

Law and Politics in the WTO — Strategies to Cope with a Deficient Relationship

*Armin von Bogdandy**

- I. Introduction
- II. The Deficient Relationship between the Political and the Adjudicative Function
 - 1. Principles of the Division of Functions in WTO Law
 - 2. Treaty-Making as Deficient Legislation
 - a. Treaty-Making and the Democratic Principle
 - b. Treaty-Making and Legislative Efficiency
 - c. Legislation and Judicial Law-Making
 - 3. Functional Equivalents?
 - a. Rule-Making by WTO Organs
 - aa. The GATT 1947 as a Rule-Making Organization
 - bb. Politics under the WTO Agreement
 - cc. What Role for Councils and Committees?
 - b. Outsourced Rule-Making
 - aa. Incorporation of Standards of other Organizations
 - bb. Scientific Evidence
 - 4. Comparative Notes
 - a. The Standard Situation in International Law
 - b. Law and Politics under the EC-Treaty
 - 5. Conclusions
- III. Strategies to Cope with the Missing Legislator
 - 1. Three Approaches: Liberalism, International Governance and Coordinated Interdependence
 - 2. The Objectives of WTO Law
 - 3. The Scope and Meaning of Discrimination and Exceptions
 - 4. A Procedural Conception of Substantive Law
- IV. Conclusions

I. Introduction

In modern societies law and politics are different and separate, and yet closely interlinked.¹ One of the great achievements of modern political and legal thought has been the conceptualization of their relationship and the development of stable forms of separation *and* interaction as essentials for the operation of contemporary societies. The dominant approach theorizes this relationship in the *separation of powers* doctrine: centralized parliamentary legislation, executive enforcement and judicial review. These three powers are often considered as the institutional basis of a fully fledged legal system.² If international law has been considered as an inferior form of law, it is because it historically lacks such types of institutions and procedures.³

Since World War II, a number of international legal regimes have developed which institutionalize some kind of centralized legislation (rule-making)⁴ or execution or adjudication in an attempt to enhance

* I am grateful for the helpful criticisms and comments from Michael Bothe and Petros Mavroidis on an earlier draft and for the help from my assistants Felix Arndt, Jürgen Bast, Eric Pickett and Uwe Säuberlich in the preparation of this article. The usual disclaimers apply. This article has been developed in the context of a DFG *Schwerpunktprogramm* which studies governance in the European Union and is headed by Beate Kohler-Koch. A comparison between the EU and the WTO is considered to be of help for a better understanding of both systems.

¹ That, at least, appears to be the common ground of most strands of legal and constitutional theory, cf. E.W. Böckenförde, "Entstehung und Wandel des Rechtsstaatsbegriffs", in: id., *Recht, Staat, Freiheit*, 1991, 143 et seq.; M. Loughlin, *Public Law and Political Theory*, 1992, 138 et seq.

² J. Locke, *The Second Treatise of Government*, 1690, Chap. XII f.; G. de Vergottini, *Diritto costituzionale comparato*, 5th edition, 1999, 346 et seq.; for an exhaustive analysis H. Seiler, *Gewaltenteilung: Allgemeine Grundlagen und schweizerische Ausgestaltung*, 1994.

³ W. Graf Vitzthum, "Begriff, Geschichte und Quellen des Völkerrechts", in: id., *Völkerrecht*, 1997, 41.

⁴ H. Schermers/ N. Blokker, *International Institutional Law*, 3rd edition, 1995, paras 389 et seq.; throughout this text, *legislation* means *rule-making*. This equation might appear questionable since contemporary political and legal thought often reserves the term *legislation* for *parliamentary* rule-making. However, given the function of many WTO provisions to provide for general rules, this equation is defensible. On the transnational level, the terms *legislation* and *legislator* are generally applied to any rule-making

international law's capability to cope with an ever increasing need for international cooperation. However, the new institutions never simply repeat the organizational and procedural set-up found in most constitutional systems of government. Rather, new and often puzzling set-ups can be found which put politics and law in a different relationship, calling for exploration.

A most striking example of this new relationship can be found in the WTO, which — irrespective of the question of direct effect — is a body of law with increasing influence on domestic economic law and its everyday practice.⁵ The WTO's particular importance stems from a widespread impression that it is a crucial element of an ongoing process which separates law from politically accountable institutions, with profound implications and perhaps even substantial harm for democratic self-determination.⁶ This is all the more so if one sees WTO law as a body of rules that provides private actors with the opportunity to build up private legal frameworks filling the space created by the WTO's deregulatory impact.⁷ These private legal frameworks satisfy

body, even if not a parliamentary institution, see ECJ, Case C-280/93, Germany/Council, ECR 1994, I - 4973, para. 47.

- ⁵ P. Eeckhout, "The domestic legal status of the WTO Agreement: interconnecting legal systems", *CML Rev.* 34 (1997), 11 et seq.; S. Griller, "Judicial Enforceability of WTO Law in the European Union", *JIEL* 3 (2000), 441 et seq.; A. v. Bogdandy/ T. Makatsch, "Collision, Coexistence, or Cooperation?", in: G. de Bruc/ J. Scott (eds), *The EU and the WTO*, 2001, (forthcoming).
- ⁶ R. Dahrendorf, "Anmerkungen zur Globalisierung", in: U. Beck (ed.), *Perspektiven der Weltgesellschaft*, 1998, 31, 46 et seq., whose disquieting prediction is that the 21st century might become a century of authoritarianism because of globalization; J.M. Guéhenno, "From Territorial Communities to Communities of Choice: Implications for Democracy", in: W. Streek (ed.), *Internationale Wirtschaft, nationale Demokratie*, 1998, 137, 140 et seq.; K. Günther, "Alles Richtig", *Rechtshistorisches Journal* 19 (2000), 232 et seq., (242, 244); D. Rodrik, *Has Globalization Gone too Far?*, 1997, 70.
- ⁷ J. Drexler, "Unmittelbare Anwendbarkeit des WTO-Rechts in der globalen Privatrechtsordnung", in: B. Grossfeld (ed.), *Festschrift W. Fikentscher*, 1998, 822 et seq., (841); J. Esser, "Der kooperative Nationalstaat im Zeitalter der Globalisierung", in: D. Döring (ed.), *Sozialstaat in der Globalisierung*, 1999, 117, 134, 137; G. Teubner, "Privatregimes: Neo-Spontanes Recht und duale Sozialverfassung in der Weltgesellschaft", in: D. Simon/ M. Weiss (eds), *Liber amicorum Spiros Simitis*, 2000, 437, 446. The projected and much criticized OECD Multilateral Agreement on Investment

some core functions of law, in particular the stabilization of normative expectations and the resolution of conflicts. By their nature, however, such private and mostly contractual regimes often fall short of meeting public interests and those of third parties. The criticism that WTO law is the vanguard of neo-liberal globalization goes in the same direction.⁸

There is an urgent need to investigate the relationship between law and politics in the WTO. In the first part, this article, inspired by European constitutional thought, will outline the mismatch between the cumbersome political institutions and procedures on the one hand and the WTO's often far-reaching rules applied by compulsory adjudication on the other. In the second part, it will present ways of responding to this mismatch. It will be shown that the dispute settlement organs and above all the Appellate Body are engaged in a process to meet dangers resulting from the mismatch. That attempt might even be considered a *Leitmotiv* of the jurisprudence built up over the last five years.⁹ Some further proposals on how to tackle the mismatch in the future are also discussed.

The author holds that the fears directed at the WTO are not without foundation. At the same time, this paper builds on the premise that both international trade and the international division of labour are, in principle, beneficial and in need of a multilateral framework.¹⁰ In order to avoid the dangers and to realize the potentials of this body of law it

has been seen as part of the WTO-process, E. Altvater/ B. Mahnkopf, *Grenzen der Globalisierung. Ökonomie, Ökologie und Politik in der Weltgesellschaft*, 4th edition, 1999, with reference to WTO Director-General Renato Ruggiero.

⁸ U. Brand/ A. Brunnengräber/ L. Schrader/ C. Stock/ P. Wahl, *Global Governance. Alternativen zur neoliberalen Globalisierung?*, 2000, 104; see also the critique of *Public Citizen* L. Wallach/ M. Sforza, *Whose Trade Organization?*, 1999, 3, 217 et seq.

⁹ So far, 32 Reports of the Appellate Body and 53 Panel Reports are published on the WTO web site (as on 30 November 2000).

¹⁰ This premise, although sometimes challenged, is supported by sound scientific evidence and strong democratic legitimacy since the WTO agreements have been endorsed by all national legislatures. However, no principle can command absolute dominance and the challenging question is how to decide in the many cases of conflict with other principles and policy objectives. S. Langer, *Grundlagen einer internationalen Wirtschaftsverfassung*, 1995, 10, "Die Frage nach einer internationalen Wirtschaftsverfassung ist mit dem Hinweis auf das Theorem der komparativen Kosten also nicht beantwortet, sondern im Grunde erst (sinnvoll) gestellt."

is suggested that the relationship between the legislative (rule-making) function and the adjudicative function as it pervades WTO law must be continuously reflected in the interpretation and application of its provisions. The key to the WTO's lasting success lies in recognizing its limits and adequately transposing this insight into legal interpretative practice.

This argument, which lies at the heart of the model developed here (termed the *coordinated interdependence model*), will lead to two interpretative principles. The first proposal states that substantive WTO law should in principle (with some clear exceptions) be understood as concretizing the principle of non-discrimination; it should not be interpreted as aiming at market integration or deregulation. Second, in situations of normative vagueness, WTO provisions should be interpreted in a rather procedural way. Interests which would otherwise have no standing in the internal political and legal processes shall be taken into consideration by a state in its public activities, whether legislative, executive, or adjudicative. Only in core fields should WTO law be developed into a substantive, closely knitted body of law. This approach underscores the importance of *in dubio mitius* as defining the background against which the interpretation of WTO rules should take place.¹¹

On this reading, WTO law does not aim at market integration or regulatory competition. Rather, its goal is first, avoiding circumvention of tariff reductions, and, second — and theoretically more important — meeting the core challenge of globalization. Globalization has one crucial element in all understandings:¹² that borders are growing increasingly porous and that a decision taken at a given place has important effects outside the borders of the state to which the place belongs. This is one of the undemocratic features of globalization if democracy means that those affected have a say. WTO law responds to this feature of globalization with multilateralism: when a sovereign decision affects economic interests of people in other Member States, their interests must be taken into account, either through a negotiated solution between the affected members, or, if impossible, through “simulated multilateralism” in the domestic legislative process. This might be a specific contribution of WTO law to “good and responsible government” in economic affairs.

¹¹ On “*in dubio mitius*” in general see, R. Bernhardt, “Interpretation in International Law”, in: id. (ed.), *EPIL* 7 (1984), 318 et seq., (321).

¹² D. Held/ A. McGrew/ D. Goldblatt/ J. Perraton, *Global Transformations*, 1999, 16; U. Beck, *Was ist Globalisierung?*, 1998, 55 et seq.

II. The Deficient Relationship between the Political and the Adjudicative Function

1. Principles of the Division of Functions in WTO Law

The WTO Agreement reproduces the traditional conceptual distinctions developed by the theory of the state with respect to the functions of public authority in a surprisingly faithful way. That theory considers legislation, execution and adjudication as the three public functions with respect to the state's inner sphere.¹³ Beyond these three internal functions, considered as all-comprehensive, sometimes a further external power is postulated.¹⁴ Article III WTO, which lays out the functions of the WTO, closely follows this traditional distinction and provides a first hint as to what extent the WTO shall exercise the various activities of public authority. Article III:1 WTO concerns executive function, article III:2 WTO the legislative function, and article III:3 WTO the adjudicative function. Article III:4 WTO can be considered as a new strategy of implementation which embraces elements of execution and adjudication,¹⁵ and article III:5 WTO concerns foreign relations.

A closer analysis of article III:2 WTO already reveals the peculiar relationship between politics and law in the WTO. With respect to the legislative process the WTO "shall provide the forum for negotiations", and with respect to the executive function it "shall facilitate the implementation, administration and operation" (article III:1). Therefore, the WTO Agreement is not meant to institutionalize any autonomous political process. In its official presentation, the organization emphasizes

¹³ G. Jellinek, *Allgemeine Staatslehre*, 3rd edition, 1928, 609 et seq.; G. Zimmer, *Funktion – Kompetenz – Legitimation: Gewaltenteilung in der Ordnung des Grundgesetzes*, 1979, 33 et seq.

¹⁴ Mostly, that function is considered as inherent part of the executive function, Locke, see note 2, Chapter XIV; for the increasing parliamentarisation of the external power R. Wolfrum, "Kontrolle der auswärtigen Gewalt", *VVDStRL* 56 (1996), 38 et seq.

¹⁵ M. Bothe, "Neue und alte Konzepte der Durchsetzung des Humanitären Völkerrechts", in: V. Epping (ed.), *Festschrift Knut Ipsen*, 2000, 23, 37 et seq.; T. Marauhn, "Towards a Procedural Law of Compliance Control in International Environmental Relations", *ZaöRV* 56 (1996), 696 et seq., (707). This strategy is a specific and quite successful method in international law to achieve compliance without centralized enforcement.

its "serving" function to its members, considering itself a "member driven institution".¹⁶ This contrasts with institutions such as the IMF which — due to the far greater operational autonomy of the IMF Executive Board than that of the WTO Director-General — can be considered "institution driven".

The picture changes completely when it comes to adjudication.¹⁷ Article III:3 WTO states that the WTO "shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes" (hereinafter referred to as the Dispute Settlement Understanding or DSU). Therefore the WTO has an autonomous function with respect to adjudication; it is not limited to "providing a forum" or "facilitation". This autonomy is not a simply formal element, but has a most important substantive quality. Just three outstanding pieces of evidence shall be tabled. First, according to article 6.1 DSU, the adjudicative procedure does not depend on the consent of the respondent member. Second, according to arts 8.6 DSU and 8.7 DSU, the nomination of the panelists is a function of the Secretariat and the Director-General, respectively. Given that in the small world of international trade law the opinion of possible panelists on the issues at stake is often more or less known, this competence provides some control over the development of the body of law, at least at the level of panel reports. In fact, it is said that the technical assistance of the WTO Secretariat to the panelists can result in shaping the report, thereby enhancing the Secretariat's influ-

¹⁶ http://www.wto.org/english/thewto_e/whatis_e/tif0m1_e.htm "In fact: it's the governments who dictate to the WTO."

¹⁷ On the dispute settlement procedure in detail F. Feliciano/ P. Van den Bossche, "The Dispute Settlement System of the World Trade Organization", in: N. Blokker/ H. Schermers (eds), *Proliferation of International Organizations*, 2001, 297; R. Hudec, "The New WTO Dispute Settlement Procedure", *Minn. J. Global Trade* 8 (1999), 1 et seq.; P. Mavroidis/ D. Palmeter, *Dispute Settlement in the World Trade Organization*, 1999; E.U. Petersmann, *The GATT/WTO Dispute Settlement System*, 1997; A. Ligustro, *Le Controversie Tra Stati Nel Diritto Del Commercio Internazionale: Dal Gatt All'OMC*, 1996, 439 et seq.; for a comparative analysis R. Keohane/ A. Moravcsik/ A.M. Slaughter, "Legalized Dispute Resolution: Interstate and Transnational", *International Organization* 54 (2000), 457 et seq.; A. Ziegler, "Scope and Function of the WTO Appellate System: What Future after the Millenium Round", *Max Planck UNYB* 3 (1999), 439 et seq.

ence on legal development.¹⁸ Third, and most important, political blockage of the dispute settlement procedure is prevented by arts 16.4 and 17.14 DSU, perhaps the most famous provisions of the whole Marrakesh Protocol. Although formally the adjudication function remains a competence of a political organ composed by representatives of the members, there is hardly any political grasp on what eventually becomes the decision, due to the principle of "reverse consensus".¹⁹ From these — hardly original — considerations flows the fact that the reporting institutions (the Panels and the Appellate Body) must be considered as independent adjudicative organs.²⁰ The WTO has created a body of law²¹ which is applied through independent and compulsory judicial adjudication.

The domestic law of some members further enhances the autonomous development of the dispute settlement system: the mechanisms through which private parties can bring about an adjudicative procedure. Certainly, only states can be parties before the adjudicative bodies, arts 1.1 and 10.2 DSU.²² There are, however, a number of mechanisms which give private enterprises important influence over the initiation and continuation of a dispute, the most important being Section

¹⁸ J. Weiler, "The Rule of Lawyers and the Ethos of Diplomats: Reflections in the Internal and External Legitimacy of WTO Dispute Settlement", *Harvard Jean Monnet Working Paper* 09/00.

¹⁹ From the point of view of transparency, this set-up is not convincing since responsibilities are obfuscated. The institution to which the decision is attributed, i.e. the Council, has almost no control. If this scheme were applied to the national plane, it would be convincing to call the U.S. President (rather than Congress) the American legislator given his veto power, article I Sec. 7(2) U.S. Constitution.

²⁰ See furthermore arts 8.9, 8.11, 13 and 17.7 DSU.

²¹ The term "body of law" instead of "legal order" or "legal system" underlines the fact that WTO provisions, principles and practices belong to international public law; see Appellate Body Report of 20 May 1996, WT/DS2/9, *United States – Standards for Reformulated and Conventional Gasoline*, page 17. For earlier tendencies to consider the GATT as a proper legal order, see W. Benedek, *Die Rechtsordnung des GATT aus völkerrechtlicher Sicht*, 1990.

²² With respect to their role in the dispute settlement procedure in detail B. Jansen, "Die Rolle der Privatwirtschaft im Streitschlichtungsverfahren der WTO", *ZEuS* 3 (2000), 293 et seq., (295 et seq.).

301 of the U.S. Trade Act 1974²³ and the EU Trade Barriers Regulation.²⁴ Also from this point of view, the dispute settlement enjoys some autonomy in the sense that no member enjoys absolute discretion as to whether or not to bring a case. The dispute Japan – Measures Affecting Consumer Photographic Film and Paper, commonly known as Kodak/Fuji, is a telling example of who stands behind the State parties to a dispute settlement procedure.²⁵

Summing up, the WTO Agreement draws conceptually on the traditional *separation of powers* doctrine and yet establishes an organization that exercises only one of those powers. Given the underlying logic of the separation of *powers*, a tension is created. This tension appears, at first glance, to be diminished because WTO law follows another basic element of the traditional separation of powers doctrine: the non-political nature of judicial adjudication. According to the traditional understanding, the judicial branch is not considered as part of the political realm: the political process, with its logic of power and interests, is transformed through the process of legislation (with its specific requirements of democratic legitimacy) into law, which is adjudicated according to the deductive logic of the legal sphere. The DSU presupposes that it is possible to oblige the adjudicative organs to proceed strictly according to the deductive logic of legal reasoning, leaving the development of the body of law to the political processes. Article 3.2 DSU requires the dispute settlement organs “to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law”, and prohibits “add[ing] or diminish[ing] the rights and obligations provided in the covered agreements”. Article 3.2 DSU was probably framed with an eye on the jurisprudence of the ECJ and the determination to exclude a similar development. It will be discussed whether this provision is more than wishful thinking.

²³ In detail M. Nettesheim, “Sec. 301 of the Trade Act of 1974”, in: E. Grabitz/ A. von Bogdandy (eds), *U.S. Trade Barriers. A Legal Analysis*, 1991, 353 et seq.

²⁴ In detail see G. Berrisch/ H.G. Kamann, “Die Handelshemmnis-Verordnung. Ein neues Mittel zur Öffnung von Exportmärkten”, *EuZW* 10 (1999), 101 et seq.

²⁵ Panel Report of 31 March 1998, WT/DS44/R, *Japan – Measures Affecting Consumer Photographic Film and Paper*.

2. Treaty-Making as Deficient Legislation

In comparison to traditional forms of international adjudication, the WTO represents an enormous step towards an efficient international exercise of public functions. This step is not paralleled with respect to legislation. Although WTO law foresees an almost continuous process of rule-making,²⁶ such rules cannot be enacted by the WTO organs. Nowhere in the WTO Agreement (or in any of the other agreements and instruments mentioned in article II:2 – 4 WTO) can one find an explicit competence to legislate. This represents one of the main differences with respect to the European Union, where legislation is one of the main tasks. According to article III:2 WTO, the WTO simply provides a “forum for negotiations among its Members”. Accordingly, there is a WTO competence to organize negotiations, but not a competence to amend its rules or to enact new ones on international economic law. The enactment happens through new treaties, mostly the fruit of most complex, tedious and protracted negotiation rounds, of which the Uruguay-Round was the last. The main legislative (i.e. rule-making) procedures for treaty amendments are those of article X WTO; the extension of WTO law through new agreements proceeds according to the standard forms of international treaty-making.²⁷ In both cases, acceptance by members, usually after parliamentary approval, is required.²⁸

a. Treaty-Making and the Democratic Principle

The drawbacks of the above-outlined form of rule-making are well known.²⁹ With respect to the democratic principle, legislation through international treaties is problematic from a static perspective, and even

²⁶ See, e.g. article XIX GATS; important examples of so called “built-in-agends” are to be found with respect to financial services and telecommunication, D. Barth, “Die GATS 2000-Verhandlungen zur Liberalisierung des internationalen Dienstleistungshandels”, *ZEuS* 3 (2000), 273 et seq., (280).

²⁷ On the organizational features J. Jackson, *The World Trade Organization. Constitution and Jurisprudence*, 1998, 41 et seq.

²⁸ In the EU, however, trade policy decisions do not need parliamentary assent, article 133.3, article 300.3 EC.

²⁹ For the respective U.S.-American debate cf. J. Jackson, “The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results”, *Colum. J. Transnat’l L.* 36 (1997), 157 et seq.

more so in a dynamic one. From the static perspective, the drawback can be found in the fact that, although national (and consequently democratic³⁰) sovereignty is formally respected, the content of the rules is determined in intergovernmental negotiations according to traditional diplomatic procedures. An open public discourse that can influence the rules, an essential element for democratic legitimacy according to most theories, is severely limited.³¹ The autonomy of the bureaucratic-governmental élites is far greater than in the national political process. If this is a general feature of international relations, it is particularly so in international trade relations: the GATT 1947 and WTO have so far been one of the most secretive in the world, and this secrecy is considered as an instrument to strengthen national negotiators who are in favour of trade liberalization.³² Furthermore, with the possible exception of the US-Congress, national parliaments show a far greater deference to governmental proposals if they concern international treaties rather than autonomous domestic legislation. As the discussion on the role of national parliaments in the EU legislative process has clearly revealed, there is also little hope of improving the input of national parliaments into transnational rule-making during negotiations.³³

Moreover, the lack of knowledge about the WTO further weakens the legitimizing force of national ratification. *John Jackson* states that "the implications of the UR [Uruguay Round] Agreement are undoubtedly not fully understood yet by any government that has accepted them";³⁴ this is particularly critical since the agreement "has such potentially profound effects on the economic well-being and activity of billions of citizens".³⁵ In order to grasp the full extent of these

³⁰ My entire argument only applies to WTO members whose internal structures can be considered democratic. The problem with respect to citizens living under autocratic rule needs a separate investigation.

³¹ For attempts to further the participation of NGOs in the work of the WTO, G. Marceau/ P. Pedersen, "Is the WTO Open and Transparent?", *JWT* 33 (1999), 5 et seq.

³² J. Goldstein/ L. Martin, "Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note", *International Organization* 54 (2000), 603 et seq., (612).

³³ P. Norton, "National Parliaments and the European Union: where to from here", in: P. Craig/ C. Harlow (eds), *Lawmaking in the European Union*, 209; D. Judge, "The Failure of National Parliaments?", *West European Politics* 18 (1995), 79.

³⁴ Jackson, see note 27, pages 33, similarly, 1 and 100.

³⁵ Jackson, see note 27, 51; Similarly Goldstein/ Martin, see note 32, 605.

effects, article XVI:4 WTO must be considered: it requires adapting the domestic legal order to WTO law. Irrespective of a possible direct effect of WTO law, this entails a profound influence on the domestic legal order.

The democratic problem grows even worse from a dynamic perspective. In modern times, *law* means *positive law*.³⁶ The main feature of the positivity of law is the legislature's grasp of and responsibility for the law:³⁷ the law is made by a legislature or is at least — in case of the common law or other judge made law — under its responsibility due to the legislature's competence to intervene at any given moment, amending or derogating a rule which an autonomous adjudicative process has developed.³⁸ This positivity of the law is an important aspect of the democratic sovereignty of a state: in democratic societies, the majority, usually conceived as a unitary subject organized through the elected government, can at any moment intervene in the body of law and change it.³⁹ Under all constitutional systems, the economic process is subject to rules that can be enacted by a simple majority or through delegated legislation: the possibility of fast intervention is a leading principle in framing the respective rule-making competence.⁴⁰

WTO law undermines the positivity of law in this sense. Once a treaty is set up, the political grasp on its rules is severely restricted — not normatively, but in all practical terms. Although international legislation respects the democratic principle insofar as treaties are negotiated and concluded by democratically elected governments, mostly

³⁶ G.W.F. Hegel, *Grundlinien der Philosophie des Rechts*, 1821 (1970), § 3.

³⁷ E.W. Böckenförde, "Demokratie als Verfassungsprinzip", in: id., *Staat, Verfassung, Demokratie*, 1991, 289, 322.

³⁸ For the specific situation in Common Law countries P. Atiyah/ R. Summers, *Form and Substance in Anglo-American Law*, 1991, 141 et seq.

³⁹ A. v. Bogdandy, *Gubernative Rechtsetzung*, 2000, 35 et seq. The guarantee of an efficient legislature is a *leitmotiv* of many constitutional developments in the last fifty years. In more specific terms see A. Scherzberg, "Risiko als Rechtsproblem", *Verwaltungsarchiv* 84 (1993), 484 et seq., (490 et seq.).

⁴⁰ In detail M. Hilf/ M. Reuß, "Verfassungsfragen lebensmittelrechtlicher Normierung", *Zeitschrift für das gesamte Lebensmittelrecht* 1997, 289 et seq., (290 et seq.); R. Schmidt, "Staatliche Verantwortung für die Wirtschaft", in: J. Isensee/ P. Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. III, 1988, § 83; on the economic constitution in Germany and the European Union, see D. Gerber, *Law and Competition in Twentieth Century Europe*, 1998, 232 et seq.

even with parliamentary assent, it totally modifies the relationship between law and politics. By ratifying WTO law the current majority in a state puts its decision largely outside the reach of any new majority.⁴¹ This restriction is particularly important in the case of the WTO since "corrective" political influence, i.e. noncompliance, becomes difficult because of the obligatory WTO adjudication. Certainly, the democratic autonomy of the new majority is preserved to some extent through the right of withdrawal, article XV WTO. However, this right supports the democratic legitimacy of the WTO as much as the individual's right to emigrate does the democratic legitimacy of a state.⁴² It can hardly be considered as sufficient as it is not a realistic option.

One might say that this limitation of democratic self-governance inevitably comes with the need for treaty-based international cooperation. This argument can also take the form that this kind of limitation has been generally accepted as intrinsic to international law. Yet, necessity and inevitability are bad normative grounds since they collide with the principle of freedom. Moreover, it has to be borne in mind that WTO law has an impact on democratic self-government far beyond most international rules: very few other international rules constrain domestic legislation on the economic process beyond the principle of non-discrimination.⁴³ Even most international environmental law instruments — which in many respects can be considered as providing cutting-edge mechanisms for international governance — do not prescribe specific regulative instruments or prohibit others, but operate with objectives that must be attained.⁴⁴

⁴¹ K. Abbott/ D. Snidal, "Hard and Soft Law in International Governance", *International Organization* 54 (2000), 421 et seq., (439); J. Goldstein/ M. Kahler/ R. Keohane/ A. Slaughter "Introduction: Legalization and World Politics", *International Organization* 54 (2000), 385 et seq., consider this a common political strategy.

⁴² See article 13 para. 2 Universal Declaration of Human Rights, A/RES/217 A (III) of 10 December 1948; article 12 para. 2 of the International Covenant on Civil and Political Rights, A/RES/2200 A (XXI) of 16 December 1966; article 2 para. 2 Protocol No. 4 of the European Convention on Human Rights; see P. Weis/ A. Zimmermann, "Emigration", in: R. Bernhardt (ed.), *EPIL* Instalment Vol.II, 1995, 74 et seq.

⁴³ See in particular the friendship, trade and shipment treaties or on the protection of investment, D. Blumenwitz, "Treaties of Friendship, Commerce and Navigation", in: Bernhardt, see note 11, 484.

⁴⁴ In detail M. Bothe, "Environment, Development, Resources", *Hague Academy of International Law*, 2001 (forthcoming).

WTO law must be regarded as an unprecedented step in the development of international economic law which goes far beyond the GATT 1947.⁴⁵ One need only recall the importance of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), the Agreement on Technical Barriers to Trade (TBT Agreement), the Agreement on Subsidies and Countervailing Measures and the new dispute settlement procedures. One could challenge this thesis by pointing to the treaties aiming at international harmonization of private law, in particular international private law and intellectual property law.⁴⁶ The difference between these fields and many parts of WTO law is, however, that these areas of law do not call for frequent political intervention. Moreover, given the lack of a centralized adjudication in these treaties, the domestic legal orders keep some autonomy in the evolution of these instruments.⁴⁷ Also in this respect, WTO law leads to a diminution of domestic autonomy because TRIPs incorporates many intellectual property treaties into the WTO adjudicative mechanism (arts 1 – 39 TRIPs).

Summing up, the lack of legal procedures which establish a solid and efficient political grasp on WTO law cannot be sufficiently justified by pointing to the general nature of international law because WTO law far more strictly circumscribes and determines the domestic political process with respect to the economic process. The problem becomes even worse if this issue is considered from the perspective of legislative efficiency.

⁴⁵ On the main innovations see W. Benedek, "GATT- The Uruguay Round to WTO", in: R. Wolfrum/ C. Philipp (eds), *United Nations: Law, Policies and Practice*, 1995, 532 et seq.; on the development see R. Senti, "Die neue Welthandelsordnung. Ergebnisse der Uruguay-Runde, Chancen und Risiken", *Zeitschrift der ordoliberalen Schule (ORDO)* 45 (1994), 301; T. Stoll, "Die WTO: Neue Welthandelsorganisation, neue Welthandelsordnung", *ZaöRV* 54 (1994), 241 et seq.; W. Meng, "WTO-Recht als Steuerungsmechanismus der neuen Welthandelsordnung", in: M. Klein/ W. Meng/ F. Rode (eds), *Die neue Welthandelsordnung der WTO*, 1998, 19.

⁴⁶ For an overview G. Kegel/ K. Schurig, *Internationales Privatrecht*, 8th edition, 2000, 69 et seq.

⁴⁷ *Ibid.*, 5, 8 et seq.

b. Treaty-Making and Legislative Efficiency

Legislative efficiency is a constitutional value in most constitutional systems.⁴⁸ Treaty-making procedures are slow and cumbersome, a feature that becomes particularly problematic if the social sector in question is in rapid evolution as is the case with the national and international economy. This entails the danger that rules become inadequate or anachronistic, a danger the authors of the WTO were aware of, as proven by clauses which require periodic revision of a number of provisions.⁴⁹ Given the acknowledged probability of the need to amend legislation, the procedures of article X WTO are deeply inadequate.

This perspective brings another peculiarity of WTO law to light. Despite the need for legislative intervention, article X WTO is even more respectful of national sovereignty than the UN Charter. Whereas an amendment of the UN Charter applies to *all* Member States once it has been ratified by two-thirds of its members (including all permanent members of the Security Council, Arts 108, 109 UN Charter), this is the case in WTO law only when the amendment "would not alter the rights and obligations of the Members" (article X:4 WTO). With respect to other changes, a member cannot be bound without its assent (article X:2-3, 5 WTO). That difference indicates that the law of the WTO affects far more *real* political autonomy of a state than the law of the UN Charter. Whereas with respect to international security only very few *de facto* sovereign states exist, the autonomy to regulate the national economic process has been real. Considering article X WTO on the one hand and Article 108 UN Charter on the other, sovereignty is better entrenched with respect to economic policy than with respect to international security.

⁴⁸ v. Bogdandy, see note 39.

⁴⁹ E.g., article 15.4 TBT Agreement stipulates that the TBT Committee must review the implementation and operation of the agreement every three years. The first report has just been published, http://www.wto.org/english/tratop_e/tbt_e/tbt5.htm

For further evidence cf. article 20 Agreement on Agriculture; article 12.7 SPS Agreement; article 15.3, 15.4 TBT Agreement; article 9 Agreement on Trade-Related Investment Measures; article 7.1 Agreement on Import Licensing Procedures; article 31 Agreement on Subsidies and Countervailing Measures; article 71.1 TRIPs.

c. Legislation and Judicial Law-Making

The necessity of an efficient democratic legislator has been argued so far with respect to the need to adopt rules to changing social conditions, fears and convictions. A further aspect must be considered: the need of an adjudicative body to have a political counterpart when developing a body of law through reasoned dispute settlement decisions. At a first glance, the DSU appears to minimize this need through provisions such as article 3.2 DSU, which curtail the adjudicative bodies' opportunities to "creatively develop" the law. Such a clause might effectively exclude decisions that introduce "revolutionary" principles such as the direct effect of WTO law or its supremacy over domestic law.⁵⁰ It can not, however, exclude the creation of a body of law through reasoned reports. Rather, such a development is inevitable if the adjudicative organs obey the DSU. Article 11 DSU requires an "objective assessment of the matter". An "objective assessment" requires giving reasons.⁵¹ Any reasoned decision will, however, inevitably lead to the creation of a body of law.⁵² The building of such case law is normatively supported by article 3.2 DSU, which sets out the objective of "providing security and predictability to the multilateral trading system." From here flows — as the Appellate Body pointed out — the obligation to take previously adopted reports and interpretations into consideration.⁵³ Even though reports do not have a binding force in and of themselves, they create legitimate expectations and must therefore be taken in account.⁵⁴ In a system with compulsory adjudication, this objective can only be attained through consistent adjudicative practice.

⁵⁰ On the lack of direct effect explicitly WT/DS152/R *United States – Sections 301-310 of the Trade Act of 1974*, Report of the Panel, para. 7.72. For an earlier attempt to introduce direct effect and supremacy cfr. DS 23/R *United States-Measures affecting alcoholic and malt beverages*, Report by the Panel adopted on 19 June 1992, BISD 39 (1991-1992), 206 et seq., (297).

⁵¹ In detail A. Ross, *Theorie der Rechtsquellen*, 1929, 283 et seq.; M. Kriele, *Theorie der Rechtsgewinnung*, 2nd edition, 1976, 167 et seq.

⁵² M. Shapiro, "The European Court of Justice", in: P. Craig/ G. de Burca (eds), *The Evolution of EU Law*, 1999, 321, 340.

⁵³ Appellate Body Report of 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, *Japan – Taxes on Alcoholic Beverages*, 15.

⁵⁴ Ibid. For the common ground between civil law systems and common law systems on this point cf. J. Esser, *Grundsatz und Norm*, 4th edition, 1990.

The adjudicative mechanism is in itself a law generating procedure, and some even consider it the engine driving neo-liberal globalization.⁵⁵ The WTO sets up not only a substantive body of law, but moreover one which is autonomously developing. In fully developed legal systems, the creative function of the judges is democratically embedded since the legislator can intervene at any given moment. This possibility of intervention entails political responsibility and, consequently, democratic legitimacy for those developments. As pointed out, such a legislator does not exist for the WTO law.⁵⁶ In brief, treaty-making is unsatisfactory legislation from both the democratic and the efficiency perspective. At least with respect to the second problem, autonomous rule-making by the institutions of the WTO might provide some relief.

3. Functional Equivalents?

There might be functional equivalents to a centralized legislator that counterbalance the shortcomings of the treaty amendment procedure. In order to determine the precise relationship between the political and the adjudicative process in the WTO, those further procedures which might allow political processes to influence WTO law need exploration. As further avenues both autonomous decisions of WTO organs and the incorporation of rules set up outside the WTO are to be considered. Moreover, science might help to keep the body of rules in touch with a rapidly changing social and technological world.

a. Rule-Making by WTO Organs

An apparently obvious response to the efficiency problem is to allow for autonomous rule-making of the international organization. Even though the WTO Agreement does not formally institutionalize a legislative body, there are elements which appear to lay down a certain competence to legislate. For example, article VI:4 GATS (General Agreement on Trade in Services) allows the Council to develop guidelines for national regulations on professional services.⁵⁷ Article X:8 WTO pro-

⁵⁵ Brand et al., see note 8, 105.

⁵⁶ On the question whether the WTO should be considered a constitutional order and would therefore lead to a different conclusion see below, Part III, 1.

⁵⁷ Barth, see note 26, 273 et seq., (288).

vides a competence for autonomous rule-making on the dispute settlement procedure.⁵⁸ There are also general provisions, of which the most important is article XXV:1 GATT. Such rule-making could be used in order to concretize vague provisions or to correct the understanding given to a provision by the dispute settlement organs. There are also provisions that can be understood as allowing the political organs to determine the application of a rule to single cases.

aa. The GATT 1947 as a Rule-Making Organization

To what extent does WTO law allow for rule-making by its institutions? The current legal situation can best be developed by first presenting the relevant discussion under the GATT 1947. Before the WTO Agreement entered into force, it was argued that the GATT had a far-reaching legislative competence under article XXV:1 GATT. The most forceful proponent of this thesis was *Frieder Roessler*, counselor of the legal section of the GATT Secretariat. In his ground-breaking article of 1987, he argued that there is a broad decision-making competence under GATT 1947.⁵⁹ His proposal conceived GATT as a dynamic international organization which solved the problem of effective legislation through an autonomous rule-making competence.

As GATT 1947 was not conceived as an international organization, the Agreement foresaw only the assembly of the CONTRACTING PARTIES, acting jointly — designated by uppercase letters (article XXV:1) in contrast to the sum of the individual contracting states (contracting parties), designated by lowercase letters — as a rule-making organ. The other institutions of GATT 1947 owe their existence and scope of competences to an act of delegation by the CONTRACTING PARTIES. This includes the Council of Representatives, which was created in 1960 to perform GATT functions between the CON-

⁵⁸ Given the overwhelming importance of the dispute settlement procedure, the comparative ease with which the DSU can be changed is surprising. It can best be explained historically: the dispute settlement procedures under article XXIII GATT were set up through decisions of the CONTRACTING PARTIES under article XXV:1 GATT. This tradition lives on in article X:8 WTO, but with an important modification: whereas according to article XXV:1 GATT the majority of votes cast decides, article X:8 WTO requires consensus.

⁵⁹ F. Roessler, "The Competence of GATT", *JWTL* 21 (1987), 73 et seq. Beyond being an analysis of positive law, his contribution can be understood as a proposal for a possible further development of the world trade regime.

TRACTING PARTIES' sessions. *Roessler* concludes from this that the scope of the CONTRACTING PARTIES' competences as an organ is the same as the GATT's competences as an organization.⁶⁰

Roessler identifies article XXV:1 GATT as the central norm conferring competences to the CONTRACTING PARTIES. It can be used "for the purpose of giving effect to those provisions of this Agreement which involve joint action" and "with a view to facilitating the operation and furthering the objectives of this Agreement". Considering all relevant provisions under GATT (in particular article XXIII:2 and article XXV:5 GATT) he infers a broad competence conferred on the CONTRACTING PARTIES, in particular the competence "for the creation of new rights and obligations".⁶¹ This competence to unilaterally enact binding norms regards above all the implementation of the existing framework of rights and obligations; *Roessler* calls it the regulatory competence.⁶² However, the competence of GATT is not limited to this already far-reaching rule-making competence. *Roessler* argues that the wording of article XXV:1 GATT — "facilitating the operation and furthering the objectives" — provides the competence to enact further reaching legislation: a competence to autonomously enact rules to the same extent as the GATT's competence to organize negotiations.⁶³

The only limits to this competence result from the words "facilitating the operation" or "furthering the objectives" (article XXV:1 GATT).⁶⁴ According to *Roessler*, the element "objectives" is to be understood not only as a reference to the preamble of the General Agreement, but also to the Havana Charter, which is also referred to in article XXIX GATT. However, even these aims must be interpreted dynamically: "What is decisive is whether in the current circumstances the discussion of the subject-matter furthers the objectives of the General

⁶⁰ Ibid., 74.

⁶¹ Ibid., 77; the possibility of *Roessler's* interpretation is confirmed by Jackson, see note 34, 42; for a general account on autonomous rule-making cf. I. Seidl-Hohenveldern/ G. Loibl, *Das Recht der Internationalen Organisationen einschließlich der Supranationalen Gemeinschaften*, 6th edition, 1996, 212 et seq.

⁶² Ibid., 76–77.

⁶³ Ibid., 74–75.

⁶⁴ Ibid., 75.

Agreement.”⁶⁵ In practice, this reading implies the autonomy of the CONTRACTING PARTIES to determine their competence.

Roessler's contribution can be understood as an attempt to push the decision-making competences to edge of what is legally justifiable, and consequently to allow for a dynamic interpretation of the General Agreement based on its aims and objectives. The development of the EEC, characterized by its autonomous rule-making authority, i.e. its power to set secondary law, might have served as an implicit model for *Roessler's* proposal. In *Roessler's* view, article XXV:1 GATT 1947 functions analogously to article 235 EC, which in the 1970s and 1980s allowed the Community organs, based on the Member States' consensus, to open up new fields for supranational regulatory activity.

bb. Politics under the WTO Agreement

Against the background of *Roessler's* proposal, a number of provisions in the WTO Agreement and the DSU can only be understood as prohibiting such an understanding and such a development in institutional practice. The generic competence of article XXV:1 GATT has been concretized and circumscribed in the WTO Agreement.⁶⁶ If there are opportunities for autonomous rule-making, they are carefully limited.

Article X:8 WTO provides the competence for autonomous rule-making with regard to the dispute settlement procedure. Another form of autonomous rule-making is permitted through article IX:2 WTO, which concerns the competence of authentic interpretation.⁶⁷ As the various “Understandings on the Interpretation” of provisions such as article II:1(b) GATT, article XVII GATT, the Balance-of-Payments Provisions, article XXIV GATT, article XXV:5 GATT or article XXVIII GATT show, authentic interpretation allows for some rule-making, i.e. legislation. However, even this competence is curtailed in various forms with respect to what was possible under article XXV:1 GATT 1947: it is exclusive to the Ministerial Conference and General Council, a decision requires a three-quarters majority of the members, and the provision may not lead to a circumvention of article X WTO (see article IX:2 WTO, article 3.2 DSU). One can clearly deduce the intent of the members to channel legislation through the treaty amendment procedure.

⁶⁵ Ibid., 76.

⁶⁶ Jackson, see note 34, 43. WTO provisions prevail over the unchanged GATT provisions, article XVI:3 WTO.

⁶⁷ On this Bernhardt, see note 11, 325.

In founding the WTO, the contracting parties to GATT have implicitly rejected *Roessler's* proposal for making WTO law more dynamic through conferring a competence for autonomous rule-making. This rejection is well-founded. In contrast to article XXV:1 GATT, article 308 EC (ex article 235) possesses specific legal safeguards that protect the Member States and affected citizens from abuse. Moreover, the institutional system of the EU, which provides procedural safeguards which go beyond the consensus of the Member States, is far more complex than that of the GATT. Noteworthy among these safeguards are the Commission's monopoly on proposals, which is designed to uphold a specific supranational perspective, and the European Parliament's right to consultation, which introduces an (admittedly weak) democratic-parliamentary element into the legislative process. Furthermore, the competences conferred by the EC Treaty are conditional upon qualified majorities or even unanimity of the Council, whereas under the GATT regime the general decision-making method required only a simple majority of the votes cast (article XXV:3, 4 GATT).

Another important difference lies in the fact that EC measures are subject to comprehensive judicial review by the ECJ. An equivalent institution within GATT or the WTO does not exist.⁶⁸ The law of the Union is thus endowed with a safeguard against informal amendment and, relatedly, the circumvention of the prescribed amendment procedures (article 48 EU, ex article 236 EEC). *Roessler* also sees the fact that this is not secured by the General Agreement as a problem. His reference to the CONTRACTING PARTIES' consensus-based, reserved practice does not satisfactorily resolve the issue.

Also with respect to the application of a provision in a single case, the WTO Agreement limits the competence of its organs more than the GATT 1947 did. Most important has been the refinement of the so-called waiver clause. Article XXV:5 GATT, which provided for the relevant competence, has been superseded through article IX:3 WTO.⁶⁹ Article XXV:5 GATT was understood as providing unrestricted discre-

⁶⁸ The Appellate Body has, however, introduced some indirect control, see Appellate Body Report of 9 September 1997, WT/DS27/AB/R, EC — *Regime for the Importation, Sale and Distribution of Bananas*, paras 179–188. This form of control does not, however, appear sufficient if the organization is to develop a fully functional legislator.

⁶⁹ The supremacy of the WTO Agreement with respect to the GATT results from article XVI:3 WTO.

tion to the CONTRACTING PARTIES.⁷⁰ By contrast, article IX:3 WTO and the "Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994" lay down substantive and — even more importantly — procedural requirements for granting such a waiver. Moreover, the juridification of WTO law and the limits of the WTO organs was underscored by the Appellate Body's restrictive interpretation of such a waiver.⁷¹ Its decision can be understood as an indication that the Appellate Body might assume the competence to review implicitly the legality of such a waiver.⁷²

cc. What Role for Councils and Committees?

The WTO Agreement and most of its Multilateral and Plurilateral Trade Agreements set up councils and committees. These councils and committees provide the institutional framework for intense and continuous political activity within the WTO as can be seen from the WTO website.⁷³ From an organizational point of view, the councils and committees are sub-organs of the Ministerial Conference and General Council, article IV:5 and article IV:7 WTO. They are composed of representatives of the members.

At this point, two questions with respect to the relationship between the political and the adjudicative procedures need clarification: whether in case of conflict one procedure is exclusive, and second, if not, which procedure prevails in case of conflict. Under GATT 1947, the relation between accepted panel reports and other decisions by the CONTRACTING PARTIES was — given that their basis was usually article XXV:1 GATT — governed by the principle of *lex posterior*. Un-

⁷⁰ J. Jackson, *The Jurisprudence of GATT & the WTO*, 2000, 186.

⁷¹ WT/DS27/AB/R, 1997, see note 68, paras 183, 185, 187.

⁷² On the parallel discussion how to control the UN Security Council when enacting legislation see J. Alvarez, "Judging the Security Council", *AJIL* 90 (1996), 1 et seq.; B. Martenczuk, *Rechtsbindung und Rechtskontrolle des Weltsicherheitsrates*, 1996.

⁷³ Cf. e.g. the work from 30 October – 3 November 2000. The following bodies met in that week: Trade Policy Review Body; Informal Working Party on the Accession of Russia; Committee on Anti-Dumping; Committee on Rules of Origin; for the — disappointing — work of the important Committee on Trade and Environment see R. Tarasofsky, "The WTO Committee on Trade and Environment: Is it making a Difference?", *Max Planck UNYB* 3 (1999), 471 et seq.

der this principle, the autonomous political process kept the control over a court-based development of GATT 1947 law.⁷⁴ In the WTO Agreement there is no explicit provision regarding this relationship. The question surfaced in a complaint by the United States against India's quantitative restrictions due to balance-of-payments difficulties. One of India's defences was that the matter belonged to the exclusive competence of the Balance of Payments (BOP) Committee and that the resolution of the dispute therefore belonged exclusively to the political process.⁷⁵

In the case at hand, there had been no decision by the relevant committee. India's main argument claiming an exclusive competence of the BOP Committee or the General Council to determine a violation was weak, and convincingly rebuffed by the Appellate Body on the basis of article 1 DSU. The more interesting question of how article XVIII Section B GATT can be adjudicated if the relevant committee had already established the legality of the measure⁷⁶ is only touched upon in passing. In this respect an interesting divergence between the panel and the Appellate Body comes to the fore. The panel assumes that a positive decision of the General Council or the competent committee could influence its decision.⁷⁷ On this reading, there would be a political control over the WTO legal order by the WTO political institutions. The Appellate Body remained ambiguous as to the legal position in the case of a conflict between the dispute settlement organs and the political institutions.⁷⁸ Nevertheless, the subtext of the decision seems to indicate

⁷⁴ The regular procedure and quorum for decisions are laid down in article IX:1 WTO in a surprising formula: consensus shall be the practice. If, however, consensus cannot be attained, the majority of the votes cast shall decide. As the tedious procedure leading to the nomination of Director-General Moore proves, consensus is sought even in cases that appear almost impossible; majority decisions, although legally possible, appear to be largely theoretical.

⁷⁵ Appellate Body Report of 23 August 1999, WT/DS90/AB/R *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*.

⁷⁶ Such a decision would need to be taken according to the rules of article IX WTO, i.e. by consensus or a majority of the votes cast.

⁷⁷ WT/DS90/AB/R, see note 75, para. 5.114; "It is also clear that panels could not ignore determinations by the BOP Committee and the General Council".

⁷⁸ *Ibid.*, paras 18, 25.

that the adjudicative organs would remain autonomous.⁷⁹ This line of interpretation is strongly supported by article IX:2 WTO. Since this provision sets up specific requirements for a decision on authentic interpretation, a decision taken by a political body under another procedure cannot yield comparable effects.⁸⁰

Therefore, the only possibility to correct a development introduced by the adjudicative organs is by authentic interpretation through the General Council. In light of the critical relationship between law and politics within the WTO, this political ability to correct a line of jurisprudence should be developed into a working mechanism; consequently, the consensus requirement for the respective proceedings of the General Council should be curtailed. Even though a majority decision within the Council is certainly problematic in light of the democratic principle, it is much less worrying than the one raised through an adjudicative development if the latter could only be corrected through treaty amendment. It would help the legitimacy of the dispute settlement organs if the procedure of authentic interpretation became a credible mechanism through which politics could correct judge-made developments.

What, then, is the proper role for the impressive institutional framework of councils and committees? On my reading, they should be operational forums to discuss WTO law, to devise adequate means for its implementation and to reconcile diverging opinions; that could help to diminish the heavy case load of the adjudicative organs. But there could be another, even more important role: they could become the laboratory for developing new forms of international governance. Perhaps the genius of practical innovation in these groups can bring about those patterns of multilateral action which might help to meet the challenges of globalization. Patterns which might provide the basis for institutional settings which are more attuned to the principles of democracy and efficiency could be experimented with in these groups. As the development of European integration proves, further steps in the institutional development of the WTO could institutionalize patterns of interaction already tested in the organization's practice.

⁷⁹ Identical to the reading by R. Howse/ P. Mavroidis, "Europe's evolving regulatory strategy for GMO's – the issue of consistency with WTO Law: Of Kine an Brine", 7 (manuscript), *Fordham Int'l L. J.*, 2001, forthcoming.

⁸⁰ This majority does not collide with the rule of reverse consensus in article 16.4 and article 17.14 DSU because the authoritative decision would not affect the settlement in a disputed case.

The above has demonstrated various pieces of evidence which demonstrate that the rule-making competence of WTO organs has been severely restricted compared with the previous situation under the GATT 1947; the same is true for political decisions affecting the application of a WTO provision in a specific case. In fact, all of these phenomena are nothing but aspects of the much lauded victory of "law" above "diplomacy" in international trade law.⁸¹ As a result of this victory there are no efficient political procedures within the WTO.

b. Outsourced Rule-Making

aa. Incorporation of Standards of other Organizations

If legislation through treaty-making or by WTO decisions does not provide for sufficiently effective and democratic political control of WTO law, the incorporation of binding rules and non-binding standards set up by other international organizations, whether public or private, might be a third way to meet the WTO's mismatch between politics and law. WTO law explicitly refers to such standards in important agreements such as the SPS Agreement, the TBT Agreement and the Agreement on Subsidies and Countervailing Measures. Moreover, such standards can play a role in defining legitimate measures under article XX GATT. The incorporation of standards can, however, have different purposes: either the harmonization of the relevant provisions of the domestic legal orders or simply the development of a common ground that helps frame the domestic orders.

Harmonization, the first possible understanding, is an obvious desideratum if the WTO aimed at easy market access and even more so if market integration were the objective.⁸² Regulatory differences, even if totally non-discriminatory, can represent formidable trade barriers. Given the density of non-discriminatory regulation in many WTO members in order to further important public goods (health, environment, consumers protection etc.), significant liberalization would re-

⁸¹ E.U. Petersmann, "The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization", *EJIL* 6 (1995), 161 et seq., (186, 208); sceptical about the benefits of legalization Goldstein/ Martin, see note 32, 630 et seq.; see on the costs also Weiler, see note 18, 7 et seq.

⁸² On the question, whether this is an aim of the WTO, see below III 2 a.

quire international guidance for the national regulatory process. This applies all the more to market integration.

WTO law on its own cannot achieve this, unless one views the WTO as promoting radical deregulation and regulatory competition.⁸³ For other approaches, a fundamental dilemma comes to the fore. If the WTO requirements for the domestic regulatory process are framed in abstract and vague norms, much discretion is left to individual members; diverging and therefore trade-restrictive legislation is the probable result. The opposite response, i.e. the stipulation of more concrete requirements in treaty law, is not convincing since the political system of the WTO is not able to provide swift legislative answers to changing needs, insights or circumstances. In important areas WTO law would risk becoming rapidly outdated without the possibility of adaptation. Detailed guidance for the domestic regulatory process — and even more so for common rule-making — cannot be sufficiently achieved through the cumbersome WTO treaty amendment procedures or the limited rule-making competence of the WTO institutions.

International and supranational economic law have developed three main strategies to cope with this problem, which can be well demonstrated in the regulatory approach of the TBT Agreement and the SPS Agreement. First, the preamble and in particular article 3 SPS sets out the objective of international harmonization through specified, more agile bodies outside the WTO (similarly article 2.4 TBT). Second, article 4 SPS lays down the aim of mutual recognition between countries of different but comparable regulatory regimes (similarly article 2.7 TBT).⁸⁴ Third, article 5.2 SPS stipulates the requirement of a scientific basis for restrictive measures.

Since market access and especially market integration are best guaranteed if domestic legislation is harmonized, the incorporation of rules of other, more dynamic rule-making bodies appears as an attractive instrument to achieve trade liberalization *and* adequate public regulation. In the early 1980s the European Community adopted the so-called “new approach”: Community legislation is limited to basic requirements while private standardization organizations concretize those requirements. This approach, a constitutive part of the Common Market

⁸³ On these positions in more detail below, III. 1.

⁸⁴ This strategy has, however, not even worked properly within the European Union, E. Vos, “Market Building, Social regulation and Scientific Expertise”, in: C. Joerges/ K.H. Ladeur/ E. Vos (eds), *Integrating Scientific Expertise into Regulatory Decision-Making*, 1997, 127, 134.

legislation, is generally considered to be successful.⁸⁵ The standardization work of CEN (European Committee for Standardization), CENELEC (European Committee for Electrotechnical Standardization), ETSI (European Telecommunications Standards Institute) and the Codex Alimentarius is an integral part of supranational legislation.

Similarly, the TBT and SPS Agreements refer in various provisions (e.g. Annex A Definitions 3 (a) SPS) to rules of other bodies, such as the Codex Alimentarius Commission (CAC), International Office of Epizootics (IOE), International Plant Protection Convention (IPPC). The respective provisions are among the most problematic and most discussed of the whole of WTO law.⁸⁶ What they entail for the relationship between politics and law shall now be examined.

The Hormones Case provides an example of the difficulties arising from the incorporation of the rules or standards produced by other bodies. The Appellate Body's response was, as shall be seen, far-sighted.⁸⁷ One crucial question in this dispute was the extent to which

⁸⁵ Report of the EU-Commission on the European Single Market 1995, <http://europa.eu.int/en/agenda/sm/smr95.htm> Section 1; in detail, A. v. Bogdandy/ D. Meehan, "Zugangerschwernisse durch Vermarktungsregelungen für Waren" in: E. Grabitz/ A. v. Bogdandy/ M. Nettesheim, *Europäisches Außenwirtschaftsrecht*, 1994, 383, 412 et seq.

⁸⁶ B. Eggers, "Die Entscheidung des WTO Appellate Body im Hormonfall", *EuZW* 9 (1998), 147 et seq., (148); M. Hilf/ B. Eggers, "Der WTO-Panelbericht im EG/USA-Hormonstreit", *EuZW* 8 (1997), 559 et seq.; R. Howse/ P. Mavroidis, see note 79; A. Quick/ R. Blühtner, "Has the Appellate Body Erred?", *Journal of International Economic Law* 2 (1999), 603 et seq., (637); M. Ritter, "Das WTO-Übereinkommen und seine Auswirkungen auf das Deutsche und Europäische Lebensmittelrecht", *EuZW* 8 (1997), 133 et seq., (136 et seq.); G. Sander, "Gesundheitsschutz in der WTO – eine neue Bedeutung des Codex Alimentarius im Lebensmittelrecht?", *ZEuS* 3 (2000), 335 et seq.; J. Pauwelyn, "The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as applied in the first three SPS disputes. EC – Hormones, Australia – Salmon and Japan – Varietals", *Journal of International Economic Law* 2 (1999), 641 et seq.

⁸⁷ Report of the Panel on *EC Measures Concerning Meat and Meat Products (Hormones)* of 18 August 1997, WT/DS26/R/USA; EC and Report of the Appellate Body of 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R. A similar issue was discussed in the Appellate Body Report of 20 August 1999, WT/DS46/AB/R *Brazil – Export Financing Programme for Aircraft*. The Appellate Body held that the Brazilian export finance regime for Brazilian aircraft violated article 3.1. lit.(a) Agreement on Subsidies and Countervailing Measures (SCMA) because it was "used to secure a material

article 3.1 SPS bound the European Union⁸⁸ to follow the standard set forth by the Codex Alimentarius.⁸⁹ That standard was set up by the CAC, a common body of the FAO and the WHO.⁹⁰ Its main aim is standardization, in particular the implementation of the Joint FAO/WHO Food Standards Programme, article 1 Statute.

Things become problematic if one looks more closely at the operative level of the CAC and its rule-making practice.⁹¹ Just two elements will be investigated: the importance of private actors in establishing a standard, and the mechanisms for safeguarding national regulatory autonomy.⁹² The CAC's substantive work is done by various committees, which prepare draft standards. A committee is usually hosted by a member country, which provides its chairperson and is chiefly responsible for the cost of the committee's maintenance and its administration.⁹³ The host country thus obtains substantial influence.⁹⁴ In the case

advantage in the field of export credit terms" which, according to the definition under lit.(k) of the illustrative list in Annex I SCMA, is a prohibited export subsidy. As a possible benchmark for the definition of a material advantage the Appellate Body referred to the "Commercial Interest Reference Rate" developed by a sub-body of the OECD, even though this standard appears nowhere in the SCMA and even though the defendant, Brazil, was not a member of the OECD and had therefore not participated in the development of this standard (para. 181).

⁸⁸ The Union acts in the WTO under the legal personality of the European Communities, in detail, A. v. Bogdandy, "Organisational Proliferation and Centralisation under the Treaty on European Union", in: Blokker/Schermers, see note 17, 177.

⁸⁹ WT/DS26/R/USA, see note 87, paras 8.59, 8.69; Appellate Body Report of 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R, see note 87, para. 162 et seq.

⁹⁰ Established through the 11th Sess. of the Conference of FAO in 1961 and the 16th World Health Assembly in 1963 during which both passed resolutions to establish the Codex Alimentarius Commission. The two bodies also adopted the Statutes and Rules of Procedure for the Commission; <http://www.fao.org/docrep/w9114e/W9114e04.htm>

⁹¹ Article 7 CAC-Statute; article IX No. 5 Rules of Procedure <http://www.fao.org/WAICENT/FAOINFO/ECONOMIC/ESN/codex/Manual/statutes.htm>

⁹² For an extensive analysis see T. Makatsch, *Gesundheitsschutz und Lebensmittelhandel im Recht der WTO*, 2001 (forthcoming).

⁹³ Rule 11.3 *Rules of Procedure of the Codex Alimentarius Commission* (Procedural Manual, 11th edition, FAO and WHO, 2000); No. 4 and 5 Guidelines for Codex-committees.

concerning the standards for hormones (hereafter "Hormone Standardization Case"), the Codex Committee on Residues of Veterinary Drugs in Food (CCRVDF) was of crucial importance; the host was the United States, whose industry had the keenest interest in those standards. The regular procedure to establish a standard has eight steps.⁹⁵

Two elements come to the fore: the Secretariat arranges for the preparation of a proposed draft standard, and the decision to adopt a standard can be taken through majority voting. In the process of creating a standard, any member can send a delegate. The delegate may bring with him any person he chooses. The U.S. delegate often brings representatives of important American food enterprises and lobbyists with him.⁹⁶ Some states have even appointed a representative of their national food industry as their delegate to the CAC.⁹⁷ A thorough empirical study revealed an impressive presence of private enterprises in the Codex-committees and a negligible one of consumer interest groups.⁹⁸

The Hormone Standardization Case is a good example of how this procedure can be used in order to favour special interests. In 1991, the CAC failed to adopt a standard for hormones because some members felt that the proposed standard did not meet the needs of precaution, consumer protection and moral arguments.⁹⁹ It was then decided within the CAC — against the will of the Member States of the EC — that "the food standards [...] shall be based on the principle of sound scien-

⁹⁴ D. Eckert, "Zur Harmonisierung des Lebensmittelrechts, 1. Teil: Bilanz der letzten 10 Jahre", *Zeitschrift für das gesamte Lebensmittelrecht* 1984, 1 et seq., (11).

⁹⁵ For a detailed description see the CAC's presentation of its procedure in: *Procedures for the Elaboration of Codex Standards and Related Texts*, <http://www.fao.org/WAICENT/FAOINFO/ECONOMIC/ESN/codex/Proced1.htm>

⁹⁶ "Weniger Lebensmittelschutz durch GATT", *Süddeutsche Zeitung* of 24 June 1993, 2.

⁹⁷ G. Sander, "Gesundheitsschutz in der WTO — eine neue Bedeutung des Codex Alimentarius im Lebensmittelrecht?", *ZEuS* 3 (2000), 335 et seq., (345).

⁹⁸ N. Avery/ M. Drake/ T. Lang, *Internationale Harmonisierung lebensmittelrechtlicher Normen, epd-Entwicklungspolitik: Materialien II/93*, Frankfurt 1993, 13, 23; 49 per cent of the official delegates of the U.S. during the 19th Sess. of the CAC were representatives of the national food industry. In the Swiss delegation this portion was even 61 per cent.

⁹⁹ ALINORM 91/40, No. 154 et seq. Ritter, see note 86, 137.

tific analysis and evidence".¹⁰⁰ Therefore, aspects such as precaution, moral aspects and consumer protection have had a very difficult standing ever since.¹⁰¹ The new standards on hormones favourable to the U.S. meat industry were subsequently enacted by 33 against 29 votes and 7 abstentions.¹⁰²

This was a victory of the U.S. meat industry and the imposition of its standard. The behaviour of the U.S. delegate can be easily explained by the theory of agency capture: often a department identifies itself with the interests of the respective group.¹⁰³ Certainly, the phenomenon of agency capture also exists at the national level. However, in national politics (and supranational politics as well, although in a different form), there are procedural safeguards in order to transform an important standard into binding law: either a parliamentary statute or a governmental (and not simply a ministerial) regulation is required.¹⁰⁴ Since a governmental regulation generally entails the participation of the whole cabinet, the interests considered are broader when only one ministry is involved.¹⁰⁵ Moreover, it is telling that the Amsterdam Treaty explicitly shifted this regulatory field from article 37 EC to article 152. 4 b EC, thereby subjecting it to parliamentary co-decision.

One might argue that the Hormone Standardization Case is special. Perhaps, yet there is another structural problem which stems directly from the deficient political process within the WTO. The incorporation of a standard into national and supranational law is embedded in substantive and procedural requirements and safeguards that are wanting in WTO law. First, Community legislation under the new approach sets out far more precise requirements for standards.¹⁰⁶ Second, and more important in our context, Community legislation allows the political organs to intervene rapidly. For example, in the Directive on the Hy-

¹⁰⁰ Codex Alimentarius Commission, Report of the 21st Sess. of the Joint FAO/WHO Codex Alimentarius Commission 61 app. (1995), ALINORM 95/8, 3.

¹⁰¹ Ritter, see note 86, 137; Sander, see note 97, 352.

¹⁰² Hilf/ Eggers, see note 86, 560.

¹⁰³ K. v. Beyme, *Der Gesetzgeber: Der Bundestag als Entscheidungszentrum*, 1997, 148 et seq.; Schermers/ Blokker, see note 4, para. 558.

¹⁰⁴ E. Denninger, *Verfassungsrechtliche Anforderungen an die Normsetzung im Umwelt-und Technikrecht*, 1990, 122 et seq.

¹⁰⁵ In detail v. Bogdandy, see note 39, 166 et seq., 385 et seq.

¹⁰⁶ See, for example, Appendix I to Directive 98/73/EC Machines O. J. 1998, L 207/1.

giene of Foodstuffs article 13 stipulates that "amendments to references to international standards, such as those of the Codex Alimentarius [...] may be adopted in accordance with the procedure laid down in Article 14".¹⁰⁷ The procedure under article 14 is dominated by the Commission of the European Union; swift action is therefore possible. An effective political organ controls the incorporation of standards.

None of this obtains under the procedures of the WTO. At a first glance, these deficiencies appear of little importance because the standards are non-binding and thus wholly within the member's discretion to adopt them or not.¹⁰⁸ At this point, however, WTO law comes into play. Article 3.1 SPS requires members to "base their sanitary or phytosanitary measures on international standards". This provision can be understood as transforming those standards into binding law. Such was the interpretation given by the panel.

It was claimed that article 3.1 SPS imposes a general obligation on the members to use international standards.¹⁰⁹ According to the panel, even though international standards are not, in their own right, binding, they become binding by means of article 3.1 SPS,¹¹⁰ so that any inconsistency with the international standard in question is inconsistent with article 3.1 SPS and can only be justified under article 3.3 SPS and the strict requirements of article 5 SPS.¹¹¹ The panel stated that the party imposing the sanitary measure also therefore bears the burden of justifying the exception.¹¹² This understanding of the Codex standards is in accordance with the CAC's.¹¹³

The panel decision therefore confirmed what the critics had assumed: that the WTO transforms rules, which — given the process of their formation — are one-sided in favour of particular industrial interests, into binding law. This increase of the Codex's standards provoked severe criticism even before the appeal, the arguments coming from a civil rights and democratic perspective.¹¹⁴ The Appellate Body's re-

¹⁰⁷ 93/43/EEC, O. J. 1993, L 175/1.

¹⁰⁸ In detail for the forms of acceptance, ALINORM 95/7, 2 et seq., 6 et seq.

¹⁰⁹ WT/DS26/R/USA, see note 87, para 8.44; 8.86.

¹¹⁰ Ibid., para. 8.44.

¹¹¹ Ibid., para. 8.83.

¹¹² Ibid., para. 8.87.

¹¹³ CAC Document of 24 May 1995, ALINORM 95/7, Particle 1 (Revised), 6.

¹¹⁴ Hilf/ Eggers, see note 86, 565; Sander, see note 97, 366; Ritter, see note 86, 135.

sponse to these issues was farsighted, revising the Panel report on the critical issues and thus assuaging the critics.

The Appellate Body began by reversing the panel's finding that the term "shall base (...) on" (article 3.1 SPS) was identical in meaning to "conform to" (article 3.2 SPS) and thereby vested international standards with a general obligatory force and effect. The Appellate Body reasoned as follows.¹¹⁵ Article 3.1 SPS does not impose an obligation to use international standards for SPS measures. In particular, the preamble to the SPS Agreement indicates that the goal of harmonization is to be realized in the future.¹¹⁶ It cannot be assumed that sovereign states wanted to legally bind themselves to the existing standards in the here and now. Such a far-reaching interpretation would require far more specific treaty language than found in article 3.1 SPS.¹¹⁷ The introduction of higher standards is not, in itself, inconsistent with article 3.1 SPS. Rather, a member has the right under article 3.3 SPS autonomously to establish a higher level of protection.¹¹⁸ This is an autonomous right and does not represent an "exception" to a "general obligation" imposed by article 3.1 SPS. It is, however, conditioned upon a scientific justification under article 5.1 SPS.¹¹⁹

With its reversal of the panel report, the Appellate Body was able to take the above-mentioned problems concerning democracy and transparency in the CAC's procedures into account. Its interpretation is more respectful to the members' freedom of action, without, however, losing sight of world trade law's objective of addressing protectionist measures.¹²⁰

One must conclude that in its current shape, international standardization can substitute for the lack of proper rule-making within the WTO only to a very limited extent. The structural differences between the various organizations with respect to objectives, instruments, procedures, voting requirements and membership are simply too important. The incorporation of such standards in the EU Common Market program cannot serve as a model for the WTO given the outlined legal, procedural and institutional differences. The incorporation of international standards should not be understood as an instrument to harmo-

¹¹⁵ WT/DS26/AB/R; WT/DS48/AB/R, see note 87, para. 163 et seq.

¹¹⁶ *Ibid.*, para. 165.

¹¹⁷ *Ibid.*, para. 165.

¹¹⁸ *Ibid.*, para. 172.

¹¹⁹ *Ibid.*, para. 173.

¹²⁰ Eggers, see note 86, 150 et seq.; Sander, see note 97, 370.

nize the respective parts of the domestic legal orders. Rather, their proper role is simply to develop a common ground that helps in framing of the domestic orders.¹²¹

bb. Scientific Evidence

The laws of nature are universal and indisputable. Therefore their "incorporation" into WTO law appears to be an obvious way to limit members' discretion. Scientific evidence could therefore be used to concretize vague normative stipulations by establishing minimum requirements.¹²² Science appears to have become the third pillar of WTO law standing along side the Most Favored Nation Principle and the Principle of Non-Discrimination. Recourse to the laws of nature could enrich the law of the WTO. Several provisions can be understood in this way. The *Hormones Case* provides a telling example of the limits of such "incorporation".

The proper use of science as a source that enriches WTO law is a core issue, in particular with respect to the SPS Agreement, and therefore has been the major battleground in the cases related to it. Article 2.2 SPS requires sanitary and phytosanitary measures introduced by the members for the protection of human, animal or plant life or health (so-called "SPS measures") to be "based on scientific principles". Article 5.1 and 5.2 SPS concretize the prohibition of unscientific protection measures by requiring a risk assessment which takes the "available scientific evidence" into account. If the scientific evidence is insufficient, article 5.7 SPS provides narrow cumulative conditions under which the measure may nevertheless be "provisionally adopted".¹²³ WTO law thus places the members' entire domestic food and health regimes, insofar as their scopes extend to imported goods, under a "scientific reservation".

The logic of these provisions is seductive. If an orientation to multi-lateral guidelines is not possible because either they do not exist or be-

¹²¹ On this in more detail below, Part III. 3.

¹²² For the legal discussion on the national level cf. J. Barcelo, "Product Standards to Protect the Local Environment", *Cornell Int'l L. J.* 27 (1994), 755 et seq.; K.H. Ladeur, "The Integration of Scientific and Technological Expertise into the Process of Standard-Setting According to German Law", in: Joerges/ Ladeur/ Vos, see note 84, 77.

¹²³ On 5.7 SPS Agreement see Appellate Body Report of 22 February 1999, WT/DS76/AB/R *Japan – Measures Affecting Agricultural Products*, para. 86 et seq.

cause they do not provide the desired level of protection (cf. article 3.3 SPS), then a member's measures should at least satisfy the objectivity of science and the laws of nature. Scientific evaluation in general, and "taking into account risk assessment techniques developed by the relevant international organizations" (article 5.1 SPS) in particular promises to tame unilateral protectionism. Science as a substitute for multilateralism may be the solution.

The problems of this approach are obvious: the world view of the natural sciences are often one-sided and biased by the peculiarities of their own, specialized scientific community.¹²⁴ The fields of risk assessment and safety necessarily involve questions of discretion and value judgments which science cannot answer. Moreover, even on their own grounds, scientific evidence is often disputed, and it is an old maxim that the "scientification" of politics leads to the politicization of science.

The Appellate Body must have had these problems in mind in the *Hormones Case* when it overturned the panel's far-reaching interpretation concerning risk assessment. The Appellate Body found that there must be "a rational relationship between the measure and the risk assessment"¹²⁵ and not a "monolithic conclusion".¹²⁶ Neither must a risk assessment embody the mainstream scientific view, nor can scientific uncertainty be entirely eradicated. The Appellate Body cautiously found that whether such a rational relationship is present "is to be determined on a case-by-case basis and will depend upon particular circumstances of the case".¹²⁷ Nevertheless, one cannot speak of a *rational relationship* if the party does not provide any relevant scientific evidence justifying its measure, as was the case for the EC according to the panel's finding of facts in the *Hormones Case*. The Appellate Body's interpretation of the definition of risk assessment in *Australia - Salmon* can be understood as concretizing this. In this case, which concerned the protection of animals, a risk assessment based on scientific evidence within the meaning of article 5.1 SPS must evaluate the likelihood of entry, establishment or spread of identified diseases *according to the SPS*

¹²⁴ In detail J. Scott, *Jean Monnet Papers* 3 (1999), 24 et seq. at <http://www.law.harvard.edu/programs/JeanMonnet/papers/index.html> - D. Wirth, Annotation, *AJIL* 92 (1998), 755 et seq., (759).

¹²⁵ WT/DS26/AB/R; WT/DS48/AB/R, see note 87, para. 193.

¹²⁶ *Ibid.*, para. 194.

¹²⁷ WT/DS76/AB/R, see note 123, para. 84.

*measures which might be applied.*¹²⁸ This interpretation was confirmed in the *Japan - Agricultural Products* Case. A risk assessment conforming to WTO law is therefore not given if the scientific studies brought forward do not “discuss or even refer to” the relevant measures which are to be evaluated.¹²⁹

The Appellate Body thereby limits the legal impact of scientific evidence by requiring only a *rational relationship* between the measures and the scientific evidence brought forward, thus allowing legislative discretion with regard to the choice of scientific reference points. Nevertheless, it treats the requirement of a risk assessment within the meaning of article 5.1 SPS as fully justiciable: if the member has not made a complete evaluation of the SPS measure, a trade-restricting SPS measure cannot be justified by a mere reference to a desired level of protection or to the precautionary principle. The background for this rigorous scrutiny is clear: “We note that a finding that an SPS measure is not based on an assessment of the risks to human, animal or plant life or health ... is a strong indication that this measure is not really concerned with the protection of human, animal or plant life or health but is instead a trade-restrictive measure taken in the guise of an SPS measure”.¹³⁰

There is, consequently, a fine line between a — from a democratic point of view unacceptable — limitation on the WTO members’ room for manoeuvre, on the one hand, and the indisputable capability of scientific rationality, on the other. Science’s abilities to solve problems are overburdened if one demands that it function as a substitute legislator, finding “objective solutions” to such conflicts as between health protection and open world trade. Norms of the WTO system that make reference to a scientific basis, such as arts 2.2 and 5.1 SPS, should be interpreted as concretizing the principle of non-discrimination and not as a further principle of WTO law. Discrimination can be assumed if a national measure cannot muster any scientific support that the danger or risk it addresses is real.¹³¹ Yet science cannot provide the answer to the

¹²⁸ Cf. WT/DS18/AB/R, *Australia Measures Affecting Importation of Salmon*, part V. B., para.10.

¹²⁹ WT/DS76/AB/R, see note 123, para. 113.

¹³⁰ WT/DS18/AB/R *Australia - Measures Affecting Importation of Salmon*, part V. C. 3., para 8.

¹³¹ This rule is nevertheless of great significance since it is probable that domestic legislation so far has only occasionally been based on scientific evi-

question of what constitutes an (un)acceptable risk. Science can inform the legislator, but can neither substitute as a legislator nor fill the political void in the WTO. In the end, it has to be concluded that the missing legislator within the WTO cannot be replaced through "outsourcing".

4. Comparative Notes

The initial thesis of this article has been confirmed: the WTO represents an enormous step towards an efficient international exercise of adjudication. This development has not, however, been paralleled with respect to legislation, resulting in a number of serious problems. In a comparative analysis, the peculiar and problematic situation under WTO law becomes even more evident.

a. The Standard Situation in International Law

The structural weakness of all three "branches of government" — the legislative, executive and adjudicative — remains the standard situation in international law.¹³² Compulsory adjudication as in the WTO remains the exception in global institutions. With respect to the ICJ, only 64 states out of 190 parties to the ICJ Statute have currently made declarations under Article 36 para. 2 ICJ Statute recognizing the compulsory jurisdiction of the ICJ.¹³³ This finding is further emphasized if one focuses on the most influential states. Among the permanent members of the Security Council, only the United Kingdom has recognized the jurisdiction of the ICJ as compulsory.¹³⁴ Similarly, only three of the G-8

dence in accordance with the Appellate Body's stringent interpretation of the SPS Agreement.

¹³² For a broad comparative analysis see N. Blokker/ H. Schermers (eds), *Proliferation of International Organizations. Legal Issues*, 2001; Goldstein/ Kahler/ Keohane/ Slaughter, see note 41.

¹³³ See the overview on the website of the ICJ at <http://www.icj-cij.org> (visited 1 November 2000). The most recent declaration was made by Lesotho on 6 September 2000.

¹³⁴ Declaration of 1 January 1969. This is in notable contrast to the fact that all five Permanent Members of the Security Council always have had a judge at the ICJ, P. Malanczuk, *Modern Introduction to International Law*, 7th edition, 1997, 284.

states have made such declarations.¹³⁵ The effectiveness of adjudication under the optional clause is further weakened by various reservations attached by states.¹³⁶ Moreover, dispute settlement by the ICJ is usually only effective if specific consent to its jurisdiction for the case in question has been made. Otherwise, it is quite possible that one party will not fully cooperate in the process.¹³⁷ It is even possible that a party will modify its declaration under the optional clause for the purpose of avoiding the jurisdiction of the ICJ in a specific case.¹³⁸ The United States withdrew their original acceptance during the Nicaragua crisis in 1985.¹³⁹ The function and impact even of compulsory adjudication under Article 36 para. 2 ICJ Statute is thus limited.¹⁴⁰

Besides declarations under Article 36 para. 2 ICJ Statute, several hundred international treaties contain provisions for establishing the ICJ's jurisdiction. Most of these treaties are bilateral agreements, while just over a hundred are multilateral agreements.¹⁴¹ The most recent multilateral agreements providing for procedures for creating compulsory adjudication of the ICJ include the Convention on Biological Diversity,¹⁴² the Framework Convention on Climate Change¹⁴³ and other

¹³⁵ Besides the United Kingdom the other two are Canada, Declaration of 10 May 1994, and Japan, Declaration of 15 September 1958.

¹³⁶ On the reservations see J. Merrills, "The Optional Clause Revisited", *BYIL* 64 (1993), 197 et seq.

¹³⁷ M. Schröder, "IGH – Internationaler Gerichtshof", in: R. Wolfrum (ed.), *Handbuch Vereinte Nationen*, 2nd edition, 1991, 321 et seq., para. 13; S. Rosenne, *The World Court*, 1989, 92.

¹³⁸ See the Fisheries Case (Spain v. Canada), in which Canada had modified its declaration when facing possible proceedings before the Court, in detail K. Oellers-Frahm, "Probleme und Grenzen der obligatorischen internationalen Gerichtsbarkeit", *AVR* 27 (1989), 443 et seq.

¹³⁹ See U.S. Department of State, Letter and Statement Concerning Termination of Acceptance of ICJ Compulsory Jurisdiction of 7 October 1985, *ILM* 24 (1985), 1742 et seq.; A. D'Amato, "Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court", *AJIL* 79 (1985), 385 et seq. Since 1951, 12 declarations accepting the jurisdiction of the ICJ as compulsory have been withdrawn.

¹⁴⁰ R. Jennings, "The International Court of Justice after Fifty Years", *AJIL* 89 (1995), 493 et seq., (495).

¹⁴¹ See the list of treaties on the homepage of the ICJ, which is based on the UN Treaty Series, <http://www.icj.cij.org/icjwww/ibasicdocuments/ibasictext/ibasic treaties and other docs.htm> (visited 1 November 2000).

¹⁴² Convention on Biological Diversity of 5 June 1992, *ILM* 31 (1992) 818 et seq., article 27 para. 3 lit.(b).

environmental regimes.¹⁴⁴ Other prominent examples of treaties which bring disputes to the ICJ include the optional protocol to the Vienna Convention on Consular Relations, which provided jurisdiction of the ICJ in the death-penalty cases brought by Paraguay and Germany against the United States,¹⁴⁵ the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, on which Libya relied in the Lockerbie Case against the United Kingdom and the United States,¹⁴⁶ and the Convention on the Prevention and Punishment of the Crime of Genocide, which Yugoslavia invoked during the Kosovo crisis.¹⁴⁷ Moreover, in order to fully evaluate the difference, the readiness to use these procedures has to be borne in mind: the number of cases brought before the WTO is ten times higher than the number of cases referred to the ICJ.¹⁴⁸ This further underlines the fact that the ICJ is mainly used as an adjudicator in various regulatory regimes where the role of judicial dispute settlement remains marginal. In view of the developments in the WTO as well as in the United Nations Convention on the Law of the Sea and the various international human rights regimes, one can conclude that there is a tendency to create regime-

¹⁴³ United Nations Framework Convention on Climate Change of 9 May 1992, *ILM* 31 (1992), 849 et seq., article 14 para. 2 lit.(a).

¹⁴⁴ Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991, *ILM* 30 (1991), 802 et seq., article 15 para. 2; Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on further Reduction of Sulphur Emissions of 14 June 1994, *ILM* 33 (1994), 1542 et seq., article 9.

¹⁴⁵ Vienna Convention on Consular Relations of 24 April 1963, UNTS Vol. 596 No. 8638; Optional Protocol article I; see the Order of 9 April 1998, Paraguay v. United States of America (Case discontinued by order of 10 November 1998), and the order of 3 March 1999, Germany v. United States (LaGrand).

¹⁴⁶ Montreal Convention of 23 September 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation, *ILM* 10 (1971), 1151 et seq.; Case Libya v. United Kingdom/ United States of America, Judgments of 27 February 1998.

¹⁴⁷ Convention on the Prevention and Punishment of the Crime of Genocide, A/RES/260 A (III) of 9 December 1948, article IX; Yugoslavia had brought ten NATO countries before the ICJ on these grounds. The proceedings against Spain and the United States were removed from the docket, as Spain and the United States had made reservations with respect to article IX and the ICJ thus lacked jurisdiction.

¹⁴⁸ Calculation based on the years 1995–2000.

specific adjudicative organs when dispute settlement becomes a central feature.

b. Law and Politics under the EC-Treaty

The advocates of a decisive and courageous interpretation of substantive WTO law might point to the ECJ's forceful adjudication, in particular the well developed and detailed jurisprudence concerning the basic freedoms of the EC-Treaty (arts 28, 29 etc. EC). That body of jurisprudence, often with deregulatory effect, has been of crucial importance for European integration and continues to be the cornerstone of the Common Market, the most impressive practical achievement of European integration so far. Within this context, the ECJ has adjudicated on such sensitive issues as the admissibility of national standards for food safety and environmental protection. It appears as a natural example that the WTO should emulate. In particular my argument that adjudication needs an accompanying political process appears to be refuted, since the Member States can usually only affect primary law pursuant to the cumbersome procedure of article 48 EU. The parallels appear to find further substance in the fact that the relevant provisions in the EC-Treaty were framed on the basis of the relevant GATT provisions.

However, there are numerous reasons why the jurisprudence of the ECJ cannot serve as a model. First, the objectives of European treaties are different to the WTO treaties: whereas the first aim at integration, this objective is not mentioned in the second. Furthermore, the European societies united within the European Union are far more homogeneous than the societies participating in the WTO; that — relative — homogeneity is an important factor for adjudication.¹⁴⁹ A further difference — the one that matters most in this context — is the crucial role that the relevant jurisprudence gives to the supranational political process: the whole jurisprudence on the four freedoms is based on the premise that the political process can correct judicial decisions, a possibility the WTO lacks. Since this aspect, crucial to our topic, is little studied, it shall be explored in greater detail.

The ECJ has not used the basic freedoms to act as a constitutional court that guides and limits the supranational political process. The basic freedoms do not provide — with the exception of free movement of

¹⁴⁹ In detail A. v. Bogdandy, "The EU as a human rights organization?", *CML Rev.* 37 (2000), 1307 et seq.

workers and their access to employment¹⁵⁰ — fundamental rights.¹⁵¹ An often overlooked reservation the ECJ makes, builds the basis for the most important difference between its jurisprudence on human rights and that of the basic freedoms: the Court applies the basic freedoms only if there is no secondary instrument.¹⁵² This signifies in substance that the Council can regulate the issue differently from the way it was decided by the Court on the basis of the basic freedom. Any decision of the Court that a national obstacle is illegal because it violates a basic freedom is not written in stone because it can be overturned through a later regulation or directive. Therefore — and this is a crucial difference to a human rights decision either by the ECJ or the ECHR or a national constitutional court — a decision on the basis of the four freedoms does not put the issue out of the reach of the normal political process.¹⁵³ The balancing of interests is, in the end, left to the political process of the Union. The relevant decision is a settlement of the issue that can be overturned or corrected by secondary law.

The ECJ's line of jurisprudence can be interpreted as follows. The ECJ clearly sees the numerous disadvantages in guiding the economic and social process through constitutional adjudication which — given the rigidity of the procedure under article 48 EU — is most difficult to reform. This line of argument also explains why the basic freedoms are not applied with respect to Council legislation unless the basic tenets of the Common Market are jeopardized through Community acts: only flagrant violations of the principles of the Common Market are prohib-

¹⁵⁰ Case C-415/93, *Bosman*, ECR I 4921, para. 129; Case C-416/96, *El-Yassini*, ECR 1999, I 1209, para. 45.

¹⁵¹ This understanding is confirmed by the Charter. In Consideration 3 it distinguishes clearly between common values and human rights, on the one hand, and the freedoms, on the other. Furthermore, no freedom except the freedom of movement and residence (article 44) is mentioned in the Charter.

¹⁵² Case 120/78, *Cassis de Dijon*, ECR 1979, 649, 662, para. 8; Case C-51/94, *Sauce Hollandaise*, ECR 1995, I 3599, 3627, para. 29; Case C-470/93, *Mars*, ECR 1995, I 1923, 1940, para. 12; this formula does not appear in all judgments, see, e.g., Case C-412/93, *Leclerc*, ECR 1995, 209, 216, para. 18 et seq.

¹⁵³ The same is true for the two other important bodies of primary law, namely competition law and gender discrimination law: they do not affect the discretion of the Union's legislature.

ited, above all discrimination,¹⁵⁴ as are — of course — violations of competences, procedures, fundamental rights and general principles. The forceful adjudication of the ECJ on the basic freedoms reflects the fact that there is — at least in principle — a working legislator who can correct the consequences of a judgment through a political process which is desired by the EC Treaty. Within the WTO, however, this legislator is missing. Therefore, the supranational law of the EU cannot serve as a model for the WTO.

5. Conclusions

The comparison between WTO law and other international or supranational treaties which set up compulsory adjudicative organs gives further account of the specificity of the WTO.¹⁵⁵ In most cases, such organs adjudicate on the basis of specific and limited obligations with little impact on the domestic legislative and regulatory process or on the basis of international human rights obligations, which have a special standing.¹⁵⁶ WTO law is similar to other international instruments insofar as it is a body of law that is difficult to change. This general feature of international law is, however, especially problematic with respect to WTO law because it addresses a dynamic, rapidly changing field. The WTO does not set up politico-legislative mechanisms to

¹⁵⁴ Cases 80 and 81/77, *Ramel*, ECR 1978, 927, para. 37; Case C-47/90, *Etablissements Delhaize frères*, ECR 1992, I-3669, para. 44; Case C-350/97, *Monsees*, ECR 1999, I – 2921, para. 24; M. Póiares Maduro, *We, the court. The European Court of Justice and the European Economic Constitution*, 1998, 76 et seq., (78); a tighter control is exercised with respect to movement of workers, given its human rights dimension, Case 41/84, *Pinna*, ECR 1986, 17, para. 21.

¹⁵⁵ This is also the evidence from Goldstein/ Kahler/ Keohane/ Slaughter, see note 41, 385 et seq., (389, 398), analyzing a number of international agreements under the categories of “obligation, precision, and delegation”.

¹⁵⁶ The international law of human rights appears to have taken a separate development since the total submission of politics to essential human rights standards has become an established feature, A. Cassese, *I diritti umani nel mondo contemporaneo*, 4th edition 1999, 5 et seq., 85 et seq.; C. Tomuschat, “Das Strafgesetzbuch der Verbrechen gegen den Frieden und die Sicherheit der Menschheit”, *EuGRZ* 25 (1998), 1 et seq.; A. Zimmermann, “The Creation of a Permanent International Criminal Court”, *Max Planck UNYB* 2 (1998), 169 et seq.

tackle this dynamism, for sound reasons. For example, there are still no international procedures which guarantee sufficient democratic legitimacy at the global level.¹⁵⁷ Since the Member States remain the crucial actors, far more than at the EU level, it is only consequent that the proper form of law-making for the WTO remains the treaty amendment procedure.

As a consequence we have a body of law which is linked to the political process only through extremely cumbersome procedures. Once this body of rules has been ratified, corrections by the political process are very difficult.¹⁵⁸ Changes in the will of the majority of citizens within a state (or the European Union) will hardly ever lead to changes in the relevant WTO law. The possibility of withdrawal pursuant to article XV WTO will generally be prohibitively expensive.¹⁵⁹ In traditional international law, a possible inroad of national politics was non-compliance with international law. This inroad has become severely restricted owing to the WTO's compulsory jurisdiction.¹⁶⁰ The relationship between law and politics in the WTO calls for an interpretation of WTO law that exhibits a deference to the sovereignty of the members. Or does it? Perhaps this straitjacket to politics in general and national politics in particular is a great achievement.

¹⁵⁷ On the relationship to Civil Society see J. Scholte/ R. O'Brien/ M. Williams, "The WTO and Civil Society", *JWT* 33 (1999), 107 et seq.; in more general terms D. Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?", *AJIL* 93 (1999), 596 et seq.

¹⁵⁸ Some scholars assume that for that reason the most important processes of forming new law have moved from the traditional institutions to societal actors, Teubner, see note 7, 437; see also K. Ipsen, *Völkerrecht*, 4th edition, 1999, § 3, paras 29, 30.

¹⁵⁹ It is telling that only the U.S. – the most influential member of the WTO – is considering withdrawal, Abbott/ Snidal, see note 41, 438 et seq.

¹⁶⁰ The substantive debate today is whether a WTO member is free to choose between fulfilling the recommendations of a dispute settlement report – and thus being obliged to adapt its internal order – or mere compensation, article 22 DSU. The opinion that a member must adapt appears more convincing, Jackson, see note 34, 85 et seq.; for the opposite view J. Sack, "Von der Geschlossenheit und den Spannungsfeldern in einer Weltordnung des Rechts", *EuZW* 8 (1997), 650 et seq., (688). Also the debate on direct applicability of WTO law can be understood in this light.

III. Strategies to Cope with the Missing Legislator

1. Three Approaches: Liberalism, International Governance and Coordinated Interdependence

There is a possibility of various and even contradictory interpretations of important WTO provisions, as proven by regular divergences between the panels and the Appellate Body. Given this scope of disagreement, general understandings of the nature and objective of WTO law influence the meaning attributed to disputed provisions in many instances. Drawing on similar discussions on the European economic constitution, three *ideal types* of understandings¹⁶¹ of transnational trade law can be distinguished: the model of *economic liberalism*, the *federal* or *governance* model, and the *coordinated interdependence model*.¹⁶² The last one is, as shall be seen, the most convincing for responding to the specific relationship between law and politics in the WTO. On this basis, some interpretative proposals will be tabled. It will also be shown that the *coordinated interdependence model* best explains some of the reports of the adjudicative organs and scholarly production.

The first conception (the *liberal model*) interprets WTO law as an instrument to substantially restrain the grasp of domestic politics on the economy and — in different variants — to increase international competition and deregulation. What this article has so far considered to be a substantial problem of the WTO — limiting the (domestic) political interference in the economic process — is, from this perspective, a crucial asset. The *liberal model* represents the most elaborate position in international trade law, and corresponds to the dominant positions in international trade theory.¹⁶³ It comes in various alternatives.

¹⁶¹ M. Weber, "Die 'Objektivität' sozialwissenschaftlicher Erkenntnis", in: id., *Gesammelte Aufsätze zur Wissenschaftslehre*, 7th edition., 1988, 146 et seq., 190 et seq.; for its usefulness in legal scholarship cf. E. Grabitz, *Gemeinschaftsrecht bricht nationales Recht*, 1966, 28 et seq.

¹⁶² This part has been inspired by Maduro, see note 154, 103 et seq.; see also A. v. Bogdandy, "A Bird's Eye View on the Science of European Law", *ELJ* 6 (2000), 208 et seq., (224 et seq.), (235 et seq.).

¹⁶³ The Economist, "World Trade Survey", 22 September 1990, 5 et seq.; The Economist, "A Survey of World Trade", 3 October 1998, 4 et seq.; B. S. Frey, *Internationale Politische Ökonomie*, 1985, 12 et seq.; H. Glismann/

John Jackson is the best known, although cautious representative of the traditional variant. Albeit sometimes ambiguous, he usually presents WTO law in the liberal light: "The basic purpose of GATT is to constrain governments from imposing or continuing a variety of measures that restrain or distort international trade".¹⁶⁴ The basic rationale comes from economic theory on which he relies when he cites *Coase's* thesis that "Economic policy consists of choosing those legal rules, procedures and administrative structures which will maximize the value of production".¹⁶⁵ WTO law is seen as an instrument to limit intervention in the markets. Settled insights from mainstream economic theory provide the main interpretative horizon with few intermediate steps.

A theoretically more developed variant of the *liberal model* is presented by private law scholars who consider WTO law as instrumental to rolling back regulatory public law interfering in the private law domain of shaping economic relations. Also from this point of view states are an "interference factor" (*Störfaktor*) in international trade.¹⁶⁶ The private law approach sees WTO law as instrumental in fostering the "global private law society" (*globale Privatgesellschaft*). According to this model, social integration largely occurs through the triad of contractual freedom, competition and property.¹⁶⁷ The global private law society is formed through transnational private law relationships, and is conceptually distinguished from the discrete political communities with

E.J. Horn/ S. Nehring/ R. Vaubel, *Weltwirtschaftslehre*, Vol. I, 4th edition, 1992, 72 et seq.

¹⁶⁴ Jackson, see note 34, 22–23, similarly, *ibid.*, 102: "...to prevent member nation states from abusing their national powers when those would damage the operation of world markets". Sometimes, however, he presents the objective of GATT as far more limited, being simply "to prevent arbitrary and unfair decisions or policies from undermining the other rules of GATT"; *ibid.*, 23; *id.*, *The World Trading System*, 1989, 305; this latter position corresponds to the understanding proposed in this article.

¹⁶⁵ Jackson, *ibid.*, 102, quoting R. Coase in his authority as a Nobel Prize winner.

¹⁶⁶ W. Fikentscher, *Wirtschaftsrecht*, Vol. I, 1983, 255. Fikentscher's great monograph interprets the whole of international economic law as parts of an emerging world competition order, *ibid.*, 204 et seq.

¹⁶⁷ E.J. Mestmäcker, "Der Kampf ums Recht in der offenen Gesellschaft", *Rechtstheorie* 1989, 273; *id.*, "Die Wiederkehr der bürgerlichen Gesellschaft und ihres Rechts", *Rechtshistorisches Journal* 10 (1991), 177; for a criticism see K. Günther, "Ohne weiteres und ganz automatisch? Zur Wiederentdeckung der "Privatrechtsgesellschaft", *Rechtshistorisches Journal* 11 (1992), 473.

their different regulatory schemes which interfere with the private law relations. According to this understanding, which reads WTO law as the basis of a global economic constitution, the WTO substantive law obliges members to follow an liberal economic policy.¹⁶⁸ Securing this private law society endows transnational law with a purpose, form and legitimacy. On this reading, WTO law is to allow only those public interventions which maintain the framework of an efficient market and of the global private law society.¹⁶⁹ This does not completely exclude regulatory intervention for social or environmental protection, but it requires doing so by the means least detrimental to the operation of markets.

From a public law perspective, the most important contribution is that of *Ernst-Ulrich Petersmann's* constitutional reading of the WTO. On this reading, WTO law respects the principle of the separation of powers and is based on an adequate relationship between law and politics. According to him, the critique developed in this article is therefore misguided. His conception has some strong foundations. It is beyond dispute that there is a specific relationship between politics and constitutional law. There is also agreement that constitutional law should stand beyond the "normal" political process. In fact, there is a difference between the legislator's ability to change "normal" law and its much more limited ability to alter constitutional law. Constitutional law guides and channels the "normal" political process and provides the core mechanism to convincingly stabilize the separation *and* interaction of law and politics in contemporary societies.¹⁷⁰ Even though constitutional rules are also subject to constitutional politics, it is the essence of the separation of powers doctrine that the constitutional political process be much more burdensome, requiring specific majorities and/or procedures.¹⁷¹ If WTO law had a constitutional function, its remoteness

¹⁶⁸ For a thorough theoretical review cf. Gerber, see note 40, 232 et seq.

¹⁶⁹ Drexler, see note 7, 841, 846; for the theoretical underpinning cf. C. Goodhart, "Economics and the Law: Too Much One-Way Traffic?", *Modern Law Review* 60 (1997), 1 et seq., (17 et seq.).

¹⁷⁰ For a theoretical account N. Luhmann, *Das Recht der Gesellschaft*, 1995, 407 et seq.

¹⁷¹ De Vergottini, see note 2, 206 et seq., 234 et seq.

from the normal political process would be in accordance with established constitutional principles and political thinking.¹⁷²

In order to attribute to the WTO law a constitutional function, Petersmann considers — in a Kantian tradition¹⁷³ — substantive WTO law as functional to realizing the basic individual freedom of choice of entrepreneurs and consumers.¹⁷⁴ The main thrust of this argument so far has been to interpret WTO provisions as giving rights to individuals against domestic legislation and other acts of public authorities.¹⁷⁵ Yet Petersmann also assumes that the WTO is an *integration* agreement with the internal European economic constitution — understood as a deregulatory constitution — as a model.¹⁷⁶

The basic argument of the liberal model in all its different variants is economic rationality, which asserts that there are optimal and sub-optimal instruments to correct market failures.¹⁷⁷ The protection of the operation of the economic process in its wealth-creating function against interfering political majorities using sub-optimal instruments is

¹⁷² For further uses of this category on the international level cf. B. Faßbender, *UN Security Council Reform and the Right of Veto. A Constitutional Perspective*, 1998, 25 et seq.

¹⁷³ E.U. Petersmann, "The WTO Constitution and Human Rights", *JIEL* 3 (2000), 19 et seq., (24).

¹⁷⁴ The leading work is E.U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law*, 1991; in particular 210 et seq.; furthermore H. Hauser, "Domestic Policy Foundation and Domestic Policy Function on International Trade Rules", *Aussenwirtschaft* 41 (1986), 171 et seq.; F. Roessler, "Competition and Trade Politics", *Aussenwirtschaft* 41 (1986), 467 et seq.; J. Tumler, "International Economic Order and Democratic Constitutionalism", *Zeitschrift der ordoliberalen Schule (ORDO)* 34 (1983), 71 et seq.

¹⁷⁵ The question of the direct effect of WTO law is the subject of the richest and most controversial discussion in international trade law; its adequate presentation is not the object of this contribution; see Advocate General A. Saggio, Conclusions of 25. February 1999 in Case C-149/96, *Portugal v. Council*, para. 14 et seq., para. 24; W. Meng, "Gedanken zur Frage unmittelbarer Anwendung von WTO-Recht in der EG", in: U. Beyerlin/ M. Bothe/ R. Hofmann/ E.U. Petersmann, *Festschrift für R. Bernhardt*, 1995, 1063 et seq., (1064); see also references in note 5.

¹⁷⁶ Petersmann, see note 81, 189.

¹⁷⁷ In detail Meng, see note 175, 1080 et seq.; E.U. Petersmann, "International Trade Order and International Trade Law", in: T. Oppermann/ E.U. Petersmann (eds), *Reforming the International Economic Order*, 1997.

an old demand of liberal economic theory.¹⁷⁸ This school of thought gives a broad scope to most obligations under the WTO, while granting only a narrow scope to the exceptions. They thus limit regulatory and legislative intervention by the domestic political systems. On a radical reading, WTO law shall help to bring to an end a historic interplay whose main feature has been the close grip of politics on the economy through law. The restriction of public interference and even deregulation at the domestic level would be the consequence, in particular since WTO requires not only avoiding a concrete collision (the standard requirement under international law), but also adapting the domestic legal order, article XVI:4 WTO. In contrast to the EU, a re-regulation at the global level would not take place in view of the cumbersome WTO political process. Law's function as a political instrument to forward political aims in the sphere of economics would therefore atrophy. At the same time, it would re-establish its more basic functions of providing a stabilization of expectations and a forum for conflict resolution. Regulatory competition is, in this light, a WTO objective.¹⁷⁹

This is an impressive model. Yet, ultimately, I do not find it convincing.¹⁸⁰ To the extent that it draws on economic theory one might question to what extent that science's models are capable of grasping the real world where "people live and work and die".¹⁸¹ Also the assertion that protectionist lobbies are usually stronger than free trade lobbies¹⁸² is not beyond doubt.¹⁸³ The normative quality appears equally

¹⁷⁸ M. Friedman, *Kapitalismus und Freiheit*, 1962, 11; see also Mestmäcker, see note 167; this vision is shared by powerful economic actors, see the chairman of Deutsche Bank, R. Breuer, "Offene Bürgergesellschaft in der globalisierten Weltwirtschaft", *Frankfurter Allgemeine Zeitung* of 4 January 1999, 9.

¹⁷⁹ For a discussion of costs and benefits cf. E.U. Petersmann, "International Competition for Governments and for Private Business", *JWT* 30 (1996), 5 et seq., (12, 15 et seq.)

¹⁸⁰ In detail Langer, see note 10, 18 et seq.; R. Howse/ K. Nicolaidis, "Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far", <http://www.ksg.harvard.edu/cbg/trade/howse.htm>

¹⁸¹ WT/DS26/AB/R, WT/DS48/AB/R, see note 87, para. 187; for the relationship between internal economic policies and international trade law cf. A. v. Bogdandy/ M. Nettesheim, "Access to the Internal Market. The System of the European Community's Legal Instruments", *World Competition* 17 (1993), 27 et seq.

¹⁸² Petersmann, see note 174, 96 et seq.

¹⁸³ Goldstein/ Martin, see note 32, 609 f.

questionable. It is not convincing to fasten the interpretation of a body of law which is hard to change to an economic theory which is — different to human rights — fiercely disputed.¹⁸⁴ At this point, legal research should be careful: neither constitutional theory nor legal theory possess the tools to decide the involved controversies. They should, however, for the sake of the legitimacy of the body of rules they investigate, fend off attempts to seize the field in the name of a particular theory.¹⁸⁵ Moreover, under domestic constitutional law, it is quite legitimate for a political community to opt for less wealth and less integration in the global market and give preference to other values to be realized through economically sub-optimal instruments. It is unconvincing to interpret an international treaty in a way that severely hampers the ratifying parties to do what their constitutions consider perfectly legitimate. Even if a member should deliberately and democratically decide to be a “competition state” rather than a “welfare state”,¹⁸⁶ there is no constitutional ground to assume that this choice should be “written in stone”, out of the reach of later majorities. It is also telling that WTO law does not provide any hint that its provisions, even the most central ones, should be considered as international human rights. In fact, human rights is a simply non-issue in WTO law.

Beyond this more ideological confrontation, there are also important arguments which are more focussed on specific problems of adjudication. There are inherent limits to any adjudicative process convincingly drawing the line between political intervention and economic freedom:¹⁸⁷ regulatory problems can only exceptionally be settled through litigation. In general, adjudicative organs lack the expertise for such policies; their information is dependent on those who participate in the adjudicative process and issues may be decided without hearing affected interests which do not participate. The total costs of adjudica-

¹⁸⁴ In detail D. Irwin, *Against the Tide: An Intellectual History of Free Trade*, 1996, 180 et seq.; E. Hobsbawm, *Das Zeitalter der Extreme*, 1995, 703; C. Lofdahl, “On the Environmental Externalities of Global Trade”, *International Political Science Review* 19 (1998), 339 et seq., (351); P. Perkins, “Sustainable Trade”, in: R. Keil/ L. Fawcett (eds), *Political Ecology*, 1998, 46, 51; see also the references in note 7.

¹⁸⁵ As the economist Goodhart, see note 169, 2, puts it: “Economics has become an increasingly and unashamedly imperialist social science in recent decades. And you in the law provide one of our finest colonies.”

¹⁸⁶ On this distinction Altvater/ Mahnkopf, see note 7, 45, 63 et seq., 133 et seq., 219 et seq.

¹⁸⁷ In detail Maduro, see note 154, 59 et seq.

tive procedures are usually far higher than those of administrative procedures.¹⁸⁸ All these considerations are confirmed by the ECJ's approach. As set out above,¹⁸⁹ an analysis of the ECJ's jurisprudence on the basic freedoms discourages an interpretation of WTO law that aims at negative integration and deregulation. The ECJ's jurisprudence is based on the premise that legislative correction is possible at the supranational level. That possibility does not obtain within the WTO.

The second model, here called the *federal or governance model*, aims to complement the international legal regimes with more policy functions. It comes in different variants: one variant calls for federal elements, another variant proposes still vaguely defined forms of international *governance*.¹⁹⁰ The federal understanding aims to reproduce the relationship between law and politics of more developed political communities at the transnational level. There are those who argue in favour of a global federation.¹⁹¹ Those who — more realistically — propose that the WTO develops similar to the European Union, are more numerous in trade law.¹⁹² This position is not necessarily in opposition to the first reading; new forms of international policy-making can be integrated into the liberal model's understanding.¹⁹³ The very idea is that the political process within the WTO should be organized in such a way that necessary legislation can be enacted on a global level. Roessler's proposed interpretation of article XXV GATT 1947 provides an example.¹⁹⁴ However, given the restricted possibilities of the WTO's

¹⁸⁸ For further arguments cf. Maduro, see note 154, 145 et seq.

¹⁸⁹ See II. 4 b above.

¹⁹⁰ The Report of the Commission on Global Governance, *Our Global Neighbourhood*, 1995, 9 et seq.; M. Zürn, *Regieren jenseits des Nationalstaates*, 1998, 329 et seq.; Altvater/ Mahnkopf, see note 7, 397.

¹⁹¹ O. Höffe, *Demokratie im Zeitalter der Globalisierung*, 1999, 310 et seq.; convincing the critique by Günther, see note 6, 232 et seq.; similarly the ideas of a cosmopolitan democracy, D. Held, "Rethinking Democracy: Globalization and Democratic Theory", in: Streek, see note 6, 59.

¹⁹² D. Messner/ F. Nuscheler, "Global Governance. Herausforderungen an der Schwelle zum 21. Jahrhundert", in: D. Senghaas (ed.), *Frieden machen*, 1997, 337, 351; G. Shell, "Trade Legalism and International Relation Theory", *Duke Law Journal* 44 (1995), 829 et seq.

¹⁹³ Petersmann has made important proposals, see e.g. see note 81, 221; as a possible model for future development Langer, see note 10, 330; Howse/ Nicolaidis, see note 180, 13 et seq.

¹⁹⁴ See above, II. 3. a. aa.

autonomous political procedures,¹⁹⁵ the *federal* or *governance* model cannot inform the interpretation of the current law: the simple possibility that sometime in the future adequate policy mechanisms might develop does not permit an interpretation of current WTO law as if such mechanisms actually existed.

The third understanding — termed the *coordinated interdependence model* — tries to find another balance between the increasingly transnational nature of the economy and the members' responsibilities under their respective constitutions.¹⁹⁶ It considers those parts of WTO law affecting the domestic regulatory processes as merely an instrument to prevent (intentional) protectionism *and* to force members to take the economic interests of other members into account.¹⁹⁷ When it comes to internal regulation, WTO law is an instrument to politically coordinate different regulatory systems, not an instrument to curtail such regulatory systems for the sake of wealth-creation or in the name of economic freedom. The *coordinated interdependence model* is predicated on the widespread conviction that non-discrimination is the central principle of WTO law.¹⁹⁸ Members remain free to regulate their national economy, and neither deregulation nor regulatory competition are among the objectives of the WTO. Unlike the liberal model, in this conception WTO law has neither a domestic policy function nor constitutional function. This model corresponds best to the deficient relationship between politics and law which this article has analyzed. The following sections will flesh out some plausible responses to this situation.

¹⁹⁵ See above, II. 3.

¹⁹⁶ To my knowledge, those fundamentally critical of the WTO have not yet proposed a scholarly model for interpretation.

¹⁹⁷ Langer, see note 10, 65, et. seq.; Robert Howse, with his concept of "embedded liberalism" proposes what is, perhaps, the most elaborate position within this school of thought, cf. Howse/ Nicolaidis, see note 180; R. Howse, *Democracy, Science, and Free Trade: Risk Regulation on trial at the World Trade Organization* (forthcoming); R. Howse, "Eyes Wide Shut in Seattle: The Legitimacy of the World Trade Organization", in: Heiskanen and Coicaud (eds), *The Legitimacy of International Institutions*, 2001, forthcoming United Nations University Press-; on related works quoted in this article, see notes 86, 180.

¹⁹⁸ Ibid.

2. The Objectives of WTO Law

The proposed reading of WTO law is based on understanding its objectives as being rather limited. It collides with other conceptions which assume that the WTO aims at free trade¹⁹⁹ or even market integration.²⁰⁰ Yet "free trade" and "market integration" do not appear anywhere as a WTO objective. In the first recital of the preamble to the WTO Agreement, the objective is "expanding the production of and trade in goods and services". This does not determine to what extent impediments to trade should be removed. More precise information about the aims is laid down in the third recital of the WTO preamble, according to which the WTO agreements are "directed to the substantial reduction of tariffs and other barriers to trade and the elimination of discriminatory treatment in international trade relations".²⁰¹ Accordingly, not even with respect to specific trade restrictive measures does WTO law aim at their elimination, but rather aims only at their "substantial reduction". Judging by its own standards laid down in article XXIV:8 GATT, WTO law does not aim at market integration and "is [...] not a free trade instrument".²⁰²

Free trade could nevertheless be the objective, if the words "substantial reduction of [...] other barriers to trade" meant that international trade flows should not be hampered. Yet the recital continues: "and to the elimination of discriminatory treatment in international trade relations". Obviously, the Contracting Parties had a narrow understanding of the term "trade barriers", as a broad understanding would include discriminatory measures. Consequently, to interpret the preamble as including free trade as an objective would render the second part of the recital meaningless, thus violating a basic rule of interpretation.²⁰³ Accordingly, such an interpretation is unconvincing.

The understanding proposed here finds further support in a comparative analysis which takes article 2 EU and article 2 EC into ac-

¹⁹⁹ This is often assumed by critics, Altwater/ Mahnkopf, see note 7, 396.

²⁰⁰ Petersmann, see note 176.

²⁰¹ Similarly the 2nd recital of GATT; see also the 2nd and 4th recitals of GATS, 1st recital of TRIPs.

²⁰² J. Tumler, "GATT Rules and Community Law", in: M. Hilf/ F. Jacobs/ E.U. Petersmann (eds), *The European Community and GATT*, 1986, 1, 7, with respect to GATT, of course.

²⁰³ F. Bydliński, *Juristische Methodenlehre*, 2nd edition, 1991, 444.

count.²⁰⁴ These two treaties aim at economic and political integration. Article 2 EC supports far-reaching interpretations of treaty provisions which force Member States to grant market access to products originating in other Member States irrespective of questions of discrimination. However, article 2 EC aims at the establishment of a "Common Market", whereas WTO law only aims at "substantial reduction of barriers to trade" and the "elimination of discrimination". The difference is even more striking when considering the relevant normative context. Article 2 EC has been continuously enriched through complementary objectives, such as cohesion, solidarity and numerous regulatory policies; WTO law lacks this entirely. As already set out above, cohesion, solidarity and regulatory policies complement the creation of new spheres of economic freedom, at least according to current constitutional thought.

The gulf separating EU law from WTO law grows even greater when looking at the preambles of the EC- and EU-Treaties, which aim at an "ever closer union of the European peoples" in order to further peace, democracy and human rights. None of this is contained in the WTO Agreement. One can assume that this omission was deliberate, because European integration — so far the most successful attempt to liberalize international trade — must have been in the minds of the negotiating parties. Moreover, the WTO lacks the political mechanisms to accompany liberalization and deregulation brought about by adjudication.²⁰⁵

This vision of limited ambitions and objectives of the WTO finds further support in a telling omission in the Appellate Body's reasoning: it never assumes a "WTO interest"; rather, it appears that only the members have an interest to be considered.²⁰⁶ Hereby the Appellate Body distances itself from understandings which aim at the creation of

²⁰⁴ This part draws on my analysis of arts 2 and 3 EC, v. Bogdandy, in: E. Grabitz/ M. Hilf (eds), *EU-Kommentar*, 2000, article 2 EC, para. 1, 19 et seq.

²⁰⁵ For further differences see C.D. Ehlermann/ G. Campogrande, "Rules on Services in the EEC: A Model for Negotiating World-Wide Rules?", in: E.U. Petersmann/ M. Hilf (eds), *The New GATT Round of Multilateral Trade Negotiations*, Vol. 5, 1988, 481, 482 et seq.

²⁰⁶ See, e.g., WT/DS2/9, see note 21, 22; WT/DS58/AB/R *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, para. 164, 167.

a new polity.²⁰⁷ According to the Appellate Body, WTO law only serves its members and no further interest. The assumption of a "Community interest" and a "Community common good" is, in contrast, a core concept of European Union law (e.g. article 43.1 lit. (a) EU, article 86.2 EC) and is among the most important argumentative tools in the ECJ's jurisprudence.²⁰⁸ This also speaks for the *coordinated interdependence model*.

A similar result comes to the fore with respect to the question of whether harmonization of domestic rules is a WTO objective. Certainly, some parts of WTO law leave members little discretion in shaping legal instruments. For example, any WTO conform anti-dumping instrument or countervailing duties instrument will have to closely follow the detailed rules in the respective WTO agreements. The same might happen with national subsidies under the relevant WTO provisions.²⁰⁹ TRIPs is even more stringent. Legally TRIPs does not impose an obligation on the members to harmonize their legislation.²¹⁰ Yet any implementation limited to foreigners may result in reverse discrimination against the member's own citizens: a result which is obviously politically untenable. It can therefore be expected that TRIPs will result in a substantial restructuring of the domestic legal systems: they will have to bow to some form of *de facto* harmonization.

Given this article's analysis, the rush towards harmonization should be contained, and it is important to emphasize that harmonization does

²⁰⁷ The assumption of a *global common good* or *interest* is crucial for those who argue in favor of the development of global governance D. Messner/ F. Nuscheler, "Global Governance. Organisationselemente und Säulen einer Weltordnungspolitik", in: id. (eds), *Weltkonferenzen und Weltberichte. Ein Wegweiser durch die internationale Diskussion*, 1996, 12, 21.

²⁰⁸ Case 26/62, van Gend & Loos, ECR 1963, 1, 24; M. Heintzen, "Die Legitimation des Europäischen Parlaments", *ZEuS* 3 (2000), 377 et seq., (381 et seq.).

²⁰⁹ For an interpretation in the sense of "coordinated interdependence" Langer, see note 10, 264 et seq.

²¹⁰ TRIPs only sets up certain minimum standards for the treatment of foreigners and does not address the treatment of nationals. According to article 1.3 TRIPs "Members shall accord the treatment provided for in this Agreement to the nationals of other Members". See also A. Schäfers, "Normsetzung zum geistigen Eigentum in internationalen Organisationen, WIPO und WTO – ein Vergleich", *Gewerblicher Rechtsschutz und Urheberrecht Int.*, 1996, 763 et seq., (770 et seq.).

not appear as an overall objective in the WTO preamble.²¹¹ This cautious analysis also finds support in the Appellate Body's reports on the SPS Agreement. This may appear surprising, as the SPS Agreement aims — according to its preamble — “to further the use of harmonized sanitary and phytosanitary measures between Members”. The Appellate Body, however, interprets even this agreement in such a manner that the members retain the autonomy to regulate their national economy. The Appellate Body reversed the panel report in the *Hormones Case*, in which the panel held that members were obliged to adopt harmonized international standards on phytosanitary measures.²¹² Instead, the Appellate Body reasoned that the harmonization mentioned in the preamble of the SPS is “a goal, yet to be realized *in the future*.”²¹³ The Appellate Body understands the relevant SPS provision as simply preventing “the use of such measures for arbitrary and unjustified discrimination between Members”²¹⁴ without hindering them to regulate their national economies according to their legitimate needs.²¹⁵ This confirms the position proposed in this article: that most substantive and procedural WTO law is limited to upholding the principle of non-discrimination.

This principle should not, however, be underestimated. In addition to its economic dimension it also has an important political function.²¹⁶ The perception that products are being discriminated against on the basis of nationality is offensive to political and moral sensibilities. The principle of non-discrimination thus helps to maintain at least the appearance of impartiality. Consequently it facilitates not only trade but also political stability between the trading partners.

Summing up, the preamble of the WTO confirms the proposed reading that WTO law — beyond the reduction of tariffs and of trade measures of a similar nature and, of course, the elimination of discrimination — does *not* aim at the general elimination of barriers as envisaged in the ECJ's *Cassis de Dijon* doctrine *or* at market integration *or* at

²¹¹ Cf. Howse/ Mavroidis, see note 86, 2 (manuscript).

²¹² WT/DS26/AB/R, see note 87, para. 165.

²¹³ WT/DS26/AB/R, WT/DS48/AB/R, see note 87, para. 165, *emph. in original*.

²¹⁴ *Ibid.*, para. 177.

²¹⁵ Similarly WT/DS58/AB/R, see note 206, para. 193; WT/DS2/9, see note 21, 30.

²¹⁶ W. Culbertson, *International Economic Policies*, 1925, 185–192; R. Gardner, *Sterling-Dollar Diplomacy*, 1956, 16, 17.

regulatory competition *or* at free trade. They are not even envisaged in the recitals which set out the overall aims which the Contracting Parties want to achieve through further negotiations (article III:2 WTO). They cannot *a fortiori* guide the interpretation of current WTO law. All this supports the *coordinated interdependence model*.

3. The Scope and Meaning of Discrimination and Exceptions

A crucial provision for determining the scope of WTO law is article III:4 GATT and the meaning given to the words "like products" and "shall be accorded treatment no less favourable". It is easy to give to these two elements a meaning which has the consequence that important parts of domestic law come within the scope of international trade law. For example, "treatment no less favourable" is synonymous with "discrimination" and can therefore easily be construed as encompassing almost any internal measure that is a burden for imports under such headings as "de-facto" or "indirect" or "disguised" or "mediated" discrimination, as European Union law proves.²¹⁷ This construction might be justified in the EU as the aim is to create a Common Market. The primary function of article III GATT, by contrast, is to sustain negotiated commitments to tariff bindings.²¹⁸ It thus becomes clear that the WTO context is much more limited. Therefore, although some forms of "disguised" discrimination must be addressed, such issues should be handled with care.

There is a similar problem with respect to "likeness". The dispute settlement organs, conscious of this problem, have adopted a careful approach. The Appellate Body has emphasized that the degree of likeness is to be determined on a case-by-case basis, with the relevant factors depending on the specific context.²¹⁹ Nevertheless, it is conventional wisdom that the comparison between products has to be limited to the characteristics regarding the product itself and cannot be extended to the product's production method. Likeness would, on this

²¹⁷ Maduro, see note 154, 35 et seq.

²¹⁸ R. Hudec, *Developing Countries in the GATT Legal System*, 1987, 133; on the centrality of discrimination P.T. Stoll, "Freihandel und Verfassung", *ZaöRV* 57 (1997), 83 et seq., (119).

²¹⁹ Appellate Body Report of 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, *Japan – Taxes on Alcoholic Beverages*, 21–22.

view, be determined solely on the basis of the physical similarity of two products.²²⁰ Consequently, products which differ only in their production methods and are otherwise identical would be considered "like products", and even origin-neutral measures would constitute a *prima facie* violation of article III:4 GATT.

This understanding is challenged by *Howse* and *Regan*, who lessen the impact of article III:4 GATT by arguing that the distinction between product and production oriented measures should be abandoned.²²¹ In their view, article III GATT should also be applicable to process-based measures, thereby not automatically placing them within the scope of article XI GATT.²²² They argue that the conventional distinction has little grounding in the text of article III GATT, and they consider their understanding to be supported by Note Ad article III GATT on the interpretation of article III GATT and article XI GATT. The conventional understanding over-emphasizes the abstract insight that products which are physically similar are more likely to be "like"; an insight which, however, does not provide a workable standard in a concrete case, especially if one does not only consider cases in which a production method is prohibited entirely.²²³ The thrust of this argument is that GATT does not provide for a general right of access, but only for specific rights against discrimination.²²⁴

Howse and *Regan* thus suggest a definition which allows for the evaluation of all circumstances of a measure. In their view, "like" means "not differing in any respect relevant to an actual non-protectionist

²²⁰ In detail on the cases *F. Altemöller, Möglichkeiten und Grenzen der Berücksichtigung von Umweltschutzziele in den Vertragstexten der Welt-handelsorganisation*, 1996, 87 et seq., 213 et seq.; see also e.g. *United States – Restrictions on Imports of Tuna*, *ILM* 30 (1991), 1594 et seq. and *ILM* 33 (1994), 936 et seq.; v. Bogdandy, "Internationaler Handel und nationaler Umweltschutz: Eine Abgrenzung im Lichte des GATT", *EuZW* 4 (1992), 243 et seq.

²²¹ R. Howse/ D. Regan, "The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy", *EJIL* 11 (2000), 249 et seq.

²²² Such a proposition does not conflict with the Appellate Body's decision in *Shrimps/Turtles*, as the delineation between article III and article XI was not at issue there, *WT/DS58/AB/R*, see note 206; the measure in *Shrimps/Turtles* was country-based and not origin-neutral.

²²³ Howse/ Regan, see note 221, 259–261.

²²⁴ *Ibid.*, 257.

regulatory policy".²²⁵ Along that line, country-based restrictions are generally suspect under article III GATT whereas origin-neutral measures are not. This crucial distinction also rests on the different economic effects of country-based restrictions as opposed to origin-neutral ones²²⁶ which is sometimes overlooked.²²⁷

Process-based trade restrictive measures are often thought to constitute illegitimate unilateral behaviour.²²⁸ Such an understanding, however, neglects the fact that the choice often is not between unilateralism and multilateralism but rather between unilateralism and inaction.²²⁹ Process-based regulations are also not extra-territorial measures in the classical sense.²³⁰ And most critically, the problem of extra-territoriality is not limited to process-based measures but can also arise in relation to product-based regulations.²³¹ Therefore the process/product-distinction is hardly capable of coherently preventing protectionism. The approach of *Howse* and *Regan* ensures that domestic regulatory policy is non-protectionist, while at the same time addressing some of the critical deficiencies of the WTO system developed in this article. While their proposal has encountered a certain amount of scepticism,²³² if their theory convincingly addresses these reservations their approach may substantially enrich the *coordinated interdependence model*.

A further important interpretative device to meet the shortcomings of WTO law concerns the question, under substantive law, of how to interpret exceptions. In this respect, an important divergence between the Appellate Body and the ECJ comes to the fore. The ECJ has con-

²²⁵ Ibid., 261.

²²⁶ Ibid., 269–272.

²²⁷ See the discussion of the *Belgian Family Allowances Case* by B. Jansen, "The Limits of Unilateralism from a European Perspective", *EJIL* 11 (2000), 309 et seq., (311); *Howse/ Regan*, see note 221, 262–263.

²²⁸ See Jansen, see above, 311.

²²⁹ D. Bodansky, "What's so Bad about Unilateral Action to Protect the Environment?", *EJIL* 11 (2000), 339 et seq.

²³⁰ *Howse/ Regan*, see note 221, 274.

²³¹ Ibid., 279.

²³² See e.g., J. Jackson, "Comments on the Shrimp/Turtle and the Process/Production Distinction", *EJIL* 11 (2000), 303 et seq.; Jansen, see note 228, 309 et seq.

strued the exceptions to the basic freedoms narrowly.²³³ By contrast, the Appellate Body has explicitly refused to apply this interpretation. "[M]erely characterizing a treaty provision as an "exception" does not, by itself, justify a "stricter" or "narrower" interpretation".²³⁴ This conception is convincing, in particular in view of the goal of sustainable development and the measures that its realization might entail.²³⁵ In the *Hormones Case*, the Appellate Body wrote: One can conclude that WTO law does not lay down a principle that trade must take precedence in case of a collision with other private or public interests.²³⁶

4. A Procedural Conception of Substantive Law

It is the nature of the domestic political process that the interests of the state's citizens enjoy a priority over those of foreigners. Even when the process does not aim at protectionism, home interests tend to be favoured and foreign interests neglected. Information, participation and regulatory traditions are control-elements of the regulatory process that reflect domestic interests.²³⁷ Foreign interests, sometimes deeply affected through domestic decisions, do not generally have a standing in domestic procedures. As already pointed out, this situation is one of the undemocratic features of globalization: more and more purely "domestic" decisions are having a transnational impact with ever greater significance. This contribution suggests that the Appellate Body's interpretation of WTO law can be understood as helping to rectify this feature of globalization with multilateralism: when a sovereign decision affects the economic interests of people in other states, their interests must be taken into account, either through a negotiated solution between the affected states, or, if impossible, through "simulated multilateralism" in the domestic process of legislation.

²³³ Case 7/61, *Commission/Italy*, ECR 1961, 695, 720; Case 113/80, *Commission/Ireland*, ECR 1981, 1625, 1637, in detail: H. Matthies/ R. v. Borries, in: Grabitz/ Hilf, see note 204, note 3 et seq.

²³⁴ WT/DS26/AB/R, WT/DS48/AB/R, see note 87, para. 104.

²³⁵ For possible steps see the proposals in: Wuppertal Institut für Klima, Umwelt, Energie, *Zukunftsfähiges Deutschland*, 1996, 153 et seq.

²³⁶ M. Hilf, "Freiheit des Welthandels contra Umweltschutz?", *Neue Zeitschrift für Verwaltungsrecht* 19 (2000), 481 et seq., (483 et seq.)

²³⁷ Maduro, see note 154, 146 et seq.

Dependence on external factors, including decisions made in foreign jurisdictions, has become greater. Similarly, the network of international obligations has become more close-knit. External relations have therefore become more important to the democratic principle, and a self-respecting democracy can no longer afford to keep foreign relations outside the mechanisms of democratic accountability. The Appellate Body's decisions can be understood as an attempt to respond to this situation.

In a series of reports, panels and the Appellate Body have interpreted WTO law as requiring members who are in non-compliance with basic obligations to seek multilateral solutions with the negatively affected members, without, however, giving concrete guidance as to the substantive prerequisites.²³⁸ This approach is particularly decisive for the analysis of domestic rules primarily aimed at the protection of non-economic interests, e.g. the environment or consumer protection. In critical situations the Appellate Body proceduralizes the substantive WTO obligations and compels the members to try to achieve a multilateral consensus. The members are thus spared from being forced to harmonize their domestic legal orders according to substantive WTO rules. This is not to suggest that a general transformation of substantive obligations into procedural requirements should occur: such an understanding is not supported by the reports thus far issued and would contradict the system of many WTO treaties. Procedural requirements have the function of serving the accomplishment of substantive obligations and cannot function as a general substitute for them. This general rule does not, however, exclude interpreting a substantive provision in such a way that it lays down certain procedural and organizational requirements which further the aim of the provision in question.²³⁹

The procedural requirements, which aim at a multilateral solution to the conflict, have two steps, though the relationship between them remains ambiguous. First, the Appellate Body forces the members to pursue multilateral cooperation as a means of keeping the effects of trade restrictive measures arising from domestic rules to a minimum.²⁴⁰ The

²³⁸ WT/DS2/9, see note 21, 27; WT/DS58/AB/R, see note 206, para. 174 et seq.

²³⁹ Most important in this respect is the discussion which derives organizational and procedural standards from fundamental rights, T. Vesting, *Prozedurales Rundfunkrecht*, 1997, 94 et seq.

²⁴⁰ WT/DS2/9, see note 21, 27; WT/DS58/AB/R, see note 206, para. 174 et seq.

negotiations should not only be conducted with the other Member States, but also directly with the affected exporters.²⁴¹ By requiring negotiations to be conducted with the trading partners as well as with affected private interests, the Appellate Body introduced a procedural prerequisite which extends an important element of the democratic principle to foreign interests. The WTO thus induces an international political process that occurs outside of its institutional framework for the purpose of coming to an international agreement aimed at coordinating domestic rules, something which could hardly be achieved by WTO law on its own.

If the efforts to achieve a multilateral solution to the conflict fail, then the member may proceed to the second step. In this case, WTO law requires that the member, in its domestic proceedings, takes the interests of the affected members and their citizens into account, even if there is no special international obligation to do so.²⁴² This is especially evident in the Appellate Body's report in the *Reformulated Gasoline Case*. There the Appellate Body found that "while the United States counted the cost for its domestic refiners [...], there is nothing [...] to indicate that it did other than disregard that kind of consideration when it came to foreign refiners."²⁴³ It concluded that this "goes well beyond what was necessary for the Panel to determine that a violation of Article III:4 [GATT] had occurred"²⁴⁴ and that there had been arbitrary discrimination. In other words, the costs and appropriateness of the measures for the trading partners must be included in the policy. This was confirmed in the *United States - Shrimps Case*, when the Appellate Body, in finding that there had been arbitrary discrimination, gave weight to the fact that there was no inquiry into the appropriateness of the program for the conditions prevailing in the exporting countries.²⁴⁵ The application of this regulatory program imposed "a single, rigid and unbending requirement" with "little or no flexibility" and consequently also constituted arbitrary discrimination within the meaning of the chapeau to article XX GATT.²⁴⁶ The implication is that such measures must be designed and applied flexibly, i.e., so that they acknowledge

²⁴¹ WT/DS2/9, see note 21, 27.

²⁴² WT/DS2/9, see note 21, 28; WT/DS58/AB/R, see note 206, para. 169, 172 et seq.

²⁴³ WT/DS2/9, see note 21, 26.

²⁴⁴ WT/DS2/9, see note 21, 26.

²⁴⁵ WT/DS58/AB/R, see note 206, para. 177.

²⁴⁶ Ibid.

comparable policies adopted by other members. Although taking foreign interests into account when creating domestic regulations does not achieve "real" multilateralism, it does achieve a "simulated" form of multilateralism. This "simulated multilateralism" preserves the democratic principle by insuring that affected foreign interests are adequately recognized and taken into account in policy formulation. Only after the domestic legislative process has taken these interests into account is it permissible to restrict imports to protect a recognized public good.

The Appellate Body has not only created prerequisites for the legislative process but also for the application of the norms. The main criteria are the principles of due process and basic fairness, which the Appellate Body developed on the basis of article X:3 GATT. In an *a fortiori* conclusion, the Appellate Body applied these principles to measures based on the provisions providing exceptions to GATT.²⁴⁷ Thus the protection of other members is to be ensured by procedural means, as is highlighted in the *United States - Shrimps* Case. Here the United States relied on an origin-based method to exclude the import of shrimps from its market that were caught with nets not certified as being "turtle friendly" by the U.S.²⁴⁸ In concluding that arbitrary discrimination had occurred, the Appellate Body attached great significance to the "singularly informal and casual" nature of the certification process, concluding that it resulted in a denial of both basic fairness and due process.²⁴⁹ The Appellate Body found that :

"there is no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it, in the course of the certification process before a decision to grant or deny certification is made. Moreover, no formal written, reasoned decision, whether of acceptance or rejection, is rendered [...]. Countries which are granted certification [...] are not notified specifically. Countries whose applications are denied also do not receive notice [...]. No procedural review of, or appeal from, a denial of an application is provided".²⁵⁰

This led the Appellate Body to conclude that the minimum standards for transparency and procedural justice established by article X:3

²⁴⁷ Ibid., para. 190.

²⁴⁸ The importing countries had to comply with the guidelines under Section 609(b)(2)(A) and (B). In practice this meant that they were required to use turtle extractor devices. See e.g., *ibid.*, para. 177 et seq.

²⁴⁹ Ibid., para. 181.

²⁵⁰ Ibid., para. 180, footnotes deleted.

GATT had not been met.²⁵¹ From the foregoing it can be concluded that, in terms of the application of domestic regulatory programs, foreign interests must enjoy a right to be heard. Furthermore, members are obliged to give reasons in proceedings for the permission to import and sufficient legal protection against the denial of such permission. The far-reaching scope of the publication requirement also serves to protect other members.²⁵² The Appellate Body thus extended basic elements of the democratic principle and the rule of law to aliens. Only after these procedural requirements have been met, does the importing member remain free to pursue its domestic preferences and interests.²⁵³ The Appellate Body thereby avoids the extremely problematic situation of establishing substantive requirements through concretizing WTO provisions; however, it remains to be seen whether and how far these procedural prerequisites can be implemented effectively in domestic legislative and administrative procedures.

IV. Conclusions

International trade is essential to enhancing the global wealth urgently needed by the poor countries and vigorously demanded by most citizens in the richer ones. Multilateral rules which ease market access and which combat discriminatory practices are a precondition of a viable trading system. Such rules, in order to fulfill their purpose, must address domestic economic policies. Given the growing global economic interdependence, such domestic policies often regulate cross-border economic transactions and therefore affect the respective policies of

²⁵¹ Ibid., para. 183.

²⁵² An important provision of this type is article 7 SPS in conjunction with Annex B SPS Agreement. It contains a publication requirement, obliges the members to create a national information office and provides for a special notification procedure. The Appellate Body gives significant weight to these provisions. In *WT/DS76/AB/R Japan – Measures Affecting Agricultural Products* it decided that the publication requirement for measures regulated by the SPS Agreement was not only applicable to legally enforceable instruments but also to other instruments which are applicable generally and similar in character to those explicitly mentioned, paras 102 – 108. This publication requirement goes well beyond what is constitutionally required in most Member States, v. Bogdandy, see note 39, 484 et seq.

²⁵³ *WT/DS58/AB/R*, see note 206, para. 169 et seq.

other states.²⁵⁴ Precisely for that reason, however, WTO law has the potential to profoundly alter the relationship between politics and law, since it is a body of economic law on which (democratic) political processes have little impact. Yet WTO law can be interpreted in a way that limits this shortcoming while realizing the potential benefits the WTO system has to offer. Some developments in the jurisprudence of the dispute settlement organs can be understood as heading in this direction.

The thrust of the *coordinated interdependence model's* approach is to give high priority to the regulatory autonomy of WTO members, to focus substantive WTO law on concretizing the principle of non-discrimination, and, in situations of normative vagueness, to interpret WTO provisions in a procedural way: to force a state to take account of the legitimate foreign interests which otherwise have no standing in the domestic political and legal processes. Relevant proposals for interpretation have been presented in this text.²⁵⁵ In this sense, international trade law should develop along the lines of international environmental law. It is one of environmental law's (soft, customary, treaty) greatest achievements that domestic decision-makers have to take foreign interests affected by the decision adequately into account.²⁵⁶ International trade law might be on the way to developing a concept analogous to *shared natural resources*²⁵⁷ for the economic realm.

With respect to future developments, this article is sceptical as to whether further broadening the scope of WTO law by introducing

²⁵⁴ R. Schmidt, "Der Verfassungsstaat im Geflecht der internationalen Beziehungen", *VVDStRL* 36 (1977), 66, 69; or, in an pointed formulation: "Each state is the whole world from a different perspective", Langer, see note 10, 29.

²⁵⁵ A further field of crucial importance for the development of the coordinated interdependence model are the issues of the burden of proof and the standard of review. Given their complexity, they are not addressed in this article, though the model's general thrust as applied to these issues should be rather evident.

²⁵⁶ This is the principle of non-discrimination, environmental variety, as developed by the OECD. In detail M. Bothe, "Grenzüberschreitender Verwaltungsrechtsschutz gegen Umwelt belastende Anlagen", *Umwelt- und Planungsrecht* 3 (1983), 1 et seq.; id., "Le Tribunal administratif fédéral allemand reconnaît le principe de l'égalité d'accès", *Revue juridique de l'environnement* 1988, 186 et seq.; M. Haedrich, "Internationaler Umweltschutz und Souveränitätsverzicht", *Der Staat* 39 (2000), 547 et seq., (554 et seq.).

²⁵⁷ Doc. UNEP/IG 12/2 of 2 February 1978.

rules on environmental protection, labour standards, human rights or competition (beyond the principle of non-discrimination) is desirable given the current situation.²⁵⁸ Environmental protection, labour standards and competition are policy areas subject to changing needs, convictions and approaches which the WTO could not meet because of the deficiencies discussed above. Human rights with all their intricate questions appear even less suited to becoming a proper subject for the WTO.²⁵⁹ Rather, the development of the WTO should focus on meeting deficiencies in the current body of law.

Interesting attempts have been made to open the dispute settlement procedure so that actors other than the states and the specific interest groups which have triggered the state action can feed information into the adjudicative process.²⁶⁰ Such efforts to increase the transparency and legitimacy of what was heretofore notoriously one of the most secretive international organizations are encouraging.²⁶¹ One should also consider improving the operation of the councils, the many committees and the working groups, not in the sense of providing them authority for unilateral binding decisions, but as bodies in which networks are developed that tackle the challenges of globalization on a multilateral basis. These networks might institutionalize procedures whereby public

²⁵⁸ For the positions cf. the website of the Centre for International Development of Harvard University, <http://www.cid.harvard.edu/cidtrade> on the far reaching European position see "Mitteilung der Kommission an den Rat und das Europäische Parlament, Das Konzept der EU für die WTO-Jahrtausendrunde", KOM 99, 331 endg.; B. May, "Die deutsch-europäische Verhandlungsposition bei der WTO-Handelsrunde", *Aus Pol. & Zeitgesch.* B 46-47/99, 27; for the position of developing countries see J. Wiemann, "Die Entwicklungsländer vor der neuen WTO-Runde", *Aus Pol. & Zeitgesch.* B 46-47/99, 32.

²⁵⁹ For the profound impact that human rights can have on a transnational institution cf. v. Bogdandy, see note 149; therefore, one should shy away from using the WTO as an instrument to install or further democracy in WTO members; in this direction Howse, see note 197, 312 et seq.

²⁶⁰ For the last step cf. the Appellate Body's Report of 8 November 2000 WT/DS135/9 containing procedures for non-party – or 'amicus curiae' brief – submissions to the dispute between Canada and the European Union over asbestos. This move has, however, flared into a serious issue among the members see *BRIDGES Weekly Trade News Digest*, Vol. 4 No. 44, 21 November 2000, <http://www.ictsd.org/html/weekly/story1.21-11-00.htm>

²⁶¹ Goldstein/ Martin, see note 32, 612; Weiler, see note 18, 11 et seq.; for far-reaching strategies cf. Howse/ Nicolaidis, see note 180, 11 et seq.

authorities are led to consider the interests of all those affected, including those living outside the borders of the WTO member's jurisdiction.²⁶²

Among all approaches, the *coordinated interdependence model* is the one with the least impact on the domestic legal and political systems. And yet, even on this limited reading, WTO law calls on domestic legislatures to introduce major reforms in domestic law. Important changes will have to be introduced into domestic procedures if the requirements of "multilateralism" and of "more objective and rational rule-making" should become a reality.²⁶³ Democratic politics do not always lead to what from a legal or scientific perspective appears as objective and rational rule-making. Moreover, these procedural requirements might present even greater challenges for the WTO members than substantive requirements.²⁶⁴ Considerable resistance is to be expected, since preferential treatment of the state's own citizens is a basic feature of most current constitutions. To my knowledge, the relevant reforms have yet to be introduced, and even worse: the relevant provisions are still to be invented.

From this point of view WTO law could have a revolutionary impact because it may require a re-thinking and re-framing of the principle of democracy, the most basic of the principles of the constitutional system of government.²⁶⁵ From another perspective, however, it could simply bring about a logical extension of a well-established constitutional principle: that sovereignty entails responsibility. For the domestic dimension of sovereignty, constitutional sovereignty entails constitutional responsibility for those affected. This concept, applied to the external side of sovereignty in an interdependent world, entails some constitutional responsibility also for people living outside the polity.²⁶⁶

²⁶² For a dramatic picture of what could happen otherwise J.M. Guéhenno, "Demokratie am Wendepunkt?", *Internationale Politik* 4 (1998), 13 et seq., (16).

²⁶³ With respect to the European Union, it probably entails that the Directorate-General for Agriculture loses its competence to develop policies on health issues and consumer protection, given its protectionist bias.

²⁶⁴ For the challenges see S. Cassese, "Gli stati nella rete internazionale dei poteri pubblici", *Rivista Trimestrale di Diritto Pubblico* 49 (1999), 321 et seq., (326 et. seq.).

²⁶⁵ For example, Howse's attempt to reconcile these requirements with the democratic principle, see note 197, 309 et seq., is largely outside constitutional orthodoxy.

²⁶⁶ Ground-breaking Langer, see note 10, 23 et seq., (51).

Hence, the requirements of WTO law could be construed as concretizing what is implicit in an adequate constitutional understanding of a state in an interdependent world. Under the *coordinated interdependence model's* interpretation, WTO law might then complement rather than conflict with the principle of sovereignty.²⁶⁷ The fundamental changes brought about by this paradigm shift might represent the true constitutional dimension of the WTO.

²⁶⁷ On this aspect of sovereignty G. Dahm/ J. Delbrück/ R. Wolfrum, *Völkerrecht I/1*, 2nd edition, 1989, § 23 IV 1.