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Introduction

In December 2013, the Ninth Session of the Ministerial Conference in Bali was an important milestone in the young history of the World Trade Organization (WTO). For the first time since its creation in 1995, the WTO succeeded in concluding the negotiation of new rules binding on its entire membership. To attend this event, 356 non-governmental organizations (NGOs) had been accredited.[1] By contrast, at the Sixth Session of the Ministerial Conference in Hong Kong in 2005, as concluding the Doha Round of negotiations seemed a realistic prospect and NGOs' attendance was at its peak, that accreditation figure had risen to 1,065.[2]

Are WTO's activities still a focus of civil society's interest? With the achievements – even symbolic – made in Bali, let's assume that a deadlock has been broken, and take the optimistic view that it is breathing new life into the negotiating machine of the WTO. In this context, one can be confident that concluding the Doha Round is on the horizon again. A new round of negotiations involving new topics will follow, reviving civil society's interest in the work of the organization. Against this background, it is timely to discuss institutional reforms and non-state actors' participation in the WTO.

Since its early days, the relevance of involving non-state actors in the work of the WTO has been a controversial issue. For one thing, Member States have held back from granting meaningful participatory opportunities to non-state actors, so that the WTO ranks very low in that regard compared to other intergovernmental organizations.[3] For another, the establishment of the WTO, and the new institutional structure it entailed for the multilateral trade regime, has given rise to claims of a legitimacy deficit. Up to 1995, civil society had had little interest in multilateral

[1] See WTO document, WT/MIN(13)/INF/11.
[2] See WTO Annual Report 2006, at 60.
[3] See Peter Van den Bossche, 'NGO involvement in the WTO: a comparative perspective' (2008) 11(4) *Journal of International Economic Law* 717.

trade negotiations.[4] This was because the GATT regime essentially dealt with the reduction of tariff barriers and other 'at-the-border' measures, which involved work of a predominantly low-profiled, technocratic nature.[5] In 1995, the establishment of the WTO brought two key novelties that would change that perception. First, it introduced a binding system of dispute settlement that would lend increased impact to WTO rules. Second, it made binding upon all Members new agreements – in particular the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) – that regulate non-tariff and so-called 'beyond-the-border' measures, i.e. domestic regulations with a possible hindering effect on trade flows. Consequently, a couple of decisions were issued in the following years by the WTO dispute settlement organs, which challenged domestic regulations protecting social interests, including health and the environment.[6] These decisions were enough to fuel a perception that the WTO was hijacking the regulatory power of its Member States, in a manner escaping due democratic process.[7]

As a result, the WTO caught the public eye. In the late 1990s, the organization made media headlines and its Ministerial Conferences – starting in Geneva in 1998 and culminating in Seattle in 1999 – turned into settings of mass protest by civil society organizations. Such effervescence was also characteristic of the pre-9/11 era of the second half of the 1990s, which saw the blooming of so-called 'anti-globalization' movements. The latter were taking shape with the advent of the internet and driven in part by a then *en vogue* hostility towards the hegemon – the United States – which was perceived as the main sponsor of the WTO regime.

While things nowadays may have calmed down on that level, academic debates have continued on the relevance of endowing the WTO with more formalized mechanisms of non-state actor participation

[4] See Jens Steffek and Claudia Kissling, 'Why cooperate? Civil society participation at the WTO', in Christian Jeorges and Ernst-Ulrich Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, rev. edn (Oxford and Portland, OR: Hart, 2011).

[5] See Robert Howse, 'From politics to technocracy – and back again: the fate of the multilateral trading regime' (2002) 96 *American Journal of International Law* 94.

[6] See in particular *US–Shrimp* (WT/DS58/AB/R), declaring unlawful a regulation of the United States that banned the import of shrimps caught with nets hurting sea turtles, and *EC–Hormones* (WT/DS26/AB/R), challenging a prohibition by the European Communities on the placing on the market of meat products treated with certain hormones.

[7] Emblematic in this respect is Lori M. Wallach and Patrick Woodall, *Whose Trade Organization? A Comprehensive Guide to the WTO* (New York: New Press, 2004).

(or 'public participation'). In this regard, scholars have been widely discussing the opportunity of granting more access to NGOs in the WTO. They have essentially been discussing the advantages and disadvantages of enhanced participation in terms of its impact on the constellation of interests represented in the decision-making process. In particular, while some commentators argue that a more open WTO would result in the effective representation of a more diverse set of interests,[8] opponents argue on the contrary that it would reinforce a system of representation that is presently biased in favour of business interests and groups from western countries.[9] These debates – which should further distinguish between the impact of formalized participation on the diversity of interests represented on the one hand, and its actual impact on policy outcomes on the other hand – are of a largely empirical nature.[10]

The present book is an attempt to address the issue of public participation from an institutional and legal perspective. It advances a conceptual framework – modelled on participatory schemes existing at the domestic level of some States – consisting of the four 'implementation parameters' of public participation: the goal, the object, the mechanisms and the actors. Accordingly, it raises a couple of core questions. First, assuming that public participation is an emanation of the democratic principle, to what extent is democracy a principle relevant to the WTO? Second, assuming that public participation pursues the goal of implementing the democratic principle, which decisions should be opened to public participation? Further, to what extent is the current WTO decision-making process compatible with formalized mechanisms of public participation? What reforms would be prerequisites to formalizing public participation?

In the following sections, this introduction briefly reviews participatory mechanisms presently in place at the WTO. The issue of legitimacy is then introduced by pointing to the variety of rules that come into play in the WTO context, and the historical evolution they result from. Finally, the scope of the subsequent analysis is outlined.

[8] See Steve Charnovitz, 'Opening the WTO to non-governmental interests' (2000) 24(1) *Fordham International Law Journal* 173.

[9] See Gregory C. Shaffer, 'The World Trade Organization under challenge: democracy and the law and politics of the WTO's treatment of trade and environment matters' (2001) 25 *Harvard Environmental Law Review* 1.

[10] See Marcel Hanegraaff, Jan Beyers and Caelesta Braun, 'Open the door to more of the same? The development of interest group representation at the WTO' (2011) 10(4) *World Trade Review* 447.

1. Public participation in the WTO: current arrangements

The present book understands the notion of 'public participation' as including *all institutionalized forms of interaction in the decision-making process between organs of an institution and external actors that are independent of any governmental entities*. Under this conception, public participation includes two interrelated dimensions: the 'transparency' of an institution's decision-making process and the 'engagement' of non-state actors in that process (or 'actual participation').[11] Public participation is anchored in the Agreement Establishing the World Trade Organization (WTO Agreement). The latter states at Article V, paragraph 2, that '[t]he General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO'. On this basis, arrangements for public participation were adopted shortly after the establishment of the WTO in 1995, and since then have borne the mark of deep-rooted political divergences among Member States. Their genesis can be traced back to controversial debates in the late 1990s and the atmosphere of popular protests that was characteristic of that time. As media attention and public focus on the work of the organization intensified, some WTO Members felt compelled to place the issue of public participation on the agenda, mindful of the image projected by the organization and of the harm that negative press would be likely to have on the acceptance of WTO policies. Other factors that seem to have pushed Members to address the issue of public participation at the time include the failure of the Multilateral Agreement on Investment (MAI), which was attributed in part to a failure to gain the support of civil society.[12]

In the ensuing debates, WTO Members made a distinction between 'internal' transparency – which concerns the fair participation of all Member States in the decision-making process – and 'external' transparency – which deals with the closed character of the organization towards the outside world. In this context, two opposing strands of Members emerged, which were quick to emphasize *political obstacles*

[11] On a similar distinction, see Georg C. Umbricht, 'An "amicus curiae brief" on amicus curiae briefs at the WTO' (2001) 4(4) *Journal of International Economic Law* 773, at 773, and Francesca Bignami, 'Three generations of participation rights before the European Commission' (2004) 68 *Law & Contemporary Problems* 61, at 72.

[12] See Sol Picciotto, 'North Atlantic cooperation and democratizing globalism', in George A. Bermann, Matthias Herdegen and Peter L. Lindseth (eds.), *Transatlantic Regulatory Cooperation: Legal Problems and Political Prospects* (Oxford University Press, 2000).

to enhanced public participation, and have survived to this day.[13] While most western countries supported reforms to improve external transparency – such as opening sessions of WTO committees to non-state actors and extending disclosure of WTO documents[14] – developing countries opposed such reforms on several grounds, pointing in particular to their lack of resources to manage increased participation.

Against this background, current arrangements of public participation in the WTO reflect the minimum consensus that Members could agree upon. They are based on two documents – the Decision of the General Council on the Procedures for the Circulation and Derestriction of WTO Documents (hereafter: 'Decision on Derestriction')[15] and the Guidelines for Arrangements on Relations with Non-Governmental Organizations (hereafter: 'WTO Guidelines on public participation').[16] While the former regulates the transparency aspect of public participation – setting the general principle that 'all WTO official documents shall be unrestricted' with some limited exceptions – the latter address the WTO's relationship with non-governmental organizations (NGOs). Essentially, these Guidelines include the possibility for NGOs to attend the Plenary Sessions of the WTO Ministerial Conference, without the right to speak, after going through an accreditation procedure that is intended to ensure that they are 'concerned with matters related to those of the WTO'.[17] For the rest, they empower the WTO Secretariat to organize regular symposia, public forums, and other informal meetings where NGOs make presentations to chairpersons of WTO bodies and

[13] Arguments of both sides on external transparency are reflected in the deliberations of one session of the General Council in 1998; see General Council – Minutes of Meeting – 15, 16 and 22 July 1998, WT/GC/M/29.

[14] See a submission paper by the United States issued two years later suggesting that some meetings of WTO bodies be opened to observers, with the opportunity for them to make written submissions (General Council – General Council Informal Consultation on External Transparency – October 2000 – Submission from the United States – Revision, WT/GC/W/413/Rev.).

[15] See Decision by the General Council, Procedures for the Circulation and Derestriction of WTO Documents, WT/L/452, dated 16 May 2002. In addition, the General Council adopted a Decision on Derestriction of Official GATT 1947 Documents, WT/L647, 13 June 2006, providing that '[a]ll official restricted GATT 1947 documents shall be derestricted as of 1 June 2006'.

[16] See Decision by the General Council, Guidelines for Arrangements on Relations with Non-Governmental Organizations, WT/L/162, dated 23 July 1996. Since the adoption of the Guidelines, the General Council has addressed the issue of external transparency in its meetings: WT/GC/M/29, 35, 45, 57, 58, 66.

[17] See WTO General Council, WT/GC/M/145, 4 June 2013, para. 4.8.

officials of the WTO Secretariat. Further, an NGO page has been set up on the WTO website where a monthly list of position papers posted by NGOs is compiled.

Characteristically, the WTO Guidelines on public participation state that closer consultation and cooperation with NGOs should occur first and foremost at the national level, and confer upon the Secretariat – which is not granted any formal decision-making power in the organization's institutional setting – the primary role in interacting with NGOs. Accordingly, it can be said that these Guidelines remain firmly consistent with the state-centred nature of the WTO and therefore provide for mechanisms of public participation that are of a rudimentary nature.

Besides participatory opportunities granted by political bodies, the WTO dispute settlement organs, as well as individual Members, have taken some steps of their own to enhance public participation. In *US–Shrimp*, the Appellate Body stated for the first time that panels are entitled to accept *amicus curiae* briefs from non-state actors as part of their right to seek information in accordance with Article 13 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU).[18] In 2000, it further adopted in the context of the *EC–Asbestos* case a document entitled 'Additional Procedure for the submission of amicus curiae briefs', which was to be applied to that particular proceeding only.[19] At the time of the *US–Shrimp* case as well as in the following years, a majority of Members, however, voiced opposition against the Appellate Body's initiative to accept *amicus curiae* briefs. They primarily invoked procedural grounds and expressed disapproval at the way the Appellate Body had addressed what they believed was a political matter to be decided by Members themselves.[20] As a result of this opposition, the panels and Appellate Body have regularly reasserted their authority to receive unsolicited *amicus curiae* briefs, but have refrained from referring to them in their rulings. Recently, in a possible change of attitude, a panel did refer to information contained in one such unsolicited brief in the *US–Tuna II* (Mexico) case.[21]

[18] See *US–Shrimp* (WT/DS58/AB/R), para. 105.
[19] See *EC–Asbestos* (WT/DS135/AB/R), at 50.
[20] See Dispute Settlement Body, Minutes of the Meeting, WT/DSB/M/50, 14 December 1998. Further: General Council, Minutes of the Special Meeting of the General Council on 22 November 2000 (WT/GC/M/60). Also: Members' statements: WT/GC/38 (2000) (Uruguay); TN/DS/W/15 (2002) (Kenya representing the African Group); TN/DS/W/18 (2002) (various countries); TN/DS/W/25 (2002) (various countries).
[21] See *US–Tuna II (Mexico)* (WT/DS/381/R), paras. 7.182, 7.288, and 7.363. However, the panel was cautious to specify that it was referring to the brief to the extent that one of the parties had cited it during the proceedings (at para. 7.9).

In addition, regarding the transparency of the dispute settlement proceedings, some Members have taken the initiative to open to the public sessions of disputes they were involved in. This practice was initiated before a panel in 2005 at the request of the EU, the US and Canada in *US – Continued Suspension* and allows the public to watch the proceedings at WTO headquarters in Geneva via a live, closed-circuit broadcast.[22]

Since the turn of the twenty-first century, a growing number of commentators have expressed the view that the WTO should increase its interaction with external actors. Proposals in this respect have included making negotiation proposals and drafts of WTO rules more systematically available to the public,[23] allowing non-state actors to attend some meetings of WTO bodies other than the Ministerial Conference,[24] establishing an Advisory Economic and Social Committee,[25] holding public hearings on trade policy,[26] or introducing a system of accreditation for non-state actors.[27] Most prominently, a report to the Director-General of the WTO issued in 2005 devoted a whole chapter to 'Transparency and Dialogue with Civil Society', stating in particular that 'today, the issue is no longer whether, but how to partner and collaborate effectively' with civil society.[28] Recalling that 'each [international] organization's mandate and structure may call for specific objectives, modes of engagement and the choice of civil society organizations with whom to collaborate', the Report specifically pointed to the need for a more structured relationship between the WTO and civil society.

[22] See *US – Continued Suspension* (WT/DS/320), paras 4.1–4.24.
[23] See Robert Howse, 'For a citizen task force on the future of the World Trade Organization' (2004) 56(4) *Rutgers Law Review* 877, at 884.
[24] See Steve Charnovitz, 'The WTO and cosmopolitics' (2005) 7 *Journal of International Economic Law* 675.
[25] Ibid.
[26] See Robert O. Keohane and Joseph S. Nye, Jr, 'The club model of multilateral cooperation and problems of democratic legitimacy', in Roger B. Porter, Pierre Sauvé, Arvind Subramanian and Americo Beviglia-Zampetti (eds.), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Washington, DC: Brookings Institution Press, 2001).
[27] See John H. Jackson, 'The WTO "constitution" and proposed reforms: seven "mantras" revisited', 4 *Journal of International Economic Law* 67, at 77.
[28] See 'The future of the WTO: addressing institutional challenges in the new millennium, report by the Consultative Board to the Director-General Supachai Panitchpakdi' (hereafter: Sutherland Report), chapter 5 on 'Transparency and dialogue with civil society'.

2. The 'discourse on legitimacy'

Proposals for further formalizing public participation are commonly put forward as a means to improve the legitimacy of WTO decision-making. In other words, proponents of public participation base their argument on assessments that emphasize the 'legitimacy deficit' of WTO law. Such assessments are part of a wider 'discourse on legitimacy' that emerged in the 1990s in legal and political scholarship as a consequence of the expanding reach of international law.[29] Referring to constitutional standards of liberal democracy, this discourse essentially assumes that some decisions, because of their impact, should be reached in accordance with appropriate procedures that have the potential of legitimizing them. In other words, it implies that a specific 'degree of legitimization requirement' is attached to a given type of decision depending on its impact.[30] While several analytical frameworks have been applied to assess the impact of contemporary international law, pioneering in this respect was Professor John Jackson's use of the concept of sovereignty. Referring to the debate on the United States' ratification of the results of the Uruguay Round, Jackson elaborated a framework around the concept of sovereignty to characterize the impact of the WTO agreements. In doing so, he was referring to several parameters, which taken in the aggregate define the restrictive influence of international law on the regulatory capacity of States (or 'amount of constraint'). Relevant parameters in this respect include the applicability (direct or indirect) of international rules in each domestic order, the law-making procedures of international institutions – in particular their ability to generate secondary norms – and the modalities of international dispute settlement mechanisms.[31]

In assessing the legitimacy of the WTO, relevant rules to be taken into account reach beyond those adopted by WTO organs. Indeed, as a result

[29] See Eric Stein, 'International integration and democracy: no love at first sight' (2001) 95(3) *American Journal of International Law* 489.

[30] The concept of a varying 'legitimization requirement' ('Legitimationsbedürfnis') is to be found in Markus Krajewski, *Verfassungsperspektiven und Legitimation des Rechts der Welthandelsorganisation (WTO)* (Berlin: Duncker & Humblot, 2001), at 217. Accordingly, in Eric Stein's words, the 'intensity of the [legitimacy deficit] argument depends . . . on the scope of the competence transferred to an IGO and the structure and impact of its institutions, that is, on the "level of its integration"'; see Stein, 'No love at first sight', at 493.

[31] See John H. Jackson, 'The great 1994 sovereignty debate: United States acceptance and implementation of the Uruguay Round results' (1997) 36 *Colum. J. Transnat'l L.* 157, at 171.

of various 'regime-linkage' techniques provided in the WTO agreements or performed by judicial initiatives, the WTO dispute settlement organs sometimes apply rules adopted outside the WTO.

The following section provides a short historical overview of international relations and the transformation of international law following the advent of an era of positive cooperation in the mid-nineteenth century. This will help explain the nature of contemporary international law, the way it relates to recent discourses on legitimacy, and how it is simultaneously the cause and result of non-state actors' emergence on the international plane – the institutionalization of public participation being one dimension of this phenomenon. Further, it will put in perspective the multiplicity of 'non-WTO' rules that the WTO dispute settlement organs may apply or refer to and which therefore can potentially be relevant objects of public participation.

2.1. The rise of international cooperation

While early international conventions to facilitate trade were adopted in the wake of the first Industrial Revolution,[32] international cooperation mainly builds on the doctrine of functionalism that emerged at the end of World War I. This doctrine assumes that international peace depends on a gradual cooperation among States at a 'low' – namely social and economic – level. It was consecrated in Article 23 of the Covenant of the League of Nations, which provided for cooperation in matters of labour, crime, arms traffic, communications and the control of disease.[33] After World War II, such cooperation was decisively reinforced with the establishment of the United Nations (UN), whose architecture assigned social and economic activities to specialized agencies with a large degree of autonomy.[34]

[32] Early international conventions and commissions included the Central Commission for Navigation on the Rhine in 1815, the European Commission of the Danube in 1856, the International Telecommunication Union in 1865, the Meteorology Organization in 1873, the Universal Postal Union in 1874, or the Paris Convention on Industrial Property in 1883.

[33] See David Armstrong, Lorna Lloyd and John Redmond, *From Versailles to Maastricht: International Organisation in the Twentieth Century* (Basingstoke: Macmillan, 1996), at 54. Also on the Bruce Report, see Victor-Yves Ghebali, *La Société des Nations et la réforme Bruce, 1939–1940* (Geneva: Centre européen de la Dotation Carnegie pour la paix internationale, 1970).

[34] See chapter 9 of the UN Charter. See further: Robert Kolb, *An Introduction to the Law of the United Nations* (Oxford and Portland, OR: Hart, 2010), at 13; Philippe Sands and Pierre Klein, *Bowett's Law of International Institutions* (London: Sweet & Maxwell / Thomson Reuters,

In the second half of the twentieth century, international cooperation was further spurred by the prevalence of economic liberalism in most of the western world, which translated into the creation of international economic institutions to pursue the liberalization of trade and capital movements. Towards the end of the twentieth century, these political efforts – facilitated by the demise of the Soviet Union – were combined with an amplification of factors that had emerged a century earlier (progress in transportation and communication) and effectively resulted in a massive growth in international trade and population mobility. This evolution gave rise to the notion of 'globalization' – which essentially describes an international system where national borders tend to become less relevant or ineffective – that itself became the source of new challenges for States to address collectively.

Under these circumstances, which still prevail today, one common concern of States is to regain control over the transactions of economic actors as factor mobility (personal and investment funds) makes it harder for them to regulate and tax.[35] Another concern is to prevent economic and financial crises, as one decision or event in one part of the world can have severe repercussions in other parts. Other threats to address collectively and that tend to amplify in the contemporary era include the spreading of international crime and terrorism, the degradation of the environment as a consequence of intensifying trade, and the spreading of disease due to increased mobility. A further aspect specific to economic policy and trade liberalization is the necessity to create 'level playing fields' in order to contain 'race-to-the-bottom' phenomena. Indeed, as economic mobility increases, States must compete with regard to the conditions of production that they offer to firms, which tends to push social regulatory standards to the lowest. In this context, creating 'level playing fields' requires adopting common minimum standards at the regional or international level in order to find a balance between the redistributional capacity of States and market liberalization.

2009), at 76; Houshang Ameri, *Politics and Process in the Specialized Agencies of the United Nations* (Aldershot: Gower, 1982).

[35] See Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007), at 21. On globalization's challenges to international law generally, see Philip Alston, 'The myopia of the handmaidens: international lawyers and globalisation' (1997) 8 *European Journal of International Law* 435; Stephan Hobe, 'The era of globalisation as a challenge to international law' (2002) 40 *Duq. L. Rev.* 655.