

WTO's contribution to sustainable development governance: balancing opportunities and threats

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Trade Rules behind Borders: The Liberalization of Public Services and the Quest for Sustainable Development Governance

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Liberalization remains controversial in large sections of the population of many of the countries involved in multilateral, regional and bilateral trade negotiations, and services liberalization is among the most divisive issue areas. Suffice it to recall the raging debates within the EU on the so-called Bolkenstein Services Directive², which is meant to further liberalise the freedom of establishment for service providers and the free movement of services between EU Member States as a means to progress in the creation of an integrated EU economy. Within this debate possibly one of the most contentious issues has been the applicability of the proposed Directive to services of general interest, or more plainly, public services.³

At the multilateral level, the impact of WTO liberalization rules and commitments has also given rise to strong disagreements. Again much of the controversy has revolved around the issue of public service provision and regulation, with liberalization advocates stressing the limited impact of WTO rules and commitments on domestic policies, and critics deprecating the loss of public control over the delivery services considered essential to the people's wellbeing. In addition, detractors frequently assert that WTO rules 'require' governments to privatise access to basic services, such as water or health services or education or mandate the removal of legislation aimed at environmental sustainability.⁴

However, the crux of the debate in the WTO (as well as in Europe and elsewhere) goes beyond public services per se, and is indicative a widely-felt malaise with the way rules, and especially trade rules, are made and implemented internationally and with the way the WTO discharge its governance function. In this respect the debate over public services is part and parcel of the broader debate over the alleged democratic deficit of international (and supranational in the case of the EU) institutions and hence, it is also at the core of the quest for a different kind of global governance. A purely legalistic analysis of the relevant provisions, albeit necessary and interesting, is not likely to solve the political issues which animates the controversy. Providing answers to the anxieties generated by international rules and commitments related to public services - as in other areas - will be difficult

¹ UNCTAD, Geneva. The views expressed herein are strictly personal

² See Commission of the European Communities, Proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM (2004) 2 final/3 of 5 March 2004

³ Services of general economic interest include services provided by network industries, for example in the transport, postal, energy and communication sectors, as well as other services activities subject to public service obligations. Services of general (non-economic) interest such as health, long-term care, social security and social housing, irrespective of the legal form and ownership status of the provider, often share the following common elements: universal service, continuity, quality, affordability, user and consumer protection. See Commission of the European Communities (2003 and 2004)

⁴ See, for example, Abugattas and Stephenson (2002); Gould and Joy (2000); Joeke (1999); Phoko and Madonsela (1999) and Shaffer, et al (2005).

without a broader rethinking of the WTO's governance role and functioning. As a result the paper tries to look at this broader, albeit long-term, agenda. The paper is organized as follows; section 1 briefly reviews the parameters of the debate over the impact of WTO rules and commitments on the delivery of public services, trying to show the tensions that exist between the marketbased, reciprocal advantage logic prevailing in the WTO and the broader consideration of human development and wellbeing. Section 2 looks at the concept of sustainable development governance, which - the paper contends - is the lens through which rules and commitments such as those related to the supply of public services should be seen. Finally, Section 3 considers the type of reforms that could make such shift possible.

1 The GATS and public services: a brief reminder

The purview of the General Agreement on Trade in Services (GATS) extends, in principle, to all sectors. It therefore includes the provision of fundamental services such as education and health care, which are crucial from a human rights and human development perspective.⁵ The key exclusion provided for in the GATS is with regard to “services supplied in the exercise of governmental authority”.⁶ Article 1.3(c) defines such services as those “supplied neither on a commercial basis nor in competition with one or more service suppliers”, but it does not define the key terms “commercial” and “competition”. As a result, there can be reason for uncertainty in some situations, as there is lack of clarity on how private and public services of a non-commercial nature can coexist without being in competition. For instance, in nearly all countries there are private sector suppliers of health and education services, which supplement public education and health systems, and in many countries the public sector providers charge various forms of “user fees”. These suppliers are specifically controlled or licensed to different extents. Thus, in a general sense, public health and education services are in competition with private sector equivalents. In the light of such ambiguity, the meaning and scope of the “carve-out” for government services remains unclear.

Sovereign discretion over the provision of public services also applies to purchases of inputs for government supply, but not “for commercial sale”, and of services that are outsourced to private firms. While multilateral negotiations on government procurement in services are under way and progressing slowly, at present governments retain freedom in this area, with the caveat of the uncertainty that derives from the term “commercial” which is not defined in the agreement.

Moving to the issue of regulation, as a general rule, governments have the sovereign right to change laws in step with evolving societal preferences and policy choices. For instance, if a government determined that private sector supply of a particular service should be replaced by public sector provision, the GATS would not restrict its freedom to do so. However, GATS commitments (i.e. market access and national treatment), once entered into, and unless limitations have been entered into the country's schedules, are permanent. In case of a withdrawal of a commitment, compensation needs to be given in the form of alternative “concessions”, to be negotiated with the affected trading partners. In this regard the GATS approach of locking in sector-specific commitments, coupled with a built-in agenda for “progressive liberalization”, could create tension with the general principle of “progressive realization” of economic, social and cultural rights, which commits governments to “take steps . . . to the maximum of [their] available resources, with a view to achieving progressively the full realization of [these] rights by all appropriate means”.⁷

The scope of national treatment commitments is particularly relevant. A WTO Member may not discriminate between domestic and foreign “like” service suppliers for those service

⁵ See, for example, Universal Declaration of Human Rights, Art. 25 (right to health) and Art. 26 (right to education); International Covenant on Economic, Social and Cultural Rights, Art. 12 (right to health) and Art. 13 (right to education); CEDAW, Art. 10 (equal access to education) and Art. 12 (equal access to health care services).

⁶ See GATS Art. I (Scope and Definitions). On these issues, see Chanda R (2003), Social services and the GATS: Key issues and concerns, *World Development*, 31(12), pp.1997-2011; Krajewski, Markus (2003), Public Services and Trade Liberalization: Mapping the Legal Framework, *Journal of International Economic Law*, Vol. 6, No. 2, pp. 341-367; Marchetti, Juan A. and Petros C. Mavroidis (2004), What are the Main Challenges for the GATS Framework? Don't Talk about Revolution, *European Business Organization Law Review*, No. 5, pp. 511-562; VanDuzer, J. Anthony (2004), Health, Education and Social Services in Canada: The Impact of the GATS, Study commissioned by the Government of Canada, Ottawa.

⁷ See International Covenant on Economic, Social and Cultural Rights, Article 2

sectors and subsectors for which it has agreed to bind itself to the granting of national treatment. Unless a specific limitation has been recorded in its schedule of commitments,⁸ a better treatment, such as a subsidy, cannot be provided to a domestic service provider, or a 'worse' treatment, such as a performance requirement, cannot be imposed on a foreign provider. To do otherwise, the Member would have to demonstrate that the domestic supplier which, for instance, is behaving in a particularly human development sensitive fashion, is not "like" the foreign one which is not paying any particular attention to such issue. Or it would have to justify its action under the general exception clause, which, in the case of the GATS, includes measures "necessary to protect public morals or to maintain public order", the latter as interpreted in a footnote to mean "a genuine and sufficiently serious threat ... posed to one of the fundamental interests of society".⁹ While both these avenues are, in principle, practicable, they remain particularly arduous. Hence, countries that want to pursue human development-related policies need to safeguard their option to do so by scheduling specific limitations.

With regard to non-discriminatory regulation, GATS Art. VI (Domestic Regulation) mandates WTO Members to regulate those services for which they have lodged a commitment, "in a reasonable, objective and impartial manner." Furthermore, this article requires that licensing and qualification requirements and technical standards are "not more burdensome than necessary to ensure the quality of the services." This test may be applied in more or less stringent fashion, but again it is not clear to what extent regulations meant to fulfil, for instance, human rights objectives would pass muster, if challenged. Art. VI also calls for the development of sector-specific, multilaterally agreed disciplines aimed at ensuring that domestic regulations do not "constitute unnecessary barriers to trade". In all these cases, a legitimate concern exists with regard to "the extent to which WTO rules actually limit, in intent or effect, the ability of governments to impose social obligations on foreign and competitive domestic service providers" (Howse and Matua, 2000). Heeding these concerns, the WTO Doha Declaration reaffirmed the right of WTO Members under the GATS to "regulate, and introduce new regulations, on the supply of services."¹⁰ However, if a new regulation on services were to modify a Member's commitments, the country could still be required to make a "compensatory adjustment".

While the opposition to services liberalization has been strong, it should be remembered that initial round of commitments under the Uruguay Round on negotiations has been primarily of a "standstill" kind – i.e., confirming and guaranteeing prevailing access conditions – though some of the subsequent commitments in basic telecommunications and financial services, as well as the commitment schedules of new members acceding to the WTO, have been more ambitious. During the current round of negotiations, WTO Members are called on to increase the number of service sectors inscribed in their GATS schedules, reconsider and remove existing limitations on market access and national treatment, and renegotiate current exemptions from most-favoured nation treatment. Such pressure towards further liberalization cannot but heighten the debate.

2. In search of Sustainable Human Development governance

While the disquiet over GATS rules and negotiations are partly exaggerated (at least from a strictly 'legalistic' viewpoint), certainly there remain areas of uncertainties which fuel opposition. While the debate is vivid in developed and developing countries alike, services trade acquires a particular relevance for the latter group in the context of the fight against poverty. Translating countries' success in services trade towards poverty alleviation is not an automatic process. It depends largely on government policies aimed at promoting domestic employment at lower skill levels (e.g. in tourism and construction), ensuring availability and accessibility of essential services to the poor (e.g. in health and education), and investments in the building of efficient and accessible infrastructure services (e.g. telecommunications, transportation, and water and sanitation).¹¹ This underlines the fact

⁸ WTO Members, for all the services sectors they wish to liberalize, are required to schedule all discriminatory measures, including subsidies, which they wish to retain. This may impose a significant burden on developing countries, to make sure they list every conceivable subsidy or other preferential treatment.

⁹ See Art. XIV (General Exceptions)

¹⁰ WTO, Ministerial Declaration, WT/MIN(01)/DEC/1, Nov. 20, 2001, para. 7.

¹¹ Increased competition from liberalisation can bring with it lower prices, more choices, better quality service, and the availability of specialty services as long as the appropriate regulatory framework is in place. The World Bank in its report

that the controversies over services liberalization and the provision of public services do not only pertain to management of the welfare state in developed countries, as important as this is, but also have a direct bearing on the lot of millions of peoples in the developing world.

Hence the debate over public services is but one vivid expression of the need to reconsider the foundational values¹² of the trading system, as well as the way the WTO discharges its governance function and in particular whether its operation delivers rules and rule implementation that are considered as legitimate. The international community has (re-)stated its core values in the 2000 UN Millennium Declaration.¹³ There it is stressed that “the central challenge we [the UN member states] face today is to ensure that globalization becomes a positive force for all the world’s people. For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed”. In this respect, the value of ‘solidarity’ is recognised as “essential to international relations in the twenty-first century”. Solidarity requires that “global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most”.¹⁴ An equitable access to public services is a fundamental issue in this respect.

In discussing the need to address “the abject and dehumanizing conditions of extreme poverty, to which more than a billion [people] are currently subjected,” the Millennium Declaration stressed the commitment “to create an environment - at the national and global levels alike - which is conducive to development and to the elimination of poverty”. And an “open, equitable, rule-based, predictable and non-discriminatory” multilateral trading system is seen as playing a key role in this context.¹⁵

The pledge of WTO members at Doha in 2001 to prioritize developing country needs and interests, as well as the reaffirmation of the right of each country to regulate the supply of services has to be understood in this broader context. Less than a year after Doha, the international community convened again for the International Conference on Financing for Development in Monterrey. The Monterrey Consensus adopted at the conference confirmed that the international community would give priority to “mobilizing and increasing the effective use of financial resources and achieving the national and international economic conditions needed to fulfil internationally agreed development goals, including those contained in the Millennium Declaration, to eliminate poverty, improve social conditions and raise living standards, and protect our environment.”¹⁶

The Monterrey Consensus also reaffirmed UN members’ commitment to trade liberalization, but noted that developing countries need “appropriate institutions and policies” to benefit fully from trade, and welcomed the emphasis in the Doha Development Agenda on giving priority to developing countries’ needs and interests.¹⁷ Hence, the Monterrey Consensus can be interpreted as embodying a significant attempt to establish a new system of shared global rules anchored on a framework of mutual obligations and accountability between developed and developing countries.¹⁸ Again the primacy of poverty reduction and the instrumental character of trade liberalisation were stressed. Finally the 2005 UN World Summit Outcome reiterates that “a universal, rule-based, open, non-discriminatory and equitable multilateral trading system, as well as meaningful trade liberalization, can substantially stimulate development worldwide, benefiting countries at all stages of development.”¹⁹

However, as designed and as it has developed since its inception, the trading system, with its enduring focus on reciprocal bargaining, does not seem able - at the present time - to

“Making Services Work for Poor People” has pointed out a series of different policy options for helping to ensure universal and equitable access, along with the challenges governments face in that regard (World Bank 2003).

¹² “Values” can be seen as the ultimate ends of public policy, the goals and obligations that policy aims to achieve as these are considered desirable in their own right, not just as means to some other objective.

¹³ United Nations Millennium Declaration, UN General Assembly Resolution, A/RES/55/2, 18 September 2000.

¹⁴ *Id.*, para. 5-6.

¹⁵ *Id.*, para. 11-3

¹⁶ Report of the International Conference on Financing for Development, Monterrey Mexico, 18-22 March 2002, ch. 1, para. 3, p. 2, U.N. Doc. A/CONF.198/11

¹⁷ *Id.*, paras. 26-7.

¹⁸ *Id.*, para 1.

¹⁹ United Nations General Assembly document A/60/L.1 of 20 September 2005, para. 27.

guarantee equity and true solidarity - hence the growing discontent in so many quarters. The system is geared to promote fairness (as commutative market-based justice), as it broadly does, thus contributing to economic efficiency (enlarging the proverbial pie). But it should also promote distributive justice (through an equitable sharing of such pie), by electing to foster equitable growth and development as one of its key objectives. In this respect, reciprocity would need to be considered a second-order value and be subjected to equity and solidarity.²⁰ Solidarity, purportedly one of the key values of the Millennium Declaration, cannot be extended only, through safeguards measures, to domestic producers that may be injured because of liberalisation measures. Solidarity needs to straddle borders in pursuit of development and wellbeing for all - an interest shared by the entire international community.²¹ Indeed, "by asserting the common good ... the majority of States have set in train a process in which the emphasis is placed on whatever may be expected to contribute to reducing the de facto inequalities between States and to promote greater heed for the longterm interests of the globe".²²

The multilateral trade regime is fully part of the global economic governance system and as such cannot escape from the 'requirements of justice'.²³ The regime can no longer simply aim at ensuring non-discrimination and reciprocity as a way of eliminating trade barriers, which distort the functioning of markets, and hope that this 'fair' approach will also produce 'equitable' results. While the current Round of multilateral trade negotiations may deliver some advances in terms of redressing existing imbalances in the distribution of benefits and costs, a deeper rethinking and reordering of priorities is required if an 'equitable' trading system, as called for by the Millennium Declaration, is to be achieved.

The key question thus remains whether commutative and distributive justice, market-based fairness and equity, can be jointly sought or whether their respective meanings are intrinsically different - or worse, incompatible - thus preventing any common pursuit. In the face of growing inequality across and within nations, many developing countries and transnational civil society groups have been increasingly assigning part of the blame for this predicament to the free market approach under which the trade regime mainly operates. In this respect such free market approach is considered particularly unsuited to the delivery of many public services. The recurrent failures in the current round of WTO trade negotiations (as well as its arduous preparatory phase) can be partly ascribed to this lack of consensus on what a 'fair' and 'equitable' regime is, and how it should operate for the benefit of all. Indeed, a modicum of consensus on these notions remains a key factor for the continuing legitimacy of the trade regime and its satisfactory working.

A useful and (hopefully) consensual avenue may be to adopt a rights-based approach to distributive justice and development, building upon the wide acceptance that human rights have received in the post World War II period. Justice can be understood as "the system of entitlements on the basis of which people can demand social recognition of their legitimate claims (e.g. for resources, freedoms, etc.)",²⁴ and human rights can be considered minimum, necessary expressions of these entitlements. Indeed, most human needs have been framed in modern times as legitimate rights to which people can aspire, and which governments have an obligation to respect and provide for.²⁵ Hence, in the trade area, generally recognised economic and social rights, from the right to food to the right to health, could provide a benchmark of what people can claim as a matter of justice. Steps in

²⁰ "Solidarity is neither charity nor welfare; it is an agreement among formal equals that will all refrain from actions that would significantly interfere with the realization of common goals and fundamental interests. Solidarity requires an understanding that every member of the community must consciously and constantly conceive of its own interests as being inextricable from the interests of the whole". See R. St. J. Macdonald, "The Principle of Solidarity in Public International Law", in C. Dominicé et al., eds, *Études de Droit International en l'honneur de Pierre Lalive, Helbing and Lichtenhahn*, Basle, 1993, p. 293.

²¹ On the notion of community interest, see Bruno Simma, "From Bilateralism to Community Interest in International Law", *Collected Courses of the Hague Academy of International Law*, 1994, p. 229 et seq.

²² Mohammed Bedjaoui, "General Introduction", in Mohammed Bedjaoui, ed., *International Law: Achievements and Prospects*, Martinus Nijhoff Publishers, Dordrecht, 1991, p. 14

²³ "The requirements of justice apply to institutions and practices (whether or not they are genuinely cooperative) in which social activity produces relative or absolute benefits or burdens that would not exist if the social activity did not take place". See Charles Beitz, *Political Theory and International Relations*, Princeton, 1979, p. 131.

²⁴ See Will Kymlicka, *Liberalism, Community, and Culture*, Clarendon Press, Oxford, 1989, p. 234.

²⁵ See Johan Galtung, *Human Rights in Another Key*, Polity Press, Oxford, UK, 1994.

the direction of fulfilling such rights for all would mean moving closer to the realisation of distributive justice.

However, despite the growing attention paid both in the North and the South to the issues of inequality and poverty, pursuing a rights-based discourse in the WTO continues to be a challenge. The trade regime still remains solidly steeped in its traditional, narrow marketbased fairness approach, notwithstanding the (limited) progress in the consideration of development and environmental issues. One possible gateway for broadening the discourse could indeed be the concept of sustainable development, which entails – in its wider understanding – a commitment to both human development and the fulfilment of basic human rights.

Human development embodies a concept of development that goes beyond economic growth to include the development of the human person as a main outcome. In this context, equity needs to be considered with respect to wellbeing, a significantly broadened concept with respect to ‘welfare’, as generally understood in the utilitarian and welfare economics tradition. “The idea of human development focuses directly on the progress of human lives and wellbeing. Since wellbeing includes living with substantial freedoms, human development is also integrally connected with enhancing certain capabilities – the range of things a person can do and be in leading a life”.²⁶

Development is not only the acquisition of more goods and services, but also the enhanced freedom to choose, or the capability to lead the kind of life one values.²⁷ On the other side, poverty is the deprivation of basic capabilities, not just lowness of income.²⁸ Although income inequality is of crucial importance, it does not exhaust all deprivations that lead to poverty, including unemployment, ill health, lack of education, and social exclusion. Hence, the emphasis needs to be placed on the broader notion of social and economic (not just income) equality and freedom. Indeed, not always and automatically does income growth translate into individual achievements (‘capabilities to function’ or ‘functionings’) in terms of wellbeing and substantive freedoms. In this context the role of public services provision, especially for those services, such as health care and education which have the characteristics of public or semi-public goods, is particularly important.

The approach focused on capabilities thus broadens the understanding of development to include both human wellbeing and freedom, which means widening the choices people enjoy in the political, civil, social, economic, and cultural spheres. As such, “human development shares a common vision with human rights. The goal is human freedom. And in pursuing capabilities and realizing rights, this freedom is vital. People must be free to exercise their choices and to participate in decision-making that affects their lives. Human development and human rights are mutually reinforcing, helping to secure the wellbeing and dignity of all people, building self-respect and the respect of others”.²⁹ Furthermore, “if human development focuses on the enhancement of the capabilities and freedoms that the members of a community enjoy, human rights represent the claims that individuals have on the conduct of individual and collective agents and on the design of social arrangements to facilitate or secure these capabilities and freedoms”.³⁰

The body of rules that govern international trade represents one important example of such social arrangements. These rules need to be designed and interpreted with the ultimate goal of enhancing human development and human rights. Indeed, “economic growth, increased international trade and investment, technological advance – all are very important. But they are means, not ends. Whether they contribute to human development in the 21st

²⁶ See UNDP, Human Development Report, New York, 2000, p. 19.

²⁷ Capabilities are thus the substantive freedom to achieve alternative ‘functionings’ combinations. Indeed, “living may be seen as consisting of a set of interrelated ‘functionings’, consisting of beings and doings. A person’s achievement in this respect can be seen as the vector of her functionings. The relevant functionings can vary from such elementary things as being adequately nourished, being in good health, avoiding escapable morbidity, and premature mortality, etc. to more complex achievements, such as being happy, having selfrespect, taking part in the life of the community and so on”. See A. Sen, *Inequality Reexamined*, Oxford, Oxford University Press, 1992.

²⁸ See A. Sen, *Development as Freedom*, New York, 2001, in particular chapter 4.

²⁹ See Human Development Report, New York, 2000, p. 9.

³⁰ *Id.*, p. 20.

century will depend on whether they expand people's choices, whether they help create an environment for people to develop their full potential and lead productive, creative lives".³¹

While human rights as such are not mentioned anywhere in WTO law,³² the notion of development has acquired a certain pre-eminence. The Preamble of the Marrakesh Agreement establishing the WTO, in its opening paragraph, recognises that international economic and trade relations should have among their objectives both the 'raising of standards of living' and 'sustainable development'. And the preamble contributes to delineating the context within which the interpretation of specific provisions must be conducted, in the light of the instrument's objectives.³³ In this way, these references establish a textual bridge between the pursuit of both human development – which needs to be inclusive of human rights – and WTO law. The reference to standards of living, which was already present in the 1947 Preamble of the GATT, stresses one of the key capabilities necessary for human development.³⁴ The inclusion of the objective of sustainable development, which was added at the inception of the WTO in 1994, aligns this organization with the goals that the international community has set for itself on numerous occasions and restated, most recently, in the Millennium Declaration.

Sustainable development and human development are by no means incompatible or alternative concepts. On the contrary, the two are mutually supportive and are sometimes made to converge in the notion of 'sustainable human development'.³⁵ Furthermore, with the adoption of the Declaration on the Right to Development, 'development' itself has been characterized as a human right.³⁶ This Declaration advances a number of important normative claims. First, it defines development as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the wellbeing of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom".³⁷ Second, it declares that the right to development is a human right "by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized".

The Declaration, as confirmed by the 1993 Vienna Declaration,³⁸ and again most recently by the Millennium Declaration, thus could be argued to represent the shared understanding within the internationally community that the realization of human rights is an integral

³¹ See Human Development Report, New York, 2002, p. 13.

³² However, there seems to be little doubt that, as a matter of treaty interpretation, WTO law needs to be read and applied consistently with the human rights obligations of WTO Members. This is obviously particularly important when interpreting the existing exceptions in WTO agreements. See for instance, S. Charnovitz, "The moral Exception in Trade Policy", *Virginia Journal of International Law*, Vol. 38, 1998, p. 689-745; R. Howse and M. Matua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization, Rights and Democracy*, Montreal, 2000; G. Marceau, "WTO Dispute Settlement and Human Rights", *European Journal of International Law*, Vol. 13, No. 4, 2002, pp. 753-814; E.-U. Petersmann, "Human Rights and the Law of the World Trade Organization", *Journal of World Trade*, April 2003, pp. 241-281.

³³ In this respect, the Vienna Convention on the Law of Treaties, 1969, United Nations Doc. A/CONF.39/27, at Art. 31 states that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The text of the treaty itself, "including its preamble and annexes" constitutes an important "context" for treaty interpretation as well as an expression of the treaty's objectives.

³⁴ For instance, the UNDP Human Development Index measures the average achievements in a country on three basic dimensions of human development: a long and healthy life, knowledge, and a decent standard of living.

³⁵ "Sustainable human development seeks to expand choices for all people – women, men and children, current and future generations – while protecting the natural systems on which all life depends. Moving away from a narrow, economy-centred approach to development, sustainable human development places people at the core, and views humans as both a means and an end of development. Thus sustainable human development aims to eliminate poverty, promote human dignity and rights, and provide equitable opportunities for all through good governance, thereby promoting the realization of all human rights – economic, social, cultural, civil and political". See "Integrating human rights with sustainable human development. A UNDP policy document", UNDP, mimeo, New York, 1998, p. 5. Furthermore, the 1995 Beijing Declaration stresses that: "Eradication of poverty based on sustained economic growth, social development, environmental protection and social justice requires the involvement of women in economic and social development, equal opportunities and the full and equal participation of women and men as agents and beneficiaries of people-centred sustainable development".

³⁶ Declaration on the Right to Development, General Assembly Resolution 4/128, 4 December 1986.

³⁷ *Ibid.*, Preamble. See also Art 2.

³⁸ Vienna Declaration and Programme of Action, adopted by consensus at the World Conference on Human Rights on June 25, 1993.

part of the process of development.³⁹ This fuller notion of development also binds (or at least ought to bind) states in their international economic and trade relations. The reference to the pursuit of the objective of sustainable development in the Preamble of the Marrakesh Agreement seems to point in the same direction. While the link with human rights norms has never been tested in WTO dispute settlement proceedings, the Appellate Body “has shown itself as sensitive to the range of normative sources in international law and policy relevant to the elaboration of meanings of trade rules ...[and] is *in principle* open to interconnectedness in the interpretation of ‘development’”.⁴⁰ A human rights benchmark can be particularly useful in the interpretation of rules and commitments in the area of public service provision. Particularly so in the face of the enduring debate over the balancing of freedom rights linked to the efficient operation of the market system and the social rights required to ensure an acceptable degree of equity at national and international levels.

3. How can this be achieved? Democracy at the WTO

Discussing issues such as the provision of public services, and making rules in this area, touches on fundamental societal choices with a key distributional dimension and with immediate consequences for the wellbeing of the people. When such discussions and rulemaking take place at international level, democracy is required to fully legitimate this governance locus. Conceiving a working model of democracy for the international trading system is a difficult task. But the WTO is one of the fundamental bodies for the governance of the international system and as such it ought to progress in this direction, lest its legitimacy and effectiveness be seriously compromised.

This calls for the pursuit of a number of reform tracks inspired by the notions of constitutionalism and deliberative democracy. A democratic model for the international system and its institutions that would deny a role to individuals, in light of the advances in human rights law and practice, as well as of the wider web of what is referred to as transnational law,⁴¹ seems inconceivable and surely undesirable. While states are obviously here to stay, individuals, including their various associative and incorporated incarnations, need to find a proper place in the design. This perspective is consistent with an understanding of cosmopolitanism that considers both individuals and social institutions such as states as bearers of rights and duties and is in line with the evolution of international law.⁴²

The WTO has seen an impressive constitutional development based on the principles of freedom, non-discrimination, rule of law, compulsory adjudication and check and balances between powers.⁴³ However, it still falls short of a full-fledged constitutional system and, in particular, still requires a complete integration of human rights. In this respect, the broader reading of the notion of sustainable development foreshadowed in the previous section could be a significant step forward.

Such a human-rights-based approach would certainly represent a major improvement in the democratic legitimisation of the WTO, in particular with regard to a fuller consideration of economic and social rights. It would also allow the necessary balancing, similar to the bargaining inside national parliaments and institutions, between the private and public interests of the various individuals and groups concerned, tackling head-on the justice and distributive issues involved. This would contribute to finding “the correct solution to the problem of the moralization of power politics [that] is therefore ‘not the demoralization of

³⁹ In spite of the Declaration, the characterisation of the ‘right to development’ as a human right remains controversial. See, for instance, Henkin, *International Law: Politics and Values*, op. cit., p. 181.

⁴⁰ See UN Economic and Social Council, Commission on Human Rights, “Mainstreaming the right to development into international trade law and policy at the WTO”, (report prepared by R. Howse), UN doc.E/CN.4/Sub.2/2004/17, para. 21.

⁴¹ “Transnational law” is defined to encompass “all law which regulates actions or events that transcend national frontiers, thus including ‘both public and private international law ... [as well as] other rules which do not wholly fit into such standard categories.” See P. Jessup, *Transnational Law*, 1956, p. 2. As such it thus includes in its purview states, international organisations, multinational companies, non-governmental organisations and private individuals.

⁴² See N. Rengger, “Justice in the world economy: global or international or both?”, in *International Affairs*, July 1999, p. 470, referring to M. Walzer, *Thick and thin: moral argument at home and abroad*, Notre Dame, 1994.

⁴³ See E.-U. Petersmann, “European and International Law: Time for Promoting ‘Cosmopolitan Democracy’ in the WTO”, in G.de Burca and J.Scott, eds., *The EU and the WTO. Legal and Constitutional Issues*, Oxford, 2001, pp. 81-110.

politics, but rather the democratic transformation of morality into a positive system of law with legal procedures of application and implementation.’ Fundamentalism about human rights is to be avoided not by giving up on the politics of human rights, but rather only through the cosmopolitan transformation of the state of nature among states into a legal order.”⁴⁴

While that legalization is well underway in the WTO context, many specific and important changes may have to be introduced to existing rules, also through interpretation, and many new rules may need to be created. This would seem to apply also to the area of public service provision. Such daunting task can be facilitated if the decision-making machinery, the institutional hardware writ large, of the organisation is adapted somewhat to allow the development of deliberative democracy.⁴⁵ A number of democracy’s definitions stress the importance of this aspect of democracy. For instance, Benhabib looks at democracy as “a model for organizing the collective and public exercise of power in the major institutions of society on the basis of the principle that decisions affecting the well-being of a collectivity can be viewed as the outcome of a procedure of free and reasoned deliberation among individuals considered as moral and political equals.”⁴⁶ Freedom and equality are valuable to the extent that they are the expression of individual autonomy, of the willingness and ability of persons to shape their lives through rational deliberation. Habermas is even more direct, stating that “the central element of the democratic process resides in the procedure of deliberative politics.”⁴⁷ The ideal of deliberative democracy is an ideal of politics where people relate to one another not merely by asserting their will or fighting for their interest, but by influencing each other through the use of reasoned argument, evidence, evaluation and persuasion.⁴⁸

The existence of an unimpeded deliberative sphere legitimising democracy is also central to the cosmopolitan democracy project.⁴⁹ Such a deliberative or communicative model of democracy is particularly adapted to the international system, as states in their cooperative relationships and particularly in institutionalised relationships rely to a large extent on discourses⁵⁰ in order to arrive at a common understanding of what is the required behaviour in any given social situation. As the Chayes put it, “international relations are conducted in large part through diplomatic conversation - explanation and justification, persuasion and dissuasion, approval and condemnation. ... The essence of the international legal process is a dialectic that, by emphasizing assent at every stage, operates to generate compliance.”⁵¹

In the area of economic relations in which the use of force has lost most of its relevance and where the identification of national interests is becoming increasingly difficult because of globalisation and interdependence, discourse and persuasion become even more important instruments for coordinating state action. Divergent interpretations and applications of

⁴⁴ See J. Habermas, “Reconciliation through the public use of reason: remarks on John Rawls’s political liberalism”, in *Journal of Philosophy*, vol. 92, no 3, 1995, p. 149, quoting K. Günther, “Kampf gegen das Böse? Wider die ethische Aufrüstung der Kriminalpolitik”, *Kritische Justiz*, 1994, vol 17, p. 144.

⁴⁵ This is recognition that a more traditional model of representative democracy, with the electoral mechanism at its core, is inherently unsuited for the international system. In this sense the reflection on the democratic legitimacy deficit in the WTO take in many respects a different track from the debate within the European Union.

⁴⁶ See S. Benhabib, “Towards a Deliberative Model of Democratic Legitimacy”, in S. Benhabib, ed., *Democracy and Difference: Contesting the Boundaries of the Political*, Princeton, 1996, p. 68.

⁴⁷ See J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge, MA, 1996, p. 296.

⁴⁸ See A. Gutmann, “Democracy”, in R. Goodin and P. Pettit, eds., *A Companion to Contemporary Political Philosophy*, Oxford, 1993, p. 417.

⁴⁹ For instance, Held states that “a defensible account of the proper meaning of democracy must acknowledge the importance of a number of fundamental liberal and liberal democratic tenets. Among these are the centrality, in principle, of an ‘impersonal’ structure of public power, of a constitution to help protect and safeguard rights, and of a diversity of power centres within and outside the state, including institutional fora to promote open discussion and deliberation among alternative viewpoints and platforms.” See D. Held, *Democracy and the Global Order: From the Nation State to Cosmopolitan Governance*, Oxford, 1995, p. 279-80.

⁵⁰ A discourse in this context is “a debate conducted by members of a community aiming at establishing or re-establishing a consensus on common norms of conduct as well as on their interpretation and proper application in concrete situations.” See A. Hasenclever, P. Mayer and V. Rittberger, *Theories of International Regimes*, Cambridge, 1997, p. 176: see also I. Johnstone, “Treaty Interpretation: The Authority of Interpretative Communities”, in *Michigan Journal of International Law*, vol. 12, 1991, p. 418.

⁵¹ See A. Chayes and A. Handler Chayes, *The New Sovereignty. Compliance with International Regulatory Agreements*, Cambridge, MA, 1995, p.119 and 112.

rules are bound to arise in a dynamic, ever-changing international environment where regimes' rules cannot aspire to cover all possible contingencies. This would make rule-governed cooperation impossible in the absence of communicative action by states aimed at inducing behaviour consistent with shared interpretations and legitimate, patterned expectations of other community members.⁵² In their discourses, states argue for a preferred course of action, and they do so in the context of a rule-governed situation, in terms of the legitimacy of their position. Their arguments are the more convincing and their positions the more acceptable, the more they are grounded in general principles and shared understandings. Or, in other words, the more legitimate they are perceived to be. Higher-order constitutive principles, such as human rights and sustainable development, lend that legitimacy.

On the other hand, while it is true that states often make only rhetorical reference to principles to conceal their interests, and use coercion and bargaining, it is also true that most of the time they engage in serious discourse in order to justify their actions and do so out of the sense of obligation they perceive. This highlights the role and importance of moral ideas in international relations, in particular because of the constitutive function they have in the international society, but also of the role they play in shaping the identity of states, their conception of the self as it relates to other actors.⁵³ The self-understanding of states and their behaviour is an intersubjective and iterative process, which is greatly influenced by discourses, ideas, rules and institutions.

The role of civil society groups, with the wide variety of viewpoints they represent, is particularly important in a deliberative model of democracy in light of its significant communicative power, comprised of questioning, criticising and publicising. In this context "these actions can also change the terms of discourse",⁵⁴ the shared assumptions and understanding which define the discourse and allow communication. As such this activity can play an important role in the interpretation and application of existing norms, including through dispute settlement, and during the negotiation process of new ones. The debate on the need to ensure that the provision of public services is governed by social policy priorities and not on the basis of commercial priorities is prime example.

It is thus important that an unimpeded deliberative sphere be ensured, so that societal choices can be fully discussed. As many authors have suggested, this may call for the creation of an advisory assembly within the WTO.⁵⁵ Such an assembly could be composed of parliamentarians of WTO member countries, and transnational civil society groups and other associations could be accredited to it as observers. This approach would draw inspiration from but also improve on the current practice within the UN system.⁵⁶ The role of the assembly, while advisory, could nonetheless be enhanced in view of the experience of institution building within the European Community and other jurisdictions. The assembly could have a supervisory role with regard to the appointment of the WTO Director General and the members of the Appellate Body, through mandatory hearings prior to the appointment decision by member states.⁵⁷ It could have a consultative role (and be able to

⁵² See F. Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, Cambridge, 1989; and F. Kratochwil and J. Ruggie, "International Organization: A State of the Art on an Art of the State", in *International Organization*, 1986, vol. 40, pp. 753-75. It is also important to underline that international regimes are not cast in stone but are "the product of an ongoing process of community self-interpretation and self-definition in response to changing context." See M. Neufeld, "Interpretation and the 'Science' of International Relations", in *Review of International Studies*, 1993, vol. 19, p.55, n. 55.

⁵³ "Identification is a continuum along which actors normally fall between the extremes, motivated by both egoistic and solidaristic loyalties." See A. Wendt, "Collective Identity Formation and the International State", *American political Science Review*, 1994, vol. 88, p. 387.

⁵⁴ See J. Dryzek, "Transnational Democracy", in *Journal of Political Philosophy*, March 1999, p. 45.

⁵⁵ For instance, see P. Lamy, "Global Policy without Democracy?" available at http://europa.eu.int/comm/trade/speeches_articles/spla85_en.htm. Even more broadly, the creation of a global parliament forms part of the cosmopolitan project, see R. Falk and A. Strauss, "On the Creation of a Global Peoples Assembly: Legitimacy and the Power of Popular Sovereignty", in *Stanford Journal of International Law*, Summer 2000, Vol. 36, p. 191 et seq.; see also, contra, J. Nye, "Parliament of Dreams", in *Worldlink*, March/April 2002 and the response of R. Falk and A. Strauss, "Not a Parliament of Dreams", in *Worldlink*, July/August, 2002.

⁵⁶ See UN Economic and Social Council Res. 1996/31 of July 25, 1996. See J.-S. Jamart, "Le rôle des organisations non gouvernementales dans le système des Nations Unies", in *Actualités du Droit*, 1999/1, pp. 47-88.

⁵⁷ This could allow as much accountability as it is possible for the WTO judiciary, if its independence is, as it should, be safeguarded. More transparency in the dispute settlement proceedings as well as more stringent conflict of interest rules for panellists may also be considered.

issue recommendations) in relation to the budget of the Organization, at different stages during the process of negotiating new rules and with regard to the implementation of existing ones. This is particularly justified with regard to those as yet limited but certainly significant areas, including selected services, food safety and intellectual property rules, where WTO law has moved from 'negative' to 'positive' integration.

Such an assembly could obviously play a very useful role in enhancing the transparency and democratic accountability of the WTO. Perhaps more importantly, it could establish the necessary agora where transnational politics could flourish. States are only one way, and a far from perfect one, of aggregating citizens' preferences, while an assembly of this kind would allow for a transnational aggregation of preferences, giving voice to alternative viewpoints and allowing for a richer consideration of the different values and interests to be balanced.⁵⁸ This would also have a positive influence on domestic democracy and politics, since in the conduct of international economic affairs the executive often prevails over the legislative.

A vision of democratic legitimacy that aims at helping to correct some of the blatant inequalities both within the Organization and, more important, within and across countries through open deliberation would certainly find many opponents and meet a barrage of criticisms. Some are technical and practical in nature: How can one provide for the standing of individuals in the context of the WTO dispute settlement mechanism? How does one reconcile some form of popular representation in an assembly with the enormous differences in population sizes across the WTO membership? Or again how can one ensure the transparency, accountability and representativity of civil society groups? All these and many more questions, as difficult as they are, can be solved if the overall direction and objectives of the reform are shared. And yet again the importance of engaging in a full debate on the issues is apparent.

However, further worrisome criticism would come from the widespread moral scepticism grounded in 'economic rationalism' that tends to consider the WTO as a merely functional organisation necessary for eliminating, through progressive approximations (the negotiating rounds), a series of barriers to the functioning of the market. On the basis of an impoverished utilitarian approach, the free market is supposed to eventually bring about the best possible results for everyone. While the case for the aggregate welfare-enhancing effects of free trade rules is very strong, the distributional consequences are not fully taken into account in the existing system.⁵⁹ Aside from technical difficulties, the compensation principle of welfare economics very often does not work in domestic markets and certainly functions very poorly across countries, especially under the conditions created by globalisation. As in the domestic domain, the challenge is not only to eliminate market distortions but also address market failures (rather frequent in many services sectors). Indeed, with regard to the moral standing of the market, as Sen puts it, there is a case for praise, but only "for *faint* praise – not any less, not much more."⁶⁰ In order to govern the world economy the political debate must play its part, even more so in an era of globalisation. Technocratic solution cannot provide (all) answers.

The vision of the WTO as an organization that should only be about lowering trade barriers and tackling market access problems is rather diffuse in the 'trade' epistemic and bureaucratic community. The consequence is that democratic legitimacy is redundant, since the issues discussed can be addressed in a technical (and somewhat secretive) fashion, and ethical issues, in particular ones involving justice both within and across countries, are best left to the domestic political domain.⁶¹ This renders the WTO what Dahl calls a

⁵⁸ On the importance of politics, see for instance, J. Pauwelyn, "The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO", *Journal of International Economic Law*, Vol. 8, no. 2, 2005, pp. 329-346.

⁵⁹ In this regard, for instance, special and differential treatment provisions for developing countries within the WTO system have proven largely unsatisfactory.

⁶⁰ See A. Sen, "The Moral Standing of the Market", in E. Frankel Paul, J. Paul and F. Miller, eds., *Ethics and Economics*, Oxford, 1985, p. 19.

⁶¹ The antipathy shown by many 'economic rationalists' to ethical issues was certainly not shared, for instance, by Adam Smith, who considered the market as a device for achieving recognition of natural rights so that everyone is free to pursue his self-interest "as long as he does not violate the laws of justice." See A. Smith, *The Wealth of Nations*, New York, 1937 edition, p. 651.

“bureaucratic bargaining system”, where there is no prospect of democratic legitimacy.⁶² If such a vision of the WTO’s role in the context of international governance could perhaps have been justified for the GATT at its inception, it is certainly out of step now, in the light of the development of the international system and of international law.

“As sovereignty has declined in importance, global decisionmaking functions are now executed by a complex rugby scrum of nation-states, intergovernmental organizations, regional compacts, nongovernmental organizations, and informal regimes and networks.”⁶³ The WTO is not an isolated *sui generis* organisation and cannot, and should not, extricate itself from that scrum, in particular as it is tackling issues as important as public services. On the contrary, it is one of the central institutions for sustainable human development governance. This is why both the democratic legitimacy and equity claims need to be taken very seriously in its reform process.



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⁶² See R. Dahl, “Can international organizations be democratic? A skeptic’s view”, in I. Shapiro and C. Hacker- Cordón, *Democracy’s Edges*, Cambridge, 1999, p. 33.

⁶³ See H. H. Koh, “Why Do Nations Obey International Law”, *Yale Law Journal*, 1997, p. 2631.