ‘good administration’ — and it is only comparatively recently that the concept of legitimacy has been subjected to more sustained attention.

There are several core understandings of the concept of legitimacy in academic writing. Most of the writing on legitimacy from the last several decades distinguishes between at least two main legitimacy categories. These categories are often allocated different labels, but the functional distinction is similar in each case. Thus distinctions are drawn between normative and sociological legitimacy;⁵³ between normative and empirical legitimacy;⁵⁴ between *de jure* and *de facto* legitimacy;⁵⁵ and between moral and descriptive legitimacy.⁵⁶ Some writers add a distinct category of legal or formal legitimacy to the mix.⁵⁷ Joseph Weiler, for instance, distinguishes formal and social legitimacy, where formal legitimacy is ‘akin to the juridical

⁵² Applbaum 2004, 76.

⁵³ See Thornhill & Ashenden 2010; Buchanan & Keohane 2008, 25.

⁵⁴ Hurrelmann, Schneider & Steffek 2007; Scharpf 2007.

⁵⁵ Vinx 2007, 60. See also Joseph Raz’s distinction between *de jure* and *de facto* authority: Raz 2009, 5.

⁵⁶ Applbaum 2004, 76.

⁵⁷ David Beetham distinguishes between legal validity (legitimacy for lawyers), moral justifiability (legitimacy for philosophers), and belief in legitimacy (legitimacy for social scientists): Beetham 1991, 4-7. Writing on US constitutional law, Richard Fallon also identifies legal, moral and sociological legitimacy: Fallon 2005, 1794-801.

concept of formal validity’.⁵⁸ This chapter distinguishes between legal, moral and social legitimacy — these labels express the distinctions between the various concepts of legitimacy well and are in reasonably common use in international law scholarship, including in relation to WTO law.

1 *Legal Legitimacy*

The term ‘legitimacy’ is etymologically derived from the Latin *legitimus* (lawful), as derived from *lex* (law), so it is not surprising that lawyers stake a claim to the word. *Legal legitimacy* is generally treated as the narrowest of the three disciplinary concepts of legitimacy. It may be defined as a property of an action, rule, actor, or system which signifies a legal obligation to submit to or support that action, rule, actor or system. Legal legitimacy is similar to moral legitimacy in that both assess given objects against particular normative framework; as such they are both sometimes grouped together as forms of ‘normative legitimacy’.⁵⁹

The concept of a specifically legal legitimacy, while undeniably important, does not provide the primary focus for this thesis. Rather, the thesis is concerned with the interrelationship between moral and social legitimacy and the making, interpreting and application of WTO law. It is nonetheless instructive to further elaborate on how the concept of legal legitimacy may be understood, for two reasons: first, to help elucidate the differences between legal legitimacy, moral legitimacy and social legitimacy; second, to highlight that even the concept of legal legitimacy raises complex moral considerations.

To writers outside of legal scholarship, legal legitimacy is often directly equated with *legal validity*, to the exclusion of questions of moral justifiability.⁶⁰ Legal validity in itself is then treated as a relatively straightforward concept.⁶¹ It is nonetheless recognized that legal legitimacy is particularly important because of the strength of its self-justification in a functioning legal system; once something has become legally legitimate, this provides an exclusionary reason for compliance even in the face of opposing moral considerations.⁶²

⁵⁸ Weiler 1999, 80.

⁵⁹ Although the term ‘normative legitimacy’ is also sometimes deployed to mean solely moral legitimacy: see Applbaum 2004, 76-80.

⁶⁰ See, eg, Beetham 1991, 4 (emphasis in original).

⁶¹ See, eg, *ibid* 4-5.

⁶² See Raz 1975, 39-48. Finnis describes ‘exclusionary reasons’ as ‘a reason for judging or acting in the absence of understood reasons, or for disregarding at least *some* reasons which are understood and relevant

Questions of legal validity thus have a direct impact on broader understandings of morality and order.

That non-lawyers commonly conflate the concepts of legal legitimacy and validity is understandable, as this is a move commonly undertaken by lawyers themselves.⁶³ For lawyers, however, the question of legal validity is anything but straightforward. There are two main (heavily disputed) schools of thought as to the requirements for legal validity, in the forms of positivism and natural law theory.⁶⁴ In the positivist tradition, represented most famously by Hans Kelsen and HLA Hart, to claim that a law is legally valid is to claim that it was created in accordance with the correct legal process. In Kelsen's view, this test for positive validity could be conducted recursively until a non-legal fundamental norm for a legal system, the *Grundnorm*, could be reached, for which authority is 'presupposed'.⁶⁵ For Hart, legal validity was ultimately traceable to a 'rule of recognition' — in contrast to Kelsen's *Grundnorm*, the rule of recognition is a social fact rather than a norm.⁶⁶

In basic terms, then, for a positivist, a norm is legally legitimate if it is created and persists in accordance with correct legal process, in which correctness is ultimately derived from a basic norm or from social consensus. Actions taken in accordance with such norms, and actors appointed to positions of authority in accordance with such norms, can also be said

and would in the absence of the exclusionary reason have sufficed to justify proceeding in some other way': Finnis 1980, 233.

⁶³ See, eg, in international law scholarship: 'Legal legitimacy takes what might be called an internal perspective: particular directives are justified in terms of a regime's secondary rules about who can exercise authority, according to what procedures, and subject to what restrictions': Bodansky 1999, 608; 'legal legitimacy being understood as the obligation to keep strictly within the frame of the original mandate': Wolfrum 2008, 23. See also, more ambiguously: 'The notion of formal legitimacy in institutions or systems implies that all requirements of the law are observed in the creation of the institution or system': Weiler 1999, 80. Some writers adopt more idiosyncratic definitions of 'legal legitimacy' which do not correspond to legal validity. Brunnée and Toope, for instance, argue that legitimacy has a 'specific, legal meaning' associated with the legal form, which is tied to the satisfaction of specific criteria of legality: Brunnée & Toope 2010, 54. These may be understood, however, as representing particular conceptions of moral or social legitimacy that are strongly tied to legal criteria, and will be dealt with below.

⁶⁴ There are almost as many variants of each theory as there are authors; it is beyond the scope of this chapter to cover every such variant.

⁶⁵ Kelsen 2007, 110-22.

⁶⁶ Hart 1994, 100-10.

to possess legal legitimacy. In international law scholarship there is still much conceptual disagreement about what constitutes a correct legal process, particularly when it comes to determining the sources of international law.⁶⁷ In WTO law, this plays out most prominently in relation to the debates about the extent to which general international law is applicable in WTO dispute settlement.⁶⁸

Central to the positivist view of legal validity is also the idea that legal validity and the moral justifiability of the law's substance are entirely separable. The formal fact of legal validity engenders a legal, but not necessarily a moral, obligation to obey.⁶⁹ Hence no moral obligation necessarily arises either on the basis of the substance of law or due to its character as law. This is not to say that law cannot be moral or immoral, simply that the question of moral justifiability lies outside the question of legality. From this perspective, legal validity is a purely formal fact — an 'amoral datum'.⁷⁰

The conflation between legitimacy and legal validity, when combined with this separation between legal validity and moral justifiability, raises some concerns. Analytically, distinguishing between legal validity and moral justifiability can be very important. However, taking legal validity to exhaust the concept of legitimacy has the potential to severely limit debates about WTO law. Questions of formal validity may crowd out broader questions about ethics and justice in WTO law.⁷¹ It can make it easier to dismiss how 'external' considerations can or should influence WTO law, or indeed how they have in the past.

The classical natural law tradition, in contrast, is often said to have treated substantive moral justifiability as an essential element of legal validity. Thomas Aquinas, for instance, is often quoted as stating that 'if in any point [human law] deflects from the law of nature, it is

⁶⁷ See generally d'Aspremont 2011, ch 1.

⁶⁸ See Pauwelyn 2003a; Trachtman 2004; Bartels 2001.

⁶⁹ Note that Kelsen's *Grundnorm* may be read as providing the normative basis for the obligation to obey the law; however its role as the basis for law's normativity was never fully explored, and whether its obligatory character was legal or moral in nature was not fully addressed: see Marmor 2010.

⁷⁰ Fuller 1958, 656. Even articulating the supposed functions of the law and stressing the importance of separating legal from moral discourse may be understood as normative projects: see Perry 2001, 410.

⁷¹ Cf Brunnée and Toope who refer to their 'interactional' account of legitimacy as enabling international lawyers to place debates about state consent, sources and the like 'in the broader context of the international legal enterprise, so as to better appreciate the roles they play, their potential, and their limitations': Brunnée & Toope 2010, 7-8.

no longer a law but a perversion of law’;⁷² while William Blackstone wrote that ‘no human laws are of any validity, if contrary to [the law of nature]’.⁷³ Many legal philosophers, including Austin,⁷⁴ Kelsen,⁷⁵ Hart⁷⁶ and Raz,⁷⁷ have read these statements as indicating that, for natural lawyers, moral justifiability constitutes an inextricable aspect of legal validity. The quintessential distillation of natural law thinking — that ‘unjust law is not law’ — has thus been interpreted as arguing that positive law is invalidated if morally disagreeable. Echoes of this idea may be found in contemporary approaches to *jus cogens* norms in international law, in that such norms are considered non-derogable and their basis is sometimes ascribed to natural law.⁷⁸

Contemporary natural lawyers such as John Finnis, however, reject this reading as a mere caricature invented by the positivists.⁷⁹ Finnis argues that there are two different meanings of ‘law’ at play in the statement ‘an unjust law is not law’.⁸⁰ The first ‘law’ refers to human-made, positive law, and will continue to exist as such in accordance with the principles of positive legal validity and enforcement in its system of origin. The second use of ‘law’ means law which has full moral obligatory force, as all law *should* have. Although laws that lack moral legitimacy retain their status as law, they are defective in that they fail to achieve the quality of moral obligation that should be experienced in relation to law. Finnis thus separates out the question of law’s validity from the question of its moral justifiability, and agrees that legal validity is a question of social fact. In this limited respect, Finnis finds common ground with the positivists.⁸¹

⁷² Aquinas 1993, I-II, q 95, a II.

⁷³ Blackstone 1766, 41.

⁷⁴ Austin 1995, lecture V.

⁷⁵ Kelsen 1949, 485.

⁷⁶ Hart 1994, 208-12.

⁷⁷ Raz 1974, 100.

⁷⁸ See O’Connell 2012, 78.

⁷⁹ Finnis 1980, 25-9.

⁸⁰ Ibid 24.

⁸¹ ‘[I]n relation to the settled positive law, natural law theory — as is acknowledged by a number of legal positivists [...] shares the principal thesis of contemporary legal positivists, that laws depend for their existence and validity on social facts’: Finnis 2011.

Even positive legal validity is not clear cut in many cases, as ‘rules do not spell out the conditions of their application’.⁸² For a given legal problem there is often a range of permissible legal interpretations. The interpretation of particular laws frequently changes over time, and hence the question of whether a particular decision or norm is legally valid remains in flux. Consequently it is possible to speak of more or less legally legitimate actions, rules, institutions or systems depending on the emphasis one places on the determinative criteria for positive legal validity. Anthea Roberts, for instance, notes that legitimacy may be used to complicate the binary choice between valid or invalid law by providing a ‘spectrum’ where ‘laws and actions may be more or less legitimate depending on the circumstances’.⁸³ Attempts to shut down debates about the WTO’s legitimacy by appealing to the legal validity of its rules or decisions thereby misses much of the complexity inherent in the concept of legal legitimacy while also ignoring its non-legal meanings.

2 *Moral Legitimacy*

Another common understanding of legitimacy is that of *moral legitimacy*. Moral legitimacy is often framed in terms of who has the ‘right to rule’⁸⁴ — that is, how the exercise of power by one actor over another can be *morally justified*. Moral legitimacy consequently posits an ‘ought’ into the given power relationship. Moral legitimacy may thus be defined as a property of an action, rule, actor or system which signifies a moral obligation to submit to or support that action, rule, actor or system. Its opposite is *moral illegitimacy*. If something is morally illegitimate, then there is no moral obligation to submit; there may even be a moral obligation to resist.⁸⁵ Moral legitimacy is thus closely bound up with questions of political authority.

There are endless potential configurations of moral legitimacy, and over the centuries many different conceptions of morally legitimate rule have been advanced. Plato suggested a system of quasi-celibate philosopher-king guardians as the appropriate rulers.⁸⁶ Aristotle identified six modes of rule, the first three of which were considered justifiable (royalty, aristocracy and constitutional government), while the second three (tyranny, oligarchy and

⁸² Koskeniemi 2009a, 413, paraphrasing Kant 1991, 140-1.

⁸³ Roberts 2008, 208-9.

⁸⁴ See Buchanan 2010, 79; Tasioulas 2010, 97.

⁸⁵ See Strauss 2005.

⁸⁶ See generally Plato 1991.

democracy) were considered perversions of the first three.⁸⁷ Egyptian pharaohs, French sun-kings and contemporary North Korean despots have all claimed a right to rule deriving from the divine.⁸⁸ Since the seventeenth century the debate in liberal democratic states has focused on the tension between individual freedom and state power, somehow mediated by consent in the form of the social contract.⁸⁹ It is important to bear in mind both the multiplicity and the historical contingency of different understandings of moral legitimacy. Contemporary writings on moral legitimacy are dominated by notions of democratic legitimacy, with sub-genres concerned with individual consent, the social contract and deliberation. This tendency is so widespread that often the term ‘legitimacy’ is used as shorthand for ‘democratic legitimacy’.⁹⁰ The preponderance of such writings has operated to eclipse the study of other forms of moral legitimacy.

Each of the various forms of moral legitimacy articulated over the last several centuries has had its share of lawyers, politicians and philosophers ready to act as apologists or critics, contributing to increasingly elaborate justificatory apparatus for various modes of rule. This intermingling of power with attempts to define the conditions of legitimate rule has ensured that not only have the various conceptions of legitimacy played a powerful role in shoring up or destabilising rule, but also that these conceptions have been informed and shaped by the realities of power.

The moral version of legitimacy remains intimately connected to the study of law.⁹¹ Law embodies, normalizes and enforces particular conceptions of the world. It informs our understandings of what is moral even as it is shaped by such understandings. Moral legitimacy is therefore central to the description and evaluation of the exercise of power through law. It is highly relevant to lawyers engaged in institutional design, in disputes steeped in moral issues, and for an appreciation of what it means to commit to a particular set of legal structures. Lawyers engaged in such projects may have a technical legal role to fulfil,

⁸⁷ Aristotle 1996, III:8.

⁸⁸ For examples of claims to divine ordination from Japan to England, see Bendix 1978.

⁸⁹ See Flathman 2007, 679; Hobbes 1914; Rousseau 1997; Locke 1988.

⁹⁰ See, eg, Elsig 2007b.

⁹¹ Indeed, Bhikhu Parekh has criticized much of the ‘post-Hobbesian’ discourse on political obligation as overly concerned with reasons for why citizens should obey the law, to the neglect of broader conceptions of political obligation that might consider the relationship between citizens, community and political life: Parekh 1993.

but that role is only enhanced by an appreciation of the moral legitimacy concerns associated with such projects. The WTO provides no exception to this.

Moral legitimacy has tended to feature in international law discourse, including trade law discourse, in one of three ways. First, it has featured heavily in debates on the moral basis of obligation in international law — that is, debates about why international law is worthy of compliance in general terms. Traditionally a range of possible bases have been suggested, ranging from consent, to human dignity, to the realization of common purposes.⁹² These debates, long dormant, have been revived in recent scholarship.⁹³ Second, conceptions of moral legitimacy may provide international law with competing, rather than complementary, normative justifications for action.⁹⁴ It is this second relationship that tends to pose the greatest concern to general international lawyers worried about the dilution of international law's normative force. Third, specific conceptions of moral legitimacy have provided a framework against which to evaluate international law.⁹⁵ Such evaluation may highlight areas where legal reform is needed.⁹⁶ From there, international law may be used as an instrument to promote or implement a particular vision of moral legitimacy. This has been the primary mode in which the WTO's legitimacy debates have taken place, as various actors have sought to articulate reform proposals on the basis of democratizing the WTO or increasing the efficiency and effectiveness of its decision-making.

3 *Social Legitimacy*

The third common understanding of legitimacy is *social legitimacy*. Social legitimacy may be defined as the property projected onto an action, rule, actor or system by an actor's *belief* that that action, rule, actor or system is morally or legally legitimate.⁹⁷ Unlike legal or moral legitimacy, social legitimacy does not make a normative commitment to any relationship of

⁹² See especially Brierly 1958; Schachter 1968.

⁹³ See, eg, Lister 2010.

⁹⁴ Ibid 208.

⁹⁵ Obiora Chinedu Okafor suggests that engaging in such evaluation is a professional imperative for international lawyers: 'International lawyers must transcend mere doctrinal analysis; to climb on its shoulders in the search for justice. It is therefore a valuable enterprise to examine ways of enhancing the normative legitimacy of international norm/rule producing institutions': Okafor 1997, 129.

⁹⁶ See Roberts 2008, 209.

⁹⁷ Cf Hurd 2007, 7: 'Legitimacy refers the belief by an actor that a rule or institution ought to be obeyed'.

power; it drops any sense of an objective ‘ought’. It treats legitimacy as a social fact, not a normative goal. Nonetheless this definition does not completely disregard the role of moral and legal legitimacy. Social legitimacy is an empty concept without an account of the moral or legal framework to which the posited believer subscribes. Social legitimacy is an empirical concept, but it is one which is concerned specifically with what forms of power people believe to be *morally or legally justified*, even if those beliefs bear little relationship to the realities of power. Thus moral and legal concerns continue to play a key role in debates about social legitimacy.

It may be possible for authorities to maintain their social legitimacy despite frequently violating the normative justifications for their legitimacy. Social legitimacy thus allows for the concept of ‘false legitimacy’, where there is an internal disconnect between people’s beliefs about the moral operation of a system and the actual operation of that system.⁹⁸ This also helps to account for legitimacy’s capacity to motivate obedience even for those who are consistently disadvantaged by the system.

The widely recognized progenitor of the social approach is Max Weber.⁹⁹ Weber saw human beings as inevitably involved in relationships of rule, where one person exerts rule/dominance/authority over others. He used the concept of legitimacy as an aid to understanding how such relationships are perpetuated or dissolved, based on the beliefs which justify the acceptance of rule. Legitimacy was viewed as a cause for such belief which could be distinguished from coercion, or mere self-interest. It was therefore a social motivation for obedience that could operate independently of either of these — an explanatory framework for voluntary compliance towards rules (‘maxims’) because ‘it is in some appreciable way regarded by the actor as in some way obligatory or exemplary’.¹⁰⁰

Social legitimacy, as with the other forms of legitimacy, is strongly tied to the analysis of legal structures. Weber’s initial elaboration of legitimacy and the forms of ‘pure’ legitimate authority focused primarily on the exercise of legal authority, especially as operationalized

⁹⁸ See Kelly 2008, 646-7. There is also a clear connection between the idea of ‘false legitimacy’ and legitimization in the ideological sense: see generally Fry 2008.

⁹⁹ Weber 1968, 31-38 and 212-301.

¹⁰⁰ Ibid 31.

through bureaucracy.¹⁰¹ He placed legitimacy firmly within a historical narrative in which modernity is characterized by the displacement of ‘traditional’ and ‘charismatic’ authority by instrumental ‘legal-rational’ legitimacy in its many forms.¹⁰² Indeed, he argued that ‘[t]oday the most common form of legitimacy is the belief in legality, the compliance with enactments which are *formally* correct and which have been made in the accustomed manner’.¹⁰³ Even removing the focus from specifically ‘legal’ ideal types of legitimacy, social legitimacy can prove useful for evaluating whether law’s formal claims accord with the normative expectations of its subjects (and other interested parties). This has important implications for enforceability and compliance, as the greater the distance between legal or moral legitimacy and social legitimacy, the less stable and effective a legal system will be.

4 *Legitimation*

The disconnect between people’s beliefs about whether or not power is normatively (that is, legally or morally) legitimate, and whether or not it may be considered normatively legitimate in any objective sense (within a given framework), leads to the concept of *legitimation*. Legitimation is the process by which actors come to believe in the normative legitimacy of an object.¹⁰⁴ Legitimation may occur as the result of a conscious effort to influence beliefs about what is normatively justified, or as the product of the unconscious replication of pervasive legitimacy narratives. Whereas each form of legitimacy represents a property, legitimation represents action. It may either be narrowly strategic,¹⁰⁵ or part of a process of public discourse leading to more broadly legitimate outcomes.¹⁰⁶

¹⁰¹ Weber described the form of legitimate domination based on ‘legal authority’ as ‘resting on a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands’: Weber 1968, 215. This form of social legitimacy, for Weber, was intended not to rely on beliefs in moral legitimacy, but on beliefs in a distinctly legal legitimacy characterized by rationality: Dyzenhaus describes Weber’s approach as stating that the legitimacy accorded to legal authority ‘would not arise out of any moral content inherent in legal order, but out of the particular kind of rationality inherent in legal order’: Dyzenhaus 1999, 237.

¹⁰² Weber 1968, ch III.

¹⁰³ Ibid 37.

¹⁰⁴ Cf legitimation as ‘the process by which authority comes to seem valid and appropriate’: Marks 2000, 19-22.

¹⁰⁵ Those with an interest in maintaining the social order tend to see legitimation as a good, and make conscious attempts at legitimation: see Barker 2001, 2. Critical voices have regularly positions themselves

Legitimation processes are not limited to mere assertions of legitimacy. They involve the articulation and practice of a highly complex and developed set of interconnected symbols and rituals, often pointing to underlying moral criteria. The creation, interpretation and application of law combine to form a quintessential legitimation process. Effective laws have the power to create legal and moral obligations where none existed previously, regardless of substance. These obligations exist not only in the abstract ‘out there’, but are internalized by various actors in the legal system.¹⁰⁷ Even Kelsen, refuting TH Huxley, argued that:

[i]f the legal norm, enacted by the legislator, provides sanctions, and if such a “law” becomes the content of a man’s consciousness, it can very well become a motive of his behaviour and hence a cause of his paying his taxes or his abstaining from theft and murder. A legislator enacts norms only because he believes that these norms, as motives in the mind of men, are capable of inducing the latter to the behaviour desired by the legislator.¹⁰⁸

The process of legitimation is not directly related to the degree of legitimacy enjoyed by its target. Organizations which have previously enjoyed legitimacy and have a highly sophisticated legitimation apparatus, with the most complex symbolic universes formed in human history, may still find their legitimacy eroding. The decline of the Holy Roman Empire provides one of the more obvious examples. Similarly, actions and ideas previously considered wholly illegitimate may be subjected to the full brunt of legitimating strategies: the US’s attempts to justify the invasion of Iraq in 2003 on the basis of pre-emptive self-defence and the ‘new threat’ posed by modern terrorism provide a relatively recent example. Awareness of this dynamic nature of legitimation is crucial to avoid the trap of too easily conceding legitimacy to established rules, institutions and practices.

against legitimation as producing either false consciousness, subliminal technologies of the self, or domination.

¹⁰⁶ See Payrow Shabani 2003, ch 4; Steffek 2000, 14-17; the question of what constitutes the ‘public’ in this context for the international sphere has yet to be fully explored.

¹⁰⁷ See HH Koh 1994; Brunnée & Toope 2010; Goodman & Jinks 2004.

¹⁰⁸ Kelsen 2007, 166.

The three categories of legal, moral and social legitimacy are often treated as self-contained. Yet each concept of legitimacy may affect how the others are understood. For instance, as social legitimacy is by definition founded on beliefs about moral and legal legitimacy, it can be seriously undermined by the discovery that such beliefs are unfounded, or the underlying beliefs change. In the other direction, Harold Koh has drawn attention to how enmeshing international lawyers and other international actors in a web of procedural obligations and practices of legal decision-making can inspire a social-psychological ‘buy-in’ to the underlying procedural framework. This suggests that feelings of social legitimacy can help to influence underlying ideas about moral legitimacy.¹⁰⁹

Dissatisfaction with purely normative or social conceptualizations of legitimacy has led various authors to straddle the moral/social divide, by incorporating a social element when articulating the moral criteria for legitimacy. Jürgen Habermas is a leading figure in this tradition. Habermas’s approach to legitimacy is idiosyncratic and complex. For Habermas, ‘[l]egitimacy means there are good arguments for a political order’s claim to be recognized as right and just: a legitimate order deserves recognition. *Legitimacy means a political order’s worthiness to be recognized*’.¹¹⁰ On first glance this would appear to be a standard moral legitimacy argument. However, what constitutes a ‘good’ argument in Habermas’s approach is determined according to a process of communicative action/public deliberation. Whether or not something is legitimate is thus a ‘contestable validity claim’.¹¹¹ This therefore moves beyond a purely social account, yet avoids crossing the line entirely into moral legitimacy as it remains dependent on how a political order is perceived.¹¹²

In international law scholarship, Jutta Brunnée and Stephen J Toope skilfully manage to incorporate elements of all three approaches — legal, moral and social — as defined above. They argue that legitimacy has a ‘specific, legal meaning’¹¹³ which goes beyond tests for

¹⁰⁹ See, eg, HH Koh 2005, 28: ‘Most compliance comes from obedience. Most obedience comes from norm internalization. Most norm internalization comes from process’.

¹¹⁰ Habermas 1979, 178 (emphasis in original). See also Dyzenhaus 1996.

¹¹¹ Habermas 1979, 178.

¹¹² Jens Steffek takes an explicitly Habermasian approach to legitimacy in international governance: see Steffek 2000; Steffek 2003.

¹¹³ See Brunnée & Toope 2010, 54.

validity.¹¹⁴ Drawing on the work of Lon Fuller, they develop an ‘interactional account’ of legitimacy in which adherence to eight criteria of legality (generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy and congruence between rules and official action) ‘produces a law that is legitimate in the eyes of the person to whom it is addressed’.¹¹⁵ Legitimacy is generated in a social sense through the creation of communities of practice in which adherence to the criteria of legality generates shared understandings about the law. These understandings carry with them a sense of moral obligation to comply with the law. Moreover, the fulfilment of these criteria is argued to have moral worth, in that it entails a ‘commitment to autonomous actor choices and diversity’ as well as to processes of communication.¹¹⁶ Brunnée and Toope thus address how moral and social legitimacy feed off one another in the international context. In contrast to their project, this thesis is less concerned with the legitimacy-generating qualities of the legal *form* and more with how legal *procedures* may embody and influence specific moral visions of legitimacy.

6 Summary

The distinction between legal, moral and social legitimacy is crucial to any understanding of how legitimacy narratives operate, within the WTO or elsewhere. In subsequent chapters, however, their relevance is generally treated as implicit. Breaking down legal legitimacy clarifies the important distinction between legitimacy and legality, and also highlights how even the concept of legality raises questions of moral and political justification. Defining moral and social legitimacy clearly helps to define the essential reliance of the social legitimacy on moral legitimacy, in that any claim to social legitimacy requires an underlying claim about what is morally legitimate. The legitimacy claims collated and dissected in subsequent chapters are inevitably moral and/or social in character, either making normative claims about how the WTO and WTO law should operate, or descriptive claims about whether such operation is perceived to be legitimate, or both. The distinction between legal, moral and social legitimacy allows us to more carefully dissect these claims by uncovering their underlying normative foundations and considering their social function.

¹¹⁴ Ibid 7.

¹¹⁵ Ibid 27.

¹¹⁶ Ibid 9 and 28-33.

B *Three Elements of Legitimacy*

Having established the major categories of legal, moral and social legitimacy, it is worth further breaking them down into their distinctive components. Each conception of legitimacy involves a different permutation of three elements: the legitimated object, the legitimating subject and the basis for legitimacy. This part discusses each of these three elements in turn. In doing so, it seeks to provide the conceptual tools required to bring clarity to how different legitimacy claims are framed and the different ways in which they may reinforce or contradict one another. The section on the bases for legitimacy, in particular, more clearly defines the concepts of input and output legitimacy that are central to this thesis.

1 *Objects of Legitimacy*

Each of the categories provided above differentiate between when legitimacy is applied to actions, norms, actors and systems.¹¹⁷ As Ian Hurd and Katharina Coleman have highlighted,¹¹⁸ the legitimacy of each of these object types can be treated separately, even in the same factual context. Hence, the US invasion of Iraq (an action) could be criticized as morally illegitimate, even by those who still recognized the legitimacy of the US (an actor) as a state and major power, while the US criticized the legitimacy of existing restrictions (norms) on self-defence, while others criticized the Security Council (an institution) for being illegitimate because it failed to prevent the invasion, or the international legal order (a system) for proving so impotent.

The legal, economic, social and cultural links between various objects of legitimacy ensure that what affects one will often affect another. In the short term, however, even intimately connected objects tend to operate, for legitimacy purposes, independently. Hence the WTO's dispute settlement system may be said to enjoy widespread legitimacy even though panels may occasionally issue reports that are considered seriously deficient. Depending on the object of legitimacy, different legitimating mechanisms may apply, and its legitimacy may be subjected to greater or lesser scrutiny. When engaging in legitimacy

¹¹⁷ See Coleman 2007, 20-3. Similarly David Rapkin and Dan Braaten suggest 'actors [...], ideas, ideologies, norms, rules, policies, or actions [...]': Rapkin & Braaten 2009. '[Legitimacy theory] now encompasses acts, persons, roles, and rules, hence the structure of relations and groups, and the groups themselves (particularly important to the legitimation of emerging nations)': Zelditch 2001, 40.

¹¹⁸ Hurd 2007, 40-3; Coleman 2007, 23.

debates, it is thus important to be clear about exactly what one is arguing to be legitimate or illegitimate.¹¹⁹ The main objects of legitimacy addressed in this thesis are the WTO as an institutional whole, the WTO's various organs and WTO law, both separately and in how they relate to one another.

The way that different views of legitimacy may be attached to different objects in the same context helps to account for the quicksilver nature of legitimacy assessments, and why they can be so readily manipulated. A specific decision which may have been considered controversial on its own terms may be justified on the basis that it was issued by a legitimate individual or institution, or because it claims to accord with a legitimate norm, or to have been produced according to a legitimate procedure, notwithstanding its substantive content or its practical effects.¹²⁰ Legitimacy can therefore, often problematically, provide a discursive space for the displacement of responsibility for decisions.

2 *Subjects of Legitimacy and Communities of Legitimation*

Both legal and moral legitimacy assume that there is a subject who should submit to or support the legitimate object. Subjects may vary depending on the particular conception of legitimacy employed. They may, for instance, be citizens of a state, people in a state's territory, or adherents of a particular religion. The subjects of international law have traditionally been considered states, and the subjects of the WTO its Members. More recently, Jeremy Waldron has argued that the world's billions of individuals should be considered the 'true' subjects of international law, in moral if not formal terms.¹²¹

It is important to differentiate the subjects of legal or moral legitimacy from the legitimating community or audience associated with social legitimacy. As discussed above, social legitimacy is constructed from beliefs about legal or moral legitimacy. As such, social legitimacy is only meaningful to the extent that it relates to a given audience. Social legitimacy must be projected *by* someone: '[t]here must be some social group that judges the

¹¹⁹ Samantha Besson notes that '[m]ost accounts [of the authority of international law] focus on the subjects to whom authoritative laws apply and elude the question of whose authority it is. Those few accounts that discuss law-making institutions include among them states and IOs (and other non-governmental actors), but without distinguishing between them and without dissociating their roles between different law-making processes': Besson 2009a, 359.

¹²⁰ See also Flathman 2007, 678.

¹²¹ Waldron 2011, 325-7. See also Parlett 2011.

legitimacy of an actor or action based on the common standards acknowledged by this group'.¹²² The subjects of a given vision of legitimacy and its legitimating community are thus not necessarily co-extensive. Moreover, it is not enough that a given group consider an object to be legitimate or illegitimate; they must judge that it is legitimate according to the same 'common standards' (or at least a similar enough family of reasons to make the concept of community meaningful) to constitute a legitimating community. There can be many legitimating communities for the one object, with differing and overlapping common standards. Nevertheless, certain legitimating communities may be more powerful, or be given a more normatively privileged status, than others. In most democratic frames of reference, for instance, the supreme legitimating community is notionally the voting public. At the international level, the primary legitimating community has long been assumed to be the group of states, although this has increasingly been brought into question.

Changes in understandings of what constitutes the relevant legitimating community over time can have significant implications for how power is distributed.¹²³ Consider the GATT and the WTO — for decades, interest in the workings of the international trading system was largely confined to a select group of trade insiders. Formally, the legitimating community comprised the Contracting Parties (for the GATT) and the Members (for the WTO). Functionally, the legitimating community was made up of the agents of the Contracting Parties/Members and the 'insiders' who had access to such agents: trade officials, diplomats, lobbyists, academics. Robert Howse notes how this allowed for the exercise of power in the multilateral trading order to be legitimated on technocratic grounds.¹²⁴ Yet as Robert Keohane and Joseph Nye note, this 'club model' was soon to fracture.¹²⁵ As the international trading system pushed further into areas (such as public health and the environment) that were previously considered the exclusive domain of domestic regulators, the system drew the attention of outsiders who were not satisfied by the technocratic model. The formal legitimating community still comprises the WTO Members, but in substance there are now several legitimating communities competing to take the WTO in radically different directions: the trade policy insiders vie with, among others, human rights activists, officials from

¹²² Coleman 2007, 24. Steffek denotes these as the 'dispensers of legitimacy': Steffek 2000, 57.

¹²³ See esp Clark 2007.

¹²⁴ Howse 2002a.

¹²⁵ See Keohane & Nye 2001.

developing countries, other intergovernmental organizations, anti-globalization protestors and environmental lobby groups.¹²⁶ The proliferation of these legitimating communities requires a careful rethinking of the grounds for the WTO's moral legitimacy to accommodate its new realities.¹²⁷

3 *The Bases of Legitimacy*

The third element is the basis for legitimacy; that is, the grounds on which an object is determined to be legitimate. One way to categorise the bases of legitimacy is to distinguish between *procedural* (or *process-based*), *substantive* and *outcome-based* forms of legitimacy.¹²⁸ Another, as preferred in this thesis, is to differentiate *input* and *output* legitimacy. This latter differentiation more clearly and consistently articulates the relationship between law, legal process and legitimacy; a relationship which is sometimes lost in discussions of substantive and outcome-based legitimacy. These categories reflect families of legal, moral and social legitimacy narratives that are qualitatively different in their scope and application. Given the prevalence of the tripartite distinction between procedural, substantive and outcome-based legitimacy it is nonetheless instructive to elaborate on these categories first, before proceeding to the input/output legitimacy distinction.

i *Procedural, Substantive and Outcome-Based Legitimacy*

Procedural legitimacy is concerned with the mechanisms by which power is conferred and exercised.¹²⁹ It prioritizes the formal validity of power, focusing on secondary rules about the making, changing and destruction of laws, and the appointment and removal of officials. In Thomas Franck's words: 'A process, in this sense, is usually set out in a superior framework of reference, rules about how laws are made, how governors are chosen and how public

¹²⁶ See also Rapkin & Braaten 2009, 117-20.

¹²⁷ In practice, this has resulted in an extensive literature on democratic legitimacy and the WTO: see, eg, Housman 1994; Krajewski 2001; Charnovitz 2002; Howse 2003a; Zampetti 2003; Petersmann 2004; Elsig 2007b; Sing 2008.

¹²⁸ Cf Franck 1990, 17-18 (process-based, procedural-substantive, and outcome-based); Ian Hurd 2007, 66-73 (process-based, fairness-based, and outcome based); Wolfrum 2008, 6 (citations omitted) (source-based, procedural, result-oriented); Clark 2005, 18-19 (procedural and substantive).

¹²⁹ Lawrence Friedman asserts that only procedural, input-based legitimacy is relevant to determining the legitimacy of a legal institution or system: Friedman 1977, 139.

participation is achieved'.¹³⁰ Weber's articulation of social legitimacy was famously process-based, as it focused on types of legitimacy that arise by reference to particular sources, rather than to the substance of the rules or actions generated by those sources. Franck also adopted a largely procedural approach to rule legitimacy with his criteria of coherence, consistency, adherence and symbolic validation.¹³¹

Procedural legitimacy is closely tied to the source of commands, rules and actions, as performed by various actors through given rituals. In the international sphere, both international law and the multitude of diplomatic practices represent different process-based forms of legitimation. The most commonly articulated archetypes of procedural legitimacy in the domestic realm (and in Europe) are the various forms of democratic legitimacy,¹³² while in international law they are those of consent.¹³³ The procedural approach to legitimacy helps to explain why actors are willing to support particular power relationships over others even when they fail to serve their substantive interests in specific instances. Legal legitimacy, at least as conceived by the positivists, represents a particularly prominent form of process-based legitimacy. Law is the ultimate vessel for procedural legitimacy, as it claims an obligation to comply notwithstanding its substance.

The procedural approach may be concerned narrowly with the 'correctness' of procedure as measured against procedural rules,¹³⁴ which may in turn be understood as reflecting a given substantive aim (eg democratic representation, or the rule of law). It stops short, however, of interrogating the desirability of a given substantive aim. Once a system or institution is constructed, its background norms are often taken for granted and its procedures are followed for their own sake without deeper consideration of whether they are serving a more fundamental substantive aim or resulting in the best outcomes.

Substantive legitimacy, by contrast, is more directly interested in the aim served by the object of legitimation. It can take on expressive or instrumental forms. Ernst Haas proposes a clearly substantive (expressive) form of legitimacy when he claims that '[o]rganizational legitimacy exists when the membership values the organization and generally implements

¹³⁰ Franck 1990, 17.

¹³¹ Ibid.

¹³² See, eg, Bekkers et al 2007; Scharpf 1999; Barnard 2001.

¹³³ See, eg, Brierly 1958.

¹³⁴ Hurd 2007, 71.

collective decisions because they are seen to implement the members' values'.¹³⁵ The archetypal form of substantive legitimacy is concerned with justice (or substantive fairness),¹³⁶ but it is also reflected in work that seeks to critique or justify given rules or institutions on the basis of human rights,¹³⁷ development,¹³⁸ global welfare¹³⁹ or indeed trade liberalization.

The instrumental, rather than the expressive, aspect of substantive legitimacy is sometimes framed as *outcome-based legitimacy*. This form of legitimacy judges the object seeking legitimation in terms of a given set of outcomes that are considered desirable. Franck, in describing work focused on outcomes-based legitimacy, notes that writers in this tradition claim that 'a system seeking to validate itself — and its commands — must be defensible in terms of the equality, fairness, justice and freedom which are realized by those commands'.¹⁴⁰ The boundaries of outcome-based legitimacy are occasionally blurred by a failure to distinguish between legitimacy based on actual, measurable outcomes and legitimacy based on potential outcomes. Purely outcome-based legitimacy, however, can focus almost exclusively on outcomes, and tends to ignore how those outcomes may be shaped by processes. The concept of output legitimacy, however, is not limited in this way; as can be seen in the following section.

ii *Input and Output Legitimacy*

A similar but separate distinction, and key for this thesis, is drawn between *input* and *output*-based forms of legitimacy. The input/output distinction was developed by Fritz Scharpf in the

¹³⁵ Haas 1990, 87.

¹³⁶ Allen Buchanan, for instance, argues for understanding legitimacy as being very closely linked to justice when assessing the legitimacy of international institutions. Although he does claim that the concepts are analytically distinct, he distinguishes them only inasmuch as '[j]ustice is an ideal standard, whereas legitimacy expresses a threshold value, in a non-ideal world, for the conditions under which an institution has the right to rule': Buchanan and Keohane 2008, 34. See also Buchanan 2004.

¹³⁷ See, eg, Petersmann 2000b.

¹³⁸ See, eg, Fakhri 2009.

¹³⁹ See Cottier 2008, 9.

¹⁴⁰ Franck 1990, 18. Franck described outcome-based legitimacy as the favoured category of 'neo-Marxist philosophers and related students of radical social restructuring [...] In this view, a system seeking to validate itself — and its commands — must be defensible in terms of the equality, fairness, justice and freedom which are realized by those commands': Franck 1990, 18. See also Wolfrum 2008, 7.

context of analysing the ‘democratic deficit’ in the EU.¹⁴¹ Input-oriented legitimacy, for Scharpf, refers specifically to the concept of ‘government *by the people*’.¹⁴² It is identity-based, and emphasizes norms of participation and consensus. Output legitimacy instead refers to ‘government *for the people*’, which ‘derives legitimacy from its capacity to solve problems requiring collective solutions’ that are unable to be solved via individual action, market exchanges or voluntary cooperation.¹⁴³ It is more interest-based, and emphasizes mechanisms of expertise and accountability. The procedures associated with the efficient and effective implementation of such outputs are sometimes encompassed by the terminology of output legitimacy and sometimes referred to as their own category of ‘throughput’ legitimacy, using a term borrowed from systems theory.¹⁴⁴ The ‘throughput’ terminology is largely avoided in this thesis, however, as the concepts of input, throughput and output used in systems theory tend to differ significantly from the political definitions advanced by Scharpf and others as well as from how these terms have been deployed in relation to the WTO to date.

Other writers have adopted the terminology of input and output legitimacy but expanded it beyond the democratic context,¹⁴⁵ such that input legitimacy derives from the identity-based aspects of a rule- or decision-making process,¹⁴⁶ while output legitimacy includes any form of legitimacy that is validated on the basis of how the practical consequences of such rule- and decision-making serve a defined set of interests. For Scharpf, this is ‘government for the people’. Victor Bekkers and Arthur Edwards, continuing in this mode, point to several commonly pursued outcome categories, including government effectiveness, efficiency and responsiveness.¹⁴⁷ For the WTO it is arguable that much of its moral and social legitimacy (such as it is) derives from the claims that its rules have successfully increased global welfare through reducing trade barriers. The difference between this and the substantive or outcome-based categories identified above is the continued focus on the relationship between aims,

¹⁴¹ See generally Scharpf 1999.

¹⁴² Ibid 6.

¹⁴³ Ibid 11.

¹⁴⁴ See, eg, Schmidt 2010.

¹⁴⁵ Keohane & Nye 2001; Kelly 2008, 608.

¹⁴⁶ Victor Bekkers and Arthur Edwards characterize input legitimacy as largely being concerned with ‘the normative idea of “government by the people”’, relating to norms of quality of representation, participation and openness: Bekkers & Edwards 2007, 44-5.

¹⁴⁷ Bekkers & Edwards 2007, 45.

outcomes, and the processes that bridge the two. Output legitimacy in its original incarnation directly included the idea of *government* for the people. Its application in the international sphere instead looks to the mechanisms of governance, and the question of who those mechanisms is intended to benefit remains hotly debated.¹⁴⁸

Drawing on these more expansive approaches, this thesis defines input-oriented legitimacy narratives as those concerned with identity-based concerns about who or what may wield legitimate rule- or decision-making authority. Input legitimacy narratives therefore emphasize processes of consent, representation, participation and accountability. Such narratives operate independently of justifications based on whether the resulting rules and decisions are just, efficient or effective. Institutional and legal structures may enjoy input legitimacy if the views of an agreed set of stakeholders have been channelled in an appropriate manner during the law- and decision-making process. What is considered appropriate will depend on the particular conception of legitimacy that is being advanced. The idea that the legitimacy of international law rests on state consent, for instance, provides the quintessential example of an input-oriented legitimacy narrative in the international sphere. Similarly, certain calls for the democratization of WTO processes, which variously seek to trace legitimate authority back to ‘the people’, provide other, more recent input legitimacy narratives.¹⁴⁹ These narratives and their limits are explored, respectively, in Chapters Three and Four.

By contrast, output-oriented legitimacy narratives are those concerned with the outcomes of rule- and decision-making, and justify processes according to their ability to produce desirable outcomes in an efficient and effective manner. Whereas for Scharpf this entailed ‘government for the people’, as a concept output legitimacy need not direct what constitutes a ‘desirable’ outcome as such. It may be left to others to determine the normative principles that give shape to what is considered desirable. Output-oriented legitimacy narratives will thus emphasize procedures relating to competence/expertise, deliberation, and enforcement, among

¹⁴⁸ For a claim that the output legitimacy of international organizations should serve the global public interest, see Steffek 2015.

¹⁴⁹ Not all democratic legitimacy narratives are purely input based. In particular, deliberative democracy narratives tend to have an output legitimacy component, as they are also concerned with the quality of decision making.

others. The moral and social legitimacy claims relating to output legitimacy and the WTO are examined more fully in Chapters Five, Six and Seven.

Some narratives of legitimacy incorporate both input- and output-oriented elements. Deliberative democratic legitimacy narratives, for instance, emphasize the importance of popular representation, participation and deliberation as inherently valuable, but also stress their instrumental value. That is, norms of representation, participation and deliberation reflect a set of political ideals that are considered valuable in themselves (although opinions as to who gets to be represented, to participate and deliberate may differ), but also may be understood as enhancing the quality of decision-making by allowing for the contestation of ideas and reflexive decision-making. Input and output legitimacy do not operate in isolation from one another, and indeed specific approaches to moral and social legitimacy may provide room for both. It is important that the two not be seen as mutually exclusive. The distinction between input- and output-based forms of legitimacy is particularly central to this thesis. Both forms of legitimacy affect the perception of WTO law in different ways, and influence the development of WTO law according to very different logics. To date, most of the scholarship on the legitimacy of the WTO has focused on strengthening input-based legitimacy mechanisms, without emphasising the limits of such input legitimacy mechanisms and to the neglect of output legitimacy mechanisms. A stronger focus on output-based aspects of the WTO's legitimacy, and a deeper consideration of the dynamic interrelation between input legitimacy, output legitimacy and WTO law, has the potential to alter the way we view our understandings of the WTO's role in the world and the various proposals for the WTO's reform.

C Distinguishing Legitimacy and Compliance

Having established the central components of the concept of legitimacy, it is important to distinguish between the aims of legitimation and compliance. Much of the wave of legitimacy scholarship in international law has directed itself towards the problem of compliance. Franck, for instance, identified his 'working definition' of legitimacy as

a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule

of institution has come into being and operates in accordance with generally accepted principles of right process.¹⁵⁰

The emphasis here is on the beliefs of ‘those addressed’ and their capacity to facilitate compliance with international law, although it is worth emphasising that Franck never lost sight of the moral component of social legitimacy.¹⁵¹ A similar emphasis on the relationship between social legitimacy and compliance with international law may be found in the work of Harold Koh,¹⁵² Antonia and Abram Chayes,¹⁵³ and Jutta Brunnée and Stephen Toope.¹⁵⁴

The direct association between compliance and legitimacy can become problematic, however, when compliance is taken as the end in itself and the underlying reasons for compliance are ignored. This undermines opportunities for critical reflection on the values and purposes of international law and dispenses with the possibility of articulating alternative approaches to global problems. Compliance should never be taken as an independent normative goal in itself — it is only a tool for the achievement of other goals.¹⁵⁵ Koskenniemi cites a note of caution about focusing on compliance to the exclusion of other considerations, as it results in a ‘managerial position that no longer questions the need for “compliance” and is only concerned over the “legitimacy” of institutions to which everyone is assumed to have already committed’.¹⁵⁶ The concept of social legitimacy does not in itself, however, necessitate such a limited view. Social legitimacy relates to beliefs about normative legitimacy. As such, debates about legitimacy should point not only to how compliance may be maximized, but also to more fundamental questions about why laws and institutions are worthy of compliance at all. It also raises questions as to how legal processes can be used to

¹⁵⁰ Ibid 24.

¹⁵¹ ‘When it is asserted that a rule or its application is legitimate, two things are implied: that it is a rule made or applied in accordance with right process, and *therefore* that it ought to promote voluntary compliance by those to whom it is addressed. It is *deserving of validation*.’: Franck 1995, 26 (emphasis added).

¹⁵² See, eg, HH Koh 1997.

¹⁵³ See, eg, Chayes & Chayes 1995.

¹⁵⁴ See, eg, Brunnée & Toope 2010.

¹⁵⁵ For an example of a focus on compliance to the exclusion of legitimacy, see Posner 2005; cf Helfer & Slaughter 2005.

¹⁵⁶ Koskenniemi 2011, 320.

generate a sense of legal obligation that extends beyond a mere acknowledgement of legal validity.¹⁵⁷

As such, it is important to clearly distinguish between legitimacy as a reason for action and alternative reasons for compliance, including coercion, self-interest and habit. Differentiating between social legitimacy and these alternative reasons for action highlights the independent analytical and social value of legitimacy.¹⁵⁸ Careful differentiation of these factors also helps to reinforce the important difference between legitimacy and compliance, and provides some protection against Koskeniemi's charge that 'legitimacy is indifferent to the conditions of its existence: fear, desire, manipulation, whatever'.¹⁵⁹

1 *Legitimacy vs Coercion*

Coercion may be defined as what occurs when one actor causes another to act against their will, usually by the application or threat of harm to that actor or something/one that they value.¹⁶⁰ The motivation here is not one of belief, incentive or persuasion, but rather one of fear.¹⁶¹ Coercion is distinct from legitimacy in that it forces obedience even when a subject does not believe such obedience to be normatively justified. Both motivations can, however, act in tandem. Indeed, a significant portion of the legitimacy literature focuses on precisely this point, treating legitimacy as concerned with the justification of specifically coercive power.¹⁶² In this, the literature parallels much of the traditional scholarship which identifies power with coercion, as discussed above in Part II(A). Even now, much of the literature

¹⁵⁷ See Brunnée & Toope 2010, ch 3.

¹⁵⁸ See Kratochwil 1984; Nanz & Steffek 2004; Elsig 2007b, 80. See also Weber: 'But custom, personal advantage, purely affectual or ideal motives of solidarity, do not form a sufficiently reliable basis for a given domination. In addition there is normally a further element, the belief in legitimacy. Experience shows that in no instance does domination voluntarily limit itself to the appeal to material or affectual or ideal motives as a basis for its continuance. In addition every such system attempts to establish and cultivate a belief in its legitimacy': Weber 1968, 213.

¹⁵⁹ Koskeniemi 2009a, 409.

¹⁶⁰ For a more detailed account, see Nozick 1969; Anderson 2006.

¹⁶¹ See Hurd 2007, 35.

¹⁶² See, eg, Ripstein 2004. Weber defined the state as 'the form of human community which (successfully) lays claim to the *monopoly of legitimate physical violence* within a particular territory': Weber 2004, 33 (emphasis in original).

relating legitimacy and international law is expressly concerned with the legitimate use of force across state boundaries.¹⁶³

John Austin and several subsequent generations of legal positivists based the law's obligatory power on coercion (as manifested through sanctions). For Austin, only those orders capable of enforcement via centralized coercion deserved the designation of 'legal' order. He proposed a chain of positive legal legitimacy that was ultimately held to rest not on any form of belief or moral justification but the mere fact of coercive power.¹⁶⁴ Austin excluded laws that were not backed by sanction from law 'properly so called' and dismissed them as either 'imperfect laws'¹⁶⁵ or 'positive morality', thereby lacking in obligatory character.¹⁶⁶ Coercion could thus be considered to cover the field when it came to evaluating reasons for compliance with the law, which would make the study of legitimacy redundant. Austin thus separated the validity of a legal order from its acceptance by a population. Even if this approach were to be adopted, it would not provide a reason for ignoring legitimacy in relation to international law, which Austin included in the category of 'positive morality'. Franck highlights that it is this very exclusion of international law from systematized coercion that makes it such a fruitful subject for the study of legitimacy.¹⁶⁷

Kelsen also defined law as a normative coercive order. Although he recognized the psychological internalization of legal norms by individuals — norms could '[become] the product of a man's consciousness' — he did not recognize this as leading to independent reasons for action beyond coercion. Kelsen did, however, distinguish between different forms of coercion, recognising psychological coercion as well as coercion in the form of sanctions. He was thus able to generate the apparent paradox that '[v]oluntary obedience is itself a form of motivation, that is, of coercion, and hence is not freedom, but it is coercion in the psychological sense'.¹⁶⁸

¹⁶³ See Armstrong 2006; Falk, Juergensmeyer & Popovski 2012, pt 2.

¹⁶⁴ Except for the moment of identification of the sovereign, who could be recognized as enjoying the habitual obedience of the population: Austin 1995, lecture I.

¹⁶⁵ Ibid 27-8.

¹⁶⁶ Ibid 11-12.

¹⁶⁷ Franck 1990, 19.

¹⁶⁸ Kelsen 2007, 18-20.

Hart, in criticising and building on Austin's theories, moved the debate on from simple coercion. On the one hand, he highlighted that not all laws are coercive in nature.¹⁶⁹ There are laws that are followed for reasons other than the threat of sanction. Hart also illustrated that it was not enough for commands backed by coercive sanction to constitute a legal order. There must be some other factor that allows us to accept the coercion backing a legal order but not the coercive threats of, say, a gun-wielding bank robber. For Hart, the determinative mechanism was the rule of recognition — the founding social fact of legal legitimacy. Moving even further, Leslie Green argues that in contemporary legal systems coercion provides only a secondary motivation for obedience and support, as a mere 'reinforcing motivation when the political order fails in its primary normative technique of authoritative guidance'.¹⁷⁰ This suggests that narratives of moral and social legitimacy, and the legal processes that embody and produce them, play a central role in producing this sense of obligation and commitment.

2 *Legitimacy vs Self-Interest*

Self-interest¹⁷¹ provides a third reason for action, based on the calculation of personal advantage. Self-interest is much favoured by international relations realists,¹⁷² who often dismiss the effect of international norms on state behaviour. This approach tends to treat actors as profoundly egoistic and focuses largely on material interests.¹⁷³ The idea is that individuals and states make decisions as to whether to obey or support norms, actions or institutions based on 'an instrumental and calculated assessment of the net benefits of compliance versus noncompliance, with an instrumental attitude toward social structures and

¹⁶⁹ Contrasting coercive laws with facilitative laws such as those governing contract or marriage: Hart 1994, 27-33.

¹⁷⁰ Green 1988, 75.

¹⁷¹ See also Weber's discussion of 'expediency' in Weber 1968, 37.

¹⁷² Hurd 2007, 37.

¹⁷³ See, eg, Weber: 'Purely material interests and calculations of advantages as the basis of solidarity between the chief and his administrative staff result, in this as in other connexions, in a relatively unstable situation': Weber 1968, 213. See also Steffek 2003, 6. Cf Goldsmith & Posner 2005, who include reputational interests as part of a game theoretical approach to understanding order in international relations. They nonetheless express concern that 'scholars sometimes lean too heavily on a state's reputational concern for complying with international law': at 102 (emphasis omitted).

other people'.¹⁷⁴ One of the clearest articulations of this position in international law comes from Jack Goldsmith and Eric Posner, who argue that 'international law does not pull states toward compliance contrary to their interests, and the possibilities for what international law can achieve are limited by the configurations of state interests and the distribution of state power'.¹⁷⁵ Both Joel Trachtman and Gregory Shaffer have also engaged specifically with rationalist explanations for how the WTO operates.¹⁷⁶

Ian Hurd describes the key difference between self-interest and coercion as lying in their different outcomes. The application of coercion leaves an actor worse off than previously, whereas the application of self-interest leaves an actor better off. Moreover, Hurd distinguishes between self-interest and legitimacy by analogy to the distinction between interest and self-interest. Although legitimacy can be understood to encapsulate a set of interests, *self*-interest assumes a narrowly egoistic attitude on the part of the relevant actor.¹⁷⁷ The self-interested actor ignores normative structures in favour of maximally improving its own situation '*de novo* at each decision point'.¹⁷⁸ Self-interest therefore represents a narrowly instrumentalist view which dismisses the relevance of the interests of others.

As with coercion, legitimacy has a dual relationship to self-interest. On the one hand it provides a parallel — occasionally complementary, occasionally competing¹⁷⁹ — reason for action. On the other hand, it provides a framework for analysing how interests come to be seen as self-interests.¹⁸⁰ Beyond the basic necessities of survival (and not always then), there is nothing inevitable about what is conceived of as self-interest. Is it better to be materially rich in life, or to follow a moral code prohibiting riches which nonetheless guarantees a

¹⁷⁴ Hurd 2007, 37.

¹⁷⁵ Goldsmith & Posner 2005, 13; cf van Aaken 2006.

¹⁷⁶ See, eg, Shaffer & Trachtman 2011; cf Cho 2012.

¹⁷⁷ Ibid 38, citing Jenks 1990 and Wendt 1999.

¹⁷⁸ Ibid 39.

¹⁷⁹ Daniel Bodansky argues that 'self-interest cross-cuts the distinction [...] between rational persuasion, power, and legitimacy. As Professor Keohane noted, one of the reasons why states might agree to subject themselves to the authority of an international institution, and consider its authority legitimate, is that they think such institutions are in their self-interest': Bodansky 2008, 312, referring to Robert Keohane's comments in Wolfrum & Röben 2008, 104. Steffek notes that 'Franck runs into conceptual difficulties when he introduces state interests to explain compliance pull of rules, rather than sticking to rule-inherent factors' (citation omitted): Steffek 2003, 4 fn 4.

¹⁸⁰ See Wendt 1999, 92-138: 'the content of interests are in turn constituted in important part by ideas'.

blissful afterlife? Does following IMF requirements necessarily result in the best economic and social outcomes, or are there more worthwhile ways to restructure an economy to serve human interests? Legitimacy provides a vocabulary for exploring who gets to make the decisions about what lies in an individual or state's self-interest. Self-interest, conversely, may also affect the extent to which people perceive a rule, ruler or system as morally legitimate. A continued failure to satisfy the self-interests of a large enough community will invariably suggest a failure of output legitimacy and spark a reconsideration of existing processes.¹⁸¹ Yet rule may be easier to sustain if the ruled think that the established relationship of rule tracks their self-interests. Appeals to either legitimacy or expediency alone are much less effective at maintaining stability and obedience over time.

3 *Legitimacy vs Habit*

A fourth reason for action is that of habit. Although addressed by Weber,¹⁸² habit has received less attention in the more recent writings on legitimacy. The ideas of coercion, self-interest and legitimacy discussed above all assume a level of conscious reflection about a given subject's reasons for action. Yet, as Weber notes, '[i]n the great majority of cases actual action goes on in a state of inarticulate half-consciousness or actual unconsciousness of its subjective meaning'.¹⁸³ Consequently, much of the time actors take actions not on the basis of conscious fear, or moral rectitude, or the promise of material gain, but simply out of unreflective habit. This may be justified by the understanding of habit as involving the unthinking extension of an initial conscious reason for acquiescence. The possibility of any of

¹⁸¹ Beetham echoes Hart's gunman metaphor in this context: 'To explain all action conforming to rules as the product of a self-interested calculation of the consequences of breaching them, it to elevate the attributes of the criminal into the standard for the whole of humankind': Beetham 1991, 27.

¹⁸² Weber notes that '[s]trictly traditional behaviour [...] lies very close to the borderline of what can justifiably be called meaningfully oriented action, and indeed often on the other side': Weber 1968, 25 and 29. The border between the two is particularly blurry in the case of legitimacy based on tradition, in which the way things are done is legitimated because that is the way that things have been done before.

¹⁸³ Ibid 21. Habit is not the same thing as legitimacy based on custom, or tradition, which involves the conscious formulation of a belief that a thing is normatively justified based on the inherent value of custom or tradition.

legitimacy, self-interest, or coercion forming the basis for habit, however, highlights the danger in inferring social legitimacy from mere public acquiescence to authority.¹⁸⁴

Overall therefore, social legitimacy may provide a reason for complying with law that is conceptually distinct from coercion, self-interest, and habit. Moreover, specific conceptions of what is legitimate may be used to shape understandings of what is coercive or what is in one's self-interest, or to help constitute the psychological space in which unreflexive habit takes over. As such legitimacy can make a distinctive contribution to debates about compliance, as long as one avoids the assumptions that compliance implies legitimacy or that with legitimacy comes compliance.

IV CONCLUSION

This chapter has attempted to clarify some of the distinctions between the different uses of the terms 'power' and 'legitimacy' in relation to the WTO, WTO law and general international law. In particular, it has argued that power is exercised through a complex constellation of forms, agents and settings in and through the WTO in a way that undermines claims about the powerlessness of the WTO. Questions about legitimacy, meanwhile, may be understood as questions about the justificatory frameworks behind the creation, interpretation and application of law. That the word legitimacy has been used indiscriminately and ambiguously by various actors is no argument against its utility, or potential for analytical clarity. If it were, it would also be necessary to throw out any number of other concepts ranging from justice, to equality, to freedom. As one of the prime motivators for international action, alongside coercion, self-interest and habit, it occupies a central position in our understandings of the stability and effectiveness of legal regimes, including the WTO. It can also point the way to more fundamental questions about why institutions such as the WTO may or may not be worthy of compliance or support, or how particular rules should be drafted or implemented. The remainder of this thesis will now focus on how specific conceptions of input and output legitimacy have been used to frame debates about the legitimacy of the WTO, and the implications of such framing for WTO law.

¹⁸⁴ O'Kane 1993, 475-6.

PART TWO

Input-Oriented Legitimacy Narratives

CHAPTER THREE:

CONSENT AND ITS LIMITS

I INTRODUCTION

Chapter Two unpacked the concepts of power and legitimacy and how they relate to debates about WTO law and international law more generally. From here, Chapters Three and Four respectively explore the most prominent and regularly invoked input-oriented bases for the moral and social legitimacy of the World Trade Organization: consent and democracy. Narratives of consent provide the paradigmatic legitimating narrative for world trade law as it is, while narratives of democracy are frequently invoked in relation to world trade law as it should be. These narratives are deeply tied to corresponding sets of rules, procedures and practices which purportedly enshrine the values of consent and democracy. Both sets of narratives, however, suffer serious normative and descriptive deficiencies when applied in the WTO context, and tend to ignore or at least defer important questions of substance and outcome.

There is an initial appeal to the idea that state consent can provide a solid legal and moral grounding for the legitimacy of WTO law. Consent at the international level provides a superficial parallel to several of the dominant social contract justifications for the legitimacy of the domestic state. It also appears, at least upon first inspection, to reaffirm key international law principles such as sovereign equality, non-interference, and self-determination. Moreover, consent-based decision-making processes lie at the heart of WTO rule- and decision-making. Closer examination, however, suggests that consent alone has a much weaker and more limited capacity for legitimation than is generally assumed, particularly when dealing with something as complex and far-reaching as WTO law. Moreover, the form that the consent narrative has taken in the WTO has largely been one of arid formalism. This, in turn, has undermined the social legitimacy of the WTO for several of its legitimating communities.

This chapter highlights the central role played by narratives of consent as providing the moral and social basis for legitimating the WTO's authority. In the process, it demonstrates that although consent does play an important discursive, formal, and even moral role in legitimating WTO rule- and decision-making, it nonetheless suffers from clear normative and

descriptive limits. Part II traces the emergence of consent as one of the most prominent narratives of legitimation for both the nation-state and for international law and institutions. It also highlights the extent to which actors rely on the idea of consent to justify the exercise of the WTO's power, and the various procedures used to preserve and channel Member consent in WTO rule- and decision-making procedures. Part III draws attention to seven key normative and descriptive deficiencies of consent-based legitimacy: (1) the inability of consent to account for law's normativity; (2) the artificial identification of sovereign will with law; (3) the agency costs associated with consent; (4) the overly Member-centric nature of consent; (5) consent as obscuring alternative settings for power; (6) the tension between formal and substantive conceptions of consent; and (7) consent as failing to address matters of substance and outcome. The Chapter thereby draws attention to the limitations of consent narratives for legitimating the WTO's authority as well as the failure of the WTO to live up to even the minimal requirements of consent-based narratives. In the process, it seeks to open up space for considering alternative approaches to the legitimacy of the WTO.

II CONSENT-BASED LEGITIMACY NARRATIVES

A *Consent and the Domestic State*

Theories of consent have been central to authority of the state for centuries. Consent ascended as one of the dominant discourses of political legitimacy in the seventeenth century, largely displacing discourses of divine right and natural reason.¹ At the domestic level, Thomas Hobbes' conception of the social contract saw individuals — free and in a state of nature — consent to obey the state in exchange for protection.² This position was modified and more fully developed by John Locke, who argued that individuals consented to delegate their powers of self-preservation to impartial sovereign to regulate conflicts and protect property.³ A more mystical strand of consent was soon developed by Rousseau,⁴ who saw consent as expressed via submission to the state, which was in turn conceived of as the embodiment of the collective will (thus allowing for a congruence between the authors and the subjects of the

¹ See Peter 2010.

² See generally Hobbes 1914.

³ See generally Locke 1988.

⁴ Raz divides consent theory into two traditions; the instrumental approach advocated by Hobbes and Locke, and the non-instrumental, ontological approach deriving from Rousseau: Raz 1988, 80.

law). In contrast to Locke, for Rousseau the concept of will was inalienable, and could only be realized through participation in the collective. Both of these strands have been developed over the centuries by thinkers from Kant,⁵ to Rawls,⁶ to Nozick.⁷ It is beyond the scope of this thesis to provide a full account of these theories.

The criticism of consent theories has just as long and illustrious a history. David Hume launched an attack on Locke's social contract writings as soon as they were published. Hume pointed out that, as a historical matter, the authority of most states is founded on violence, not on spontaneous acts of consent.⁸ Moreover, for most people, the lack of alternatives and the practical impossibility of exit from the political system made the idea of consent meaningless.⁹ Hume thus saw consent as both descriptively inaccurate and normatively inadequate.¹⁰ Later, Antonio Gramsci saw consent as a 'mask' for coercion essential to the maintenance of hegemony. The idea of consent was thus viewed as artificial and deceptive.¹¹ More recently, Joseph Raz¹² has criticized consent on several grounds: that it is often tainted by duress; that it merely reinforces other instrumental reasons for fidelity to authority; that it masks important substantive reasons to disobey authority; and the meaninglessness of 'consenting' in a way that 'binds for life, is open-ended, and affects wide-ranging aspects of a person's life'.¹³ As such, he argues that consent 'can have no more than a marginal

⁵ See especially Kant 1991, 73-87.

⁶ See generally Rawls 1999.

⁷ See Nozick 1974, ch 6.

⁸ Hume 1994, 188-91.

⁹ Ibid 193-4.

¹⁰ Hume did acknowledge the normative value of consent: 'My intention here is not to exclude the consent of the people from being one just foundation of government where it has place. It is surely the best and most sacred of any. I only contend that it has very seldom had place in any degree and never almost in its full extent. And that therefore some other foundation of government must also be admitted': *ibid* 192. Matthew Lister argues that Hume's objections to Locke's social contract approach do not transfer to the international sphere: Lister 2010, 676-80.

¹¹ Gramsci 1992, §§ 47-8.

¹² Raz's distinctive approach to legitimacy, based on his 'normal justification thesis', has recently proven attractive to public international lawyers for whom consent has always appeared a weak ground for legitimacy: see especially Tasioulas 2010, 100-03; Besson 2009a.

¹³ Raz 1988, 90.

ceremonial, as well as an auxiliary and derivative, role' in justifying the authority of law.¹⁴ Despite these criticisms, Lockean and Rousseauian approaches to consent and popular sovereignty remain deeply embedded in the popular consciousnesses of democratic states and remain at the heart of academic debates over legitimate authority.

B *Consent and International Law*

Consent-based approaches to international law rose to prominence in tandem with their domestic law counterparts.¹⁵ Grotius, although still tied to the natural law tradition, advocated consent as the basis for government at both the domestic¹⁶ and international levels,¹⁷ although as Brierly noted he 'did not regard consent as its ultimate or independent basis'.¹⁸ Over time, although consent continued to feature in natural lawyers' discussions of law, the idea that consent (as the manifestation of, and way of transmitting, sovereign will)¹⁹ provided the foundation for obligation in international law became increasingly tied²⁰ to the legal positivists.²¹ This development was accompanied by the consolidation of the central role of

¹⁴ Raz 1987, 93. Raz defines consent as 'consent to a change in the normative situation of another — to a change in his rights and duties': Raz 1988, 80.

¹⁵ See generally Hall 2001. For a discussion of the role of 'sacral obligation' and international law prior to and during the ascendance of consent as the main signifier of obligation, see Reus-Smit 2003, 615-20.

¹⁶ 'But as there are several Ways of Living, some better than others, and every one may chuse which he pleases of all those Sorts; so a People may chuse what Form of Government they please: Neither is the Right which the Sovereign has over his Subjects to be measured by this or that Form, of which divers Men have different Opinions, but by the Extent of the Will of those who conferred it upon him': Grotius 2004, 64.

¹⁷ Hersch Lauterpacht noted that the Grotian approach to international law is characterized in part by the recognition that 'the binding force of even that part of [international law] that originates in consent is based on the law of nature as expressive of the social nature of man': Lauterpacht 1946, 21.

¹⁸ Brierly 1958, 10.

¹⁹ See Bederman 2002, 14.

²⁰ Note that while there has been a tendency to link the ideas of consent and positivism, there is no necessary connection between the two. There have been positivists who locate the source of the law's normativity outside of consent (eg Raz). See Leslie Green's argument to this effect in Green 1989, 796. See also Priel 2010.

²¹ Similarly, Bruno Simma and Andreas L Paulus outlined the 'classic' voluntarist approach to international law as: 'the association of law with the emanation of state will (voluntarism). Voluntarism requires the

the state in international law discourse, and the idea that states were ‘individuals writ large, as autonomous, free and equal actors, each rationally pursuing their own exogenously determined interests’.²² Until the early twentieth century, the focus of consent was on creating order between equal sovereigns — *pacta sunt servanda* was an instrumental doctrine for ensuring the smooth running of the major powers’ empires and their relationships with one another.²³

One of the first to investigate the relationship between consent and international law systematically was the nineteenth century jurist Georg Jellinek. For Jellinek, the binding force of international law — indeed its very legal character — relied on its status as an emanation of state will.²⁴ Jellinek proposed that there were no per se limits to the exercise of sovereign will on the international plane. This unfettered autonomy of sovereign will meant that states were also able to bind themselves by voluntarily limiting their own sovereignty.²⁵ Jellinek’s theory also, however, allowed for states to retract any self-limiting actions, to return to their previous unlimited state. It was thus considered normatively self-defeating.²⁶

Soon after, Heinrich Triepel proposed an alternative way of conceiving of consent²⁷ which replaced the idea of self-limitation with that of voluntary submission to a collective

deduction of all norms from acts of state will: states create international norms by reaching consent on the content of a rule’: Simma & Paulus 2004, 25 (citation omitted). See also Wolfrum 2008, 6.

²² Reus-Smit 2003, 599.

²³ As such, the version of consent espoused by international lawyers at the time had little to do with popular sovereignty, and better reflected a vision of direct consent by state-embodiment monarchs.

²⁴ See generally Jellinek 1880. Cf Koskenniemi 2005, 125-30.

²⁵ Koskenniemi describes Jellinek’s voluntarism as a representation of a ‘pure fact’, rather than ‘legal’, approach to sovereignty, in that it assumes that sovereignty is external to law rather than constituted by law: Koskenniemi 2005, 228-33.

²⁶ Hart noted that these voluntarist approaches were ‘the counterpart in international law of the social contract theories in political science’, in that they ‘attempted to reconcile the (absolute) sovereignty of states with the existence of binding rules of international law, by treating all international obligations as self-imposed like the obligation which arises from a promise’: Hart 1994, 224. In referring to the ‘social contract’ here, Hart appears to be referring to the Lockean rather than Rousseauian strand.

²⁷ Triepel 1899. Similarly, Anzilotti argued that: ‘[r]ules of international law may derive only from the will of several States: “*ex omnium aut multorum gentium voluntate*”. Only the will of several States, by becoming a collective or common will, may acquire the character of a will which is higher than that of individual

will (*volonté générale*).²⁸ That is, states could provide their initial consent to restrictions on their freedom, but their actions thereafter were subject to the limitations imposed by the collective will thus created.²⁹ The act of consent was thereby decoupled from the idea of individual state will with which it had previously been identified. The collective will theory and its descendants provide rough parallels to the Rousseauian tradition at a domestic level,³⁰ in that they focus on the generation of right and obligation in accordance with a general and indivisible will rather than the transmission of individual will.³¹

By the early twentieth century, Oppenheim would claim authoritatively that '[i]f law is [...] a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power, common consent is the basis for all law',³² and that:

As the basis of the Law of Nations is the common consent of the member-States of the Family of Nations, it is evident that there must exist, and can only exist, as many sources of International Law as there are facts through which such common consent can possibly come into existence.³³

States and is capable of imposing on their conduct some positive rules, that are not lacking in the essential character of law': Anzilotti 1902, 34 as translated in Gaja 1992, 127. See also Hall 2001, 283.

²⁸ For a further development of the 'collective will' theory in international law, see Jenks 1955, ch 1.

²⁹ Brierly further rejects Triepel's resort to a superior 'collective will' of states: Brierly 1958, 15. Hall distinguishes between the creation of international law by sovereign will in command mode, as in earlier positivist theories, and creation of international law by sovereign will in consent mode: Hall 2001, 283.

³⁰ See Koskeniemi 2005, 316-17.

³¹ One must be wary of drawing too direct a comparison. For Rousseau, it was not a matter of transmitting will to a general consciousness, but the manifestation of will through a general consciousness. Also, Rousseau so heavily privileged the idea of popular sovereignty, as against the idea of representative democracy, that it is a little misleading to claim that an approach which treats states as fundamental units has Rousseauian characteristics. The question is further complicated in relation to the WTO as there is disagreement about whether the covered agreements create merely bilateral obligations or multilateral obligations: see Pauwelyn 2002a; Pauwelyn 2003b; cf Carmody 2006 and Carmody 2008. For an attempt to apply a slightly modified (adding a further limit of allowing the possibility of approval or rejection) version of Rousseau's vision of the *volonté générale* to assess whether WTO law is 'just', see Tijmes-Lhl 2009, 419-20.

³² Oppenheim 1905, 15 § 11.

³³ Ibid 21 § 16.

This approach was famously reflected in the *Lotus* case when the Permanent Court of International Justice held that ‘the rules of law binding on States [...] emanate from their own free will’.³⁴ The consent model was also forcefully advocated by the Italian jurist Dionisio Anzilotti, who initially argued that even the norm of *pacta sunt servanda* could be derived from state consent.³⁵ More recently, Louis Henkin claimed that ‘State consent is the foundation of international law. The principle that a law is binding on a State only by its consent remains an axiom of the political system, an implication of State autonomy’.³⁶

Consent and sovereign will are also heavily prioritized in much of the principal-agent literature in international relations.³⁷ This literature tends to assume that states are *a priori* legitimate, and that consent provides the basis for constructing delegation chains through which state will may be rightfully exercised on the international plane.³⁸ The legitimacy of institutional rules and procedures on such accounts is thus closely tied to the extent to which they constrain the autonomy of an international organization and ensure that the organization remains accountable to its state principals. The idea that state consent forms the basis for legitimate authority in international law thus remains pervasive across disciplines.³⁹

³⁴ *SS Lotus (France v Turkey)* (1927) PCIJ (Series A) No 10, 18. Brierly claimed that this decision was ‘based on the highly contentious metaphysical proposition of the extreme positivist school that law emanates from the free will of sovereign independent States’: Brierly 1928, 155.

³⁵ See discussion in Lauterpacht 1927, 134 et seq.

³⁶ Henkin 1989.

³⁷ See Hawkins et al 2006a. See also Venzke 2010.

³⁸ See Elsig 2007a; Alter 2006; and Cortell & Peterson 2006. Cf Petersmann 2006, 90; Petersmann 2008c. See also Guzman and Landsidle 2008.

³⁹ The relatively straightforward application of consent theory to treaty formation, when compared to the tortured intellectual gymnastics involved in tying together consent and international custom, has led many authors to assume that the application of the consent model to treaty law was in itself unproblematic. This tends to ignore problems immanent to the theory of state consent, the incompleteness of the theory, and the capacity of treaty regimes to affect non-parties negatively. On this last point, see, eg, Bhagwati 2011: ‘evidence is mounting that [PTAs] foster harmful trade diversion by increasing discrimination against non-members through differential use of anti-dumping actions. Thus, recent work by the economists Tom Prusa and Robert Teh has produced convincing evidence that anti-dumping filings decrease by 33-55% within a PTA, whereas such filings increase against non-members by 10-30%’.

C *Consent and the WTO: The Rhetoric*

The idea of Member consent, as reflective of Member's will, is crucial to the WTO's self-image; indeed, one of the WTO's central mantras is that it is a 'Member-driven organisation'.⁴⁰ In fending off claims that the WTO is a marauding engine of globalization, and countering the 'myth' that the WTO tells governments 'what to do', from 1999-2012 the WTO website explained that being a 'Member-driven organization' means that WTO rules are the product of 'agreements resulting from negotiations among member governments', that the 'WTO's agreements have been ratified in all members' parliaments', and that decisions are 'virtually all made by consensus among all members'.⁴¹ More directly, it claimed that 'it's the governments who dictate to the WTO'.⁴² The website noted that '[s]ince decisions are taken by the members themselves, the Secretariat does not have the decision-making role that other international bureaucracies are given'.⁴³ Although it recognized the prominence accorded to dispute settlement in the WTO, the website nonetheless claimed that 'the scope of [a dispute settlement] ruling is narrow: it is simply a judgement or interpretation of whether a government has broken one of the WTO's agreements—agreements that the infringing government had itself accepted'.⁴⁴ A more recent (and less defensive) version of this document has been on the website since 2012. It drops most of the discussion of the Secretariat, but continues to emphasize the importance of consensus decision-making, ratification by parliaments, and that 'there is a clear basis for judging who is right or wrong' in WTO disputes because the disputes are based on the WTO Agreements.⁴⁵

Continuing in this vein, James Bacchus claims that the WTO is 'only a label' which the 'vast majority of sovereign nations of the world have chosen [...]'.⁴⁶ Writing of his work on the Appellate Body, he claimed that:

[i]n all we do every day, we work *exclusively* for the 147 Members of the WTO. [...] We do *only* what they *agree* we should do. We are simply the agents of their shared will as

⁴⁰ Cf Jackson 2001.

⁴¹ WTO, *Ten Common Misunderstandings about the WTO* (1999).

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ WTO, *Ten Things the WTO Can Do* (2012) 12.

⁴⁶ Bacchus 2004, 668.

expressed by consensus in the “Member-driven” institution that is “the WTO”. [...] The source of the “legitimacy” of the WTO is the Members of the WTO.⁴⁷

Similarly, Robert Wolfe, writing in the early days of the WTO, argued that the WTO ‘remains an essentially member-driven, contract-based organization. Like the GATT, it has no autonomous power, and the Secretariat is kept on a tight leash [...]’.⁴⁸ Both Bacchus and Wolfe treat the WTO’s legitimacy as purely derivative of that of its Members, which are in turn assumed to possess some sort of foundational legitimacy. The emphasis here on the primacy of the will of the Members in WTO rule- and decision-making thus strongly plays into the idea that the WTO does not exercise any power worth legitimating, and rather that all power and responsibility lies with the Members independently.

Other commentators acknowledge the centrality of consent to the legitimacy of the WTO but recognize that consent alone is insufficient. Robert Howse notes that ‘[t]he consent of sovereigns provides a powerful basis for the legitimacy of the rules that constitute the WTO treaties’,⁴⁹ while Joshua Meltzer argues that ‘[f]rom the perspective of state sovereignty, state consent to the WTO is the starting point for any assessment of the WTO’s legitimacy’.⁵⁰ John Jackson long maintained a more ambivalent relationship with consent, and suggested that ‘in some cases, the “state consent” theory will not carry the legitimization far enough to be broadly persuasive’.⁵¹ The limits on the capacity of state consent to legitimate the WTO’s authority thus require further analysis.

⁴⁷ Ibid 669 (emphasis in original).

⁴⁸ Wolfe 1996, 697. See also Hudec 2001, 298.

⁴⁹ Howse 2001a, 359.

⁵⁰ Meltzer 2005, 694. Meltzer continues: ‘There are, however, limits to the extent that states’ consent to the WTO agreements can explain why states should comply with their WTO obligations’.

⁵¹ Jackson 2003, 797. Jackson argues that the consent approach is most visibly insufficient in relation to a ‘core of issues’ in international law including humanitarian intervention, terrorism and possibly weapons of mass destruction; international trade law is conspicuously absent from this list. See also Andrew Guzman, who argues that the emphasis on state consent prevents international law from progressing towards beneficial outcomes in certain areas, and that it is time to prioritize more non-consensual decision-making by further empowering international organizations: Guzman 2012. Jackson made a stronger version of this claim back in 1967, arguing against the unanimity requirement in GATT Article XXX for any amendments to GATT Part I, suggested that ‘the idea that no international trade obligations should be imposed on a nation without its consent no longer deserves unwavering recognition’. Jackson continues: ‘Such an idea

D *Consent and WTO Procedure*

Consent provides more than a merely discursive legitimating vocabulary for the WTO. Mechanisms for expressing consent are central to its formal rules and procedures for norm-generation.⁵² Such mechanisms may be found at four levels of decision-making processes. These include: (1) the negotiation processes leading to the WTO's creation and the acceptance of the obligations under the covered agreements; (2) the processes relating to the WTO's secondary rules; (3) the processes relating to general decision-making in the WTO, through the General Council and its emanations, the Secretariat and the various committees and working groups;⁵³ and (4) processes incidental to other forms of decision-making that provide Members with additional political control.

First, consent played a crucial role in legitimating the creation of the WTO and its rules. The WTO's claim to legitimacy upon its founding was based not on GATT's legislative fiat nor some form of cosmopolitan spontaneous acclamation, but rather on the direct consent of its (soon to be) Members. Following the Uruguay Round negotiations,⁵⁴ the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations was adopted

was truly effective, if at all, for only a few large, powerful nations. For most countries, dependence on international trade is a fact of life and leaves them vulnerable to forces beyond their control including sometimes selfish and irresponsible actions of trading parties': Jackson 1967, 143.

⁵² 'Recognition that consent can—and perhaps in a limited number of cases, does—justify international law's claim to legitimate authority has important implications for the sources of international law. For example, a focus on the conditions in which consent actually generates an obligation can lead to changes in the processes whereby international legal norms are created, modified, or annulled that aim specifically at clarifying when an [international actor] has genuinely consented to be subject to (some part of) international law, and increasing opportunities for them to do so': Lefkowitz 2010, 194.

⁵³ d'Aspremont and de Brabandere draw a distinction between the legitimacy of origin (legitimacy flowing from the manner of an institution or rules' creation) and the legitimacy of exercise (legitimacy flowing from the manner in which the institution operates): d'Aspremont and de Brabandere 2011. D'Aspremont and de Brabandere claim that this distinction is only relevant to the external, rather than internal, legitimacy of a government, claiming that 'the internal legitimacy of an authority is usually related to the achievement of social and distributive justice': at 193-4 (footnote omitted).

⁵⁴ As managed under the auspices of the GATT. The Uruguay Round was launched by the GATT Contracting Parties on 20 September 1986, by consensus: see Punta del Este Declaration, MIN.DEC.

by consensus on 15 December 1993.⁵⁵ It was signed by Ministers representing 111 of the 125 participants in the negotiations at the final Ministerial-level session of the TNC.⁵⁶ The covered agreements only became legally binding on states once those states had indicated their consent in accordance with the requirements of WTO Agreement Article XIV and the general international law of treaties.⁵⁷ Consent to the covered agreements thus provided the formal basis for obligation in the WTO.

Second, consent continues to play a central role in the operation of the WTO's secondary rules,⁵⁸ ie those rules relating to the suspension, interpretation, amendment, and termination of the primary WTO rules. Thus, WTO Members may collectively waive obligations under the WTO Agreements via WTO Agreement Article IX:3; may issue authoritative interpretations of the covered agreements under Article IX:2;⁵⁹ and may amend the covered agreements under Article X.⁶⁰ Although the provisions regarding authoritative interpretation and amendment have rarely been put to use,⁶¹ their existence is testament to the political and

⁵⁵ See the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations. Paragraph 1 of the Final Act provides that the representatives of the governments and the EC: '*agree* that the Agreement Establishing the World Trade Organization (referred to in this Final Act as the "WTO Agreement"), the Ministerial Declarations and Decisions, and the Understanding on Commitments in Financial Services, as annexed hereto, embody the results of their negotiations [...]'.
⁵⁶ Marrakesh Declaration of 15 April 1994, Preamble.

⁵⁷ See VCLT Part II ('Conclusion and Entry into Force of Treaties').

⁵⁸ On secondary rules generally see Hart 1994, 94-9; for a detailed breakdown of the application of secondary rules in the WTO, see Footer 2006, 203-66. Cf Wolfrum 2008, 9: 'The consent of a State will undoubtedly be sufficient as a mechanism to invoke the legitimacy of the measure in question if the obligation is a specific and static one and can be implemented by an isolated act or omission. The same is true even if the obligation is of a continuing nature but the commitment does not change over time as far as its substance and scope is concerned. There is, de facto, the danger, though, that the legitimizing effect of the original consent may fade over time'.

⁵⁹ When making an authoritative interpretation in relation to one of the Annex 1 Agreements, the General Council must exercise their authority on the basis of a recommendation from the Council overseeing that Agreement: WTO Agreement Article IX:2.

⁶⁰ This has been attempted officially only three times to date. See WT/L/940 (on trade facilitation; yet to enter into force); WT/L/641 (the TRIPS Amendment, yet to enter into force); and the failed attempt to amend the DSU to deal with the sequencing issue regarding DSU Articles 21.5 and 22: WT/GC/W/410/Rev.1.

⁶¹ See Steger 2007, 484 and 495.

symbolic importance of consent. The waiver provision has been invoked far more often, regarding matters of varying political and legal significance.⁶² Although various parts of the WTO Agreement set out majority voting requirements for certain classes of decisions (including for authoritative interpretations, waivers, and amendments), following the General Council Decision on Decision-Making Procedures under Articles IX and XII of the WTO Agreement⁶³ the vast majority of such decisions are now made by consensus instead. Although an amendment under Article X may come into force in the absence of consensus, it will only be binding on those Members which have ratified it. In addition, Article XV of the WTO Agreement allows Members to withdraw from the covered agreements (as a whole) on six months' written notice. In formal terms, this contributes strongly to the idea of the WTO as an organization based on state consent as it allows for Members to withdraw from all of the covered agreements (and only all of the agreements) if they feel their interests are not being met.⁶⁴

⁶² See generally Feichtner 2012. See also Feichtner 2008.

⁶³ The Decision provides that consensus should be used in lieu of the voting requirements in relation to waivers under WTO Agreement Article IX:3 (which provides for a 3/4 majority vote) and the approval of the terms of accession under WTO Agreement Article XII:2 (which provides for a 2/3 majority vote). Members nonetheless retain the power to request a vote in such circumstances: see WT/L/93.

⁶⁴ To date, no Member has withdrawn from the WTO, although the possibility has certainly been mooted in national legislatures. The six month notice requirement for withdrawal is significantly longer than the 60 day notice requirement in place under the GATT 1947: see Protocol of Provisional Application of the GATT, para 5. Robert Howse also notes the illusory quality of the right to withdraw from the WTO, arguing that such withdrawal '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 the routine expression of democratic will within that country': Howse 2003a, 94. See also Philip Pettit, who argues that: 'Any individual state that signs up to a trading agreement, or to any organization in which its interests overlap with those of other members, is going to find it very hard to exercise the right of exit. The other members will generally be disposed to penalize any defector and the penalties in prospect may act as a powerful deterrent against secession. [...] The existence of a formal right of exit may guard in principle against domination by such an agency. But in practice it will not do so': Pettit 2010b, 156.

Third, the WTO's general decision-making powers operate largely on the basis of consent; or more specifically, consensus.⁶⁵ Participation in each level of WTO decision-making, from the Ministerial Conferences,⁶⁶ to the General Council,⁶⁷ to the various emanations of the General Council (ie the DSB⁶⁸ and the TPRB,⁶⁹ followed by the Councils on Trade in Goods, Trade in Services, and TRIPS⁷⁰), to the myriad committees⁷¹ and working groups, is formally open to representatives of all Members, and each Member has only one equal vote.⁷² Members in these bodies, for the most part, continue the practice of decision-making by consensus followed under GATT 1947.⁷³ At higher levels matters may be decided by voting where consensus fails, unless consensus is mandated by the relevant provision of the covered agreement.⁷⁴ Lower level bodies, including the specialized Councils, are required by Rule 33 of their various Rules of Procedure to refer the matter upwards for decision.⁷⁵ Importantly, in the WTO, 'consensus' does not require that all WTO Members express their

⁶⁵ The main exception to this lies in DSU Article 16.4, which establishes a rule of 'reverse consensus'. When faced with a dispute settlement report from a panel or the Appellate Body, the DSB (another emanation of the General Council) generally has 60 days to adopt the report unless it decides by consensus *not* to adopt the report. Nonetheless, maintaining the possibility for the membership as a whole to reject such reports preserves a symbolically important formal hierarchy placing consent above judicial reasoning/expert hermeneutics: see Van Damme 2010, 647.

⁶⁶ The Ministerial Conference is given plenary power to 'take decisions on all matters under any of the Multilateral Trade Agreements': WTO Agreement Article IV:1. The Ministerial Conference is composed of representatives of all of the WTO Members, generally at a Ministerial level.

⁶⁷ WTO Agreement Article IV:2. The General Council is composed of representatives of all of the WTO Members, generally at an ambassadorial level.

⁶⁸ See WTO Agreement Article IV:3.

⁶⁹ See WTO Agreement Article IV:4.

⁷⁰ See WTO Agreement Article IV:5.

⁷¹ WTO Agreement Article IV:7 expressly provides for the creation of a Committee on Trade and Development, a Committee on Balance-of-Payments Restrictions and a Committee on Budget, Finance and Administration. The General Council may create additional committees and charge them with such functions as it deems appropriate, and it does.

⁷² Although see footnote 2 to WTO Agreement Article IX:1, which provides that the number of votes of the EC and its member States is not permitted to exceed the number of the EC's member states.

⁷³ See WTO Agreement Article IX:1.

⁷⁴ See table in Footer 2006, 136.

⁷⁵ Ibid 36.

agreement with a decision. Rather, a body ‘shall be deemed to have decided by consensus [...] if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision’.⁷⁶ It is not necessary for Members to provide any positive indication of their consent to a decision; it is enough that no one present formally objects.

Fourth, Members are given the opportunity to express or withhold their consent (albeit not always decisively) at various stages of WTO law-making and application. With respect to dispute settlement, for instance, Petersmann highlights that:

WTO Members politically control the first “diplomatic phase” of WTO dispute settlement proceedings (see Articles 5 and 6 of the DSU), the initiation and conduct of panel and Appellate Body proceedings (Articles 6 and 17 of the DSU), the terms of reference, the composition, and the working procedures of panels (Articles 7 and 8 of the DSU), the “applicable law” in WTO dispute settlement proceedings (Article 7), the interim review stage (Article 15), and the adoption of panel and Appellate Body reports (Articles 16 and 17) and their implementation [...] or alternative dispute settlement (including compensation, Articles 21, 22, and 25).⁷⁷

In practice parties to disputes are also given a role, although not the final word, in the selection of scientific and technical experts by panels.

III THE LIMITS OF CONSENT-BASED LEGITIMACY

Narratives of consent are therefore deeply embedded within the discursive and procedural legitimating structures of the WTO and WTO law. They provide a highly visible and effective vocabulary for legitimating the exercise of power through the WTO, in part through their affinity with dominant liberal-democratic discourses affiliated with the legitimacy of the domestic state. Less well-explored in the WTO context, however, are the limits on the legitimating capacity of consent, and the implications of such limits for the WTO.

⁷⁶ Footnote 1 to Article IX:1 of the WTO Agreement. To this extent, Tijmes-Lhl’s treatment of unanimity and consensus as ‘substantially equivalent because of their shared characteristic of being decision-making procedures [...] by which not even one member of the political unit disagrees with the content of the decision’ is problematic: see Tijmes-Lhl 2009, 421. This is because it ignores the substantial normative difference between affirmative consensus and consensus by default, especially given that several WTO Members are unable to attend even important meetings due to resource constraints.

⁷⁷ Petersmann 2006, 97-8.

A *First Limit: The Contingency of Consent*

First, consent alone cannot provide a basis for legitimacy, as the procedural fact of consent in isolation says nothing about relations of rule. Consent must always be parasitic on some non-consensual norm.⁷⁸ In Koskenniemi's words, 'the emergence of a consensual norm assumes the existence of a non-consensual norm according to which consent is to have a law-creating effect'.⁷⁹ The idea that states are *bound* by the act of consent requires a deeper normative principle to supplement the exercise of state will. One common candidate for this principle is *pacta sunt servanda*. Those taking this approach argue that there is inherent value in an international system where states honour their agreements with each other.⁸⁰ Hans Kelsen, for instance, in his early work, posited *pacta sunt servanda* as the *Grundnorm* for international law.⁸¹ In later years, however, he relegated *pacta* to a position as merely one of the most important international law norms, rather than a foundational norm, arguing instead for a *Grundnorm* to the effect that 'States should behave as they customarily behave'.⁸²

Others have taken a more instrumental approach, seeing consent as creating binding commitments to achieve particular ends. These ends may be quite specific, as pursued through subject-specific functional regimes, or quite broad. James Leslie Brierly, for instance, hinted that the binding force of international law ultimately derived from the pursuit of order⁸³ (although this simply leaves open the question of why an order prioritising consent is more desirable than the alternatives). More recently David Lefkowitz has constructed a rudimentary

⁷⁸ Howse notes that any theory of consent is unable to account for obligation unless accompanied by a substantive case for why 'agreed-upon rules' should be followed: Howse 2001a.

⁷⁹ Koskenniemi 2005, 311. See also Hart 1994, 222-5, who notes that there must be pre-existing rules defining the capacities of the sovereign state and binding a state to its undertakings. See also Brierly: 'Consent cannot of itself create an obligation; it can do so only within a system of law which declares that consent duly given, as in a treaty or a contract, shall be binding on the party consenting. To say that the rule *pacta sunt servanda* is itself founded on consent is to argue in a circle': Brierly 1958, 54.

⁸⁰ Or, in the language of Article 26 of the VCLT, 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'. See also Brierly 1958, 10.

⁸¹ See, eg, Kelsen 1967, 216, fn 80. In his early work, Anzilotti also suggested *pacta sunt servanda* could in turn be justified on the basis of state consent; however he was later to refute this position: see Anzilotti 1955, 26f, discussed in Gaja 1992, 128.

⁸² Kelsen 2007, 369; cf Lauterpacht 1970, 91; see also Rigaux 1998, 328.

⁸³ Brierly 1958, 67.

argument positing self-determination as the normative foundation underpinning consent.⁸⁴ Robert Howse has argued again for *pacta sunt servanda*, but notes that the principle can also take on an instrumental form that serves broader functional goals.⁸⁵ The choice of the substantive basis underlying consent is important, as procedural rectitude only has meaning when measured against substantive goals, against which effectiveness, efficiency and fairness can be measured.⁸⁶ Hence the choice of underlying substantive goal has potentially normative implications for the design of procedures involving consent. This relationship between substantive aims and procedural norms, including consent, will be further explored in Chapters Five through Seven.

Of course, those who emphasize consent as the source or basis of obligation in WTO law may simply be using ‘consent’ as a short hand, by pointing to consent as a historical fact which stands in for a larger, non-consensual, premise. If that is the case, however, this larger premise remains largely unarticulated and requires further attention.

B *Second Limit: The Changeable Will*

Second, in the absence of a broader non-consensual premise which overrides the mere fact of consent at any given point, consent is unable to account for the normativity of international law across time. A state may give their consent to international norms at one point in time, but wish to withdraw or ignore such consent later on. As Brierly noted: ‘A consistently consensual theory [...] would have to admit that if consent is withdrawn, the obligation created by it comes to an end’.⁸⁷ More recently, Howse has noted that ‘the hard issue is, of course, why sovereigns should be bound to past acts of consent, if obedience to the rules no longer serves their perceived interests’.⁸⁸ This led to the central problem with Jellinek’s approach. Overall, Jellinek’s failure to provide well-defined limits on when and how states could withdraw their consent could not account for the persistent normativity of international

⁸⁴ Lefkowitz 2010, 193.

⁸⁵ Howse notes that the substantive case for why it following *pacta sunt servanda* is desirable varies, from appeals to collective economic welfare to natural law: Howse 2001a, 359.

⁸⁶ See, eg, Galligan 1994, vol I, 114 and 116, referring to Bentham’s theories on procedure (‘The role of procedures is to ensure that the law is applied accurately and, as a consequence, that the social good is realized’).

⁸⁷ Brierly 1955, 54.

⁸⁸ Howse 2001a, 359.

law in the face of changing state will.⁸⁹ Martti Koskenniemi nonetheless points out that Jellinek did preserve a modest role for normativity by including a substantive limit on states' ability to retract their consent to be bound. Any exercise of state will, including retracting consent, had to be based on a 'reasonable motive (*vernünftliche Motive*)' seeking to fulfil a 'natural State purpose (*Staatszwecke*)'.⁹⁰ However, in glossing over this aspect of his theory, Jellinek was forced to turn away from a model based purely on state will towards a naturalistic vision of state purpose. Later writers have tried to get around this problem in other ways, either by relying on collective state will as providing an autonomous limit on individual state will (as Triepel did), or by turning to deeper substantive bases for legitimacy to supplement and constrain consent.⁹¹

C *Third Limit: Agency Costs*

1 *Generalized Grants of Authority*

Third, consent is unable to provide a convincing narrative of legitimation in the face of the agency costs resulting from the broad delegation of vaguely defined powers. Turning once more to the principal-agent literature, one of the most direct ways to ensure that the exercise of power by an agent in a given system is tied to some previous act of consent by the principal is to ensure that the agreed rules are highly detailed and specific. This leaves the agent exercising such power with little discretion/slack; the capacity to determine policy, and to create norms, remains in the hands of the principal(s).⁹² The less detailed the rules are, and the broader the grant of power, the larger the agent's role in policy- and norm-generation;⁹³ potentially to the point where it is no longer tenable to describe them as merely an agent.⁹⁴

⁸⁹ See criticisms in Lauterpacht 1933, 409-12; Brierly 1958; Hall 2001, 282.

⁹⁰ Koskenniemi 2005, 129. See also Koskenniemi 2009a, 403.

⁹¹ See discussion in Part III(A) above.

⁹² Exactly who or what constitutes the principal(s) in relation to the WTO remains unresolved. It is unclear whether there are multiple principals, in the form of the individual Members, or whether the membership creates some sort of collective principal, or whether there are two stages of principal-agent relationship at hand. For attempts to grapple with the issue of multiple principals in the international law context, see: Nielson & Tierney 2003; Lyne, Nielson & Tierney 2006, 44-6; Besson 2010, 164.

⁹³ 'Under discretion-based [as opposed to rule-based] delegation, the policy-making role of the agent is greatly enhanced': Hawkins et al 2006b, 27.

⁹⁴ See, eg, Alter 2008; Elsig and Pollack 2014.

This relationship is not strictly linear, as several other mechanisms may be employed to control the agent's autonomy, including processes of agent selection, consultation, monitoring, approval, and exit. The broader the delegation, however, and the less such controlling mechanisms are employed, the less adequate the idea of consent proves as a basis for legitimation. As consent moves from specific, detailed consent to general, or 'meta' consent, the underlying (Lockean) idea of the transmission of sovereign/Member will become less convincing and increasingly artificial.⁹⁵

The history of the last century is replete with examples of international institutions that have taken broad grants of authority, that states have consented to in a general manner, and built them into something more than their makers anticipated. The ICJ set the scene relatively early on when it recognized the doctrine of implied powers for international institutions in the *Reparation for Injuries* Advisory Opinion.⁹⁶ The doctrine of implied powers has enabled various international bodies, from the UN to the EU to the IMF, to take on a range of powers in the name of fulfilling functional imperatives. The foundational treaties of several international institutions may even be thought of as what Cass Sunstein has termed 'incompletely theorized agreements'⁹⁷ — the rules have been intentionally underspecified by the negotiating parties on the assumption that they would be further developed by various institutional mechanisms (such as dispute settlement organs) further down the track.⁹⁸

In the WTO, dispute settlement panels and the Appellate Body have been granted broad discretion to set their own procedures⁹⁹ and there are few detailed formal constraints¹⁰⁰ on

⁹⁵ 'The growth in the number of States and the complexity of international legal obligations makes the forms of consent as a means of justifying norms increasingly fictitious, requiring the invocation of presumptions, silence, meta consent and the like': Weiler 2004, 557. See also Raz 1988, 90.

⁹⁶ See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Rep 174, 179-80. The doctrine of implied powers had already been recognized by the Permanent Court of International Justice in the *Case concerning the Interpretation of the Greco-Turkish Agreement of December 1st, 1926* [1928] PCIJ (Series B) No 16, 20.

⁹⁷ See generally Sunstein 1995; Sunstein 2007.

⁹⁸ See also Schropp 2009, pt II; Horn, Maggi & Staiger 2010.

⁹⁹ DSU Article 12.1 (Panels); DSU Article 17.9 (Appellate Body).

¹⁰⁰ DSU Article 3.4 provides that the DSB's '[r]ecommendations or rulings [...] shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations' under the covered agreements. DSU Article 11 requires that panels 'assist the DSB in discharging its responsibilities' by 'making an objective assessment of the matter before it, including an objective assessment of the facts of

how they are to reach their decisions.¹⁰¹ In some cases, it has even been argued that the dispute settlement organs have powers of inherent jurisdiction, an argument which takes the exercise of legal power even further from the notion of consent-based legitimacy.¹⁰² While there is a hugely important formal link between Member consent to the terms of the DSU and the broad contours of the dispute settlement mechanism's powers, the details of those powers, and even the determination of their limits, has largely been left to panels and the Appellate Body. This is arguably necessary to their efficient functioning — as John Jackson contended:

“consent” should not be considered as a requirement for every small detail, or for every resolution of ambiguity or gap-filling by a dispute settlement institution. The mere fact that the original consent of nation-states included consent to a dispute settlement system, suggests a measure of deference to the results of that system [...].¹⁰³

That said, if consent cannot adequately legitimate the exercise of power in the dispute settlement mechanism, this requires a turn to a more principled alternative basis for legitimacy than is provided by a general appeal to ‘necessity’ or ‘efficiency’.

Similarly, both the SPS¹⁰⁴ and TBT Agreements¹⁰⁵ require Members to base certain measures on international standards developed by non-WTO intergovernmental organizations, such as the Codex Alimentarius Commission and the ISO. Although exceptions alleviate the bluntness of these rules, in practice this has transformed these international standards into rules enforceable through the WTO dispute settlement mechanism. The SPS and TBT Agreements thus allocate broad norm-generating powers to non-WTO institutions with non-

the case and the applicability of and conformity with the relevant covered agreements, and make other such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements’. DSU Article 17.1 requires that the Appellate Body ‘hear appeals from panel cases’. See also DSU Articles 3.2 and 19.2 which provide that the DSB, the panels and the Appellate Body may not add to or diminish the rights and obligations provided in the covered agreements. See also the panels’ standard terms of reference in DSU Article 7.

¹⁰¹ See Ginsburg 2005, 631.

¹⁰² See Mitchell & Heaton 2010; cf Chalmers & Tomkins 2007, 53.

¹⁰³ Jackson 2006, 206.

¹⁰⁴ See SPS Agreement Article 3.1.

¹⁰⁵ See TBT Agreement Articles 2.4 and 4, and Annex 3, para F.

identical parties while providing little opportunity for collective oversight or veto.¹⁰⁶ Joost Pauwelyn goes as far as to say that holding Members to such international standards under the TBT and SPS Agreements takes the basis for normativity outside of the ‘rule of state consent’ on the grounds that Members may not have consented to the specific rules in question.¹⁰⁷ Again, this calls for rethinking the moral and social bases of legitimacy for important aspects of the multilateral trading order.

Hence, although broad delegations of power may be brought within the legitimating framework of state or Member consent, consent’s legitimating power in relation to such broad delegations is weak and inadequate. Consent has little to contribute when trying to evaluate the normative justifiability of particular delegatory choices (ie why particular groups have been given privileged decision-making powers as opposed to others). It also seems descriptively implausible when the broad delegation of powers means that international institutions act beyond what their founders anticipated. It is thus necessary to form some account of how the rules governing the selection and interaction of particular types of agent — panel members, allied institutions, technical experts — affect (and are affected by) different understandings of legitimacy.

2 *The Nature of the Agents and the Principals*

Moreover, agency costs may continue to undermine the legitimating value of consent even in cases where there are relatively specific delegations of authority. Joshua Meltzer highlights how agency costs undermine the extent to which state consent can meaningfully legitimate Appellate Body decisions, and his analysis holds equally for other forms of authority in the WTO.¹⁰⁸ Meltzer notes the gap between the interests of individual negotiators and their state employers, and suggests that ‘repeat player’ negotiators at the WTO, particularly those based in Geneva who spend long periods of time far away from their home bases, may prioritize their working relationships with negotiators from other states over immediate state

¹⁰⁶ Both the Codex Alimentarius Commission and the ISO have tightened up their accountability mechanisms, partly as a result of the elevated normative status they have enjoyed as a result of the SPS and TBT Agreements: see Livermore 2006; Pollack & Shaffer 2009, 172-3. Such accountability mechanisms, however, remain internal to the standards organizations — they do not provide for direct accountability to WTO Members.

¹⁰⁷ See Pauwelyn 2006, 208 and 211-12.

¹⁰⁸ Meltzer 2005.

interests.¹⁰⁹ It is important that this effect not be overstated. For one thing, Meltzer's formulation seems to assume a level of unity, definition and finality to state negotiating interests which predates the negotiators' inputs (including information about their working relationships with other negotiators). One must also not overlook Article 51 of the VCLT, which vitiates a state's consent if such consent was procured by coercion of its representative, and the requirements in many Members for further executive and legislative oversight of treaties prior to their ratification.¹¹⁰

More significant agency costs may well arise in relation to the delegation of authority to individuals to act on behalf of the Membership as a whole, rather than those who act on behalf of individual Members. Secretariat officials, panel and Appellate Body members, and international standards organizations all provide higher agency costs as they have multiple principals with inevitably conflicting interests,¹¹¹ and often are formally required to place the interests of the collective above those of individual states. Moreover, lacking the same oversight and monitoring mechanisms associated with state representatives, they are more likely to be caught up in forms of WTO groupthink and for their interests to diverge from those who originally appointed them.¹¹² This makes it all the more important that the nature of these actors and the terms of their interaction be considered more closely.

Turning to the WTO as an agent for its Members, international law has also inserted additional slack in this relationship through the mechanism of separate legal personality. The legal personality of the WTO, as well as its privileges and immunities, are specifically provided for in Article VIII of the WTO Agreement. Separate legal personality ensures that the WTO enjoys a separate legal existence from its makers. In formal terms, this alters the

¹⁰⁹ Ibid 707.

¹¹⁰ Cf Armin von Bogdandy and Ingo Venzke, who point out that negotiators seeking consensus must be given a fair amount of autonomy as it is simply not effective to provide for parliamentary control of consensus-based decision making at the international level: von Bogdandy & Venzke 2012, 20. Gregory Shaffer has recorded the extent to which negotiators in the Trade and Environment Committee appear to remain strongly committed to their individual state interests notwithstanding the pull of their technocratic community: Shaffer 2001, 83.

¹¹¹ See Nielson & Tierney 2003, 247-9.

¹¹² Andrew Cortell and Susan Peterson argue that the WTO's 'staffing and voting rules suggest an agent capable of forming its own preferences and escaping the control of its principals, at least with respect to the dispute settlement system': Cortell and Peterson 2006, 271.

character of decisions made by the WTO as they become decisions of the WTO itself, rather than of the Members acting collectively.

D Fourth Limit: Consent as Overly Member-Centric

On a related note, the Member consent narrative of legitimacy is descriptively and normatively incomplete because, in treating Members as the fundamental political units, it ignores how power may be exercised by other actors.¹¹³ This falls into the trap of ignoring the alternative institutional settings through which power is exercised in relation to the WTO. Focusing on the exercise of power by Members entails a displacement of responsibility from the WTO, and diverts critical focus away from the WTO as an institution. In particular, it falls into the trap of treating Members as having fixed, pre-established preferences which are expressed at the moment of consent. Jellinek, Triepel and Anzilotti, for instance, treated sovereign will as a matter of fact, ignoring that its construction, expression and recognition are all contingent upon a pre-existing legal, social and economic landscape.

The Member-centric approach is also descriptively¹¹⁴ incomplete because of its tendency to treat the Members as ‘black boxes’, with clearly discernible, rational, and unified interests.¹¹⁵ By treating Members as monolithic entities, it fails to account for the complex

¹¹³ The assumption that states are the basic unit of analysis is slightly complicated in the WTO, as WTO membership is open not only to any state but also to any ‘separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for [in the covered agreements]’: WTO Agreement Article XII:1. Consequently Hong Kong; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei); and Macau are all WTO Members, as is the EU. The problems of the purely state-centric approach are, however, largely preserved in this slightly more expansive set.

¹¹⁴ Weiler also points to the normative problems with this approach: ‘You take the obedience claim of international law and couple it with the conflation of government and State which international law posits and you get nothing more than a monstrous empowerment of the executive branch at the expense of other political estates or an empowerment of those internal special interest [sic] who have a better capture of the executive branch’: Weiler 2004, 558.

¹¹⁵ This is sometimes referred to as the ‘billiard ball model’ of international relations: see Burton 1972, 28. Similarly, Stephan argues that: ‘Traditionally conceived, international law governed the relations among sovereigns. [...] This kind of international law—the “old” international law—has hardly disappeared’: Stephan 1999, 1556.

variety of competing interests jostling beneath the surface of the Member construct.¹¹⁶ It also ignores the influence of NGOs and other IGOs. In practice, Member policy is generated by complex interactions between elected representatives, competing government departments, lobbyists, business networks, civil society, and the media.¹¹⁷ Unpacking the internal operations of the Member highlights how different interests both internal and external to the Member can use international organizations such as the WTO to serve their interests. For example, Susan Sell demonstrates how a small group of multinational pharmaceutical and electronics corporation executives came together in the form of the Intellectual Property Committee ('IPC') to influence the drafting and implementation of the TRIPS Agreement to reflect their private interests.¹¹⁸ Sell notes that Jacques Gorlin, a consultant to the IPC, claimed that the IPC got 95% of what it sought from the TRIPS Agreement negotiations.¹¹⁹ Amrita Narlikar further highlights the different negotiating outcomes that result from negotiating processes that privilege either bureaucratic/technocratic agents or politicians.¹²⁰

The consent-based approach to legitimacy in this light is thus descriptively inadequate, in that it fails to recognize important details about the allocation of power within and across Members, including how Member interests may be shaped by their interactions on the international plane. It is also normatively problematic, in that its pretensions to formal Member consent can mask how Member policy can be manipulated by special interests. A more diffuse approach which considers the roles played by various kinds of actors and experts at various stages of the policy cycle is needed to provide a convincing narrative of legitimacy in such circumstances.

E *Fifth Limit: Consent as Obscuring Alternative Settings for Power*

A fifth limitation of the consent-based approach is that it overemphasizes the moment that norms are formally adopted at the expense of other moments which relate to the formulation and application of such norms. As discussed in Chapter Two, the temporal setting of the

¹¹⁶ Weiler notes that 'classical consent was based on a conflation of government with State. That conflation is no longer tenable': Weiler 2004, 558.

¹¹⁷ See Slaughter 2002, chs 1-3 which attempt to 'disaggregate the state'.

¹¹⁸ Sell 1999a; Sell 1999b; Sell 2003. See also Gervais 2003; Braithwaite & Drahos 2002.

¹¹⁹ Sell 1999a, 188.

¹²⁰ Narlikar 2004, 10-13.

exercise of power extends beyond the moment of formal prescription in significant ways.¹²¹ Focusing on formal consent privileges the ‘prescription’ phase of the rule-making process, while ignoring the operation of power in other, more subtle forms that shape the content of the prescribed rules and decisions and affect how they are received. Although consent may be implicated in other parts of these processes — including, to a limited degree, the composition of a panel and selection of panelists in WTO dispute settlement — this still only provides a partial view of the operation of power. Concomitantly, this results in a focus on formal rule-making bodies to the exclusion of consideration of bodies more concerned with agenda-setting and information dissemination and exchange. The relative importance of these alternative settings may be debated: Steinberg, for instance, points to research suggesting that, in domestic legislative settings, agenda setting processes have more explanatory power than plenary voting processes, but then discounts the value of this insight in relation to organizations that are governed by decision-making processes that emphasize sovereign equality (including the WTO).¹²² Lang and Scott, on the other hand, counter Steinberg directly by arguing that:

important work is often done before we get to the stage of intergovernmental bargaining, and that the politics of international trade is found just as much in everyday routines of global economic governance as it is in its eye-catching moments. This is the ‘background’ world of discursive interaction which helps both to set the scene for formal decision-making and to shape how such decisions are implemented.¹²³

Thus both temporally and institutionally speaking, the consent narrative is unable to convincingly account for important exercises of power which have significant implications for law-making and application. The moment of formal prescription, and the plenary bodies prescribing the laws, are certainly of central importance — but narratives of legitimacy that ignore the alternative settings of law-affecting power are simply incomplete.

¹²¹ See also McDougal & Lasswell 1959.

¹²² Steinberg 2002, 354.

¹²³ ‘[I]mportant work is often done *before* we get to the stage of intergovernmental bargaining, and that the politics of international trade is found just as much in everyday routines of global economic governance as it is in its eye-catching moments. This is the “background” world of discursive inter-action which helps both to set the scene for formal decision-making and to shape how such decisions are implemented’: Lang & Scott 2010, 1074.

F *Sixth Limit: Formal vs Substantive Consent*

‘Consent’ may refer to the formal process of signing up to WTO obligations, but it may also be understood to include a substantive, voluntaristic component; one which emphasizes the free, informed, and participatory nature of the act of consent. As David Lefkowitz notes, ‘consent can give rise to genuine moral obligations only if it is free and informed, and [...] most acts of putative consent to be bound by international legal norms fail to meet at least one, if not both, of these conditions’.¹²⁴ To the free and informed requirements is sometimes added the element of participation in the process of norm-generation.¹²⁵ Indeed, several coalitions of developing countries came together in 2007 to declare that ‘[a] major positive feature of the multilateral trading system is the principle that it allows all trading partners the opportunity to participate in making the rules. The legitimacy of the WTO rests on whether this principle is adhered to’.¹²⁶

This thicker concept of consent — which is free, informed, and participatory — has been largely absent from narratives about consent both in the WTO and in international law.¹²⁷ In the WTO, the principle of sovereign equality, as reflected in the one-Member-one-vote rule,¹²⁸ gives each Member a formally equal say in rule negotiation and decision-making. Similarly, the principle of consensus notionally gives each Member the equal power to veto any new developments. In practice, however, most of the decision-making power has resided with only a few key players: the US and EU at the top, historically the remaining members of

¹²⁴ Lefkowitz 2010, 193. Lefkowitz notes, however, that when: (a) states can be said to have entered into treaties on an informed and voluntary basis; (b) consent does not imply violation of another moral duty; and (c) consent derives from the agents of states that are themselves legitimate, then their consent gives rise to an independent ‘obligation to uphold the legal obligations created by these treaties [...] even if some of the other signatories to the same treaties did not accede to them voluntarily’. See also Meltzer 2005.

¹²⁵ See Narlikar 2002. See also generally Bonzon 2014.

¹²⁶ WT/L/687.

¹²⁷ See also Buchanan 2004, 303: ‘the super-norm of state consent, as it actually operates in the international legal system, is too morally anemic to confer legitimacy, either on individual norms or on the system as a whole. For one thing, what counts as consent in the system is not qualified by any requirement of voluntariness that would give what is called consent normative punch’. The lack of focus on the free and informed aspect may also have followed on from the attempts in the domestic sphere to downplay these elements in relation to the foundation of political authority. Many social contract theories are dedicated to establishing consent even when ‘citizens have no choice but to consent’: Raz 1988, 88-9.

¹²⁸ WTO Agreement Article IX:1.

the Quad (Japan and Canada), and now increasingly China, India, Brazil, and potentially Russia.¹²⁹ The domination of the ‘major players’ during the GATT era was so pervasive as to prompt Jock Finlayson and Mark Zacher to declare the operation of a ‘major interests norm’ in GATT decision-making — that is, a norm by which the Members with the greatest interests in a decision (*de facto* equated with the greatest power) should have ‘paramount influence’ over that decision.¹³⁰ Mary Footer has argued that such a norm has continued to operate in the WTO era, albeit in a challenged and altered form.¹³¹ It also resonates with some of the recent formulas proposed for weighted voting and critical mass voting, which would take into account matters such as Members’ populations, GDP, contributions to world trade and the like in allocating voting share.¹³²

On first glance this would seem to be complicated by the practice of consensus decision-making, which essentially gives each Member a veto power on any new developments. On the surface, the consensus principle ensures that rules are not created, amended or terminated without the acquiescence of all Members affected. This can have a flattening effect, forcing powerful states to take into account the preferences of the less powerful and to frame rule proposals in a form that is at least minimally acceptable to such smaller powers.¹³³ Yet upon closer inspection, taking into account the reputational effects of blocking consensus and the persuasive capacity granted by the possession of resources and desirable markets, the

¹²⁹ Cf Kissinger’s definition of legitimacy: ‘Legitimacy as here used should not be confused with justice. It means no more than an international agreement about the nature of workable arrangements and about the permissible aims and methods of foreign policy. It implies the acceptance of the framework of the international order by all major powers, at least to the extent that no state is so dissatisfied that, like Germany after the Treaty of Versailles, it expresses its dissatisfaction in a revolutionary foreign policy’: Kissinger 1973, 1. Similarly Hans Morgenthau once argued that ‘[t]here is no such thing as the policy of an organization, international or domestic, apart from the policy of its most influential member [...]’: Morgenthau 1953, 150.

¹³⁰ Finlayson & Zacher 1983, 304.

¹³¹ Footer 2006, 90, 107-08 and 110-12.

¹³² See, eg, Cottier & Takenoshita 2003.

¹³³ Allen Buchanan notes that consent provides ‘an important safeguard against the rule of the strong’. If authority cannot be exercised over a state without its consent, this substantially hobbles the ability of powerful states to ‘hijack the project of international law’. He notes that the flipside of this is that it gives any state the power to veto even progressive change in international law: Buchanan 2010, 92-3.

consensus principle may be seen to preserve underlying power differentials.¹³⁴ This effect has been well described by Jonathan Charney in relation to consensus-based negotiations for the UN Convention on the Law of the Sea:

The consensus system assures that decision-making as a multilateral negotiation of a convention will not be dominated by the numerical superiority of any group of nations. Rather, procedural significance will be given to the variations in power of nations. Since it is difficult to obtain acceptance of voting systems that overtly recognize the differences in nations' importance, the consensus approach permits the maintenance of an egalitarian procedure which in practice may assure that multilateral negotiations reflect the real geopolitical power of the negotiating nations.¹³⁵

Similarly, Steinberg concludes that this makes the GATT/WTO decision-making process 'organized hypocrisy in the procedural context', in which '[t]he procedural fictions of consensus and the sovereign equality of states have served as an external display to domestic audiences to help legitimize WTO outcomes'.¹³⁶

There are limits to how far Members may go to leverage these power asymmetries. Article 52 of the VCLT, for instance, voids a treaty if its conclusion has been procured by the threat or use of force.¹³⁷ Yet there is no equivalent hard law relating to merely political or

¹³⁴ Several developing countries have nonetheless expressed their preference for consensus decision-making in relation to ministerial declarations: see WT/GC/W/471, 2. For a critique of the legitimating function of formal voting more generally, see Marks 2000, 64-5.

¹³⁵ Charney 1978, 43 (footnote omitted); see also Buzan 1981, 327.

¹³⁶ Steinberg 2002, 342. Steinberg nonetheless notes that a group of developing countries led by the 'Group of Five' managed to use existing GATT consensus-procedures to insist on the inclusion in the Uruguay Round of matters important to developing countries, including, among other things, tropical products, textiles, and the elimination of Voluntary Restraint Agreements, and to make sure that these issues were not dropped. Similarly, various coalitions of developing countries threatened to block the launch of the Doha Round unless it included issues in which they were interested: at 352-3.

¹³⁷ Until well into the twentieth century, customary international law did not treat the coercion of a state as vitiating consent. In keeping with the general legality of the use of force as a means of resolving international disputes, the use of coercion or the threat of force against a state to make them consent to a treaty was considered similarly unobjectionable under law: see Draft Articles on the Law of Treaties with Commentaries 1966, 246. At most, international law recognized that consent was vitiated if the state's representative had been corrupted or coerced as an individual to consent on behalf of the state. In 1932 Chester Rohrich was able to write confidently that 'as far as existing international law is concerned,

economic coercion. Although the UN Conference on the Law of Treaties¹³⁸ and the General Assembly¹³⁹ have adopted declarations denouncing ‘the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind’,¹⁴⁰ neither of these are binding under international law.

There is no suggestion that individual countries were subjected to the threat of force to consent to the WTO Agreements. There are, nonetheless, various indicators that undermine the claim that consent to the WTO rules was voluntary in a thicker substantive sense for all participants.¹⁴¹ It is widely acknowledged that the US and EU’s final move to gather the necessary formal support for the WTO involved threatening to withdraw from the existing GATT and to implement various unilateral trade measures against those who elected not to join them. After signing up to the Uruguay Final Act, both the US and the EC formally withdrew from the GATT 1947, ending their obligations to any GATT signatories who chose not to sign up to the WTO Agreements.¹⁴² Robert Howse points out that:

freedom of consent is not actually essential except as applied to the person of the negotiator’: Rohrllich 1932, 19. Following various unusual and harsh treaty obligations imposed on Russia following the Crimean War, on China following the Opium Wars, and on [Germany] following the First World War, various states advocated an alternative ‘unequal treaties doctrine’: see, eg, Putney 1927, 89, for the view prevalent in 1927. See also Buell 1927; Stone 1968. For a discussion of the decline of interest in the issue of unequal treaties altogether, see Craven 2005. In particular, Craven highlights the distinctions drawn between economic and political coercion on the one hand, and formal and actual consent on the other, noting Sinclair’s proto-positivist emphasis on formal consent as the only relevant factor to the exclusion of evidence of duress: at 374-5.

¹³⁸ Soon after the adoption of the VCLT, the UN Conference on the Law of Treaties adopted the 1969 Declaration on Political, Military or Economic Coercion in the Conclusion of Treaties. This Declaration addressed economic coercion directly; it ‘condemns the threat or use of pressure in any form’, including economic, ‘by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of sovereign equality of States and freedom of consent’.

¹³⁹ See Declaration on Principles of International Law Friendly Relations and Co-Operation among States in Accordance with the Charter Of The United Nations 1970.

¹⁴⁰ Ibid.

¹⁴¹ Weiler states this forcefully when he argues that ‘for most States both the Take it is fictitious and the Leave it is even more. [...] One cannot afford to be out, and one cannot afford to leave’: Weiler 2004, 557.

¹⁴² See Steinberg 2002, 360.

In a number of cases, including services and intellectual property rights, it is highly unlikely that a large number of countries, particularly developing countries, would have agreed to new multilateral rules, except under the threat of unilateral action, largely from the United States.¹⁴³

Steinberg expressly frames the ‘threat to exit’ as coercion, ‘in its most potent form’, to ‘generate consensus for an outcome that makes powerful states better off and weaker states worse off, or that is Pareto-improving but with benefits distributed in favour of powerful states’.¹⁴⁴ In this sense, the criticism of the genesis of the WTO echoes Hume’s criticism that states are generally not founded on consent but on violence. That said, Howse and Meltzer both note that the covered agreements contain several provisions which indicate a level of balance between interests that would sit uneasily with the claim that the content of the agreements were dictated by only the powerful,¹⁴⁵ and the larger developing countries are increasingly making use of the WTO Agreements to serve their interests effectively.¹⁴⁶

Beyond the issue of overt coercion, claims to substantive as opposed to merely formal consent are also undermined by the lack of opportunities for many of the less powerful players to participate in key negotiations, whether through active exclusion or lack of capacity, as well the lack of transparency in certain negotiations and decision-making fora. Green Room¹⁴⁷ negotiations — that is, informal small group negotiations that take place between 20 to 40 WTO Members,¹⁴⁸ but which have tended to present draft proposals to the broader membership as *fait accompli*¹⁴⁹ — have come under particular scrutiny. Originally

¹⁴³ Howse 2001a, 360.

¹⁴⁴ Steinberg 2002, 349, citing Gruber 2001. See also Hudec 1999, 14; Higgott & Erman 2010, 468.

¹⁴⁵ Howse 2001a, 360; Meltzer 2005, 709.

¹⁴⁶ Santos 2012; see also Higgott & Erman 2010, 467 (emphasis in original): ‘The growth of Southern activity, including stronger positions in Green Room negotiations that have emerged during the Doha Round, is a reflection of an increased understanding by the developing countries of their *juridical equality* within the WTO legal framework. This is having the effect of breaking some of the traditional asymmetries’.

¹⁴⁷ Named after a green-painted conference room at the Centre William Rappard in which they originally took place. See generally Pedersen 2006.

¹⁴⁸ See Narlikar 2001, 3.

¹⁴⁹ Charnovitz 2003, 49.

seen as a step forward from secretive, confidential meetings between the major powers,¹⁵⁰ Green Room negotiations would soon face substantial criticism for being both opaque and unrepresentative.¹⁵¹ At the Seattle Ministerial African, Latin American, and Caribbean delegations issued statements criticising the practice for its exclusivity and lack of transparency.¹⁵² In particular, they noted that those excluded had no notice of Green Room meetings, were not informed in advance as to their subject-matter, and were given little to no time to consider the resulting proposals.¹⁵³ The exclusive, closed, and non-consultative nature of the Green Room process has also been credited with causing, at least in part, the failure of the Cancún Ministerial in 2004 and deadlock at various other Ministerials.¹⁵⁴

The Green Room process has begun to evolve as a result of these pressures. Following the Seattle collapse,¹⁵⁵ WTO Director-General Mike Moore launched a series of consultations

¹⁵⁰ Indeed, the ‘invention and the institutionalization of the smoky green room process’ was feted as one of Arthur Dunkel’s more significant contributions to the transparency of the Uruguay Round negotiations: GATT Council, ‘Farewell to the Outgoing Director-General, Mr Arthur Dunkel’, Spec(93)24.

¹⁵¹ T Koh 1997, 439; Schott & Watal 2000; Pedersen 2006, 107; Steinberg 2002.

¹⁵² At one stage the Secretariat kept the list of attendees to Green Room meetings secret to avoid being ‘flooded’ with requests for participation: Narlikar 2001, 9. See also Pedersen 2006, 111.

¹⁵³ These criticisms were repeated in 2007 in WT/L/687 by the ACP Group, the African Group, the LDC Group, Bolivia and Venezuela: ‘We have been concerned that the recent negotiating process has been less than transparent and participatory. Although it is widely known that important negotiations are taking place in the G4 process, the vast majority of members have little or no knowledge of the progress and content of different stages of the negotiations. Although two developing countries are part of the G4, we cannot expect them to carry the responsibility of representing the views and positions of all developing countries. We have been told that the Geneva multilateral process is central, but without knowledge of the political or technical aspects of the G4 negotiations, it is not possible for the majority of members to prepare themselves or provide inputs. We are concerned that members may be faced with texts arising from small plurilateral processes and requested to consider them at very short notice and to adopt them for the sake of the system. As we are the majority of members of the system, we have the right to know what is going on and to be given the opportunity to participate. [...] The multilateral system cannot be used to rubber stamp and legitimize the decisions made by a few members.’

¹⁵⁴ See Wolfe 2010, 82-3.

¹⁵⁵ ‘In the preparations for the Seattle ministerial conference, [developing countries] tabled about half of the proposals made for the WTO agenda. The Geneva decision-making machinery could not accommodate the diversity of views’: Schott & Watal 2000. See also Pedersen 2006, 121-2.

on ‘internal transparency and participation’.¹⁵⁶ Even by Cancún, there were additional measures to notify those not participating in Green Room negotiations of their subject matter and the Membership was given greater time to consider Green Room proposals.¹⁵⁷ The WTO website now goes as far as to claim that the Green Room’s deficiencies relating to representation and transparency have largely been resolved by the development of other informal practices such as coalition-building and notification. Indeed, it claims that the proliferation of coalitions means that ‘all countries can be represented in the [Green Room] process if the coordinators and other key players are present’ and notes that there are now ‘regular reports back to the full membership’.¹⁵⁸ That said, the focus on increased participation and transparency for Green Room meetings may have simply driven the more powerful Members to other fora. At the 2008 mini-Ministerial in Geneva, for example, some countries expressed ‘unease’ with the Director-General’s ‘near-exclusive focus’ on the G-7 countries.¹⁵⁹ Therefore although some steps have been made to improve less powerful states’ ability to participate in WTO law-making processes and to do so on a more informed basis, continuing power and information asymmetries suggest that the legitimating narrative of ‘consent’ will continue to prove less than convincing for many of these states.

G Seventh Limit: Neglecting Questions of Substance and Outcome

This leads to the seventh and final limit of consent-based narratives addressed in this chapter. As with other purely input-based accounts of legitimacy, the consent-based approach provides no real handle on which to address questions of substance and outcome. One way that this issue has manifested in relation to the WTO is through the formalist interpretive tendencies of the WTO’s Appellate Body. It is well-recognized there are multiple ways of interpreting treaties, including (but not necessarily limited to) the textual, the intentional, and the teleological approaches.¹⁶⁰ Sol Picciotto argues that the Appellate Body draws on the legitimating power of textual interpretation, which notionally provides for fidelity to the text

¹⁵⁶ Pedersen 2006, 112. See also WT/GC/M/57.

¹⁵⁷ Narlikar 2004, 2. Narlikar notes that the preparatory process for the Ministerial was also far more open, with institutionalized small group meetings which allowed ‘the possibility of self-selection’.

¹⁵⁸ WTO Website, ‘Whose WTO Is It Anyway?’.

¹⁵⁹ ICTSD 2008.

¹⁶⁰ See, eg, discussion in Fitzmaurice 2014, 178-9.

to which the Members have consented, to mask much more complex and ‘political’ decision-making.¹⁶¹ A legalist focus on the contours of consent thus not only obscures the operation of judicial discretion and choice in such matters,¹⁶² it also fails to ‘persuade a broader constituency of the fairness of WTO rules’.¹⁶³ By making the central question whether or not a state or Member has consented to a given rule or decision, one can elide the broader question of whether the rule or decision is functionally appropriate, or substantively just, or whether or not it leads to desirable results.¹⁶⁴

This problem is only exacerbated when considered in light of the increased technicalization of WTO law and practice, a development which purely consent-based narratives struggle to track. The knowledge considered essential to contemporary governance, whether it relates to global economics, development theory, trade law or other disciplines, is considered to require a level of expertise and specialization that puts it beyond the reach of most people,¹⁶⁵ including, often, the notional principals. Even the experts themselves are likely to be highly specialized and unable to assess for themselves the validity of other knowledge claims made in the same institutional context. Functional differentiation in the international system has meant not only do different international regimes have their own internal vocabularies and grammars, but also that even within given regimes there will be a multiplicity of expert languages at play.¹⁶⁶ In the WTO, this has played out most visibly in SPS disputes, and is increasingly being recognized as a feature of disputes involving complex

¹⁶¹ Picciotto 2005.

¹⁶² Similar criticisms have been made of the Appellate Body’s reasoning in *EC — Sardines* by Weiler and Horn: Weiler & Horn 2005.

¹⁶³ Picciotto 2005, 496.

¹⁶⁴ Although instrumental justifications for consent may be found, they have not featured strongly in the WTO legitimacy debates. One such justification claims that it is the principals which have the best information to judge whether or not their interests are being served, and their consent ensures that their well-informed decisions are respected: see Raz 1988, 85-6.

¹⁶⁵ ‘Expertise, the high degree of division of labor, new technologies, and many more factors also seem to put many current issues beyond the grasp of even the best-informed citizens’: Bohman 1996, 151.

¹⁶⁶ ‘But modern “functional differentiation,” beginning with the differentiation of state and economy from society, culminates in increasingly distinct but interdependent subsystems, each with its own specific role and organizational structure. According to these theories, each distinct system also develops its own “functional code” (such as money in economics or votes in politics) which determine the significance of actions within such a social system’: *ibid* 155 (citations omitted). See also Koskeniemi 2007b.

economic evidence.¹⁶⁷ The prevalence of such expert languages and the difficulty in translating them has important implications for the allocation of rule- and decision-making authority. Yet consent-based legitimacy, on its own, has nothing to say about such technical complexity, and its assumption of formal equality may serve to obscure the differing degrees to which WTO Members are able to access technical expertise to form and pursue their interests.

A related challenge arises due to the increased political complexity of the WTO's membership. Even at the level of the state, there are qualms about the extent to which consent may legitimate the exercise of power once a certain population threshold has been reached or there are sufficiently divergent views within a given population. While the diversity of interests represented by the first 23 Contracting Parties to the GATT must not be underestimated, it was nothing compared to the WTO's now 164 Members. During the Uruguay Round it became abundantly clear that the interests of even developing countries were diverging significantly,¹⁶⁸ and this process has only continued in the course of the Doha Round. Such complexity seriously reduces the likelihood of reaching consensus decisions, let alone engaging in any meaningful deliberation about which options to pursue. This weakens the legitimating power of consent on a structural level, as evident in the recent calls for 'streamlining' various aspects of WTO rule- and decision-making, ranging from further empowering the Secretariat to introducing some form of weighted voting rather than consensus.¹⁶⁹ The weakening of the legitimating power of consent consequently calls for greater attention to be devoted to the questions of why so many Members have come together in the first place — in other words, to questions of substance and outcome.

IV CONCLUSION

Consent-based legitimacy therefore has a more limited role to play than its advocates might suggest. It is formally incomplete in that it is unable to account for the ultimate basis of legal normativity in the WTO. Moreover, it is descriptively incomplete in that it is unable to account for generalized delegations of power; the reasons for selecting particular agents; the influence of other aspects of the policy cycle on normativity; or the operation of interests

¹⁶⁷ See discussion in Chapter Seven.

¹⁶⁸ Page 2003, 9-10.

¹⁶⁹ See discussion in Chapter Six.

within and beyond the state. The substantial gap between the rhetoric of consent and any commitment to a genuinely voluntaristic notion of consent also has the potential to further undermine consent's power to legitimate the WTO. Nonetheless, consent-based legitimacy, even when thus whittled down, continues to play a hugely important role in justifying WTO law and regulating the exercise of the WTO's power that should not be discounted. Consent provides an important signal to help identify a substantial portion, if not all, of the WTO's binding legal norms. It thus plays a crucial role in establishing positive legal legitimacy.¹⁷⁰ An emphasis on formal consent also provides a definitive moment around which debates on broader legitimacy and justifiability can be centred. Moreover, many of the rules and processes in the WTO are founded on the idea that consent is an essential aspect of the multilateral trading order. The consent model therefore continues to provide an important starting point for considering the legitimacy of the WTO — a starting point which, nonetheless, highlights the need for a more multifaceted understanding of legitimacy which brings in other elements.

¹⁷⁰ Even there, it has limits, as it is not always clear whether the decisions of the General Council are intended to be legally binding or otherwise: see Footer 2006, 176-8.

CHAPTER FOUR:
‘NOT UNDEMOCRATIC’ — THE BOUNDARIES OF DEMOCRATIC
LEGITIMACY IN THE WTO

I INTRODUCTION

Although state consent has traditionally provided the dominant legitimating narrative for the exercise of authority at the international level, at the domestic level that title has long been held by democracy. Until recently democratic theory was largely considered to be a matter of only national concern, with no relation to the international sphere. The international law on the recognition of states and governments is, after all, notionally indifferent to the form that government takes. Following the rapid spread of democracy in the late twentieth century — or at least the increase in the number of states claiming to be democratic — much was made of the idea of an emerging customary international law right to democratic governance.¹ Even then, these debates largely, if not exclusively, focused on the character and operation of democracy as a national phenomenon — international institutions were considered to play only an ancillary role. Starting in the mid-1990s however, international relations theorists and international lawyers began to investigate in detail whether or not international institutions could or should be made democratically legitimate. The WTO, in particular, found itself at the centre of debates about the ‘democratic deficit’ in the international sphere.² These debates have become increasingly prominent as the legitimating power of consent *simpliciter* has receded.

The ways that narratives of democracy have been deployed in debates about the legitimacy of WTO law are complex and multifaceted. As such, this chapter aims to map the most common democratic legitimacy narratives that have been advanced in relation to WTO law, addressing their relationship to WTO law and their limits. The chapter begins by providing a brief overview of the rise of democracy as a narrative of legitimacy for the exercise of power at both the national and global levels. Part III sketches out four families of democratic legitimacy narratives that have proven particularly prominent in relation to WTO

¹ See, eg, Franck 1992; Fox 1992; Cf Marks 2000; Marks 2011.

² See, eg, Atik 2001; Barfield 2001b; Krajewski 2001; Howse 2003a; Elsig 2007b; Bonzon 2014.

law: direct democracy, representative democracy, participatory democracy and deliberative democracy, and some of the implications these narratives have for how WTO law is made, implemented, and even conceptualized. In particular, it highlights the potential for the participatory and deliberative approaches to democracy to break free of the purely input-oriented constraints of the direct and representative approaches to allow for some consideration of outputs. Rather than treating law as simply an instrument for channelling Member will, these latter narratives view WTO law as also playing a role in shaping such will. That said, all four of the narratives identified in this chapter suffer from their own limitations. In particular, certain deliberative democratic narratives run the risk of overemphasising the epistemic and reason-based aspects of democratic decision-making at the expense of meaningful popular participation.

II THE TURN TO DEMOCRATIC LEGITIMACY IN INTERNATIONAL LAW

The idea of democracy stretches back to at least the ancient Greeks, but it is only in the last few hundred years that it has achieved its privileged position as the dominant account of national legitimacy.³ In the words of Susan Marks, ‘the character of democracy as a form of mass politics, and its identification with legitimate political authority, are signally recent phenomena’.⁴ The word ‘democracy’ derives from the Greek *demokratia*, a composite of ‘*demos*’ (‘the people’) and ‘*kratos*’ (‘power’)⁵ dating back to roughly the fifth century BCE. This simple conjunction belies the complexity of the idea and its many variations. Early Athenian democracy, for instance, involved direct voting by only the adult male ‘citizens’ of the Athenian city-state who had completed military training.⁶ More recognizably contemporary accounts of democracy — emphasizing representative government, periodic elections, the separation of powers and respect for the ‘rights of man’/human rights — were only formulated around the time of the eighteenth century French and American revolutions.

³ See Held 1992; for Jürgen Habermas, ‘[o]ne cannot adequately describe the operation of a constitutionally organised political system, even at the empirical level, without referring to the validity dimension of law and the legitimating force of the democratic genesis of law’: Habermas 1996a, 287-8. Cf Isakhan & Stockwell 2011. By contrast, Aristotle famously denounced democracy as a perverted form of constitution, alongside tyranny and oligarchy: Aristotle 1996, III: 7-8, cf III:11.

⁴ Marks 2000, 30.

⁵ See Larsen 1973.

⁶ See generally Stockton 1990.

The word ‘democracy’ has since become something of a floating signifier,⁷ and a full account of its myriad incarnations is well beyond the scope of this chapter. It is nonetheless helpful to distinguish between four common understandings of democracy which are reflected in WTO legitimacy debates: the direct, the representative, the participatory, and the deliberative.⁸ *Direct* democracy requires that the members of a polity participate directly in creating the laws that govern them, primarily through voting. It was a version of this that was pursued in Ancient Athens. Direct democracy also found a forceful modern advocate in Jean-Jacques Rousseau,⁹ who argued for unmediated direct voting as the best means for manifesting the general will of the people (as discussed in Chapter Three).¹⁰ *Representative* democracy, by contrast, allows for democratic will to be mediated by intermediaries. The strand often corresponds to the Lockean idea that individuals in a state of nature may transfer their will to a representative by consent,¹¹ at which point their representatives may make decisions on their behalf.¹² *Participatory* democracy does not necessarily contradict either direct or representative democracy, but focuses more on citizen participation in the processes

⁷ Or, again in Susan Marks’s words, ‘fertile material for cant’: Marks 2001, 48.

⁸ Although there are other procedural accounts of democracy, including consociational democracy, republican democracy, decentralized democracy, epistemic proceduralism, and more, these have featured less strongly in WTO legitimacy debates and are not the focus of the present chapter.

⁹ Rousseau 1997, bk II § 6. To that end, Rousseau was specifically scornful of representative accounts of democracy: bk III § 15. For Rousseau, the less deliberation there was between voters, the better — deliberation only served to corrupt the purity of the collective will. This would appear to reflect Rousseau’s faith in the purity of the human being in a state of nature as compared to the ‘modern’ version corrupted by politics and socialization: *ibid* bk II § 3 and bk IV § 2. Moreover, to the extent that Rousseau supported governmental deliberation, this was only for the purpose of discerning and implementing the general will, not shaping or correcting or improving it. That is, the ends were to be chosen in accordance with the general will of the people, but the means for doing so could be the subject of deliberation by administrators and experts: bk III § 15.

¹⁰ Recognizing that such direct democracy would work best with smaller polities, Rousseau’s ideal government was that of the city-state; he was sceptical of anything larger: *ibid* bk III § 15. Cf Madison 1961, 71-9, on the benefits of larger polities and territories.

¹¹ Locke 1988 § 140.

¹² There has long been a link between representative democracy and the idea of deliberation. Theorists such as Edmund Burke and James Madison were distrustful of the capacity of the ordinary citizen to engage in reasoned deliberation, and saw part of the virtue of representation as allowing for reasoned deliberation by wise elites (ie the representatives): Brown 2009, 65-6.

of policy-making and implementation.¹³ Instead of focusing on formal representatives and voting, participatory democracy stresses the creation of a broader, autonomous and informal public sphere in which political disagreements can be thrashed out even as they influence and inform formal decision-making. Finally, *deliberative* democracy shifts the emphasis away from the channelling of will through voting and onto processes of deliberation and reason-giving.¹⁴ In doing so, deliberative accounts tend to allocate greater value to expert knowledge and guidance than alternative accounts of democracy.

As with other narratives of legitimacy, democratic legitimacy narratives can be categorised into input-based and output-based accounts.¹⁵ Input-based accounts focus on the inputs to democratic decision-making processes: who gets to make laws/decisions and how they make those laws/decisions. Questions of representation, participation, and deliberation loom large.¹⁶ Output-oriented accounts of democracy instead focus on the substantive outputs of such laws/decisions, considering instead whether the laws serve democratic principles of, for instance, distributive justice or human rights.¹⁷ Of the four narratives identified above, direct and representative democracy provide squarely input-based visions of democracy. Participatory and deliberative democracy can also contain an output-oriented component — through an emphasis on political participation and self-realization as overarching goods in the case of participatory democracy, and through an emphasis on the manifestation of collective rationality and epistemically superior decisions in the case of deliberative democracy. Overall, the ‘democratic deficit’ debate in the WTO has been characterized by an emphasis on procedural, input-based approaches to democracy at the expense of output-based

¹³ See generally Pateman 1975; Pateman 2012; Mutz 2006.

¹⁴ See Cohen 1989, 17; Habermas 1996a; Gutmann & Thompson 1996; Young 2000; Dryzek 2006; Dryzek 2010. See also Howse, who broadly defines the deliberative understanding of democracy ‘a legitimization of power that depends on a conception of public justification and deliberative reason’: Howse 2001b, 478.

¹⁵ See Scharpf 1999, ch 1; Elsig 2007b.

¹⁶ On the dangers of a purely procedural conception of democratic legitimacy, and its disassociation from justice, see Marks 2000, 59-61; Tribe 1980; Rawls 2005, 427-33.

¹⁷ See Bellamy 2007, ch 3; Elsig 2007b; Michelman 1996; and Dahl 1999, 20. This distinction turns on a matter of emphasis, as procedural and substantive accounts are often interrelated. Any democratic procedure must of necessity rest on a particular substantive account of what democracy means, and systems that focus on substantive values democratic legitimacy will invariably put in place procedures to protect those values.

alternatives.¹⁸ In this way, they often replicate the consent narratives' failure to engage with how questions of substance and outcome relate to the legitimacy of WTO law.

Notwithstanding the primacy of democratic legitimation at the national level, it is only recently that democracy has been considered to have any relevance to international law. Indeed, Joseph Weiler and Iulia Motoc suggest that 'for most of the 20th Century, generally speaking International Law has displayed indifference, even hostility, to the concept of democracy'.¹⁹ Arguments about the democratic legitimacy of international institutions were not completely absent from international debates — in 1919 the League of Free Nations Association, for instance, argued for 'complete publicity' and 'effective popular representation' to guard against an 'immense bureaucratic union of governments instead of a democratic union of peoples'.²⁰ Yet it was only at the close of the twentieth century that the language of democracy began to be invoked regularly and systematically in the international sphere.²¹

The language of democracy and democratization also largely bypassed the GATT. Until the mid-1990s, with the notable exception of the New International Economic Order, there were few calls to examine the GATT's democratic credentials, or worries about the threat it posed to national democracies.²² It was only with the inception of the WTO that the multilateral trading order regularly found itself on the defence against charges of a democratic deficit. Indeed, for years the WTO website stated emphatically that the WTO is 'NOT

¹⁸ With a few exceptions: see Zampetti 2003; Elsig 2007b, 88; Fakhri 2009. See, eg: 'The "democratic" procedures drawn on for this purpose tend to be ones in the liberal proceduralist tradition, which emphasise processes for ensuring transparency, deliberation and public participation in decision-making as the basis of legitimate authority': Peel 2007, 365.

¹⁹ Weiler & Motoc 2003, 49.

²⁰ League of Free Nations Association 1919, 43; cf '[I]t is not necessary in the interest of democracy, to democratize diplomacy, as some imprudent demagogues demand; it is the government, the executive power which is and which must remain the first organ, the first representative of democracy in its external policy': Barthélemy 1917, quoted in translation from the French in Garner 1918, 536.

²¹ See, eg, Marquand 1979; Dahl 1999; Marks 2000; Moravcsik 2004; Wheatley 2010.

²² Cf Tumlin 1983; Housman 1994. Cf the unadopted provision in the Draft Declaration on the Right to Development for 'democratic participation in international economic institutions, particularly International Monetary Fund, World Bank and General Agreement on Tariffs and Trade' as part of a new international economic order: see Report of the Working Group of Governmental Experts on the Right to Development 1982, para 12(d)(iii).

undemocratic’.²³ Speaking more ambivalently in 2010, then Director-General Pascal Lamy noted that ‘the very credibility of national democracies is at risk if global governance fails to establish its own democratic credentials’.²⁴ What form these ‘democratic credentials’ may take, however, remains open to contestation.

III FOUR KEY NARRATIVES OF DEMOCRATIC LEGITIMACY (AND THEIR LIMITS)

The four visions of democratic legitimacy briefly identified above — direct, representative, participatory and deliberative — have all manifested in very particular ways in debates about WTO law and legitimacy.²⁵ Each of these narratives provides a different framework from which the law and institutional structure of the WTO may be justified and critiqued, as well as different agendas for legal reform. As such, they tend to be advanced by different groups seeking to promote different sets of interests.

A *Direct Democracy*

The first prominent WTO-related narrative takes elements of direct democracy and gives them a distinctly Westphalian spin. This ‘democratic’ narrative treats WTO Members as the central moral and legal actors; it pays essentially no attention to the representation or participation of the individuals or groups inhabiting those Members.²⁶ This narrative is not recognizably democratic in the sense of providing government by ‘the people’.²⁷ Rather, the

²³ WTO, *Ten Common Misunderstandings about the WTO* (1999) 10 (emphasis/capitalization in original). Intriguingly, the WTO’s replacement for this document contains no references to democracy at all: WTO, *Ten Things the WTO Can Do* (2012) 12.

²⁴ Lamy 2010. In 2002 then Director-General Mike Moore delivered a speech in which he argued that the WTO did not pose a threat to democracy: Moore 2002.

²⁵ They are also awkwardly refracted through an economic lens, as the Members of the WTO are not only states, but also autonomous customs territories. Individuals in the WTO context are generally envisaged as producers, consumers, or regulators rather than as citizens.

²⁶ For instance, one of the main papers addressing democracy in the WTO, as promulgated on the WTO website, is attributed to Saif Alqadhafi — not a man generally recognized for his strong commitment to democracy, to say the least: Alqadhafi 2007.

²⁷ ‘So long as an international agency continues to be maintained and financed by member governments, its right to exist, and to carry out the functions which those members have collectively assigned to it, is clear. To this extent, and in this sense, its legitimacy derives from governments alone. Questions of public acceptability and ‘popular sovereignty’ do not enter in’: Henderson 2002, 280.

primary emphasis is on how WTO rules and decisions should reflect the interests of the broader Membership, rather than of a small handful of Members or a detached international bureaucracy. The WTO's pamphlet on *Ten Common Misunderstandings about the WTO*, for instance, claimed that 'decisions taken in the WTO are negotiated, accountable and *democratic*' because the WTO is 'Member-driven', decisions are rules are ratified by Members' parliaments and decisions are made by consensus.²⁸ Similarly, in 2002, then Director-General Mike Moore argued that those who claimed that the WTO system was 'undemocratic' started 'from a basic fallacy', in that 'no other body is as directly run by Member governments'.²⁹ In their emphasis on Members and the expression of Members' will, these narratives often strongly resemble consent-based narratives.

Some variants of the direct democracy narrative emphasize the democratic credentials of consensus voting. The *Ten Common Misunderstandings about the WTO* pamphlet argued that consensus voting is '[i]n principle [...] even more democratic than majority rule because no decision is taken until everyone agrees'.³⁰ A similar perspective is provided by Peter Van den Bossche and Werner Zdouc, who claim rather boldly that '[i]t cannot be disputed that decisions taken by consensus have more "democratic legitimacy" than decisions taken by majority vote'.³¹ The emphasis on Members and on consensus provides for little distance between this vision of democracy and the narratives of consent-based legitimacy.

Another variant of the direct democracy narrative is more open to the possibility of majoritarian rather than consensus-based voting. Jaime Tijmes-Lhl, for instance, attempts to

²⁸ WTO, *Ten Common Misunderstandings about the WTO* (1999) 2 (emphasis added). The language of democracy has been dropped from the pamphlet's successor: WTO, *Ten Things the WTO Can Do* (2012).

²⁹ 'Indeed, the irony is that many of the things opponents of the WTO do not like about the system stem from too much democracy, not too little. Many who say the WTO is too powerful, actually want it to take on wider powers. They want the WTO to force open markets, preserve union jobs, strengthen labour standards, protect animal rights, preserve the environment, save the developing world from capitalism, and a lengthening list of other goals — even when these goals are resisted by sovereign countries. The WTO has an ambitious enough mandate without making it a substitute for a "global government". The fact is that on certain issues international consensus simply does not exist. The WTO does not and cannot perform a role in areas where it does not have a mandate. The WTO cannot impose rules and standards on unwilling sovereign governments. Indeed, imposing rules on unwilling Members is "undemocratic": Moore 2002.

³⁰ WTO, *Ten Common Misunderstandings about the WTO* (1999). Peter Singer identified this as 'a very strange view of democracy': Singer 2004, 75.

³¹ Van den Bossche & Zdouc 2013, 142.

frame consensus-based³² and majoritarian decision-making rules in the WTO in an expressly Rousseauian direct democratic framework.³³ Ultimately Tijmes-Lhl argues that a Rousseauian view of democratic legitimacy supports consensus as the most democratic decision-making procedure possible in the WTO,³⁴ in that:

because every member of Rousseau's ideal political community is involved in the process of approving a statute (that is, universal participation) and the bill is approved by everyone (put differently, unanimity and therefore every member has a right to veto), this regulation is just.³⁵

Tijmes-Lhl nonetheless allows that majoritarian voting could be democratically just, but notes that a Rousseauian perspective would require this to be supported by a rigorous system of checks and balances to check the tyranny of the majority — checks which he does not consider the WTO to have in place currently.³⁶ As such he suggests that 'expanding majority voting in the WTO might cause or deepen problems regarding input legitimacy'.³⁷

While Tijmes-Lhl raises some important reservations about the WTO's general lack of checks and balances in relation to majoritarian rule-making, his article offers an unrecognizable reading of Rousseau.³⁸ It also reflects the serious normative deficiencies of attempting to transfer direct democracy to the international sphere while maintaining a Westphalian ontology. Rousseau placed a heavy emphasis on direct *citizen* participation in a democratic setting. Treating Rousseauian democratic conditions as fulfilled because Member

³² See also Ehlermann & Ehling 2005.

³³ See also Röben 2008. The consensual strand closely resembles the consent-based approach dealt with in Chapter Three of this thesis, and tends to make similar arguments about the need for increased Member participation and internal transparency.

³⁴ Tijmes-Lhl 2009, 423-4. Cf Weiler & Motoc 2003, 54. When Mike Moore claimed that the WTO was inherently democratic, one of his main arguments was that no other international body is 'as firmly rooted in consensus decision-making. [...] What the consensus rule embodies is the right to sovereignty, free choice, self-government — in other words "democracy" in its most basic sense': Moore 2002. See also Elsig and Cottier 2011, 297.

³⁵ Tijmes-Lhl 2009, 419.

³⁶ Ibid 423-4.

³⁷ Ibid 425.

³⁸ For a more plausible reading of how Rousseau's thought can be applied in the international sphere, see Nili 2011.

states and customs unions participate directly, notwithstanding their internal government structures, is a non-sequitur. This approach also runs directly counter to Rousseau's desire to rest the foundation of authority with 'the people'. By treating states as 'moral persons in their own right, rather than merely being institutional resources for human beings',³⁹ the cord to Rousseau's thought, and indeed to popular sovereignty in general, is cut.⁴⁰

The direct democracy narrative has also been invoked by less-powerful Members seeking a louder voice in WTO decision-making, along very similar lines to the invocation of the participatory narrative in relation to consent. In seeking such a voice, these Members have turned to the formal and informal rules governing WTO rule- and decision-making. They note that, despite the seeming levelling effect of the principle of consensus, in practice many Members have been effectively excluded from decision-making processes.⁴¹ Calls for reform in this area have generally focused on 'internal transparency' issues concerning the lack of representation in Green Room decision-making, the lack of transparency of decision-making processes, the wide discretion given to the chairs of WTO negotiation groups, and the general informality of decision-making processes.⁴²

When accompanied by such an emphasis on ongoing participation and transparency, and on informal practices as well as formal rules, the direct democracy narrative appears to move beyond some of the limitations of the more formalist consent narratives. It is not as tied to the moment when formal consent to a rule is given. Moreover, a turn to majoritarian voting, although controversial, would at least have the potential to address some of the rule- and decision-making efficiency concerns raised by the increased political complexity of the WTO. However, the direct democracy narrative also shares many of the consent narratives' limitations. First, the vision of 'democracy' underlining the narrative is painfully thin and has little to offer in terms of moral legitimization. If we are to reach for the democratization of the

³⁹ Buchanan 2004, 305, citing Beitz 1979, 71.

⁴⁰ See Roth 2011 for a defence of sovereign equality that does not claim to be democratic. See also Christiano 2010, 123; and Bodansky 1999, 613-4.

⁴¹ See generally the views expressed by various delegates in Jawara & Kwa 2003, esp 19-21. See also Alqadhafi 2007, 2: 'WTO member countries are all equally represented and influential within the organization, or if a certain set of members has illegitimately amassed an undemocratic—"unfair"—amount of influence'.

⁴² See, eg, Pedersen 2006; Odell 2005; Ismael 2009; Gathii 2004, 891-900; CIDSE & Caritas Internationalis 2005.

international sphere, surely we can reach for more than this. Second, the narrative's exclusive focus on Members neglects the role of non-Members (including bureaucrats) not only in influencing and shaping WTO laws and decisions, but also in influencing and shaping Member preferences. Third, in focusing only on whether or not WTO rules and decisions are 'Member-driven', it continues to ignore whether the outcomes of such rules and decisions are substantively desirable.

B *Representative Democracy*

The second major narrative of democratic legitimacy to manifest in debates about the WTO is the *representative* narrative. This is by far the most common of the democratic legitimacy narratives articulated in relation to the WTO. It treats individuals rather than Members as the central moral entities, but sees Members as the primary representative agents for individuals in their international relations.⁴³ In representative accounts of the WTO's democratic legitimacy, Members are not treated as fundamental moral subjects in themselves, but rather as conduits for the will of 'the people',⁴⁴ either as a vague collective or a mathematical aggregate of individuals.⁴⁵ Legal mechanisms relating to accountability feature strongly in such narratives. The legitimacy of WTO laws and practices are assessed in light of their capacity to constrain or facilitate⁴⁶ the practice of democracy within Members.⁴⁷ In this way, the representative narratives sidestep some of the problems faced by the direct narratives.

⁴³ Cf Slaughter 2000; Simpson 1994, 115-20 (on 'democratic liberalism').

⁴⁴ Robert Howse identifies a 'dimension' of the legitimating value of sovereign consent with the idea that 'this consent stands as a surrogate for the democratic legitimacy of the wills in question. The WTO rules represent the wills of various *demos*, to which sovereigns are accountable': Howse 2001a, 361. This approach has also been articulated with respect to international law more generally. Samantha Besson argues that 'states do not make international law just for themselves as free, rational agents, but as officials for their respective populations, other states and IOs': Besson 2009a, 362. See also Matthew Lister, who 'assume[s] the traditional view that the primary subjects of and actors in international law are states' even though he does not 'take states to be moral agents in their own right, but rather because states are, or should be, the representatives of individuals at the international level': Lister 2010, 665 fn 3.

⁴⁵ Although the WTO Agreements nowhere make reference to individuals, and Members have membership in light of their autonomy over commercial matters, most of the liberal accounts of the idea of democratic legitimation in the WTO make use of the idea of individuals rather than consumers.

⁴⁶ See, eg: 'The investment of lawmaking authority in multilateral international bodies, whether through the negotiation of international agreements or the resolution of international disputes, engages three

The representative narratives include both nationalist and internationalist strands. Nationalists tend to be sceptical of any measure that has the capacity to impose external constraints on national decision-making processes. The democratic legitimacy of the WTO in such accounts is considered purely derivative of the democratic legitimacy of the individual Members,⁴⁸ and international institutions such as the WTO are viewed with suspicion. Thus when Gregory Shaffer interviewed a US congressional staffer in May 2003, the staffer considered that any attempt to systematize inter-parliamentary meetings in the WTO would be ‘hurting legitimacy’, which should instead be maintained ‘through national oversight’.⁴⁹ What may at first have appeared to facilitate global democracy in the form of the increased

antidemocratic tendencies. All things being equal, this shift strengthens the Executive with respect to Congress, enhances the ability of concentrated interest groups to procure rules that benefit their own, rather than the general, welfare, and bolsters the power of the bureaucracies of international institutions. Each of these developments shrinks the realm of democratic public decision-making and makes it less likely that lawmaking will reflect the popular will’: Stephan 2000, 238 and 249-53. Cf Paul 2000, 268-70 who agrees with Stephan’s identification of the anti-democratic influence of ‘new international law’ generated by multilateral institutions such as the WTO and takes them even further. See also Hudec 1993.

⁴⁷ In the words of Gregory Shaffer, ‘[t]he core concept of contemporary democracy is to hold rulers accountable through elected representatives’: Shaffer 2005b, 385. Shaffer is quick to highlight that this does not mean that the idea of representativeness is exhausted by elections and voting: ‘The central normative concept for assessing the normative legitimacy of decision-making should not be whether a decision has been rendered by a popularly elected body. [...] Rather, the legitimacy of institutions should be viewed in a broader sense as concerning the relative *accountability* of decision-making processes to those affected by them’: at 386 (emphasis in original).

⁴⁸ ‘To the extent that the individual states that are the Members of the WTO become more truly democratic, and to the extent that those individual states are more democratic in the making of their own domestic trade policies, the combined efforts of those individual states in their combined capacity *as the WTO* will be more truly democratic as well’: Bacchus 2004, 670 (emphasis in original).

⁴⁹ Shaffer 2005b, 397. Note how Shaffer’s main basis of criticism against the civil society/stakeholder model, a variant of what is here termed the cosmopolitan model, is based on a metric of representation. In a nuanced and detailed analysis of the operation of the WTO Committee on Trade and Environment, Shaffer also came to the conclusion that ‘the [Committee] served as a conduit for states responding to domestic pressures. In this sense, the WTO is a much more democratically accountable institution than its critics claim’: Shaffer 2001, 81. That said, Shaffer’s argument may be more convincing for wealthy and influential Members; those with lesser ability to influence decision-making may find they have little opportunity to channel domestic priorities through WTO Committees.

participation of national parliaments is here viewed as simply another attempt to relocate the setting of power away from national legislatures.

Internationalist accounts allow for the validity of decision-making at the international level, and are more optimistic about the democracy-preserving aspects of long-term consent to general rules. In this vein, Andrew Mitchell and Elizabeth Sheargold have argued that:

assuming that the decision to accede to the WTO was initially made by democratically elected representatives, complying with an unpopular WTO ruling is not necessarily undemocratic. Rather, members are simply being held to follow rules that their governments agreed to uphold.⁵⁰

Similarly, at the WTO-sponsored NGO forum in Seattle in 1999, then Director-General Mike Moore argued that:

Our decisions must be made by our Member States, agreements ratified by Parliaments and every two years Ministers meet to supervise our work. There's a bit of a contradiction with people outside saying we are not democratic, when inside over 120 Ministers all elected by the people or appointed by elected Presidents, decide what we will do.⁵¹

This was also echoed in a joint statement by three former WTO Directors-General — Arthur Dunkel, Peter Sutherland and Renato Ruggiero — who traced 'public and political disenchantment with international institutions' to, in part,

a view that powerful international bodies are less accountable to the ordinary citizen than should be the case. It is a view we cannot share. It is governments which negotiate in institutions like the WTO, and governments are accountable to their citizens.⁵²

⁵⁰ Mitchell & Sheargold 2009, 1078. Note also their framing of the question 'Does popular will within democratic nations undermine compliance with WTO Dispute Settlement, and hence the effectiveness of global governance?' first conflates compliance with WTO dispute settlement with the effectiveness of global governance, and second takes the 'effectiveness of global governance' as a matter of technocratic implementation.

⁵¹ PRESS/155. Similarly, Claude Barfield has argued that the 'best means of achieving continued democratic legitimacy is for the WTO to remain a "government-to-government" organization, one in which governments take decisions in the WTO after having sorted through and resolved conflicting claims and the demands of competing interests in the domestic political process': Barfield 2001a, 411.

⁵² Dunkel, Sutherland & Ruggiero 2001.

At the centre of most representative narratives is the concept of the ‘legitimacy chain’, a continuous chain of formal accountability between individuals and those making WTO rules and decisions. The idea is that through clear delegations of formal legal authority WTO rule- and decision-making can be made democratically legitimate. The role of law here is to facilitate such accountability through institutionalising requirements of legality and transparency and by providing for fair voting processes. As Howse notes, ‘[u]nder a representative democracy model, the problem of “democratic deficit” is essentially a problem of agency costs’.⁵³ To this end, nationalists tend to emphasize the importance of national-level accountability mechanisms, seeking an end to ‘fast-tracking’ of trade agreements, increasing *ex ante* restrictions on trade negotiators, demanding *ex post* legislative approval of agreed rules, and even requiring referenda on the adoption of new WTO rules.⁵⁴ Internationalists, too, may subscribe to some or all of these national-level mechanisms for legally controlling agents;⁵⁵ however they place more emphasis on international-level accountability and transparency mechanisms. The WTO Secretariat, for instance, is notionally kept accountable through narrowly ascribed competences,⁵⁶ annual reports to the Members, the appointment of the Director-General by the Ministerial Conference,⁵⁷ the General Council’s control over the Secretariat’s budget,⁵⁸ the requirement that the Director-General and Secretariat staff ‘not seek or accept instructions from any government or any other authority external to the WTO’,⁵⁹ and the fact that officials are expected to internalize an ethos which prizes the ‘international character’ of their responsibilities.⁶⁰

⁵³ Howse 2003a, 83; Stein 2001, 490; Dahl 1999, 20.

⁵⁴ See Howse 2003a, 83-9 for a fuller discussion of these accountability mechanisms.

⁵⁵ Robert Howse points to the inclusion of a ‘rider’ placed by the US Senate on the Trade Promotion Authority for the US President that required the executive not to agree to any provisions that would require US trade remedy law to be amended: *ibid* 88. See also Petersmann 2002a, 63.

⁵⁶ The regulations setting out the ‘powers, duties, conditions of service and term of office of the Director-General’, which also determine the scope of the duties and conditions of service for Secretariat Staff, are determined by the Ministerial Council: WTO Agreement Article VI:2 and 3. See also Staff Regulations, WT/L/282.

⁵⁷ WTO Agreement Article VI:2.

⁵⁸ WTO Agreement Article VII:1.

⁵⁹ WTO Agreement Article VI:4.

⁶⁰ WTO Agreement Article VI:4.

The legitimacy chain argument is subject to two major criticisms. First, many WTO Members simply cannot make a claim to be democratic. Unlike the EU⁶¹ and MERCOSUR,⁶² WTO law does not require Members to adhere to any particular form of government, let alone democratic government. Despite James Bacchus's claim that the 'vast majority' of WTO Members are democracies,⁶³ the Economist Intelligence Unit's Democracy Index ('EIUDI') suggests otherwise. Of the 144 WTO Members represented in the EIUDI in 2014, only 24 were classified as 'full democracies', another 50 were considered 'flawed democracies', 33 were 'hybrid regimes' and 37 were 'authoritarian regimes'.⁶⁴ This is further complicated in the WTO as Members need not even be states; any 'separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in [the covered agreements]' may accede to the WTO.⁶⁵ As economically-defined entities rather than comprehensive political states, these Members have even less claim to be channels for the broad ranging political preferences of their citizens.

Second, any attempt to stretch the chain from the individual to the WTO results in the chain becoming too attenuated to provide a convincing basis for social legitimacy.⁶⁶ Problems with access to Green Room meetings, the information and power asymmetries which

⁶¹ See Treaty on European Union Articles 2, 6(1) and 49; European Council in Copenhagen, *Conclusions of the Presidency*, SN 100/1/93 Rev.1 (21 – 22 June 1993).

⁶² Cf MERCOSUR's suspension of Paraguay in June 2012 under Articles 3 to 5 of the Ushuaia Protocol on Democratic Commitment following the Paraguayan impeachment of its President in the absence of due process: Nejamkis & Flor 2012.

⁶³ Bacchus 2004, 668; see also McGinnis & Movsesian 2000, 588.

⁶⁴ Economist Intelligence Unit 2014. The Polity IV Project's ('PIVP') Global Report 2013, which focuses more on formal procedure to the exclusion of other factors, was more generous. Of the 141 WTO Members included in its State Fragility Index and Matrix 2013, 88 were considered to be institutionalised democracies, 22 uninstitutionalised democracies, 18 uninstitutionalised autocracies, and 11 institutionalised autocracies, with two classified as undergoing state failure: Marshall & Cole 2014, 45-54. Considering that China is included in PIVP's 'institutionalised autocracies', it can hardly be said that the non-democracies lack influence in WTO decision-making. Even for those that are democracies, the decisions of distant IGOs rarely have much of an impact on electoral campaigns, further weakening the accountability chain: see Woods & Narlikar 2001.

⁶⁵ WTO Agreement Article XII:1.

⁶⁶ 'Between someone who actually got elected, and the director general of the WTO, there are so many miles that, in fact, he and his staff are accountable to no one': Lori Wallach, quoted in Wallach & Naím 2000, 47. See also Dahl 1999, 19; Atik 2001, 457; Keohane & Nye 2001, 285; Buchanan & Keohane 2008, 37.

characterize WTO decision-making, the agency costs which separate WTO delegates from their home governments, and the agency costs which separate those governments from the preferences of their citizens in even the most democratic Members severely weaken any claims that individuals are able to hold WTO decision-makers accountable.⁶⁷ Practices of agent selection and delegation in the WTO are not well-suited for democratically-oriented decision-making. Delegates and Secretariat members as are generally drawn from similar epistemic communities and share a particular functionally-oriented worldview centred on the importance of international trade. In contrast, at the national level, rules and decisions are made by elected legislators of general competence from (ideally) various backgrounds who are able to weigh competing values and interests against one another. Although the competences of government departments are more specialised, they operate within a framework of rules formulated with an eye to the system as a whole, and interact with other departments on a constitutionally ordered legal basis. In the WTO, delegations are composed of delegates from usually only one or two government departments, those concerned with trade and foreign affairs. Even at the Ministerial level, it is the trade and foreign ministers who attend.

To counteract this problem, one set of proposals has sought to expand the range of governmental interests represented at the WTO.⁶⁸ The idea is that by ‘increasing the participation of national representatives of the economic and social activities in the work of the WTO’ this could help improve the transparency and representativeness of WTO decision-making processes.⁶⁹ This could include, for instance, the creation of an advisory parliamentary body.⁷⁰ A related set of proposals highlights the representative value of national parliaments, operating not just as filters for international rules but also active participants in the creation of those rules.⁷¹ In the WTO, this finds limited reflection in the operation of the

⁶⁷ See also Elsig 2010b.

⁶⁸ Samantha Besson advocates ‘enhanced executive cooperation’ by ‘building a stronger secretariat general at the level of the WTO, but linking it at the same time to domestic executives through a committee whose role would be intergovernmental on the model of the EU Council’: Besson 2011, 27.

⁶⁹ See ILA 2000, 193.

⁷⁰ Ibid.

⁷¹ See Shaffer 2005b; Skaggs 2005; Hilf 2005; Mann 2005; Krajewski 2001; Steger 2009, 824-30.

biennial Parliamentary Conferences on the WTO.⁷² These conferences seek expressly to ‘strengthen democracy at the international level by bringing a parliamentary dimension to multilateral cooperation on trade issues’.⁷³ The WTO Secretariat also runs national and regional parliamentary workshops, and dispenses regular bulletins on WTO matters specifically for parliamentarians.⁷⁴ However, these inter-parliamentary meetings and measures have no formal decision-making role in relation to the WTO, and several of the WTO’s major players simply do not attend.⁷⁵

Therefore although representative democracy is regularly invoked to justify the exercise of legal power by and through the WTO, it still faces several problems as a narrative of legitimacy. The appeal of representative democracy as a basis for moral legitimacy, so strong at the national level, is severely weakened at the international level for three reasons: first, because many WTO Members cannot plausibly claim to be democracies; second, because of the intractable agency costs associated with the legitimacy chain; and third, because of the continued empowerment of the executive branch of domestic governments at the expense of legislatures.⁷⁶ Its almost exclusive focus on input-based/procedural mechanisms also again

⁷² See generally Krajewski 2011. Greg Shaffer traces parliamentary involvement at the international level back to the 1999 WTO Ministerial in Seattle, where Members of the European Parliament presented a proposal to establish a Parliamentary Assembly for the WTO. The European Parliament was the main champion of the proposed Interparliamentary Assembly. The US was unenthused, and developing country reactions were mixed — many were wary of the extra resource demands that would be made by such a body, and felt that countries with larger delegations would be favoured, could undermine executive control of negotiation, and could be diverted by vested interests: see Shaffer 2005b, 400.

⁷³ See WTO Website, ‘Parliamentary Conference on the WTO’.

⁷⁴ Shaffer 2005b, 403 and 406.

⁷⁵ Among others, the 2011 Conference did not include representatives from Australia, Brazil, India, Japan, or the USA. Gregory Shaffer has gone into some detail about how the US government and US Congress’s antipathy to global interparliamentarian meetings: *ibid* 394-7. Indeed, he notes that when he ‘raised the issue of congressional oversight and democratic control of the WTO with staff of Congress’s trade and foreign relations committees, as well as with the heads of staff of some congressional representatives, *no one expressed much interest in interparliamentarian meetings*. Such meetings were viewed as either purely symbolic or, even worse, legitimizing an illegitimate process’: at 397 (emphasis in original).

⁷⁶ ‘You take the obedience claim of international law and couple it with the conflation of government and State which international law posits and you get nothing more than a monstrous empowerment of the executive branch at the expense of other political estates or an empowerment of those internal special interests who have a better capture of the executive branch’: Weiler 2004, 558. This echoes earlier

neglects issues of substance and outcome. Overall, this narrative treats international rule- and decision-making as an aggregative process, as if all that is necessary is to calculate the preferences of individuals as expressed through their Members to arrive at ‘the right decision’. In this way, it neglects the question of how WTO law may itself shape those preferences or the conditions under which Members are able to express them. Moreover, it deflects from the question of whether or not the decision reached is substantively desirable by once again (as with the consent and direct democracy narratives) relying exclusively on procedural inputs to determine the desirability of a given rule or decision. This failure to address the ideational and substantive dimensions of WTO rule- and decision-making renders the representative account of the WTO’s legitimacy seriously deficient.

C *Participatory Democracy*

The third major narrative of democratic legitimacy to manifest in WTO debates is the participatory narrative.⁷⁷ As with the representative narrative, this narrative takes the individual, rather than the Member, as the central moral subject. This approach, however, abandons the Member as a normatively privileged legal vehicle for the transmission of collective will to the WTO in favour of more varied, often informal possibilities for individual engagement, including through NGOs, social movements and corporations.⁷⁸ It is generally cosmopolitan in orientation. Although these narratives have the potential to be quite radical, in general their advocates recognize the continued ‘Member-driven’ formal basis for the WTO. There have been only a few isolated suggestions, for instance, that individuals be given legal subjecthood in the WTO.⁷⁹ This does not mean, however, that the concept of the moral subjecthood of the individual has no relevance for how law is designed, interpreted, and implemented, or that WTO law itself has no impact on how we come to understand the idea of individual moral subjecthood.

observations by Max Weber: ‘Bureaucracy inevitably accompanies modern *mass democracy*, in contrast to the democratic government of small homogeneous units’: Weber 1968, 983 (emphasis in original).

⁷⁷ For a detailed investigation of public participation and WTO legitimacy, see Bonzon 2014.

⁷⁸ For more on cosmopolitan approaches to international law and order, see Falk 1998; Held 1995; and Archibugi 2008.

⁷⁹ See discussion in Shell 1995, 885 and 902-03 and associated citations.

There have been several advocates of participatory democracy in the WTO. In a comparatively early (1994) article on democratizing international trade decision-making, Robert Housman argued that representative democracy was ill-suited to an international sphere lacking free and fair elections. He instead proffered a participatory approach concerning ‘the democratic right of citizens to have knowledge of and participate in decisions that will effect [sic] their interests’.⁸⁰ Similarly Peter Gerhart argues that the WTO should be considered as an ‘institution of international participatory democracy’, because it allows Members to participate in the trade policy-making of others.⁸¹ A participatory element is also present in Charnovitz’s work on the WTO and ‘cosmopolitics’.⁸² Defining ‘cosmopolitics’ as ‘global political action transcending a strict state-to-state, or multilateral, basis’ which ‘has to be tested against democratic norms’,⁸³ Charnovitz argues that, instead of states, ‘one should start with the most basic unit — the individual person’,⁸⁴ whose views are then mediated through ‘cosmopolitan communities’ of their own creation (including, but not limited to, NGOs).⁸⁵

The participatory narrative continues to embrace accountability as a fundamental principle, but stresses the value of accountability mechanisms that operate alongside those provided by and in relation to the state/Member. This focus on accountability is often accompanied by the articulation of the principle of ‘affectedness’. That is, that the basis for participation does not lie in membership of a formally defined community (such as a Member), but rather on the basis that one is affected by a given decision or rule. In this way, some participatory narratives break free of the tendency shared by the direct and representative narratives to treat WTO rules and mechanisms as merely instruments for the propagation of Members’ preferences. Instead, they recognize that the operation of WTO

⁸⁰ Housman 1994, 703.

⁸¹ Gerhart 2004, 897.

⁸² Charnovitz 2002; Charnovitz 2004.

⁸³ Charnovitz 2002, 299-300.

⁸⁴ Ibid 310.

⁸⁵ Cf Keohane & Nye 2001, 290: ‘In this sense of shared externalities and a degree of shared understanding, there may be some global publics even if there is no global community’. Daniel Bodansky treats ‘public participation’ as an independent ground of legitimacy, but does not consider it to be democratic as such: Bodansky 1999, 617-18.

rules and decisions may help to constitute the very communities in which such preferences are generated.⁸⁶

For some, however, the principle of affectedness provides an insufficient grounding for democratic community. These accounts require accountability to a well-defined *demos* that is the product of ‘underlying cultural commonalities and a shared identity’.⁸⁷ It is the common identity provided by the sense of *demos* which allows for the political trade-offs necessary to effective democratic government. At the international level many argue that the ties of community and identity are too weak to sustain the notion of a membership-based *demos*. Commentators from Dahl,⁸⁸ to Weiler,⁸⁹ to Howse,⁹⁰ to Pauwelyn⁹¹ have all noted variations on the theme that ‘governance with government and without *demos* means there is no purchase, no handle whereby we can graft democracy as we understand it from Statal settings on to the international arena’.⁹²

Charnovitz, by contrast, claims that arguments concerning the lack of a global *demos* are not ‘constructive’.⁹³ Invoking the principle of affectedness, he argues that the lack of an equivalent *demos* or elected decision-makers at the international level ‘do not make the individual uninterested in participating in international organizations, institutions, and processes that affect her’.⁹⁴ Indeed, ‘[i]ndividuals will create their own cosmopolitan communities of common concern’.⁹⁵ Others have taken this criticism of *demos* in a different direction to redefine *demos* in terms of this sense of common concern.⁹⁶

⁸⁶ See generally List & Koenig-Archibugi 2010.

⁸⁷ Ibid 81. Howse concurs with Stein that a *demos* requires a ‘certain community of common good and common expectations of the people that bridges the cultural differences’: Howse 2001a, 362, quoting Stein 2000, 335ff. For Howse, the absence of a transnational *demos* means that the democratic pedigree of civil society must derive from its informal representative value in domestic politics, including through monitoring the agents of national *demoi*: at 362. See also Keohane & Nye 2001, 282-3.

⁸⁸ Dahl 1999, 30-2.

⁸⁹ Weiler 2004, 560.

⁹⁰ Howse 2001a, 362.

⁹¹ Pauwelyn 2005.

⁹² Weiler 2004, 560.

⁹³ Charnovitz 2002, 309.

⁹⁴ Ibid 313.

⁹⁵ Ibid (citations omitted).

⁹⁶ See discussion in List and Koenig-Archibugi 2010, 81-6.

Participatory narratives have become bound up in legal debates in two main ways. The first emphasizes transnational regulatory transparency,⁹⁷ which enables citizens of one Member to scrutinise trade-related regulations promulgated by another Member. Several WTO Agreements require Members to improve their regulatory transparency in this way. GATT Article X, for instance, requires Members to publish all trade-related laws, regulations, judicial decisions and administrative rulings of general application ‘in such a manner as to enable governments and traders to become acquainted with them’. Article 25.3 of the SCM Agreement requires Members to notify certain types of subsidies in a manner ‘sufficiently specific to enable other Members to evaluate the trade effects and to understand the operation of notified subsidy programmes’. Article 12.1 of the Agreement on Safeguards requires Members to immediately notify the Committee on Safeguards upon the decision to, among other things, apply or extend a safeguard measure, while Article 12.6 requires Members to notify the Committee of any ‘laws, regulations and administrative procedures relating to safeguards’. Article 12.3 requires Members proposing to apply or extend such measures to ‘provide adequate opportunity for prior consultations with those Members having a substantial interest as exporters of the product concerned, with a view to, inter alia, reviewing the information provided [...], exchanging views on the measure and reaching an understanding’ on ways to ‘maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994’⁹⁸ between it and the relevant exporting Members. There are further notification and consultation requirements in Article 7 and Annex B of the SPS Agreement and throughout the TBT Agreement.⁹⁹

Participatory narratives have also featured strongly in debates over the role of NGOs in WTO decision-making. NGOs are considered to assist participatory democracy in the WTO in two ways. First, they improve the transparency of the system by scrutinizing the WTO’s activities and translating the technical elements of those activities into languages that can be more readily understood by laypeople (thereby improving accountability).¹⁰⁰ The Guidelines for Arrangements on Relations with NGOs (‘NGO Guidelines’),¹⁰¹ for instance, provide that

⁹⁷ See, eg, McGinnis and Movsesian 2000, 547-8.

⁹⁸ Safeguards Agreement Article 8.1.

⁹⁹ See TBT Agreement Articles 2.9.2, 2.10, 5.6.2, 5.7.1, 10.5, 10.6, 10.7, and 15.2.

¹⁰⁰ See Howse 2001b.

¹⁰¹ WT/L/162.

‘Members recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities’.¹⁰²

Second, NGOs have the potential to increase opportunities for participation by giving voice to interests that are not well-represented by the Members’ delegates. The WTO does not, however, see the WTO as the appropriate forum for this form of NGO participation, stating in those same Guidelines:

there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings. Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making.¹⁰³

Similarly, proposals for an Advisory Economic and Social Committee in which NGO representatives would advise the WTO have largely fallen on deaf ears.¹⁰⁴

The argument that greater NGO participation in WTO rule- and decision-making is necessarily more democratic has drawn many critics. One strand of criticism notes that NGOs dealing with ‘non-trade’ concerns are vastly outnumbered by industry groups and that their contributions to WTO legal debates are likely to be weighted accordingly.¹⁰⁵ Another strand highlights that most NGOs come from wealthy, developed countries; they are thus perceived as representing Northern concerns without taking into account the political and economic

¹⁰² Article V of the WTO Agreement provides that the ‘General Council may make appropriate arrangement for consultation and cooperation with [NGOs] concerned with matters related to those of the WTO’. See also Petersmann 2001, 108-09. Howse suggests the formation of a more radical ‘Citizen’s Task Force’ on the WTO, the guiding principle of which would be ‘as much inclusiveness as the Internet permits’ with the aim to compiling a report that ‘evoke[s] the range of opinions, ideas, dreams and challenges that have been brought forth through the deliberation’: Howse 2004, 879.

¹⁰³ NGO Guidelines, WT/L/162, para VI.

¹⁰⁴ Bonzon 2014, 231-4.

¹⁰⁵ See, eg, Edwards & Zadek 2003, 202 and 208-11. *Contra* Hanegraaff, Beyers & Braun 2011, who argue that there is ‘no systematic underrepresentation of non-business interests compared to business interests’ (at 462) and that few industry groups appear to be maintaining a long-term lobbying presence in the WTO (at 468). That said, in recent years this could be attributed to the private sector’s continuing disappointment of the Doha Round and the diversion of its attention to the negotiation of regional trade agreements.

issues of concern to the South.¹⁰⁶ A third (representative) strand suggests that NGOs simply interfere with and distract from the formal mechanisms of accountability at the state level — Jeffery Atik criticizes NGO involvement in WTO decision-making on the basis that ‘NGOs, as wonderful as they may be, are hardly reliable channels of the popular will’.¹⁰⁷

The participatory narrative is not as philosophically unconvincing as the direct narrative, and it can at times complement rather than contradict the representative narrative. Its legitimating power nonetheless remains limited. Although the participatory narrative does away with many of the problems of accounting for the exercise of legal power by non-Members, it does so at the expense of introducing additional problems of agency and representation. When it comes to NGOs, it is unclear on whose behalf they can claim to speak. Although NGOs may assist in keeping national and international bureaucrats accountable, the NGOs then make their own claims to expert authority in the service of specific agendas.

In addition, the participatory narrative seriously exacerbates the problems of political and technical complexity identified in relation to the consent narratives. The notification and enquiry requirements described above require the development of particular forms of knowledge which are framed in accordance with the technical vocabularies that have grown up around WTO disciplines of safeguards, subsidies and the like.¹⁰⁸ They require masses of data to be collected, categorised, and represented in accordance with associated sets of expert professional vocabularies and methodologies. Once published, this information requires further armies of technical experts to scrutinise and dissect the published claims. The participatory narratives that have been advanced to date in relation to the WTO have not made any attempt to grapple with the law and legitimacy implications of such a turn to expertise or the greater reliance on more complex and inaccessible representations of knowledge about the world.

¹⁰⁶ For a fuller discussion see Joseph 2009, 321-2; Bhagwati 2001, 27; Shaffer 2001, 62-74; cf Sjöstedt 2012, 99-100.

¹⁰⁷ Atik 2001, 459 fn 35. Moreover: ‘While it is undoubtedly useful to permit NGOs a degree of standing in WTO dispute resolution, their presence does little to increase democratic participation in WTO decision-making. Depending on one’s politics and opinion of the particular NGOs exerting influence on the WTO, one may believe that democracy is impeded by their presence’: 458-9 (citations omitted). See also Barfield 2001a, 409-10.

¹⁰⁸ See Lang 2009.

Finally, through the principle of affectedness, the participatory narrative attempts to break free of the exclusive focus on process and inputs as the foundation for legitimacy. The principle of affectedness gestures towards a broader substantive commitment to how the WTO should operate by requiring a degree of sensitivity to the distributive consequences of rule- and decision-making. Its effectiveness in this regard is nonetheless limited, as its solution to the question of how to achieve better outcomes for all those affected is ultimately procedural — better outcomes will be produced if those affected have a say in the processes that generate those outcomes.

D *Deliberative Democracy*

The fourth and final democratic narrative addressed by this chapter is that of deliberative democracy. Markus Krajewski and Robert Howse were among the first to draw attention to the deliberative possibilities of WTO rules at the advent of the millennium, and over the last decade calls to make WTO decision-making more deliberative have become more common.¹⁰⁹ The legal requirements of deliberative democracy are not necessarily inconsistent with those of direct, representative, or participatory democracy — indeed, some elements of participatory democracy pursue similar notions of citizen empowerment. However, although deliberative democracy recognizes the importance of individual will and participation, it places a greater emphasis on the value of public deliberation and public reason in shaping democratic decision-making. In the words of Joshua Cohen:

citizens in [a deliberative democracy] share a commitment to the resolution of problems of collective choice through public reasoning, and regard their basic institutions as legitimate in so far as they establish the framework for free public deliberation.¹¹⁰

¹⁰⁹ This follows a pattern taking place more generally: ‘Increasingly, proposals to overcome the democratic deficit of international governance are rooted in deliberative models of legitimation, following Jürgen Habermas’ discourse theory’: Nanz 2006, 68. See, eg, Howse 2000b; Krajewski 2001 and 2011; Verweij & Josling 2003; Steffek 2003; Kapoor 2004; Chimni 2004; Evenett 2008; Higgott & Erman 2010; von Bogdandy & Venzke 2012.

¹¹⁰ Cohen 1989, 21. Cohen enumerates four criteria for deliberative democratic decision-making: that they be free of coercion; that participants get an equal chance to deliberate; that deliberative outcomes are based on reasons; and that consensus is directed towards the common good: Cohen 1996, 99.

Deliberation is supposed to be a communicative process, in which individuals exchange and respond to reasons as equals while adopting a reflexive posture in relation to their own arguments. Deliberation is thus ‘arguing and not bargaining’.¹¹¹

Deliberative democracy aims not only at fair decision-making processes, but also at ‘better’ decision-making.¹¹² Consequently, deliberative democracy seeks to link democratic inputs and outputs in a way that the other democratic models addressed above do not. In Habermas’s words:

democratic will formation draws its legitimating force not from a previous convergence of settled ethical convictions, but both from the communicative presuppositions that allow the *better arguments to come into play* in various forms of deliberation and from the procedures that secure fair bargaining processes.¹¹³

‘Better arguments’ are to arise naturally under conditions which encourage communication rather than strategic bargaining.¹¹⁴ This faith in deliberative processes to produce superior outcomes is typical. For Higgott and Erman, ‘fair deliberative procedures and equal respect and participation’ must be institutionalized ‘to promote the democratic values of justice and equality’.¹¹⁵ Verweij and Josling go as far as to propose deliberative democracy as a counterweight to a Weberian process of rationalization and bureaucratization, thereby preventing bureaucratic self-interest from overtaking the public interest in law and policy

¹¹¹ Krajewski 2001, 172-3.

¹¹² At two levels: first, whether the right public goods are being pursued through WTO rules, and second, whether they are being pursued in a way that is effective (the goals are attained) and efficient (with an optimal use of resources).

¹¹³ Habermas 1996b, 24 (emphasis added).

¹¹⁴ Habermas suggests an ‘ideal speech situation’, which is meant to provide a critical yardstick against which the relative communicativeness permitting the generation of better arguments can be measured. This requires that deliberative processes be: (1) inclusive, in that they do not leave out anyone who considers the issues relevant to him/her and do not leave out relevant information and arguments; (2) non-coercive, in that arguments are made freely and not in the shadow of domination. This is meant to ensure that ‘the unforced force of the better argument prevails’ (Habermas 1996a, 306); and (3) ‘open and symmetrical’, meaning that each participant can contest any relevant topic, including the procedures governing the discussion: Habermas 1990, 86-9; see also discussion in Kapoor 2004, 523; cf Habermas’s discussion of Joshua Cohen’s ‘ideal procedure’ for deliberation in Habermas 1996a, 304-308.

¹¹⁵ Higgott & Erman 2010, 463. They see the WTO as having ‘ventured further down this discursive route than any of the other international economic institutions’: at 464.

making.¹¹⁶ Deliberative narratives thus claim to provide moral and epistemic legitimacy benefits that improve the quality of decision-making in service of the public interest while encouraging participants to accept the resulting decisions.¹¹⁷ In this sense deliberative democracy, unlike direct and representative democracy, is meant to be more than merely ‘aggregative’, or input-oriented. This can lead to a tension in deliberative narratives between a voluntaristic dimension that emphasizes equal participation in consensually-oriented decision-making processes, and an epistemic dimension that prioritizes expert knowledge and the production of ‘reasonable results’.¹¹⁸

Deliberative democracy also provides a very different account of human will and agency to aggregative accounts of democracy, as represented by the direct and representative narratives. Instead of treating preferences as pre-formed and coherent, they are instead characterized as amenable to change (including as a result of communication and persuasion) and formed in and through inter-subjective social contexts.¹¹⁹ There is thus a much greater emphasis on informal processes of opinion- and will-formation that come before and after the moments of formal decision-making. Attention shifts to the ability of an informal public sphere to affect formal decision-making processes over time. As such, ‘[c]ommunicative power is exercised in the manner of a siege. It influences the premises of judgment and decision-making in the political system without intended to conquer the system itself’.¹²⁰ This

¹¹⁶ This ‘points the way towards building an “output” argument in favour of democratizing and pluralizing multilateral decision-making. If Weber’s analysis is valid, then the lack of democracy among multilateral organizations must go hand in hand with failing international policies’: Verweij & Josling 2003, 6.

¹¹⁷ Buchanan and Keohane argue that ‘the proper response to both the problem of factual knowledge and the problem of normative disagreement and uncertainty is to focus on what might be called the *epistemic-deliberative* quality of the institution, the extent to which the institution provides reliable information needed for grappling with normative disagreement and uncertainty concerning its proper functions’: Buchanan & Keohane 2008, 51.

¹¹⁸ ‘Although the deliberative theory of democracy at first had its place in the tradition of radically democratic approaches that attempted to make a contribution to reform policy by strengthening forums of participation, its source of legitimacy has successively shifted ever more toward engendering “reasonable results” as a normative point of reference’: Buchstein & Jörke 2012, 278.

¹¹⁹ Dryzek takes the separation of the will-forming and will-imposing stages of decision-making even further, arguing that deliberation is at its strongest and most valuable when disconnected from exercises of sovereign power through formal decision-making: Dryzek 2006, ch 2.

¹²⁰ Habermas 1996a, 486-7.

also provides a potential way around the *demos* problem. As noted by Nanz, ‘instead of presuming that democratic legitimacy presupposes a certain pre-political homogeneity, [deliberative democracy] claims that democratic legitimacy is ultimately created by the communicative power of the public as a collective body’.¹²¹

1 *Deliberation in the WTO*

Deliberative narratives in the WTO tend to focus on the benefits of democratic deliberation at one of two levels: at the international level, focusing directly on WTO rules and procedures, and at the national level, focusing on the effect of such rules and procedures on national decision-making. To begin with international deliberation, even Pascal Lamy, then Director-General of the WTO, referred to the ‘deliberative function’ of the WTO, pursuant to which the WTO is ‘a platform for governments to exchange views on important issues relating to trade, to assess whether existing arrangements need to be revisited, and to analyse policy challenges facing the international community’.¹²²

i *Deliberation and WTO Rule-Making*

Arguably the most important sites for deliberation in the WTO are the trade negotiation rounds, which have the potential to create longstanding and binding rules across any area on which the Members can reach formal agreement. Several commentators have noted that these rounds are characterized by strategic, interest-based bargaining, rather than open, communicative argumentation. In 2004, Ilan Kapoor criticized the deliberative failings of WTO negotiation rounds. Assessing WTO rule-making procedures against an expressly Habermasian ‘ideal speech situation’ (emphasizing inclusion, non-coercion, and openness/symmetry), Kapoor pointed to familiar problems with Green Room negotiations, the lack of NGO involvement, the US threats to withdraw from the Uruguay Round, and the lack of developing country capacity. Kapoor concluded that WTO rule-making falls well short of deliberative requirements.¹²³ In 2006, BS Chimni made similar criticisms, adding further

¹²¹ Nanz 2006, 73 (citation omitted). Quoting Habermas, Nanz notes that such communicative power ‘springs from the interactions between legally institutionalized will-formation and culturally mobilised publics’: see Habermas 1996b, 21 and 29.

¹²² Lamy 2011.

¹²³ Kapoor 2004, 523. Kapoor notes that Southern Members have taken a more active role in the Doha Round negotiations.

suggestions for reform including amending the VCLT to ‘eliminate the use of economic and political coercion in multilateral negotiations’, assigning a stronger role to national parliaments in negotiating and ratifying WTO Agreements, moving from ‘passive’ to ‘active’ consensus, and considering alternatives to the single undertaking approach.¹²⁴

In the intervening years, the WTO initiatives to increase internal and external transparency, open up Green Room negotiations, improve Member capacity, and augment opportunities for developing Member participation have represented generally positive, if small, steps forward for advocates of deliberative democracy in the WTO. Higgott and Erman even characterize these changes as being driven in part by developing country attempts to enhance their ‘deliberative impact’.¹²⁵ Such improvements are, however, widely recognized as quite limited and can only be thought of as representing the first step in a much longer process. The continuing disparities in Member capacity, the confines of the single undertaking, the continued emphasis on consensus-based decision-making, and raw self-interest have all continued to allow power and bargaining to trump reasoned deliberation.

ii *Deliberation and WTO Decision-Making*

Deliberation has also been argued to play a role for the legitimacy of ongoing WTO decision-making processes.¹²⁶ There is less literature critiquing the deliberative potential of the WTO in relation to general decision-making as opposed to primary rule-making, reflecting the ‘missing middle’ of WTO activity.¹²⁷ What material there is largely concerns how deliberation can be encouraged either through the increased involvement of NGOs or through augmenting the inter-parliamentary dimension of the WTO.

Another potential site for ongoing deliberation may be found in WTO committees and working groups. Andrew Lang and Joanne Scott both draw attention to the ‘hidden world of WTO governance’ in the WTO committee system, emphasising their value as sites of information exchange, norm elaboration and regulatory learning.¹²⁸ To this end, Lang and

¹²⁴ Chimni 2006, 35.

¹²⁵ Higgott & Erman 2010, 467.

¹²⁶ This is not to separate out the effects of deliberation in rule-making and decision-making completely — each provides the context for the other.

¹²⁷ See Evenett 2008.

¹²⁸ Lang & Scott 2009.

Scott's contribution may be contrasted with Shaffer's earlier investigation of the Committee on Trade and the Environment, which concluded that Committee negotiations were largely driven according to the logic of a two-level intergovernmental game.¹²⁹ Lang and Scott do not expressly draw on the vocabulary of deliberative democracy. Nonetheless their analysis has clear resonances with the deliberative narratives discussed here.¹³⁰

The possibilities for deliberation in this context nonetheless appear rather limited. Richard Steinberg critiques Lang and Scott's findings on the basis that they do not sufficiently question the possibilities for the strategic manipulation of information by committee representatives or attend to the problems of information asymmetry.¹³¹ Steinberg also considers the examples of 'norm elaboration' provided by Lang and Scott to be essentially insignificant.¹³² In the process, however, Steinberg neglects to address the ideational dimension of Lang and Scott's argument, which is that these WTO committees provide legal-institutional structures which affect how Members formulate and reassess their understandings of their interests.¹³³ How the balance is struck between deliberative instances of preference- and interest-formation and between strategic gaming by the relevant delegates is likely to vary from committee to committee and from issue to issue. Further research is required to determine just how significant any deliberative effects are.

¹²⁹ That is, representatives in the Committee served as 'conduits for states responding to domestic pressures', rather than as disinterested communicators working towards consensus: Shaffer 2001, 81-4.

¹³⁰ For instance: 'In the [SPS Committee], science represents just one part of a deliberative process which is concerned not only with scientific evidence but with achieving a more rounded understanding of the global costs and consequences of SPS regulation. By contrast to the dispute settlement bodies, and in a manner which is not apparent without careful analysis of its day-to-day activities, the SPS Committee offers an opportunity for Members to step outside the scientific frame and to expand the range of arguments which they deploy in challenging trade-restrictive regulations adopted elsewhere': Lang & Scott 2009, 614.

¹³¹ In particular, Steinberg points to the disproportionately high information benefit for 'smaller, poorer' countries participating in WTO committees: Steinberg 2009, 1069.

¹³² Ibid 1065-6.

¹³³ See generally Lang & Scott 2010.

2 *WTO Rules as Promoting National Democratic Deliberation*

i *Promoting National Democratic Deliberation during WTO Accessions*

Deliberative narratives may also act to legitimate the WTO through claiming that WTO rules exert a beneficial deliberative influence on law- and decision-making at the national level. These arguments tend to come in one of three forms. The first claims that WTO rules can be used to encourage national deliberation when making choices about whether or not to commit to WTO rules. There have, for instance, arguably been some small steps to improve national deliberative capacity in relation to WTO accessions. Aaronson and Abouharb note that during its accession process Saudi Arabia was pushed to create a website to disseminate trade policy information, to ‘publish notices of proposed measures related to trade and to provide an opportunity for “interested persons” to provide comments and views on such measures’.¹³⁴

The notionally deliberative potential of such measures, however, is undercut by the manner in which the WTO Secretariat has encouraged them. Aaronson and Abouharb point out that Vanuatu’s accession was stalled by a public backlash against the changes required for accession. In its review of the situation, the WTO Secretariat proposed two forms of consultation: one aimed at ‘determining private views’ for the purposes of ‘deciding the content of negotiating proposals’, the other in the form of ‘frequent national seminars aimed and stimulating debate and arriving at an overall viewpoint’, ‘mostly to create a sense of public ownership’.¹³⁵ The aim here appeared not to be to stimulate discussion to enable more informed and considered decisions, but rather to normalize the idea of trade liberalization: ‘[i]f local players feel that they have been consulted, they are more likely to commit to any final outcome even if they disagree with it’.¹³⁶ ‘Stimulating debate’ thus appears largely geared to legitimating a set of pre-determined economic baseline rules through participation in accession process; there is little sense that such participation would be used to highlight local concerns about WTO rules. ‘Deliberation’ in WTO accessions thus seems aimed at encouraging, to use David Held’s words, *homo credens* rather than *homo politicus*.¹³⁷

¹³⁴ Aaronson & Abouharb 2011, 385 (citation omitted).

¹³⁵ Gay 2015.

¹³⁶ Ibid.

¹³⁷ Held 1992, 18.

ii *Promoting National Deliberation through WTO Rules*

A second approach suggests that WTO rules serve deliberative democracy at a national level by constraining regulatory processes in a way that promotes public deliberation and reason-giving. Jan Tumlir argued that the GATT rules served a constitutional function in improving the ‘quality of democratic discussion’ by providing protection for private property rights.¹³⁸ Robert Keohane, Stephen Macedo and Andrew Moravcsik similarly argue for recognition of the ‘democracy-enhancing’ aspects of multilateralism, in helping ‘domestic democratic institutions restrict the power of special interest factions, protect individual rights, and improve the quality of democratic deliberation, while also increasing capacities to achieve important public purposes’.¹³⁹ These arguments seem less convincing when one considers the potential for regulatory capture of WTO rules themselves. Indeed, many of the intellectual property protections in the TRIPS Agreement appear to provide a quintessential example of regulatory capture.¹⁴⁰

In addition, Robert Howse has suggested that the science provisions in the SPS Agreement be viewed as enhancing domestic deliberation. SPS Agreement Article 2.3 requires that any SPS measure be ‘based on scientific principles and is not maintained without sufficient scientific evidence’, while Article 5.1 requires that such measures be based on a ‘risk assessment’. These ‘science provisions’ have been heavily litigated before the WTO’s dispute settlement organs, and the resulting decisions have frequently been framed in a way

¹³⁸ Tumlir 1983, 79. A version of this argument has also long been argued by Ernst-Ulrich Petersmann. See, eg, Petersmann 2002a.

¹³⁹ Keohane, Macedo & Moravcsik 2009, 2. Cf Gartzke & Naoi 2011; Keohane, Macedo & Moravcsik 2011. Petersmann even suggests that WTO rules somehow serve a broad version of the ‘common good’, arguing for the virtues of fast track procedures: ‘Rather than “circumventing democracy”, such special legislative and procedural procedures for reciprocal tariff liberalization have proven to be effective “pre-commitments” for protecting the general citizen interest in transnational legal freedom, liberal trade, and welfare-increasing legislation’: Petersmann 2002a, 53-4. See also Brewster 2004; McGinnis and Movsesian 2000.

¹⁴⁰ A ‘key actor’ in the transnational business network that played an active role in the TRIPS negotiations claimed that 95% of the network’s wishes had been met: Sell & Prakash 2004, 160. Even then they considered lobbying further for the US Government to reject the Agreement until more of their wishes had been enshrined. See also Brewster 2004, 505-24. Chantal Thomas argues that the model of legislative capture by protectionist interest groups is outdated, and that instead there is an ‘overarching [pro-liberalization] directive and smaller concessions to pro-protection interests’: Thomas 2004, 2-3.

that casts the normativity of WTO rules against the democratic autonomy of individual Members.¹⁴¹

Howse seeks to recast the relationship between the science provisions and democratic government by considering how they might serve a deliberative account of democracy. He argues that the role of science may be transformed ‘if one understands democracy not simply in terms of popular will and decision, but as a form of legitimation of power that depends on a conception of public justification and deliberative reason’.¹⁴² Following Cass Sunstein and Richard Pildes, he argues that

the appropriate role of scientific expertise in the regulatory process is not to trump citizens’ intuitive judgments about which risks are acceptable and which not, but rather to help ensure that citizens’ judgments result from an appropriately structured deliberative process.¹⁴³

To this end, Howse argues that the Appellate Body in *EC — Hormones* read the ‘risk assessment’ provisions of SPS Agreement Article 5.1 as only bringing ‘science in as one necessary component of the regulatory process, without making it decisive’.¹⁴⁴ This is because of the distinction made between setting the appropriate level of protection (which is not governed by science) and requiring evidence that there is a risk to be protected against; the separation of risk assessment and risk management; and the relatively open epistemological approach taken by the Appellate Body to scientific evidence, in which it permitted risk assessments to be made on the basis of ‘nonmainstream’ science.¹⁴⁵ Similarly, in a later article, Howse argues that neither the SPS Agreement’s science provisions nor the TBT Agreement’s disciplines need be viewed as ‘constraining democratic regulatory choices’, arguing that they instead only discipline ‘the *processes* by which those choices are arrived at’. As such, these rules ‘may be understood as democracy-enhancing with respect to regulatory *processes*’.¹⁴⁶

¹⁴¹ For a further discussion of these issues that complicates this binary, see Peel 2004; Peel 2010, ch 7.

¹⁴² Howse 2000b, 2334.

¹⁴³ Ibid 2335, referring to Sunstein & Pildes 1997.

¹⁴⁴ Howse 2000b, 2341.

¹⁴⁵ See, eg, *Canada — Continued Suspension*, Appellate Body Report, para 194.

¹⁴⁶ Howse 2003a, 90-1 (emphasis in original).

Yet Howse is too quick to argue that the SPS Agreement does not make science ‘decisive’, and that the science provisions necessarily improve the democratic credentials of national regulatory processes. A key tenet of deliberative democracy is that the processes themselves must also be open to reflexive contestation, but Howse treats the science provisions as fixed, ignoring whether a populace may wish to structure their regulatory processes less rigidly. Many of the deliberative benefits elaborated by Howse could be maintained, for instance, by requiring that Members utilise risk assessment and scientific evidence as part of the regulatory process, but then allow such evidence to be counted as only one factor in the decision as to whether to implement an SPS measure. Although Howse acknowledges that citizens may still desire to enact a regulation that is not considered scientifically rational, and that failing to honour the citizen’s choice would be to ‘favor an artificial and cryptically elitist conception of democratic deliberation’, he does not resolve this issue. His appeal to the ability of ‘openness in government’ to improve trust in expert regulation cannot bridge the gap in all cases. As such, treating the science provisions as enhancing deliberative democracy falls into the trap of losing sight of the democratic subject — it becomes deliberation without the democracy.

iii *Regulatory Transparency*¹⁴⁷ and ‘Improving’ National Democracy

A third approach claims that the WTO Agreements enhance national deliberation through their creation of a panoply of transparency, notification, and consultation measures, some of which were discussed in relation to the participatory democracy narratives in Part III(C) above. Certain provisions of the WTO Agreements concerning transparency and notification procedures arguably go further than improving opportunities for participation to encourage a species of regulatory deliberation. GATT Article X, for instance, requires that:

Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted

¹⁴⁷ See generally Wolfe 2003.

with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any other contracting party shall also be published.

Annex B (in conjunction with Article 7) of the SPS Agreement takes things further. It requires that Members publish promptly all SPS regulations that are not based on international standards, and which may have a significant impact on trade ‘in such a manner as to enable interested parties to become acquainted with them’. Annex B also requires that Members set up enquiry points to provide ‘answers to all reasonable questions from interested Members as well as for the provision of relevant documents’ regarding SPS regulations and associated procedures.¹⁴⁸ Members are required to give notice ‘at an early stage, when amendments can still be introduced and comments taken into account’¹⁴⁹ of any proposed SPS regulation which would not be substantially the same as an international standard, including the ‘objective and rationale’ of the regulation. They are consequently required to provide at least brief written reasons for their choice of SPS regulation. Finally, Members must ‘allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take the comments and the results of the discussions into account’.¹⁵⁰

Annex B thus requires Members to engage in quite a detailed process of information exchange, comment and justification. It requires Members to make certain information available to others, and requires them to offer reasons for their decisions to make particular regulatory choices (even if those reasons need only be brief). Moreover, Members are required to discuss comments made by other Members, and thus may have to elaborate further on their reasons for particular regulation. As they must take the results of the discussion into account, this also allows for the possibility that Members will change their laws and regulations as a result of such deliberation. That said, it is questionable as to how much of the international consultation associated with SPS rules may be considered open and contestatory in nature and how much it involves conversations between the like-minded members of a given epistemic community.

¹⁴⁸ Similar provisions regarding enquiry points may be found in Article 10 of the TBT Agreement. See also TBT Agreement Annex 3.

¹⁴⁹ SPS Agreement Annex B para 5(b).

¹⁵⁰ SPS Agreement Annex B para 5(d).

The WTO also provides for more generalized instances of regulatory assessment through the TPRM. The administration of the TPRM is one of the permanent central functions of the WTO.¹⁵¹ Its purpose is to ‘contribute to improved adherence’ to WTO rules and ‘the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members’.¹⁵² Assessments are understood to take place ‘against the background of the wider economic and developmental needs, policies and objectives of the Member concerned, as well as of its external environment’.¹⁵³ Each Member must ‘report regularly’ to the TPRB, another emanation of the WTO General Council, which carries out the trade policy reviews.¹⁵⁴ Ernst-Ulrich Petersmann argues for greater use of the TPRM as a mechanism for encouraging national deliberation,¹⁵⁵ while Aaronson and Abouharb portray trade policy reviews as sites where Members can ‘openly debate another member’s trade conduct’ while also discussing ‘the broad context in which trade occurs’.¹⁵⁶

Trade policy reviews are technically carried out by the TPRB on the basis of a report made by the Member under review and an economic report formulated by the WTO Secretariat.¹⁵⁷ To date, the approach taken by the Secretariat in providing such reports appears to have undermined the potential deliberation-enhancing effects of the TPRM. Valentin Zahrnt views the TPRM as a vehicle straightforwardly designed for promoting a particular vision of trade policy liberalization¹⁵⁸ rather than a process by which Members can push back and give reasons for alternative regulatory choices. Howse, too, notes that the TPRM’s ‘democratic potential [...] 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’.¹⁵⁹

¹⁵¹ See WTO Agreement Article III:4.

¹⁵² TPRM Agreement para A(i).

¹⁵³ TPRM Agreement para A(ii).

¹⁵⁴ TPRM Agreement para D.

¹⁵⁵ Petersmann 2008d.

¹⁵⁶ Aaronson & Abouharb 2011, 387.

¹⁵⁷ For a more detailed breakdown of how trade policy reviews operate in practice, see Ghosh 2010, 419.

¹⁵⁸ ‘In the future, the main objectives of the TPRM should be to shape domestic politics’: Zahrnt 2009.

¹⁵⁹ Howse 2003a, 92. Cf Bonzon 2014, 72-6.

Although some of the discussion in trade policy reviews does address issues of political participation, transparency, and due process, these are rarely posited as being intrinsically valuable, and instead are linked to the development of more predictable and trustworthy economic arrangements. China, for instance, in 2008, claimed that implementing new trade-related laws had helped to create ‘a more rule-based predictable business environment, which was particularly important for foreign investors’.¹⁶⁰ Advances in the rule of law may ultimately be beneficial, but the implementation of market liberalization measures that benefit foreign investors should not be confused with the implementation of democracy.

3 *The Limits of Deliberative Narratives*

i *Forgetting the deliberatively democratic subject*

Many accounts linking deliberative democracy and the WTO fall into one of four common traps. The first trap is losing sight of the democratic subject. Some accounts of the WTO’s legitimacy emphasize the value of reasoned and efficient deliberation by experts at the expense of broader participation. For instance William Smith and James Brassett, as well as Jens Steffek, have expressly attempted to detach deliberation from democratic ideals at the international level.¹⁶¹ In the process, they risk abandoning the democratic premise of the deliberative narrative in favour of a more recognizably technocratic approach.¹⁶² John Dryzek

¹⁶⁰ WT/TPR/M/199, para 42. See also Aaronson & Abouharb 2011, 387-8.

¹⁶¹ Smith and Brassett ‘understand deliberation in a minimal fashion as *a process of public reasoning geared toward generating political decisions or public opinion about how to solve shared problems*’: Smith & Brassett 2008, 72 (emphasis in original); Steffek 2003, 251 and 258.

¹⁶² ‘There is especially the danger of a slippery slope from deliberative politics, through epistemic communities, to the rule of experts’: Buchstein and Jörke 2012, 278, citing Joerges and Neyer’s work on comitology as representing the slippery slope: see Joerges 2002; Joerges & Neyer 1997. Similarly, Martin Shapiro cites Joerges and Neyer as exemplary of when ‘[t]he whole paraphernalia of deliberation is employed as a cover for technocratic government. [...] In transnational regimes, the desire to transcend national logrolling, the need to establish some sort of non-electoral legitimacy, and the very real technical complexity of transnational regulatory issues create a natural push toward technocratic government under the camouflage of deliberation’: Shapiro 2005, 351.

even reconfigures the very meaning of ‘democratic’ to abandon the human subject in favour of competing ‘discourses’.¹⁶³

ii *False trade-offs between deliberation and efficiency*

A second, and related, trap is to assume that there is a straightforward trade-off between deliberative legitimacy and decision-making efficiency. Creating more opportunities for deliberation in trade rounds may only create more opportunities for Members to entrench their bargaining positions. Nonetheless, others have argued that deliberation may serve to increase efficiency if used properly. While negotiation rounds and the limited output of Ministerials are still largely characterized by bargaining rather than arguing or deliberation, there is a penumbra of deliberative activity at other stages of the policy cycle which lead up to, surround and shape these bargaining moments. Thomas Risse has emphasized that

[e]mpirical research demonstrates that arguing and persuasion matters particularly during specific phases of negotiations. [...] processes of persuasion are particularly relevant during agenda-setting and pre-negotiations.¹⁶⁴

Similarly, Simon Evenett asks whether the current Doha impasse could ‘have been have been avoided had there been more deliberation before the Round was hurriedly launched in 2001’.¹⁶⁵ It may well be that institutionalizing deliberative procedures during the agenda-setting and pre-negotiation phases will allow consensus to be reached more easily in future (although there is little that this can do for the Doha Round). At present, however, the WTO does not have any specific institutionalized procedures relating to how agenda-setting and pre-negotiation should be structured; law is yet to be seen as a productive mode of intervention in this regard.¹⁶⁶

¹⁶³ ‘Democracy here cannot be interpreted in electoral terms, as universal suffrage for everyone affected by an international issue. Transnational discursive democracy does not have to be integrated with any particular set of formal institutions [...]. Democracy is about communication as well as voting, about social learning as well as decision-making, and it is the communicative aspects that for the moment can most straightforwardly be pursued in the international system’: Dryzek 2006, 25.

¹⁶⁴ Risse 2004, 302 (footnote omitted).

¹⁶⁵ Evenett 2008, 4.

¹⁶⁶ Chimni suggests that the VCLT be amended to cover ‘all aspects and phases of the process of negotiations including pre-negotiations and agenda setting’ to improve effective participation for members in international economic institutions: Chimni 2006, 17. It seems unlikely that such amendments to the

The third trap is that of losing sight of the contingency of WTO rules. In this trap, certain WTO rules are posited as objectively enhancing democratic deliberation. Those arguing for the deliberative value embodied in these rules then tend to ignore that those rules are themselves socially produced and subject to contestation. This is perhaps most obvious in Petersmann's deontological defence of a right to trade in international law,¹⁶⁷ but is not otherwise uncommon. Steffek, for instance, points to the 'moment of consensus in regime foundation' which 'provides consensual reference points for the regime's discursive justification and thus legitimacy'.¹⁶⁸ Once the moment of foundation has passed, it seems, these 'reference points' are no longer subject to debate. Such perspectives are particularly evident in relation to those who argue for the constitutionalization of WTO rules. After all, domestic constitutional law scholars such as Bruce Ackerman have argued that full popular involvement in law-making is only necessary or even desirable at key 'constitutional moments' — of which he argues that the US has had only three in its over 200 year history.¹⁶⁹

It is, however, a problem in relation to many of the WTO's rules which enjoy nothing like a broad constitutional consensus, and they did not originate in anything approaching a deliberative context. This is particularly problematic as the WTO's ongoing negotiating mandate is limited, even if that mandate is broader than often assumed. The WTO's aims are formulated broadly, and it is generally recognized that there is no natural boundary to the idea of 'trade concerns'. Nonetheless, the WTO remains an institution operated by actors schooled and socialized in very particular languages of law, economics, and trade policy, which formally addresses Members as predominantly economic actors, and generates and enforces rules aimed at, among other things, non-protectionism, trade liberalization, and efficient good governance. When Members negotiate with one another during trade rounds, discourses of public health and the environment may be salient but these discourses do not provide the bases for specific WTO rules — rather they provide discursive spaces around which

VCLT, or equivalent formal provisions for the WTO specifically, are likely to be forthcoming any time soon.

¹⁶⁷ See Petersmann 1991. See also Petersmann 2002b; *contra* Howse 2002b and Alston 2002; cf Petersmann 2002c. See further Petersmann 2008a; *contra* Howse 2008; cf Petersmann 2008b.

¹⁶⁸ Steffek 2003, 263-4.

¹⁶⁹ Ackerman 1991, 40-1.

multilateral trade rules are built. While the WTO is not a ‘mono-culture’ in that it covers issues ranging from intellectual property rights to telecommunications,¹⁷⁰ it still views these diverse areas through the lens of ‘international trade’, rather than, say, human rights or innovation.

The WTO thus provides a profoundly different setting to that of domestic legislatures, which are usually imbued with the general competence to weigh all possible arguments against one another for the purpose of making laws across all relevant fields. Von Bogdandy and Venzke describe this as the ‘requirement of generality’ — that is, the requirement that ‘the democratic legislature is the central place of norm production and legitimation’ and that ‘procedures in [the democratic legislature] are thematically unsettled and open to all kinds of competing perspectives’, as well as ‘open-ended’.¹⁷¹ The likelihood of satisfying such a norm of generality in a functionally-oriented international institution such as the WTO is effectively nil without a profound transformation in the way the WTO is understood and operated.¹⁷² Calls to democratize the WTO in this way may be seen as a more demanding procedural accompaniment to calls to further empower the WTO to deal directly with various ‘other’ issues, such as human rights and the environment.¹⁷³

The problem of generality may be alleviated somewhat, however, if the WTO is recast as merely one player among many in the international system — as the carrier of a particular family of trade-related discourses which are, at least to some extent, permeable, reflexive, and capable of engaging with discourses in diffuse processes of international interaction.¹⁷⁴ In this sense, and bearing in mind the limits of domestic analogies, the WTO could be viewed as

¹⁷⁰ Bronckers 2001, 44-5.

¹⁷¹ von Bogdandy & Venzke 2012, 23.

¹⁷² See Bronckers 2001 arguing for an expansion in the ambit of the WTO, claiming it would be ‘salutory’ if agreements on health and the environment were incorporated into the WTO, and arguing for a transformation of the WTO into a World Economic Organization with a broad mandate to address ‘economic policy issues’.

¹⁷³ For a discussion of the contours of the substantive ‘trade and’ debate, see Lang 2007.

¹⁷⁴ Although as Jan Klabbers notes, ‘[f]unctional regimes (formal or informal) are of increasing importance, to such an extent that it is no longer certain where to look for normative guidance. There is no a prior reason why, say, the AIDS medication crisis should be approached through the WTO rather than the WHO, or rather through some social welfare scheme set up under UN auspices, or even through the prism of human rights’: Klabbers 2005, 291.

more akin to a government department than a government¹⁷⁵ — but without all of the attendant legal and political safeguards to ensure that its powers remain bounded and that the interests it was created to serve do not swallow competing interests. This would appear to take some of the edge of the demands that the WTO itself be democratic,¹⁷⁶ as long as it forms part of an overall democratic international system. There is, however, hardly such a system in place at present, and it is well beyond the scope of this chapter to engage with this highly distant possibility more fully.¹⁷⁷

4 *The Distance between Deliberative Democratic Ideals and Practical Reality*

The fourth trap lies in ignoring the disparities between the ideals of deliberative democratic theory and the practical realities of the operation of power. As regards the WTO, this requires careful attendance to Member disparities in legal and expert capacity. Deliberation only serves autonomy in a universal sense if all participants are able to participate on an equal footing. If there are substantial resource and information asymmetries that cannot easily be resolved, deliberation may deteriorate into a mere process of justifying the actions of the

¹⁷⁵ Jeremy Waldron argues that states should be ‘recognized by [international law] as trustees for the people committed to their care’: Waldron 2011, 325; Alexander Somek paraphrases this as arguing that states should be recognized as ‘agencies the task of which is to implement commonly agreed upon projects that are supposed to improve the lives of billions of people’: Somek 2011, 345-6.

¹⁷⁶ There are also clearly many institutions in democratic states that privilege independence and expertise over democratic proceduralism. Central banks in the US, UK, and Australia have a strong degree of independence in setting monetary policy. Parliamentary ombudsmen, police corruption commissions, courts, are all considered stronger the less they are ‘politicized’, in the sense that their conclusions are determined independently of popular interference. Then there are the modes of justification for the various sites of non-governmental power, including the corporate and religious spheres. Dahl points to the existence of other ‘autonomous hierarchies’ outside of national governments in democratic countries that are justified on non-democratic grounds, including corporate hierarchies which appeal to the market, and ‘universities, research centres, hospitals, some religious organizations, and many others’ which appeal to superior knowledge and expertise: Dahl 1999, 32-3.

¹⁷⁷ See Verweij & Josling 2003, 11; Krisch 2010, ch 8; Besson 2011, 27; von Bogdandy & Venzke 2012, 36-8.

powerful.¹⁷⁸ Martin Shapiro is particularly sceptical of the purported virtues of deliberation, whether at the national or at the global level:

[T]here is little reason to believe that people with substantial, long-term, material interests in achieving a particular outcome are going to abandon those interests and their dedication to those outcomes as sweet reason emerges from the talk fest.¹⁷⁹

Indeed, even Habermas does not see global society as particularly well-suited to legitimation through deliberation. Arguing against the legitimating potential of a world state, he claims that:

Within the framework of a common political culture, negotiation partners also have recourse to common value orientations and shared conceptions of justice, which make an understanding beyond instrumental-rational agreements possible. But on the international level this “thick” communicative embeddedness is missing. And a “naked” compromise formation that simply reflects back the essential features of classical power politics is an inadequate beginning for world domestic policy.¹⁸⁰

As such, he argues that ‘[r]ather than a [world] state, it has to find a less demanding basis of legitimacy in the organizational forms of an international negotiation system’.¹⁸¹ The role of international institutions would then be to strengthen the deliberative/communicative processes of the nation-state — for instance, by allowing for greater participation by NGOs which ‘would strengthen the legitimacy of the procedure insofar as mid-level transnational decision-making processes could then be rendered transparent for national public spheres’.¹⁸²

Consequently, notwithstanding the current ascendancy of deliberative democracy in the world of democratic theory, there are some serious practical constraints that make its realization in or through the WTO problematic. Sophisticated deliberative theories have the capacity to overcome many of the limitations faced by consent-based legitimacy narratives, as well as by the exclusively input-oriented direct and representative democracy narratives.

¹⁷⁸ See, eg: ‘Providing for inter-state deliberation will not ensure in itself against domination; deliberation in the presence of a manifest asymmetry of power may only cover up a deeper game of intimidation by the strong’: Pettit 2010a, 83.

¹⁷⁹ Shapiro 2005, 350.

¹⁸⁰ Habermas 2001, 109.

¹⁸¹ Ibid.

¹⁸² Ibid 111.

Deliberative narratives provide a more nuanced normative role for non-Members in rule- and decision-making, whether they be national bureaucrats or NGOs. Indeed, if anything some deliberative narratives run the risk of pushing this too far, by over-emphasising the authority of expert decision-makers and discursive openness. Deliberative narratives also engage directly with the problem of technical complexity, although they face if anything greater problems than the alternatives when it comes to political complexity. Importantly, too, deliberative narratives aim to bridge some of the gap between purely input-based and output-based approaches to legitimacy. By emphasising broad participation and reasoned deliberation, they seek to ensure that ‘better’ outcomes are reached.

IV CONCLUSIONS

Democratic narratives thus play an increasingly prominent, but by no means unified, role in constructing arguments about the legitimacy of WTO law and practice. This chapter has sought to map out the major elements of four of the most prominent democratic narratives in the WTO context, namely the direct, the representative, the participatory, and the deliberative approaches to democratic legitimacy. In the process, it has sought to highlight their similarities and contradictions, as well as their different implications for the reform of WTO rule- and decision-making procedures. Commitment to these narratives often reflects underlying interests. Direct narratives are often used by developing countries seeking more influence in WTO rule- and decision-making. Representative narratives are invoked not just by those seeking to extend the liberal democratic project to the international sphere, but by those seeking to deflect non-Members from taking part in WTO decisions. Participatory approaches are advanced by those same non-Members in trying to increase their own participation. Deliberative approaches, meanwhile, are increasingly been invoked in a way that helps to justify practices of expert rule.

Collectively, however, a distinctive feature of democratic legitimacy narratives in the WTO context is their emphasis on inputs and procedure. The direct and representative narratives are essentially input-oriented in character and make no attempt to account for the quality or effectiveness of rules and decisions produced other than to note that they are ‘Member-driven’. These narratives have little to say about the character of the rule- and decision-making processes beyond the idea that each Member should try maximize the realization of their subjective preferences. The participatory and deliberative narratives provide an improvement in this regard, as their procedural ramifications are concerned with

making ‘better’ decisions. They also provide a more sophisticated account of how Member and citizen preferences are formed in the first place, by acknowledging that Member will is in part a *product* of the WTO’s legal-political processes. Overall, however, as presently formulated they remain heavily input-focused, showing little concern with questions of efficiency and effectiveness either in relation to the making of rules and decisions in themselves or in realising the aims of those rules and decisions. Consequently, the present lack of consensus over what it means for the WTO to be more democratic, the enormous practical hurdles to realizing any of the possible approaches, and the continued neglect of the output dimension of legitimacy ensure that the capacity of these democratic narratives to legitimate the WTO is limited at best.

PART THREE

Output-Oriented Legitimacy Narratives

CHAPTER FIVE:

‘A RESULTS-ORIENTED INSTITUTION’? TURNING TO OUTPUT LEGITIMACY IN THE WTO

I INTRODUCTION

Although input-oriented narratives of consent and democracy have provided the dominant legitimating narratives for international law and WTO law to date, there has also long been a strong instrumental, output-oriented strand associated with the legitimacy of world trade law. Although frequently invoked, this strand has been subjected to less stringent scrutiny and theorizing in the international context; with the extensive scholarship on expert legitimacy as it relates to the SPS Agreement providing a clear but narrow exception.¹ It is timely to further consider the roots and limits of output legitimacy in the WTO for several reasons. The increased technical and political complexity of the WTO’s rules and decision-making procedures has made it more difficult to justify the exercise of power in consent-based or input-oriented democratic terms. Major actors in the international trade regime increasingly frame issues in technical terms (whether economic, legal, scientific or otherwise) leading to the rise of the expert as a source of both epistemic and political authority on the world trade stage. And the ever-broader subject-matter covered by the contemporary trade regime calls for careful reconsideration of its aims and techniques.

Indeed, as much as the WTO presses the idea that it is a ‘Member-driven organization’,² it is also framed as ‘a results-oriented institution’.³ WTO law is strongly associated with a family of legitimacy narratives that depend not on procedures designed to make it reflective of Members’ subjective preferences, but on substantive visions of what is in those Members’ interests and what WTO law should achieve.⁴ WTO law has a central role to play in

¹ See discussion in Peel 2010, 47-55.

² This was identified by John Jackson as one of seven ‘mantras’ that the WTO Members chant continuously: Jackson 2001, 72.

³ Sutherland Report 2004, ch VII.

⁴ Thomas Franck distinguished between ‘procedural-substantive’ and ‘outcome-based’ forms of legitimacy. He associated the former with a Habermasian approach in which legitimacy is the product of ‘discursive validation which is rooted in scientific empiricist reasoning that produces a rational result’: Franck 1990,

determining, making visible, and sometimes modifying which outputs are considered desirable in the international trading order, as well as in ensuring that those outputs are achieved efficiently and effectively. How WTO law goes about doing this has important implications for the WTO's role in the world and whether its legitimacy claims are well-justified.

This chapter explores the concept of output legitimacy, the role played by output legitimacy narratives in WTO law debates to date, and the implications that a stronger focus on output legitimacy may have for how we think about WTO law. It begins in Part II by elaborating on the concept of output legitimacy — tracing its development over time and noting its increasingly prominent role in the justification of WTO law. In Part III, the chapter highlights the limits and risks associated with output legitimacy narratives, including the lack of a clear substantive mandate for the contemporary WTO, the WTO's lack of adherence to certain accepted aims, the threats of technicalization and depoliticization, and the problem of expert overreach. In Part IV, it considers what implications a focus on output legitimacy may have for the design, implementation and evaluation of WTO law at a broad level, to set up the further consideration of these matters in Chapters Six and Seven.

II OUTPUT LEGITIMACY NARRATIVES

A *Output Legitimacy and the Domestic State*

As with the input-oriented narratives of consent and democracy explored in Chapters Three and Four, output-oriented narratives have long played a role in legitimating authority at the domestic level. Rather than focusing purely on procedural rectitude as the basis for the right to rule, these narratives have justified the exercise of authority by reference to law's ability to facilitate the efficient and effective achievement of desirable outputs. Such outputs may be divided into two categories. The first category includes goal-oriented, instrumental outputs, in which the aim is to achieve something concrete, preferably in a way that can be managed according to a set of indicators and metrics. The second category relates to value-oriented,

17 (footnote omitted). By contrast, for the latter he notes that 'a system seeking to validate itself — and its commands — must be defensible in terms of the equality, fairness, justice, and freedom which are realized by those commands': at 18. This thus strongly resembles Weber's notion of 'value-rational' legitimacy: Weber 1968, 33-7.

expressive outputs, in which the aim is to act in a way which reflects underlying moral-normative commitments.⁵

Most output-oriented narratives of legitimacy rely heavily on notions of superior knowledge and expertise, and justify the allocation of not only epistemic but also political power on this basis. The authority of the rulers in Plato's *Republic*, for instance, was based on their nature as philosopher-kings, possessed of the relevant expertise in the 'science' of ruling.⁶ The idea that only a privileged elite had access to the knowledge necessary for right rule persisted for centuries. In medieval times this gave rise to a rich literature known as the 'mirrors for princes', which claimed to offer guidance on how to be a virtuous and effective ruler.⁷ Over time these works came to emphasize virtue less and instrumental effectiveness to a greater degree, with Machiavelli's *The Prince* providing the apotheosis of the genre.⁸ As the Enlightenment progressed, those with claims to superior empirical knowledge (as opposed to moral or theological knowledge) accrued an increasingly powerful hold over the processes of government. By the early nineteenth century, Henri de Saint Simon was claiming that the world of nation-states and politicians was soon to give way to a productive utopia ruled by a technocratic elite of engineers and industrialists.⁹ Even those with more liberal democratic tastes placed a high premium on knowledge in governing. John Stuart Mill, for instance, sought to introduce plural voting for the highly educated, and to deny the vote to the illiterate and innumerate, on the grounds that such differentiation would lead to better decision-making.¹⁰

Max Weber, the progenitor of the social understanding of legitimacy discussed in Chapter Two, was particularly concerned about the technical-rationalization of rule that accompanied modernity and the concurrent legal-political elevation of the expert, and indeed

⁵ These roughly map on to Weber's somewhat underdeveloped distinction between instrumental rationality and value-rationality: see Weber 1968, 24-6.

⁶ Plato treats 'just rule' as a technical craft that can be learned, in the same way as building a ship: Plato 1991, §§ 342, 473 and Book IV in general; see also Plato 1995. The idea that there is a distinct art or science of rule found a much more recent reflection in the professional image of the British civil service mandarin: see Laski 1931; Shapiro 2005.

⁷ See generally Gilbert 1938; Nederman 1998.

⁸ Machiavelli 1988.

⁹ See Audi 1999, 809.

¹⁰ Mill 1861, ch VIII.

the bureaucracy more generally. For Weber, the process of modernization was characterized by the displacement of the metaphysical ideal of universal reason by instrumental rationality, and of natural law by positive law.¹¹ ‘Traditional’ forms of legitimacy and authority were viewed as increasingly giving way to a ‘legal-rational’ form of legitimacy.¹² Weber was particularly concerned by what he saw as the increased bureaucratization of government that accompanied this turn to legal-rational authority, creating a class of agents which were not accountable in traditional ways either to the people or to the market.¹³

Although Saint Simon’s rather distinctive vision has long since faded from view, Weber’s persists in the legal-political imagination. In the last few decades output legitimacy narratives have proven increasingly important at the level of the nation-state. The rise of quasi-independent, non-majoritarian administrative agencies such as central banks, financial services authorities, food and drug agencies, and environmental protection agencies, has led to what Frank Vibert has termed the ‘rise of the unelected’.¹⁴ More and more power has been concentrated in the hands of administrative agencies, operating with significant discretion or slack, and framed by only weak accountability mechanisms.¹⁵ This phenomenon has not been confined to specialist government departments. Governments worldwide have also sought to outsource governmental functions to private bodies, in relation to everything from education and health to immigration detention. Legal power is regularly being delegated to administrative, expert institutions based on their superior competence in achieving certain aims, rather than based on their ability to respond to their principals’ immediate demands or

¹¹ See especially Weber 1968, 809-38 and 865-900. See also Onuf 1998, 19.

¹² Weber 1968, 217-26.

¹³ ‘Experience tends universally to show that the purely bureaucratic type of administrative organization—that is, the monocratic variety of bureaucracy—is, from a purely technical point of view, capable of attaining the highest degree of efficiency and is in this sense formally the most rational known means of exercising authority over human beings’: *ibid* 223. See also the discussion of Weber’s ‘scientisation’ of politics in Habermas 1970, ch 5.

¹⁴ Vibert 2007, 5. See also Habermas 1996a, 430-52; Thatcher & Stone Sweet 2002; Kahan et al 2006.

¹⁵ Standard accountability mechanisms such as transparency tend not to work as well in relation to these agencies due to the complexity of the information, models, and projects with which they are involved: see Jasanoff 2012, ch 8.

reflect popular preferences. This has led to attempts to grapple with the legitimacy of such institutions in specifically instrumental terms.¹⁶

Two rather distinct visions of the role of specialised knowledge and expert power emerge from the above. The first is a *technocratic* vision,¹⁷ which draws on the ‘guardianship’¹⁸ tradition spearheaded by Plato. This vision emphasizes deference to expert authority and is suspicious of popular input, particularly where such input may lead to ‘irrational’ decision-making. This vision has serious anti-democratic tendencies, and often forms the basis for critique of some of the more expert-oriented theories of deliberative democracy. The second is a *facilitative* vision,¹⁹ which sees the role of expert knowledge and power as a means of facilitating political decision-making by providing access to more reliable and effective knowledge and analysis, and more clearly laying out the likely consequences of given decisions and laws. It has faith in the experts’ abilities to provide rational, unbiased knowledge which can be placed at the service of policy-makers. The facilitative vision can prove just as problematic as the technocratic vision. The bureaucratic dream of having experts ‘on tap, not on top’²⁰ can prove a misleading fantasy as a consequence of the sheer scale of

¹⁶ See, eg, Majone 1996; Lindseth 2010; Maggetti 2010, 2.

¹⁷ The Oxford English Dictionary defines technocracy as ‘[t]he organization of the social order based on principles established by technical experts’. Ironically, the earliest use of the term ‘technocracy’ recorded in the Dictionary was by William H Smyth. Smyth’s original version, however, was envisaged as more democratic in character. He defined it as ‘the rule of the people made effective through the agency of their servants, the scientists and engineers’: see Jones 1995, 210.

¹⁸ For a further discussion of the idea of guardianship, see Dahl 1989, 52-79. See especially his discussion of another version of guardianship, that is ‘Lenin’s doctrine of the vanguard party with its special knowledge of the laws of history and, as a consequence, its special, indeed its unique, claim to rule’: at 53. See also Holden 2002, 31-57.

¹⁹ Cf Habermas 1970, ch 5, who differentiates between decisionistic and technocratic approaches, which roughly parallel the facilitative and technocratic approaches discussed here, respectively. He also identifies a Deweyan ‘pragmatistic model’, but argues that the empirical conditions for this are not met in contemporary mass democracies as due to widespread depoliticization and the decline of the public realm: at 70. This observation would only be strengthened at the international level. Sunstein argues for the virtues of entrusting large areas of government to experts of various kinds, particularly through embedding practices of cost-benefit analysis (‘CBA’) and comparative risk analysis (‘CRA’) in governmental processes: see, eg, Sunstein & Pildes 1999; Sunstein 2002, 7.

²⁰ Martin Shapiro notes that, in practice, such views tend not to work very well as ‘the experts supposedly on tap are likely in reality to end up on top’: Shapiro 2005, 343.

contemporary law- and policy-making and the difficulty of translating expert languages into something that can be understood by non-experts. It also neglects the modern tendency to vest epistemic experts with political or legal authority, and the blurred boundaries between what constitutes an epistemic, legal or political test.²¹ Both the technocratic and facilitative visions attempt to separate politics and technical decision-making into separate realms.

It is not necessary to force a choice between the technocratic and facilitative visions. Instead, the two may be understood to operate simultaneously in ineluctable tension with one another. Indeed, one of the central problems of deliberative democratic theory lies in the attempt to resolve this tension. Narratives of expert or output legitimacy often move back and forth between the two visions depending on the circumstances. The two may thus be seen as dynamically interrelated modes of justification for power. Viewing their interaction in this way draws attention to the socially constructed nature of ideas of expertise and effectiveness and the artificiality of the technical/political division assumed under either approach. Expertise is not merely the product of superior technocratic knowledge, or a means of facilitating better decision-making, but rather a contested concept, the capacity to legitimate of which varies depending on the context.

There have been a few different attempts to reconcile input and output modes of legitimacy that draw on this dynamic interrelation. John Dewey's pragmatism, for instance, stressed the importance of consultation, debate and persuasion to democracy. He saw experts as playing an important role in clarifying and refining the public's idea of its interests, while the consequences of expert determination and policy were to be held up to careful scrutiny to ensure that those interests were being met.²² Dewey's approach fell out of favour over the course of the twentieth century, in part because it over-idealised the relation between experts and the public and their capacity to mutually inform one another in the overall public interest.²³ Further attempted syntheses may be found in many of the contemporary theories of deliberative democracy, some of which were discussed in Chapter Four.

²¹ See generally discussion in Foster 2013, 136-82.

²² See, eg, Dewey 1927.

²³ See criticism in Habermas 1970, ch 5.

B *Output Legitimacy and International Law*

Output legitimacy narratives have also played an increasingly prominent role in general international law, including in debates about the basis for the authority of international law.²⁴ Perhaps the most well-known instrumental understanding of the authority of law lies in Joseph Raz's 'service conception' of legitimate authority. Highly skeptical of consent-based justifications for the authority of law, Raz instead argues that law's authority derives from its capacity to further our objective interests through social coordination.²⁵ Samantha Besson has recently adapted Raz's service conception for the international sphere by 're-interpreting' it in a way that gives greater emphasis to democratic coordination.²⁶ Raz's theory is by no means the only point of departure for such instrumental narratives. Working from a very different jurisprudential basis, Jutta Brunnée and Stephen Toope have formulated a theory of legal legitimacy that draws on Lon Fuller's approach to law as a 'purposive enterprise' that enable actors to 'pursue their purposes and organize their interactions through law'.²⁷

²⁴ Quasi-instrumental justifications for the authority of customary international law have also been advanced by natural lawyers such as John Finnis, who argues that: 'recognition of the authoritativeness of particular customs affords all states an opportunity of furthering the common good of the international community by solving interaction and co-ordination problems otherwise insoluble. And this opportunity is the root of all legal authority, whether it be the authority of rules or (as here) of rules': Finnis 1980, 244.

The ultimate root of customary international law's authority for Finnis, then, is one that is instrumentally oriented towards achieving the common good, rather than purely procedural (as might be suggested by theories based more on consent).

²⁵ The instrumental quality of obligation attaching to law is central to Raz's thought, and complements his scepticism about input-oriented approaches based on consent: see Raz 1988; Raz 2006; Raz 2009. See also the discussion of the 'favourable-outcomes approach' to legitimacy as discussed in Hurd 2007, 67-9.

²⁶ Besson argues that this focus on democratic coordination does not, as might first appear, collapse Raz's substantive theory of legitimacy into a purely procedural account of legitimacy. Rather, she sees the democratic element as 'building on' Raz's conception: 'What a legal authority does, when understood along those lines, is provide legal subjects with reasons to co-ordinate over an abstract set of reasons they share objectively even if they disagree about it or its internal ordering concretely. In circumstances of reasonable disagreement about issues of justice and matters of common concern, they will be able to abide by their own reasons better overall if they co-ordinate, getting their turn in identifying a salient point of co-ordination, than if all of them decide (even correctly) for themselves in each case': Besson 2009a, 356.

²⁷ Brunnée & Toope 2010, 7 and 21. See also generally the work of the New Haven School, which saw law as a purposive enterprise aimed at creating a world public order of human dignity: Reisman, Wiessner & Willard 2007.

Output legitimacy narratives have also been applied to the law of international institutions. Just as there has been a turn to non-majoritarian administrative institutions at the national level, the last century has also seen the significant empowerment of international institutions. Daniel Esty argues for a mixed approach to the legitimacy of such institutions in which

[l]egitimacy [...] can also be grounded in an institution's *delivery of good results*, its capacity to carry out rulemaking in ways that provide clarity and stability, its systemic strength and structure of checks and balances, its ability to promote political dialogue, and its commitment to procedural rigor.²⁸

Daniel Bodansky, too, notes that the promise to 'deliver the goods' could provide an alternative or supplementary basis for the legitimacy of international environmental governance. Importantly, he notes that in some ways output legitimacy can be easier to achieve than democratic forms of input legitimacy, as it requires only the 'thin' connection of perceived common interests rather than the 'thick' requirements of shared identity, language and history.²⁹

Robert Keohane and Allen Buchanan go even further to claim that '[t]he justification for having [global governance institutions] is primarily if not exclusively instrumental'.³⁰ As such, they have formulated a complex standard of legitimacy for international institutions that comprises several desiderata, including:

- (1) the consent of democratic states;³¹

²⁸ Esty 2006, 1561 (emphasis added). See also Wolfrum 2008, 7: '[I]t has been argued that authority can be legitimated or delegitimated by the outcome it produces. This is a crucial issue and one that deserves further consideration. If a particular body, such as the Security Council or an international court or tribunal, although established in accordance with applicable rules and taking decisions according to the established procedure does not achieve results which the community as the addressee of such decisions considers to be adequate, this may, in the long run, lead to an erosion of its legitimacy.' See also Wolfgang Friedmann, who wrote in the mid-twentieth century of the changing structure of international law, noting a move from international law's traditional preoccupation with coexistence, to an international law of cooperation, focused on addressing collective problems: Friedmann 1964, chs 5 and 6.

²⁹ Bodansky 1999, 619-23.

³⁰ Buchanan & Keohane 2006, 422.

³¹ Ibid 414-16.

- (2) minimal moral acceptability, requiring at minimum that international institutions respect human rights, but not ruling out the possibility of holding them to higher standards;³²
- (3) comparative benefit, requiring that international institutions ‘provide benefits that cannot otherwise be obtained’;³³
- (4) institutional integrity, prohibiting ‘major discrepancies between an institution’s behaviour and its prescribed procedures and professed goals’;³⁴
- (5) an epistemic-deliberative element, which emphasizes notions of accountability and transparency (including public justification).³⁵

Elements (3) and (4) in particular focus on the legitimacy associated with the outputs produced by international institutions, while (5) focuses on how such outputs are formulated as desirable in the first place.

Output-oriented accounts of legitimacy have also loomed large in scholarship on the EU. Fritz Scharpf was, after all, writing on the governance of Europe when he popularized the term ‘output legitimacy’.³⁶ Carol Harlow notes the ‘mass-élite gap’ in the EU which finds ‘businessmen and politicians’ concerned more about strengthening output legitimacy to improve regulation while ‘popular discontent’ festers over inadequate input legitimacy.³⁷ Peter Lindseth, too, has written on the technocratic legitimacy of European institutions, ‘rooted in their ability to produce sound regulatory policy for an increasingly integrated social and economic space transcending national borders’.³⁸ He further argues that the focus on classical notions of democratic and constitutional legitimacy in the EU is misguided; and rather, that the EU’s legitimacy may be more productively considered as *administrative* in character, in a way that parallels the legitimating structures of the post-World War II ‘constitutional settlement of administrative governance’.³⁹

³² Ibid 419-22.

³³ Ibid 422.

³⁴ Ibid 422-4.

³⁵ Ibid 424-33.

³⁶ Scharpf 1999, 10-21.

³⁷ Harlow 2010, 16.

³⁸ Lindseth 2010, 8.

³⁹ Ibid 13.

The focus on output legitimacy for international institutions also has important legal consequences. It provides functionally-oriented background norms which encourage the broad use of legal mechanisms such as the implied powers doctrine, inherent jurisdiction, and teleological treaty interpretation to justify the exercise of power by international institutions. By contrast, the input-oriented doctrines of attributed powers, express delegation, and textual treaty interpretation are often far more focused on ensuring that such institutions remain explicitly ‘Member-driven’.

C Output Legitimacy and the WTO

To date, output legitimacy narratives in the WTO have not received the same degree of detailed attention as input legitimacy narratives. What little there has been has focused on one of four issues: the role of experts in dispute settlement, issues relating to the SPS Agreement, the bureaucratic legitimacy of the WTO Secretariat, and teleological treaty interpretation. The first of these relates to debates about the role of experts and expert knowledge in the WTO dispute settlement system. Joost Pauwelyn has written perceptively on the role of expertise-based legitimacy in WTO disputes, arguing that the “epistemic authority” of experts is what gives expert-based WTO decisions their extra legitimacy’.⁴⁰ Joseph Conti has addressed how the very idea of legal expertise is used to ‘produce’ legitimacy at the WTO, by encouraging Members to focus on the acquisition of expertise so that they can more effectively get the system to serve their interests in future, rather than questioning why it does not serve their interests well in the present.⁴¹ Meanwhile, Arthur Daemmrigh has claimed that the ‘basis for the broader legitimacy of the WTO is shifting from questions of representation that have long drawn attention to epistemic issues, especially concerning the design of econometric models’.⁴² One does not need to agree with the idea of this shift to see the prominence that the notion of expertise plays in these accounts of the dispute settlement system’s legitimacy.

The output-oriented legitimacy that derives from expert knowledge and expertise has also been addressed extensively in the SPS context, both in relation to SPS disputes and the broader SPS architecture.⁴³ The SPS Agreement has provided particularly rich grounds for the

⁴⁰ Pauwelyn 2002b, 330.

⁴¹ Conti 2010.

⁴² Daemmrigh 2012, 200-201. See also Daemmrigh 2011, 1.

⁴³ See, eg, Winickoff 2005; Cooney & Lang 2007; Pollack & Shaffer 2009; Peel 2010; Foster 2013.

consideration of output legitimacy. Several of the SPS Agreement's rules⁴⁴ make direct reference to scientific evidence and risk assessment to provide normative yardsticks for assessing the legitimacy and legality of national SPS measures. Parties, panel members and Appellate Body members have made extensive reference to scientific expert evidence when making arguments in the course of WTO litigation. Indeed, questions of how to most appropriately engage with scientific experts and knowledge have sat at the centre of these disputes. The SPS Agreement also draws on the related authority of international standard setting associations such as the Codex Alimentarius Commission, the IPPC and the OIE.⁴⁵ This association has, in turn, triggered a series of debates about the legitimacy of such standards institutions that addresses both input- and output-related aspects of legitimacy.⁴⁶

The intensity of the debate over the SPS Agreement's science and risk assessment provisions has led to the development of a sophisticated and nuanced literature on the relationship between the WTO law, the natural sciences, risk analysis, risk management and legitimacy. Commentators have incorporated post-normal⁴⁷ and post-positivist⁴⁸ understandings of science and have engaged directly with complex epistemological problems concerning different kinds of scientific uncertainty.⁴⁹ These lessons are only beginning, however, to be extended to other forms of expertise in the WTO; economic expertise in particular has long been overlooked.

A third context within which the idea of output legitimacy has been addressed, albeit less extensively, relates to the exercise of power by trade policy networks and the WTO Secretariat. In excavating the 'source' of the bureaucratic legitimacy associated with such networks, Howse proposes a degree of self-conferral, motivated by mutual perception of

⁴⁴ Article 2.2 of the SPS Agreement requires that Members' SPS measures be 'based on scientific principles' and not be 'maintained without sufficient scientific evidence', and Article 5.1 requires that Members base their SPS measures on an 'assessment [...] of the risks to human, animal or plant life or health'.

⁴⁵ See SPS Agreement Preamble, Articles 3.4 and 12.3, and Annex A para 3.

⁴⁶ Claire Kelly notes the 'derivative legitimacy' that international institutions such as the WTO can obtain from their relationships with other international organizations such as the Codex Alimentarius Commission: Kelly 2008, 646-7; cf Livermore 2006.

⁴⁷ See Footer 2007.

⁴⁸ See, eg, Bohanes 2002; see also discussion in Lang 2011, 334-5.

⁴⁹ See, eg, Schropp 2012; Foster 2013.

greater far-sightedness and less emotivity than more demotic actors like politicians, NGOs and activists, or journalists; relatedly, an absence of nationalist attachment and a distaste for xenophobia; and high “technical” competence in a rather naïve, or straightforward, sense.⁵⁰

For Howse, a major concern is that there are insufficient checks on even the informal power exercised by such bureaucratic actors.⁵¹ In addition, Howse is particularly scathing of the ‘illusion’ that trade-related conflicts, which are irreducible to mere ‘technical’ conflicts, can be satisfactorily resolved by such insiders’ networks.⁵²

Recently the WTO’s general law-making paralysis has recently encouraged commentators to propose reforms to the WTO law- and decision-making processes which would give more authority to such experts.⁵³ The Sutherland Report, for instance, called for the creation of a permanent consultative group of senior policy officials, of limited but rotating membership, which would (when appropriate) ‘seek to provide some political guidance to negotiators’.⁵⁴ In addition, the Report argued for a ‘more assertive role’ for the WTO Secretariat in negotiations, including through the more direct involvement of the Director-General and the reinforcement of the practice of using ‘facilitators’ — persons ‘commanding wide respect’ who have no national interest in the negotiating issues at hand — to steer negotiations productively.⁵⁵ Others have called for furthering empowering the Secretariat and chairs in negotiations, for creating a WTO Advisory Council, or for requiring that Members produce reasons for decisions to veto measures that would otherwise enjoy

⁵⁰ Howse 2001a, 372 (footnote omitted).

⁵¹ As a result of, for instance, a lack of transparency: *ibid* 373. Howse has elsewhere argued that the WTO have moved from a politically oriented form of decision-making, to a technocratic one, and was signalling a move away from excessive technocracy to once more embrace politics through broader participation and increased transparency: Howse 2002a.

⁵² Howse & Nicolaïdis 2008, 170-1.

⁵³ Other suggestions have included introducing some form of majority or weighted voting, or abandoning the single undertaking in favour of a variable geometry that would allow Members to pick and choose which WTO obligations they enter into in future: see, eg, Sutherland Report 2004, paras 291-300.

⁵⁴ *Ibid* para 324. It also called for Members who veto measures that otherwise enjoy overwhelming support to be required to give written reasons for their decision.

⁵⁵ *Ibid* para 331.

overwhelming popular support.⁵⁶ In this context it should be noted that there is nothing inevitable about a turn to expertise or steering committees to ‘streamline’ WTO law- and decision-making, even when faced with a process as dysfunctional as the Doha Round. Procedural alternatives, including the introduction of majority or weighted voting, exist; the negotiating agenda could be rolled back; different types of experts may be empowered; or the WTO can continue to carry on, as now, in a state of near-paralysis while the locus of trade law innovation moves to preferential trade agreements. These issues will be addressed more fully in Chapter Six of this thesis.

Finally, output legitimacy narratives have played a significant role in relation to questions of treaty interpretation in the WTO. For example, the GATT Panels for *US — Tuna I* and *US — Tuna II* interpreted GATT Article XX restrictively in a way that invalidated US measures that imposed conditions on US imports of shrimp products with the aim of protecting endangered turtle populations.⁵⁷ Howse notes that, in both cases, the Panels showed a fairly loose regard for the text of Article XX and instead based their decisions on the purportedly pernicious consequences of allowing states to regulate for environmental protection in a way that could have extraterritorial effects.⁵⁸ This would, in the view of the Panels, have undermined the very purpose of the GATT as providing a multilateral framework for trade. The Panel in *US — Tuna I*, for instance, claimed that:

if the broad interpretation of Article XX(b) suggested by the United States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement. The General Agreement would then no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations.⁵⁹

⁵⁶ For a further discussion of these issues, see Chapter Six of this thesis.

⁵⁷ Neither Panel report was ultimately adopted.

⁵⁸ See Howse 2002c; Howse 2002a, 102.

⁵⁹ *US — Tuna I*, GATT Panel Report, para 5.27.

Such broad appeals to a vaguely-defined overall *telos* of the WTO,⁶⁰ which show little regard for the formal text of the WTO Agreements,⁶¹ have been in retreat since the WTO's inception. Even at the time they were released, the GATT tuna decisions were roundly criticized. The Appellate Body has not only largely abandoned the rather simplistic 'free trade' ideology that underpinned those decisions,⁶² but has since insisted on a more robustly textual methodology when it comes to treaty interpretation.⁶³

This turn to formalism, however, and thus away from one form of output-oriented legitimization, has merely contributed to the demand for a different form of expertise. Andrew

⁶⁰ Such teleological readings of WTO law have had implications not only for treaty interpretation, but also for applicable law in WTO disputes. The ILC Fragmentation Report, for instance, noted that: 'It is sometimes argued that general international law should not be applied in the administration of WTO treaties as the latter differ fundamentally in their general orientation from the orientation of regular public international law: where the latter is based on State sovereignty, the former derives its justification from the theory of comparative advantage': Report of the Study Group of the ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682 (13 April 2006) para 134.

⁶¹ Robert Hudec argued that such 'aggressive unilateralism' could in principle be justified (normatively, if not legally) even if it broke GATT law so long as it served the broader aims of the GATT. He considered that disobedience to GATT law had 'has made a constructive contribution to breaking legal deadlocks and stimulating improvements in GATT law' and had 'been an important element in the process of GATT legal reform over the past decade or so': Hudec 1990, 116. Hudec nonetheless considered Section 301 to represent 'bad law' because of the US's failure to live up to its own standards under the law: at 152. The WTO Panel in *US — Section 301 Trade Act* eventually determined that Section 301 was not inherently in violation of the WTO Agreements: *US — Section 301 Trade Act*, Panel Report, para 8.1.

⁶² Andrew Lang argues that 'the claim that the decisions taken in and around the trade regime tend to prioritize economic efficiency over other values and objectives—whether as a result of the regime's mandate, or as a result of the influence of neoliberal priorities, or both—is somewhat misleading, at least when stated so baldly': Lang 2011, 9. This is far from claiming that WTO decisions are otherwise 'objective' or 'balanced', as 'there has been very little direct consideration within the WTO of the distributive, environmental, or social costs of international trade liberalization, not in my view (or at least not directly) because such costs are considered unimportant, but because such matters are not considered appropriate topics of conversation given the limited purpose of international economic governance, as redefined within the liberal imagination': at 10.

⁶³ This formalist approach arguably in turn uses the idea of legal expertise to mask political decision-making in the dispute settlement system: see Picciotto 2005. But cf Van Damme 2009, who argues that the Appellate Body has been turning away from strict formalism in its more recent decisions.

Lang has demonstrated how shared understandings in trade policy networks have more subtly affected the way that WTO obligations are interpreted in a way that further legitimates expert power. He traces how the intuitive understandings of what constitutes a ‘trade barrier’ in the multilateral trading order has expanded over time to include more ‘behind the border’ measures,⁶⁴ expanding the realm in which trade experts are called on to operate as technical experts. Lang argues that vague rules regarding non-discrimination in the GATT and TBT Agreements, as well as risk assessment in the SPS Agreement, have increasingly been given a highly technical, scientized reading by the dispute settlement organs that too-often excludes serious consideration of regulatory purpose. The legitimacy of government intervention in the market is then determined by way of reference to technical bodies of knowledge (including economic and scientific knowledge) as if this led to straightforward normative conclusions.⁶⁵ As a consequence, WTO disputes are increasingly being taken over by contests over expert evidence and knowledge.

Thus although there has definitely been a place for output legitimacy narratives in the WTO, they have largely been confined to a few key contexts. Little consideration has been given to how output legitimacy may be relevant to WTO law outside of these contexts. Moreover, most of the literature to date has focused specifically on issues relating to experts and expert knowledge. Notwithstanding the perception of the WTO as a ‘results-based’ institution, little attention has been given to how law helps to structure the discursive spaces in which certain forms of knowledge or expert authority become privileged or ignored.

III ON THE DANGERS OF OUTPUT LEGITIMACY NARRATIVES

Output legitimacy narratives have the capacity to address some of the deficiencies of purely input-oriented narratives. They tend to focus much more directly on the nature of the agents chosen to implement given laws and policies — the experts, whether economic, scientific, legal or otherwise. This more granular focus simultaneously helps to counteract the tendency

⁶⁴ Lang 2011, 169-72 and chs 7 and 8; see also Kennedy 1991; Howse 2002a, 95-6.

⁶⁵ ‘As a result, the social purpose of domestic regulation became a less secure yardstick by which to measure its legitimacy, and the GATT/WTO legal system increasingly turned to technical expertise—including economic and scientific expertise—for guidance in its interpretation and application of legal disciplines on domestic regulation’: Lang 2011, 18. Lang further argues that WTO negotiating fora are unable to provide a remedy for this, as they are increasingly treated as a ‘political marketplace’ in which Members bring their fixed preferences to bear in negotiations and votes.

of the consent-based and direct democratic approaches to the WTO's legitimacy to focus solely on Members as the relevant political units. In addition, output-oriented narratives draw attention to how various forms of expert knowledge are used to frame problems and draw conclusions about how those problems should be addressed. They thus have the potential to highlight the way in which Member preferences are shaped by different knowledge practices and professional sensibilities. In addition, by their very nature such narratives are more focused on substance and outcome, although the risk of procedural myopia in which the means come to stand in for the ends remains ever present.

In advocating for more rigorous consideration of the relationship between output legitimacy narratives and WTO law, it is important to stress that output legitimacy should not be considered as a simple substitute or alternative for ailing narratives of input legitimacy. Both are important to an understanding of both the moral and social aspects of the legitimacy of WTO law; both derive from different foundational assumptions and seek to address different forms of power. Moreover, as with the consent and democracy narratives, output legitimacy narratives in the WTO suffer from their own significant limitations.

A Absence of a Clear WTO Mandate

One of the primary obstacles to those attempting to legitimate the WTO on the basis that it is a 'results-driven institution' is the confusion over which results the WTO should be trying to achieve. Disagreement over the nature of the outcomes the WTO is intended to achieve makes it more difficult to legitimate the WTO by reference to those outcomes. The aims purportedly served by WTO law are legion, but tend to fall into one of two categories. First are the substantive aims of WTO law, which at their most simple include aims such as trade liberalization and market access. Second are the institutional aims, which are neutral as to the ultimate purpose of the WTO other than to ensure that the WTO provides an effective forum for multilateral trade negotiations and a well-functioning dispute settlement system.⁶⁶ For both, WTO law seeks to induce a particular type of conduct in its Members, which then seeks to create some form of substantive or institutional benefit.⁶⁷ Both sets of aims raise important questions of institutional and legal design.

⁶⁶ Cf Fakhri 2011, 71.

⁶⁷ Robert Hudec defined the capacity to induce such conduct as 'legal effectiveness' and the resulting achievement of the economic benefit desired as 'economic effectiveness': Hudec 2011, 123.

In the early days of the GATT, the multilateral trading regime's aims were often portrayed as relatively straightforward: tariffication and non-discriminatory tariff reduction (key substantive aims) and providing an orderly forum for negotiations and disputes (key institutional aims).⁶⁸ Such aims clearly remain at the heart of the current system, but do not tell the whole story. For some, the shared assumptions of 'embedded liberalism' — that Members would be left with sufficient regulatory autonomy to ensure the continuation of the welfare state and a degree of flexibility in ensuring domestic economic stability — tempered the drive to liberalize trade in a way that could otherwise have excited accusations of a democratic deficit.⁶⁹ The New International Economic Order movement, however, and the turn to SDT for developing countries within the GATT, signalled deeper divisions about the direction of the interim institution. From there, the Tokyo and Uruguay Rounds introduced the 'post-discriminatory' disciplines in the SPS, TBT and TRIPS Agreements⁷⁰ which raised controversial challenges to non-tariff regulatory trade barriers. The tendency of these non-tariff barriers to implicate matters of environmental protection and public health, or in the case of TRIPS to redraw the boundaries between the interests of intellectual property producers and consumers, made attempts to challenge them through trade law appear less defensible in technical terms.⁷¹ In addition, the narrow functional logic applied by the GATT panels in *Thailand — Cigarettes*, *US — Tuna I* and *US — Tuna II* drew the attention of new communities of legitimation to the operations of the GATT. These new communities were much less convinced by the legitimating power of the substantive 'freer trade' narratives, and the relative simplicity of the early GATT era's consensual vision faded rather quickly.⁷²

Now, aside from a few central yet vaguely defined principles, what is considered a 'desirable outcome' for the WTO varies wildly depending on who is asked. This confusion,

⁶⁸ This is not to state that the initial GATT negotiations were in any way straightforward, or that the various Contracting Parties' reasons for signing up were identical: see Irwin, Mavroidis & Sykes 2008. Moreover, although the original preamble to the GATT 1947 made reference to other aims, including 'raising standards of living, ensuring full employment and a large and steady growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods', there was substantial variation in the extent to which these aims were taken seriously.

⁶⁹ See generally Lang 2006; Ruggie 1982.

⁷⁰ See Hudec 2003.

⁷¹ Although cf Lang 2011, ch 8.

⁷² See Keohane & Nye 2001.

among other things, has helped to feed into the deadlock of the Doha Round. Even WTO insiders such as Debra Steger (the first Director of the Appellate Body Secretariat) argue that ‘[t]here is presently, it is fair to say, no common understanding on what the mandate of the WTO is’.⁷³ Candidates for the overall substantive aims⁷⁴ of the WTO have included trade liberalization and maximising the benefits of comparative advantage,⁷⁵ or maximizing some nebulously articulated concept of global welfare⁷⁶ or efficiency.⁷⁷ Other suggested substantive aims, which have achieved varying degrees of acceptance, have included facilitating any one of ‘embedded liberalism’,⁷⁸ ‘good governance’,⁷⁹ development,⁸⁰ world peace,⁸¹ a right to trade,⁸² global justice,⁸³ or human rights⁸⁴ (although it should be noted that these last two have

⁷³ Steger 2007, 492. See also Steger 2009, 807-08. In the latter article, Steger identifies a broad split between ‘those who believe that the mandate of the WTO is trade liberalization through reciprocal exchanges of concessions’ and ‘those who consider that the mandate of the WTO should extend to international economic regulation more generally’: at 807.

⁷⁴ Robert Howse has analysed several options for grounding the WTO’s substantive legitimacy, including in global wealth, economic welfare, the Washington consensus, Petersmann’s neo-Kantian approach, conflict management, and political liberalism: Howse 2001a, 359-70.

⁷⁵ Cf Jackson 1992, 1231, as cited in Dunoff 1999, 737.

⁷⁶ Writing generally on the value of world trade law, John Jackson argued that if “‘liberal trade’ goals [...] contribute to world welfare, then it follows that rules which assist such goals should also contribute to world welfare’: Jackson 1997, 28. Jackson had earlier defined ‘liberal trade’ as ‘the goal to minimize the interference of governments in trade flows that cross national borders’: at 11. For a discussion of the problems with treating ‘economic welfare’ as the basis for the WTO’s substantive legitimacy, see Howse 2001a, 363-8. He notes that ‘the welfare-based case for trade liberalization can provide important, albeit limited and qualified, substantive legitimacy to multilateral trade rules, at least those such as tariffs and other border restrictions on imports that have direct, explicit, price-distorting effects in domestic markets, or even discriminatory regulatory policies that have indirect but clearly identifiable effects of this nature. This is not the case, however, for many of the new era rules that characterize the WTO system [...]’: at 365.

⁷⁷ See the discussion of the ‘efficiency model’ in Dunoff 1999, 737 and 745-7.

⁷⁸ See Lang 2006; Ruggie 1982.

⁷⁹ Bonzon 2014, 63-79.

⁸⁰ Fakhri 2009; Broude 2006.

⁸¹ See Van den Bossche & Zdouc 2013, 21-2; Howse 2002a, 369-70.

⁸² See, eg, Petersmann 1991. See also Petersmann 2002b. Cf Cass 2005, ch 5.

⁸³ See, eg, Garcia 2003; Garcia 2013; Caney 2009, 110-17.

received less attention than others). Institutional aims that have been proposed for the WTO include protecting the security and predictability of the international trading system,⁸⁵ constraining special interest capture of domestic politics,⁸⁶ and providing an ordered framework in which Members can manage expectations in their trade relations.⁸⁷ This is all before we even consider the various aims and values listed in the preamble to the WTO Agreement, which include ‘ensuring full employment’ and ‘to preserve and protect the environment’.⁸⁸

Each of these visions brings with it advantages and disadvantages for different sets of actors — the problem lies in the absence of even broad consensus on new issues which would allow those actors to come together. Arguably, too, this lack of clearly defined *telos* has encouraged the predominantly input-oriented approach to the legitimacy of the WTO. Deborah Cass argued that it was precisely this lack of agreement on a common *telos* that encouraged the WTO’s retreat into considering only input-based matters of process:

Improvement being impossible on the particular outcomes or even starting points, focus moved to method. Instead, improvements in participation (for other states and non-state groups); increases in the representative nature of the body making decisions whether it be the WTO, the IMF or the World Bank; and improved communication and transparency

⁸⁴ See, eg, Joseph 2011; Pogge 2002; Petersmann 2000a, 1377; Petersmann 2002a, 32-3; Petersmann 2002b, 644. Philip Alston has referred to Petersmann’s attempt to draw on the vocabulary of human rights to legitimate WTO rules as a ‘form of epistemological misappropriation’: Alston 2002, 815. See also Howse & Nicolaïdis 2001; see also references in n 167 of Chapter Four of this thesis.

⁸⁵ See, eg, DSU Article 3.2, which provides that ‘[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system’.

⁸⁶ See, eg, McGinnis & Movsesian 2000; Keohane, Macedo & Moravcsik 2009.

⁸⁷ See discussion in Cass 2005, ch 4.

⁸⁸ The Preamble to the WTO Agreement provides a whole range of potentially contradictory aims for the WTO to pursue, from raising standards of living, to ‘ensuring full employment’, to ‘seek to preserve and protect the environment’, to encouraging ‘positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development’. The extent to which these have realized or been taken seriously varies depending on the aim — full employment, for instance, has not been on the agenda for some time. These aims do not, however, exhaust the list of the aims which can be used as metrics against which to assess the substantive legitimacy of the WTO. Moreover, the GATT and WTO case law has emphasized different goals at different times.

will improve and safeguard the legitimacy and authority of international economic law regulation and decision-making.⁸⁹

This may also help to account for the Appellate Body's ostensibly formalist approach to treaty interpretation.⁹⁰

The capacity of such input-oriented processes to legitimate WTO law-making and application can only go so far, however. As it is, the inability of the WTO's membership to reach consensus on how to address contemporary issues relating to, say, human rights and labour protection, increased intellectual property protection, regulatory cooperation, or trade and investment matters has helped to set the conditions for the recent proliferation of regional trade agreements. Unable to advance their agendas successfully through multilateral trade negotiations or dispute settlement, states have instead turned to bilateral and regional agreements for this purpose.⁹¹ This also shows the limits of legitimacy narratives in constraining various actors' self-interests. An iterative, dynamic model of legitimacy that incorporates both input and output concerns — that takes expertise seriously even as it allows for contestation of expert determination and contestation of the choice of expertise — may provide a theoretically strong basis for the legitimacy of future WTO law. The time, money and opportunity costs associated with implementing such a vision, however, may simply be too much for those states that are more easily able to achieve their aims through means other than a multilateral trading order.

The divergence between the views of the Members as to the overall aims of the WTO must not be overstated. There is at least relative consensus at a general level surrounding many of the core aims and disciplines: progressive but limited liberalization, tariffication, non-discrimination, economic stability, the peaceful settlement of trade disputes. The purpose in identifying the nonetheless substantial disagreement over the current and future direction of the WTO is not to disregard WTO's contributions to the world, but rather to call for greater caution in justifying the exercise of WTO power by reference to nebulously conceptualized outcomes that nonetheless sound broadly desirable. That said, the resulting indeterminacy can paradoxically make it easier for the WTO to legitimate itself. It allows for the WTO to invoke 'common sense' and a general sense of instrumental efficiency and effectiveness while

⁸⁹ Cass 2005, 85 (footnote omitted).

⁹⁰ See Picciotto 2005 and Van Damme 2009.

⁹¹ See Gathii 2011, 441-9.

leaving open the question as to what its specific goals are, justifying further expansion of the scope of WTO rules while confounding attempts at criticism.⁹² Achievements in one area may be held up as evidence of the WTO's overall effectiveness even for unrelated matters.

B *Lack of Adherence to Accepted Aims*

Even for those aims that enjoy a measure of consensus, questions arise as to whether they are well-served by WTO law and its application. Output-based narratives are more difficult to sustain if it appears that even agreed outcomes are not being achieved by the existing legal-institutional machinery. At one level, this raises the question of whether the WTO's practice adheres to its overall aims. Buchanan and Keohane describe this as the problem of 'institutional integrity', noting that legitimacy problems can arise for an international institution when there is 'a pattern of egregious disparity between its actual performance, on the one hand, and its self-proclaimed procedures or major goals, on the other'.⁹³ At another, more specific level, there is a question over whether or not the aims underlying specific WTO rules are being realized by their application, in terms of both guiding Member conduct and in terms of achieving the result to which that conduct is directed.

In light of the indeterminacy of the WTO's overall aims, it can be difficult to determine whether the WTO is indeed adhering to such aims, especially in relation to some of the newer disciplines. Even when there is relative consensus on particular aims, there are questions about whether the WTO is implementing those aims as efficiently, effectively and universally as it can. Similarly, the introductory WTO E-Learning module on 'The WTO Multilateral Trade Agreements' states that:

⁹² See also: 'Regrettably, proposals on WTO reform are frequently advanced on the basis of ill-defined concerns about weak "efficiency" or "performance," without a sufficiently clear articulation of the broader goals, normative purpose or benchmarks against which the WTO's performance, efficiency, or credibility should be judged': Deere-Birkbeck 2012, 121.

⁹³ Buchanan & Keohane 2006, 422. Writing specifically on the WTO, they suggest that 'if the WTO claims to provide the benefits of trade liberalization to all of its members, but consistently develops policies that exclude its weaker members from the benefits of liberalization, this undermines its claim to legitimacy': at 423.

The economic case for an open trading system based on multilaterally agreed rules not only rests on commercial common sense, but it is also supported by evidence: the experience of world trade and economic growth since the Second World War.⁹⁴

Such statements gloss over the sometimes ambivalent effects of WTO membership on many smaller Members.⁹⁵ It also flattens the unequal way that benefits may be distributed between Members in general as a result of structural defects in the rules, such as the relative neglect of market access for agricultural as opposed to industrial products. More broadly, the ‘economic case’ for the WTO often rests on the idea that economic growth deserves priority over other interests. This has tended to mean that distributive questions about where any extra wealth generated by having a well-ordered multilateral trading system should be allocated tend to be pushed to the side.⁹⁶ It is thus important that the economic benefits of joining the WTO, central to the global wealth and welfare cases for the WTO, not be overstated or oversimplified.⁹⁷

Issues of integrity also arise in relation to the drafting and application of specific WTO rules. The claim that the underlying economic logic of the WTO is simple ‘common sense’ neglects the weaknesses of the economic justifications for the existing disciplines on safeguards,⁹⁸ subsidies⁹⁹ and anti-dumping,¹⁰⁰ as well as the confused justifications for the

⁹⁴ WTO E-Learning, ‘The WTO Multilateral Trade Agreements’.

⁹⁵ See, eg, Subramanian & Wei 2007; Eicher & Henn 2011. See also Rose 2004; Tomz, Goldstein & Rivers 2005.

⁹⁶ Michael Davis and Dana Neacsu argue that ‘globalization and those features we have examined produce, contrary to their express claims, disastrous global disparities of income and welfare’. They even ‘conclude that it is the legitimizing functions of the law of comparative advantage that allows globalization to proceed in the manner it does while claiming to do quite the opposite’: Davis & Neacsu 2001, 734. See also Gonzalez 2006; Chang 2002; Chang 2008.

⁹⁷ This has led Roberto Unger to observe that ‘[t]he attempt to claim for a particular system a free trade a neutrality it does not deserve makes no contribution to world peace and reconciliation. On the contrary, disguising a contentious global project as simple common sense is asking for trouble’: Unger 2007, 24. See also Howse 2002b, 651-2.

⁹⁸ See Sykes 2003; Sykes 2004a; Jones 2004; Sykes 2004b; Sykes 2006; Lee 2006.

⁹⁹ See Sykes 2010. Howse argues that the WTO rules on subsidies, even if not particularly efficient or welfare improving on their own, may have value as parts of a political bargain to ‘curb the unilateral use of countervailing duties against subsidies’: Howse 2010, 90 and 101-02.

¹⁰⁰ See Sykes 1996. See also Trebilcock 1990, 235.

TRIPS Agreement's stringent intellectual property requirements.¹⁰¹ There are genuine questions as to whether these rules, as drafted, are capable of furthering their purported goals. Problems also arise in relation to the application of rules in WTO disputes, when dispute settlement organs fail to engage in sufficiently rigorous fact-finding and fact-checking processes and make legal decisions on dubious evidential grounds. This problem is particularly acute in relation to cases involving complex economic and scientific evidence requiring modes of expertise that lie beyond the panel or Appellate Body members' personal competences.¹⁰² For some observers, these problems of application have already adversely affected the WTO's social legitimacy.

Failures of institutional integrity can then lead to a further problem, in that they may result in a decoupling of process and outcome. Writing on the GATT, Robert Hudec noted the ease with which debates over 'effectiveness' would shift back and forth between the concepts of legal effectiveness (inducing the desired conduct in the Contracting Parties) and economic effectiveness (achieving the economic benefit desired).¹⁰³ This is a problem when the legal effectiveness of the application of WTO rules fails to result in economic effectiveness (or for that matter other forms of non-economic effectiveness). In such cases, a focus on legal compliance may come at the expense of considering whether the results of compliance are worthwhile.¹⁰⁴ Tobias Hofmann and Soo Yeon Kim, for instance, point out that often, even where 'the WTO's dispute settlement process had yielded a positive record of juridical compliance', actual 'trade flows do not recover through dispute resolution'.¹⁰⁵ Trade flows remain unchanged in disputes which do not reach the panel stage, while a 'significant drop in trade flows' post-dispute is associated with cases that do reach a panel.¹⁰⁶ Similarly Gabriele Spiker highlights how WTO Members can rely on complex trade instruments to help prolong

¹⁰¹ See Trebilcock, Howse & Eliason 2013, 514-19.

¹⁰² This will be further explored in Chapter Seven.

¹⁰³ Hudec 2011, 123.

¹⁰⁴ This is reminiscent of Weber's account of the operation of value-rationality: 'The more the value to which action is oriented is elevated to the status of an absolute value, the more "irrational" in this sense the corresponding action is. For, the more unconditionally the actor devotes himself to this value for its own sake, to pure sentiment or beauty, to absolute goodness or devotion to duty, the less he is influenced by the consideration of the consequences of his action': Weber 1968, 26.

¹⁰⁵ Hofmann & Kim 2012, 20.

¹⁰⁶ Ibid 18.

the duration of WTO disputes in a way that allows ‘a politically relevant sector to enjoy the benefits of trade protection for a longer time’.¹⁰⁷ Such Members may be strictly complying with what is required of them by the DSU and the relevant trade agreements until the conclusion of the dispute, but cannot be said to be acting in a way which furthers the substantive objectives of the WTO.¹⁰⁸

C Technicalization and Depoliticization

A third problem with output legitimacy narratives derives from the perils of technicalization and depoliticization. The technicalization of issues may result from the framing of WTO law as a domain of technical bodies of knowledge rather than one of political disagreement. Criticisms of WTO law on the basis that it is ‘anti-democratic’ or constrains regulatory autonomy are then construed as misguided, as the application of WTO rules is framed as product of neutral technical consensus. At its most extreme, this can result in claims that WTO rules are beyond politics, either because they represent transcendental substantive norms, or because politics was confined to an earlier stage of the legislative process and all that remains is application of the law. Ernst-Ulrich Petersmann, for instance, acknowledges the normative content of trade decision-making, but seeks to place this normative element beyond the reach of political debate by framing it in the language of a transcendental right to trade.¹⁰⁹ This displacement of the political can prove to be a powerful legitimating tool.¹¹⁰

Technicalization is not inherently problematic. Framing certain issues in technical terms is often essential to enjoying the instrumental benefits that specialized and methodologically

¹⁰⁷ Spiker 2012, 1.

¹⁰⁸ This calls to mind the words of John Jackson, that ‘realistic observations of the operation of the legal system, even as it pertains to international economic affairs, will lead one to perceive that many government and private practitioners are not all in favour of an effective international rules system!’: Jackson 1997, 108.

¹⁰⁹ See Petersmann references at (n 82) and (n 84) above. See also McGinnis and Movsesian 2000, and discussion in Shaffer 2001, 13.

¹¹⁰ The WTO may also be understood to provide senior members of Member’s governments with legitimating devices for implementing otherwise unpopular policies, by appealing to the need to comply with international trade law and to adjust to ‘the realities’ of globalization. In Anne Orford’s words: ‘Governments make use of an “internationalist discourse” about the need to adjust to a changing world economy in order to ensure that citizens endorse “the modernizing actions taken by the state on [their] behalf”’: Orford 1997, 476 (citation omitted).

rigorous knowledge practices can bring. Moreover, some forms of depoliticization may make disputes and other forms of disagreement easier to resolve. As Kenneth Abbott has argued:

the GATT-WTO system has achieved results on many issues by treating them in a technical fashion that allows economic effects to be quantified and tradeoffs calibrated. This approach has for the most part kept the emotional heat of international trade negotiations below the boil.¹¹¹

As Abbott goes on to note, ‘many issues on the current trade agenda — including corruption, labor rights, environmental protection, and consumer issues (including those relating to genetically modified food) — have strong normative components that are difficult to keep under control’, with the result that technical narratives of legitimacy are rendered ineffective.¹¹² It is not enough, however, to note the increased profile of issues with ‘strong normative components’ in the trade regime as undermining technicalization. There is a more fundamental question of how something gets classified as a technical or political matter in the first place.¹¹³

It is a truism that no ‘bright line’ can be drawn between what constitutes a ‘trade’ and a ‘non-trade’ matter, and it is remarkably easy to reframe almost any issue as affecting trade in some way. Where this line is drawn is always the result of political choices born along social, economic and political currents. The denial of the political character of processes of technicalization has a number of problematic consequences. It results in philosophically impermissible attempts to justify the exercise of normative authority on the sole basis of epistemic competence,¹¹⁴ by claiming that economists and scientists hold not only answers within their professional-epistemic domains but also when it comes to political life. It deflects attention from the understanding that technical decisions may have political and legal implications, or that notionally technical decisions inevitably take place within a given social

¹¹¹ Abbott 2001, 294.

¹¹² Ibid.

¹¹³ See generally Lang 2011.

¹¹⁴ Scientific expertise does not provide a standalone normative basis for the exercise of political power. It cannot. The sciences, including economics, are part of a descriptive enterprise concerned with producing ‘factual’ statements based on empirical observation in accordance with professionally accepted vocabularies and methodologies. The impossibility of deriving normative statements from factual statements has been well established since David Hume and clearly stated in the legal context by Hans Kelsen: see Hume 1817, 171-2; Kelsen 1967, 6.

and political frame.¹¹⁵ It allows actors making such decisions to displace their sense of responsibility for the practical implications of their decisions. It operates to obscure underlying power imbalances and stifle opportunities for change. Ironically, this can lead to the entrenchment of particular ways of knowing and approaching the world that are actually less effective and less efficient at producing desired outcomes.

To further emphasize this point: output legitimacy narratives sometimes assume that the forms of knowledge included in the notion of ‘the technical’ — whether economic, scientific, or legal — are inherently universal and neutral. Yet David Kennedy has noted how particular ideas and disciplinary vocabularies can gain ascendancy as a result of the institutional resources channelled in their favour. He argues that ‘[p]ower in this sense — money, access to institutional resources, relationship to underlying patterns of hegemony and influence — is central to the chance that a given idea will become influential or dominant within the international law profession’.¹¹⁶ Scholars identifying with the Third World Approaches to International Law tradition have also heavily criticized the purported neutrality and universality of ‘technical’ WTO rules. Bhupinder Chimni suggests that in some cases (particularly with respect to the TRIPS Agreement) WTO rules, rather than being neutral, rather reflect the interests of the ‘transnational capitalist class’.¹¹⁷ Antony Anghie links the WTO to the IMF and World Bank as all helping to facilitate a neoliberal vision of the global economy which poses distinctive challenges for Third World states.¹¹⁸ Meanwhile, James Gathii argues that there has been a ‘neoliberal turn’ in recent years in regional trade agreements, not only as the result of material drivers but also as the result of the actions of national and transnational networks which are partially constituted by shared cultural-

¹¹⁵ Scientific experts, in their capacity as scientific experts *alone*, may therefore only provide epistemic legitimacy, not normative or political legitimacy. That is, on their own, scientific experts give people reasons for believing that something is or is not empirically verifiable according to the precepts of a given discipline, not whether or not it is normatively justified. This is not to say that experts cannot be given political power to wield, but simply that their authority to wield such power cannot derive from their character as ‘experts’ per se. Where power is allocated on the basis of expertise, such allocation can only be justified on the basis of a larger overarching normative system that privileges that particular form of expertise.

¹¹⁶ Kennedy 2000, 422.

¹¹⁷ See Chimni 2004, 7-8; Chimni 2006, 7-10.

¹¹⁸ See Anghie 2006, 749.

economic assumptions.¹¹⁹ As such, rather than viewing the technical languages associated with WTO law (legal, economic, scientific, diplomatic) as inherently apolitical, they may be productively considered as representing competing knowledge systems about the WTO that may be used to advance the interests of certain actors over the interests of others.¹²⁰ Moreover, if anything, the ongoing functional differentiation of international expertise is only set to aggravate such competition, as an ever-multiplying series of specialist technical languages with ever higher barriers to entry are deployed in the service of framing and addressing particular problems.¹²¹

D *Expert Overreach*

Technicalization is in part a matter of substance, in that it concerns which modes of knowledge are prioritized and how they are then notionally stripped of political associations. It is also in part a matter of procedure, as technicalization processes invariably require normative power to be allocated to specific people and groups (experts) on the basis of, among other things, their epistemic competence. WTO law allocates power to various types of individuals and institutions on the basis of their expertise, often to good effect. Indeed, as will be discussed in Chapter Seven, there are even cases where the WTO could stand to make more use of experts. Problems arise, however when the limits to expert competence are not clearly defined or recognized and when the political dimensions of expert decisions are ignored. Experts may thereby exceed their authority in two ways: either by overstepping the bounds set for them in law, or overstepping their own professional competence. In such cases, the social element of output legitimacy in these cases may outstrip the normative benefits that expert knowledge can bring. As Emanuel Adler and Steven Bernstein note:

as an unintended consequence of the actions of epistemic communities, scientific knowledge becomes socially validated as truth, the power that is used on behalf of this

¹¹⁹ See Gathii 2011.

¹²⁰ ‘The opening up of international governance to greater deliberations among a wider array of actors has contributed, perhaps not surprisingly, to an increasing preoccupation with struggles over the truth status of knowledge claims and the resources for making those claims more or less believable to diverse publics’: Miller 2007, 330.

¹²¹ See Koskeniemi 2007b, 4-9. See also Koskeniemi 2009b.

truth acquires social legitimacy, instrumental rationality becomes deeply institutionalized, and efficient practices rather than good practices become the natural order of things.¹²²

This problem is exacerbated by the social logic of expert institutions and epistemic communities, which can operate to swallow up more areas of rule- and decision-making than might otherwise be desirable.

Closely related is the critique of managerialism, which highlights how issues are framed as ‘problems’ to be managed by appropriately tasked and competent experts. Indeed, Deborah Cass identified one of the central narratives of the constitutionalization debate within WTO as one of ‘institutional managerialism’, which

creates the illusion of being a flexible, neutral, technocratic constitution while running the risk of becoming a self-legitimizing, bureaucratic, insufficiently deliberative, and legalistic constitution which appeals to a predominantly classical economic telos and, indirectly, intrudes on national regulatory function and diversity.¹²³

This is accompanied by the problem of broad delegation to such experts, as strictly defined legal tests give way to the discretionary application of informal ‘balancing’ rubrics that are applied on a case-by-case basis.¹²⁴ Writing on war and law, David Kennedy has raised similar issues about the way that framing decisions in a technical-legal vocabulary allows people to displace their ‘political and ethical responsibility’ for such decisions. Indeed, Kennedy argues that such ‘denial of both freedom and responsibility’ is an essential part of the self-construction of the expert as an expert.¹²⁵ Output legitimacy narratives can thus contribute to the empowerment of experts in a way that has problematic implications for expert groupthink and the displacement of responsibility for the consequences of decisions.

Difficulties also arise when trying to properly demarcate between the competences of various experts. Article 14.9 of the Tokyo Round Standards Code, for instance, provided for the establishment of technical expert groups to make findings on whether a given measure was necessary for protecting human, animal or plant life or health. The experts in question were envisaged as scientific experts, but the determination as to what constitutes ‘necessity’

¹²² Adler & Bernstein 2004, 301. Cf Shapiro & Guston 2007, who also note that this can lead to the increased politicization of expert knowledge practices.

¹²³ Cass 2005, 99. See also Koskeniemi 2007a.

¹²⁴ See Koskeniemi 2007b, 9-10.

¹²⁵ Kennedy 2006, 168-72.

in such circumstances has since been understood to be more of a legal question than a scientific question.¹²⁶ Caroline Foster has similarly noted that it is not uncommon for the boundaries between fact and law, and the factual or normative character of particular determinations, to be blurred in SPS disputes.¹²⁷ The panels in SPS disputes have sometimes struggled to identify the appropriate boundaries of experts' epistemic competence, either by requesting information which lies beyond the expertise of the expert in question (either because it is outside of their specialization or is normative in character)¹²⁸ or taking into such information when it is improperly volunteered by such experts. Jacqueline Peel also notes that panels may 'feel obliged to defer to the "epistemic superiority" of experts', which may carry with it a deferral to experts' framing of issues, thereby importing a series of value judgments that may not be shared by the broader community.¹²⁹ This is not to dismiss the value of using scientific experts in the SPS context, where Members are in agreement that science provides the best available metric for determining whether or not something poses an SPS risk. Nonetheless in harnessing the instrumental power of expertise, it is important to remain aware of these limitations and risks.

Finally, many WTO Members clearly struggle to access sufficient expertise as a result of a lack of institutional and professional capacity and in the absence of the kinds of sophisticated knowledge gathering infrastructures that are such a central aspect of the regulatory apparatus of the wealthier Members. This hampers their ability to claim the modicum of power set aside for experts in the WTO for themselves. It also undermines these Members' abilities to participate in steering the systems of knowledge prevalent in the WTO to serve their interests, and indeed to define the very boundaries of what constitutes relevant expertise in the context of the WTO. As argued by Diane Stone, 'asymmetries in power relationships within the global polity are reproduced within these [international] knowledge networks as well as occasionally modified by them'.¹³⁰ Although some attention has been

¹²⁶ This provision was quietly dropped from the SPS and TBT Agreements, which succeeded the Standards Code. Cf art 4.5 of the SCM Agreement, which empowers the SCM Committee, once their assistance has been requested by a panel, to reach determinative conclusions on whether or not a measure is a prohibited subsidy. The SCM Committee, however, is not framed as a purely technical body.

¹²⁷ Foster 2013, 139-43.

¹²⁸ Ibid 175-7.

¹²⁹ Peel 2010, 77.

¹³⁰ Stone 2004, 125.

paid to these capacity problems in the WTO dispute settlement context,¹³¹ more investigation of the social construction of expertise in the face of systemic global inequality is needed.

IV CONCLUSION

A focus on output legitimacy brings into focus a very different set of challenges for the creation, interpretation, and application of WTO law. It directs attention towards the role of otherwise neglected ‘background’ actors in the WTO, including experts, international and domestic bureaucrats, and other participants in the creation of systems of knowledge relating to the WTO. It raises questions about whether and how the operation of WTO law leads to desirable outcomes, rather than focusing exclusively on the degree to which certain procedural criteria, such as transparency or participation, are being fulfilled for their own sake. Such a focus raises questions not only about whether the WTO is effectively and efficiently achieving its goals, but also whether those goals are desirable at all. It also has the potential to show how, contrary to many of the consent and democratic narratives, Members’ and individuals’ preferences and interests are not pre-established and fixed, but are in part constituted by WTO law and practices. Careful consideration of how input- and output-based modes of legitimacy dynamically interact with one another could therefore lead to a richer understanding of the relationship between law, knowledge, and legitimacy.¹³²

To be clear, however, this thesis is not aimed at ‘maximising’ output legitimacy in the WTO or elsewhere, or for input-oriented concerns to be neglected in favour of a legitimacy focused narrowly on results. Output legitimacy provides no panacea for the WTO’s legitimacy woes. The present uncertainty over the WTO’s direction, the gap between various of the WTO’s laws and procedures and their purported aims (not least the widespread malaise about the Doha Round), the failures of technicalization and the dangers of expert empowerment all impose their own limits on the legitimating capacity of such narratives. Moreover, output legitimacy narratives can prove particularly problematic where they begin to discount questions of consent and democratic participation. To echo Joseph Weiler:

¹³¹ See, eg, Shaffer 2005a; Nottage 2009; Hsieh 2010; Santos 2012.

¹³² ‘[W]e need to apply a dynamic view of input and output legitimacy to overcome a rigid dichotomy. A categorization that focuses either on processes/structures or output runs the risks of segmenting the problem, cutting it into small salami slices and losing the broader picture’: Elsig 2007b, 88.

I believe too that in the international sphere as elsewhere the end can justify the means only so far. That a legitimacy powerfully skewed to results and away from process, based mostly on outputs and only to a limited degree on inputs, is a weak legitimacy and sometimes none at all.¹³³

Notwithstanding these limitations, output-oriented narratives still have a prominent role to play in legitimating the law and operations of the WTO. A legitimacy skewed towards inputs and away from substance and outcome takes on its own fragility as its means become increasingly distant from its ends.

What the thesis does call for, then, is greater scrutiny of output legitimacy claims, greater awareness of how such claims intersect with WTO law and practices, and further investigation of both the benefits and the dangers that a more rigorous approach to output legitimacy may bring for international governance. It is thus worthwhile to consider how it is that knowledge about what constitute appropriate and desirable outcomes for the WTO, and knowledge about how to achieve such outcomes, is framed and generated by WTO law.¹³⁴ WTO law and practice to structure what kinds of knowledge claims are acknowledged, prioritised, validated, or discarded in different fora. Of particular significance in this regard are the WTO's laws and practices that are used to frame and resolve competing knowledge claims about such outcomes and their realization. As Clark Miller argues:

Justificatory arguments about both the substance of international norms — what goals and objectives international governance should strive to achieve — as well as compliance with those norms demand recourse to knowledge, evidence, and proof.¹³⁵

The remainder of this thesis will focus on how the laws governing the WTO's negotiation processes (Chapter Six) and dispute settlement processes (Chapter Seven) have been shaped by conceptions of output legitimacy, and how they in turn have contributed to how output legitimacy is constructed with respect to the WTO.

¹³³ Weiler 2004, 562.

¹³⁴ When he first defined output legitimacy, Fritz Scharpf also identified a series of 'mechanisms of output oriented legitimization'. These mechanisms include, among others: electoral accountability, independent expertise, intergovernmental agreement, and pluralist policy networks (ie policy networks that reflect an openness to mutual rational persuasion, as sometimes reflected in associative or deliberative democratic theories): Scharpf 1999, 13-21.

¹³⁵ Miller 2007, 330.

CHAPTER SIX:

OUTPUT LEGITIMACY, LAW AND WTO NEGOTIATIONS

I INTRODUCTION

The Doha Round of multilateral trade negotiations disappointed many, having variously been described during its tenure as ‘stalled’,¹ ‘failed’,² ‘paralysed’³ and ‘doomed’.⁴ Even having been pronounced ‘dead’ on several occasions, it showed a remarkable capacity for resurrection, albeit fairly half-hearted.⁵ Its current status is somewhere in limbo; at the Nairobi Ministerial in 2015 although ‘many Members reaffirm[ed] the Doha Development Agenda’, other Members chose not to do so; negotiations on the remaining Doha issues continue.⁶ The aura of failure surrounding the round has impinged on the WTO’s legitimacy more broadly, by encouraging commentators to somewhat extravagantly question whether the WTO as a whole is still relevant⁷ and even whether it can survive.⁸ The incremental progress in recent years, such as on the Trade Facilitation Agreement at the Bali Ministerial in 2013⁹ and on agricultural trade, electronic commerce and matters relating to LDCs at the Nairobi Ministerial,¹⁰ only goes some way to countering this.

There have been two common responses to this malaise from trade lawyers and diplomats. The first is to emphasize that, for the very survival of the multilateral trading system, the WTO needs to keep moving forward by making new trade agreements — reflecting the ‘bicycle theory’ of international trade. The second claims that the WTO’s law-making processes should be ‘streamlined’ to make them more efficient and effective. To date, the vast

¹ Beattie 2011.

² Bhagwati 2012.

³ ‘Goodbye Doha, Hello Bali’ 2012.

⁴ Schwab 2011.

⁵ See, eg, ‘Doha Is Dead...’ 2006; Kleimann & Guinan 2011; Agence France-Presse 2011; Wilkinson 2012.

⁶ WT/MIN(15)/DEC [30].

⁷ See Meunier 2009; Elliott 2013.

⁸ ‘Can the WTO Remain Relevant?’ 2013.

⁹ WT/L/940. See Clarke 2005; Agence France-Presse 2013.

¹⁰ See WT/MIN(15)/DEC [21] for a list of decisions adopted.

majority of the proposals associated with these responses were focused on how to make the conclusion of the Doha Round more likely, or at least make the conclusion of some legally binding agreements more likely; the focus was thus on the institutional efficiency and effectiveness of the negotiations, and to some degree the level of commitments rather than the character of those commitments.¹¹ The broad desirability of additional rules and instruments was largely assumed. The precise content of such agreements and whether they are headed in the right direction — what may be thought of as the functional effectiveness of the rules negotiated — has received less attention from legal scholars.

Despite the WTO's apparent emphasis on being a 'results-oriented institution', WTO rules as drafted do not necessarily represent economically first-best solutions; indeed they are not even always functionally coherent. As early as 1975 Robert Hudec observed that 'never has such a practical program enjoyed so much prestige with so little justification in historical experience',¹² and he was writing of the comparatively limited rule-set contained in the GATT. New rules, and further elaborations of the old rules, have attracted further criticism. In 1990, Michael Trebilcock argued that 'there is no intellectual case for antidumping laws' and that 'there is no intellectual case for countervailing duty laws'.¹³ Similarly, Alan Sykes argues that the WTO's detailed rules on subsidies are 'largely indefensible from an economic perspective', as they are unable to identify subsidization effectively and cannot distinguish whether or not subsidies are socially desirable.¹⁴ Sykes also argues that certain rules on safeguards in WTO law are internally incoherent; for instance, 'the current interpretation of the "non-attribution" requirement for the use of safeguard measures in the WTO Agreement on Safeguards obliges members to make a demonstration that is logically impossible as an economic matter'.¹⁵ Writing with respect to GSP schemes, Gene Grossman and Sykes also note that, notwithstanding the relative enthusiasm from certain Members for such schemes, it is 'exceedingly difficult to say whether discrimination and reciprocity in GSP schemes make the trading community worse off or better off over the long haul'.¹⁶ These studies are not

¹¹ See Rolland 2010, 66.

¹² Hudec 1975, 4 and 15-16.

¹³ Trebilcock 1990, 238.

¹⁴ Sykes 2010. Cf Howse 2010; Lang 2014.

¹⁵ Sykes 2004b, 523. See also Sykes 2003; Jones 2004; Sykes 2004a; Sykes 2004b; Lee 2006; Sykes 2006.

¹⁶ Grossman & Sykes 2005, 42.

necessarily the last word on these matters; but they do raise important questions about whether multilateral trade law-making processes are (a) well-tailored to creating efficient and effective rules; and (b) whose interests those rules are intended to serve.¹⁷

Further problems arise when WTO rules are interpreted and applied; yet the problems identified above lie in the nature of the rules themselves. These rules embody ideas about how the world operates that are not necessarily justifiable in epistemic terms. No matter the legal effectiveness of these rules — of how completely Members' conduct may reflect what the rule requires — their functional effectiveness will, of necessity, be lacking. It is thus worthwhile to consider what role WTO law may play in facilitating, or appearing to facilitate, the drafting and adoption of more functionally effective rules. At the same time, it is important to consider how output legitimacy narratives concerned with knowledge, expertise and the concept of 'the technical' are used to justify the exercise of power by and through WTO law in relation to multilateral trade negotiations, and how these narratives intersect with the idea of functional effectiveness.

This chapter therefore explores how the legal mechanisms governing law-making at the WTO are framed as enhancing the WTO's output legitimacy, while also drawing attention to the serious limitations of those mechanisms. It argues that such mechanisms have a potentially beneficial role to play in leading to more informed and better reasoned policy formation, including at the negotiation stage, and in turn to more efficient and effective yet contestable WTO rules. This beneficial potential is, however, accompanied by the dangers identified in Chapter Five, especially those of technicalization and expert overreach. This is not to claim that the functional effectiveness and therefore output legitimacy of potential rules should be the sole or overriding concern in trade negotiations. To ignore the role of national interest, historical grievance and political trade-offs would be naïve. Nonetheless given that the WTO is characterised as a results-based institution, it is worth considering how law may help steer WTO negotiations in a way that facilitates the creation of more functionally efficient and effective rules on matters of common agreement.

The chapter proceeds in three parts. Part II provides a brief overview of the legal framework for WTO negotiations. Part III considers the relationship between output

¹⁷ For instance, Members may still see antidumping rules as politically desirable even in the absence of a political 'intellectual case' for them, while GSP schemes may still benefit the beneficiaries of those schemes even if they do not benefit 'the trading community' overall from an economic perspective.

legitimacy narratives and the legal requirements governing the characteristics of participants in WTO law-making processes, including norms relating to epistemic competence, independence and diversity. Part IV then examines the relationship between output legitimacy and the norms that govern the terms of interaction between those participants. This Part focuses on recent proposals to ‘streamline’ WTO law-making and how these are framed in terms of ‘necessary’ trade-offs between input and output legitimacy. Throughout, this chapter highlights the politicized and materially driven manner in which various regimes of knowledge are deployed and become embodied in WTO rules, and notes the importance of maintaining reflexive processes to ensure that WTO rules are able to adapt to changing circumstances and preferences. Overall it argues that law is central to how we understand both the functional and institutional efficiency and effectiveness of WTO law-making processes; that input legitimacy does not necessarily come at the expense of output legitimacy; and that institutional efficiency considerations should not be allowed to eclipse questions of whether given rules are substantively desirable or functionally effective.

II LAW-MAKING THROUGH NEGOTIATION ROUNDS

The WTO Agreement sets out various law-making options for WTO Members, including through amendment,¹⁸ waiver¹⁹ and authoritative interpretation.²⁰ For the most part, however, Members have continued to prefer negotiating new general rules²¹ in bulk through GATT-style multilateral negotiating rounds. There have been only a few cases of primary multilateral trade law-making outside of this context.²² These negotiating rounds are only loosely

¹⁸ WTO Agreement Article X.

¹⁹ WTO Agreement Article IX:3 and 4.

²⁰ WTO Agreement Article IX:2.

²¹ Although there has been rather extensive use of the waiver power, these waivers are generally directed at a small fraction of the membership. Waivers of general application, such as the TRIPS waiver on access to essential medicines, the Kimberley Waiver, and the GSP waivers, are more rare: see Feichtner 2012, ch 4.

²² There have also been limited plurilateral negotiations between Members for agreements within the WTO but outside of the context of negotiating rounds. Article XVIII of the GATS, for instance, provides that Members ‘may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII’. These have given rise to, inter alia, further agreements on telecommunications and financial services. In addition, Members may amend the WTO Agreements in accordance with WTO Agreement Article X.

structured by formal law, with GATT Article XXVIII regarding the conduct of tariff negotiations providing only the most tenuous connection to today's complex negotiations. A variety of informal and customary practices nonetheless abound, some of the most of important of which include the consensus principle²³ and the single undertaking principle.²⁴

The Doha Round was launched by the Membership with the Doha Ministerial Declaration, which was adopted on 14 November 2001. The Declaration set up a TNC for the duration of the round to supervise the negotiations and establish appropriate negotiating mechanisms.²⁵ The TNC operates under the authority of the General Council and is chaired by the Director-General. It has set up myriad issue-specific negotiating groups. Some of these were created whole-cloth, while others operate as special sessions of existing WTO bodies, such as the Agriculture Committee and the Services Council. Each negotiating group is led by a chair who plays a key role in facilitating and influencing negotiations.²⁶

Trade law and policy formation does not start when a negotiation round is opened, nor does it stop at the moment a treaty or instrument has been finalized and signed. Trade ministries and foreign offices worldwide work in conjunction with the private sector to gather information and develop theories about what policies would suit their interests. These processes have likely been both further stimulated and further fragmented by the surge in negotiations for preferential trade agreements outside of the aegis of the WTO. Discussions taking place in WTO committees and working groups, as well as in other IGOs, also help to shape perceptions about what may constitute desirable developments in the trade regime. Once rules are in place, various evaluative mechanisms may be used to highlight whether there are grounds for elaboration, amendment or termination, using information culled from WTO disputes, from the Member reports for the TPRM, from Secretariat reports, from national agencies and from civil society. Throughout the policy cycle, and in various fora, knowledge about the trade regime and national interests is framed by law.²⁷

²³ See Doha Declaration, WT/MIN(01)/DEC/1, paras 20, 23, 26 and 27; WTO Agreement Article IX:1.

²⁴ See Doha Declaration, WT/MIN(01)/DEC/1, para 47.

²⁵ Doha Declaration, WT/MIN(01)/DEC/1, para 46.

²⁶ See generally Odell 2005.

²⁷ Although Steinberg argues that 'most of the important information generated through the Trade Policy Review Mechanism [...] is known already to the EU Commission and the US government, is much less complete than the information they have, and is not as well prioritized for understanding measures which domestic industry finds most significant': Steinberg 2009, 1064-5. Steinberg encourages the reader to

Within this broad and relatively loose structure, there are a variety of norms and practices that may be understood as relating to the functional and institutional effectiveness of WTO negotiations, and by extension to the WTO's output legitimacy. The remainder of this chapter divides these norms and practices into two groups: those regarding the characteristics of the major participants in trade negotiations, both formal and informal; and those regarding the terms of interaction between those participants. These groups do not necessarily exhaust the potential categories into which output legitimacy-oriented norms and practices may be divided, but they have proved loci for ongoing debates about how to structure the WTO's negotiating processes.

III RULES GOVERNING THE PARTICIPANTS IN WTO NEGOTIATIONS

The first major category of output-oriented legal mechanisms relates to the characteristics required of the various participants in WTO negotiations. There are three main categories of output-oriented norms that relate to participant characteristics: these are norms which relate to epistemic competence, independence and diversity.²⁸ Norms of epistemic competence facilitate output legitimacy by encouraging negotiators to have a stronger command of the facts and ideas underlying their negotiating positions;²⁹ they may also specify which forms of knowledge and professional orientations are preferred in given circumstances.³⁰ Norms of

compare the TPRM country reports with the USTR's country analyses in the annual *National Trade Estimate Report on Foreign Trade Barriers*: at fn 7.

²⁸ These norms are more obvious in other WTO contexts. As will be discussed further in Chapter Seven, for instance, Article 17.3 of the DSU requires that Appellate Body members be 'persons of recognized quality, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally' (competence), 'be unaffiliated with any government' (independence) and 'be broadly representative of membership in the WTO' (diversity).

²⁹ 'The more robust the findings and the better they are communicated to decision makers, the greater the chances that the research will find echo in high-quality and effective public policies — that is, policies that can solve a given problem': Botto 2010, 16 (citation omitted).

³⁰ Competence is not just about ensuring that decision-makers have the information and the expertise at hand to make instrumentally effective decisions. It also provides as a limited form of accountability, in that expert discretion is limited by their professional integrity. At the same time, however, it also has the capacity to allow for individual experts to displace their personal responsibility for certain decisions. As David Kennedy points out, '[t]hese people are *experts* who come upon their roles as investors, managers, patent holders or bishops precisely by routinizing themselves into a professional vocabulary and practice

independence and impartiality facilitate output legitimacy by guarding against the capture of law-making process by special interests. Norms of diversity facilitate output legitimacy by bringing alternative perspectives to the table and thereby increasing opportunities for knowledge contestation. The remainder of this Part now examines each of these norms manifest in relation to the major participants in WTO negotiations (including the Members, the Secretariat, NGOs and IGOs), and how they have been deployed in claims about the legitimacy of the WTO.

A *The Members*

The primary participants in WTO rule- and decision-making, and the only actors entitled to vote or to veto, are the Members.³¹ The WTO Agreement provides that the WTO ‘shall provide a forum for negotiations among its Members concerning their multilateral trade regulation in matters dealt with under the [WTO Agreements]’ and that it ‘may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference’.³² The number of WTO Members has risen steadily over the last couple of decades, as had the number of Contracting Parties to the GATT before it. The 23 original Contracting Parties of the GATT 1947 had risen to 128 Contracting Parties by 1994, while at the time of writing the WTO had 164 Members.³³ Although increasingly beleaguered by the rise of bilateral, regional and even ‘mega-regional’ trade agreements, the WTO remains the primary negotiating forum for multilateral trade rules.

Not surprisingly, at the WTO level there are no formal requirements of epistemic competence, independence or diversity for Members or their delegates participating in multilateral trade negotiations. Formally speaking, every Member of the WTO has an equal legal right to participate in the negotiations. The WTO Agreement provides that the Ministerial Conference and the General Council are ‘composed of representatives of all the

which makes it difficult for them to experience human freedom and the direct responsibility that goes with it. The difficulty is to understand just how expertise limits expert freedom, and dulls the experience of responsibility’: Kennedy 2005, 17.

³¹ See WTO Agreement Articles IX and X.

³² WTO Agreement Article III:2.

³³ See WTO Website, ‘Members and Observers’.

Members³⁴ — it is left to the Members to decide who they want to appoint as representatives and their advisors.³⁵ When it comes to norms of independence, customary international law and the VCLT require that states not be coerced into entering agreements under the threat of force³⁶ and that they not be bound by agreements where their consent has been procured via the corruption or coercion of their representatives.³⁷ The WTO does not add anything more to this, and the idea that Members be independent and impartial in entering into negotiations in any broader sense is, for good reason, generally considered a non-starter. As to norms of diversity, informal norms have arguably come into play that affect the diversity of representation in WTO negotiations; these are most visible in the debate over Green Room participation. For the most part, however, changes to Green Room practices have been justified in terms of the inherent virtues of participation, rather than the instrumental virtues of ensuring that a more diverse range of views are represented.

1 *Competence: Members and Expertise in WTO Negotiations*

Norms of epistemic competence, nonetheless, play a significant role in WTO negotiations in two ways: first, in the extent to which Members make use of expert knowledge in formulating their trade policy positions and in negotiating trade-offs;³⁸ and second, as a result of asymmetrical access to information and expertise in negotiations. Even in the absence of formal requirements, Members have increasingly recognized the importance of having dedicated trade policy experts to focus on formulating and representing their interests in multilateral trade law negotiations. In the US, for instance, the Havana negotiations for the ITO were originally largely handled by the State Department, and responsibility for foreign

³⁴ WTO Agreement Articles IV:1 and 2.

³⁵ These representatives and advisors are members of various overlapping communities defined by, among other things, nationality, professional orientation, educational background (disciplinary and institutional), and employment history, to form part of both national and global policy networks.

³⁶ See VCLT Article 52.

³⁷ See VCLT Articles 50-51. The Doha Ministerial Declaration, which sets out the mandate for the Doha Round, is written in the collective voice of the Ministerial Conference. Not surprisingly, the Declaration also makes no reference to the epistemic competence of trade negotiators: see WT/MIN(01)/DEC/1.

³⁸ In trying to assess the likely national impact of new trade commitments, Members ‘need information about and knowledge not only of the national economy and regulations, but also of the country with which they are negotiating’: Botto 2010, 22. See also Das 2009.

economic policy issues was split between small groups and individuals in the State Department, the Department of Commerce, and the White House, among others.³⁹ This scattered approach was succeeded by the creation of the Special Trade Representative office in advance of the Kennedy Round in 1962, although even this was initially staffed by only a dozen or so people (including a 28 year old Robert Hudec).⁴⁰ The Special Trade Representative had only intermittent influence in US trade policy circles until 1979, when it was renamed the Office of the United States Trade Representative ('USTR') and was made the 'principal locus for trade policy coordination and negotiation'.⁴¹ The substantial increase in both the scope and ambition of the multilateral trade regime in the aftermath of the Tokyo Round in particular led to increased demand for specialist trade expertise. As of mid-2014 the USTR had over 200 'committed professionals with decades of specialized experience in trade issues and regions of the world'⁴² with primary responsibility for 'developing and coordinating US international trade, commodity, and direct investment policy, and overseeing negotiations with other countries'.⁴³ Simultaneously, the knowledge-gathering infrastructure relating to US trade has become increasingly sophisticated and complex, giving the USTR's trade policy experts more raw data with which to work. Moreover, the USTR only represents the most obvious accretion of trade policy expertise in a specific US government agency; trade expertise has also continued to multiply in other countries, in other government agencies,⁴⁴ in lobby groups, think tanks, consultancies, NGOs, law firms and academia. Importantly, trade policy expertise such as this is not merely there to be strategically exploited by Member governments. Rather, it represents a body of knowledge and practices subject to its own methodological and professional idiosyncrasies which may result in findings that do not reflect immediate government priorities.

³⁹ Between 1954 and 1960 there was also a Council on Foreign Economic Policy which sought to coordinate the US's foreign economic policy: see general information in 'US Council on Foreign Economic Policy: Records, 1954-61' available at <http://eisenhower.archives.gov/Research/Finding_Aids/pdf/US_Council_Foreign_Economic_Policy.pdf>.

⁴⁰ Dryden 1995, 64.

⁴¹ Ibid 252.

⁴² USTR, 'About Us' available at <ustr.gov/about-us>.

⁴³ USTR, 'Mission of the USTR' available at <ustr.gov/about-us/about-ustr>.

⁴⁴ These are further coordinated through the Trade Policy Review Group and the Trade Policy Staff Committee.

One possible view sees a facilitative role for trade policy experts and economists, in which the latest empirical and theoretical developments are transmitted to negotiators who then rationally incorporate their insights into national trade policy and international negotiation.⁴⁵ Knowledge is here used to illuminate and clarify trade-offs as far as they may affect reflect national interests and to lead to better quality rules. This perspective views the role of expert knowledge as purely supportive, and does not consider how different forms of knowledge and the contests between them may in themselves socially construct the preferences and interests of the policy-makers.

The superficial appeal of such a vision does not, however, stand up to scrutiny. Notwithstanding the ever-increasing number of trade experts, the impact of expert knowledge on trade negotiations has traditionally been assumed rather than rigorously traced.⁴⁶ And it is important that such impact not be overstated. Although Robert Howse notes that the trade policy elite of the GATT era ‘tended to understand the trade system in terms of the policy science of economics, not a grand normative political vision’,⁴⁷ the extent to which such GATT insiders were guided by economic science in the course of negotiation rounds, even at a purely ideational level, may itself be questioned. Nicolas Lamp, for instance, has recently highlighted how international trade negotiations are implicated in and shaped by ‘discourses’ of reciprocity, SDT, and development; ‘practices’ of participation; and ‘narratives’ of liberalization, fairness, stability and necessity.⁴⁸ These background discourses, practices and narratives all interact in complex ways with the material drivers of Members’ interests.⁴⁹

⁴⁵ This approach is now largely out of favour in social science circles: see Young 2004, 2; Botto 2010, 17.

⁴⁶ ‘There may be a growing body of literature on the use of knowledge in a variety of policy fields, but studies on how research has been used in the area of trade policy and negotiations have lagged behind those in some other areas [...]’: Tussie 2009, 2.

⁴⁷ And were relatively ‘insulated from, and not particularly interested in, the larger political and social conflicts of the age’: Howse 2002a, 98. Howse’s emphasis in this article is on the GATT/WTO’s dispute settlement procedures, rather than negotiation rounds, but his characterization of the ‘trade policy elite’ of the GATT era is not limited to their role in dispute settlement.

⁴⁸ Lamp 2013.

⁴⁹ ‘Often, the link between research and policy, or evidence and practice, is viewed as a linear process, whereby a set of findings or lessons shift from the “research sphere” over to the “policy sphere”, and then has some impact on policymakers’ decisions and programmes. Reality tends to be much more dynamic and complex, with two-way processes between research, policy and practice, shaped by multiple relations and reservoirs of knowledge’: Young 2004, 2.

Moreover, even if one assumes the influence of particular forms of knowledge on trade law-making, there are still epistemic clashes between and within expert areas of knowledge to contend with, and bodies of expert knowledge are themselves often characterized by uncertainty or simply incomplete. As Carolyn Deere-Birkbeck notes:

Despite the many links between trade policies, WTO rules, and social and environmental outcomes, the multilateral trading system lacks adequate mechanisms for gathering, reviewing, and assessing data on the relationship between trade rules and flows and key environmental and social indicators. It thus lacks the information and processes for enabling governments to harness the multilateral trading system to mitigate problems where it can and to adjust its rules where they may cause or exacerbate harm.⁵⁰

This is not merely a problem of information-gathering. Raising the profile of expert knowledge within trade negotiations will not necessarily resolve conflicts, and in some cases may exacerbate them. As such, Botto and Bianculli argue ‘expectations of academic incidence on trade policy should be cautious’.⁵¹ Trade negotiations are notoriously messy and complex, and epistemic concerns provide only part of a complex decision-making matrix. Although empirical and theoretical knowledge have an important role to play in trade negotiations, including in shaping Members’ understandings of their own interests,⁵² the impact of such knowledge is strongly curtailed by the other material and ideational dimensions of such negotiations. This can, in part, help to explain the significant gaps between first-best

⁵⁰ Deere-Birkbeck 2012, 122.

⁵¹ Botto & Bianculli 2009, 119. Botto approaches a common model (which she identifies as ‘more realistic’ than the alternative) of how knowledge affects decision-making as concluding that ‘technical knowledge is of relative and secondary significance, and that only exceptionally does empirical research have direct, instrumental and clearly identifiable effects on decision making’: Botto 2010, 18. That said, she also suggests that negotiators working on external trade policy ‘are more open to new ideas than are officials in other areas of domestic policy. [...] [I]nternational negotiators are more sensitive to innovation and to changes in scenarios, most of them proposed from outside. Nonetheless, they prefer research that they commission themselves or that is produced in their own environments’: at 27. Diane Tussie advocates caution when considering the effect that research and ideas have on trade policy, as this effect may be limited by communication difficulties, countervailing material interests and other facts: Tussie 2009, 7.

⁵² ‘The complexity of [international trade issues] virtually compels policy makers to seek out frames of reference and evidence for their policies. These frames of reference are cognitive maps that describe problems and map out realities; but they also have the power to shape and create realities’: Tussie 2009, 1.

economic solutions and the written reality of WTO agreements as highlighted by authors such as Trebilcock and Sykes.

2 *The Problem of Differential Access to Expertise*

The connection between expert knowledge and the positions taken by Members in the course of trade negotiations is even more precarious for the WTO's less wealthy Members. Asymmetric access to knowledge and expertise adversely affects developing countries' abilities to protect and advance their interests in trade negotiations. During the Uruguay Round, there were significant differences between the level of experience of the various negotiators and the quality of information to which they had access. Major developed states were able to draw upon the expertise of staff with decades of general negotiating experience, including direct experience with GATT negotiations. The US and EC were able to draw on vast swathes of information concerning trade effects as generated by experienced domestic experts and long-established information gathering systems, while smaller countries largely had to rely on the information produced by external agents. This is not to say that developing countries were wholly devoid of resources. Larger developing countries, such as China and India, had experienced negotiators who had taken part in previous negotiating rounds and dedicated GATT missions. In addition, the Technical Cooperation Division of the GATT Secretariat provided developing countries with a basic level of technical assistance, by providing trade policy seminars, performing country studies, providing data on tariffs, non-tariff measures and trade flows, and providing information on negotiating rules, procedures and techniques.⁵³ Developing countries were also able to draw on expert information supplied by the OECD, UNCTAD and the World Bank.

There were, however, significant limitations to these sources of information. Sheila Page points out that the OECD and World Bank figures on the potential benefits for developing

⁵³ See COM.TD/W/445, para 12. The objective was to 'help developing countries in their preparations for and participation in the Uruguay Round of multilateral trade negotiations, by providing data, information and background documentation focusing on issues and problems in the negotiations, of interest to developing countries. The programme would thus aim at facilitating the more effective participation of developing countries in the Uruguay Round': at para 9. Carolyn Deere-Birkbeck suggests that the WTO Secretariat should 'provide more systematic objective information on the status and process of negotiations and on the implications for LDCs of various specific proposals under discussion, particularly when negotiations move into a rapid or technical phase': Deere-Birkbeck 2012, 125.

countries were wildly optimistic, took into account a number of irrelevant factors, and only appeared after the Uruguay Round had begun.⁵⁴ Such information was also less comprehensive and targeted than that used by the wealthiest participants. Less powerful states thus had much less of an idea of how their interests would be affected by the proposed rules.

Resource constraints have also ensured that it is very difficult for many developing countries to obtain even information about what is going on in Geneva. Writing in 1998, Richard Blackhurst estimated that Members required at least three delegates in Geneva to cover only the most essential WTO meetings.⁵⁵ By 2003, Håkan Nordström estimated that the minimum number necessary had risen to five, given that the number of meetings taking place each week in the WTO had tripled following the launch of the Doha Round.⁵⁶ Nordström further highlighted that in 2003 there were 22 WTO Members (half least-developed countries, half small island developing states) with no formal representation in Geneva, as compared to the US, China, Korea, Japan and EC, which had over 15 delegates per mission each. The inability to attend these meetings is rendered all the more significant by the practice of decision-making by consensus, as consensus only requires that no one present at the relevant meeting objects. This has led some delegates to call for the number of meetings to be reduced so that developing countries can participate more effectively.⁵⁷ On the one hand, this is a matter of input legitimacy, in that it relates to ensuring that developing countries have sufficient opportunities to participate in decision-making that affects them. On the other hand, it also has output legitimacy implications because it leads to the neglect of potentially relevant sources of information and undermines opportunities to contest prevailing ideas.

The Doha Round⁵⁸ brought with it a comparatively (in historical terms) extensive set of funds and projects for capacity building and technical assistance for developing countries,⁵⁹ which was in part intended to ameliorate some of the problems associated with a lack of expert capacity. The WTO Secretariat's technical assistance measures are now largely

⁵⁴ Page 2002, 21.

⁵⁵ Blackhurst 1998, 54.

⁵⁶ Nordström 2006, 9.

⁵⁷ See the views expressed by various interviewees in Kwa 2003, 16.

⁵⁸ See Doha Declaration, WT/MIN(01)/DEC/1, paras 2, 16, 20-1, 23-7, 33, 36 and 38-43.

⁵⁹ Diane Tussie and Pablo Heidrich describe the WTO as having 'a very generous budget' for such activities: Tussie & Heidrich 2010, 41. That said, in recent years there has been trouble securing desired levels of funding: Smeets 2013, 1052-3 and 1078-82.

channelled through the ITTC, which was founded in 2003. Technical assistance is provided to developing countries on a needs-based approach, in which needs are assessed by both the ITTC and the WTO's Trade Policy Review Division.⁶⁰ Particular priority is given to LDCs.⁶¹ These measures include training programmes (including Geneva-based, regional and national programmes),⁶² one-off seminars and conferences, outreach programmes for trade policy officials, e-learning programmes, internship programmes and the creation of WTO chairs at fourteen universities worldwide.⁶³ The effectiveness of the programmes is monitored by the Technical Cooperation Audit Unit and is assessed on Results-Based Management principles.⁶⁴ Turning to the numbers, Maarten Smeets notes that by 2013 the Secretariat had trained over 46,000 officials since the Doha Ministerial, including 20,000 officials completing a WTO e-learning course,⁶⁵ and that a further 250 interns had been recruited. This has arguably improved the opportunities for participation and contestation in WTO negotiations. Maarten Smeets notes that, among other things:

Trainees reported that the exposure to WTO trade negotiations acted as a useful training tool to equip them to actively participate in the negotiations, submit position papers and defend their interests in the negotiations themselves. It can safely be said that never before in the history of GATT/WTO so many negotiating and text proposals were prepared and submitted by developing country Members, including by LDCs, sometimes on highly complex and technical issues.⁶⁶

⁶⁰ Smeets 2013, 1051.

⁶¹ Ibid 1070. See also Doha Declaration, WT/MIN(01)/DEC/1, paras 42 and 43.

⁶² Smeets 2013, 1056-8.

⁶³ Ibid 1058-66.

⁶⁴ Ibid 1066-9. The Results-Based Management approach is widely incorporated into UN development programmes, and is described by Smeets as follows: 'the underlying idea is ensure that donors and partner countries direct resources to achieving results, and use information on results to improve decision making and programme performance, based on indicators, that allow to measure progress and determine change and impact': at 1066-7.

⁶⁵ Ibid 1069. It is unclear whether this number accounts for 46,000 individuals or 46,000 completed training programmes.

⁶⁶ Ibid 1073.

In addition, Amrita Narlikar and Diana Tussie use the example of the G20 to illustrate how developing countries' bargaining positions may be enhanced by coalition-based research, while Paul Mably has conducted a similar exercise focusing on the G33.⁶⁷

While these are positive developments for developing countries, from both participatory and epistemic perspectives, there are nonetheless clear limits to the epistemic openness of such capacity-building and technical assistance programmes. A significant proportion of technical assistance activities are directed towards educating developing countries 'about the legal complexities of the commitments that countries made before they had acquired the appropriate analytical skills'.⁶⁸ These programmes, in other words, are directed more towards ensuring better implementation of standards already committed to, rather than towards considering whether those standards serve developing countries' interests or how they might be contested, or how developing countries may better advance their interests in future. The programmes also provide developing Members with little in the way of assistance in determining whether other Members are failing to comply with existing rules in a way that adversely affects their interests. As Tussie and Heidrich note:

Only a very small part of this training concerns WTO rules on drawing up regional and preferential agreements, on the more common negotiating practices in multilateral discussions, or on the several possible interpretations of a single clause. There is no training on how to put in place systems to monitor separate and unfulfilled commitments that could adversely affect acquired rights. [...] The technical assistance is designed in such a way that it is biased toward ensuring that countries comply with the rules, but without instruments to monitor if there is compliance elsewhere and thus determine if rights are being infringed.⁶⁹

Tussie and Heidrich also note that these training and internship programmes are generally taken up by a limited cross section of public servants who are usually from foreign or trade

⁶⁷ Narlikar & Tussie 2009; Mably 2009.

⁶⁸ Tussie & Heidrich 2010, 41.

⁶⁹ Tussie & Heidrich 2010, 42. Similarly although a significant facet of the Aid for Trade initiative launched at the Hong Kong Ministerial in 2005 focuses on trade policy development, Dominique Njinkeu et al argue that '[e]xisting Aid for Trade programs tend to focus narrowly on enhancing participation in negotiations and implementing trade agreements', with only a 'limited supply of aid programs that promote independent thinking about trade policy and negotiations or that take a holistic and long-term perspective': Njinkeu et al 2008, 176.

ministries, rather than ministries for agriculture, industry, mining, development, technology and the like.⁷⁰ Moreover, they point out that technical assistance activities are targeted only towards public servants, rather than those from the private sector.⁷¹ Taking all of these factors into account, they argue that ‘[t]echnical assistance conceived as merely neutral ceases to be a condition or circumstance and becomes, in effect, and active factor in reproducing the given distribution of costs and benefits’.⁷²

The WTO’s technical assistance programmes are therefore largely directed to legitimating existing WTO rules and processes by emphasising implementation and compliance, rather than allowing for a more critical epistemology to flourish that questions the rules themselves. Moreover, this narrowly instrumental epistemology often denies the ambiguity already present in WTO rules,⁷³ by presenting specific interpretations of the rules advanced by the Secretariat as objective and uncontroversial. Gregory Shaffer’s interviews with developing country delegates to the WTO further highlight misgivings about the ideological tenor of the Secretariat’s technical assistance programmes. One interviewee even claimed that ‘[t]he problem [with the WTO Secretariat’s capacity-building programme] is that it is ideological’ and that technical assistance is often directed towards ‘the use of ideas to transform developing country negotiating positions’.⁷⁴ In this sense the Secretariat’s technical assistance activities, while often framed according to a facilitative narrative (in the sense discussed in Chapter Five), tend to assume a much more technocratic character. Of course, developing countries are not the only ones subject to such ideological conditioning, which is experienced

⁷⁰ Tussie & Heidrich 2010, 42.

⁷¹ Ibid.

⁷² Ibid.

⁷³ ‘If technical assistance terms itself neutral, in fact it interprets in order to ensure a form of implementation: it is creating obligations that might not have been so clear at the time of the negotiations’: *ibid* 43.

⁷⁴ Shaffer 2005a, 650-1. Similarly: ‘In the words of Thandika Mkandawire, director of the UN Research Institute for Social Development, developing country “nationals” may simply serve to champion “externally driven policy agendas”, so that the resulting “dialogue” between donor and recipients can take on “the character of the conversation between a ventriloquist and a puppet”. See also: ‘[Technical assistance] generates a mental map of conformity, one that is often dysfunctional for the interests of recipient countries, perpetuating rules of the game in which the initial winners guarantee that they will persist. [...] Without space to explore the possibilities of new contractual arrangements, the veil of ignorance is maintained through the impartial cloak of technical knowledge — a subtle means of reproducing the status quo by means of technical assistance’: Tussie & Heidrich 2010, 43.

by even the major players in WTO negotiations. Background norms and systems of knowledge can act to shape and limit the way that even the most powerful actors in the trade regime think about their interests and how to achieve them. Its impact, however, is much more keenly felt by those countries which have had fewer opportunities to shape and contest its formation.

B *The Secretariat*

Aside from its technical assistance activities, the WTO Secretariat plays an important, albeit comparatively limited, role in WTO negotiations. It helps with chairing committees and working groups, organizing the logistics of negotiations, information gathering and framing (including through providing economic simulations of negotiation scenarios), agenda-setting, brokering compromises, drafting agreements, and recording the results of meetings, among other things. Nonetheless, of the secretariats of international economic institutions, the WTO Secretariat is one of the smallest and weakest. In part, this is because of its comparatively small budget and limited personnel. In 2014, the total budget for the WTO Secretariat was CHF 197,203,900,⁷⁵ as opposed to the World Bank's administrative budget of US\$2.6 billion⁷⁶ and the IMF's gross administrative budget of US\$1.186 billion.⁷⁷ The WTO Secretariat also had only 634 staff,⁷⁸ compared to over 12,000 salaried staff for the World Bank⁷⁹ and roughly 2,500 for the IMF.⁸⁰ Overall, this limits the scale of the contribution that the Secretariat can make to gathering and framing information for negotiations and more generally to functioning as a global knowledge institution.⁸¹

Whereas WTO Members are expected to be partisan, and their representatives may exhibit wildly variant levels of expert competence in trade policy, the legitimacy of the Secretariat's participation in multilateral trade negotiations is heavily tied to notions of independence and

⁷⁵ WTO, *Annual Report 2014*, 134. Obviously the US dollar exchange rate fluctuated throughout the year, but this was roughly equivalent to between US\$200 million and US\$220 million.

⁷⁶ World Bank, *Annual Report 2014*, 10.

⁷⁷ IMF, *Annual Report 2014*, 60.

⁷⁸ WTO, *Annual Report 2014*, 134.

⁷⁹ World Bank, *Annual Report 2014*, 11.

⁸⁰ IMF, *Annual Report 2014*, 65.

⁸¹ See Miller 2007.

expertise.⁸² The WTO Secretariat's impartiality is legally enshrined in WTO Agreement Article VI:4, which states that the 'responsibilities of the Director-General and of the staff of the Secretariat shall be exclusively international in character' and that they 'shall not seek or accept instructions from any government or any other authority external to the WTO'. Members are also obligated to 'respect the international character' of the Secretariat's responsibilities and 'not seek to influence them in the discharge of their duties'.⁸³ The WTO Agreement does not mention any specific competence requirements for Secretariat staff, but the preamble to the Secretariat Staff Regulations provides that '[t]he paramount objective in the determination of conditions of service shall be to secure staff members of the highest standards of competence, integrity and efficiency',⁸⁴ and Regulation 3.1 states that '[t]he recruitment policy of the WTO shall be to seek to attract and retain staff members offering the highest standards of efficiency, competence and integrity'.⁸⁵

For the most part, the WTO Secretariat is widely respected for its adherence to the principle of independence⁸⁶ and for its epistemic competence. That said, as glimpsed in the discussion on technical assistance above, the 'international character' of the Secretariat does not necessarily shield it or its officials from exhibiting institutional or professional bias. Secretariat officials' assumptions about what is neutral or uncontroversial, even in terms of economic input, may be informed by a particular worldview that is not necessitated by the treaty language and which fails to recognize its own contingency. Developing Members in particular have often not been convinced of the neutrality of the Secretariat, seeing it instead

⁸² The Secretariats of international organizations regularly invoke the legitimating power of notions of independence and epistemic competence. Outside of the hiring context, however, they tend to make less of an effort to stress notions of diversity. On the one hand, these Secretariats provide purportedly neutral expert advice which can inform debates and reduce information asymmetries between negotiating parties, serving at least a facilitative and potentially a deliberative function. On the other hand, the functionalist orientation of Secretariats can allow them, if sufficiently empowered, to slip into a technocratic mode, as most clearly exemplified by the implementation of the World Bank and IMF's structural adjustment policies.

⁸³ See also Regulations 1.4-5, 1.7, 1.9-10 of the Staff Regulations, WT/L/282.

⁸⁴ Ibid Preamble.

⁸⁵ Ibid. See also Regulation 5 (performance evaluation) and Regulation 7 (career development).

⁸⁶ Although cf Alvarez-Jiménez 2010, who argues for introducing more formal conflict of interest rules and limitations on lobbying for Secretariat staff.

as more effectively advancing the interests of developed Members.⁸⁷ Thus although the legal framing of the Secretariat helps to position it as a source of output legitimacy, its invocation of expertise and independence can in practice be used to mask a much more complex set of political preferences and power dynamics.

C Non-Governmental Organizations

Multilateral trade law-making may also be legitimated through the informal involvement of NGOs on the grounds of their ostensible expert competence and the diversity of views they can bring to the discussion. WTO Agreement Article V:2 provides that the General Council ‘may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO’.⁸⁸ In mid-1996 the General Council adopted the Guidelines for Arrangements on Relations with Non-Governmental Organizations (‘NGO Guidelines’) which stated directly that ‘it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings’.⁸⁹ No NGO has yet been granted observer status to the General Council or any WTO committees, and it is unlikely that any will be in the foreseeable future.⁹⁰ NGOs have nonetheless been permitted to attend the plenary meetings of the Ministerial Conferences from Singapore onwards.⁹¹ As of yet, no NGO has been allowed to make any official statements at the Ministerial Conferences.⁹² However, the NGO Guidelines encourage the WTO Secretariat to play a ‘more active role in its direct contacts with NGOs who, as a valuable resource, can contribute to the

⁸⁷ Nordström 2005, 844.

⁸⁸ There were no formal arrangements to include NGOs in GATT decision-making throughout the GATT era. This is notwithstanding Article 89:2 of the Havana Charter (‘Relations with Other Organizations’), which would have allowed for the ITO to make suitable arrangements to consult and cooperate with NGOs. See Sjöstedt 2012, 96.

⁸⁹ WT/L/162.

⁹⁰ Cf the Constitution of the ILO, which provides expressly for non-governmental delegates (representing employers and workpeople) to attend and vote at the General Conference of the ILO and on its Governing Body: see Constitution of the ILO, Articles 3, 4 and 7.

⁹¹ NGO Guidelines, WT/L/162; Sjöstedt 2012 lists the number of NGOs attending at the Ministerial Conferences under his study as follows: Seattle (746); Doha (220); Cancún (834); Hong Kong (999); and Geneva (426).

⁹² Van den Bossche 2008, 727.

accuracy and richness of public debate'.⁹³ Chairpersons of WTO councils and committees may, in their personal capacities, also meet and discuss with NGOs.⁹⁴ The Guidelines also encourage informal arrangements which allow NGOs to circulate information to interested delegations,⁹⁵ and NGOs have consulted with and advised Member governments and participated in their delegations. There have also been proposals for NGOs to contribute collectively to an 'Advisory Economic and Social Committee' which would have some formal input into WTO decision-making, if not any form of vote.⁹⁶

Even confined to this limited set of informal contributions, NGOs can do much to enhance the output legitimacy of WTO negotiations, particularly by bringing a diversity of views to the table. Steve Charnovitz argues that:

The value-added from NGOs is not really enhanced representation in Geneva. Rather, it is that NGOs can inject new energy, ideas, and values that may help to improve decision-making in the WTO. NGOs' proposals can improve the market of ideas that undergirds the WTO. [...] Thus [...] the value of NGOs for the WTO is not so much that they may enhance the 'input legitimacy' of the WTO, but instead that NGOs can enhance 'output legitimacy' by leading to better, more effective intergovernmental decisions.⁹⁷

⁹³ NGO Guidelines, WT/L/162, para IV.

⁹⁴ Ibid para V.

⁹⁵ Ibid para IV. See also Van den Bossche 2008, 733 for the mechanics of how NGO position papers are circulated to the Members' delegations.

⁹⁶ See, eg, Lacarte 2004, 685; Petersmann 2001, 108-09. To date, the closest mechanisms to this in the WTO were the short-lived Informal NGO Advisory Body and the Informal Business Advisory Body, which advised the former Director-General Supachai Panitchpakdi on WTO-related matters. Howse is more critical of the creation of WTO advisory committees, whether staffed by NGOs, parliamentarians, or some combination, as 'it is an open question whether such ideas will ultimately not simply cabin or constrain democratic deliberation, through formalizing an understanding of which stakeholders have a legitimate place at the table'. He thus argues that '[p]eriodic meetings of such committees are no substitute for an ongoing and inclusive process of engagement of civil society and political actors with the activities of the WTO': Howse 2002b, 659.

⁹⁷ Charnovitz 2004, 680. Charnovitz even calls expressly for 'de-emphasizing' the representative claims of NGOs as '[i]deas are weighed not by how many people hold them, but rather by their scientific or philosophical merit'. He sees a role for IGOs, NGOs, and inter-parliamentary organizations in contributing to this 'market of ideas': 681-2. Nanz and Steffek also claim that 'organized civil society can make an

Similarly, Daniel Esty has argued that NGOs can provide ‘intellectual competition’ to governments in the trade policy space, thus improving the quality of trade policy decision-making.⁹⁸ Gunnar Sjöstedt, after mapping NGO participation in five Ministerial Conferences during the Doha Round (from Seattle in 1999 to Geneva in 2009), notes that the potential for NGOs to increase the complexity of the Doha negotiations may have negatively affected the institutional efficiency of the negotiations in the short-term. Nonetheless, he also points to several ways in which NGO participation may enhance the long-term effectiveness of the negotiations, including through Member capacity-building, promoting ‘collective intelligence and learning’ to ‘pav[e] the way for smooth implementation of a binding treaty’, and drawing attention to a wider range of issues and interests that may otherwise have been missed.⁹⁹

Even so, the notional epistemic benefits of increased NGO participation remain subject to claims of systemic bias: in particular, the claim that Northern NGOs are overrepresented vis-à-vis Southern NGOs and fail to adequately reflect the concerns of the global South,¹⁰⁰ and the claim that most NGOs that have pursued links with the WTO are oriented towards private interests rather than public interests, or to producer interests over consumer interests.¹⁰¹

Moreover, some WTO insiders view NGOs not as contributors to an open marketplace of ideas with the capacity to shape WTO decision-making for the better, but rather as mechanisms for transmitting WTO-framed information to the broader public. Generally noting the sometimes ‘distorted information’ that formed the basis for arguments used by the protestors in Seattle and elsewhere,¹⁰² some commentators suggest that more transparency and more active public education campaigns would solve, or at least mitigate, the problem of opposition as people came to understand the beneficial role fulfilled by the WTO.¹⁰³ Sungjoon Cho describes the view that:

If the WTO’s decision-making process can be made transparent to the public, subject to various inputs from various levels of participants of the global trading community —

important contribution by processing and disseminating information on world trade, with an emphasis on critical perspectives’: Nanz & Steffek 2004, 329.

⁹⁸ See Esty 1998, 136-7; see also Van den Bossche & Zdouc 2013, 98-101.

⁹⁹ Sjöstedt 2012, 108-11.

¹⁰⁰ See references at (n 106) of Chapter Four of this thesis.

¹⁰¹ See references at (n 105) of Chapter Four of this thesis.

¹⁰² Lacarte 2005, 450.

¹⁰³ See also Fakhri 2011, 95-6.

namely, governments, NGOs and the civil society in general — and thus facilitate discussion, deliberation and enlightenment on a global scale, the WTO can be deemed acceptable and thus legitimate.¹⁰⁴

This view does not seem to acknowledge the possibility that the WTO could itself learn from its interactions with governments, NGOs and civil society, but only that greater transparency could facilitate ‘enlightenment’. Cho points out that the Sutherland Report takes this even further, seeing NGOs as vessels to ‘promote the WTO’s image and enhance awareness of the WTO in general’.¹⁰⁵ In itself this may be a beneficial goal, particularly when there does appear to be a great deal of misinformation about the WTO circulating in what passes for a global public sphere. It also points, however, to a sense that the WTO rules have been reified, and are not themselves considered matters for contestation, thereby further consolidating the WTO’s technocratic approach to its output legitimacy on matters of trade law-making.

D *Intergovernmental Organizations*

IGOs too play an ancillary role in multilateral trade negotiations. WTO Agreement Article V:1 provides that the General Council shall ‘make appropriate arrangements for effective cooperation with other IGOs that have responsibilities related to those of the WTO’. Several international organizations, including the FAO, UNCTAD and the IMF, have been granted observer status in relation to the Uruguay Round negotiations,¹⁰⁶ the Doha Round negotiations, the General Council, and specific WTO committees.¹⁰⁷ The WTO also expressly aims for policy ‘coherence’ with other international institutions in global economic policy-

¹⁰⁴ Cho 2005, 393 (citation omitted).

¹⁰⁵ Ibid.

¹⁰⁶ International organizations were given a role as observers in the Uruguay Round negotiations, however their contributions were intended to be strictly limited to ‘technical’ matters. The reservation of the ‘political’ aspect of the negotiations for the Contracting Parties was strictly emphasized: ‘Since the negotiations are taking place among participants, the sole purpose of [international organizations] attendance is to enable negotiating bodies to seek technical support in the field of expertise of these organizations, to complement the expertise primarily available from participants’: see MTN.TNC/3. Moreover, observer status did not entitle international organizations to take part in all negotiations. Rather, their status was linked to particular negotiation fora (such as the Negotiating Group on the Functioning of the GATT System), and even then it was open for Contracting Parties to hold closed meetings.

¹⁰⁷ See WTO Website, ‘International Intergovernmental Organizations Granted Observer Status to WTO Bodies’.

making.¹⁰⁸ To this end, the WTO maintains heavily formalized relationships with the World Bank¹⁰⁹ and IMF¹¹⁰ but also releases joint communiqués and studies,¹¹¹ and launches joint projects,¹¹² with a host of other organizations.¹¹³ Many developing countries also rely on studies done by other IGOs, especially the World Bank and UNCTAD, to supplement and inform their own negotiation positions. As with the WTO, many of these organizations stake claims to epistemic competence (particularly in relation to their fields of specialism) and independence/neutrality. How formal and informal norms of independence, diversity and competence combine to generate output legitimacy varies from institution to institution, and it is beyond the scope of this thesis to interrogate their construction. Entities such as the IMF and the Codex Alimentarius Commission are nonetheless broadly considered to provide expert, independent opinions on matters within their function.¹¹⁴ In this vein, Claire Kelly notes a form of ‘derivative legitimacy’ that institutions such as the WTO may be able to call on as a result of their institutional alliances. Successful alliances may generate legitimacy dividends for allied institutions, allowing them to better compete for global resources and to more effectively pursue their specific aims.¹¹⁵

IV TERMS OF INTERACTION

The output legitimacy of WTO law-making depends not just on norms governing the characteristics (competence, independence, diversity) of the participants in the law-making

¹⁰⁸ ‘The interlinkages between the different aspects of economic policy require that the international institutions with responsibilities in each of these areas follow consistent and mutually supportive policies’: Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policy-Making.

¹⁰⁹ See the Agreement between the International Bank for Reconstruction and Development and the World Trade Organization. See also WTO Agreement Article III:5.

¹¹⁰ See the Declaration on the Relationship of the World Trade Organization with the International Monetary Fund; Agreement between the WTO and IMF. See also WTO, ‘Agreements between the WTO and the IMF and the World Bank’, WT/L/194.

¹¹¹ See, eg, WHO and WTO 2002.

¹¹² See, eg, the Standards and Trade Development Facility, a collaborative venture of the WTO, the WHO, the World Bank, the OIE, and the FAO.

¹¹³ For a complete list see WTO Website, ‘The WTO and Other Organizations’.

¹¹⁴ Cf Pollack & Shaffer 2009; Livermore 2006.

¹¹⁵ See Kelly 2008, Part II.

process. They are also heavily shaped by the terms of interaction between those participants. How those participants are positioned against one another, hierarchically or otherwise; what kinds of rules govern how to reach an authoritative decision; how transparent the negotiations are; who negotiators are accountable to and how much time they are given to negotiate — all of these things may affect the output legitimacy of WTO rule-making. On an institutional level they affect the efficiency and effectiveness of the law-making process. On a functional level they affect whether the substance of the rules is well-targeted towards achieving desired aims. More broadly, the norms governing the interactions between law-making participants structure how negotiating options come to be seen as desirable or undesirable, or even possible or impossible.

The failure to make progress on the Doha Round has led a number of commentators to call for the ‘streamlining’ of WTO negotiation processes in a way that places a greater emphasis on output legitimacy.¹¹⁶ Even the concept of ‘streamlining’ law-making processes in itself represents a certain technocratic appeal, substituting as it does for the arguably more provocative concept of ‘reform’. This is far from the first time that stalled trade negotiations have led to such proposals. The failure to pass the Havana Charter in the US Congress in 1950, for instance, partially inspired the creation of fast track negotiating authority¹¹⁷ and trade promotion authority¹¹⁸ in the US. These sought to prioritise international agreement on matters of notionally technical concern over standard congressional controls over treaty negotiations. A similar output-oriented impulse has now been fostered by the failure to conclude the Doha Round. In particular, there have been calls to further empower the WTO Secretariat,¹¹⁹ to turn to some form of weighted or critical mass voting over consensus, and to turn from the single undertaking to variably geometry. There have also been calls from other quarters to increase the transparency of the negotiations and the deliberative quality of the negotiations. Calls for greater functional effectiveness or institutional efficiency, however,

¹¹⁶ ‘Why is there the current paralysis in the Doha Round? The short answer is that the world has changed, and the WTO, because of the cultural attitudes of its members, is mired in the old GATT theology of the past. Until the members of the WTO wake up and face the new realities, and develop decision making and rule making procedures that reflect the new geo-political power relationships, there will continue to be paralysis in the system’: Steger 2007, 486.

¹¹⁷ See US Trade Act of 1974, § 151–154 (19 USC § 2191–2194).

¹¹⁸ See US Trade Act of 2002, § 2103–2105 (19 USC § 3803–3805).

¹¹⁹ See, eg, Sutherland Report 2004, ch IX; Steger 2009, 814–24.

must also be considered in light of the intentional constructive ambiguity that pervades WTO law-making. The remainder of this part will consider how these proposals may affect the construction of input and output legitimacy in relation to law-making in the WTO.

A Empowering the Secretariat

Even taking into account the WTO Secretariat's comparatively limited staff and budget, Manfred Elsig notes that their influence on multilateral trade negotiations appears to be on the decline.¹²⁰ The Secretariat 'enjoys only limited authority in formal proceedings' while 'a dominant role is reserved for contracting parties' [sic] delegations within the system'.¹²¹ This is in stark contrast to the Uruguay Round, when then Directors-General Arthur Dunkel and Peter Sutherland were widely recognized as helping to drive the Round through to completion. During the Uruguay Round, GATT Secretariat officials were also regularly selected to chair negotiation groups (both formal and informal). For the Doha Round, although the Director-General continues to be the chair of the TNC, other chairing duties are more likely to be allocated to Member delegates.¹²² The marginalization of the Secretariat in this respect has also been fed by the relocation of trade law-making energy from the multilateral to the bilateral and regional arenas. Even the Secretariat's knowledge production function appears to have been curtailed, with several delegations increasingly relying on their own economic simulations to assess possible negotiation outcomes.¹²³

Several commentators have suggested augmenting the powers of the Secretariat in relation to multilateral trade negotiations.¹²⁴ The Secretariat's role in the WTO is often portrayed as one of support rather than initiative; very much a weak facilitative role rather than a technocratic role, in marked contrast to the perceptions of various developing countries and

¹²⁰ See Elsig 2010b.

¹²¹ Ibid 501. Elsig also notes that '[t]he Secretariat's impact of using its authority in constructivist terms, such as classifying the world, fixing meaning, and articulating and diffusing norms, is limited as it is one actor among many': at 501.

¹²² Ibid 503.

¹²³ Ibid 504.

¹²⁴ See, eg, Elsig 2010a, 72-4.

critics mentioned in Part III(A)(2), above.¹²⁵ This weak view of the Secretariat's role was criticized in the Sutherland Report on the Future of the WTO, the authors of which argued that the Secretariat should take a more active role as 'Guardian of the Treaties', defending the principles of the WTO against 'domestic political preoccupations'.¹²⁶ In particular, they expressed concern that 'a more timid and diminished role' for the Secretariat 'is leading to lost efficiency for the WTO'.¹²⁷ They thus proposed that the Director-General should continue to chair the TNC, and that this chairing role be extended to 'other committees and councils when necessary', including the General Council.¹²⁸ In addition, they argued that the WTO Agreement, currently largely silent on the role of the Director-General, should more clearly spell out the powers and duties of the role to help strengthen the Director-General's ability to act independently of the Membership.¹²⁹ More recently, the Report of the Panel on Defining the Future of Trade went further to argue that the Secretariat should be able to 'table proposals for action' as this could 'speed up deliberative processes and facilitate consensus by providing technical information and fresh ideas', again with the caveat that '[t]his would in no way compromise the exclusive right of members to decide'.¹³⁰ These aspects of the reports'

¹²⁵ The Consultative Board expressed concern that the vision of the WTO as a 'Member-driven organization' had relegated the Secretariat's role to 'solely one of support, not of initiative or even institutional defence of the WTO system': Sutherland Report 2004, para 338. Cf Elsig 2010a, 71.

¹²⁶ Sutherland Report 2004, ch IX in general, and para 361 in particular. The authors of the Report argue that 'the legitimacy of decision-making is adequately protected by the consensus principle': para 361. They further claim that '[i]ndividually, Members are not always the best guardians of the system': para 360. Other authors have also suggested strengthening the Secretariat as a means of improving WTO negotiations and decision-making: Elsig 2010a, 72; Steger 2007, 486.

¹²⁷ Sutherland Report 2004, para 339.

¹²⁸ Ibid para 345. The Report also seemed dismayed by the prospect that the Director-General, if 'reduced to a spokesperson and international advocate for free trade', is then 'unlikely to have a big impact at the diplomatic, negotiating level in Geneva': para 344. By contrast, the Wall Street Journal reported that then Director-General Eric Wyndham White was 'the chair of every sub-Committee established when the Kennedy Round started': Elsig 2010b, 497, citing Vicker 1964. Today, negotiation groups other than the Trade Negotiation Committee are almost always chaired by ambassadors, who are in turn assisted by the Secretariat by compiling information and advising the chair on agenda-setting: at 502-03.

¹²⁹ Sutherland Report 2004, para 347.

¹³⁰ Panel on Defining the Future of Trade 2013, 32. Cf Footer 2006, 171, who argues that 'the very fact that this is not explicitly regulated has not deterred (former) Director-Generals (and Deputy Director-Generals) [sic] as well as Secretariat staff and Chairpersons acting under their own responsibility, from launching

analyses and prescriptions mainly focus first on questions of institutional efficiency and second on maintaining the social legitimacy of the WTO for its own sake. There is thus a focus on augmenting a specific type of output legitimacy that is institutionally rather than functionally oriented. There is also a parallel concern with ensuring that Member-driven input legitimacy is not compromised.

The Sutherland Report also suggests a more broadly instrumental role for the Secretariat in arguing that that '[t]he membership should also encourage and stimulate a greater intellectual input from the Secretariat'.¹³¹ Indeed, the Report claims that

the WTO should be making a pre-eminent intellectual input into public and political debate on trade policy matters, globalization, development and other pressing issues of the day on which the international trading system impinges.¹³²

This would include a 'clearer — though always careful — lead on policy issues'.¹³³ In making these claims, the Sutherland Report remains firmly committed to the idea that there is a relatively clear direction in which the WTO can move which is 'consistent with its overall objectives'.¹³⁴ The Panel on Defining the Future of Trade similarly argued that 'members should support a stronger Secretariat, with sharpened expertise across the WTO's range of activities, and stronger research capacity'.¹³⁵ The focus is on foregrounding the Secretariat's epistemic authority on the world stage, rather than in interrogating the knowledge structures that constitute such authority or in opening up further opportunities to contest the Secretariat's views on matters. There is little consideration here of the potential politicization of the Secretariat, or of the possibility that the Secretariat would bring its own agenda to bear on such a role,¹³⁶ no matter how 'international' in character its orientation. A strengthening of the WTO's role as a global knowledge institution has the potential to bring great benefits, but the risks involved in doing so should not be ignored.

initiatives and tabling proposals for consideration by the broader membership'. See also Steger & Shpilkovskaya 2009, 129 who also argue that the Secretariat should be able to table proposals in negotiations; and Elsig 2010a, 72.

¹³¹ Sutherland Report 2004, para 365.

¹³² Ibid.

¹³³ Ibid para 366.

¹³⁴ Ibid para 360.

¹³⁵ Panel on Defining the Future of Trade 2013, 33.

¹³⁶ Cf Elsig 2010b, 510.

Some calls to enhance the powers of the Director-General and the Secretariat are, however, careful to specify the need for the Members to first come together to provide the Director-General and Secretariat with a clear mandate, thereby carefully pairing input and output legitimacy concerns. Petros Mavroidis, for instance, argues that any expansion of the Secretariat's currently limited range of administrative functions (servicing the dispute settlement and committee systems) should only be 'upon request' of the Members. He suggests that 'the WTO would be better served if it were limited to preparing "useful papers" for its principals, the WTO Members'.¹³⁷ In Mavroidis's view, the social and political conditions of the Doha Round differ significantly from those in place at the time the Dunkel Draft was introduced during the Uruguay Round, and enhanced intervention by the Secretariat poses a high risk of failure. Ultimately, he concludes that '[m]aking the Secretariat co-responsible for the observed failure to conclude negotiations is unfair'.¹³⁸

Many developing countries have also expressed concern at further involvement by the Secretariat, which they see as undermining the Member-driven aspect of multilateral trade negotiations.¹³⁹ James Gathii notes that this 'is in part informed by a desire not to have the experience during the Uruguay Round where the members of the WTO in effect ended up negotiating with the Secretariat rather than amongst themselves'.¹⁴⁰ Instead, some developing countries have argued for more formal rules governing the relationship between the various parts of the WTO negotiating apparatus, including more clearly separating the roles of the TNC and the General Council, selecting the chairs of the TNC and other negotiating groups by consensus and confining negotiations to formal meetings.¹⁴¹ In this sense, 'streamlining' decision-making and making it more 'efficient' and 'effective' may only lead to a further loss of a sense of ownership of the process on the part of developing countries, stimulating further disagreement and backlash; and eventually leading to a loss of legitimacy of WTO law for these countries.

Thus legal reform proposals to augment the power of the Secretariat are in part framed as improving output legitimacy, often accompanied by an insistence that this need not

¹³⁷ Mavroidis 2011, 380.

¹³⁸ Ibid.

¹³⁹ Gathii 2004, 891; see also Jawara & Kwa 2003, 227-8.

¹⁴⁰ Gathii 2004, 891.

¹⁴¹ Ibid 892.

undermine input legitimacy. The primary focus is on improving the institutional efficiency of the negotiations and concluding the Round, but there is also a secondary focus on improving access to technical information. Various of the risks associated with emphasizing output legitimacy are nevertheless evident, including the loss of Member control over law-making processes, the risks involved in the Secretariat taking a leading position in the face of broad disagreement about the direction of the Round, and the insistence that significant changes to the power relations in negotiations are simply marginal by-products of enhancing the essentially technical role of the Secretariat.

B *Informal Steering*

There have also been a number of proposals to create more informal steering mechanisms for WTO negotiations. The Sutherland Report recommended the creation of a senior officials' consultative board tasked with holding 'regular meetings to discuss the political/economic environment as well as current dossiers' and to provide 'some political guidance to negotiators'.¹⁴² This would be restricted to a maximum of 30 Members at any one time, with some permanent Members and some rotating Members.¹⁴³ A similar proposal has been put forward by Pedersen (building on India's suggestion at the 2009 Ministerial¹⁴⁴) who argues for the creation of a Working Party on the Functioning of the WTO to provide a flexible forum for a 'broad discussion of institutional and systemic challenges facing the multilateral trading system'.¹⁴⁵ Pedersen suggests that this could be a more informal process than that found in General Council decision-making, and could be thought of as an 'incubator or brainstorming forum for issues which cannot yet muster the required consensus to be formally catapulted onto the WTO agenda', accentuating 'informality, exploratory debate and non-negotiation'. Indeed, he envisages such a group as being 'allowed to invite outside experts and organizations to contribute to the discussion'.¹⁴⁶ This may be contrasted with his discussion of the Functioning of the GATT System negotiating group (FOGS) during the Uruguay Round, which was expressly conceived as a site for negotiation, and one which

¹⁴² Sutherland Report 2004, para 324.

¹⁴³ Ibid para 325.

¹⁴⁴ Pedersen 2011, 7.

¹⁴⁵ Ibid 2.

¹⁴⁶ Ibid 9.

focused on promoting Ministerial involvement in decision-making.¹⁴⁷ Pedersen is nonetheless careful to impose clear limits on the power of such a body, emphasising that it would continue to be Member-driven and that this would provide a purely deliberative, recommendatory process without any official decision-making powers.

Pedersen suggests that moving such a process away from formal decision-making power may prove beneficial for effective deliberation, as it depoliticizes the process and encourages ‘serious, creative, and outside-the-box thinking on trade-related issues’.¹⁴⁸ Although this would not directly affect the rights and obligations of WTO Members, it could have an important role in opinion and will-formation about the relevant institutional structure of the WTO. Although Pedersen emphasizes that his proposal remains ‘Member-driven’, it does so in a way that continues to augment the importance of contestation, deliberation and expertise. It thus represents a shift in thinking away from the idea that Members have wholly independent and predetermined wills that they attempt to implement through international organizations such as the WTO, and towards an appreciation of the capacity of international institutional frameworks to frame and shape Member’s understandings of their own interests.

C *Consensus, Voting, the Single Undertaking, and Variable Geometry*

Proposals to streamline negotiations through abandoning the consensus principle in favour of some form of weighted or ‘critical mass’ voting adopt a similar institutional output-oriented narrative. These alternative voting methods hold out the promise of passing laws that would otherwise be blocked under the consensus principle. The idea of weighted voting, in which Members would be allocated a voting share based on, say, their share of world trade, is not particularly new to multilateral trade law-making. On 21 January 1947, for instance, the UK proposed a formula for weighted voting for use in the Preparatory Committee for the International Conference on Trade and Employment and for elections to the Executive Board of the ITO,¹⁴⁹ while the US proposed a system of weighted voting that would apply only to

¹⁴⁷ Ibid 4-5.

¹⁴⁸ Ibid 9-10.

¹⁴⁹ The formula would have granted the US the highest number of votes (399), and the UK the second highest (335) — there was a substantial drop off in the number of votes allocated to each party thereafter, with the third highest USSR only garnering 199 votes: UN Economic and Social Council, E/PC/T/C.6/W.3 (21 January 1947) 1. The Preparatory Committee of the International Conference on Trade and Employment also discussed the possibility of weighted voting in the conference ‘and whether provisions should be made

issues arising out of the balance-of-payments provisions and membership of the Executive Board.¹⁵⁰ More recently, weighted voting proposals have been made in response to the perceived paralysis associated with consensus voting in WTO negotiations. In 2003 Thomas Cottier and Satoko Takenoshita proposed a form of ‘weighted voting’ to address the ineffectiveness of the WTO’s legislative wing, with a suggested formula that took into account Members’ contributions to world trade, their GDP, their population and market openness (defined as the proportion of imports to GDP).¹⁵¹ The Warwick Commission, in their 2007 report, considered a similar voting model but ultimately rejected it on the grounds that governments would find it difficult to agree a precise formula, that it would de facto disenfranchise certain countries, and that it too strongly contradicted the prevailing consensus culture in the WTO.¹⁵²

Some authors have even called for an explicit trade-off between an input legitimacy associated with consensus, and output legitimacy associated with weighted voting.¹⁵³ In early 2013, Arvind Subramanian argued for the abolition of the consensus principle and the accompanying veto power on the grounds that ‘too much legitimacy can hurt global trade’.¹⁵⁴ He claims that the main problem with the WTO’s law-making effectiveness, not just in relation to Doha, is that it has ‘suffered from too much democracy and associated blocking powers’.¹⁵⁵ His solution — that ‘larger countries’ be allowed to ‘negotiate among themselves while offering assurances to the smaller countries that they would receive the benefits of such negotiations and be spared any burdens’ — is unlikely to be reassuring for any smaller country currently facing the pressures of regional trade negotiations or indeed with a memory

for granting permanent seats on the Executive Board to countries of chief trading importance’ in its meeting of 6 November 1946: UN Economic and Social Council, ‘Journal of the Preparatory Committee of the International Conference on Trade and Employment’, No 21 (7 November 1946) 103, 104.

¹⁵⁰ UN Economic and Social Council, E/PC/T/C/6/W.6 (21 January 1947) 1.

¹⁵¹ Cottier & Takenoshita 2003; see also Cottier & Takenoshita 2008. Cottier does note that this is still ‘generally considered “outside the box” thinking’: Cottier 2010, 58.

¹⁵² Warwick Commission 2007, 29. Weighted voted was also considered unfeasible by the Panel on Defining the Future of Trade 2013, 31.

¹⁵³ ‘One downside of requiring full consensus is that it may be a recipe for impasse, stalemate and paralysis. In other words, the result may be that things do not get done’: Jackson 2001, 74.

¹⁵⁴ Subramanian 2013.

¹⁵⁵ Ibid.

of the Uruguay Round's 'grand bargain'.¹⁵⁶ More recently, Cottier has supplemented the idea of weighted voting with a 'consensus minus' proposal, which would take the veto away from individual Members and allocate it to coalitions only, such as the US and EU together, or 'Brazil and India and China jointly'.¹⁵⁷ He frames these proposals as specifically concerned with how one can 'bring about and secure output legitimacy of rules'.¹⁵⁸

Amrita Narlikar notes that the WTO has proven responsive to evolving norms and the changing balance of power in its Membership (particularly through the rise of India, China, and Brazil) by altering its procedures (through increased opportunities for transparency and participation) and substantive focus (through an increased focus on development). She also notes, however, that the relevant constituencies remain 'dissatisfied and disgruntled',¹⁵⁹ in part because the more fair and equal procedures have come at the cost of efficiency of decision-making, trading off institutional output legitimacy for input legitimacy. Moreover, this has encouraged the EU and US to negotiate elsewhere, 'where their relative power is stronger and the negotiation process faster'.¹⁶⁰ As such, Narlikar too considers streamlining the decision-making process by altering the consensus rule. Canvassing the options of an executive board, a critical mass approach or weighted voting, she decides that weighted voting is the preferable option — in particular, a double threshold voting system in which the first vote could be carried by a percentage of global trade or global national income, and a second vote which must be carried by a minimum number of countries.¹⁶¹ While this would lead to the demise of absolute consent in the multilateral trading system on an ongoing basis, any such move would still need to be agreed in advance by current WTO Members.

Another suggestion has been to temper the consensus principle on a more informal basis, by introducing a 'critical mass' approach. This would seek to encourage a culture in which Members refrained from blocking a proposal if a 'critical mass' of the relevant Members had already agreed to it. John Jackson, for instance, floated the idea that the critical mass could be defined as 'an overwhelming majority of countries and an overwhelming amount of the trade

¹⁵⁶ Ibid.

¹⁵⁷ Cottier 2010, 57. Cottier does not go on to canvass the political feasibility of this proposal, or explain in any detail the criteria for creating such coalitions.

¹⁵⁸ Ibid 62.

¹⁵⁹ Narlikar 2011, 114.

¹⁶⁰ Ibid 118.

¹⁶¹ Ibid 125, discussing the two-threshold model discussed in Warwick Commission 2007.

weight in the world, such as 90% of both of these factors'.¹⁶² The Warwick Commission also endorsed a critical mass approach (again as part of the informal negotiating culture rather than as a formal rule), noting its relative success in relation to the telecommunications, financial services and information technology agreements of the late 1990s.¹⁶³ Jackson,¹⁶⁴ the Warwick Commission,¹⁶⁵ Cottier¹⁶⁶ and Elsig¹⁶⁷ have all agreed that commitments entered into on a critical mass basis should also be subject to the MFN principle, thereby extending the benefit of the commitments to all WTO Members.¹⁶⁸

The idea of critical mass voting is also strongly linked to proposals to reintroduce a variable geometry approach to the negotiations, which would allow for plurilateral agreements of differentiated Membership. This is to be contrasted with the single undertaking approach, in which 'nothing is agreed until everything is agreed',¹⁶⁹ and reservations to the

¹⁶² Jackson 2001, 74-5.

¹⁶³ Warwick Commission 2007, 30-1.

¹⁶⁴ Ibid 74-5.

¹⁶⁵ Warwick Commission 2007, 30-1.

¹⁶⁶ Cottier 2010, 58.

¹⁶⁷ Elsig 2010a.

¹⁶⁸ Cf Elsig who calls for a 'cautionary reading' of automatic MFN extension in relation to the Tokyo Round agreements on the grounds that the MFN application of the Codes was far from clear, and that '[n]on-signatories were, to some degree, denied benefits originating from the codes, including the rights to participate equally in the committees to implement the codes': *ibid* 77. Elsig also notes the lack of developing country participation in their formation, and the very small size of the accepted 'critical mass' in relation to these agreements: at 76-7.

¹⁶⁹ See paragraph 47 of the Doha Declaration, which provides that: 'With the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking': WT/MIN(01)/DEC/1. The Punta del Este Declaration that launched the Uruguay Round included as a 'general principle' that '[t]he launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking': MIN.DEC, para B(ii). Originally, this was intended only to mean that all of the agreements should be finalized simultaneously: 'Nothing is agreed until everything is agreed'. Over time, however, it evolved into a hard requirement that any state seeking to become a Member of the WTO had to accept all of the provisions of all of the agreements: see Finger & Schuler 1999; Steinberg 2002, 359-60. The four plurilateral agreements left over from the Tokyo Round were not treated as part of the single undertaking: Footer 2006, 95; see the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement, and the International Bovine Meat Agreement.

agreements are not permitted.¹⁷⁰ The variable geometry approach was standard prior to the Uruguay Round, but was seen as problematic given the experience with the Tokyo Round's plurilateral codes. On the one hand, variable geometry helped to usher through a series of plurilateral agreements, including the Standards Code and the Tokyo Round Anti-Dumping, SCM and Customs Valuation Agreements. On the other, many of the plurilateral agreements failed to attract many signatories, undermining their effectiveness. Moreover, the widely differentiated rights and obligations that arose from each Member being able to pick and choose which agreements to sign up to led to a level of legal complexity that posed barriers to enforcement and implementation. Today, proposals to roll back the single undertaking have come under strong criticism from developing countries.¹⁷¹ For one, there is a concern that variable geometry could lead to increased fragmentation in the negotiations, which could make it more difficult for developing countries to form negotiating coalitions.¹⁷²

Overall, therefore, there have been a series of proposals to make WTO law-making more efficient and effective by weakening the consensus principle and turning away from the single undertaking. Some frame this as an essential trade-off between legitimacy and effectiveness, while others insist that the WTO's output legitimacy depends on removing principles that have come to be understood as barriers to efficient decision-making. Pauwelyn, meanwhile, argues that these solutions are illusory at best. For Pauwelyn, the strength of the consensus principle and the single undertaking is directly related to the 'higher levels of law and discipline' that emerged from the Uruguay Round, in particular its 'stricter dispute process' and strong enforcement capacity. Lowering the barriers posed by these principles in the

¹⁷⁰ WTO Agreement Article XIV:5 provides that '[n]o reservations may be made in respect of any provision' of the WTO Agreement, and reservations may only be made with respect to the multilateral and plurilateral trade agreements as expressly permitted by those agreements.

¹⁷¹ 'A key scenario to avoid is one where small and poor countries are engaged on only a narrow set of issues, such as discussions on cotton, market access, and [SDT], while the broader systemic and regulatory issues that define the multilateral system are negotiated exclusively by larger players': Deere-Birkbeck 2012, 124. During the Uruguay Round, the single undertaking was seen as a device used by developed countries to coerce developing countries into agreeing to agreements and provisions that they considered detrimental to their interests: See Rolland 2010, 72. See also Chimni 2004, 25; MTN.TNC/W/18, para 3.

¹⁷² 'Fragmentation helps them accomplish these goals by making it difficult for weaker states to create coalitions through cross-issue logrolling and by dramatically increasing the transaction costs that international bureaucrats and judges face in trying to rationalize the international system or to engage in bottom-up constitution building': Benvenisti & Downs 2007, 625.

negotiating context may allow for more efficient law-creation, but would then undermine the legitimacy of the rules themselves when it is time for them to be enforced. This could then potentially undermine support for the rules, and weaken the legitimacy of the WTO's dispute settlement system, leading to a new equilibrium closer to that seen in the GATT era.¹⁷³ The focus on streamlining the WTO's law-making processes for short term institutional efficiency gains may therefore ultimately undermine the input legitimacy of the rules and the output legitimacy of the dispute settlement system.

D *Transparency and Reason-Giving*

Rules and practices relating to transparency and reason-giving in negotiations are similarly regularly framed in terms of their contribution to output legitimacy.¹⁷⁴ On the one hand, transparency may improve the functional efficiency and effectiveness of negotiations by improving negotiation participants' access to relevant information, thereby sharpening ideas about which outcomes are desirable and achievable and how they might best be implemented. The right information can show which rules and practices have been successful in achieving their aims or have produced more problematic or unintended consequences, or make it more difficult for actors to adopt inconsistent and self-serving positions in different fora. In Benedict Kingsbury's words:

Some of the justifications given for [publicity] are entirely non-instrumental, but most of the justifications relate to the improving the quality of the law or decision (through better information, or reduced risk of venality or co-option or regulatory capture), to strengthening the overall legitimacy of the institution and hence support for it, or to

¹⁷³ Pauwelyn 2005, 38-9.

¹⁷⁴ See Curtin & Meijer 2006; de Fine Licht et al 2011. Jutta Brunnée and Ellen Hey, for instance, note that the 'availability of relevant factual and scientific information enhances transparency *of* governance because it enables States and other actors to assess the need for action and whether the [International Environmental Institution ('IEI')] succeeds in promoting relevant action. At the same time, to the extent that access to this kind of background information is designed to assist the IEI in promoting effective collective action, it is a crucial aspect of transparency *for* governance as well. By the same token, the legitimacy of an institution flows not only from its decision-making processes but also from its success in promoting its ends. This "output legitimacy" too is connected to transparency, especially to transparency *for* governance': Brunnée & Hey 2011, 28 (citations omitted, emphasis in original). For a focus on regime effectiveness, rather than output legitimacy per se, see RB Mitchell 1998.

improving the overall quality and impact of the laws and law-governed behaviour through sociological mechanisms such as the “civilizing effect of hypocrisy”, the reinforcement of latent inclinations or aspirations to do the right thing, or “blowback”.¹⁷⁵

From a deliberative perspective, more transparency may help to improve the available pool of information and to sharpen understanding about the reasons behind various actors’ decisions.¹⁷⁶ The perception of transparency can also in itself enhance faith in the fairness and integrity of the negotiating process, which may reduce the likelihood of opposition to certain proposals.

Yet transparency is also just as often framed as providing an obstacle to output legitimacy, at least when outputs are framed in terms of institutional efficiency. Transparency may increase opportunities for various actors to find flaw with and oppose negotiation proposals, dragging negotiations on for longer. There is also a difference between the availability of information and the extent to which people make use of that information¹⁷⁷ — mere publication on its own does not entail the promised benefits of transparency. Indeed, the sheer quantity of trade-related information that can be made available can become increasingly difficult to parse due to its scale and complexity. Transparency’s promise of better access to information may then translate either into extra power for the expert few, or simply the misleading use of information that has been divorced from its proper context. In addition, increasing transparency can also prove both resource and time intensive. It costs money to organize, translate, format, store and publish information, and it takes time to create, publish, perform and digest information.

The modalities of how a principle of transparency may apply in relation to the Doha Round, and the potential effects of these modalities on the WTO’s output legitimacy, are complex. One question relates to who gets to enjoy the immediate benefit of increased transparency — is it sufficient that the negotiations be transparent merely to some of the Members, all of the Members (generally referred to as relating to internal transparency) or to the global public at large (often referred to as external transparency)?¹⁷⁸ Each option

¹⁷⁵ See Kingsbury 2009, 48 (citations omitted).

¹⁷⁶ de Fine Licht et al (n 174) 7-8.

¹⁷⁷ Curtin and Meijer 2006, 117-18.

¹⁷⁸ See articles in ‘Mini-Symposium on Transparency in the WTO’ (2008) 11 *Journal of International Economic Law* 705.

implicates different subjects of legitimacy and communities of legitimation. On the internal side, the Uruguay Round negotiations were criticized by many developing countries as lacking sufficient transparency, partly as the result of the Green Room processes mentioned above and the failure to engage with NGOs. This in part led to the adoption of paragraph 49 of the Doha Declaration, which states that:

The negotiations shall be conducted in a transparent manner among participants, in order to facilitate the effective participation of all. They shall be conducted with a view to ensuring benefits to all participants and to achieving an overall balance in the outcome of the negotiations.

Pedersen tracks the development of reforms concerning internal transparency in the WTO from the time of the Singapore Ministerial through to 2005. He highlights improvements in practice and procedure, including more open consultation processes, the promulgation of statements outlining future negotiation processes, and reports on the substance and processes of informal Heads-of-Delegation meetings.¹⁷⁹

There appears to be a core disagreement between developing and developed countries as to what transparency may entail. Several developing countries have stressed the importance of formal negotiating rules to enhance the transparency of the negotiation process, including requiring that all negotiations take place in formal sessions without concurrent informal meetings. By contrast, developed countries have countered that transparency would be better served by retaining flexibility in negotiations as this would more likely reduce the opportunities for procedural obstruction.¹⁸⁰ Most of these debates, however, are framed in terms of the importance of equal participation and inclusivity for developing countries. Questions of institutional efficiency only receive peripheral notice, while the impact of transparency in negotiations on the functional legitimacy of the rules produced has been largely neglected.

Furthermore, paragraph 49 of the Doha Declaration refers only to the negotiations being conducted ‘in a transparent manner among the participants’ — it has nothing to contribute

¹⁷⁹ See, eg, Pedersen 2006, 121-2. Even the final Green Room meeting of the July 2004 General Council meeting was comparatively transparent — ‘everybody knew when it was taking place, what the agenda was and who was present’: 122. See also the General Council and TNC discussions on internal transparency at WT/GC/M/57 and TN/C/1. Note the relevant Principles and Practices governing the TNC remain best endeavours obligations and are non-binding.

¹⁸⁰ See discussion in Gathii 2004, 892-3.

with respect to external transparency. Paragraph 10 of the Declaration does refer to the broader public, but again views transparency more as an aid to enlightening the public about the WTO's benefits:

While emphasizing the intergovernmental character of the organization, we are committed to making the WTO's operations more transparent, including through more effective and prompt dissemination of information, and to improve dialogue with the public. We shall therefore at the national and multilateral levels continue to promote a better public understanding of the WTO and to communicate the benefits of a liberal, rules-based multilateral trading system.

The WTO has taken many steps to fulfil this commitment.¹⁸¹ On the one hand, it has the various modes of engagement with NGOs and IGOs discussed above. On the other, it engages directly with the public via its extensive and regularly updated website, on which it publishes speeches, press releases, reports and derestricted documents (pursuant to the 2002 General Council decision on Procedures for the Circulation and Derestriction of WTO Documents¹⁸²). Much of how this is presented to the public is handled by the WTO's Information and External Relations Division. Importantly, the WTO also publishes the notifications that it receives from various countries as required under the covered agreements, making it an important source of trade data for use by the private sector and civil society. The recent WTO Director-General mandated Panel on Defining the Future of Trade nonetheless highlighted two problems with WTO notifications. First, some Members either delay their notifications until a very late stage, or disregard their notification obligations altogether. Second, some of the notification requirements are not well-designed and do not result in the production of optimally useful information.¹⁸³

Aside from the question of which actors should enjoy the benefits of transparency, an additional question arises as to which materials and processes need to be made transparent. The minutes of the meetings for the TNC, other dedicated negotiations working groups and many of the WTO's standing committees and working groups are regularly published. Some

¹⁸¹ For a fuller discussion of how WTO rules on transparency, notice and comment operate in relation to public participation in the WTO, see Bonzon 2014, 244-9.

¹⁸² WT/L/452. At present this provides for the vast majority of WTO documents to be published within 60 days of their circulation.

¹⁸³ Panel on Defining the Future of Trade 2013, 32.

argue that this should go further. Daniel Esty, for one, also argues that ‘monthly General Council meetings should be open to the public and the media’.¹⁸⁴ But should treaty drafts be published? If so, how far along do the drafts have to be before this becomes necessary? Daniel Esty, for instance, argues that:

the WTO should adopt a practice that potential trade rules or policies be advanced in draft form with public “notice” and an opportunity for all interested parties to “comment” on the draft. Decision-makers should then be required to respond to the comments and concerns put forward.¹⁸⁵

To date, this proposal has not gained much traction. Nevertheless, several Members publicize the broad contours of their negotiation intentions on their government websites.¹⁸⁶

In addition, the last decade or so has seen proposals to introduce some form of public reason-giving into negotiation processes.¹⁸⁷ Traditionally, reason-giving, so essential to judicialized dispute settlement processes, has generally not been considered necessary for Members during negotiations. Members may find it advantageous to provide reasons for their negotiating positions in the hope of persuading others to agree with them, but they have traditionally not been *required* to justify their ultimate decisions to agree or not agree with given proposals. Nevertheless, the Sutherland Report recommended that the General Council adopt a Declaration which would require that ‘a Member considering blocking a measure which otherwise has very broad consensus support shall only block such consensus if it declares in writing, with reasons included, that the matter is one of vital national interest to it’.¹⁸⁸ More recently, the Report on The Future of Trade by the Panel on Defining the Future of Trade, as convened by former Director-General Pascal Lamy, advocated that Members ‘vetoing the adoption of decisions provide reasoned explanations for their position’.¹⁸⁹

¹⁸⁴ Esty 2007, 525.

¹⁸⁵ Ibid 524.

¹⁸⁶ The 1985 Leutwiler Report suggested that ‘governments should be required regularly to explain and defend their overall trade policies’ and that ‘the making of trade policy should be brought into the open’: Leutwiler Report 1987, 13, 41 and 49.

¹⁸⁷ The role of reason-giving in the context of the WTO’s ‘administrative’ disciplines has also been examined in Hepburn 2012.

¹⁸⁸ Sutherland Report 2004, 81.

¹⁸⁹ Panel on Defining the Future of Trade 2013, 31-2.

These proposals, once again, have generally been framed in terms of institutional efficiency; they are seen as a way of speeding up the negotiation process by deterring Members from exercising their veto in the face of increased public scrutiny. In theory it could also have implications for functional efficiency, as both the process of Member self-justification and the engagement of other Members with those justifications can lead to more reasoned negotiation. This, however, would require some fairly optimistic assumptions about how extensive the reasons provided by Members would be likely to be, and how closely they tie to the actual reasons for the veto in a given case. No matter how extensive the drafting and reason-giving requirements, there are simply some aspects of the process that will never be adequately reflected in published materials. It is the rare Member that would wish to go on the record as stating that it is holding up negotiations because it needs to appear to be standing firm against WTO negotiations due to an impending election.

E *Constructive Ambiguity*

Trade negotiations are not purely determined by an eye to output legitimacy. Functional imperatives are balanced against competing national interests, material drivers and public scrutiny to produce legal texts that are often constructively ambiguous by design. Constructive ambiguity may provide a means by which consensus can be achieved more quickly, as all sides consider that they have been allowed sufficient room to manoeuvre. In the process, however, it may result in provisions that it is difficult to implement efficiently or effectively, as there is little clarity about what the provision is intended to achieve or how it is intended to achieve it (beyond the fact of the ambiguity itself). The institutional efficiency it affords in allowing agreements to be concluded more quickly thus often comes at the expense of functional effectiveness.

An important example which illustrates the imperfect trade-offs that constructive ambiguity poses between institutional efficiency and functional effectiveness may be found in the process leading up to the adoption of the decision to submit the TRIPS Amendment for approval to the Members. The Amendment negotiations were not formally a part of the Doha Round negotiation structure and were not included as part of the Doha Round's single undertaking. Indeed, the TRIPS Waiver decision called for the TRIPS Council to initiate the process of formulating an amendment to the TRIPS Agreement on the understanding that 'it

will not be part of the negotiations referred to in paragraph 45 of the Doha Ministerial Declaration'.¹⁹⁰ It appears that the Members wanted to ensure that the Amendment was shielded from competing negotiating priorities and the uncertain duration of the Doha Round negotiations.

The Waiver and Amendment decisions both represented attempts by the WTO to address the problem of access to essential medicines for developing countries. Following the entry into force of the TRIPS Agreement, an attempt by multinational pharmaceutical companies to bring a lawsuit against South Africa concerning its HIV/AIDS medicines programme,¹⁹¹ and the US's TRIPS-based opposition to a Brazilian HIV/AIDS programme,¹⁹² NGOs and media outlets expressed concern that the TRIPS patent provisions were undermining developing countries' attempts to counteract burgeoning public health crises. In particular, the TRIPS Agreement's provisions relating to compulsory licensing were seen as impeding developing countries' access to (cheaper) generic medicines. There was thus a clear functional imperative to change the law in a way that allowed these countries greater access to such medicines.

The issue of access to essential medicines was first raised in formal terms at the WTO by a group of developing countries at a TRIPS Council meeting in June 2001.¹⁹³ Later that year, on the same day that it adopted the Doha Declaration, the Ministerial Conference adopted a separate Declaration on the TRIPS Agreement and Public Health.¹⁹⁴ On 30 August 2003, following extensive negotiations, the General Council adopted a temporary waiver (the TRIPS Waiver) which would allow less wealthy countries to import generic medicines under compulsory licences in circumstances where they were unable to manufacture the medicines domestically.

¹⁹⁰ WT/L/540 [11].

¹⁹¹ See *Pharmaceuticals Manufacturer's Association of South Africa v President of the Republic of South Africa*, Notice of Motion in the High Court of South Africa (Transvaal Provincial Division), Case No 4183/98 (filed 18 February 1998). The case was ultimately dropped. See also 'T Hoen 2003, 43-4.

¹⁹² See *Brazil — Patent Protection*, Request for Consultations, 1; 'T Hoen 2003, 44-6.

¹⁹³ IP/C/W/296, submitted by the Africa Group, Barbados, Bolivia, Brazil, Dominican Republic, Ecuador, Honduras, India, Indonesia, Jamaica, Pakistan, Paraguay, Philippines, Peru, Sri Lanka, Thailand and Venezuela.

¹⁹⁴ WT/MIN(01)/DEC/2.

The adoption of this Waiver, and subsequently the decision submitting the Amendment to Members for approval,¹⁹⁵ was not straightforward. There were a number of points of disagreement between developing countries and, in particular, the US. This was resolved for the immediate purpose of passing the Waiver through the intervention of the chair of the TRIPS Council, who set out in a statement ‘several key shared understandings of Members regarding the Decision to be taken and the way in which it will be interpreted and implemented’.¹⁹⁶ This removed the pressure from the limitations of the Waiver by creating an ambiguous interpretive space for certain of its provisions.

Moreover, even the legal status of the Chairman’s statement was left ambiguous. A footnote to the decision adopting the TRIPS Waiver noted that the Waiver was to be interpreted ‘in light of’ the Chairman’s statement. Yet a subsequent corrigendum to that decision inserted an additional line at the start of the footnote, identifying it as a ‘Secretariat note for information purposes only and without prejudice to Members’ legal rights and obligations’.¹⁹⁷ This meant that not only were the terms of the Waiver ambiguous, but the legal status of the purported clarification to the Members ‘shared understandings’ was itself ambiguous.

As effective as this might have proven for ensuring that the Waiver and Amendment decisions were adopted (the statement was also read out before the decision adopting the TRIPS Amendment for submission to the Members), neither the Waiver nor the Amendment decision have been well-received from a functional perspective. Both are considered to impose complex and burdensome conditions on the manufacture, export and import of generic medicines by developing countries.¹⁹⁸ Only one country has availed itself of the special export licence system set up under Paragraph 6 of the TRIPS Waiver — Rwanda — and that was back in 2007.¹⁹⁹ Instead, the workability of the system has depended on the informal balancing of interests between pharmaceutical originators, generic drug manufacturers, and importing and exporting Members in the ambiguous legal space generated by the texts of the

¹⁹⁵ In accordance with Article X of the WTO Agreement, the Amendment can only come into force once two-thirds of the WTO Membership has accepted it, and even then it is only binding on the accepting Members.

¹⁹⁶ WT/GC/M/82 [29].

¹⁹⁷ WT/L/540/Corr.1, asterisked footnote.

¹⁹⁸ See, eg, Abbott & Reichman 2007, 936-57.

¹⁹⁹ IP/N/9/RWA/1.

Waiver and Amendment. Nevertheless, portraying this as a simple trade-off between the institutional efficiency of the law-making process and the functional ineffectiveness of the Waiver and Amendment would be misleading. Even in 2007, two years after the Amendment was submitted to Members for approval, Abbott and Reichman were pessimistic that continued negotiations could lead to anything other than an ‘impasse’.²⁰⁰ It appears that the trade-off here was not necessarily between institutional efficiency and functional effectiveness, but rather between institutional efficiency and nothing at all.

V CONCLUSIONS

Given the undeniable urgency of the TRIPS Waiver and Amendment negotiations for the lives of millions of people, the above does not provide cause for optimism that WTO Members will rally around functional effectiveness as the leitmotif of future negotiations anytime soon. Even if they did, too great a focus on maximizing output legitimacy would bring its own dangers. This chapter nonetheless considers that a great focus on how law may shape output legitimacy narratives, and how it is shaped by them in turn, could bring a number of benefits to WTO negotiations. It can ensure that the assumptions on which negotiations are conducted are more clearly aligned with more reliable knowledge about the world. It may help to identify areas of common concern. It may also help to sharpen individual negotiation positions and to clarify the potential costs and benefits of potential trade-offs.

It is evident that many elements of the WTO law and practice governing law-making have a direct bearing on output legitimacy concerns, including in relation to both the functional and institutional effectiveness of the WTO. These include norms and practices governing the characteristics of the law-making participants relating to epistemic competence, independence and diversity; as well as those governing the terms of interaction between such law-making participants, including the allocation of powers of framing, agenda-setting, decision and review, voting rules, the single undertaking, and transparency and reason-giving. There are further mechanisms which tie into the functional and institutional effectiveness of WTO law-making, which call for further investigation. The TPRM, in particular, has the potential to play an important role in monitoring and reviewing the effects of WTO rules on a Member-by-Member basis, as does the WTO committee system.

²⁰⁰ Abbott & Reichman 2007, 984-7.

The relationship between the rules and practices that govern and influence WTO law-making and the functional effectiveness of WTO rules is complex. On the one hand it is clear that there is room for further epistemic input and review of WTO rules, which also have the potential to shape how Members interests are framed;²⁰¹ and there is certainly room for greater contestation of existing WTO rules and the present Doha agenda. On the other hand it seems that many of the more powerful Members are relatively comfortable with the present state of affairs.²⁰² Moreover, to the extent that there has been a focus on reforming WTO law-making processes, the emphasis has been on improving institutional efficiency through streamlining such processes rather than on ensuring that they are better informed and reasoned.²⁰³ Although there are strong drivers for this focus on institutional efficiency — the collapse of the Doha Round and the turn to preferential trade agreements — it is important that the longer term legitimacy of the agreed rules is not sacrificed for the sake of short term expediency.

It should also be noted that several of the proposals highlighted above claim an unavoidable trade-off between input and output legitimacy in law-making processes, in particular the need to sacrifice elements of input legitimacy to get things done. Yet the relationship between these two aspects of legitimacy need not be viewed in such a binary way. Input legitimacy may help strengthen elements of output legitimacy in the long term, by encouraging stronger buy in from a wider range of actors, and by ensuring that rules take into account a sufficiently diverse range of interests when first made. The production of various

²⁰¹ ‘Naturally, procedures for intergovernmental accords are not dependent on given constellations of power alone. As normative framing conditions delimit the choice of rhetorical strategies, they effectively structure negotiations just as much as the influence of “epistemic communities” (which occasionally generate thoroughly normative, global background consensuses over supposedly purely scientific questions, as in the case of today’s neoliberal economic regime)’; Habermas 2001, 109.

²⁰² There is also no guarantee that an improved set of rules would of itself result in changed negotiation outcomes. See Shapiro 2005, 350. See also Hart 1990, 274-5: ‘Hard-nosed policy analysts and negotiators in government have always appreciated that a rigorous economic, legal, sociological, or political analysis would expose the shortcomings of the heavily brokered and compromised solutions found in international agreements and implemented in domestic law’.

²⁰³ ‘Regrettably, proposals on WTO reform are frequently advanced on the basis of ill-defined concerns about weak “efficiency” or “performance,” without a sufficiently clear articulation of the broader goals, normative purpose or benchmarks against which the WTO’s performance, efficiency, or credibility should be judged’: Deere-Birkbeck 2012, 121.

forms of knowledge and the allocation of power to experts may help shape Members understandings of their own interests, changing the dynamics of input legitimacy. Meanwhile, theories of deliberation seek to unify aspects of both input and output legitimacy by showing how properly structured political participation can lead to better outcomes, and how providing a stronger role for knowledge and reason can enhance participants' understandings of their own interests and relationships. Ultimately, both would appear to be necessary to develop rules and practices that respond to current needs and interests while remaining sufficiently flexible to address future challenges.

CHAPTER SEVEN:

WTO DISPUTE SETTLEMENT, ECONOMIC EVIDENCE AND OUTPUT LEGITIMACY

I INTRODUCTION

In stark contrast to the WTO's trade negotiation function, its dispute settlement system is considered to enjoy widespread social legitimacy. It is referred to repeatedly as the 'jewel in the crown' of the WTO, and the Sutherland Report was confident to pronounce: 'So far so good: the system has worked'.¹ Several authors have investigated the legitimacy of the WTO's dispute settlement system from multiple perspectives. Robert Howse and Kalypso Nicolaïdis have extensively analysed the concept of 'adjudicative legitimacy' as applied to WTO dispute settlement, noting the importance of 'fair procedures; coherence and integrity in legal interpretation; and institutional sensitivity' in legitimating adjudicative decisions.² Sol Picciotto describes (with some exasperation) a technical-rationalist vision of legitimate adjudication as prevailing in the WTO.³ Joseph Weiler argues that the dispute settlement system has developed different legitimating strategies for its internal and external constituencies, and that the friction between these strategies has produced some 'dysfunctional' features in WTO dispute settlement.⁴ Armin von Bogdandy and Ingo Venzke unpack the problems facing any attempt to legitimate international adjudication in democratic terms. They propose a range of procedural mechanisms for fostering democratic legitimacy, ranging from reason-giving and open panel hearings, to norms ensuring the independence and impartiality of adjudicators, to making use of the principle of systemic interpretation when

¹ Sutherland Report 2004, 50.

² See Howse & Nicolaïdis 2003a, 331-41; Howse & Nicolaïdis 2003b. See also Howse 2000a; Howse 2003b. Howse is clear to distinguish his vision of adjudicative legitimacy from the naïve vision that adjudication is a matter of 'technical expertise underpinned by a consensus about competence rather than contestable legal interpretations': Howse 2001a, 374.

³ 'Under a formalist view of law, legitimacy is thought to be provided by law because it offers a process for decision-making that is technical-rational: a logical application of precise or unambiguous rules prescribing obligatory conduct, to implement politically determined aims': Picciotto 2005, 479.

⁴ Weiler 2001, 193.

interpreting treaties.⁵ Several other writers have sought to advance theories of adjudicative or judicial legitimacy; or to claim legitimacy as the inevitable advantage of a proposed reform such as increasing the use of *amici curiae* or establishing a standing first-instance panel.⁶

The focus of this chapter is complementary to this work on adjudicative legitimacy — it addresses a gap in the literature relating to the output legitimacy associated with the dispute settlement system's functional effectiveness in 'clarifying' and enforcing WTO rules.⁷ Such functional effectiveness is concerned not just with ensuring that the system is structured to maximise legal compliance (what may otherwise be termed legal effectiveness). It is also about ensuring that rules designed to implement desired policy outcomes are operating as they should.

This chapter's analysis of the relationship between WTO norms and practices, output legitimacy, and the functional effectiveness of WTO rules parallels the analysis in Chapter Six, except that the focus here is on dispute settlement rather than trade negotiation rounds. At the same time, the scope of the analysis in this chapter is much narrower. Whereas Chapter Six took a very high-level overview of the legal and institutional mechanisms involved in structuring negotiation rounds, this chapter focuses much more specifically on the treatment of economic evidence in relation to various WTO Agreements, which until recently has failed to receive the kind of attention devoted to the treatment of scientific evidence in SPS disputes. In doing so it aims to show that the demands of output legitimacy may be relevant not just to broad institutional questions, but may also have specific legal and policy implications for how WTO disputes are handled. While there are various aspects of dispute settlement that could benefit from this kind of analysis, such as treaty interpretation, or the selection processes for WTO panellists and Appellate Body members, the treatment of economic evidence also provides a particularly glaring example of how the WTO's claims to output legitimacy are not necessarily backed up in practice.

⁵ von Bogdandy & Venzke 2012, 24-38.

⁶ See also Alvarez 2006, ch 9; Fukunaga 2008; Petersmann 2008c.

⁷ This output-oriented aspect of the legitimacy of dispute settlement has received little attention in either the WTO or in relation to international economic adjudication more generally. Von Bogdandy and Venzke note that: 'Such functional narratives appear to be a little bit weaker with regard to the WTO and arbitration in investment disputes, but here too it is possible to find elements providing links for functional legitimation, such as increasing economic welfare in the WTO or fostering economic development through foreign investment in the case of ICSID': von Bogdandy & Venzke 2012, 25.

The DSU sets out a number of functional imperatives for the dispute settlement system which may be used to assess its output legitimacy. Article 3.2 provides ‘that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with the customary rules of interpretation of public international law’. It also notes that ‘[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system’. Article 3.3 provides that the ‘prompt settlement’ of disputes between Members ‘is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members’. It also stresses that ‘the recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements’. Similarly, Article 3.4 notes that:

Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

DSU Article 3.7 notes that the ‘aim of the dispute settlement mechanism is to secure a positive solution to a dispute’.

These provisions identify several potential outputs by which the efficiency and effectiveness of that dispute settlement system may be measured. First, there is the immediate institutional goal of efficient (‘prompt’) and effective (‘satisfactory’ and ‘positive’) dispute settlement, as reflected in Articles 3.3, 3.4 and 3.7. The dispute settlement system is largely successful in settling the disputes brought before it, although there is a subclass of disputes (such as the EU-US beef hormones dispute and the Canada-US softwood lumber dispute) that have proven more intractable. Several disputes have also pushed the boundaries of what may be considered ‘prompt’.

Second, there is the broader functional goal of ensuring the ‘security and predictability of the multilateral trading system’ as noted in Article 3.2. This output is much broader; it is more difficult to use this as a yardstick for measuring the efficiency and effectiveness of the dispute settlement system, as the security and predictability of the multilateral trading system as a whole is dependent on many factors outside of its control. It would hence be difficult to isolate the specific contribution made by the dispute settlement system to this goal in general terms. Article 3.2 may nonetheless be read as encouraging procedural norms that facilitate security and predictability, including potentially norms relating to transparency, ‘judicial’ independence, reasoned deliberation and careful assessment of evidence. It may also be

considered to encourage consistent approaches to interpretation and compliance, but without specifying what form those approaches must take and while allowing room for change over time. Further investigation of the output related implications of Article 3.3 would be worthy of future research, but it is less relevant as a normative yardstick for the concerns addressed by this chapter.

Third, the dispute settlement system is tasked in Article 3.2 with ‘clarifying’ the provisions of the covered agreements in accordance with customary international law, in a manner that ‘preserve[s] the rights and obligations of Members under the covered agreements’, without adding to or diminishing those rights. In attempting to carry out these functions, WTO dispute settlement organs are often confronted with complex economic evidence and argument. This is because the WTO covered agreements represent an attempt to translate a loose set of economic ideas into a politically viable system of legal norms. The vocabulary and authority of economics is co-opted and mediated through law, leaving arguments as to the nature of the facts to be framed in economic terms. Panels may be required to determine, for example, whether a ‘competitive relationship’ exists for the purposes of GATT Articles I or III;⁸ to consider a law or regulation’s impact on imports or exports as part of a ‘necessity’ test under various heads of GATT Article XX;⁹ or to determine whether a subsidy has caused ‘serious prejudice’ under Article 6.3 of the SCM Agreement.¹⁰ Panels may also be required to take into account economic information when reviewing whether a domestic authority’s initial compilation of the facts is adequate.¹¹

⁸ Parties have adduced consumer surveys and econometric analysis as evidence in such cases: see, eg, *Japan — Alcoholic Beverages II*, Panel Report, paras 6.28-32; *Korea — Alcoholic Beverages*, Panel Report, paras 10.44-50; and *Chile — Alcoholic Beverages*, Panel Report, paras 7.31-47, 7.68-79, and 7.81-8.

⁹ See, eg, in relation to GATT Article XX(d), Appellate Body Report, *Korea — Various Measures on Beef*, Appellate Body Report, paras 162-4.

¹⁰ Although the determination of whether or not there has been ‘serious prejudice’ is a legal question, underlying issues of causation and degree require empirical evaluation.

¹¹ Under the Anti-Dumping Agreement, for instance, panels may be required to investigate whether a domestic authority’s examination of the impact of dumped imports on domestic industry included ‘an evaluation of all relevant economic factors and indices having a bearing on the state of the industry [...]’, and was ‘proper’, ‘unbiased’, and ‘objective’. Similarly Article 5.3 of the SPS Agreement requires domestic regulators to ‘take into account as relevant economic factors’ when conducting a risk assessment. See also the reference to ‘economic consequences’ in the definition of ‘risk assessment’ in SPS Agreement Annex A, para 4.

It has been argued elsewhere that some of the economic ideas underlying WTO rules are dated,¹² that they carry inherent biases towards certain Members,¹³ and that they are, even on their own terms, incoherent¹⁴ or poorly defined.¹⁵ They remain, nonetheless, at the heart of the WTO rulebook, and subject to enforcement through the WTO dispute settlement system. If the functions set out in the DSU are to mean anything at all, then when WTO rules specify economic metrics for determining the boundaries of those rights and obligations, panels must take such metrics seriously and not ignore them in favour of their own unconstrained discretion. To that end, it is crucial that panels ensure that their reasoning relating to such economic metrics is not epistemically arbitrary.¹⁶ It must instead be rationally justifiable in accordance with the economic metric specified in the relevant provision, within the context and limits of the legal process. In other words, panel and Appellate Body decisions must be *epistemically legitimate*. This may be thought of as a specific component of the dispute settlement system's output legitimacy.

Despite the economic foundations of WTO rules, the presumed relevance of negative market impacts to any WTO dispute,¹⁷ and the effects of panel rulings on Members' economic policies,¹⁸ WTO panels have often proven reluctant to engage rigorously with economic evidence and argument. In the face of disputes characterized by increasing factual complexity and disagreement over the facts,¹⁹ panels' cursory treatment of economic evidence and

¹² See, eg, Gomory & Baumol 2001. Jan Tumlrir described GATT Article XIV as 'unnecessary' and 'motivated by the fallacious dollar shortage theory current in the 1940s': Tumlrir 1986, 7.

¹³ Or to certain economic groups spread across and within different Members' territory. See generally Stiglitz 2003; Chang 2002; Chang 2008.

¹⁴ See discussion in Chapter Six, Part II.

¹⁵ See Driesen 2001; Dunoff 2001, 1219.

¹⁶ Cf the concept of 'epistemic non-arbitrariness' in Brewer 1998, 1672, which concerns judges making non-arbitrary choices when faced with competing epistemically valid sources of information. Another way of approaching this is to claim that legal decisions have 'veritistic value'; that is, that there is value in legal decisions reflecting true judgment: see Goldman 1999, 272.

¹⁷ DSU Article 3.8 provides that '[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment'. See also DSU Article 3.3.

¹⁸ See Bown 2010, 396-8.

¹⁹ This trend is also evident in other international tribunals. Anna Riddell and Brendan Plant note that the ICJ has been required to make more extensive findings of fact in recent cases, including in relation to

continued refusal to turn to independent economic experts for assistance raises some difficult questions. Such practice results in inaccurate, opaque, and unconvincing judgments with uncertain implications. It compromises the due process rights of the parties, undermines the effectiveness of WTO rules, obfuscates the effects of those rules, and ultimately damages the output legitimacy of the dispute settlement system. This matters, because even dry technical disputes on causation and ‘competitive relationships’ have repercussions for the working conditions, standards of living, and self-government of billions worldwide.

This chapter argues that the failure of the panels to engage more carefully and rigorously with economic evidence and argument, particularly through the use of economic experts, undermines the output legitimacy of the dispute settlement system. Part II demonstrates how various provisions of the DSU may be understood as promoting and protecting epistemic legitimacy in WTO dispute settlement. Part III highlights how panels are failing to live up to the promise of epistemic legitimacy in these provisions by making decisions that lack a rational basis and are non-transparent. Part IV accounts, in part, for these deficiencies by drawing attention to the epistemic limitations of the sources of information on which panels currently rely. Finally, Part V argues that the increased use of panel-appointed experts could augment the epistemic legitimacy of panel decision-making significantly, and explores the implications of using such experts for the dispute settlement system.

II NORMS ENSURING EPISTEMIC LEGITIMACY IN WTO DISPUTE SETTLEMENT

A decision may be considered epistemically legitimate²⁰ if it is justifiable in accordance with a given set of epistemic criteria (formal epistemic legitimacy), or if a given community

‘significant quantities of scientific and technical evidence’. They suggest that such increasing complexity appears to render ‘obsolete’ the ICJ’s reasons for failing to use its fact-finding powers: Riddell & Plant 2009, 70.

²⁰ In using the term ‘epistemic legitimacy’ I wish to differentiate it from the term ‘expert legitimacy’. Commentators often write of ‘expert legitimacy’ when discussing how the involvement of scientific (in the broad sense) and technical experts justifies the exercise of authority. It is often framed as a distinct category alongside democratic legitimacy: see, eg, Shapiro 1998, 44-7; Stahn 2005, 47-9. This tends to conflate the idea of ‘expert rule’ with the internal methodological integrity of expert processes. Yet the distinctive feature of ‘expert legitimacy’, as opposed to other forms of legitimacy (such as those based on consent, justice, or the legal form), is its emphasis on epistemic competence, rather than normative justifiability. In general, to claim that something is legitimate in the normative or political sense is to claim

believes that it is so justifiable (social epistemic legitimacy).²¹ There are several procedural norms at play in WTO disputes that may be understood as designed, at least in part,²² to improve the reliability of panel and Appellate Body decisions about the facts underlying disputes, including those relating to economic matters. These norms help to protect the formal epistemic legitimacy of panel decisions by ensuring that panelists have the necessary empirical knowledge to assess compliance with the covered agreements, and that they use that knowledge appropriately when making decisions.²³ Such norms also help to protect social epistemic legitimacy by ensuring that the various communities of legitimation engaged with the WTO — Members, trade experts, NGOs, the press — also perceive the system to be acting in this way. These norms may be grouped into five categories, which again may be divided between norms that govern the nature of the participants in the process and those that govern the terms of interaction between those participants.

Turning first to the terms of interaction this time, the first category seeks to ensure that there is a rational basis for the panels' decisions. It includes, for example, DSU Article 11, which requires that panels make an 'objective assessment of the facts'.²⁴ It also includes the principle of due process known as the 'no evidence' rule,²⁵ which bars decision-makers from

that its exercise of political power is rationally justifiable in normative terms. For consent-based forms of legitimacy, for example, the exercise of political power by one actor over another is considered justified because the second actor has, at least in theory, agreed to such exercise in advance. 'Expert legitimacy' as commonly discussed, then, is generally a mixture of epistemic legitimacy and other standard normative forms of legitimacy (such as consent or legality).

²¹ Cf Weiler 1999, 80-1 for a discussion of the distinction between formal and social legitimacy in a political, rather than epistemic, context.

²² Occasionally the covered agreements directly prioritize other concerns over epistemic legitimacy; for instance SCM Agreement Annex V, para 9 specifies that 'ordinarily the panel should not request additional information to complete the record where the information would support a particular party's position and the absence of that information in the record is the result of unreasonable non-cooperation by that party in the information-gathering process'.

²³ See Stein 2008.

²⁴ The Appellate Body has read this to provide that 'a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof': *Korea — Dairy*, Appellate Body Report, para 137.

²⁵ In *Canada/US — Continued Suspension*, the Appellate Body noted that 'the protection of due process is an essential feature of a rules-based system of adjudication, such as that established under the DSU': *Canada*

making any finding based on evidence which, ‘taken as a whole, is not reasonably capable of supporting the finding’.²⁶

The second category, again concerning the terms of interaction, includes norms seeking to preserve the transparency of panel decision-making. Such transparency opens up the decision-making process to public scrutiny, which both deters decision-makers from making arbitrary and unjustified claims and allows for the development of public trust. Norms preserving transparency include DSU Articles 18.1²⁷ (no *ex parte* communications with panels or the Appellate Body) and 12.7²⁸ (panel reports shall set out findings of fact and basic rationale behind findings).²⁹ Transparent decision-making is also protected by two principles of due

— *Continued Suspension*, Appellate Body Report, para 433; see also *US — Continued Suspension*, Appellate Body Report (all paragraph references from here on refer to the Canadian version of the report). For a more extensive discussion of the application of principles of due process in the WTO dispute settlement system, see AD Mitchell 1998, 145-75; see especially 160-2 for a discussion of the no evidence rule; see also Mitchell & Heaton 2010.

²⁶ Wade & Forsyth 2009, 229-30; see also AD Mitchell 1998, 149.

²⁷ This is complemented by Rule VII:2 of the DSU Rules of Conduct which forbids covered persons (including, among others, panelists, panel-appointed experts, and members of the Secretariat support staff) from engaging in *ex parte* contacts on the matters under consideration during proceedings: WT/DSB/RC/1.

²⁸ The Appellate Body has described DSU Article 12.7 as reflecting ‘principles of fundamental fairness and due process’, arguing that ‘where a Member has been found to have acted inconsistently with its obligations under the covered agreements, that Member is entitled to know the reasons for such a finding as a matter of due process’: *Mexico — Corn Syrup (Article 21.5 — US)*, Appellate Body Report, paras 105-07 (footnote omitted). Turning to the Oxford English Dictionary, the Appellate Body found that Article 12.7 required panels to ‘set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations’: para 106.

²⁹ Other provisions include DSU Article 11, which requires panels to consult regularly with the parties, and DSU Article 13.1, which requires panels to inform the authorities of a Member before seeking information or advice from any individual or body within the jurisdiction of that Member. The need for transparent panel reports is further emphasized by the requirements in DSU Articles 7.1 and 11 that panels must make such findings ‘as will assist the DSB in making the recommendations or in giving the rulings provided for’ in the covered agreements. Although the DSB’s adoption of panel reports is generally an automatic formality, it would be reduced to a totally empty ritual if the panel report adopted failed to reflect the reasoning behind it. The Appellate Body moved to protect the DSB’s role in *EC — Export Subsidies on Sugar*, where it held that the Panel had falsely adopted judicial economy in such a way as to fall short of its obligation to make such findings as necessary to assist the DSB in making a recommendation or ruling: Appellate Body Report, paras 334-35.

process: the hearing rule, which requires decision-makers to provide those affected by their decision³⁰ with an opportunity to hear and respond to the case against them,³¹ and (again) the no evidence rule, which requires decision-makers to ‘provide reasons that are adequate, intelligible and that deal with the substantial points raised by the parties’.³²

The third category turns to the nature of the participants. It is concerned with the competence of the participants in the dispute settlement process. Hence DSU Article 8.1 provides that panels ‘shall be composed of well-qualified governmental and/or non-governmental individuals’,³³ and the indicative list of potential panelists indicates ‘specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements’.³⁴ More specifically, paragraph 4 of the GATS Annex on Financial Services requires that panels ‘for disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial service under dispute’. Similarly, Appellate Body members must be ‘persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally’.³⁵ In addition, participation in expert review groups under DSU art 13.2 is ‘restricted to persons of professional standing and experience in the field in question’.³⁶

The fourth category aims to preserve the independence and impartiality of panelists, to prevent the incursion of bias or the perception of such bias. Such norms include DSU Article 8.2, which provides that panelists ‘should be selected with a view to ensuring the independence of the members’, and the ‘governing principle’ in Rule II of the DSU Rules of

³⁰ Limited for present purposes to the parties to the case.

³¹ See AD Mitchell 1998, 156, for a discussion of various provisions in the DSU and the Working Procedures for Appellate Review reflecting the hearing rule. See also Wade & Forsyth 2009, 402 for a discussion of the application of the hearing rule in the UK.

³² AD Mitchell 1998, 149.

³³ More specifically, this includes ‘persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member’.

³⁴ DSU Article 8.4.

³⁵ DSU Article 17.3.

³⁶ DSU, Appendix 4, para 2. See also TBT Agreement, Annex 2, para 2; SCM Agreement Articles 4.5 and 24.3.

Conduct, which requires various participants in the dispute settlement process³⁷ to be ‘independent and impartial’ and to ‘avoid direct or indirect conflicts of interest’.³⁸ The requirements of independence and impartiality are also enshrined in another principle of due process — the bias rule,³⁹ which provides that no decision-maker may determine a case in which the decision-maker is, or could ‘fairly be suspected to be’, biased.⁴⁰

The fifth category seeks to enhance the diversity of the sources of information available to the dispute settlement organs, providing further opportunities for contestation and refinement of legal and factual positions adopted over the course of the dispute.⁴¹ This is, for example, facilitated by the adversarial nature of the WTO’s dispute settlement process, as well as the extensive practice of third party submissions in WTO disputes. In addition, DSU Article 13.1 provides panels with ‘the right to seek information and technical advice from any individual or body which it deems appropriate’.⁴² Similarly, DSU Article 13.2 authorizes panels to ‘seek

³⁷ Panelists, Appellate Body members, arbitrators, Secretariat support staff and panel-appointed experts.

³⁸ WT/DSB/RC/1. Other relevant norms include DSU Article 8.3, which prohibits citizens of parties to a dispute from serving on the panel for that dispute; DSU Appendix 4, which prohibits citizens of parties to a dispute serving on an expert review group without the mutual consent of the parties; and the requirement that panels make an ‘objective’ assessment of the facts in DSU Article 11. See also Rule VI of the DSU Rules of Conduct for more detail on covered persons’ self-disclosure requirements.

³⁹ In *Canada/US — Continued Suspension* the Appellate Body held that: ‘Fairness and impartiality in the decision-making process are fundamental guarantees of due process. Those guarantees would not be respected where the decision-makers appoint and consult experts who are not independent or impartial. Such appointments and consultations compromise a panel’s ability to act as an independent adjudicator’: Appellate Body Report, para 436. See also AD Mitchell 1998, 154-5.

⁴⁰ Wade & Forsyth 2009, 380-1.

⁴¹ As Whitney Debevoise has noted: ‘Interestingly, there are no rules of evidence for testing the credibility of information. It is merely assumed that information submitted by a Member will be truthful and complete. The only way to test factual submissions is to submit additional information or opinions’: Debevoise 1998, 824.

⁴² Panels have exercised their discretion to seek information and advice under DSU Article 13 even when: (1) neither party contested a particular version of the facts; (2) neither party requested that the panel seek such information; and (3) the parties agreed specifically that the panel need not seek further information: for examples of (1), see, eg, *Colombia — Ports of Entry*, Panel Report, paras 7.180-1; *China — Publications and Audiovisual Products*, Panel Report, para 6.46; *US — Anti-Dumping Measures on PET Bags*, Panel Report, para 7.5. For an example of (2), see, eg, *US — Shrimp*, Appellate Body Report, paras 99-110. For an example of (3), see, eg, *EC — Biotech*, Panel Report, para 7.16.

information from any relevant source’ and ‘to consult experts to obtain their opinion on certain aspects of the matter’.⁴³ More specifically, when considering a ‘factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group’.⁴⁴ Panels are not, however, expressly required to seek information, no matter how complex the dispute or how limited the technical knowledge of the panelists.⁴⁵

III DEFICIENCIES IN THE CASE LAW

In the face of complex economic evidence the approach taken by many panels has fallen far short of the promise of epistemic legitimacy contained in these rules and principles. This has resulted in several decisions which lack both formal and social epistemic legitimacy, undermining the proper enforcement of WTO rules and the output legitimacy of the WTO more broadly. These problematic decisions may be divided into two categories: decisions for which there is no rational basis, and decisions suffering from a lack of transparency.

A *Lack of Rational Basis*

Those decisions lacking a rational basis may be further broken down into two subcategories: decisions where panels lacked sufficient evidence to make epistemically justifiable conclusions, and decisions where panels ignored or misapprehended the evidence that was before them. *US — Upland Cotton* provides an example of the former. In the original Panel proceedings, Brazil’s evidence included an expert report by Dr Daniel Sumner which made use of an economic model owned by the Food and Agricultural Policy Research Institute (‘FAPRI’). Oddly, although the US was given access to the workings of the model by

⁴³ Similar provisions regarding consultation with experts appear in SPS Agreement Article 11.2; TBT Agreement Article 14.2; Customs Valuation Agreement Article 19.4; and SCM Agreement Articles 4.5 and 24.3. Of these, SPS Agreement Article 11.2 is unique in specifying that panels ‘should’, rather than ‘may’, seek advice from panel-appointed experts in disputes involving ‘scientific or technical issues’.

⁴⁴ Appendix 4 to the DSU sets out the rules and procedures for such expert review groups in greater detail.

⁴⁵ See discussion below at (n 58) and accompanying text. Panel fact-finding is also constrained by the invariably brief working procedures for consultation with experts which are drafted for each dispute in consultation with the parties: see, eg, *Canada — Continued Suspension*, Panel Report, Annex A-5: ‘Working Procedures for Consultations with Scientific and/or Technical Experts’.

FAPRI,⁴⁶ this access was granted only subject to the express stipulation that the model not be provided to either Brazil or the Panel.⁴⁷ Despite noting the due process issues surrounding Brazil's lack of access to the FAPRI model, the Panel simply claimed that: 'We have not relied upon the quantitative results of the modelling exercise — in terms of estimating any numerical value for the effects of the United States subsidies, nor, indirectly, in our examination of the causal link required under Articles 5 and 6.3 of the SCM Agreement'.⁴⁸ The Panel nonetheless took the analysis into account 'where relevant to our analysis of the existence and nature of the subsidies in question, and their effects under the relevant provisions of the SCM Agreement'.⁴⁹ The Panel thus used the model to determine the 'effects' of the relevant subsidies despite being unaware of the workings of the model — all while expressly claiming that it did not consider its ability to make an objective assessment of the matter to be affected.⁵⁰ As expressed by Hylke Vandenbussche, '[t]his lack of information makes the Panel's analysis look arbitrary'.⁵¹ On appeal, the Appellate Body gently chided the Panel for failing to provide sufficient reasons for their decision, but disregarded the idea that the Panel's underlying reasoning may have been deficient.⁵² As such it did not find the problems with the Panel's causation analysis to amount to legal error.⁵³ The Appellate Body's

⁴⁶ FAPRI received US funding for its work: *US — Upland Cotton*, Panel Report, paras 7.18(2) and 7.1205-06.

⁴⁷ Ibid paras 7.18(2) and 7.1206.

⁴⁸ Ibid paras 7.1205-06.

⁴⁹ Ibid para 7.1209.

⁵⁰ Ibid para 7.18(5). See Sapir & Trachtman 2008, 193. Sapir and Trachtman's analysis is part of the American Law Institute Reporters' Studies on WTO Case Law. This series brings together expert economists and lawyers to comment on the jurisprudence of the WTO, providing an invaluable resource for scrutinising the epistemic legitimacy of WTO case law concerned with economic metrics.

⁵¹ Vandenbussche 2008, 216.

⁵² Although no claim was made under DSU Article 11, the Appellate Body asserted an inherent power to review whether a set of facts is consistent or inconsistent with a given treaty provision: *US — Upland Cotton*, Appellate Body Report, para 399; see also *EC — Hormones*, Appellate Body Report, para 132. In general the Appellate Body may review only matters of law, not of fact, but the question of whether a panel has satisfied the 'objective assessment' standard is considered a matter of law and hence reviewable: DSU Article 17.6. See also *US — Wheat Gluten*, Appellate Body Report, para 151.

⁵³ See *US — Upland Cotton*, Appellate Body Report, paras 448 and 458.

formal preservation of the Panel's decision on this point cannot serve to erase the epistemic deficiencies of the original decision.

Soon after, in *US — Continued Zeroing*,⁵⁴ the original Panel was criticized by the Appellate Body for failing to seek out additional information from the US Department of Commerce to corroborate the use of simple zeroing during the relevant periodic reviews. The Appellate Body held that 'while a panel cannot make the case for a party, Article 11 requires a panel to test evidence with the parties, *and to seek further information if necessary*, in order to determine whether the evidence satisfies a party's burden of proof'.⁵⁵ It further held that the Panel failed to take the 'necessary steps' to seek information from the parties that would 'elucidate its understanding of the facts and issues before it', had failed to consider the evidence 'in its totality', and had therefore failed to make an objective assessment of the facts.⁵⁶ Although in the main body of the report the Appellate Body claimed that it could not determine whether further enquiry under DSU Article 13 would have 'yielded greater clarity as to the evidence',⁵⁷ it could not resist adding in a footnote that '[a]t a minimum, it would seem the Panel should have done more to engage the parties on the specific question of [the extent to which the Panel could rely upon certain documents] in determining the use of simple zeroing'.⁵⁸ It thus provided an unusually strong condemnation of the Panel's failure to make its decision on a rational basis.

⁵⁴ *US — Continued Zeroing*, Appellate Body Report.

⁵⁵ This was held to be the case 'regardless of whether a party has requested it to seek such information': *US — Continued Zeroing*, Appellate Body Report, para 347 (emphasis added). See also *Canada — Aircraft*, where the Appellate Body noted that Canada's refusal to provide information prevented the panel from conducting an objective assessment of the facts: Appellate Body Report, para 192.

⁵⁶ *US — Continued Zeroing*, Appellate Body Report, paras 347-8.

⁵⁷ *Ibid* para 347.

⁵⁸ *Ibid* fn 742. The Appellate Body's approach in *US — Continued Zeroing* appears to be at odds with its earlier approach in *EC — Sardines*. There, the Appellate Body held that '[a] contravention of the duty under Article 11 of the DSU to make an objective assessment of the facts of the case cannot result from the due exercise of the discretion permitted by another provision of the DSU, in this instance Article 13.2 of the DSU': *EC — Sardines*, Appellate Body Report, para 302. Yet the Appellate Body has also repeatedly affirmed that the objective assessment test in DSU Article 11 'regulates' a panel's exercise of its discretion: see also *Japan — Agricultural Products II*, Appellate Body Report, para 127, and *US — Shrimp*, Appellate Body Report, paras 104 and 106.

US — Offset Act (Byrd Amendment), *US — Upland Cotton (Article 21.5 — Brazil)*, and *US — Large Civil Aircraft (Second Complaint)* all provide examples of where panelists have simply either ignored or misapprehended the relevance of economic data and analysis to their decisions.⁵⁹ *US — Offset Act (Byrd Amendment)* required both the Panel and the Appellate Body to address the effects of contested US legislation on the conditions of competition. Henrik Horn and Petros Mavroidis note that the Appellate Body’s report ‘makes claims concerning economic effects without performing an economic analysis’⁶⁰ even though the ‘effects [were] determined to be crucial to its illegality’,⁶¹ and that ‘[a] distinguishing feature of the dispute is that the [Appellate Body’s] (as well as the Panel’s) finding is not based on any empirical verification’.⁶² Although confirmed by the Appellate Body, these aspects of the decision would therefore seem to fall short of both the DSU Article 11 requirement to make an objective assessment and the no evidence rule.

Similarly, in *US — Upland Cotton (Article 21.5 — Brazil)*, after treating the US subsidy estimates data (provided in the original case) as being of ‘central importance’,⁶³ the Panel marginalized the US re-estimates data for the purposes of the DSU Article 21.5 proceedings on uncertainty grounds — even though the re-estimates were no more uncertain than the original estimates.⁶⁴ This time the Appellate Body held that the Panel had failed to make an objective assessment of the facts ‘by dismissing the import of the re-estimates data submitted by the United States on the basis of internally inconsistent reasoning’.⁶⁵ The Appellate Body further criticized the Panel’s reluctance to engage more deeply with the economic model used by the parties, stating that:

The relative complexity of a model and its parameters is not a reason for a panel to remain agnostic about them. Like other categories of evidence, a panel should reach conclusions with respect to the probative value it accords to economic simulations or

⁵⁹ For further criticism of the misapprehension of economic evidence in other cases, see Grossman & Mavroidis 2007a, 387 and Howse & Neven 2007, 167.

⁶⁰ Horn & Mavroidis 2007b, 629.

⁶¹ Ibid 634-5.

⁶² Ibid 633.

⁶³ *US — Upland Cotton (Article 21.5 — Brazil)*, Appellate Body Report, paras 287 and 291.

⁶⁴ Indeed, the Appellate Body noted that ‘[i]f anything, the re-estimates might be expected to be more reliable because they reflect the historical performance of the programme’: *ibid* para 287.

⁶⁵ *Ibid* para 292.

models presented to it. [...] the Panel could have gone further in its evaluation and comparative analysis of the economic simulations and the particular parameters used.⁶⁶

The Appellate Body went on to complete the analysis on a different basis.⁶⁷

Finally, in *US — Large Civil Aircraft (Second Complaint)*, the Panel found that there had been insufficient evidence to determine whether certain US Department of Defence research, development, testing, and evaluation programmes had funded ‘predominantly’ assistance instruments, or had also to some degree funded procurement contracts. Funding assistance instruments would have violated Article 1.1(a)(1) of the SCM Agreement, whereas funding procurement contracts would not. The EU argued that the Panel had failed to exercise its powers under DSU Article 13 to seek out additional information from the US. On appeal, the Appellate Body was scathing of the Panel’s neglect, judging that:

We consider that the particular circumstances of this dispute demanded that the Panel assume an active role in pursuing a train of inquiry that would allow it to apply its predominance approach. In failing to seek additional information regarding the use of assistance instruments under all of the [US Department of Defence] programmes, the Panel compromised its ability to assess properly whether the effects of all 23 [research, development, testing and evaluation programmes] [...] caused adverse effects to the interests of the European Communities.⁶⁸

They went on to find that the Panel had thereby violated its obligation under DSU Article 11 to make an objective assessment of the facts.

B *Lack of Transparency*

Panels dealing with complex economic evidence have also fallen short of the WTO’s procedural norms on transparency in two ways. Firstly, it is not clear that panelists have been fully transparent about their engagement with economic experts. Secondly, panel reports often fail to set out the rationale behind their economic findings adequately.

⁶⁶ Ibid paras 357-8.

⁶⁷ Ibid paras 295 and 448(b). See Davey & Sapir 2010, 199.

⁶⁸ *US — Large Civil Aircraft (Second Complaint)*, Appellate Body Report, paras 1144-5.

1 *Failure to Acknowledge Use of Economic Expertise*

Panels rarely acknowledge which sources they draw upon for economic expertise, either during proceedings or in drafting their reports.⁶⁹ Indeed, so far, not a single panel has acknowledged seeking information or advice from an independent economic expert.⁷⁰ It is difficult to tell whether WTO panels have made use of economic experts unless they acknowledge them in their reports. There have, however, been several cases to date which demanded consideration of complex, technical economic information which would seem to require specialized expertise but in which panels made no such acknowledgement. Chad Bown highlights that ‘subsidy cases such as *Foreign Sales Corporations (FSC)*, the Canada and Brazil *Civil Aircraft* disputes, as well as others likely require specialized expertise in corporate finance’.⁷¹ This suggests that panels have been relying on their own expertise, on experts provided by the Secretariat, or most troublingly, consulting independent experts, but without providing the parties with the opportunity to confront such evidence nor mentioning it in their reports. The problems with using such ‘*experts fantômes*’ were summarized by Judges Al-Khasawneh and Simma of the ICJ in their dissenting opinion in *Pulp Mills*. They noted that the use of such “invisible experts” [...] would deprive the Court of the [...] advantages of transparency, openness, procedural fairness, and the ability for the Parties to comment upon or otherwise assist the Court in understanding the evidence before it.’⁷²

⁶⁹ The practice of not acknowledging expert assistance in panel reports appears to have its origins in the GATT years. The WHO’s appearance in *Thailand — Cigarettes*, GATT Panel Report, paras 73 and 80 has been cited as the first and only use of panel-appointed expertise in GATT dispute settlement: Pauwelyn 2002b, 325 (footnote omitted). Yet one year earlier, when referring to advice rendered to the Panel by the IMF in *Korea — Beef (US)*, South Korea noted that ‘[w]hen panels had consulted an expert in the past they were not bound to accept the expert’s advice, and neither were the GATT contracting parties’: *Korea — Beef (US)*, GATT Panel Report, para 81. Moreover, despite the absence of references to independent experts in previous panel reports, the Annex to the Understanding on Notification, Consultation, Dispute Settlement and Surveillance, L/4907, para 6(iv) noted that panels would ‘often consult with and seek information from any relevant source they deem appropriate and they sometimes consult experts to obtain their technical opinion on certain aspects of the matter’.

⁷⁰ As distinct from an IGO with a formal institutional link to the WTO, such as the IMF or the World Customs Organization.

⁷¹ Bown 2010, 417.

⁷² *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment [2010] ICJ Rep 14, para 14 (dissenting Opinion of Judges Al-Khasawneh and Simma) (‘*Pulp Mills*’). See also Riddell & Plant 2009, 336.

Transparency in this regard would be well-served by Joost Pauwelyn's suggestion that there should be an explicit prohibition on *ex parte* communications between panels and panel-appointed experts, as '[t]he disputing parties should get an opportunity to comment on all input provided by experts, no matter how trivial it may seem'.⁷³ At present, the prohibition on *ex parte* contact between panelists and experts in DSU Article 18.1 only applies when those experts are tied to one of the parties. At minimum, the hearing rule would also require panelists to notify the parties of any expert input, the content of such input and, where possible, provide the parties with the opportunity to respond.⁷⁴ This should apply to any expert input on economic matters with a bearing on the final decision, whether such input derives from panel experts, the Secretariat, or elsewhere (for instance, Lori Wallach recounts an incident when one of the panelists in the original *EC — Hormones* dispute sought out an officially rejected *amicus* brief from Public Citizen to read while on holiday).⁷⁵

In contrast, panels have acted transparently when seeking economic information and advice from IGOs.⁷⁶ In *India — Quantitative Restrictions* the Panel notified the parties that they intended to consult with the IMF, provided the parties with the opportunity to comment on the questions put to the IMF and to respond to the IMF's answers; and noted when it was relying on information provided by the IMF to reach specific conclusions. The Panel also quoted the questions posed to, and the answers received from, the IMF in part in its report, although the full correspondence was not reproduced.⁷⁷ Any unacknowledged use of

⁷³ Pauwelyn 2002b, 350.

⁷⁴ Writing on international tribunals, Gillian White has argued that '[t]he fundamental nature of this principle of the equality of the litigants' means that, where parties are denied the opportunity to comment on opinions given by tribunal-appointed experts, this 'would be a ground for the nullity of any resulting award, on the basis that the tribunal had not complied with the principle of *audi alterem* [sic] *partem*': White 1965, 11 (citation omitted).

⁷⁵ Wallach 2000, 775.

⁷⁶ For instance, panels have consulted the IMF for information on India's balance-of-payments situation, on the implementation of exchange fees, and on the interpretation of the Articles of Agreement of the IMF: *India — Quantitative Restrictions*, Panel Report; *Dominican Republic — Import and Sale of Cigarettes*, Panel Report. Panels have also declined to consult with the IMF in relation to an Argentinean statistical tax despite a request from both parties that they do so: *Argentina — Textiles and Apparel*, Panel Report. The World Customs Organization has also been consulted three times in relation to technical customs matters: *China — Auto Parts*, Panel Report; *EC — Chicken Cuts*, Panel Report; *EC — IT Products*, Panel Report.

⁷⁷ *India — Quantitative Restrictions*, Panel Report, paras 5.11-13 and 5.164-8.

economic expertise provided by invisible experts, and even Secretariat staff, falls far short of these standards.

2 *Lack of Transparency in Panel Reports*

As mentioned above, DSU Article 12.7 requires that ‘the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes’. Although no panel has yet been overturned for falling short of Article 12.7, the Appellate Body has criticized panels for the lack of detail in their economic reasoning. In *US — Upland Cotton*, the Appellate Body noted that ‘the Panel indicated expressly that it had taken the [economic] models in question into account. It would have been helpful had the Panel revealed how it used these models in examining the question of third country responses’.⁷⁸ The Appellate Body further criticized the Panel’s lack of transparency, stating that ‘the Panel could have provided a more detailed explanation of its analysis of the complex facts and economic arguments arising in this dispute’.⁷⁹ The Appellate Body nonetheless declined to ‘second guess’ the Panel’s appreciation and weighing of the evidence.⁸⁰

André Sapir and Joel Trachtman also point out that the Appellate Body has several times held that DSU Article 11 requires panels to ensure that domestic authorities provide ‘reasoned and adequate’ explanations for their determinations in the trade remedies context. In both *US — Wheat Gluten* and *US — Lamb*, for instance, the Panels were required to establish that the competent domestic authority (the US International Trade Commission in each case) had failed to fulfil its obligations to consider all relevant economic factors and provide reasoned and adequate reports in accordance with Articles 3.1 and 4.2(c) of the Agreement on Safeguards.⁸¹ Despite the different sources of obligation for the duty to give reasons at the domestic and panel levels, they nonetheless argue that ‘*a fortiori*’ panels should in turn ensure

⁷⁸ *US — Upland Cotton*, Appellate Body Report, para 448 (citation omitted). The Appellate Body nonetheless decided against ‘second guessing’ the Panel’s fact finding.

⁷⁹ *Ibid* para 458.

⁸⁰ See also *EC and Certain Member States — Large Civil Aircraft*, Appellate Body Report, paras 135-43, 254 and 1304-5.

⁸¹ *US — Wheat Gluten*, Appellate Body Report, paras 156-63; *US — Lamb*, Appellate Body Report, paras 140-9.

that their own reports are ‘reasoned and adequate’.⁸² This line of argument was picked up in *US — Upland Cotton (Article 21.5 — Brazil)*, in which the Appellate Body held that ‘where a panel operates as the initial trier of facts [...] it would similarly be expected to provide reasoned and adequate explanations and coherent reasoning’.⁸³ While this finding of the Appellate Body is to be welcomed, it remains to be seen as to how far it will alter the practice of panels when addressing economic evidence and argument in their reports.

There are, of course, limits to how much panels should be expected to record in their reports. In *Chile — Price Band System (Article 21.5)*, the Appellate Body noted that ‘a panel is not required, in its report, to explain precisely how it dealt with each and every piece of evidence on the panel record’.⁸⁴ With respect to experts specifically, in *EC — Hormones* the Appellate Body noted that ‘a panel cannot realistically refer to all statements made by the experts advising it and should be allowed a substantial margin of discretion as to which statements are useful to refer to explicitly’.⁸⁵ Panels may also be subject to confidentiality restrictions, especially in relation to sensitive business information. However, when it comes to evidence and analysis that is material to a panel’s conclusions, and where such evidence and analysis is complex and both the parties and the wider public would benefit from its detailed breakdown, it is vital that the panels engage in as detailed an examination as is permitted in the circumstances and be as open as possible about the sources of their reasoning.

IV THE EPISTEMIC LIMITATIONS OF CURRENT SOURCES OF INFORMATION

The problems identified above have undermined the epistemic legitimacy of individual decisions and of the dispute settlement process in general. The question then becomes what may be done to improve the situation. Panelists draw upon several sources of economic information. Since they have so far declined to use panel-appointed economic experts, panels have relied on themselves, the parties, the Secretariat, *amicus* briefs, and the corrective force of the Appellate Body to generate and test factual economic claims. Each of these has

⁸² Sapir & Trachtman 2008, 193. See also Horn & Mavroidis 2007a, 125.

⁸³ *US — Upland Cotton (Article 21.5 — Brazil)*, Appellate Body Report, para 293, fn 618.

⁸⁴ *Chile — Price Band System (Article 21.5)*, Appellate Body Report, para 240.

⁸⁵ *EC — Hormones*, Appellate Body Report, para 135; referred to with approval in *Canada — Wheat Exports and Grain Imports*, Appellate Body Report, 63, fn 251.

structural and practical limitations which, without more, weaken the epistemic legitimacy of the decision-making process.

A *The Panelists*

With the exception of the vague exhortation in DSU Article 8.1 that panelists be ‘well qualified’ and the more specific requirements of the GATS Annex, the requirements for panelists in the covered agreements clearly do not require them to have any level of specifically economic expertise, let alone economic expertise tailored to the particular dispute. This has been reflected in practice; Chad Bown points out that in nine disputes involving significant economic evidence and arguments, only five of the 27 panelists had PhDs in economics, and only a handful of others had undergraduate or masters level degrees in economics. Fewer still were practicing as professional economists. As distinguished as many panelists may be, and notwithstanding the valuable contributions many of them make to the dispute settlement process, it is clear that the vast majority of them lack the qualifications necessary to engage fully with specialized and complex economic information without assistance.⁸⁶

To counter this, Bown recommends that at least one panelist in any given dispute should have ‘formal graduate training in economics’.⁸⁷ As Reto Malacrida points out, however, the selection of panelists is a complex process driven by the agreement or agreed criteria of the parties.⁸⁸ If even one party would prefer not to have panelists with economic expertise this is likely to have an impact on panel selection. Moreover, it could equally be argued that the key missing qualification for panelists has been *legal* training. It may be quite difficult to find many mutually acceptable candidates who are both legally trained and have graduate qualifications in economics. Consequently, although the flexibility of the panelist selection system serves a number of other purposes well, other sources will likely be needed to shore up the epistemic legitimacy of panel decisions.

⁸⁶ See Pauwelyn 2002b, 331.

⁸⁷ Bown 2010, 430.

⁸⁸ Malacrida 2010, 436.

B The Parties

There are also significant limits on the ability of the parties to contribute to the epistemic legitimacy of the dispute settlement system. The WTO panel process is set up partly along adversarial lines. Panels are reliant on the parties to provide them with the vast majority of the evidence necessary to construct a factual record. It is the responsibility of the parties, not the panelists, to satisfy their respective burdens of proof and, where necessary, to provide the evidence necessary to establish a *prima facie* case.⁸⁹ The advantages of the adversarial model of dispute settlement include the control it gives parties over their arguments and the rigorous scrutiny and counterargument to which each party is subjected by their opponent. This mutual hammering out of opposing viewpoints is supposed to have a refining effect conducive to the production of authoritative factual and legal truth.

Following a purely adversarial logic, it may seem reasonable for panels to rely simply on their party experts, leaving panel-appointed experts out of the process. In light of the factual complexity of many cases before WTO panels, and to back up the epistemic authority of their arguments, parties often make use of experts. They refer to publications by experts, they commission reports from experts, and they involve experts directly in meetings with panels. This often has beneficial effects on the epistemic legitimacy of panel judgments; in *US — Upland Cotton*, the Panel ‘underlined’ that ‘we consider the participation of experts, as part of the submissions of the parties and third parties, contributed constructively to our duty to conduct an objective assessment of the matter before us’.⁹⁰

Yet economic experts appointed by parties are vulnerable, as in domestic systems, to many forms of bias. Even if the experts do not suffer from actual bias, there may still be a perception of bias which undermines their social epistemic legitimacy. Party experts may reflect a *selection bias* on the part of the parties, who are likely to seek out experts whose

⁸⁹ See *India — Patents (US)*, Appellate Body Report, para 94.

⁹⁰ *US — Upland Cotton*, Panel Report, 284, fn 1323. The Panel also observed, however, that ‘it is open for a Member to determine the composition of its own delegation for the purposes of WTO dispute settlement. Neither the DSU nor the SCM Agreement contains specific rules on any sort of qualification of experts’. In any case, despite the contributions of party experts, the Panel’s ‘objective assessment’ was heavily criticized by the Appellate Body and several commentators: see, eg, Sapir & Trachtman 2008; Vandenbussche 2008.

record and methodology is sympathetic to their arguments.⁹¹ Party experts may suffer from *reference bias* as a result of the strategic limitations placed by the parties on the experts' terms of reference. Experts may be perceived as suffering from some form of *financial bias* if they have been commissioned by the parties directly. Party experts may also be considered as afflicted with *prosecutorial bias* if they are or are seen to be psychologically co-opted by the adversarial process as 'hired guns'.⁹² Finally, in a form of bias peculiar to international law, party experts may be perceived as tainted by *national bias* if they are citizens of a Member who is a party to the dispute.⁹³

Domestic adversarial systems have many safeguards that are used to contain the distorting effects of such biases on fact-finding and argument and which thus serve to preserve the epistemic legitimacy of judicial processes. Many of these are dependent on the vertical relationship between the parties and the court as an organ of the state. In WTO proceedings, however, parties are formally equal sovereigns participating before a tribunal with no direct ability to compel compliance. Neither counsel nor experts for the parties have an explicit duty to disclose all relevant information to the panel, nor to provide unbiased evidence.⁹⁴ Party experts are not even bound by the impartiality and disclosure provisions in the DSU Rules of Conduct. There is no international professional body to watch over the ethics of international lawyers appearing before the WTO. With no direct coercive powers, panels are unlikely to

⁹¹ Lianos 2009, 15 and 17; Cameron & Orava 2000, 228.

⁹² Lianos 2009, 17. Variations on prosecutorial and financial bias are also well recognized in domestic courts. See, eg, Jessel MR in *Lord Abinger v Ashton* (1873) 17 LR Eq 358, 373: 'Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves witnesses, rather considering themselves as the paid agents of the person who employs them'; see also Keane J of the Supreme Court of Ireland: 'There is unquestionably a tendency under an adversarial system for expert witnesses, even of high standing, to become advocates for the side by whom they are retained': OECD Policy Roundtable, *Judicial Enforcement of Competition Law*, OECD Doc OCDE/GD(97)200 (1996) 53.

⁹³ In *Pulp Mills*, for example, Argentina argued that, for an expert to be independent, they could not be a government employee of either of the parties to the dispute: [2010] ICJ Rep 14, para 166.

⁹⁴ Lianos 2009, 14. Cf Part 33.2 of the UK *Civil Procedure Rules 1998*: 'An expert must help the court to achieve the overriding objective by giving objective, unbiased opinion on matters within his expertise'; and Part 35.3: 'This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid'.

have inherent jurisdiction to prosecute for contempt.⁹⁵ Nor is there recourse to discovery.⁹⁶ These all compound the logistical and political difficulties that parties face when seeking to gather information from outside of their own jurisdictions, especially when they seek information from within the jurisdiction of an opposing party.⁹⁷ In the face of all of this the injunction to Members in DSU Article 3.10 not to use the dispute settlement procedures contentiously, and to engage in the procedures in good faith, seem comparatively anaemic.

When it comes to party experts, therefore, WTO dispute settlement relies on extra-legal factors such as the expert's personal integrity and, if enough of the experts' evidence is made public, the scrutiny of their peers.⁹⁸ Such factors are not always sufficient to ensure the epistemic legitimacy, or even relevancy, of information provided by party experts. Writing in relation to the Appellate Body's decision in *Japan — DRAMS*, Meredith Crowley and David Palmeter note that:

The [Appellate Body's] task in developing its economics analysis was complicated by the fact that the economic arguments presented by the parties and the Panel were sometimes incorrect and at other times were irrelevant. Both the Panel and the Appellate Body spent a great deal of time bogged down in hearing arguments that ultimately had no bearing on the case, but which were construed by the parties to be related to the economic criteria set out in the SCM Agreement.⁹⁹

To counter such problems, WTO panels, like many other international tribunals, have limited inquisitorial powers.¹⁰⁰ The right of panels to seek information from the parties under DSU Article 13 is one such example of these powers. Yet even this provides only a weak mechanism for extracting information — when panels seek information under DSU Article 13.1, the information generally remains within the sovereign jurisdiction of one of the parties, who control the level of disclosure.¹⁰¹ Although Members are required to respond to

⁹⁵ Cf the International Criminal Tribunal for the Former Yugoslavia finding that it possessed such inherent jurisdiction in *Prosecutor v Hartmann*, Case No IT-02-54-R77.5, Judgment on Allegations of Contempt, para 18 (14 September 2009).

⁹⁶ Cf Goldman 1999, 300-304.

⁹⁷ Waincymer 2002, 548.

⁹⁸ See Pauwelyn 2002b, 347.

⁹⁹ Crowley & Palmeter 2009, 271.

¹⁰⁰ See Pauwelyn 2002b, 353. See also Goldman 1999, 289-92.

¹⁰¹ For a discussion of how this problem afflicts fact-finding in the ICJ, see Riddell & Plant 2009, 70.

any such request for information ‘promptly and fully’, there have been several cases to date where parties have refused to do so. Members have usually justified such refusal on confidentiality grounds,¹⁰² even though confidentiality alone is not considered a valid excuse.¹⁰³ Furthermore, although panels may draw adverse inferences from a Member’s refusal to provide requested information,¹⁰⁴ so far panels have generally chosen not to do so.¹⁰⁵ The parties and party-appointed experts, therefore, are a useful source of information, but such information is best verified against other sources.

C *The Secretariat*

The WTO Secretariat provides another source of economic information and advice. DSU Article 27.1 provides that the Secretariat ‘shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support’. Bown interprets the reference to ‘technical support’ to include a specific delegation of the responsibility to provide technical *economic* support to the parties.¹⁰⁶ This provides a broader reading of Article 27.1 than is necessary or desirable. Whereas the ‘legal, historical and procedural’ aspects of the Secretariat’s support capabilities are framed in the context of ‘the matter dealt with’, the word ‘technical’ is placed alongside ‘secretarial’ without any such context. As such this suggests that the word ‘technical’ in Article 27.1, unlike in various other parts of the covered agreements, was only intended to refer to incidental administrative matters. While this does not prevent the Secretariat from providing economic assistance — the list in Article 27.1 is inclusive — it certainly does not demand it.

¹⁰² *Canada — Aircraft*, Panel Report, paras 9.176-82; *US — Wheat Gluten*, Panel Report, paras 8.11-12; *US — Upland Cotton*, Panel Report, paras 7.631-32; *Turkey — Rice*, Panel Report, paras 7.99-107.

¹⁰³ See *Indonesia — Autos*, Panel Report, para 14.235.

¹⁰⁴ *Canada — Aircraft*, Appellate Body Report, paras 187-90.

¹⁰⁵ No adverse inferences were drawn when Members refused to provide requested information in *Canada — Aircraft*, Panel Report, paras 9.176-82; *Canada — Aircraft Credits and Guarantees*, Panel Report, paras 7.383-6; *US — Wheat Gluten*, Panel Report, paras 147-76; and *US — Upland Cotton*, Panel Report, paras 7.631-32; *China — GOES*, Panel Report, para 7.302. In *Turkey — Rice* the Panel did draw certain inferences from Turkey’s refusal to provide requested information, but relabelled them as ‘appropriate’ rather than ‘adverse’ inferences: Panel Report, paras 7.90-107.

¹⁰⁶ Bown 2010, 392.

In practice, however, panels do make use of the expertise of Secretariat economists.¹⁰⁷ Bown argues that the Secretariat should provide additional economic support in the course of WTO dispute settlement, including through using more PhD-level economists in the support staff for WTO panels.¹⁰⁸ When it comes to complex economic analysis, however, even if the Secretariat's mandate is interpreted to include economic advice, the Secretariat is not the best place to turn, for reasons relating to qualifications, transparency and bias.

Bown notes that Secretariat support teams for panels have 'only rarely been staffed with a Secretariat-provided economist', and that although some of the lawyers included in support teams have had prior training and experience in economics, none of them have been PhD-level research economists.¹⁰⁹ Bown suggests that the solution to this is to increase the resources of Secretariat panel support teams by including at least one PhD-level research economist on each team.¹¹⁰ There are, however, other significant issues with relying on Secretariat support that go beyond credentials.

As far as transparency is concerned, the information exchange between panels and Secretariat staff is largely hidden. Although this leads to certain efficiencies in decision-making, it becomes problematic if the Secretariat is expected to provide economic information likely to be material to the panel's final decision.¹¹¹ At present the Secretariat's advice to panels is generally not released to the parties during proceedings, nor published to the public at large once the panel report has been circulated. Parties are not given the opportunity to cross-examine the support staff. That Secretariat staff have provided any information at all is rarely acknowledged in panel reports. When it is, the acknowledgement is

¹⁰⁷ Malacrida 2010, 436.

¹⁰⁸ Bown 2010, 424-31.

¹⁰⁹ Ibid 411.

¹¹⁰ Ibid 430.

¹¹¹ The importance of transparency, even in relation to such 'internal' consultation, has been highlighted by Judge Maureen Brunt, reflecting on her role as a lay member of the New Zealand High Court and an economist member of the Australian Competition Tribunal: 'it is extremely important to recognize the value that comes about from intense discussion between the judge and economist, shall we say behind the scenes. In this way you can achieve a tremendous economy of time. [...] Of course, what is going on behind the scenes *has to be made known to the parties* and there is a variety of ways in which this can be done': OECD Policy Roundtable, *Judicial Enforcement of Competition Law*, OECD Doc OCDE/GD(97)200 (1996) 76 (emphasis added).

brief and general, without highlighting specific contributions. As changing these factors would require a substantial reimagining of the Secretariat's role in WTO disputes, this suggests that panels should instead turn to other sources for economic information when such information is likely to prove material to their decisions. The parties' right to respond to the case against them under the principles of due process should not depend on the source of the evidence.

With regards to bias, Secretariat staff are obliged under the DSU Rules of Conduct to remain impartial and independent and to disclose any relevant conflicts of interest. Article VI of the WTO Agreement also provides that their responsibilities 'shall be purely international in character', pointing to their role in representing the Membership's collective interests.¹¹² This independent character insulates them from charges of selection, reference, financial, or prosecutorial bias, if one accepts the assumption that the WTO itself is neutral as to the outcome of any given dispute. National bias may continue to play a role, but is largely ignored on necessity grounds.¹¹³

Yet there are good reasons to question the assumptions of WTO neutrality, especially in economics-heavy disciplines such as anti-dumping. Ernst-Ulrich Petersmann points out that '[c]onfidence in the independence and "public interest" functions of the Secretariat' has been undermined by 'political interferences'.¹¹⁴ He cites occasions when 'at the request of US trade diplomats — the GATT/WTO Secretariat's Legal Affairs Division was prevented from offering independent legal advice in GATT/WTO dispute settlement proceedings challenging anti-dumping measures' as well as when 'the GATT/WTO Secretariat's Anti-dumping Division was "packed" with lawyers from the US Department of Commerce and the US International Trade Commission'.¹¹⁵

Secretariat support staff may also suffer from various forms of institutional bias. Their assumptions about what is neutral or uncontroversial, even in terms of economic input, may be informed by a particular worldview that is not necessitated by the treaty language and which fails to recognize its own contingency. Robert Howse has written on how the neutral and technocratic facade of the GATT collapsed when subjected to deeper interrogation about

¹¹² See Nordström 2005, 824-5.

¹¹³ See Ragosta 2000, 761.

¹¹⁴ Petersmann 2008c, 844-5 (citation omitted).

¹¹⁵ Ibid 845.

the economic basis for its exclusion of environmental and labour concerns, noting that ‘what ultimately backed their position was not, as it turned out, state-of-the-art economics, but highly contingent and contestable social and political notions’.¹¹⁶ With these examples in mind, and considering the weaknesses identified above in relation to the economic qualifications of Secretariat support staff and the lack of transparency in consultations with the Secretariat, WTO panels should be wary of relying solely on the Secretariat for economic information and advice.

D *Amicus Briefs*

Amicus briefs may provide another potential source of economic information. Although both panels¹¹⁷ and the Appellate Body¹¹⁸ have admitted *amicus* briefs in the past, their use remains controversial amongst various WTO Members and they are used only sparingly.¹¹⁹ Beyond the political controversy, *amicus* briefs are of limited use in shoring up epistemic legitimacy. *Amicus* briefs are designed to advocate specific legal conclusions, rather than provide a neutral factual record. As such they suffer from all of the same issues surrounding the perception of bias that plague parties and their experts. The differences between how *amicus* briefs and independent expert evidence are perceived are well illustrated by the response by a group of developing countries¹²⁰ to the admission of *amicus* briefs in *US — Shrimp*. The group sought to introduce a footnote to DSU Article 13 ‘clarifying’ that ‘seek’ did not allow panels to accept unsolicited *amicus* briefs, all while reaffirming the right of panels to seek the ‘opinions and views’ of experts.¹²¹ Moreover, as a systemic matter, *amicus* briefs can hardly be relied on as a major source of economic information and advice — there is no guarantee that *amicus* briefs will even be submitted in a given case, let alone contain relevant, independent, and comprehensive economic analysis.

¹¹⁶ Howse 2002a, 103-04. See also discussion in Part III(B) of Chapter Six.

¹¹⁷ *US — Shrimp*, Appellate Body Report, paras 104-06.

¹¹⁸ *US — Lead and Bismuth II*, Appellate Body Report, para 39.

¹¹⁹ See, eg, *Thailand — Cigarettes (Philippines)*, Panel Report, where the Panel declined to receive *amicus* briefs directly, instead suggesting the *amicus* briefs be addressed to the parties and third parties who could make use of them as they saw fit: para 2.5.

¹²⁰ Cuba, Honduras, India, Jamaica, Pakistan, Malaysia, Sri Lanka, Tanzania and Zimbabwe.

¹²¹ TN/DS/M/5, para 1.

E *The Appellate Body*

The Appellate Body provides something of a control on panel fact-finding, although certainly not a comprehensive one. The Appellate Body is only able to review panel fact-finding when a panel has made errors sufficiently ‘egregious’ as to amount to an error of law,¹²² and has proven generally unwilling to acknowledge that errors have risen to this level. It may ‘complete the analysis’ so long as the original factual record is sufficiently complete, but where it considers a panel’s initial fact-finding to be inadequate it lacks the ability to conduct any further fact-finding of its own or to remand the case back to the panel. There is, in any case, no guarantee that a case will make it to the Appellate Body. Even if it does, it only does so at great expense to the parties. Finally, as legal experts, Appellate Body members are even less likely to be practising, highly qualified economists; as occasionally reflected in their reasoning.¹²³ As such the Appellate Body should not be relied on to counteract the deficiencies in other areas of panel fact-finding and reasoning when it comes to economic matters.

V IMPLICATIONS

The dispute settlement system’s reliance on solely the parties, panelists, the Secretariat, *amicus* briefs, and the corrective force of the Appellate Body to address complex economic evidence and analysis in disputes is thus epistemically deficient from both formal and social standpoints. This suggests that WTO panels should rethink how they approach to such evidence and analysis. Fortunately, it seems likely that many of these problems can be addressed within the existing framework, without the need for laborious treaty amendments.

A *Appointing Independent Economic Experts*

The increased use of independent economic experts by panels, using their powers under DSU Article 13 and similar provisions, could help overcome many of deficiencies of epistemic legitimacy identified above. Independent economic experts can be enormously helpful in

¹²² *EC — Hormones*, Appellate Body Report, para 133. The Appellate Body will intervene only when a panel has ‘exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence’: *US — Wheat Gluten*, Appellate Body Report, para 151. Concomitantly, it will overlook ‘inconsequential inaccuracies’ in fact-finding: *EC — Chicken Cuts*, Appellate Body Report, para 186.

¹²³ See Grossman & Mavroidis 2007a, 387; Horn & Mavroidis 2007b; Howse & Neven 2007, 167.

minimising the potential for epistemic arbitrariness in panel decision-making. In the words of the Appellate Body, the role of such experts is to help panelists ‘understand and evaluate the evidence submitted and the arguments made’¹²⁴ by the parties. As mentioned above, and in marked contrast to their approach to SPS and GATT Article XX disputes, no WTO panel has formally called upon any individual experts for information or advice on economic matters.¹²⁵ Panels have used their powers to seek such information from other IGOs, but only those given some formal role in the WTO Agreements — and even then only rarely.¹²⁶ It may be that the lack of clear inter-institutional links for many of the provisions concerned with economic metrics has discouraged the panels from seeking out similar advice from elsewhere. In this way economic evidence has been treated very differently than has scientific evidence under the SPS Agreement. Whereas part of the problem in the SPS Agreement has been to minimise expert overreach, when it comes to economic evidence the problem has been a failure to engage with expertise in a way that honours the rules themselves and gives confidence that the dispute settlement organs have decided correctly.

This is unfortunate, as panel-appointed experts are strong sources of epistemic legitimacy due to their relative expertise, transparency, and independence. Panels are free, subject to addressing the objections of the parties and expert availability, to appoint PhD-level, practising professional economists who specialize in precisely the area of economic analysis that is relevant to the dispute.¹²⁷ Appointees to expert review groups under DSU Article 13.2 are required formally to be ‘persons of professional standing and experience in the field in

¹²⁴ *Japan — Apples*, Appellate Body Report, para 130.

¹²⁵ In such cases panels have consistently and openly sought advice from individual scientific experts: see, eg, *US — Shrimp*, Panel Report and *EC — Asbestos*, Panel Report. In addition, panels have sought information and advice from linguistic experts on translation issues and WIPO on the interpretation of the Berne and Paris Conventions: see *China — Auto Parts*, Panel Report; *China — Publications and Audiovisual Products*, Panel Report; *China — Intellectual Property Rights*, Panel Report; *US — Section 211 Appropriations Act*, Panel Report; *US — Section 110(5) Copyright Act*, Panel Report; *EC — Trademarks and Geographical Indications*, Panel Report.

¹²⁶ See (n 76) above and accompanying text.

¹²⁷ To this end, Malacrida’s suggestion that the DSB create ‘an indicative list of governmental and non-governmental economic experts’ is problematic: Malacrida 2010, 437. High-level research economists have distinct disciplinary specialties in particular sectors, and part of the benefit of DSU Article 13 and equivalent provisions is that it allows panels to seek out *any* source of information.

question’,¹²⁸ the expertise of panel-appointed experts is otherwise limited only by the availability of any given expert.¹²⁹ Moreover, if treated similarly to scientific experts in SPS disputes,¹³⁰ information exchange between panels and their appointed experts would provide a more transparent record of how panels formulate their economic conclusions, better serving the due process rights of the parties, the function of the panels in making recommendations to the DSB, and the openness of the dispute settlement system.

As far as independence is concerned, panel-appointed experts are subject to the standards of independence and impartiality that apply to the panelists and support staff, must overcome the objections of the parties during the selection process, and face the often fierce scrutiny of their peers. Unlike party experts, panel-appointed experts are subject to the independence and disclosure requirements in Rules II, III, and VI.2 of the DSU Rules of Conduct. They can also only be selected in accordance with the requirements of due process, including the hearing rule.¹³¹ Panels have fewer incentives than parties to select experts whose views only represent a small part of the field. As panels can select a variety of experts representing different

¹²⁸ DSU Appendix 4, para 2.

¹²⁹ In practice it may sometimes be difficult to find suitable economic experts. Mike Beckers notes that in *Canada/US — Continued Suspension*, of the 71 experts who were suggested by the international organizations consulted by the Panel, only 35 responded to the initial request for background information, and only one escaped objection from either of the parties: see Beckers 2009, N34. See also *Australia — Apples*, Panel Report, paras 1.21-46, 1.48-52, and 7.1-102. However, as the Appellate Body noted in *Canada/US — Continued Suspension*, ‘the practical difficulties that a panel may encounter in selecting experts cannot displace the need to ensure that the consultations with the experts respect the parties’ due process rights’: Appellate Body Report, para 480.

¹³⁰ In almost all SPS cases resulting in a panel report to date, panelists have: involved experts in the panel meetings; consulted with the parties about the appointment of experts; consulted with the parties about the questions to be put to the experts; circulated the experts’ reports to the parties in draft form; named the experts used in the final panel reports; stated expressly which expert evidence they are relying on when reaching conclusions; quoted extensively from independent experts’ submissions to the panel; and appended transcripts of meetings with experts to the panel report. Panels have also on occasion included additional working procedures on consultation with experts and appended correspondence between the panel and the parties concerning the use of scientific experts to the panel report. The consistent acknowledgement of the use of experts in the draft and interim reports has also given the parties plenty of opportunity to consider, scrutinize and rebut the panel’s characterization of expert evidence.

¹³¹ See *Canada/US — Continued Suspension*, Appellate Body Report, paras 480-1.

approaches, panel-appointed experts are less likely to suffer from selection bias.¹³² Panel experts' terms of reference/working procedures are also generally finalized only after consultation with the parties, which should also discourage reference bias. As these experts are paid by the WTO¹³³ and hired to report to the panel, they are less likely to suffer from financial or prosecutorial bias in favour of either of the parties, and are less likely to represent any form of consistent institutional bias.¹³⁴ Moreover, the presence of panel experts encourages the parties, and party experts, to clarify and justify their own positions more carefully when framing their submissions. Party experts, knowing that their submissions will be subject to additional expert review, are likely to be more critical of their own work and less likely to fall prey to prosecutorial bias. Panel-appointed experts are also generally non-nationals of the parties to the dispute. Overall, there are far more controls to ensure the independence and impartiality of panel-appointed experts than there are with other sources of expertise.

In addition, a turn to independent economic experts could have beneficial consequences for developing countries participating in disputes. Proceedings before the WTO are becoming more complex and more costly. Parties who wish to participate effectively in shaping the facts of the case are increasingly reliant on economic experts. As India argued before the Panel in *US — Steel Plate*:

[t]he calculation of dumping margins can be a complex matter, requiring substantial expertise. Complaining parties, particularly developing countries, should have equal access to analytic expertise, just as they now have equal access to legal assistance in WTO dispute settlement. Being able to present alternative analyses is essential to their

¹³² 'Systems that rely on experts accountable solely or primarily to the court have the advantage of reducing the gamesmanship that is possible when dueling experts of the parties have the responsibility for submitting the economic evidence': Diane P Wood, Judge, Seventh Circuit Court of Appeal, Illinois (United States) in OECD Policy Roundtable, *Judicial Enforcement of Competition Law*, OECD Doc OCDE/GD(97)200 (1996) 69.

¹³³ Pauwelyn 2002b, 339.

¹³⁴ This is not to claim that experts cannot experience institutional bias or that they are wholly apolitical. For analysis of the survival of politics in technical standards bodies such as the Codex Commission see Livermore 2006; and Pollack & Shaffer 2009, 162-74. The lack of advocates for a particular economic approach may also reflect broader social and political biases relating to the funding of research or academic trends, rather than the merits of a given position.

ability to enforce those provisions in the [Anti-Dumping] Agreement that turn on legal interpretation of the investigative process, such as the provisions at stake in this dispute.¹³⁵

As things stand, more frequent use of panel-appointed experts could provide developing countries with additional means to scrutinize and criticize the expert evidence adduced by wealthier Members, as well as to provide their own ‘alternative analyses’. Although this could still increase the short term cost of litigation, the cost would be borne by the WTO¹³⁶ and is unlikely to become a problematic drain on the budget.

B *Technocracy, Managerialism and the Limits of Expertise*

Any call for greater expert involvement raises the spectres of technicalization, depoliticization, managerialism¹³⁷ and expert overreach, as identified in Chapter Five Parts III(C) and (D). These can result in political decision-making being overwhelmed by technocrats whose jargon, embedded biases, and presumed authority neutralize the possibility of political involvement for anyone outside of their professional community; often in the service of the interests of the powerful few. Structurally, the turn to economic expertise can emphasize and prioritize the values embedded in dominant economic vocabularies to the exclusion of others. This poses a problem if it shuts out alternative voices and blinds decision-makers to the contingency and the political consequences of their decision-making.¹³⁸ To that end, as with scientists in relation to the SPS Agreement, it is crucial that the economic and political justifications underlying the economic metrics in the covered agreements continue to be interrogated, as well as their economic, political, social, and cultural effects.

It is only in rare cases, however, that the panel dispute settlement process will prove the appropriate forum for such interrogation. The economic metrics in question have been

¹³⁵ US — *Steel Plate*, Panel Report, Annex D-2 ‘Oral Statement of India’ (23 January 2002) para 86.

¹³⁶ The experts’ ‘fee is minimal and most panel members as well as experts do it for the experience and the prestige, not the money’: Pauwelyn 2002b, 339.

¹³⁷ See Kennedy 2001; Kennedy 2005; Koskenniemi 2007b; Koskenniemi 2007a; Koskenniemi, 2009b.

¹³⁸ See Laski 1931, 9: ‘My point may, perhaps, be made by saying that *expertise* consists in such an analytic comprehension of a special realm of facts that the power to see that realm in the perspective of totality is lost. Such analytic comprehension is purchased at the cost of the kind of wisdom essential to the conduct of affairs. The doctor tends to think of men as patients; the teacher sees them as pupils, the statistician as units in a table’.

incorporated into the covered agreements, are the subjects of shared understandings by the Members, and will, for the most part, have been introduced into the proceedings by the parties themselves. While it is important to remain alert to the risks of managerial thinking, these risks should not be allowed to eclipse the value of using empirical and rational means to advance goals selected according to political processes. Rather, they should be used to draw attention to the goals served by such expertise; to the biases inherent in expert vocabularies; and to the effects of choosing some forms of expertise over others. Requiring epistemic legitimacy in decision-making clarifies these goals, biases, and effects and minimizes the opportunities to manipulate the language of expertise to justify the exercise of arbitrary power.

The risks of managerialism do, however, make it all the more crucial for expert evidence to be used within appropriate limits. Anne van Aaken highlights four general limits on the use of economic analysis in international law that may be applied here. First, economics is subject to the limits of human knowledge. Complex systems cannot always be reduced to a series of easily understandable ‘facts’, but this does not mean that panelists should ignore the information that is available.¹³⁹ Second, economic knowledge does not produce independent normative conclusions.¹⁴⁰ This can be read as an assertion of the limits of epistemic, as opposed to political, legitimacy. Economic knowledge cannot tell us how to live our lives; it is only once particular goals have been chosen that it can produce recommendations about how to achieve those goals. Panelists should therefore be careful not to pose normative questions to experts or to treat expert advice as binding.¹⁴¹ Third, it is important to maintain the functional distinction between the role of economic experts and the role of panelists.¹⁴² It is for experts to provide and elucidate an economic reading of the facts; it is for panelists to make an objective assessment of the facts so presented in line with the requirements of the covered agreements, a hermeneutic function. Fourth, as a practical matter much economic analysis in international law has relied solely on classic rational choice theory and has treated

¹³⁹ van Aaken 2010, 29.

¹⁴⁰ Ibid 30.

¹⁴¹ Some of the Tokyo Round plurilateral codes actually required panels to take the advice of technical expert groups as authoritative and binding; these provisions were not carried over into the WTO covered agreements.

¹⁴² van Aaken 2010, 30.

the state as a ‘black box’. This should be opened up to take into account a greater variety of actors and changes in preferences.¹⁴³ To these I would add, particularly in light of the SPS case law, that panels should confine their questions to experts to matters within the realm of the experts’ expertise, and to ignore any expert advice offered that goes beyond these confines.¹⁴⁴

There are a number of ways to encourage panels to stay within such limits. Panelists could be given extra training in fact-finding techniques and in dealing with economic evidence and advice. Guidelines could be drawn up to assist economic experts in fulfilling their functions, and to panelists when dealing with such expertise. Both the EC and the UK, for instance, have guidelines on the submission of economic evidence and data collection in competition cases.¹⁴⁵ At present, the working procedures for consultation with experts in WTO disputes focus more on confidentiality, due process concerns, and the mechanics of seeking expert advice, rather than the delimiting the respective functions of panelists and experts.¹⁴⁶

Finally, even if dispute settlement organs remain alert to the proper limits of the expert contribution to the dispute settlement process, certain risks to the use of experts that remain unavoidable. Increasing the complexity of factual arguments in disputes can provide a hook which can be used to prolong disputes and even to generate additional disputes. Expert languages cannot readily be translated for public digestion. In addition, locating experts, getting approval from the parties, and commissioning reports based on their expertise can be

¹⁴³ Ibid 30-1.

¹⁴⁴ Laski frames this as a problem of expert ‘humility’: Laski 1931, 2 and 7. These problems were recognized by the Appellate Body in *Canada/US — Continued Suspension*, Appellate Body Report, paras 415-84.

¹⁴⁵ See UK Competition Commission, *Suggested Best Practice for Submission of Technical Economic Analysis from Parties to the Competition Commission* (2009) available at <http://www.competition-commission.org.uk/rep_pub/corporate_documents/corporate_policies/best_practice.pdf>; EC Directorate-General for Competition, *Best Practices for the Submission of Economic Evidence and Data Collection in Cases Concerning the Application of Article 101 and 102 TFEU and in Merger Cases* (2010) available at <http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_submissions.pdf>.

¹⁴⁶ See, eg, *Canada/US — Continued Suspension*, Panel Report, Annex A-5, ‘Working Procedures for Consultations with Scientific and/or Technical Experts’; *Australia — Apples*, Panel Report, Annex A-5, ‘Procedures for the Panel’s Meeting with the Experts and Parties and the Panel’s Second Substantive Meeting’; *Australia — Salmon (Article 21.5 — Canada)*, Panel Report, Annex 2, ‘Revised Working Procedures’, paras 14-18.

time-consuming. This causes friction with the WTO's notionally streamlined timetable for panel disputes. Pursuant to DSU Articles 12.8 and 12.9, panels generally have six months in which to conduct an examination, which can be extended to a maximum of nine months. DSU Article 20 also provides that unless the parties agree otherwise, the period from the date of establishment of the panel until the DSB considers the panel report for adoption should 'as a general rule not exceed nine months'. This should not be seen as an insuperable obstacle to the appointment of economic experts by panels. DSU Article 12.2 anticipates that '[p]anel procedures should provide sufficient flexibility so as to ensure high quality panel reports, while not unduly delaying the panel process'. SPS cases are frequently extended because of, among other reasons, the complexity of the facts of the case, the need to consult with scientific and technical experts, and the due process concerns of the parties.¹⁴⁷ The issue of delay has not proven a significant obstacle to the progress of these cases, several of which have run well over the nine month time limit in DSU Article 12.9. WTO practice suggests that the authority of panels does not lapse merely because they have exceeded these time limits.¹⁴⁸ Moreover, extended timetables are likely unavoidable considering the increasing factual complexity of cases. In *EC and Certain Member States — Large Civil Aircraft*, even without the involvement of panel-appointed experts, the proceedings ran for just under seven years.

These systemic issues with the resort to increased economic expertise do not necessarily cancel out their potential contribution. Rather, it must be remembered that expertise provides a tool for understanding and framing the world. As with any tool, it can be used productively or it can be used in a way that causes harm — indeed, the perception of whether it is being used well or misused may depend upon one's vantage point. It is therefore important when deciding whether to call upon economic expertise to consider all of the potential risks and benefits together. At present, it would appear that the deficiencies posed to the dispute settlement by failing make greater use of independent experts far outweigh the potential risks involved in utilizing them more.

VI CONCLUSION

The failure of panel decisions to achieve epistemic legitimacy when faced with economic evidence and argument has not been limited to one or two isolated and forgettable cases.

¹⁴⁷ See Kennedy 2011, 239-42 and 245-50.

¹⁴⁸ Waincymer 2002, 305-06.

Rather, it forms part of a broader systemic failure of the WTO dispute settlement system to incorporate and foreground independent economic expertise into its decision-making processes. This is troubling because of the extent to which disputes now turn on readings of embedded economic metrics which rely on complex factual evidence. There will be occasions in which poor drafting and politics may mean that no clear economic metric is evident or that the use of the provided metric would make no sense.¹⁴⁹ There may be significant disagreement amongst economists about what given economic metrics may demand or demonstrate.¹⁵⁰ This makes it all the more important for panels to recognize and articulate such deficiencies and differences and to provide adequate reasons for choosing between conflicting pieces of information. Although panels have drawn on various sources of economic information in the course of disputes, their failure to make use of independent experts has only undermined their output legitimacy. Although there may be historical and cultural reasons for why such experts have not been used until now, these should not be used to continue to justify otherwise arbitrary decision-making. Importantly, it is possible to address the deficiencies of the existing approach without facing the formidable challenge of amending the covered agreements — panels simply need to make greater use of powers they already possess. That said, it remains crucial for panels to recognize the political and epistemic limits of independent economic expertise to prevent overreach from the realm of knowledge, malleable as it may seem, to the realm of normativity.

¹⁴⁹ See Janow & Staiger 2007a, 131; Janow & Staiger 2007b, 290; Grossman & Mavroidis 2007b, 425 and 432; Mavroidis & Sapir 2008, 319.

¹⁵⁰ See WTO, *World Trade Report 2005*, 171-212, 206.

CHAPTER EIGHT:

CONCLUSION

This thesis has not sought to valorize one particular approach to the WTO's legitimacy. Rather, it has sought to explore the parameters of the relationship between WTO law and various key legitimacy narratives. It has shown that narratives of legitimacy permeate many levels of WTO law- and decision-making. They shape the processes by which laws and decisions are made and thereby ultimately shape the resulting laws and decisions. In turn these processes of law- and decision-making reinforce legitimacy narratives by creating shared understandings about common practices and values. Moreover, the thesis has highlighted the multiplicity and contingency of these narratives — some of which have proven complementary, others wholly incommensurable — with the aim of destabilizing the idea that there exists an objective and freestanding account of legitimacy that could resolve the WTO's legitimacy problems, whether normatively or socially.

In particular this thesis has argued that, on the one hand, the input-oriented narratives relating to consent and democracy have proven unable to carry the normative legitimating burden placed on them by various communities of legitimation. Specifically, they largely neglect: (1) the instrumental reasons addressing why particular laws and institutional processes should exist; and (2) the role played by those laws and processes in constructing communities of legitimation and in influencing various actors' preferences. On the other hand, output-oriented narratives that focus on instrumental concerns have long been identified with a narrow functionalism, or worse, technocracy. One consequence of this identification has been the neglect of how specific legal mechanisms may be used to improve the functional efficiency and effectiveness of WTO rules to further common goals, and also how legal mechanisms affect how those goals are constructed in the first place. Another consequence has been the neglect of how input- and output-oriented legitimacy concerns may interact to guard against the twin evils of instrumental rationality and political chaos.

Chapter Two sought to clarify the concepts of 'power' and 'legitimacy' as used in the thesis. It also made two preliminary arguments. First, it argued that the WTO, both in its own right and as a vessel for others, acts as a locus of power in a way that makes the question of its legitimacy a matter worthy of careful and sustained investigation. Second, it argued that legitimacy itself is a distinctive (if somewhat messily invoked) concept that is a worthwhile

subject of inquiry for international trade lawyers, and indeed international lawyers more generally. This is because unlike other bases for compliance such as coercion, self-interest or habit, legitimacy poses the question of whether laws and institutions are *worthy* of compliance; a question central to matters of law-making and enforcement, and to the sense of law as *law*, rather than merely as an instrument for the powerful.

Part Two then explored the relationship between WTO law and two of the most prominent (primarily) input-oriented narratives of legitimacy associated with the WTO: consent and democracy. Chapter Three focused on consent, and considered how various legitimating narratives of consent have emerged in domestic law, international law, and WTO law over time. In the process it highlighted the historical contingency of these narratives, as well as the variety of ways in which even something as apparently straightforward as consent can be conceptualized.

Notwithstanding the key central role played by consent in legitimating WTO law, it suffers from clear philosophical, normative and descriptive limitations. Chapter Three therefore considered the limitations of consent as a sufficient narrative of legitimacy for WTO law. Normatively, consent must be supplemented by some non-consensual norm to convey a binding sense of legal or moral obligation; and the philosophical basis for such a norm is less than clear. Consent also leaves large gaps when it comes to justifying particular exercises of power. It has little to contribute in the face of the agency costs associated with broad grants of discretionary power to agents, and has even less to say about why particular types of agents (lawyers, economic experts, etc) should be invested with such power (beyond the idea that that is what the Members want). Moreover, consent narratives, focusing as they do on *Member* will, generally fail to give due consideration to the role of non-Members (whether lobbyists, NGOs, IGOs, experts or otherwise) in the creation and implementation of WTO law. Their focus on the formal moment of prescription for law also results in the neglect of much of the ‘background’ of trade law and policy making in the WTO Secretariat, the committee system, and national administrative networks. All of this combines, in the face of the increased political and technical complexity of WTO law, to provide a rather brittle skeleton of legitimacy which almost completely neglects questions of function, substance, and outcome — ie questions of outputs. This helps to explain why various commentators have seen it necessary in recent times to turn to alternative sources of legitimacy for WTO law.

Chapter Four addresses that other grand input-oriented narrative of legitimacy — democracy. The Chapter identified four main families of democratic legitimacy narratives that

have enjoyed prominence in relation to WTO law: direct democracy, representative democracy, participatory democracy and deliberative democracy. While the WTO is far from satisfying the requirements of any these approaches to democracy in any strong sense, they are still frequent calls for it to be democratized along each of these lines. Although not as strongly or clearly embedded in WTO law as the consent narrative, these various narratives have distinct, sometimes incompatible, implications for how WTO law is conceptualized, applied and reformed.

Of the four narratives, the direct and representative versions are exclusively input-oriented; several of their limitations strongly parallel those of the consent narratives. The participatory and deliberative democratic narratives, however, are capable of also addressing certain matters of substance and outcome, and hence matters of output legitimacy. They are concerned not only with ensuring that law reflects Members' preferences, but also in realizing ideals of political participation and reasoned decision-making with a view to making 'better' decisions. These narratives thus place a stronger emphasis on mechanisms governing expert knowledge, transparency, communication and reason-giving. Although deliberative democracy may seem promising as a means of bridging the gap between input and output legitimacy, it faces serious challenges in the WTO context; not the least of which is the tendency of its advocates to lose sight of the subjects of democracy in favour of expert determination. That is, the focus on the epistemic aspects of deliberative decision-making risks eclipsing the idea that democratic decisions should be made by the people, as well as for the people.

Part Two therefore explored the close relationship between input legitimacy narratives and how WTO law is structured and implemented, and the limits to the legitimating capacity of these narratives. It showed that consent has been essential to understanding the legitimacy of WTO law as it is, while democracy is increasingly pushed as something the WTO and its laws should embody. It demonstrated that there are a multitude of ways of conceiving of consent-based and democratic legitimacy, each with distinctive implications for WTO law. It also showed that a focus purely on input legitimacy narratives has serious limitations. Such a focus is unable to account for many of the reasons why specific agents are allocated authority over others, or why particular forms of knowledge are prioritized. Input legitimacy narratives cannot address why WTO law may be desirable beyond the idea that it reflects the preferences of a given group, the members of which vary depending on which narrative of legitimacy is chosen. Moreover, claims to justify the exercise of power on the basis of input-oriented

accounts often outstrip the internal justificatory power of such narratives, leading to claims of false legitimacy. Any story of WTO law's legitimacy therefore, needs to take account of output legitimacy as well as input legitimacy.

The third part of the thesis consequently turned to the concept of output legitimacy and explored some of its implications for multilateral trade negotiations and WTO dispute settlement. Chapter Five elaborated on the concept of output legitimacy and its relationship with WTO law. It traced the emergence of such narratives at the domestic and international levels, before also considering their place in debates about WTO law. As with Chapters Three and Four, this chapter highlighted the multiple forms that such narratives can take and the very different implications these forms have for how WTO law is conceptualized. The chapter then turned to four key dangers associated with output legitimacy narratives and WTO law: the absence of a clear WTO mandate; the distance between stated aims and their implementation; the downsides associated with technicalization and depoliticization; and the tendency of experts to stray beyond their professional competences. As with input legitimacy narratives, output legitimacy narratives are often invoked in ways that ignore these limitations. This is potentially problematic as it can lead to the unjustifiable empowerment of expert groupings and can lead to a narrow instrumental rationality that ignores the preferences and interests of WTO Members and human beings.

Having further elaborated the concept of output legitimacy in Chapter Five, and having drawn attention to both its benefits and its dangers, Chapters Six and Seven explored the implications that a heightened focus on questions of output legitimacy may have for WTO law. Chapter Six focuses on the interplay between output legitimacy concerns and WTO law-making through multilateral trading rounds. It emphasized the importance of law for constructing our sense of what constitutes an appropriate outcome for the multilateral trade regime, sometimes regardless of whether that outcome may be desirable in more functional or economic terms. The chapter also considered how legal norms and practices relating to WTO law-making may implicate or improve: (1) the functional efficiency and effectiveness of WTO rules; and (2) the institutional efficiency and effectiveness of WTO rule-making processes. To this end, the first part of this chapter focused on the role played by norms relating to the epistemic competence, independence, and diversity of WTO law-making participants in constructing the functionally-oriented output legitimacy of WTO law. This part concluded that the current arrangements pose a high risk of false legitimization, and that more could be done to strengthen the functional orientation of WTO law-making processes. The

second part of the chapter turned to claims that the WTO law-making processes should be ‘streamlined’ through changes to processes involving the Secretariat, voting, the single undertaking, transparency and reason-giving. It argued that matters of institutional efficiency — simply making sure that agreements are concluded — are being prioritized over questions of functional effectiveness and whether the concerns of the broader Membership are being met. As such, it cautioned against too quickly assuming that the institutionally-oriented output legitimacy benefits of such streamlining can offset the threats posed to the functionally-oriented output legitimacy (as well as the input legitimacy) of WTO rules.

Chapter Seven, the final substantive chapter, investigated what consequences a greater focus on output legitimacy may have for the WTO dispute settlement system. More specifically, it focused on the treatment of economic evidence in WTO disputes to highlight the distance between the dispute settlement organs’ relatively straightforward claims about fact-finding and the rather messier reality of their practice. In doing so, it sought to remedy the imbalance in much of the existing literature which deals with the legitimacy implications of ‘hard’ scientific expertise but tends to allow economic expertise to continue to operate in the background with relatively little scrutiny. The Chapter highlighted five categories of legal mechanisms that can be thought of as enhancing the functional output-oriented legitimacy of dispute settlement decisions: the rational basis requirement, requirements of transparency and reason-giving, requirements of independence, requirements of epistemic competence and tools for ensuring epistemic diversity and contestation. It noted that these mechanisms are not used as extensively as they could be, especially when it comes to the appointment of independent economic experts by panels, and considered the relative epistemic value of the various sources of information available to the panels.

The limitations of the various legitimacy narratives, even in their ideal forms, does not mean that we should turn away from legitimacy altogether. An ideal may still be worth striving for even if it cannot be realized. In striving for a more legitimate WTO law, however, it is important that we keep sight of both the benefits and the dangers associated with particular legitimacy narratives. This calls for a critical approach to both input- and output-oriented forms of legitimacy and the ways in which they constitute, and are constituted by, WTO law.

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