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Deliberative global governance and the question of legitimacy: what can we learn from the WTO?

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Abstract. The integration of the global economy through the liberalisation of the trade regime, the deregulation of financial markets and the privatisation of state assets has led to what we now commonly call ‘globalisation’. These processes, however, have not been accompanied by a comparable development of the global polity. At the same time, it is increasingly recognised in policy circles that without the development of norms, institutions and processes to manage globalisation many of the advantages it has brought the world could be undone by a failure to mitigate the excesses and negative consequences that emanate from it, especially for large sections of the world’s poor. This article addresses two broad questions: what might we understand by global governance in an era of increasingly contested globalisation and what role might international organisations play in making it more (democratically) legitimate? It addresses these questions in three steps. First, it proposes a *heuristic* definition that identifies two key strands of ‘governance’ in the contemporary debate. It is argued that global governance understood as effective and efficient collective decision-making and problem solving is insufficient for normative reasons and must, in addition, be complemented by global governance understood as the democratic legitimisation of policy-making. In a second step, as an example of this latter type of governance, the article develops a deliberative two-track view of transnational legitimacy. It argues that deliberative democracy offers some fruitful theoretical tools in this context since it is equipped to address some of the qualitative problems of international decision-making as well as accommodate a plausible notion of political agency. Thirdly, from the point of view of this two-track view, the article examines the WTO and discusses its strengths and vulnerabilities, not only as a vehicle for trade liberalisation but also as an instrument of better global governance.

‘The WTO as trade regulator, is at the heart of global governance [...] the international trading system and its benefits belong to us all – it is an international public good and the WTO is the only instrument that can be used to deliver the global public good of non-discriminatory multilateral trade.’¹

Introduction

For some, the concept of global governance is something of an oxymoron, or at best the fantasy of scholars. Realist scholars accept no understanding of

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¹ Pascal Lamy, ‘Humanising Globalisation’, Santiago, 30 January 2006, available at: {http://www.wto.org/english/news_e/sppl_e/sppl16_e.htm}.

governance beyond the level of the state; the principal characteristic of the international system has been, and remains, ‘anarchy’.² Liberal interdependence scholars argue that we can do better. We may live in an anarchical society, but one with recognised norms and rules of behaviour.³ Current day cosmopolitan democratic theorists, more optimistically, argue that the seeds of a global society are emerging.⁴ But in all theoretical contexts global governance continues to become a salient, albeit contested, political concept.⁵ Moreover, the debate is now no longer just the play thing of scholars. Writing before the global financial crises (GFC) of 2008, Martin Wolf of the Financial Times identified the growing impact of ‘[...] [t]he dilemma of global governance’.⁶ Salient prior to the GFC, a need to understand the dynamics of the how we govern the global economy casts even longer policy shadows now.

The interruptions of a GFC notwithstanding, the integration of the global economy through the liberalisation of the trade regime, the deregulation of financial markets and the privatisation of state assets has led to what we now commonly call ‘globalisation’. But this has not been accompanied by a comparable development of the global polity. Even prior to the GFC of 2008, it was increasingly recognised in policy circles that without the development of norms, institutions and processes to manage globalisation many of the advantages it has brought the world could be undone by a failure to mitigate the excesses and negative consequences that emanate from it, especially for large sections of the world’s poor. This was not only the position of the ‘alter’ or anti-globalisation movement⁷ but also impeccably credentialed defenders of globalisation who recognise that without proper processes of regulation, globalisation has within it the seeds of its own downfall. This has been a well understood conundrum for advocates of globalisation for some time.⁸ The crises of the global financial system since 2008 have merely reinforced these views.

The questions at hand are thus twofold: firstly, at a conceptual level, what might we understand by the idea of global governance in an era of increasingly contested globalisation? Most scholars and practitioners today agree that international *political* institutions suffer from a legitimacy deficit and prospects for democracy beyond the state need to be addressed in this context. Concerning the international *economic* institutions, however, appropriate global governance is still predominantly seen as effective and efficient collective action problem solving. Proponents claim that ‘effective’ and ‘efficient’ governance is not a normative but

² Kenneth Waltz, *Theory of International Politics* (New York: McGraw Hill, 1979).

³ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 1977); Robert O. Keohane and Joseph S. Nye, *Power and Interdependence: World Politics in Transition* (Boston: Little, Brown and Company, 1977).

⁴ David Held, *Global Covenant: The Social Democratic Alternative to the Washington Consensus* (Cambridge: Polity Press, 2004).

⁵ See Phillippe Pattberg, ‘Global Governance: Reconstructing a Contested Social Science Concept’, *Working Paper No. 6*, Warwick University: EUFP6 Network of Excellence on Global Governance, Regionalisation and Regulation: Role of the EU, 2006.

⁶ Martin Wolf, *Financial Times* (24 January 2007), p. 7.

⁷ Walden Bello, *Deglobalization: Ideas for a New World Economy* (London: Zed Press, 2004); Martin Khor *Rethinking Globalisation: Critical Issues and Popular Choices* (London: Zed Books, 2001).

⁸ Jagdish Bhagwati, *In Defence of Globalization* (Oxford: Oxford University Press, 2004); Joseph Stiglitz *Globalisation and its Discontents* (London: Penguin, 2002); Martin Wolf *Why Globalization Works* (New Haven: Yale University Press, 2004).

a technical matter. Against this view we argue in this article that effective and efficient decision-making also has important normative implications, and consequently, that international economic institutions must address the questions of democratic legitimacy that have grown progressively more pressing in the first decade of the 21st century.

Secondly, we ask what role international organisations might play in this democratic endeavour. In this article, we will look specifically at the WTO not only as a vehicle for trade liberalisation but also for enhancing the development of norms and institutional processes that can also adapt its structures and new instruments, such as the Dispute Settlement Mechanism (DSM), in ways that might contribute to a more democratic governance of the contemporary global order. What role the WTO could play in such a normative context is dependent on how we answer these questions – and especially what we understand by ‘global governance’ and what we mean by ‘better’. However, at a time when all international economic institutions face considerable challenges, the WTO should not be thought of as *sui generis*, but as a case study with learning applications for the other international economic institutions.

The article elaborates these two sets of questions in order to sketch out the contours of a theory of legitimacy of global governance institutions. It is argued that deliberative democracy offers some fruitful theoretical tools in this endeavour, for normative reasons and because it is a pragmatic theory with increasing policy resonance. Concerning the *pragmatic* aspect, deliberative democracy is useful for revealing coerced decision-making and inequitable outcomes where they exist in power politics.⁹ Extreme power asymmetry within global institutions is a serious impediment to fair negotiations promoting democratic values. No matter how developed formal global representation might be, it says little about influence over decisions. Deliberative theory, we will argue, can address some of the qualitative problems of international decision-making. Concerning the *normative* aspect, we argue that a deliberative view of the legitimacy of global governance is suitable because it embraces a plausible notion of political agency, which is absent in the liberal cosmopolitan approach, without at the same time yielding to statist democratic theory. Furthermore, it does so without losing track of the democratic element of legitimacy, which is often the case in contemporary theorising about the democratic deficit of global governance.

In section one, we propose a *heuristic* definition that identifies two key strands of ‘governance’. It shows how global governance, understood as effective and efficient collective decision-making and problem solving, is insufficient for normative reasons and must, in addition, be complemented by global governance understood as the democratic legitimation of policy-making. As an example of this latter type of governance, we develop a deliberative two-track view of transnational legitimacy in the second section, which embraces justificatory practices at three different levels of agency: global institutions, legal-political communities (that is, primarily states) and global civil society. We contrast this view with liberal cosmopolitan democracy and argue that in absence of a cosmopolitan demos, global governance institutions should promote the democratic values of justice,

⁹ For an early formulation of this argument see Ilan Kapoor, ‘Deliberative democracy and the WTO’, *Review of International Political Economy*, 11:3 (2004), pp. 522–41.

equality and accountability in order to be justified (reasonably acceptable). To the extent that our approach might be called cosmopolitan, it is a decentralised version which attempts to draw together universal moral norms, communicative action and agency into a theory of cosmopolitan reform. Finally, in section three we highlight both the WTO's strengths and vulnerabilities as an instrument of 'better' global governance in the particular sense given in this article; namely the degree to which it might enhance the values of justice, equality and accountability in global decision-making on trade matters while, at the same time, *pace* the opening quote from Pascal Lamy, upholding the international trade system as a public good.

Global governance and the 'legitimacy deficit'

The main question concerning international organisations as vehicles of global governance pertains to the quantity and quality of this governance in an era where we have an over-developed global economy and an under-developed global polity.¹⁰ There is a strong disconnect between governance, as effective and efficient collective action problem solving in a given issue-area, and governance as the democratic legitimation of policy-making. This has led to the debate about 'legitimacy deficits' in major international organisations. Moreover, governance has become a hosting metaphor identifying non-traditional actors (non-state actors such as NGOs and networks) that participate as mobilising agents broadening and deepening policy understanding beyond the traditional, exclusivist, activities of states and their agents. The demand for global (and regional) governance is complex and the role of multilevel governance structures in key policy areas, as in the evolution of the EU, has grown. Yet in some areas of the global co-operative agenda, in both the economic and the security domain, we appear to be witnessing the deterioration of collective governance capacity and resistance to its enhancement even. In some issue areas, the utility of institutions as vehicles for sharing information, building trust and enhancing compliance are coming unlearned as global public policy problems resist the technocratic fix and pose major political and ethical questions about the appropriate manner in which policy is made, decisions are taken and resources are distributed. For many practitioners, advances in global governance are inhibited by assumptions that it must assume the mantle of an ethically neutral activity, removing politics or ethics from problem solving. We thus identify two ideal types of global governance, one driven largely by economic theory, the other by normative (often cosmopolitan) theory. Our thesis is that, without the enhancement of the latter, the former will become unsustainable (impossible to defend for normative reasons). Our heuristic offers a simple twofold classification of global governance.

- Global Governance Type 1 (GGI): An *economic* theory of governance emphasising the enhancement of effectiveness and efficiency in the delivery of global public goods via collective action problem solving. GGI is underwritten by the emergence of a technocratic/managerial elite for which international institutions

¹⁰ Morten Ougaard and Richard Higgott (eds), *Towards a Global Polity?* (London: Routledge, 2002).

are instruments of transaction cost reduction, policy coordination and compliance for the mitigation of the risks attendant on an open and global economy.

- Global Governance Type 2 (GGII): A *political* theory of governance emphasising the struggle for systems of representation and accountability that will enhance legitimation and democratisation of policy-making in global contexts. GGII reflects an assumption that as the nation state becomes more problematic as a vehicle for democratic engagement, the clamour for democratic engagement at the global level becomes stronger.

One explanation why GGII is met with scepticism and resistance is that global economic governance is seen as a subject of ‘empirical investigation’. The defence of GGI draws on the argument that the efficient and effective delivery of public goods is not a normative but a factual technical matter. For example, ‘politics’ in the global public goods literature is seen largely as the effective and efficient making of public policy, where the enhancement of property rights and the reform and development of institutions is the key to success. In global public goods theory, politics is about the ‘rediscovery of institutions’. These innovations are important but insufficient. To the extent that they privilege efficiency over democratic accountability and legitimacy they isolate the institutions of global governance from Lasswellian (who gets what and how) style politics. This is a problem for institutions (such as the WTO) working with an assumption that the liberalisation of trade is an uncontested public good. For many global ‘rule takers’ this is not self evident. The struggle over the continued pace of economic liberalisation is a *political* struggle about the distribution of global wealth, not merely a *technical economic* one about how best to produce that wealth. This struggle has become increasingly vocal since the growth of the anti-globalisation backlash in the closing years of the 20th century. Global governance is no administrative ‘science’ to accompany economic ‘science’. It is a contested political process.

Even if some proponents of GGI agree that what counts as a public good is a political and not merely a technical matter, GGI is still anchored to the presumption that this is one thing (normative); and the effective and efficient production and delivery of public goods another (technical/factual). Such a modified understanding of GGI, however, reveals other problems. Although it might be (internally) coherent, it leans on premises that are questionable. To illustrate why this is the case we need to look at when something could be regarded as factual and not. For example, we might view good governance as the effective and efficient delivery of goods, and define effective and efficient as quick and cheap. Then we can reasonably claim that the effective and efficient delivery of water from a purification plant to a village is not a normative but a technical matter. But it is only technical within a normative framework where effective and efficient are defined in this way. Other possible definitions are at hand, and the choice between them is a normative question with normative implications. Therefore, since concepts such as effective and efficient are difficult to interpret in a meaningful way outside a normative framework, it does not hold to say that global economic governance is simply a technical and not a normative matter. In order for GGI to be sustainable it needs to be complemented by systems that also allow for enhanced democratic legitimation in global policy-making (GGII). What kind of

GGII is most appropriate for this task, however, is intensely debated in political theory. Below we sketch out a particular deliberative democratic understanding of GGII, which draws on both liberal cosmopolitan and statist theories of democracy but follows in neither of their footsteps.

Towards a deliberative view of legitimacy

As we have seen GGII is not solely a political theory of governance, it is a normative political theory dealing with questions of democracy, legitimacy and ethics on the global level. The primary role of normative political theory is not to create models to be applied but to reflexively and critically examine legal, political and moral phenomena as well as function as a yardstick for criticism and change; at best pointing out possible directions for future policy making. There is a growing theoretical literature on democratic global governance, ranging from cosmopolitan democratic theory to critical theory, attempting in different ways to react and respond to the traditional Realist picture of an anarchic international political system, consisting of competing states and with little room for common moral norms. In the last couple of decades liberal cosmopolitan democracy has increasingly made its voice heard in this debate. Starting out from the idea that human beings in a fundamental sense are equal and deserve equal political treatment, cosmopolitan theorists claim that the globalisation of goods, information, labour and currencies also calls for a globalisation of democratic and civic institutions. In order to achieve this, they argue, we must release democracy from the traditional sovereignty system emphasised by statist theorists by setting up a cosmopolitan framework of common political action, in which cosmopolitan rights are enforced by regulation and law.

In what follows we will engage in this theoretical debate with the particular purpose of elaborating a theory of the legitimacy of global governance institutions, what we call transnational legitimacy. We argue that liberal cosmopolitanism fails on both pragmatic and normative accounts as a suitable candidate for GGII, and that a particular deliberative approach is more appropriate – for pragmatic reasons because it ascribes a major and substantive role to the state in global governance and for normative reasons because it can accommodate a plausible account of political agency. We begin with a brief presentation of some central ideas of deliberative democracy in order to place our account within the contemporary deliberative debate; this is followed by a critical analysis of liberal cosmopolitanism in relation to our approach, in which we develop a two-track view of transnational legitimacy to be used for informing and guiding the constitutional framework of an extended deliberative global governance system, and in this particular case the WTO.

In a broad sense deliberative democracy is a system of government in which free and equal citizens engage in collective deliberative procedures and debates in order to reach agreement on matters of common concern. The basic idea is that those affected by a decision should have an equal opportunity to participate (at least indirectly) in its making, and that a law is legitimate to the extent that it is a result of public reason, that is, of reasons that all involved in the process of

deliberation can accept.¹¹ It is also commonly assumed that deliberation is the best way of solving collective action problems through reasoned agreements. What underpins these ideas is the view of the individual as a deliberative political agent. While some deliberative democrats investigate the epistemic aspects of deliberation,¹² others take on a more critical view, emphasising the democratic role played by civil society through processes of opinion- and will-formation¹³ or highlighting difference as a resource in deliberation.¹⁴ Still others attempt to work out the relationship between deliberation and constitution-making,¹⁵ laying stress upon institutionalised rights as the communicative conditions of political will-formation.¹⁶ In general there is a focus on the *formal* structures of deliberation, involving rules and decision-making procedures within institutions, and/or on the *informal* structures of deliberation, involving processes of opinion- and will-formation among different kinds of civil society actors.

In the transnational context deliberative democracy has taken a much wider range of shapes. Here also Rawlsian ideas of global governance between peoples and liberal cosmopolitan ideas of global democracy are sometimes categorised as approaches to deliberative global politics.¹⁷ Our deliberative approach, however, takes a narrower route, drawing primarily on the work of Jürgen Habermas, in particular two basic ideas: the *philosophical* idea that moral norms require wide agreement through reason-giving among equals, and the *political-theoretical* idea of a two-track model of democracy (discourse theory of democracy). Both ideas are dependent on the presupposition that deliberation in a vital sense is constitutive of agency and are in the present transnational context worked out in terms of a two-track view of legitimacy.

Concerning the first idea, it is widely held that agency is a precondition for normativity, but agency on a deliberative (discourse theoretical) account is not something that simply can be presumed, it is something that must be achieved – we become moral agents by being recognised as agents by others. While being an agent for Kant means to take responsibility for what one has committed oneself to, our discourse theoretical approach takes on the Hegelian view that the normative status of being committed to a rule, and thus to acknowledge agency and being responsible, is understood as a social accomplishment. As emphasised by Robert

¹¹ See for example Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. W. Rehg, (Cambridge, MA: MIT Press, 1996); Jürgen Habermas, in C. Cronin and P. de Greiff (eds), *The Inclusion of the Other* (Cambridge, MA: The MIT Press, 1998a); Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000); Jon Elster, 'Deliberation and Constitution Making', in J. Elster (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998); James Bohman and William Rehg, 'Introduction', in J. Bohman and W. Rehg (eds), *Deliberative Democracy: Essays in Reason and Politics* (Cambridge, MA: the MIT Press, 1997); Joshua Cohen, 'Deliberative Democracy', in S. W. Rosenberg (ed.), *Deliberation, Participation and Democracy: Can the People Govern?* (New York: Palgrave Macmillan, 2007).

¹² Jon Elster, 'Deliberation and Constitution Making', in Elster (ed.), *Deliberative Democracy* (1998).

¹³ John Dryzek, *Deliberative Global Politics: Discourse and Democracy in a Divided World* (Cambridge: Polity Press, 2006).

¹⁴ Young, 'Inclusion and Democracy' (2000).

¹⁵ Habermas, 'Between Facts and Norms' (1996); Elster, 'Deliberative Democracy' (1998).

¹⁶ Jürgen Habermas, 'Remarks on Legitimation through Human Rights', *Philosophy & Social Criticism*, 24:2/3 (1998b), pp. 159–61.

¹⁷ William Smith and James Brassett, 'Deliberation and Global Governance: Liberal, Cosmopolitan, and Critical Perspectives', *Ethics & International Affairs*, 22:1 (2008), pp. 69–92.

Brandom, a normative status is a social status since the normative character of practical (communicative) reason does not only depend on a person's endorsement of a rule but in equal measure on the attitudes of the members of the social community.¹⁸ According to a deliberative view, similarly, action norms (for example, moral norms or principles) are formed in the deliberative practice of giving and asking for reasons, in which validity claims are raised and accepted (or not) by the participants. To be a reason-giver and act for a reason (that is, to act under a norm) means to be treated as a reason-giver by the relevant social community.¹⁹ In contrast to the Kantian view of autonomy, according to which persons make themselves subject to a rule by taking themselves to be subject of this rule, being autonomous on our deliberative account is not something that one could become on one's own, since it requires structures of reciprocal recognition in a society.²⁰

If we move from the philosophical to the political level of analysis, the relationship between moral norms and deliberation on the deliberative account is unpacked somewhat differently. Indeed, the political community is much more than a social community constituted by recognitive structures. It is a self-determining coercive political organisation within which membership is non-voluntary. But political agency is still created intersubjectively. The difference is that when we move from moral theory to democratic theory, a sovereign legal-political community and a legal code must already be in place. Such a community (most notably the state) ensures that the free and equal participation of all participants is legally secured. Against the deliberative tendency to overemphasise the epistemological and critical gains of communicative practices in the transnational context, found for example in the recent work by Dryzek,²¹ we thus hold on to the basic normative assumption that in order for decisions to be democratically legitimate, such free and equal deliberative participation must be guaranteed.

Secondly, according to Habermas' idea of a two-track model of democracy, political agency and legitimate decision-making are achieved through two kinds of deliberative practices: through informal processes of opinion-formation and will-formation on the one hand through institutionalised formal deliberative decision-making procedures on the other.²² The two tracks are complementary in the sense that informal public discussions can identify social problems that lie outside the agenda of formal politics and bring them into political decision-making as well as critically examine political rule-makers and require accountability.²³ Thus to the extent that the political community can foster relatively autonomous practices of opinion-formation and will-formation, communicative power can flow from citizen activity to institutionalised decision-making and legislation.²⁴

¹⁸ Robert Brandom, 'Some Pragmatist Themes in Hegel's Idealism', *European Journal of Philosophy*, 7: 2 (1999), pp. 168–71.

¹⁹ Kenneth Baynes, 'Practical Reason, the "Space of Reasons", and Public Reason', in J. Bohman and W. Rehg (eds), *Pluralism and the Pragmatic Turn: The Transformation of Critical Theory* (Cambridge, MA.: MIT Press, 2001), pp. 63–4.

²⁰ Brandom, 'Some Pragmatist Themes in Hegel's Idealism' (1999), p. 168.

²¹ See for example John Dryzek, *Deliberative Global Politics: Discourse and Democracy in a Divided World* (Cambridge: Polity Press, 2006).

²² Habermas, 'Between Facts and Norms' (1996), pp. 486–87.

²³ *Ibid.*, p. 365.

²⁴ *Ibid.*, p. 375.

The challenge facing global governance is that there is no cosmopolitan demos, no global political community. Moreover, all but the most minimal of democratic constraints present within a domestic polity are absent at the global level and there is no serious institutionalised system of checks and balances.²⁵ These are the main pragmatic objections to the liberal cosmopolitan project. From the deliberative standpoint taken here, however, there are normative objections as well, primarily concerning its presuppositions about political agency.

Liberal cosmopolitan democrats argue that democratic institutions need to be developed on the global level in order to involve individuals in global decision-making irrespective of the role that they are allowed to play as citizens within their states.²⁶ They thus suggest the creation of institutions and channels of representation for all individuals so that they could be 'directly represented in global affairs'.²⁷ Starting out from the egalitarian idea that we as members of humanity deserve equal political treatment, cosmopolitan theorists emphasise the importance of individual rights claims and wish to replace the state-based UN Charter with a new set of cosmopolitan principles (cosmopolitan rights), constituting a moral standard for what people and political authorities are allowed to do. These principles form an overarching cosmopolitan law for a multilayered system, specifying the organisational basis of legitimate public power. Political power becomes legitimate only to the extent that it is constituted by these cosmopolitan elements. Examples of such principles are the all-affected principle and the principle of active agency.²⁸ Even if layers of local 'sovereignties' subordinated to this law are self-governing, concerning many political issues, their autonomy would be circumscribed by cosmopolitan principles. Sovereignty, the idea of rightful authority, is divorced from the idea of fixed territorial boundaries and thought of as an *attribute of basic cosmopolitan law*.²⁹

What is of concern here is the cosmopolitan view of agency built into cosmopolitan principles, that is, agency as a distribution of *status* in the principle of active agency and agency as a distribution of *inclusion* in the all-affected principle. Philosophically, the problem is that such a view presumes that subjects of the distribution are already available, prepared to 'make use' of this agency in their interactions with and actions towards others. It thus suggests that the identity of the subject is a premise of its agency rather than a product of it. This echoes a Kantian view of autonomous agency, mentioned earlier, according to which rules (norms, laws and principles) are binding on a person only to the extent that she has acknowledged them as binding. They thus get their normative status in virtue of our attitudes towards them – by us endorsing them. However, the question which immediately arises is that if whatever I acknowledge as binding *is* binding, in what sense is it meaningful to speak about what I did as *binding* for me? It goes without saying that the very idea of commitment would be exhausted of its meaning if one is committed to whatever one commits oneself to. As Brandom

²⁵ Robert Dahl, 'Can international organisations be democratic?', in I. Shapiro and C. Hacker Gordon (eds), *Democracy's Edge* (Cambridge: Cambridge University Press, 1999).

²⁶ Daniele Archibugi, 'Cosmopolitan democracy', *New Left Review*, 4 (2000), pp. 143–6.

²⁷ *Ibid.*, 13 (2002), p. 32.

²⁸ David Held, 'Law of States, Law of Peoples: Three Models of Sovereignty', *Legal Theory*, 8:1 (2002), p. 24.

²⁹ Held, 'Law of States, Law of Peoples: Three Models of Sovereignty' (2002), p. 32.

argues, while the authority of the self-binder governs the force that attaches to a certain rule that authority cannot extend also to the content of said rule. According to the idea of an interconnectedness between norms and reason-giving, the only way to create the necessary distance between the *act* which makes a rule binding on me (my authority) and the *content* of this rule is to have the rule secured and administered by someone else.³⁰ This means that my very capacity to commit myself to a rule is dependent on the *attitudes of others* within a community and thus that agency is not something that can be distributed or *a priori* presumed, for example through a universal principle of active agency, but is something that must be achieved.

Translated to a political context, the cosmopolitan emphasis on individual autonomous agents tends to transform cosmopolitanism to a moralised theory giving priority to moral principles over politics and, in doing so, downgrading the role of the political community.³¹ In fact, this priority also impregnates their view of sovereignty. Cosmopolitans wish to replace sovereignty as *autonomy* with sovereignty as *status and inclusion*, a shift which has also been noticeable in the changing contours of international law since 1945. Sovereign equality as an international legal entitlement increasingly denotes the status of being included as a member of the international community with the right to participate in the decision-making processes of international institutions.³² As a result of the individualisation of international law, coercive global governance institutions are increasingly informed by a human rights discourse. This is a desirable development, according to Anne-Marie Slaughter. She argues that in a globalised world interconnected by networks and institutions, sovereignty as status and inclusion ought to replace sovereignty as autonomy.³³ In a similar vein Archibugi claims that ‘the category of sovereignty should be replaced by that of global constitutionalism’.³⁴

The attractive core idea of human rights law – the right to the protection of individual dignity and integrity – easily makes us blind to the complexity of political agency. As argued by Cohen, the idea of replacing sovereignty as autonomy with that of status and inclusion is based on the false premise that sovereignty is only a fact of power and control in the Schmittian sense. But sovereignty is not and has never been solely about factual power. It is a legal and normative category. The notion of sovereign equality expresses the ideal of political autonomy in a double sense: as status and inclusion to secure *external* legal and political independence, and as autonomy to secure the *internal* conditions of possibility for self-determination under law). By abolishing the latter we do not only pave the way for cultural imperialism and military intervention justified via a discourse of ‘outlaw states’ and ‘evil rough states’, we also destroy the conditions of possibility of political agency.

So while we agree with liberal cosmopolitans that the traditional Westphalian notion of sovereignty expressed in terms of supremacy and exclusivity must be

³⁰ Brandom, ‘Some Pragmatist Themes in Hegel’s Idealism’ (1999), p. 171.

³¹ David Chandler, ‘New Rights for Old? Cosmopolitan Citizenship and the Critique of State Sovereignty’, *Political Studies*, 51:2 (2003), pp. 332–49; Bruce Robbins, ‘What’s Left of Cosmopolitanism?’, *Radical Philosophy*, 116 (2002), pp. 30–37.

³² Cohen, ‘Deliberative Democracy’, p. 596.

³³ Anne-Marie Slaughter, *The New World Order* (Princeton, NJ: Princeton University Press, 2004).

³⁴ Archibugi, ‘Demos and Cosmopolis’, p. 35.

abandoned, when looking into the conditions of possibility of political agency we have to be careful with what we replace it. If we deploy a functionalist reading and redefine sovereignty in terms of status and inclusion,³⁵ we will leave behind the core idea of the modern notion of sovereignty; that is, the exercising of autonomy as self-determination. At the same time, we should not neglect that sovereignty as status and inclusion renders possible a certain human rights threshold delimiting the autonomy of legal-political communities. Therefore our deliberative approach to global governance looks upon sovereignty as autonomy and sovereignty as status and inclusion as two *complementary* dimensions of a post-Westphalian conception of sovereignty. States (the primary legal-political communities today) do not merely have a functional role to play in implementing cosmopolitan rights, but a substantial and normative role to play in the provision of the conditions of possibility of political agency through legally secured free and equal deliberative participation.

In order to offer a viable normative-theoretical alternative to liberal cosmopolitanism, which is neither a boiled down statist view of democracy nor an epistemic-deliberative or a critical-deliberative view where the democratic component of legitimacy is lost – by overemphasising the representation of discourses in the former case and the role of civil society activity in the latter, at the expense of institutionalised free and equal deliberative participation – we have to be specific about how the above reflections on an intersubjective idea of agency fit into a deliberative theory of transnational legitimacy. The recent work by Habermas does not give us much guidance as to how we might achieve this.³⁶ As pointed out by Cristina Lafont, there is an ambivalence in Habermas' cosmopolitan vision, which oscillates between a *minimalist* proposal and an *ambitious* proposal.³⁷ But more importantly for our purposes, not much effort is put into elaborating the prospects for political agency in global governance on either of the two accounts. Therefore, we suggest instead a reinterpretation, indeed refinement, of Habermas' two-track model, moulded into a transnational conception of legitimacy which connects to three levels of agency: global institutions, legal-political communities (primarily states and regional bodies such as the EU), and global civil society. The latter is not viewed as an ethical agent but is defined in broad terms as consisting of multiple public spheres and civil activity by individual actors, non-state actors, and other organisations.

At the core of democratic legitimacy lies the idea that political authority becomes legitimate through the *actual consent* (directly or indirectly) of the *rightful source* ('the people'). In political philosophy this is separate from the question of justification commonly viewed as the *rightful end* of political authority through some kind of *hypothetical consent*, for example, in the shape of a shared moral principle.³⁸ How to best interpret this distinction is debatable. Most theorists agree that whereas democratic institutions become legitimate through the rightful source

³⁵ Held, 'Law of States, Law of Peoples' (2002), p. 32.

³⁶ Jürgen Habermas, in C. Cronin (ed. and trans.), *The Divided West* (Cambridge: Polity Press, 2006a); Jürgen Habermas, in C. Cronin and M. Pensky (eds and trans.), *Time of Transitions* (Cambridge: Polity Press, 2006b).

³⁷ Cristina Lafont, 'Alternative Visions of a New Global Order: What Should Cosmopolitans Hope For?', *Ethics & Global Politics*, 1:1 (2008), pp. 45–7.

³⁸ John Simmons, 'Justification and Legitimacy', *Ethics*, 109:4 (1999), pp. 739–71.

(usually referred to in the global governance literature as ‘input legitimacy’) and through striving towards rightful ends (output legitimacy), an institution can be justified (reasonable to accept) without being legitimate by possessing the right to impose binding duties on its subjects.³⁹

Indeed, in a transnational context, hypothetical and actual consent are two important justificatory practices for any GGII formulation. It is widely held that both practices need to be embedded in shared norms (usually of elites, but wherever possible of wider national publics) and be underwritten by judicial instruments (such as the ICC and increasingly the DSM of the WTO) in order to increase the legitimacy of global governance. Contrary to many assumptions in both the scholarly and the policy world that excessively privilege an increasingly dynamic role for civil society and non-state actors, the core of any chance for enhancing GGII remains with states as actors and instruments of diplomacy, especially multilateralism, that has been marginalised in recent years.⁴⁰

This empirical claim is to a large extent in tune with our normative suggestions of enforcing these two justificatory practices on the three levels of agency mentioned earlier, together forming a two-track view of transnational legitimacy. Concerning the state level, these practices are ideally secured by the two ‘tracks’ of deliberation discussed before: formal deliberative decision-making – legally guaranteed free and equal deliberative participation making *actual consent* (direct or indirect) possible – and informal processes of opinion- and will-formation – civil society lending its *hypothetical consent* to the political authority as long as it strives towards rightful ends. Once we move outside of the legal-political community, however, a split occurs: while formal deliberative decision-making procedures between free and equal participants ought to be enforced within global institutions, primarily between representatives of states and other major legal-political communities (such as the EU), processes of opinion- and will-formation ought to be enforced by actors of the global civil society. We argue that, rather than being lost, the two-track democratic structure is reframed through this split, creating a division of normative labour between the different levels of agency: while *actual consent* (direct or indirect) is the major justificatory practice of global institutions and states, *hypothetical consent* is the major practice of global civil society to justify global institutions. Of course, through this split we end up with a normatively weaker form of legitimacy than the traditional conception of democratic legitimacy associated with a bounded political community such as the democratic state. Still, we think it is an attractive and viable option in the absence of a global demos.

Civil society engagement is crucial for our account of transnational legitimacy. However, in order for actors in global civil society to reasonably accept (hypothetically consent to) global institutions we need to specify some normative criteria for acceptability as well as identify in what sense these criteria are deliberative. We argue that global civil society actors have moral reasons to accept (or at least not interfere with) global institutions to the extent that they promote three key democratic values: justice, equality and accountability. Of course, in order to be feasible and desirable, this would not be a binary (either/or) but a

³⁹ Ibid., pp. 745–6.

⁴⁰ Robert O Keohane, ‘The Contingent Legitimacy of Multilateralism’, *Working Paper, No. 9*, Warwick University: EU FP6 Network of Excellence on Global Governance, Regionalisation and Regulation: The Role of the EU (2005).

gradual matter. Following John Rawls' idea of counting principles,⁴¹ other things being equal, a global institution would be more justified the higher the degree to which it fulfils these normative requirements. The threshold for what can be reasonably accepted as the 'lowest level' for an institution is a political question that cannot be solved within a theory, structured by counting principles, of the kind we are proposing.

It is crucial to stress the interconnectedness of the justificatory practices that together make up the defended conception of transnational legitimacy. Civil society actors not only play a role in pressuring global institutions to fulfil the normative requirements of promoting the values of justice, equality and accountability; the reasonable acceptability of those institutions by civil society will be dependent on how well those requirements are satisfied. But this in turn will depend heavily on how successfully deliberative mechanisms for equal and fair decision-making procedures are implemented within those institutions. Here, deliberative democracy is not only a suitable normative theoretical tool, because it embraces a plausible notion of agency as argued previously, but because it also constitutes an element of modern political theory with increasing policy resonances. Deliberative democracy represents one way of revealing and addressing the manner in which global institutions operate primarily by the conventions of power politics delivering coerced decision-making, false consensus and inequitable outcomes. Enhanced institutional structures which ensure inclusive, free, symmetrical and non-coercive discussion would reduce key elements of the power asymmetries within multilateral trade negotiations and help secure a fairer bargaining process than currently exists.

Let us examine the three democratic values that global institutions are required to promote in order to be justified. In recent years, the call for *justice* in terms of fair procedures has become salient in international negotiations, in particular from the voices of developing countries. For economic institutions such as the WTO to avoid perpetual stand-off of the kind seen in the failures in Seattle, Cancun and Geneva in July 2008, the establishment of principles of procedural fairness are required. Indeed, for advocates of a theory of public goods, underwritten by methodological assumptions of rational self interest, the privileging of 'process' rather than 'outcome' no doubt appears irrational.⁴² But as literature, spanning the political spectrum, tells us, it is in the bargaining process that structural asymmetries between North and South have traditionally been at their most evident and their most political sensitive. It is politics that matters here – especially issues of sovereignty, ethics, perceived fairness and dignity – not economic outcomes. For many developing countries, it is in the negotiating process where what constitutes a public good is determined. The gradual learning curve that has seen the self-empowerment of developing countries as negotiators in the absence of procedural fairness, as in the early stages of the Doha Round, is proving to be a serious obstacle to multilateral collective action problem solving in general and to the acceptance of what constitutes *global* public goods in particular. Collective action problems are not simply a technical issue of bridging the participation gap

⁴¹ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971); Rawls, John *The Law of Peoples*, (Cambridge: Harvard University Press, 1999).

⁴² Richard Higgott, 'Global Public Goods and Global Governance: A Political Analysis of Economic Theory and Policy Practice', A Report Prepared for UNIDO, (2005) available at {http://exchange.unido.org/upload/3361_Governance_Higgott.pdf}.

identified by Inge Kaul and her colleagues in the 1999 and 2003 volumes on *Global Public Goods*. Indeed, such problems require negotiated outcomes and these are secured in the political activity between the principal actors and the power relationships of the principal actors, typically identified in the rise of the so-called BRICs, are changing dramatically in the early 21st century.

Procedural fairness is a necessary, if not sufficient condition to guarantee *outcome* fairness.⁴³ At the very least decisions taken by genuine consensus 'enhance the perception of the outcome being fair and balanced',⁴⁴ and a positive perception is a vital ingredient in any process of institutional legitimation. According to Habermas, the normative conditions of procedural fairness are ideally secured in the discourse process in the sense that moral norms are valid if (and only if) 'the foreseeable consequences and side effects of its general observance for the interests and value-orientations of *each individual* could be *jointly* accepted by *all* concerned without coercion'.⁴⁵ Thus, from a deliberative perspective it is impossible to separate justice from *equality*, since the reciprocal and mutual recognition of each other as equal political agents in discourse is a precondition for fair procedures.

In order to fulfil the requirement of promoting justice and equality understood in these specifically deliberative terms, international institutions must rely primarily on non-hierarchical steering. Thomas Risse distinguishes between two types of non-hierarchical steering in global governance: firstly, following a logic of consequentialism, sanctions and incentives can be used to inveigle actors into complying with rules and norms by manipulating their cost-benefit calculations so that they are convinced that compliance is in their own interest. Secondly, following a logic of appropriateness, actors comply with rules and norms when convinced by their moral validity or the procedure which led to the norm in question. While negotiations previously were understood in terms of instrumental rationality, recent research shows that actors often follow a logic of appropriateness. Risse links the latter steering mode to the idea of communicative action.⁴⁶ Actors either acquire the social knowledge to act appropriately in a negotiation or they become convinced by the moral validity of the rule in question. In both cases, however, they draw on the social actions of learning and persuasion, which harbour the logic of argumentation. While the logic of consequentialism is *dyadic* in the sense that only mutual assessment matters, the logic of argumentation is *triadic* in the sense that it demands that speakers and listeners alike refer to some external authority, such as common values, to make validity claims.⁴⁷

Of course, the extreme power asymmetry within global institutions is the most severe obstacle for equal and fair deliberative negotiations. While advocates of civil society emphasise a widened formal representation by non-state actors in global governance, an important problem concerning representation is that having a seat at the negotiating table guarantees neither influence nor effective representation.⁴⁸

⁴³ Cecilia Albin, 'The Role of Fairness in Negotiation', *Negotiation Journal*, 9:3 (1993), pp. 223–44.

⁴⁴ Cecilia Albin, 'Negotiating international Cooperation: Global Public Goods and Fairness', *Review of International Studies*, 29:3 (2003), pp. 379–40.

⁴⁵ Habermas, 'The Inclusion of the Other', p. 42.

⁴⁶ Thomas Risse, 'Global Governance and Communicative Action', *Government & Opposition*, 39:2 (2004), pp. 292–3; Eva Erman, 'Rethinking Accountability in the Context of Human Rights', *Res Publica: A Journal of Legal and Social Philosophy*, 12:3 (2006), p. 261.

⁴⁷ Risse, 'Global Governance and Communicative Action', p. 297.

⁴⁸ Erman, 'Rethinking Accountability', p. 268.

We contend that the logic of argumentation has more to offer than the logic of consequentialism in coming to terms with the fact that formal representation does not say much about influence over decisions. The more arguing matters in multilateral negotiations, the more actors with less material resources are empowered through the process.⁴⁹ However, communicative processes must be strictly regularised. As Stephen Krasner pointed out twenty-five years ago, developing countries have a strong preference for formalised, rule governed processes of decision-making rather than the informal less prescriptive and flexible approaches often favoured by powerful states.⁵⁰ In order to promote the democratic values of justice and equality, fair deliberative procedures and equal respect and participation must be regulated and institutionalised.

In our particular approach to GGII, apart from promoting justice and equality, global institutions should promote *accountability* in order to be reasonably acceptable. How can we conceive of accountability in the absence of democracy, for example, in global governance without global government? The relationship between accountability and legitimacy is indeed under-theorised in international politics, where accountability is often equated with legitimacy. Unfortunately, this equation has led to a negligent way of speaking about global governance in democratic terms. For our purposes it is useful to distinguish between institutions being democratically accountable in the traditional sense; thereby increasing their democratic legitimacy, and institutions promoting the value of democratic accountability, thereby increasing their justifiability and thus contributing to what we have called transnational legitimacy. The latter is not best achieved by a widened institutionalised participation in global institutions. Instead we stress two other aspects of importance: Firstly, *improved normative standards* will increase the accountability of global institutions. Therefore, one important way for global institutions to promote the value of accountability is to promote procedural fairness and equal deliberative participation. But equally important for accountability is *enhanced information provision and transparency*.⁵¹ Modern communications and their global diffusion make open information provision, and hence transparency, a more important political tool than at any time in history.⁵² From a deliberative view, this aspect of accountability is not only connected to the normative but also the epistemological dimension of reason-giving. Judgements about whether an institution satisfies the criteria for legitimacy require factual knowledge. Sometimes this is referred to as the 'epistemic-deliberative' quality of an institution, measured by the extent to which it provides reliable information.⁵³ But epistemic quality is not solely an empirical and practical matter since what counts as 'reliable information' is partly a normative question.

A problem today is that the epistemic power to define global economic governance is driven primarily by a neoliberal discourse and liberal trade theory (in

⁴⁹ Risse, 'Global Governance and Communicative Action', p. 303.

⁵⁰ Stephen Krasner, *Structural Conflict: The Third World Against Global Liberalism* (Los Angeles: University of California Press, 1985).

⁵¹ Ruth Grant and Robert O. Keohane, 'Accountability and the Abuses of Power in World Politics', *American Political Science Review*, 99:1 (2005), pp. 29–43.

⁵² Ann Florini, *The Third Force: The Rise of Trans-national Civil Society* (Washington DC: Carnegie Endowment for International Peace, 2003).

⁵³ Allen Buchanan and Robert, O Keohane, 'The Legitimacy of Global Governance Institutions', *Ethics & International Affairs*, 20:4 (2006), pp. 425–6.

support of GGI) while outlets for critical voices are weak. In order for global institutions to provide reliable information some kind of (self-) critical discourse must be secured. Moreover, since the terms of accountability will most probably be contested, rules and procedures should be established to enhance the conditions for deliberative contest concerning the institutions' own operations. As the next section will demonstrate, the WTO has ventured farther down this discursive route than any of the other international economic institutions. This journey is briefly reviewed and suggestions for the next steps advanced. Via a brief examination of WTO decision-making we look at some of the theoretical opportunities and practical constraints on the role of the WTO operating as an instrument of global governance.

The WTO, deliberative democracy and decision-making

As we have indicated, the legitimacy question is not merely a 'policy' question for international institutions. This is especially the case for the WTO as a global actor. It is also a normative-theoretical question, more important now than at any time in the life of the post World War II multilateral trade regime. This is due in no small part to the shift from a relatively informal, albeit rules based agreement, amongst contracting parties (GATT) to a more formal organisation with greater policy reach and influence (WTO).⁵⁴ And it is not just developing countries, NGOs and the alter-globalisation movement that are frustrated by the roles of the WTO. Strong objections are found towards some of its activities (especially those of the DSM) among the rising economic nationalist tendencies in the USA and some European countries. Also, key sections of the global business community and the wider trade policy community feel the WTO acts at times as an impediment rather than a support to liberalisation; hence the turn to alternatives, such as bilateral and regional preferentialism, especially in times of economic crisis.

Who or what confers legitimacy on the activities of an organisation like the WTO is a complicated matter. So apart from the adjustment problems that arise with the creation of a new organisation, the legitimacy question reflects a number of longer term structural problems pertaining to:

- (i) The continuation of increasingly dysfunctional decision-making procedures that accompany the question of determining the legitimate functions and roles for the WTO given how the move from GATT to WTO has widened its remit.
- (ii) The issue of to whom the WTO is accountable; given the increased the range of actors that now assume a right to a 'voice' on trade matters.

The primary aim of the deliberative theoretical framework elaborated in the previous section is not to propose an ideal to be realised but to offer tools for criticising global economic institutions from a legitimacy perspective and to point out directions that these institutions might take in order to remedy their legitimacy deficit. Specifically we need to ask what problems and possibilities face the WTO

⁵⁴ For a discussion of this transition see Amrita Narlikar, *A Short History of the WTO* (Oxford: Oxford University Press, 2005).

from a deliberative perspective. The major task here is to reduce the power asymmetries within multilateral trade negotiations by establishing a fairer and more equal bargaining procedure as well as opening up the organisation for a transparent critical discourse, from the outside as well as from within, and to disperse the epistemic power to define what good global economic governance is. What is often forgotten is that the WTO is ostensibly more democratic than most international organisations and its institutional structure certainly harbours elements with (potential) deliberative qualities and major efforts at reform have been undertaken since 2005. Indeed, as Director-General Pascal Lamy notes:

While most international economic organisations have a restricted body alongside their plenary body, the WTO is unusual in that the totality of its membership participate, as a matter of law, in all of its bodies from the Ministerial Conference, which meets at least once every two years, to the General Council which functions during the interval, not to mention each of the Councils and the Committees. All of the decisions are taken according to the principle of ‘one government, one vote’ and by consensus. While it is true that this rule of consensus is responsible for a certain sluggishness in the negotiations it does enable all Members, whatever their share of international trade, to express their views and to participate on equal footing [. . .] no decision is ever taken in a green room meeting, the object of which, as that of many group meetings of variable geometry, is simply to narrow down the main interests at stake.

Green room meetings include representatives from all interest groups [. . .] They usually follow open ended meetings held by Chairs of negotiating groups in addition to bilaterals, confessionals, group briefings, informal meetings, technical meetings and briefings by the Director General to various regional group members [. . .] Once a consensus emerges in green rooms, Members go back to broader meetings in the form of Heads of Delegations, TNC or GC Meetings, where all members participate and can express their views and their position on any proposed consensus decision.⁵⁵

We quote Lamy at length to demonstrate that there is a case to be made – stronger than one would believe from a reading of the often explicitly critical NGO literature⁵⁶ – that the WTO is a venue at which ‘all’ voices, including those of the weakest members can, in theory if not always in practice, be heard. There does in fact exist at the WTO a *formal institutional environment* for deliberative decision-making which could in principle promote the democratic values of justice, equality and accountability.

Of course, this is not the same as suggesting the presence of an embedded *culture environment* that automatically lends itself to deliberative democratic discussion. The WTO remains principally a venue for negotiation rather than for argumentation. Deliberative democracy of the kind we have outlined in the preceding section is not embedded in the WTO at either the normative or empirical level. Notwithstanding some shift in the balance, the logic of consequentialism still prevails over the logic of appropriateness and conditions for enabling communicative action are not embedded. And certainly the historical record suggests that the multi-lateral trade negotiation (MTN) processes have been driven by restricted deliberations of the major powers and issue specific coalitions. The pattern of negotiation in MTN rounds to-date has seen ‘[. . .] a semblance of law based

⁵⁵ Pascal Lamy to Richard Higgott, personal correspondence, 27 June 2006.

⁵⁶ *pace* Aileen Kwa and Fatoumata Jawara, *Behind the Scenes at the WTO: The Real World of Trade Negotiations* (London: Zed Books, 2003).

negotiation in the launch phases of trade Rounds, but domination and coercion by powerful western states for most of the rest of this process'.⁵⁷

For developing countries, both the psychologically negative impact of Green Room processes and the usually asymmetrical deals that result have traditionally been a severe test of commitment to the organisation. Significantly, however, this is better understood in the contemporary era of the WTO than at any time in the history of the GATT/WTO. Director General Pascal Lamy for example is on record as saying that he understands the negative impact of the Green Room process on the WTO's less powerful members. Responding to the criticism that Green Room processes at the July 2008 Geneva Mini-Ministerial resulted in a sense of lack of ownership of decisions by smaller members, Lamy replied, 'I totally understand, and share, the concerns of those of you who feel that this process is frustrating and sometimes too obscure [...] I agree that we have to work out this problem of ownership.' But, notwithstanding more sensitive use of Green Room and small group discussions, these activities can still lead to wider member resentment; as was clearly the case in Geneva in 2008.⁵⁸

For some WTO analysts and practitioners, especially those concerned about its ability to make effective decisions, the only way beyond this kind of impasse is the creation of some kind of 'consultative board'⁵⁹ not dissimilar to the UN Security Council or a move away from 'single undertaking' decision-making towards 'critical mass' decision-making in the setting of the WTO policy agenda.⁶⁰ Needless to say neither suggestion has so far found much support within the developing world. Nor will a 'critical mass approach' to agenda setting and decision making secure much support until (unless) formal closure is brought to the Doha Round. Some significant elements of the trade policy community, such as the Australian Department of Foreign Affairs and Trade do, however, see it as an increasingly important agenda item to be addressed in any post Doha discussions of institutional reform at the WTO.⁶¹

Notwithstanding developing country dissatisfaction with the current processes, the one thing that WTO decision-making processes theoretically have in their favour is that they are rules based and consensus based with a juridical notion of member equality. And as argued in the previous section, regulated fair and equal deliberative participation is an important condition of possibility of political agency. But there is a practical limitation with the 'one-member-one-vote' argument. The WTO has a *de facto* system based on the size of a country's market.

⁵⁷ Kapoor, 'Deliberative Democracy', p. 529; see also Markus Krajewski, 'Democratic Legitimacy and Constitutional Perspectives of WTO Law', *Journal of World Trade*, 35:1 (2001), p. 167–86; Richard H. Steinberg, 'In the Shadow of Law or Power: Consensus Based Bargaining and Outcomes in the GATT/WTO', *International Organisation*, 56:2 (2002), pp. 339–74.

⁵⁸ This point is based on a detailed empirical analysis of the discussions of the Ministerial Meetings in the Doha Round from 2001 through to Geneva July 21–30, 2008. For insights into the nature of the negotiations processes in these meetings see the detailed 'Daily Update' analyses produced by the International Centre for Trade and Sustainable Development (ICTSD, Geneva) accessed at {<http://ictsd.net/>}.

⁵⁹ Narlikar, 'A Short History of the WTO'.

⁶⁰ Warwick Commission, *The Multilateral Trade Regime: Which Way Forward?*, Warwick University, December 2007. Accessible at {<http://go.warwick.ac.uk/go/warwickcommission>}.

⁶¹ Commonwealth of Australia, *Winning in World Markets: Meeting the Challenge of the New Global Economy. A Review of Export Policies and Programmes*, Canberra, Department of Foreign Affairs and Trade (2008), {http://www.dfat.gov.au/publications/mortimer_report/mortimer_report2.pdf} recommendation 5.6.

This would be difficult to change in a *de jure* sense. A formal approach based on weighted preferences (as at the World Bank and the IMF) for the major trading states would shatter the myth of sovereign equality amongst WTO members and formalise the omission of many developing countries from the consultation processes. It may be easier to acknowledge the growing power of the ‘new powers’ in a *de facto* way than it would be if voting weights were formalised. As Lamy argues, ‘the WTO is one of the few places where the geographical and economic changes of the recent past are reflected in the representation around the table’.⁶² An observation of the behaviour of the G20,⁶³ and especially India, Brazil, China and South Africa, in the Doha Round would support Lamy’s view but it does not solve the dilemma inherent in the need to progress GGI and GGII in lock step. A move towards ‘critical-mass’ agenda setting that streamlines decision-making while at the same time protecting the varied but legitimate interests of all members will need to be considered at some stage if the WTO is to remain a sustainable long term pillar of the global economic architecture.⁶⁴

The processes in train since the Seattle Ministerial Meeting of 2000 have been characterised by a concerted attempt by developing countries to enhance at one and the same time both their deliberative impact, that is, their ability to set the terms and practices of argumentation, and their *de facto* market power in the WTO on a number of fronts. This is epitomised in the growth of coalitions such as the G20.⁶⁵ The growth of Southern activity, including stronger positions in Green Room negotiations that have emerged during the Doha Round, is a reflection of an increased understanding by the developing countries of their *juridical equality* within the WTO legal framework. This is having the effect of breaking up some of the traditional asymmetries. Developing countries – notwithstanding the danger of ‘coalition proliferation’ (G20, G33, G90, G110 – 20+90 etc.) – have enhanced their ability to offer ‘voice’ in the negotiating process. Recognition of this is to be found in the growing influence over the negotiations, and of India and Brazil in particular, and the irritation of traditional powers (the US and EU especially) at not automatically getting their own way. Although power asymmetries are still heavily weighted in the favour of the traditional powers, the veto capacity of the ‘new majors’, as evinced by India and China’s role in closing down the Mini-Ministerial in Geneva in July 2008, has been fully established since the turn of the century.⁶⁶

The growth of power of the new coalitions has allowed Lamy, and his predecessor Supachai Panitchpakadi, to re-legitimise Green Room activities. The regular inclusion of the powerful developing countries into Green Room deliberations has had the effect of weakening the traditional developing country critique that they were totally controlled by the US, Europe and, to a lesser extent, Japan.

⁶² *The Financial Times* (24 January 2007), p. 7.

⁶³ That is the group within the WTO, not the G20 that has emerged from the Global Financial Crisis of 2008.

⁶⁴ See the proposal and the safeguards for developing countries advanced in the Report of the Warwick Commission in to the *Future of the Multilateral Trade Regime* (2007), pp. 31–3.

⁶⁵ Amrita Narlikar and Diana Tussie, ‘The G20 at the Cancun Ministerial Meeting: Developing Countries and their Evolving Coalitions’, *The World Economy*, 27:7 (2004), pp. 947–66.

⁶⁶ This is not a story exclusive to the trade regime. Whatever its effectiveness in restoring stability to the global financial regime, the 15 November 2008 G20 meeting in Washington confirmed the place of the major developing countries in discussions over the governance of the global economy.

This does not mean that in-built structural disadvantages have gone; nor that the ‘new majors’ axiomatically represent the interests of states other than themselves. The WTO remains a ‘power based’ system with little concern for the asymmetries in the relationship between the developed and developing countries. The WTO negotiating system remains a system of asymmetrical domination embedded in a formally fair system of legal rules.

Further, limited financial and human resources – especially technical knowledge – also work against the evolution of a deliberative process and, by extension, developing country participation within it.⁶⁷ This is in large part explained by the neoliberal language of the WTO, emphasising core market values of competition and efficiency, which remain predominant; albeit battered by the events in global markets since 2008. This ensures a high degree of access to and influence over the trade policy community as illustrated for example in the effectiveness of the pharmaceutical industry lobby and the Coalition of Service Industries on TRIPS and GATS in the Uruguay Round. Increased capacity for developing countries usually means becoming more adept at understanding and articulating their interests through the prism of this paradigm with its settled (hegemonic) rationalist, state-centred, market driven norms. Indeed, the ability of the developing countries to generate ‘voice’ on new ideas – by which, following Hirschmann⁶⁸ we mean the dual ability and opportunity to both formulate policy and advance policy – is constrained not only by capacity and cost, but also by the residual strength of existing liberal, rationalist norms within the core epistemic and political groupings at the WTO. Liberal (trade) theory privileges ‘abstracted rationality’ at the expense of ‘contextual rationality’.⁶⁹ But, for many developing country policymakers contextual rationality is clearly privileged in their policy thinking. This can reinforce North-South divisions; especially in times of financial crisis of the kind witnessed since 2008.

Other disparities in intellectual (and infrastructural) resources at the disposal of developing countries in the negotiation process when compared with those of the majors also inhibit their decision-making. For example, NTBs such as phytosanitary arrangements are now so technical that developing world trade officials do not have the expertise to understand them,⁷⁰ hence the importance of the Aid for Trade initiative. Moreover, the WTO, unlike say the IMF or the World Bank is not a ‘knowledge based’ organisation with capacity building capability and programmes.⁷¹ Notwithstanding a range of activities and initiatives to build technical capacity, WTO members are largely left to their own devices and material capabilities when it comes to the formation of national policy positions on WTO issues. The WTO is a repository of expert knowledge (on international trade) but it does not, unlike the IMF or the Bank, have substantial material resources to

⁶⁷ See Sheila Page, *Developing Countries: Victims or Participants Their Changing Role in International Negotiations* (London: Overseas Development Institute, 2003).

⁶⁸ Albert O. Hirschman, *Exit Voice and Loyalty: Responses to Decline in Firms, Organisations and States* (Cambridge: Harvard University Press, 1970).

⁶⁹ Steven Brint, *In the Age of experts: The Changing role of Professionals in Politics and Public Life* (Princeton: Princeton University Press, 1994); and Charles Lindblom *Inquiry and Change: New Haven* (Yale University Press, 1990).

⁷⁰ UN Millenium Project, *Task Force on Trade* (Washington DC, 2005), pp. 146–65.

⁷¹ Diane Stone, *Banking on Knowledge: The Genesis of the Global Development Network* (London: Routledge, 2001).

distribute as a way of legitimating and embedding its epistemic knowledge in the wider trade community. Greater socialisation into the discourse of liberal trade via a sustained process of knowledge capacity building could turn out to be one useful way of minimising hostile Southern voices on the issue of the legitimacy of the WTO but this is a difficult task when critical voices against liberal trade theory are, as in times of recession, louder within developed countries than in developing ones.

Conclusion

Notwithstanding the limitations and constraints on the WTO identified in the preceding section of the article, we argue that as a putative organisation of global governance it has considerable deliberative potential to enhance the values of justice, equality and accountability and thereby increase its reasonable acceptability among a large group of diverse agents in global civil society. To begin with, the organisation's formal legal structure constitute the conditions of possibility of political agency between representatives of legal-political communities and a firm basis for justice and equality in decision-making. Formal equality is a necessary (pre)condition for eventual non-hierarchical steering through deliberative problem solving. Of course, to become more legitimate, rules and procedures must also be more strictly and explicitly formulated and prescribed in order to prevent the 'vagueness' which favours strategic action by powerful actors. Moreover, rules and procedures must be reformed in a way which encourages a shift from the dyadic logic of consequentialism, where only mutual assessment counts, towards the triadic logic of argumentation, where participants must also make reference to an external authority of common values when raising validity claims in discourse; that is, in a direction that strengthens the values of justice and equality and thus reduce major power asymmetries in trade negotiations. The changes we have witnessed at the WTO since 2001 – and with the growing pressure and effectiveness from developing countries (and non-state actors and civil society at large) – testify to movement in this direction.

For this trend to progress further however, socio-cultural and psychological factors are as important as juridical and institutional ones. Indeed, the 'free trade' culture nurtured by liberal trade theory infuses the basic intellectual structure of what we have called GGI. But as we have argued, this view has become increasingly challenged both on pragmatic and normative grounds in the period 2008–2010. This is not simply a case of increasing protectionism since 2008 – a verifiable empirical trend.⁷² In addition, and from both ends of the spectrum, the sharp dichotomy between abstracted and contextual rationality in the global economic policy community is softening. Political actors from the South form coalitions and come together in joint action which enhance their deliberative impact and slowly breaks down some of the cemented power asymmetries. As a consequence, their self-confidence and argumentative capacity increases, which in turn gives rise to further requirements of equal inclusion and participation central

⁷² Richard Baldwin and Simon Evenett (eds), *The Collapse of Global Trade: Murky, Protectionism and the Crisis: Recommendations for the G20*, Geneva, VoxEU.org (2009).

to what we call GGII, thereby supporting and substantiating the growing juridical equality of the smaller members of the WTO. If actors come to rely more on argumentation, this will alter the balance in the relationship between GGI and GGII.

The key issue in the early 21st century at the WTO is not the future of liberal, freer trade. Even in times of acute global recession, the importance of trade liberalisation as a vehicle for growth remains theoretically unchallenged. A failure to secure an end to the Doha negotiations will not be the end of trade liberalisation. The issue is how to overcome a residual belief that structural power asymmetries actively work against developing countries taking the maximum benefit from a liberalising trading order. No developing countries nowadays talk of autarky in a manner common to the 1970s. But many believe that the first mover advantages and infant industry arguments that benefited the now developed world in earlier times are not so easily available to them in the 21st century.⁷³ This is a political problem inhibiting the consolidation of global trade norms, principles and rules and the institutionalisation of the WTO as their arbiter. It has thus been the argument of this article that it is the unsatisfactory and contested nature of the decision-making process, as much as any substantive trade liberalisation issues at dispute amongst the players in multilateral trade negotiations, which challenges the legitimacy of the WTO as a vehicle for 21st century global economic governance.

For all the efforts of the WTO to overcome its failings, and these efforts we argue have been substantial and well in advance of the other international economic institutions since the turn of the century, a democratic deficit remains. Most of those affected by WTO rules still have little, or at least insufficient in their own eyes, input into the process. But we have also argued that this problem cannot be solved by the liberal cosmopolitan implementation of an all-affected principle and a principle of active agency, since political agency requires that free and equal participation in deliberative democratic decision-making is secured by legal-political communities such as states, and that states therefore ought to be the major actors of global institutions. However, according to our two-track view, actors of global civil society not only contribute to increased transnational legitimacy by playing a crucial epistemic role in pressuring for increased transparency and bringing new issues into the agenda of global institutions, they also do so because they only have moral reasons to accept (that is, hypothetically consent to) such institutions to the extent that they promote the values of justice, equality and accountability. In our attempt to blend normative theorising with analytical observation, we have tried to demonstrate that the activity at the WTO since the turn of the century provides a partial empirical verification that a move in this direction is possible.

⁷³ Chang Ha-Joon, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (London: Anthem Press, 2002).