

# Reforming The World Trading System

*Legitimacy, Efficiency, and  
Democratic Governance*

Edited by

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## General Editor's Preface

The Oxford University Press series of books on International Economic Law is once again honoured to present a distinguished work in the general subject-matter indicated. The goal of this OUP series is to present works that probe deeply problems inherent in the 'globalized' and 'interdependent' world in which we now live. As General Editor, I am delighted to introduce the latest volume in the International Economic Law Series, a volume of essays about reforming the world trading system, resulting from three exceedingly interesting international conferences organized at the European University Institute in Florence, under the direction of Professor Ernst-Ulrich Petersmann. This book is a second book in this OUP series deriving from the interesting activity of the European University Institute in relation to transatlantic and international law institutions. The previous book, *Trans-Atlantic Economic Disputes*, also resulting from a series of conferences, was published in 2003.

This book takes a somewhat different approach, examining some of the defects and needs for reform in the current world trading system, which focuses on the World Trade Organization (WTO). The subtitle of the book—*Legitimacy, Efficiency, and Democratic Governance*—is very descriptive of the intent of the author and director, Professor Petersmann, and his view of the endeavour. An examination of the book reveals that it is one of the most thorough and probing scholarly works on the subject, based on scholarship from major practitioners and officials that have been deeply engaged in WTO negotiating and other activity. The book could not be more timely, since the subject-matter is under intense discussion, both in international institutions and in academia. Indeed, some of this discussion in the WTO context has resulted in the appointment by the WTO Director-General of a 'Consultative Board', which has been charged with reporting to the Director-General, and through him, to the Membership, about important institutional problems of the WTO, and what might be some of the options for reform.

This book probes virtually all of the important reform needs, including substantive subjects (e.g. agriculture and services) of international trade norm directions of the Doha Round of negotiation which is currently ongoing. This volume also examines some important institutional questions, such as the 'political legitimacy' of the WTO system, with references to subjects such as parliamentary oversight, transparency, and decision-making procedures (including consensus norms). In addition, this volume looks particularly at the degree to which the system protects consumer welfare, and how that goal of the system could be evaluated.

## *The WTO and Cosmopolitics*

STEVE CHARNOVITZ<sup>1</sup>

In early 2001, European Commissioner for Trade Pascal Lamy gave a noted lecture at the London School of Economics entitled, 'Harnessing Globalization: Do We Need Cosmopolitics?'<sup>2</sup> Lamy explained that better global governance requires a system which provides for interconnections between governments, markets, and civil society. He further suggested that non-governmental organizations (NGOs) and civil society can contribute to legitimization by fulfilling a demand for new social intermediaries which is not provided elsewhere. Reflecting on the globalization debate, pre-September 11, Lamy opines that the term 'governance' connotes too much control, and instead offers the term 'cosmopolitics'. With reference to the short-term challenges for the World Trade Organization (WTO), he points to the idea of pulling on cosmopolitical constituencies for support.

Lamy's lecture inspired new thinking about the role of cosmopolitics generally and in the WTO. In the article 'WTO Cosmopolitics', I sought to build on Lamy's speech by tracing the history of the cosmopolitan idea in international law, by identifying the eight ways in which cosmopolitics is manifested, and by advocating a thicker cosmopolitics in the WTO in order to make that body more effective in liberalizing trade.<sup>3</sup> What follows in this report are my own views, and should not be attributed to Commissioner Lamy.

<sup>1</sup> Thanks to H. E. Ambassador Julio A. Lacarte for being the commentator on this paper, and to Merit Janow for helpful suggestions which predate her appointment to the Appellate Body.

<sup>2</sup> Online at <http://www.lse.ac.uk/collections/globalDimensions/lectures/harnessingGlobalisationDoWeNeedCosmopolitics/transcript.htm>.

<sup>3</sup> S. Charnovitz, 'WTO Cosmopolitics' in 34 *New York University Journal of International Law and Politics* (2002) at 299, online at <http://www.nyu.edu/pubs/jilp/main/issues/34/h.html>. One way in which cosmopolitics is practiced is issue alliances among governments. See E. Taylor, 'Brazil, India, South Africa Join to Foster Trade, Possible WTO Bargaining Positions' in *BNA Daily Report for Executives* (11 June 2003) at A-5.

## I. OUR COSMOPOLITICAL WTO

If conventional politics is the idea that unitary states each speak with one voice, and that the only relevant players in the trading system are the voices of the 147 WTO Members, then surely conventional politics in that pure form no longer exists in the WTO. Today, more than ever before, the governmental delegates to the WTO are looking outward, to situate negotiations about trade within a world constitutive process. For example, in June 2003, the WTO Secretariat held a three-day public symposium to examine the challenges on the road to Cancún. At the symposium, WTO Director-General Supachai Panitchpakdi announced that he had set up an informal Business Advisory Body and an NGO Advisory Body.<sup>4</sup>

In 1969, Professor John Jackson could write that even though the General Agreement on Tariffs and Trade (GATT) has 'an immense impact on the individual citizen, there is presently no *direct* relationship between GATT and such private persons'.<sup>5</sup> The same point could have been made in 1979, and in 1989.

But during the 1990s, the traditional insularity of the GATT/WTO ended. Cosmopolitics came to the WTO—most painfully at Seattle in 1999. Cosmopolitics came to the WTO because the public and NGOs began to see how emerging trade law affected numerous social, environmental, development, cultural, and ethical concerns. NGOs were not willing to leave these matters to trade technocrats, and were not willing to assume that the representatives of the Members could find the optimal solutions on their own.

The discussion here focuses on the WTO rather than its constituents. That is, to what extent does the WTO currently embrace cosmopolitics, and what more should be done? Let me briefly highlight some of the most important developments since 1995:

- Using its authority in Article V:1 of the Marrakesh Agreement, the WTO General Council has pursued and accepted cooperation with other intergovernmental organizations, such as the United Nations Food and Agriculture Organization (which has observer status).
- Using authority in Article V:2 of the Marrakesh Agreement, the WTO has increased consultation and cooperation with NGOs. For example, the WTO Secretariat posts new NGO position papers periodically on the WTO website.<sup>6</sup> In April 2001, the WTO joined the World Health

<sup>4</sup> D. Pruzin, 'WTO Chief Sets up Advisory Bodies with Business, NGOs to Boost Dialogue' in *BNA International Trade Reporter* (19 June 2003) at 1044.

<sup>5</sup> J. H. Jackson, *World Trade and the Law of GATT* (1969) at 187.

<sup>6</sup> Online at [http://www.wto.org/english/forums\\_e/ngo\\_e/pospap\\_e.htm](http://www.wto.org/english/forums_e/ngo_e/pospap_e.htm).

Organization, the Norwegian Foreign Ministry, and Global Health Council (an NGO) to hold a workshop on affordable drugs.<sup>7</sup> In September 2003, NGOs around the world received accreditation to be observers at the forthcoming Ministerial Conference in Cancún.

- In 2001, WTO Member governments agreed at Doha to express a commitment 'to making the WTO's operations more transparent, including through more effective and prompt dissemination of information, and to improve dialogue with the public' (para. 10).
- The WTO has achieved a great deal of transparency in its own operations, particularly through its website. For instance, many documents are downloadable on a timely basis, including now the *Trade Policy Reviews*. A current calendar of WTO meetings is provided. The value of this free public access is enormous. Just to give one example, anyone with internet access in any part of the planet can read and download freely the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) from the WTO website in at least three languages. We have become so used to such access that it may sound trivial. But I would invite the reader to go to the website of the International Civil Aviation Organization and try to download a copy of its founding Convention.<sup>8</sup>
- The WTO Secretariat works hard at improving public understanding of the WTO and its processes. Everyone from the trade neophyte to the trade expert can learn a lot by spending 30 minutes periodically perusing the WTO website and looking at 'WTO News', 'Trade Topics', the 'Community/Forums', etc. The availability of such information not only better informs interested individuals, but also enhances the accountability of the WTO to governments and to the market. Recently, the new *Global Accountability Report* gave the WTO high marks for its website and overall accountability.<sup>9</sup>
- WTO Director-General Mike Moore established a public advisory committee reporting to him, and recently Director-General Supachai Panitchpakdi has set up a private committee to prepare a report on the challenges and opportunities facing the WTO.<sup>10</sup>
- The WTO Appellate Body has ruled that panels and the Appellate Body may consider amicus curiae briefs.<sup>11</sup> In that one respect, the WTO is ahead of most other international tribunals.

<sup>7</sup> Online at [http://www.wto.org/english/tratop\\_e/trips\\_e/tn\\_hosbjor\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/tn_hosbjor_e.htm).

<sup>8</sup> Online at <http://www.icao.int>.

<sup>9</sup> Online at <http://www.oneworldtrust.org/Ch99/htmlGAP/report/report.htm>.

<sup>10</sup> WTO, 'WTO Director-General Establishes a Consultative Board on the Future of the Multilateral Trading System' in *WTO Presse/345* (June 2003).

<sup>11</sup> See P.-M. Dupuy, 'Sur les Rapports Entre Sujets et "Acteurs" en Droit International Contemporain' in L.C. Vohrah *et al.* (eds), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (2003), 261, 274.

- In at least two instances, WTO dispute panels have sought information from the World Intellectual Property Organization, which has responded.<sup>12</sup>

This report intentionally starts with the good news in the hope of orienting the conversation toward the future and making it pragmatic. Let us take as a baseline the current openness of the WTO, and the trends in other organizations, and ask whether greater transparency and non-governmental participation would be good for the trading system.<sup>13</sup> The emphasis here on transparency and the non-governmental role, as two important dimensions of cosmopolitics, reflects the Kantian tradition in international law.

## II. IMPROVING WTO TRANSPARENCY

The WTO needs to do much more to improve transparency. Let me begin with transparency at the national level before discussing the WTO level.<sup>14</sup>

One of the least known and most positive features of WTO law is the rule requiring national governments to manifest transparency through procedures for notice and comment.<sup>15</sup> In the years since the Uruguay Round, the value of such 'good governance' provisions has become better understood as a driver of development and equity. Issues of transparency are again on the agenda in the Services negotiations of the Doha Round.

The WTO could strengthen requirements on Member governments to provide more information to the public and to the WTO. Let me give one example on a substantive topic of WTO law that loomed important in the past ten years—that is, Article XX of the GATT which provides General Exceptions. In 1969, Professor Jackson made the interesting suggestion that governments be required to report all instances where regulations are utilized when those restrictions are consistent with GATT only by virtue of Article XX.<sup>16</sup> Recognizing as we do today the delicacy of litigating the Article III and XX interface, we would probably not want to phrase the notification requirement in that exact way. Nevertheless, Professor Jackson was surely right in contending that

<sup>12</sup> This occurred in United States—Omnibus Appropriations Act of 1998 and United States—Section 110(5) of the US Copyright Act.

<sup>13</sup> Certainly, greater governmental participation would also be good for the WTO.

<sup>14</sup> This chapter does not discuss the vital issue of internal WTO transparency, that is, the transparency of WTO decision-making to the governmental members.

<sup>15</sup> These provisions build on GATT Art. X which requires publication of trade regulations.

<sup>16</sup> Jackson, *supra* n. 5 at 744.

more information about such measures would help governments bring order to international trade.

Although the WTO imposes many rules for reporting and transparency by WTO Members, the WTO treaty does not reflexively impose similar requirements on the WTO itself. The WTO constitution does not posit openness and transparency as a fundamental value of trade law nor does it state that individuals have any *right* to information. The one semi-exception occurs in Annex 3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which states an obligation of a Member (upon request by another Member) to provide a non-confidential summary of its submission that could be disclosed to the public. So far, the experience under this rule has been disappointing. It has not led to significantly greater disclosure of submissions to panels.

Even without a constitutional commitment to transparency, the WTO can and should take legislative action to open up more to civic society. The two main reasons for doing so are that openness enhances legitimacy and that openness can help to build public support for the WTO's mission. Social and economic actors need information in real time about what the WTO is doing if these private actors are going to be able to influence governments. Here is one possible programme to enhance openness:

- Rules are needed to strengthen protection for business confidential information.
- Other categories of WTO secrecy should be defined and instituted as needed.
- Aside from that, all other WTO documents should be publicly available. Recently, I read that the Chairman of the Special Session of the Dispute Settlement Body had prepared a Chairman's Text, denoted 'JOB(03)91'. That document is not available on the WTO website, however, and an email I sent to the WTO Enquiries Office asking for a copy went unanswered.<sup>17</sup> A similar problem occurred at the Doha Ministerial Conference where none of the negotiating documents was made public until the negotiations had ended. The only logic to such a policy would be to keep the public from knowing what law-making is going on until it is too late to influence it.
- Written submissions to panels should be posted on the WTO website by the Secretariat.
- Observers should be permitted to watch proceedings of the WTO General Council and the Dispute Settlement Body.

<sup>17</sup> Of course, the document was immediately available to subscribers of *World Trade Online*, to which I have access both at my law firm and at the law school where I teach.

The above current list does not include opening sessions of WTO panels to the public. The United States (US) government has made this proposal, but it has drawn little support from other governments. The proposal of the European Communities (EC) of March 2002 was a bit more cautious; it would allow the parties to decide whether certain parts of a panel or Appellate Body proceeding should be open to the public. Such a change would reverse the rule in DSU Appendix 3 which states that the panel shall meet in 'closed session'. The EC proposal would have been an interesting experiment. While on this subject, let me note that the US-Singapore Free Trade Agreement provides that unless the parties otherwise agree, a dispute panel will hold at least one public hearing (Article 20.4(4d)). (This is an example of the way in which bilateral trade agreements can offer opportunities for policy experiments not possible in Geneva.)

### III. ENHANCING PARTICIPATION IN THE WTO

The Marrakesh Agreement provides for consultation and cooperation with NGOs. This provision mirrors a similar provision in the 1948 Charter of the International Trade Organization. The designers of the post-war trading system anticipated that there would be space for NGO participation, and yet that vision of a competition culture has not been fulfilled.

The advocates of NGO participation sometimes undermine their cause by claiming that NGOs can boost the representativeness of the WTO. Many of the WTO ambassadors have found that baffling because they do not see how NGOs can improve on the official representatives of governments. Instead, the NGO community should not promise more than they can deliver. The value added from NGOs is not really enhanced representation in Geneva.<sup>18</sup> Rather, it is that NGOs can inject new energy, ideas, and values that may help to improve deliberating in the WTO. NGOs' proposals can improve the market of ideas that undergirds the WTO. NGOs also provide a mechanism for an individual to influence other governments beyond her own. Such transnational politics is especially important in the WTO given its consensus decision-making rule in which one foot-dragging government can impede the entire Organization.

Thus, in terms of the analytical framework employed for this Conference, the value of NGOs for the WTO is not so much that they

<sup>18</sup> The WTO Secretariat has stated that 'Citizens are expected to be represented at the WTO through their governments.' WTO, *WTO Policy Issues for Parliamentarians* (May 2001) at 14, online at [https://secure.vtx.ch/shop/boutiques/wto\\_index\\_boutique.html](https://secure.vtx.ch/shop/boutiques/wto_index_boutique.html).

may enhance the 'input legitimacy' of the WTO, but instead that NGOs can enhance 'output legitimacy' by leading to better, more effective intergovernmental decisions. By de-emphasizing the issue of whom NGO spokespersons represent, we can avoid the fruitless (yet currently popular<sup>19</sup>) efforts to vet NGOs so as to examine who their members are and where their funding comes from. International organizations should not care whether an NGO has 100 members or 1 million. Counting is for votes. Ideas are weighed not by how many people hold them, but rather by their scientific or philosophical merit.

The three major entities in the international system are: (A) intergovernmental organizations, (B) parliamentarians, and (C) NGOs. All three should gain a greater participatory role in the WTO.

#### A. Intergovernmental organizations

Functional international organizations make progress through specialization, but are vulnerable to tunnel vision. That's why it is important for international organizations to work closely with each other. The WTO is much better at this than was the GATT, but more cooperation would be beneficial.<sup>20</sup>

Let me give one example. In April 2003, the WTO Secretariat released a Special Study titled 'Adjusting to Trade Liberalization'.<sup>21</sup> One chapter of the report was about how 'Government can facilitate the adjustment process', and this chapter contained several pages of interesting information about social safety-nets, labour markets, education and training, export promotion, etc. WTO attention to the difficult challenges of adjustment is certainly appropriate. Yet one wonders why the Secretariat sought to reinvent the wheel rather than work with the functional international organization with expertise in worker adjustment, the International Labour Organization (ILO)? Did the WTO Secretariat not know that the ILO has a comparative advantage on worker issues?

#### B. Parliamentarians

Elected parliamentarians are a growing and important part of cosmopolitics. This volume contains a number of papers on that issue.<sup>22</sup>

<sup>19</sup> Recently, three new publications have been launched to report on NGOs. They are: *NGO Monitor*, *NGO Watch*, and *NGO Watch Digest*.

<sup>20</sup> See G. P. Sampson, 'Is There a Need for Restructuring the Collaboration among the WTO and UN Specialized Agencies so as to Harness their Complementarities?' in this volume.

<sup>21</sup> WTO, *Adjusting to Trade Liberalization*, Special Study No. 7 (2003).

<sup>22</sup> See Chapters 19-22.

## C. NGOs

Greater NGO participation could help make the WTO more effective and would, at the very least, enhance the voices of developing countries at the WTO. A full implementation of Article V:2 would provide for accreditation of NGOs and for observer status in some of the WTO committees, bodies, and councils. Many models exist for how this could be done in United Nations practices, and in the 80-plus years of experience of NGO participation in intergovernmental organizations in Geneva. One possibility is an Advisory Economic and Social Committee, as proposed in the International Law Association.<sup>23</sup> Another possibility would be to convert the new advisory committees appointed by the Director-General into official advisory committees to the WTO.

My own preference is that international NGOs be mainstreamed into the WTO's functional committees and bodies. For example, development NGOs might be invited to observe the Committee on Trade and Development; food safety and agriculture NGOs might be invited to the Committee on Sanitary and Phytosanitary Measures; transparency and consumer NGOs might be invited to the Working Party on Domestic Regulation. For the first two-year cycle, the role of the NGOs might be purely observational, but once governments gain more confidence, opportunities could be provided for NGOs to make presentations.

## IV. CONCLUSION

This author wishes that he could be more optimistic that the WTO would act soon to improve external transparency and participation. Unfortunately, two barriers exist: one is the *de facto* consensus decision-making rule. The other is that many WTO Member governments are not democratic, and therefore may not share the values of transparency and participation.

At the Conference in Florence in June 2003, one of the senior ambassadors present cautioned the participants to avoid 'wishful thinking'. Injecting a dose of realism into a policy discussion is always a good idea, and led me to reflect on whether it is merely wishful thinking that NGOs participation will promote free trade and increase public support for the WTO. Perhaps it is. Even so, such an effort seems worth trying because the advocates of free trade have the more intellectually honest case to make.

<sup>23</sup> E. U. Petersmann, 'Constitutionalism and WTO Law: From a State-Centered Approach Towards a Human Rights Approach in International Economic Law' in D. L. M. Kennedy and J. D. Southwick (eds), *The Political Economy of International Trade Law* (2002) 32, 62-63.

Two trends of the past few decades point to a need to refine our understanding of transgovernmental organizations. One is the ever-expanding need for international cooperation. The other is the deeper rooting of democratic expectations throughout the world. As a result, the challenge for all international organizations will be to better connect the decision-making of the organizations to the democratic processes in each country. In an era where cosmopolitics will be ascendant, the WTO cannot be aloof. It should continue down the path of expanding transparency and public participation.