Conceptions of Democratic Legitimate Governance in the Multilateral Realm: The Case of the WTO

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For a long time, the question of legitimacy, especially of democratic legitimacy was neglected in international relation studies. But in the past years there has been an impressive research addressing this issue. The aim of this article is to review the conceptions of democratic legitimate governance in the multilateral realm with regard to the WTO. It starts with a summary on the theoretical foundations of democracy and legitimacy in the multilateral realm also highlighting the demos-problem. It gives then an overview on the different approaches to enhance the democratic legitimacy on a multilateral level such as enhancing accountability, stakeholder participation, transparency and the output of international organization. The final chapter takes a closer look at a recent comprehensive conception of democratic legitimacy in the international realm.

Introduction

The legitimacy of governments has been a central focus of political theory since the ancient Greeks (Beetham 1998, 538). The definition of legitimacy derives from the Latin word legimus and literally means lawful. But its scope is hardly possible to put into a nutshell (Bodansky 1999, 600) and political philosophers, lawyers and social scientists have proposed multitudinous theories of legitimacy. The questions the theories of legitimacy seek to address are: what gives a government the right to exercise such powers over its citizens, and which of the powers are rightly exercised (Barnard 2002, 3)? Therefore, legitimacy concerns the justification and acceptance of authority and of the exercise of power (Flathman 2007; de Búrca 1996).

In the course of globalization, there has been an ongoing transfer of decision-making authority from domestic governments to international organizations. National states have agreed to this because they realized that some problems cannot be solved at a purely national level anymore. As a result, international organizations have gained more and more power to impose obligations and duties (Bohman 2007, 172) and national boundaries are no longer congruent with the populations affected by political decisions on an international level. This transfer of power has raised new questions of legitimacy. Thus, the recent challenge with which international lawyers, philosophers and political scientists are confronted concerns the question of whether international organizations and its laws are legitimate. What gives an international organization the right to exercise such powers? From where do they receive their legitimacy?

In general terms, the debate on legitimacy can be divided into a normative and an empirical, descriptive one (Beetham 1991; Nanz 2006, 63; Cheneval 2005; Zürn 2004; Krajewski 2001, 168). In normative terms, legitimacy refers to the validity of a political order (or its elements and rules) in an objective sense. The discussion on normative legitimacy therefore concentrates on theoretic and conceptual principles and their justification. Definitions of, and conceptions concerning, legitimate power in an objective sense vary according to the profession of the author. For lawyers, power is legitimate “where its acquisition and exercise conform to established law” (Beetham 1991, 4). In this sense, normative legitimacy mainly corresponds with legality. For scholars of political and moral philosophy, power is legitimate “where the rules governing are justifiable according to rationally defensible normative principles” (Beetham 1991, 5). In this regard, normative legitimacy often addresses questions of “justice” (Herwig and Hüller 2008, 231). In empirical terms, legitimacy refers to the societal acceptance of a norm or a government (Cheneval 2005; Zürn 2004; Bellamy and Castiglione 2003). But the interpretation of the term “empirical legitimacy” is very ambiguous and controversial. Based on the classical definition of Weber ([1922] 1980; [1921] 1988), for most authors power is empirically legitimate if people believe it to be so (see e.g. Nanz, Zürn 2004; see also the references in Beetham 1991, 9). On the other hand, it is not the belief of people that makes power legitimate in an empirical way but the fact that “it can be justified in terms of their belief” (Beetham 1991, 11).

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review therefore mainly focuses on normative conceptions of legitimacy. Nevertheless, it is important to note that especially on a multinational level, legitimacy is not one-dimensional but “multi-dimensional in character” (Beetham 1991). As Cheneval accurately states, the legitimacy of a political system results from the “mutual acknowledgement” of acceptance and normative legitimacy (Cheneval 2005); and as Weiler notes, “an institution or system or polity will in most cases have to enjoy” normative legitimacy “in order to enjoy social legitimacy” (Weiler 1991, 416). On the other hand, even if a system enjoys normative legitimacy, there may be a lack of societal acceptance (Weiler 1991, 416). This paper is designed to give an overview of the existing literature on conceptions of democratic legitimacy in the multilateral realm, in particular of the WTO. Therefore the author abstains from declaring his own position in depth. A personal evaluation and outlook on future developments are mainly limited to the final section. The review is divided into five sections. It starts with a summary on the theoretical foundations of democracy and legitimacy in the multilateral realm. After a short overview of the debate concerning democracy beyond the nation state, highlighting also the demos-problem, it will provide an overview of the sources of legitimacy. Based on this theoretical background, a third section will deal with the content of legal legitimacy, especially the constitutional approach. It will be followed by a fourth on procedural legitimacy by highlighting the most common conceptions regarding the enhancement of accountability, stakeholder participation and transparency in the multilateral realm, especially in the WTO. A fifth section will take a closer look at the various conceptions concerning substantive legitimacy. Before concluding this review, a sixth section will take a closer look at one of the few general conceptions to determine democratic legitimacy.

Theoretical Foundations of Democracy and Legitimacy

Democracy as Basis of Legitimacy: Democratic Legitimacy

In most modern constitutional systems, a government and its decisions are legitimized if the rules and decisions are set up in a democratic manner (see e.g. Fierlbeck 1998, especially at 201). It therefore does not come as a surprise that with the relocation of parts of the decision-making authority from domestic governments to international organizations questions about democracy beyond the nation state have been raised. Central questions within this debate are whether international institutions – such as the WTO, the World Bank, the UN and particularly the European Union – are in need of legitimacy and democratization, and how such democratization can be conceived at the supranational level (see e.g. Moravcsik 2004). While some authors argue that the question of democracy at a multilateral level is mainly a problem of the undemocratic members of an international organization and not of the organization itself, the debate on democratic legitimacy in the multilateral realm can be divided into a gradualist and a transformationalist conception. The demos, the idea of citizen, popular consent as the basis of every democracy, equal rights to participate, the public sphere and the idea of political accountability are all based on the idea of a nation state. The crucial question of today’s research on democratic legitimacy is to what extent these criteria might also be relevant at a multinational level. For proponents of the gradualist conception, democracy at a supranational level implies a quasi-identical normative structure of national democracy (Bohman 2005). Transformationalist conceptions, on the other hand, imply a transformation of democracy beyond the nation state, as occurred when representative democracy emerged in the early modern city-state ( Held, McGrew, and Perraton 1999; see also Bohman 2005). A main concern is whether democracy in the multilateral realm is really possible without a demos: a collective identity (Dahl 1999; Nagel 2005, 143; Zürn 2000; Scharpf 1993). The debate on the necessity of a demos for a democratic government in the multilateral realm is most prominently carried out within the discussion on the democratic deficit of the European Union (see e.g. Nanz 2006, with further references; Utzinger 2009; Zürn 2000, with further references; Kraus 2003). For many authors, who mainly support the gradualist conception, democracy without a demos is not possible and they therefore deny the possibility of democratic legitimacy at a supranational level. According to them, democracy requires a “foundation not only of shared values, but also of shared experience, so that people identify with the political system to which they belong, and can trust its procedures and their outcomes” (Arblaster 2002; for more references see e.g. Bodansky 1999; see also Zürn 2000). In other words, to them democracy presupposes a demos as a “guarantor of collective identity”. This is one of the reasons why Dahl argued that international organizations cannot be democratized (Dahl 1999). Zürn, on the other hand, proposes a disaggregated view of the term demos. For Zürn, the term demos contains five elements: the acknowledgment of “each other as autonomous individuals, each with a right to personal self-fulfilment” (“Rights”), trust, public spirit, public discourse and solidarity (Zürn 2000, 196-199). According to him, a “democratic process beyond the nation-state must not be ruled as an unalterable matter of principle until all aspects of a demos are fully developed” (Zürn 2000, 200). For Bohman and others, democracy beyond the nation state needs a transformation of the political subject from demos to demoi (Bohman 2005; see also Cheneval 2005; Cheneval 2006). They base their arguments on the premise that “the nation-state is a too important category” to be ignored at a supranational level (Nicolaidis 2003). The main question to them is not how to preserve or even promote democracy as it is now on a national level, but to how to establish a different type of democracy (Bohman 2007, 21). A key element of such a new type of democracy would be a reconsideration of the political subject. As Bohman argues, democracy on a transnational level needs “a transition from a singular to a plural subject, from demos to demoi” (Bohman 2007, 21). An essential condition for such a “demoi-cracy” would be “the republican value of freedom as non-dominination”, in the sense of equal “capacities” for influence and organization (Bohman 2004). The ideal of nondomination would require that all people enjoy meaningful opportunities “to contest arbitrary exercises of power over them” (Bohman 2004).

Unfortunately, conceptions of the democratic legitimacy of the WTO barely deal with the “demos-question”. This might have to do with the fact that hardly anyone believes that a global
demos beyond the nation state could evolve over time, but that on a multilateral level the concept of demos has to be replaced by new forms such as “common interests” or demoi. For Nanz and Steffek, democratic legitimation of international governance does not presuppose a certain (pre-political) homogeneity of citizens. Similar to Bohman’s conception of transnational democracy, legitimation on an international level can also be generated “through deliberation between a variety of social actors” (Nanz and Steffek 2004). A starting point for deeper analysis of the “demos-question” of the WTO could be the normative framework of Cheneval (Cheneval 2008). Assuming that all parties to a multilateral order or institution are liberal democratic peoples, he demonstrates that if multilateral democracy were only based on citizens or peoples, “fundamental interests of either citizens or peoples are violated” (Cheneval 2008, 49). Therefore, Cheneval concludes, multilateral democracy is not based on a demos principle alone, but on citizens and peoples as normative references. Applied to the WTO one would have to investigate to what extent the citizens and peoples are also constitutive units and basic sources of multilateral democratic legitimacy, even if not all parties of the multilateral order are liberal democratic peoples. The following reviews of the conception of democratic legitimacy on a multilateral level will show that most authors deal with particular aspects of democracy – such as accountability or transparency – as well as with the outcome of the WTO. They determine alternatives for democratic legitimacy on a multilateral level even without a pre-existent collective identity.

Sources of Legitimacy

As in the discussion on legitimacy and its scope, there is no concurrence on the sources of legitimacy, of which one can basically distinguish two: the procedural and the substantive (Barnard 2002; Bodansky 1999). Some authors identify a third source of legitimacy: the legal or source-based legitimacy (Nanz 2006, 65; Bodansky 1999). In this sense, legitimacy mainly corresponds with legality.

Procedural legitimacy focuses on the process by which rules and decisions are brought about and adopted (Barnard 2002, 27). For most of the authors, and also in most modern constitutional systems, the process is legitimized if the rules and decisions are set up in a democratic manner. Therefore, some authors call this source of legitimacy simply the democratic source of legitimacy (see e.g. Nanz 2006, 64). But as Bodansky correctly states, “democracy can be conceptualized and justified in terms of all three types of legitimacy” (Bodansky 1999, 613). For some authors, procedural legitimacy mainly corresponds to the input legitimacy as defined by Scharpf (Nanz 2006; Elsig 2007). But in the terminology of Scharpf, input legitimacy can only be achieved by a “pre-existent collective identity” with the belief in “our essential sameness” (“Gemeinsamkeitsgläuben”; see Scharpf 1999a, 7-10; 1999b, 17-20). For Scharpf, the process by which decisions are made is an element of output legitimacy (Scharpf 1999a; 1999b; Cheneval 2005; Zürn 2000). Scharpf notes that output legitimacy does not need a pre-existent collective identity. What is required for output legitimacy is “no more than the perception of a range of common interests that is sufficiently broad and stable to justify international arrangements for collective action” (Scharpf 1999a, 11; 1999b, 20; Cheneval 2005). As we will see, most of the conceptions on procedural legitimacy in the multilateral realm do not assume that there is a pre-existent collective identity at the multilateral level. As mentioned above, conceptions of the democratic legitimacy of the WTO barely deal explicitly with the “demos-question”: the question of a possible pre-existent collective identity. Therefore, according to the terminology of Scharpf, this review will mainly deal with the conceptions of output legitimacy. Nevertheless, it will be important to distinguish between procedural and substantive legitimacy.

Substantive legitimacy refers to the output of a government or an institution (Barnard 2002). Hence, authority can be legitimized by its success in producing the desired outcome (Nanz 2006, 64). For Scharpf, substantive legitimacy is also an element of output legitimacy (Scharpf 1999a, 1999b). Substantive legitimacy depends on its capacity to achieve the citizens’ goals and solve their problems effectively and efficiently. The emphasis is on “democracy as ‘government for the people’” instead of “government by the people” (Schimmelpfennig 1996, 19; Scharpf 1999b, 16). Substantive legitimacy assesses the effect of rules on society at large in terms of for example equality, fairness, justice and freedom. To be legitimate in the sense of substantive legitimacy, an institution or government has to show a “problem-solving capacity” (Schimmelpfennig 1996, 19). As we will see, the yardsticks applied for substantive legitimacy strongly depend upon underlying political and economic philosophies, and vary (Elsig 2007, 84-86).

The idea of legal or source-based legitimacy is that international organizations have to be based on the rule of law and on the consent of the member states (Nanz 2006, 65 with further references). Of course the consent of states is a procedural element and one could integrate the conceptions of legal-based legitimation into procedural legitimacy. But apart from the question of consent, legal-based theories of legitimation barely deal with the process by which rules are made, but instead focus on the rules themselves – for example, on their systematic placement and on their content. The legal legitimacy of a rule or an organization is “ultimately based on its potential for legal justification” (Nanz 2006, 65). Therefore, it seems necessary for this review to make a distinction between procedural and legal conceptions of legitimacy.

It is important to mention that the transitions of all sources of legitimacy are smooth and cannot be strictly separated. But it can be said that all sources of legitimacy are of equal standing and no single one should be overstated at the expense of the others (Nanz 2006).
**Legal Legitimacy and Constitutionalism**

As stated above, according to legal legitimacy, authority can be legitimated by the rule of law. Legal legitimacy is based on the tradition of positive legal theory where legitimacy is derived from the process defined by the legal order (Kelsen 1945) and where there is a higher order norm to validate the system. In the multilateral realm, legal legitimacy refers particularly to the consent of states to treaties, general rules or even customary international law (Krajewski 2001, 169). As Coicaud states, the legitimacy of international organizations, treaties, general rules and customary international law “derives originally from states” (Coicaud 2001, 523; see also Howse 2001, 359 et seq.).

A consequence of legal legitimacy is that international organizations can only act as far as states give their consent to them. The organizations are bound by the basic rules agreed by the states.7 Bacchus goes even further by stating that the sources of legitimacy of international organizations (in casu the WTO) are the organizations’ members (Bacchus 2005, 431). According to him, the WTO is “a mutual effort by individual states to assert and to sustain their sovereignty in an effective way in confronting the many challenges that face individual states in an increasingly ‘globalized’ economy” (Bacchus 2005, 431). This “calculated” transfer of sovereignty is for Bacchus the source of legitimacy of the WTO and other international organizations. But in today’s age of globalization, of deeper economic integration and increased multilateral cooperation, a sole “consent-based” legitimacy by the states might no longer be sufficient (if it ever was) (Wolftrum 2008; see also e.g. Buchanan and Keohane 2006). Buchanan and Keohane even point out that a consent-based legitimacy is not possible as there are many non-democratic countries which themselves lack legitimacy (Buchanan and Keohane 2006). According to them, non-democratic countries cannot transfer legitimacy “for the simple reason that there is no legitimacy to transfer” (Buchanan and Keohane 2006). Furthermore, even if it is technically possible in “today’s globalized world”, it is highly unlikely that a country would decide to stay outside the WTO as “few countries (…) can risk being isolated from the organization’s powerful and growing economic and trade ambit” (Kapoor 2004, 536).

A primarily legal-based conception of legitimacy is put forward by Franck (Franck 2006, 1995, 1990, 1988). In general, Franck argues that “legitimacy is the capacity of a rule to pull those to whom it is addressed toward consensual cooperation” (Franck 2006, 93). In order to determine legitimacy (and thus its compliance) at the international level, Franck names four indicators that are inherent in every norm: determinacy, symbolic validation, coherence and adherence. According to his viewpoint, they are decisive in validating rules as legitimate. Referring to the factor of determinacy, Franck assumes that the clearer a rule is, the better it will communicate its content to those who are addressed by it and the more it will exhibit legitimacy and pull towards compliance. A second condition for a legitimate rule is its symbolic validation. According to him, a rule is symbolically validated “when it has attributes, often in the form of cues, which signal its significant part in the overall system of social order” (Franck 1995, 34). Such cues may be ritual or pedigree. The ritual of a rule may be given by ceremonies, which “provide ununcinated reasons for compliance with the commands of persons or institutions” (Franck 1990, 92) such as the swearing in of a new president in the United States. They serve to communicate and ratify the beliefs and values of a system (Franck 1990, 93). Pedigree refers to the depth of the root of a law in a historical process. The pedigree of a rule focuses on where the rule comes from and to what extent it is connected to a society (Franck 1988, 726). In other words, the older a rule is, the more it will be conceived as legitimate. Franck underlines that symbolic validation increases the acceptance of a norm because “authority is being exercised in accordance with the right process, that it is institutionally recognized and validated” (Franck 1995, 34). Furthermore, a rule should also be coherent. Coherence means that a rule needs to be applicable to everybody and that likes are treated alike, otherwise it cannot be perceived as legitimate. Coherence requires that a rule has to be applied uniformly in every similar instance. Distinctions are possible but only if they are “based on underlying general principles which connect with an ascertainable purpose of the rules and with similar distinctions made throughout the rule system” (Franck 1995, 41). Finally, in order to be legitimate, a norm needs to be adherent. Adherence means that the legitimacy “of each primary norm depends in part on its relation to the secondary rules of process” (Franck 1995, 41).

Rules need to be connected to a normative hierarchy. Secondary rules define the process of rule-making. From a nation-state viewpoint, Franck assumes that the constitution of a state is the ultimate rule of recognition and that rules become legitimate “by having been made in accordance with the process established in the constitution” (Franck 1995, 41). According to him, the international community also has secondary rules of recognition, such as the rule of pacta sunt servanda. The legitimacy of these secondary rules may derive from a specific or implied consent of states. But the legitimacy of the ultimate rule of recognition “cannot be demonstrated by reference to any other validating rules or procedures, but only by the conduct of nations manifesting their belief in the ultimate rules’ validity as the irreducible prerequisites for an international concept of right process” (Franck 1990, 194).

In general terms, Franck recognizes that the legitimacy of a norm becomes more effective when the norm in question undergoes a certain process of validation (Franck 1988, 706). The outcome of that process increases the quality of the norm in such a way that the rule makers and those addressed by the rules feel obliged to pull towards voluntary compliance.

Obviously, not every norm manifests all factors. Some norms may include one, others all four indicators. The more these factors play together, the greater the pull towards compliance becomes because the norms are conceived as more legitimate (Franck 1995, 30).

The constitutional approach points in a similar direction (among others Cass 2005; Cottier and Hertig 2002; Howse and Nicolaidis 2003; Kumm 2004; Peters 2006b).8 The contributors

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8 For a good overview on the pros and cons of constitutionalism in international law, see Peters 2006.
to constitutionalism aim to limit the political power of international actors through legal rules and to create a legal hierarchy on the global scale. Scholars of this approach use the term in order to describe rules and principles of such importance that they deserve the label “constitution”. Transposing this term to the international context does not result in a single global constitution. It is an attempt to realize on a global scale core values that can also be found in modern domestic constitutions (Werner 2007, 341).

As the constitutional approach is based on the tradition of positive legal theory, the notions of legality and legitimacy often mean the same (Cass 2005; Elsig 2007). One dimension of constitutionalization is legalization. Unlike the traditional understanding of international law, which attached the emergence of such values purely to the specific treaties, constitutionalism tries to describe the existence of a hierarchically structured international legal order (Werner 2007, 366). Global constitutionalism aims to express constitutional principles that reflect the unity of international law as a whole. Principles like jus cogens or pacta sunt servanda are considered as constitutional because they reflect the basic values of the international society. They cannot be changed by the will of states and serve as reference rules for other norms (Werner 2007, 351).

According to proponents of constitutionalism, it is not useful to stick to this static dichotomy of international-national law. Peters, for example, declares that the constitutional approach might also help to compensate for the “de-constitutionalization on the domestic level which is effected by globalization and global governance” (Peters 2006a; see also Armingeon and Milewicz 2008). In the end, this “compensation” might enhance the legitimacy of the international order. Cottier/Hertig speak of a five-storey house (Cottier and Hertig 2002). This view implies that there are five layers: the constitutional levels of the communities, of the sub-federal entities and of the federal structure the regional integration layers, for example the EU; and the global layer. Although the different layers of governance derive from different sources of law, they are linked in such a way that these layers together form a constitutional system. The aim of the constitutionalist approach is thus to define the process of interaction between the different levels of governance and to show that these levels form part of an overall constitutional system.

To achieve international constitutionalism, Coicaud stresses four major challenges for international organizations (Coicaud 2001, 546-548): firstly, they have to adjust “diversity without annihilating it”; secondly, international organizations will have to strengthen the “sense of global community”; thirdly they will have to strengthen their cooperation with all relevant actors, such as the states, but also individuals and private actors; and finally, international organizations will have to handle “the effects of the paradox of contemporary democratic culture”. According to him, there is a paradox between the “increased sense of responsibility at the international level” and the concurrent “proliferation of a culture of individual entitlement at the national level” (Coicaud 2001, 546). To Coicaud, international constitutionalism will also depend on the answers to the questions arising out of this paradox. Even though Coicaud names these four challenges to achieve an international constitutionalism, his requests have little in common with the above presented conceptions of constitutionalism. They seem more like a claim to increase the substantive legitimacy of international organizations.

Another, more recent constitutional approach is offered by Herwig and Hüller (Herwig and Hüller 2008a; 2008b). The focus of their normative framework is not only the WTO but the world trade order as a whole. According to them, world trade should be ordered after the fashion of a “divided, democratic constitutionalism” (Herwig and Hüller 2008a, 252). For them, the core category of normative analysis is justice rather than democracy. In line with Cottier and Hertig (Cottier and Hertig 2002), Herwig and Hüller argue for an order divided between political levels, which may be different and possibly complementary; but overall they have to guarantee the “procedural standards of law-making, such as publicity and the duty to give reason” as well as a reliable consideration of fundamental substantial requirements, such as basic freedoms or the securing of basic material needs. According to Herwig and Hüller, such a divided, procedural constitutionalism has to some extent “already crystallized” (Herwig and Hüller 2008a, 249). Nevertheless, improvements could be made on an international level by enhancing the fairness of procedures mainly in favour of poor, small states, and on a national level by expanding the democratic practices to foreign policies – in particular to quasi-constitutional acts. Opponents of the constitutional approach criticize inter alia that constitutional law is inherently limited to the nation state and has the prerequisite of a homogenous society (Cottier and Hertig 2002, 267 with further references; Peters 2006b). Further objections are that using the term “constitution” may cause “over-expectations” insofar as that constitutionalism at a global level could “instantly bestow legitimacy” (Klabbers 2004, 48); and, as most enthusiasm for global constitutionalism comes from Europe, the constitutional approach might be too “holistic and genuinely anti-pluralist” (Peters 2006b, 7).

**Concepts of Procedural Legitimacy**

According to Moravcsik, concepts of procedural legitimacy can be divided into the deliberate and the pluralistic (Moravcsik 2004; Elsig 2007, 81-84).

Pluralist conceptions mainly focus on the accountability of the decision makers (Moravcsik 2004, 340; Keohane and Nye 2001, 282; Slaughter 2005). Deliberate conceptions, on the other hand, emphasize the exchange of arguments in order to convince each other, the exchange of information and mutual learning of the citizens (Habermas 2000; Cohen 1989). “Deliberate democrats” are very sceptical of representative elements. They therefore call for increased participation through improved inclusion of stakeholders and greater transparency in rule making (Elsig 2007). Transparency is also a key element in pluralist conceptions, as the possibility of individuals to decide on the accountability of the decision makers requires a transparent procedure. This part of the review...
Accountability

As mentioned above, pluralist conceptions mainly focus on the accountability of the decision makers (Moravcsik 2004, 340; Keohane and Nye 2001, 282; Slaughter 2005). Systems are democratically legitimate to the extent that active individuals can influence policy outcomes through elections and sanctions. Citizens of member states of multilateral organizations, such as the WTO, are indirectly represented by their diplomats, delegates or other government officials who are accountable to the governments of each respective member state. They act under the instructions of the government, which in democratic countries is directly or indirectly elected by the people. Formally speaking, one could argue that the decision makers in the democratic member states of a multinational organization are accountable and the decisions are therefore legitimate (Krajewski 2001; Keohane and Nye 2001). Increased legitimacy of multilateral organizations would imply that all their members are democratic countries, with democracy in the nation state being a condition for becoming a member of the multilateral organization. Even though this seems farfetched at present, it is at least conceivable to some authors (Gould 2004, 164). In order to still supply a sufficient degree of legitimacy, various authors further argue that the chain of accountability cannot be too long (Krajewski 2001).

This is one reason why Dahl concludes that international organizations cannot be democratically legitimized (Dahl 1999, 32). To him, democracy is “a system of popular control over governmental policies and decisions” (Dahl 1999, 20). He doubts that international organizations and international decision making can be democratically legitimized as the chain of accountability between those governing and those governed is too long. In his view, international organizations are “bureaucratic bargaining systems” that have a “highly attenuated kind of responsiveness” to the governed and are too attenuated to be democratic (Dahl 1999). As popular control is already difficult on a national level, he states that this will be “even harder to solve in international institutions” (Dahl 1999, 30). Similar arguments are put forward by Woods and Narlikar (Woods and Narlikar 2001, 572). According to them, elections are not an adequate form of accountability within nation states. Therefore, representativeness at the international level based on elected governments is even more problematic (Woods and Narlikar 2001, 574). However, they see a possibility to legitimize international organizations and their activities through so-called “horizontal accountability” (Woods and Narlikar 2001, 574; see also O’Donnell 1999). At a national level, horizontal accountability may be carried out by courts or other state agencies (Checks and balances). On an international level, other international organizations or bodies in an organization could carry out this form of accountability (Woods and Narlikar 2001).

Grant, Nye and Keohane consider the classical horizontal accountability “only as one of several ways in which power can be constrained” (Grant and Keohane 2005). According to them, the accountability mechanism can operate in multiple manners, and “accountability is not ensured through elections alone” but is a “multidimensional phenomenon” (Keohane and Nye 2001, 283). Keohane and Nye identify three electoral and three nonelectoral forms of accountability, which to them are equally important. First of all, member states should control the actions of their diplomats or delegates in the international organization, as this would not only strengthen the accountability but also enhance the transparency of decision making. Secondly, the mechanism of domestic accountability should be strengthened. In most countries, this would require a constitutional amendment; and for many industrial countries, except the US, the role of the national parliament in international matters would need to be reconsidered. For decades, national parliaments have not been much interested, or involved, in the formation of international economic law (Shaffer 2005; Krajewski 2001; Bellmann and Gerster 1996; for Switzerland for example see Oesch 2004; for other country reports see Jackson and Sykes 1997). In most cases, national parliaments are still presented with a “take-it-or-leave-it” kind of situation, and there is little scope for any meaningful deliberation. To strengthen domestic accountability, national parliaments should therefore receive more participation rights with regard to foreign matters, as is the case in the United States (Shaffer 2005). According to Keohane and Nye, another form of electoral accountability could be achieved by increased legislative control over policy at the supranational level. With regard to non-electoral dimensions of accountability, they argue that a public space in which people could communicate and expresses their views could enhance the legitimacy of an international organization. Here, NGOs and the media play an important role. Furthermore, accountability could also be achieved through “professional norms and transnational networks”. Accountability here arises “through reasoned criticism and discussion”. Thirdly, they argue that markets also provide non-electoral accountability. According to them, it is not a problem that there are no accountability mechanisms at a multilateral level, but that “they are not joined into a coherent system with mutually reinforcing components” (Keohane and Nye 2001, 285).

Another approach has been brought forward by Slaughter (Slaughter 2005). According to her, accountability of the decision makers at an international level is possible if three conditions are met (Slaughter 2005, 39). First of all, the international policy makers of the states must be accountable to their domestic citizens for “their transgovernmental activities to the same extent that they are accountable for their domestic activities” (Slaughter 2005, 39). As we discussed above, a similar claim has been made by Keohane and Nye. Secondly, Slaughter suggests that the policy makers at an international level should elaborate basic operation codes that take account of the rights and interests of all people (Slaughter 2005, 39). To her, global deliberative equality, legitimate difference, positive comity, checks and balances and subsidiarity could constitute possible global norms. The third condition for accountability of decision makers at a global level is a “disaggregated sovereignty” (Slaughter 2005, 62): the policy makers should be directly subject to the international obligations that currently apply to their nations (Slaughter 2005, 39).
Apart from a greater accountability of the decision makers at a multilateral level, the prime components of procedural legitimacy will remain at the domestic level. This has to do with the fact that a lot of member states are still nondemocratic countries. Unless domestic processes are viewed legitimate, “the regime that rests on those domestic processes will not be viewed as legitimate” (Keohane and Nye 2001, 291). As Cottier states: “Democracy begins at home” (Cottier, forthcoming; see also Bodansky 1999, 617). Members are bound to develop democratic structures, to adjust to globalizing economic structures in their own right and way.9

Enhancing Stakeholder Participation

On the other hand, deliberate conceptions emphasize the exchange of arguments in order to convince each other. They stress the exchange of information and mutual learning of the citizens (Habermas 2000; Cohen 1989). According to Habermas, “democratic will-formation draws its legitimating force (...) 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” (Habermas 1996). For the proponents of the deliberate conception, mere opportunities for participation are not sufficient. Political institutions have to be designed “to encourage and promote meaningful and effective participation” (Moravcsik 2004, 342).

Various authors as well as governments see an inter-parliamentary assembly in the WTO as a means to improve stakeholder participation and thereby to increase the organization’s legitimacy (Shaffer 2005; Mann 2004; see also Krajewski 2001; Bellmann and Gerster 1996). This idea has also been discussed inter alia by the Inter Parliamentary Union (Mann 2004) and the International Law Commission (Petersmann 2001a). In their opinion, an inter-parliamentary dimension in the WTO could improve the knowledge of national parliamentarians of WTO developments, and it could also monitor the WTO. Furthermore, it could foster deliberation among parliamentarians all over the world. This in turn could help national parliaments to decide with a more global viewpoint when it comes to international affairs. To Esty, it would be sufficient if national parliamentarians would hold “joint oversight hearings on the WTO’s performance” (Esty 2002). Critics of an inter-parliamentary dimension claim that it would only “provide a facade of WTO legitimacy and privilege an illegitimate WTO process” (Shaffer 2005). Among the critics there are many representatives of developing countries who fear that an inter-parliamentary dimension would further worsen the WTO negotiations asymmetries. Others fear that it could diminish the interest in enhancing the internal transparency of the WTO (Shaffer 2005). For Shaffer, “the creation of a WTO parliamentary body should [therefore] be judged in terms of its impact on the participation of less powerful stakeholders and in particular of developing countries and their constituents, relative to the institutional alternatives” (Shaffer 2005, 382).

Ambitious authors even call for a world parliament (Held 2004; Höffe 1999). To others, this is illusionary because the international community lacks a demos and is therefore not able to express a common will and to communicate on common values (Hilf 2005, 418).

For Scholte and others, civil society associations could enhance the democratic accountability of international organizations such as the WTO (Scholte 2004; see also e.g. Nanz and Steffek 2004). But, as he himself admits, it is not “an easy answer to the global accountability problem” as the enhancement of democratic accountability through civil society “does not occur automatically”, and it cannot be expected “to secure accountability in global governance on its own, without concurrent interventions from parliaments, judiciaries, official expert evaluations and the mass media” (Scholte 2004, 233).

Others argue that international organizations should be remodelled by increasing the influence of NGOs (see e.g. Barfield 2001, 101-110; Charnovitz 2006; Keohane and Nye 2001; Krajewski 2001; Spiro 2002; Payne and Samhat 2004; for more on this see also Bugdahn 2006, 145).10 According to them, NGOs should get more access to WTO documents, they should be granted an observer status and be entitled to present amicus curiae briefs in the dispute settlement. Generally, their participation in WTO activities such as committee meetings should be enlarged. In deliberate conceptions, political parties, interest groups and social movements play an important role as they improve the common discourse and engage citizens in political education (Moravcsik 2004, 342). In Krajewski’s opinion, NGOs “can be seen as representing people on a functional basis” as they represent “societal concerns” at a global level and not only limited to a territory (the so called “stakeholder” model of representation, Krajewski 2001, 185). They therefore enable international organizations to hear views beyond governmental ones. With better access to documents and meetings, they could furthermore improve the transparency of decision making of international organizations by reminding government delegates that they are being watched and by informing the general public, thereby enhancing public understanding. In this way, they are seen as a linkage machine between the broad public and international organizations. Apart from the possibility that NGOs may enhance the procedural legitimacy of the WTO, they could, according to Charnovitz, particularly improve the output of the organization (Charnovitz 2004, 443).

Other authors as well as many developing countries are sceptical as to the ability of NGOs to increase the democratic legitimacy of the WTO. Rugman, for example, states that NGOs “should lobby their home-government” and not at a multilateral level: if the WTO talks directly to NGOs “it cannot begin to function as a facilitator for governments to consider issues of deep integration” (Rugman 2001, 19-20). Furthermore, critics claim that NGOs are not democratically legitimate (Singh, forthcoming; see also Singh 2008, 355).

10 So far, national parliaments have no official role in the WTO, but since 1999 they have begun to work together to influence the decision making in the WTO. See e.g. Mann 2004.
11 For Singh, the marginal role of non-state actors in the WTO is even “a major part of the democratic legitimacy deficit” (Singh 2008, 355).
legitimized themselves. Keohane and Nye hold a moderate view by stating that the problems of legitimacy of the WTO cannot be solved by simply giving NGOs more participation rights. Nonetheless, “some form of NGO representation (…) could help to maintain their legitimacy” (Keohane and Nye 2001, 289-290).

For some authors, the WTO’s voting system is also possibly a barrier to legitimacy, with most decision making in the WTO based on consensus (Cottier, Oesch, and Fischer 2005, 100-107; Van den Bossche 2005, 141-164). Although there are several rules that allow it, voting seldom takes place in practice (Van den Bossche 2005, 149-150). For Cottier and Takenoshita this has to do with the fact that the present voting system does not take into account the economic interests and the real powers within the multilateral trading system (Cottier and Takenoshita 2003). They therefore propose to give up consensus and replace it with a weighted voting system (Cottier and Takenoshita 2003). Others argue that by giving each member a right to veto, consensus is consistent with the principle of equal sovereignty of states and therefore enhances the democratic legitimacy of the WTO’s decision making (Van den Bossche 2005, 148-149). Furthermore, decisions based on consensus tend to enjoy broad support (Ehlermann and Ehring 2005, 513) and may therefore enhance the empirical legitimacy of the WTO – which itself argues that consensus is more democratic than majority voting. This argument has also been brought forward by Zürn who states that “consensus-oriented negotiation systems will be an important element of any form of democracy beyond the nation-state” (Zürn 2000).

Overall, seen from a deliberative perspective, the WTO lacks democratic legitimacy as negotiations are still “dominated by bargaining instead of arguing” (Krajewski 2001, 177).

Transparency

Proposals have been put forward to enhance the transparency of international organizations, particularly in their activities and procedures (Held 2004, 112; Payne and Samhat 2004). Democratic control as well as deliberation require information about what governments are doing. On the matter of internal transparency, various authors criticize that the decision making of the WTO is not transparent enough. This has to do with the fact that there are still a lot of informal negotiations with participation restricted to certain individual members or groups of members (so-called “green-room negotiations”) (Payne and Samhat 2004, 104). Of course, green-room decisions are neither final nor legally binding. Furthermore, consultations behind closed doors also take place in national democracies, for example between parties or a party and lobby organizations. But members who were excluded from negotiating in the green room are often imposed an agenda as a fait accompli. This decision making behind closed door conflicts with the main objective of the deliberative conceptions, and it has been criticized not only by scientists but primarily by developing countries. Deliberation requires an open, transparent and participatory discourse among equal subjects (Krajewski 2001). This is often not the case in the WTO, where informal negotiations behind closed doors take place. Krajewski therefore recommends that these informal meetings should receive a clear and transparent rule-based structure (Krajewski 2001, 169-170; see also Singh 2008, 354). In order to enhance the legitimacy of WTO law, rules should be elaborated on how and when to use small group negotiations (Krajewski 2001, 169-170). As a correlate to the green-room meetings, Blackhurst and Hartridge call for a “WTO consultative board” (Blackhurst and Hartridge 2004), which would have to become a formal part of the WTO. As with green-room meetings, the decisions of this consultative board would not be legally binding, but in contrast to the green-room meetings, membership of the consultative board would be possible for every country as the members would have a seat only on a rotating basis (Blackhurst and Hartridge 2004, 708).

Another obstacle to internal transparency is the “institutional capacity” of developing countries (Payne and Samhat 2004, 106; Bellmann and Gerster 1996, 58-60). Even if the voices of developing countries would have the same power as voices of industrial countries in a formal sense, developing countries often lack the possibility and the knowledge to effectively participate in negotiations. According to Jacobs, to influence policy options and to effectively participate in the WTO three requirements have to be fulfilled: first, it is necessary to have a seat at the negotiation table; second, the representatives must know what their national interests are; and third, they must have “the capacity to formulate highly technical policy options to defend those interests” (see Al-Islam Alqadhafi 2007, 11, citing; Jacobs 2002; see also Toye 2003). In his view, many developing countries cannot meet these requirements due to a lack of resources (Jacobs 2002, 14). While few countries do not even have representatives in Geneva or Berne, the sizes of the existing delegations are very different (Payne and Samhat 2004). Delegations of industrialized countries are often composed of more than twenty representatives and national experts. On the other hand, some countries can only afford one representative (Bellmann and Gerster 1996). Furthermore, the technical knowledge of representatives from some developing countries is mostly minimal, especially with regard to their legal capacity (Payne and Samhat 2004, 107; Al-Islam Alqadhafi 2007, 12; Toye 2003, 120). To Held, the capacity of developing countries to participate more effectively in the WTO is therefore an important step (Held 2004, 61). Furthermore, it is important that they have the institutional and human capacity to understand and implement the agreements in their countries. To mitigate these differences, the WTO offers technical assistance and training programmes to developing countries. Moreover, the Aid for Trade Initiative helps developing countries to build supply-side capacity in order to expand trade, and the Advisory Centre on WTO Law provides assistance and training programmes to developing countries.

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12 Consensus means that “no Member, present at the meeting when the decision is taken, formally objects to the proposed decision”. See Footnote 1 to the WTO Agreement.
13 See WTO, 10 Misunderstandings, Point 10: the WTO is undemocratic, available at http://www.wto.org/english/tratop_e/whatis_e/10mis_e/10m00_e.htm.
15 The Aid for Trade Initiative was launched at the Hong Kong Ministerial Meeting Conference in December 2005. For more on the Aid for Trade Initiative see World Trade Report 2008, 150 and http://www.wto.org/english/tratop_e/devel_e/4tr_e/aid4trade_e.htm
subsidized legal advice, support in dispute settlement proceedings and training in WTO Law to developing and least-developed countries. Various authors call for a greater effort in providing technical assistance to developing countries (see e.g. Bellmann and Gerster 1996). Bellmann and Gerster furthermore call for a “universal house” where any country could have facilities for a permanent mission (Bellmann and Gerster 1996, 60).

Various authors also advocate more transparency in the dispute-settlement procedure (Sandford 2007; Barfield 2001; see also Arend 2008), which has been an issue of concern in international trade negotiation for some time. The proceedings of the panels and the Appellate Body are currently closed to the public and to other WTO members. This has to do with the fact that under the old GATT, the dispute-settlement system was a diplomatic model based on mediation to settle a dispute peacefully between governments. If a party did not agree with the establishment of a panel or with the outcome of a panel’s deliberation, it could block the procedure. The system, therefore, was more a diplomatic than a legal one (Cottier and Oesch 2001). The diplomatic nature also had impacts on the transparency of the disputes. According to Weiler, the process “tended to treat them as discrete eruptions between members requiring ‘settlement’” (Weiler 2001). The panel’s proceedings were seen as a “continuation of diplomacy by other means” (Weiler 2001). Rules on transparency therefore were not only seen as unnecessary but mainly as impedimental for a peaceful settlement of a dispute between governments. The Uruguay round brought some changes in the direction of a more legal procedure. Thus, today it is not possible any more for a party to block the establishment of a panel or the adoption of an Appellate Body report (Cottier and Oesch 2001). But the rules on transparency have not changed much. To this day, the only possibility to gain insight into a proceeding for a WTO member is to participate in a proceeding as a third party. However, to a third party, the procedural laws are constrained. In principle, they are invited only to a session of the first substantive meeting of the panel.

For Weiler, once a panel is established there is no more space for a “secret” dispute settlement, as was the case under the old GATT (Weiler 2001). Among others, Barfield therefore recommends that all documents (governmental documents and amicus briefs that the panels or the Appellate Body accept) should be made public at the time they are submitted (Barfield 2001). The Appellate Body, for example, has ruled in the “US-Shrimp case that panels and the Appellate Body may consider amicus curiae briefs. In its Carbon Steel decision in May 2000, the Appellate Body ruled that it had the legal authority to accept and consider an NGO brief in an appeal in which “we find it pertinent and useful to do so”. Nonetheless, the handling of amicus curiae briefs, as well as their impact on the legitimacy of the dispute-settlement process, are still not clear (among others Marceau and Stilwell 2001; Mavroidis 2001; Prévost 2000; Weiler 2001). A further step in the direction of more transparency was made in 2005 in the dispute EU-Hormones before the panel, where the panel proceedings were opened for public viewing via a closed-circuit television broadcast at WTO headquarters in Geneva. In the Banana dispute in 2007 and in the Zeroing dispute in 2008, the panel has agreed at the request of the

Nevertheless, there were some improvements in the transparency of the dispute-settlement process. The Appellate Body, for example, has ruled in the US-Shrimp case that panels and the Appellate Body may consider amicus curiae briefs. In its Carbon Steel decision in May 2000, the Appellate Body ruled that it had the legal authority to accept and consider an NGO brief in an appeal in which “we find it pertinent and useful to do so”. Nonetheless, the handling of amicus curiae briefs, as well as their impact on the legitimacy of the dispute-settlement process, are still not clear (among others Marceau and Stilwell 2001; Mavroidis 2001; Prévost 2000; Weiler 2001). A further step in the direction of more transparency was made in 2005 in the dispute EU-Hormones before the panel, where the panel proceedings were opened for public viewing via a closed-circuit television broadcast at WTO headquarters in Geneva. In the Banana dispute in 2007 and in the Zeroing dispute in 2008, the panel has agreed at the request of the

19 For a good overview on the pros and cons of direct private participation in the WTO dispute-settlement procedure see Schleyer 1997 and Barfield 2001.
20 See WTO Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998. Amicus curiae briefs are unsolicited documents that are submitted by sources other than the parties and third parties to a dispute without having been requested by a panel or the Appellate Body.
22 Disputes United States – Continued Suspension of Obligations in the EC - Hormones Dispute, WT/DS320 and Canada - Continued Suspension of Obligations in the EC - Hormones Dispute, WT/DS321.
24 Dispute European Communities – Regime for importation, sale, and distribution of bananas: Recourse to Article 21.5 of the GATT by the United States, WT/DS27.
parties to start its meetings with the parties with a session open to public viewing at the WTO headquarters, also via a closed-circuit television broadcast. Furthermore, the oral hearings in the appeals of EU-Hormones on 28-29 July 2008 were also open to public observation. This was the first time that the Appellate Body opened its hearings for public observation.

With regard to external transparency and access to documents, the WTO has made some remarkable progress over the last years particularly through its website (Charnovitz 2005). In 2003, it has been judged as one of the best websites of international organizations (One World Trust 2003). This enhanced transparency through information disclosure on the website is mainly based on a decision adopted by the General Council in May 2002 on the circulation and derestriction of official WTO documents, stating that all official WTO documents have to be made public. In its decision, the General Council distinguishes between not-restricted and restricted documents. All WTO documents that are not restricted have to be made available on the WTO website once they have been translated into all three official languages of the organization. Documents can be restricted if a member submits a document as restricted. Such documents will either be derestricted after they are first considered by the relevant WTO body, or 60 days after circulation – whichever is earlier. Documents produced by the Secretariat can be restricted if the body in question so decides, and in such cases have to be derestricted 60 days after circulation unless a member government requests an additional 30 day restriction period. After this period has lapsed, also those documents have to be derestricted. All minutes of WTO meetings are at first restricted but, with very few exceptions, have to be derestricted after 45 days.

Nevertheless, various authors called for an enhancement of the transparency of the WTO. Charnovitz, for example, claims that the written submissions of the member states to the panels should be posted on the WTO website. Furthermore, he claims that observers should be permitted to watch proceedings of the WTO General Council and the Dispute Settlement Body (Charnovitz 2005, 441).

Finally, it is also important to look at the transparency policies in different member states of the WTO. As Bellmann and Gerster show, there are still great contrasts between these


(Bellmann and Gerster 1996, 44-46). To enhance the democratic legitimacy of the WTO, it is not only important that the WTO itself become more transparent but also that the transparency polices, at least with regards to international trade matters, be improved in its member states (similar Bellmann and Gerster 1996, 46).

**Substantive Legitimacy**

As stated above, the legitimacy of governance is not determined solely by the procedures used on the input side. The substantive outputs of an international organization are at least likewise important. It has been argued by some authors that the legitimacy of the WTO derives almost entirely from the output, “its perceived efficacy and value as part of the international economic management structure” (Esty 2002, 10). It would go beyond this review to reassess this statement. Nevertheless, we may explain why there are more contributions to enhancing the procedural and legal legitimacy of the WTO than the substantive legitimacy.

Applying Moravcsik’s distinction into four main traditions of democratic legitimacy of international organizations, the libertarian and the social democratic are output conceptions (Moravcsik 2004; see also Elsig 2007, 84).

**Libertarian Conceptions**

According to libertarian conceptions, governance is legitimate if it provides an effective protection of individual liberties against the “potentially arbitrary, corrupt and tyrannical power” of government (Moravcsik 2004, 215). The WTO is based on the neoclassical economic theory stating that trade liberalization should increase global economic efficiency and lead to increases in aggregate production and consumption. The WTO therefore protects rights such as the right to trade, the right to market access, the protection of properties and the protection of civil liberties (Elsig 2007; Barfield 2001). The WTO thereafter is legitimate insofar as it can effectively protect these specific rights by rendering production and exchange more efficient (Petersmann 1997, 398).

Ever since GATT came into force in 1947, tariffs on industrial goods have been reduced from an average of 40% to some 4% in eight trade rounds (Cottier, Oesch, and Fischer 2005, 74). Non-tariff barriers have been addressed and reduced, contributing to ever increasing levels of world trade. Principles such as non-discrimination, national treatment and reciprocity provide for an effective and comprehensive protection of the above mentioned specific rights. Even Keohane and Nye agree that the WTO’s dedication to trade liberalization may enhance its legitimacy (Keohane and Nye 2001, 286).

Nevertheless, the proponents of the libertarian conception think that more can be done with further liberalization (Frankel 2000). According to them, abolishing all trade barriers could boost global income again by some trillions and lift millions of people out of poverty. For Frankel, for example, in order to enhance the efficiency of the WTO there should be a liberalization of at least three sectors: textiles and other
manufactures, the service sector and the agriculture sector (Frankel 2000, 97). In the manufacturing sector, the WTO should work towards further tariff and quota reductions on manufactured products (see also McCulloch, Winters, and Cirera 2001, 253-274). Furthermore, efforts should be made to reduce trade barriers in the agriculture sector (Frankel 2000; see also e.g. Stiglitz 2006). From the perspective of the poor, the main causes of imbalance are to be found in the agricultural policies of industrialized countries, in particular the US, the EU, Japan and other members of the Group of Ten (Tokarick 2002; Frankel 2000, with further references; World Bank 2002). Therefore, many authors call for a liberalization of agricultural trade as this has “the potential for considerable poverty alleviation” (McCulloch, Winters, and Cirera 2001, 12, 171-207). Claims to liberalize the agriculture sector are furthermore not only made by libertarian but also by proponents of the social democratic conception. For them, the outcome of trade negotiations has generally not been favourable to developing countries (Brown and Stern 2006; Kapstein 2006, 84). So far the negotiations have often been dominated by the interests of industrialized nations. For many authors, this led to a very unbalanced outcome. The NGO Oxfam, for example, states that “powerful private interests have dominated, taking precedence over the interests of poor people”. Among others, Held therefore argues that further liberalization in the agriculture or manufactures sectors not only enhances the efficiency of the WTO but mainly would level the playing field for developing countries (Held 2004, 59; see also Kapstein 2006, 84). Finally, Frankel calls for increased liberalization in the service sector. In his view, the greatest efficiency gains might “to be had by liberalizing transportation services” (Frankel 2000, 98).

To control the government and to protect individual liberties, some libertarians furthermore call for direct effect of international obligations (Cottier 2002; Petersmann 1991, 2001a). Under the principle of direct effect, a nation state agrees that its domestic laws and regulations will be bound by obligation undertaken in international agreements and treaties. Direct effect gives private citizens the right to base their claims directly on a specific norm of an agreement or a treaty before a national court. For the proponents of a direct effect of international law, specific obligations and guarantees deriving from international treaties should be protected by domestic laws and judged as individual rights (Cottier 2002).

On the other hand, some authors argue that the legitimacy of international law is sufficient “as long as it remains not directly applicable” (Krajewski 2001, 170). For Jackson, allowing direct effect would cause domestic imbalances in the institutional balance of government (Jackson 1992). Furthermore, he fears that the direct effect “may inhibit national authorities from entering into international agreements that would otherwise be desirable” (Jackson 1992, 326). One main argument against direct effect is also that the different interpretation of the international obligations through different national courts could compromise a uniform interpretation and for this reason could jeopardize the assertiveness and the effectiveness of international obligations (Croley and Jackson 1996). Trachtman furthermore argues that the question of direct effect is a political question and therefore has to be answered in political terms and not by scholars or judges (Trachtman 1999, 677). Finally, he argues that as long as the WTO has no more direct democratic participation possibilities, allowing direct effect “raises as many issues as it resolves” (Trachtman 1999, 678).

As noted above, Ragosta and others even propose that real parties having interest be given the right to sue in the dispute-settlement procedure (Ragosta 2000). But this may open the floodgates and lead to an enormous rise of claims, and may therefore reduce the dispute-settlement procedure’s effectiveness.

For Petersmann, protecting the “economic rights” as mentioned above is not enough. According to him, governance in the multilateral realm, especially the WTO, requires a “human rights approach” to become legitimate (Petersmann 2001a, 96; see also Petersmann 2001b). Just as domestic governments, “international organizations derive their value from enhancing human rights” (Petersmann 2001a, 97). For him, the WTO could enhance its legitimacy by “explicitly recognizing the existing human rights obligations of all WTO Members as relevant ‘legal context’ for the interpretation and application of WTO rules” (Petersmann 2005, 359). Traditional human rights should have priority over the right to free trade (Petersmann 2001a).

Finally, some authors argue that bilateral trade agreements are a threat to the substantive legitimacy of the WTO. For Stiglitz, for example, such bilateral trade agreements “undermine the movement toward a multilateral free trade regime” (Stiglitz 2006, 96). Therefore he recommends an independent international panel that could judge “whether a bilateral agreement leads to more trade diversion than trade creation” (Stiglitz 2006, 97). To others, bilateral trade agreements are so far no threat to the WTO, but they could have negative economic implications for developing countries (Abbott 2007).

**Social-Democratic Conceptions**

The social democratic model of legitimate governance focuses on offsetting power asymmetries and correcting imbalances (Elsig 2007, 84). As Moravcsik states, “while libertarian prize liberty over equality, social democrats espouse the opposite” (Moravcsik 2004, 217). According to proponents of social democratic conceptions, rules are legitimate if they bring about equality and social justice. For them, the liberalization of trade has “cemented inequalities among states” (Woods 2003, 466). The rules of the WTO, mainly aimed at establishing equal conditions of competition and equal opportunities, call into question the extent to which the concept offers fairness and justice, given substantial differences in terms of wealth, development and power among states and members of the WTO. For Pogge, for example, the WTO lacks legitimacy because it fails to reduce severe global poverty (see e.g. Pogge 2005, 2008). The democratic deficit of the WTO therefore lies in its inability to bring about equality and social justice.

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29 In 2006, financial support for farmers in the 36 OECD nations reached $268 billion, around 27% of agricultural income. The EU spent $138 billion on its farmers, the US $30 billion. See for example: ’Agrarsubventionen mit dem Zisternenwagen’, *Neue Zürcher Zeitung* (24 October, 2007), 25.
Legitimacy to him refers to the way a system treats its poorest members (Pogge 2005, 717). Even though the poor may benefit from the present WTO rules on trade, they are, according to Pogge, still being harmed by the present rules in that they are more deprived of basic goods than they would be under a different set of rules (Pogge 2008, 2005, 2001). For Stiglitz, the international economic institutions failed to ensure “that the power of the global market economy leads to the improvement of lives of most of the people of the world, not just the richest in the richest countries” (Stiglitz 2006, 276). According to him, there must be an improvement in thinking and acting more globally (Stiglitz 2006).

The WTO takes factual differences into account in principles and rules relating to preferences for developing countries and the concept of special and differential treatment. For proponents of the social democratic model, however, this is not enough. Held, for example, calls for the adoption of a legally binding minimum level of overseas development assistance for all developed countries. They should be called on “to set a clear timetable for reaching the UN’s 0.7 per cent of GNP target for overseas aid” (Held 2004, 62). Furthermore, more aid should be spent on the poorest nations (Held 2004, 62). Garcia also argues that the actual special and differential treatment provisions in the existing WTO agreements are insufficient, especially with regard to the question of additional time for implementation and compliance (Garcia 2000, 1040-1045). According to Garcia, in order to establish just trade relationships between developed and developing countries, developed countries should attach more importance to the demands of developing countries (Garcia 2000, 1044-1045). Brown and Stern go even farther by stating that “multilateral trade rules should make adequate allowance for the use by countries of protectionist measures that are defensible as developmental policies” (Brown and Stern 2006, 17). For them, protectionist measures might help to foster the development of emerging countries. According to Kapstein, the principle of strict reciprocity should be replaced by a “principle of diffuse reciprocity” (Kapstein 2006, 31, 37-38). In his view, in a world of unequal state actors, strict reciprocity in the sense of equivalent exchange can lead to unfair results (Kapstein 2006, 31). This could mean that “countries exchange concessions on the basis of their relative economic size”. Unlike special and differential treatment, the principle of diffuse reciprocity would allow the incorporation of “developing-world concerns while still holding them responsible for meeting certain trade liberalization measures” (Kapstein 2006, 187). For Stiglitz, rich countries “should simply open up their markets to poorer ones, without reciprocity and without economic or political conditionality” (Stiglitz 2006, 83). Middle-income countries should open up their markets to least developed countries, and it should be possible for them to “extend preferences to one another without extending them to the rich countries” (Stiglitz 2006, 83).

Social democratic conceptions also call for common welfare and international distributive justice. Beitz, for example, argues for a global difference principle (“resource redistribution principle”) that would give “each society a fair chance to develop just political institutions and an economy capable of satisfying its members” (Beitz 1999, 141; see also Barry 1973, 128-133). Pogge also argues in favour of a difference principle at the global level (Pogge 2001, 16). Beitz and Pogge base their argument on the difference principle developed by Rawls for the domestic case (Rawls 1971/1999). Rawls himself rejects an extension of his principle to a global level, mainly because he denies that the whole world constitutes a single co-operative partnership in the required sense (Rawls 2002; see also Bock 2008, 99-125 and Nagel 2005, 137). According to him, however, there is a duty to assist burdened societies (Rawls 2002). A highly controversial debate arose with regard to intellectual property rights, more precisely with regard to the effects of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). In fact, as Cottier states, most of the rights, in particular patent rights, “are primarily of interest to industrialized countries” (Cottier 2005). Nevertheless, he argues that a “proper application of all its provisions, including those relating to social and developmental goals can serve the long-term interests of developing countries in fostering intellectual property protection” (Cottier 2005). The most prominent and emotional conflict was the one over AIDS drugs in Africa (Kapstein 2006, 71-79). Although the TRIPs regime was modified during the millennium Doha Development Round to cushion its impact on the poorest countries,22 for Birsall, Rodrik and Subramanian, “TRIPS will make the prices of essential medicines significantly greater, and this at a time when poor countries are being ravaged by one of the worst health epidemics ever known -- HIV/AIDS” (Birdsall, Rodrik, and Subramanian 2005). For Held it is therefore necessary that the TRIPs agreement be reformed if not abolished (Held 2004, 60). In his opinion, there should be at least “an end to the universal application of the WTO intellectual property blueprint, with developing countries enjoying the right to maintain short-term and more flexible systems of intellectual property protection” (Held 2004, 60). Furthermore, he argues that there must be “a clear commitment to put public health priorities before the claims of patent holders” and that patent protection for genetic resources for food and agriculture should be prohibited in conjunction with stronger rights for developing countries “to develop more appropriate forms of plan-related protection, and protection of farmers’ rights to save, sell and exchange seeds” (Held 2004, 60). Finally, according to Held, there should be a removal of the option to enforce TRIPs by imposing trade sanctions (Held 2004, 60).

Conceptual Frameworks for Legitimacy on a Multilateral Level

Most contributions to the question of the WTO’s legitimacy address specific legitimacy problems, such as transparency, stakeholder participation, accountability or output. There are

31 Herwig and Hüller classify this duty to assist as a “weak[er] (natural) duty of international emergency aid” (Herwig and Hüller 2008, 239).


30 In multilateral trade rounds, this principle is often called “relaxed reciprocity” (Kapstein 2006, 31).
few overall conceptual frameworks for democratic legitimacy at the WTO (see also Herwig and Hülser 2008b, 124). One such framework is offered by Zweifel (Zweifel 2006). Based on delegation and agency theories of democracy, Zweifel elaborates an analytical framework with seven dimensions to evaluate multilateral legitimacy. According to him, international organizations have to be analyzed under the aspects of appointment, participation, transparency, reason-giving, overrule, monitoring and independence (Zweifel 2006, 18-25). Under the first aspect, the aspect of appointment, an elaboration has to be made on how key officials are appointed or elected, on what the structure of the agency’s governance in question is and on how its voting procedure works. Furthermore, one has to analyze who can become a member of that organization and what conditions have to be met. Finally, another important factor that needs to be investigated is funding: who gives more money to the institution and what are the demands of those that contribute more. In the participation dimension, one has to determine the possibilities for public participation; while under the aspect of transparency an investigation has to be made on the access to information. The fourth factor is reason-giving, and for Zweifel the decision makers have to give reasons on why they took a decision or not, which should be published together with the decision made. Two further important aspects that Zweifel proposes are the following: can the decisions be overruled by principals or judges? Is there a monitoring system “to keep moral hazard problems in check”? Finally, there should be an elaboration on how independent from political processes an institution is. For Zweifel, an eighth dimension elaborating the output of an institution is not necessary as there is a direct link between input and output legitimacy. His premise is that the greater the input accountability the better its outputs. Translating this to the WTO, Zweifel comes to the conclusion that – compared to the IMF and the World Bank – the WTO is the second most democratic of the three institutions.

Overall, Zweifel provides an interesting approach to analyze the democratic legitimacy of international organizations. However, the explanations as to why he advocates exactly those seven dimensions are scanty. One might, for example, ask why the dimension of reason-giving is required in addition to the dimension of transparency. Is reason-giving not an element of transparency? Similar questions can be brought forward with regard to overruling and monitoring. Is the capacity to overrule not an element of monitoring? If not, why? Furthermore, it is often not clear why some elements belong to a particular dimension. Why, for example, is funding an aspect of appointment? What does decentralization have to do with participation? A major point of criticism of Zweifel’s framework is that he denies the inclusion of the outcome dimension. In his opinion, “output accountability is not a separate dimension for our purposes” (Zweifel 2006, 25). First of all, he is wrong in thinking that his seven indicators belong to the input-oriented legitimacy defined by Scharpf. For Scharpf, those seven indicators would belong to the output-oriented legitimacy (see above chapter II.B.). Furthermore, it is questionable whether one can measure the democratic legitimacy of an organization without analyzing its outcome and its efficiency. The arguments of Zweifel on why one could omit an eighth dimension measuring the outcome of an institution are not convincing. Of course, in an ideal situation a government is by and for the people. But democratic procedures do not guarantee an output that effectively promotes the common welfare of the constituency in question (Scharpf 1999a, 6) and achieves the goals citizens collectively care about (Scharpf 1997, 19). A satisfying output is not always based on democratic procedures. Last but not least, the application of his framework to the WTO is disappointing, mainly because it remains very cursory, often focussing only on the most striking elements (for a critical review on the framework see also Bernstein 2006).

A starting point for a conceptual, normative framework for the democratic legitimacy of the WTO could be the study of Cheneval (Cheneval 2008).33 As mentioned above, his framework of “ideal” multilateral democracy is based on the assumption that all parties to the multilateral order are to be liberal democratic peoples. As democracy is not a condition to become a WTO member, further analysis would have to investigate which part of this ideal theory ought to be extended to non-ideal multilateral integration.

Conclusions

This review showed that the democratic legitimacy of the WTO has many facets, and especially with regard to substantive legitimacy it is strongly dependent upon underlying political and economic philosophies. In recent years, there has been considerable research on this topic. However, most of the studies were only directed to specific features of legitimacy and democracy, such as transparency or equitable state representation, leaving aside questions of political justice in general, and of the nature of the polity of multilateral organizations (Keohane and Nye 2001; Herwig an Hülser 2008a; 2008b). Furthermore, they often evaluate international organizations in the gradualist paradigm and by comparing them to their own domestic tradition (Stein 2001; Cheneval 2008) or to national conception of democracy (Moravcsik 2004). In addition, most research was carried out within a specific scientific discipline. But, as this literature review showed, questions on democratically legitimate governance in the multilateral realm are very complex and differ from traditional conceptions of political legitimacy. First of all, it is still not clear if international organizations such as the WTO are in need of a democratic legitimacy or if their legitimacy can be established on other grounds such as efficiency. But as international integration advances and new actors appear with growing influence on the behavior of states, it is and will be necessary to discuss questions on stakeholder participation, accountability and other core elements of democracy. Protests and opposition in national parliaments against international organization emphasize this necessity to discuss democratic legitimacy also on a multilateral level.

Therefore, future investigations will have to analyze more thoroughly the meaning of democracy at a multilateral level. On the one hand, the focus of the whole debate needs to be widened. A simple gradualist evaluation has to be overcome since questions on legitimacy of multilateral integration have to be distinguished from national conceptions on legitimacy. The whole debate needs dissociation from traditional conceptions of political legitimacy. Furthermore, it will be necessary to extend the research from specific features of legitimacy to a broader conception of democratic legitimacy including not only an evaluation of the legitimacy of an international organization as such, but also an evaluation of the interaction between an international organization, the nation state and the people. Interdisciplinary research could contribute to such a greater focus. On the other hand, the focus will have to be narrowed as international organizations cannot easily be compared with each other. On the contrary, the degree of legitimacy as well as the conditions for legitimacy relate to a great extent to the goals, the functions and the actual influence of an organization. Legitimacy on a multilateral level therefore differs from organization to organization and depends on its level of integration. Furthermore, one will have to distinguish organizations with a membership limited to democratic countries and others. The conceptions mentioned in this review provide a basis for advanced studies in this field.

References


