THE TRANSFORMATION OF WORLD TRADE

by

Joost Pauwelyn∗

Abstract

Why is the trade regime amongst the most robust of international regimes? For half a century we have been told that it is because trade law gradually replaced trade politics. This article contests the orthodox view. Part I rewrites the history of world trade as a carefully balanced transformation where both levels of law or international control and levels of politics or country participation increased. Unlike the traditional from-politics-to-law approach, this novel law-and-politics paradigm convincingly explains otherwise puzzling stages in the system’s evolution. How could countries ever agree to decision-making by simple majority in 1947? What made them commit to compulsory dispute settlement in the World Trade Organization (WTO)? And why are they now so vehemently defending the consensus rule? Part II diagnoses the current trade system through this new law-and-politics lens. It finds that the WTO lacks both input legitimacy (not enough politics) and output legitimacy (standstill in trade liberalization and deadlock on transparency and equity-based reforms). Normatively, the article rejects conventional reform proposals -- offered by what is referred to as, on the one hand, insider-institutionalists, utilitarians and constitutionalists and, on the other hand, sovereigntists and cosmopolitans -- as they focus exclusively on one side of the law and politics spectrum and risk, respectively, an unsupported or an inefficient trade regime. In the alternative, the article suggests a more balanced reform package that tackles both poles and combines gains from trade with broad-based support. It pleads for more, not less, politics and maintaining, not eliminating, crucial exit options.

∗ Associate Professor of Law, Duke University School of Law. Lic. Jur. (Leuven), M. Juris (Oxon), Ph.D. (Neuchatel). Formerly legal officer with the WTO Secretariat (1996-2002). I am extremely grateful to Karen Alter, Claude Barfield, Marc Bush, Jeffrey Dunoff, Andrew Guzman, Laurence Helfer, Donald Horowitz, Robert Howse, Kal Raustiala and Jonathan Wiener for comments and discussions on earlier drafts, and to Kevin Blume and Bautista Logioco for excellent research assistance. I would also like to thank the legal staff of the WTO Secretariat and the commentators at an international symposium at the Martin-Luther University (Halle-Wittenberg) where earlier versions of this article were presented. This article is dedicated to the memory of Mariano Garcia-Rubio.
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INTRODUCTION

Conventional wisdom holds that the world trade system evolved from a power-based to a rules-based regime. “To a large degree”, one of the pioneers of the academic study of international trade notes, “the history of civilization may be described as a gradual evolution from a power-oriented approach, in the state of nature, towards a rule-oriented approach”. In a steady, uni-directional process of legalization, the argument goes, trade law has gradually replaced trade politics. In particular, the creation 10 years ago of the World Trade Organization (WTO) is commonly portrayed as a constitutional moment when the stability of the rule of law finally eclipsed the caprices of politics and diplomacy. In support, proponents invariably point at the WTO’s new dispute settlement mechanism, which, unlike that of its predecessor, the General Agreement on Tariffs and Trade (GATT), is compulsory and fully automatic. Combined with the WTO’s expansion into a host of new regulatory areas (such as health and safety standards, services trade and intellectual property protection) and its single package approach (all

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6 Pursuant to Articles 6.1, 16.4 and 17.14 of the DSU, a defendant can no longer block the establishment of a panel nor the adoption of panel or Appellate Body reports by the WTO’s Dispute Settlement Body (DSB).

but 2 of the more than 30 WTO agreements are binding on all 148 member countries, the conclusion of a *thickened* legal-normative structure is, indeed, inescapable. The common perception is, therefore, that at the expense of member countries’ regulatory autonomy, the authority of the WTO gradually expanded.\(^9\)

Within this prevailing school of thought (from-politics-to-law) it is a prominent theme that for trade liberalization to occur the process *must be* unlinked from the horse-trading and instabilities of domestic politics.\(^10\) For so-called utilitarian proponents of this idea, much the way we rely on experts to cure diseases, or most countries have a politically independent central bank to ensure price stability, so does the world need a trade regime that is sealed off from the excesses of domestic (and international) politics.\(^11\) If not, the argument goes, concentrated special interest groups commanding disproportionate leverage (in particular owners and workers in industries that are habitually injured by free trade) would overshadow more diffuse majority concerns in favor of free trade (in particular consumers paying less for imports). Since the resulting protectionism would inherently harm the majority, WTO agreements tying the hands of domestic politicians to the mast of free trade “act to restrain protectionist interest groups, thereby promoting both free trade and democracy”.\(^12\) In other words, the argument concludes, rather than a threat to sovereignty and representative government, the WTO is a fundamental and inherent

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8 Agreement on Government Procurement and Agreement on Trade in Civil Aircraft, Apr. 15, 1994, WTO Agreement, Annex 4.


11 The need to restrict discretionary powers of governments, in furtherance of the common good, is explained with reference to the so-called time consistency problem, that is, the inability of political institutions to bind themselves for future periods given their exposure to strategic behavior of private agents. See F.E. Kydland & E.C. Prescott, *Rules Rather Than Discretion: The Inconsistency of Optimal Plans*, 85 J. POL. ECON. 473 (1977).

guarantor of democracy. Others base a similar approach not on utilitarian, welfare maximization calculations, but on constitutional theory. Just as most countries have human rights and constitutional guarantees to protect against political dictatorship by the majority, so does the world require economic freedoms of a constitutional nature to protect citizens against economic abuse or failure by representative government. From both this utilitarian and constitutional perspective, the commonly perceived trajectory of world trade from politics to law is, therefore, not simply a historical observation. It is a prescriptive, normative goal.

This article contests the traditional view of the evolution of the world trade system. Rather than a uni-directional process of legalization focused exclusively on the system’s normative structure, Part I of the article (“The Explosion of the GATT Club”) recounts the transformation from GATT to WTO as a bi-directional interaction between law and politics, in particular, between the system’s legal-normative structure and its political, decision-making branch. Legal change in the world trade system has, indeed, been profound. Yet, it could only happen and is best understood in its interaction with the system’s political process. My claim is that this law-and-politics narrative, more than the conventional from-politics-to-law story, better explains the evolution of the world trade system. It better explains, in particular, how countries could ever agree to decision-making by simple majority in the original GATT, what reassured them to surrender their veto right in the WTO dispute process, and why today WTO members so vehemently defend the consensus rule for political decisions.

To tell this alternative story the article borrows from the theoretical framework of exit and voice, introduced in 1970 by the economist Albert Hirschman and later brilliantly applied by Joseph Weiler to the transformation of the European Community. Crudely put, following Hirschman’s insight, there is an inverse, bi-directional relation between exit (in this article, characterized by the lack of law, discipline or the thickness of a system’s legal-normative structure, i.e. offering easy options to defect from the cooperative regime) and voice (in this article, characterized by the broader notions of politics, participation or levels of contestation in the political, decision-making process, i.e. offering abundant opportunities for expressing preferences for cooperative decisions). Closure of exit options (more law or discipline) leads to higher demands for voice (more

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politics or participation). Conversely, higher levels of voice (more politics) are an absolute requirement for enabling and sustaining the closure of exit (more law).

Through this lens, my claim is that the world trade system evolved from a combination of high exit, i.e. low discipline or law (many escape clauses and weak enforcement) and low voice, i.e. low participation or politics (e.g. political decisions by majority vote) in the text of GATT 1947, to a combination of low exit, i.e. high discipline or law ( stricter rules and automatic enforcement) and high voice, i.e. relatively high participation or politics (e.g. political decisions by consensus) in the WTO. One major consequence of this claim is that increased legalization or discipline (more supervision by the WTO, less exit) must not come at the expense of less politics (less voice from member countries). Rather, more discipline and harder law (less exit) lead to and require more politics and higher levels of participation (more voice). Hence, both the WTO (a stronger enforcement mechanism) and its member states (retaining a veto in the political process) were strengthened. Another crucial insight of this claim is that the often referred to “institutional paradox” between the WTO’s consensus-based, inefficient rule-making procedures and its highly efficient, automatic dispute settlement system is readily explained. Rather than a paradox or puzzle, the juxtaposition of a strong, automatic dispute settlement system (high discipline, low exit) and a tedious, consensus-based rule-making process (high voice/participation) is a logical -- though not necessarily optimal -- phenomenon. High levels of legalization and discipline, such as a strong enforcement mechanism entail limited exit options and naturally require and lead to high demands for voice via participation and political input, such as consensus decision-making.

Moving from the descriptive and analytical to the normative, Part II of this article (“The Threat of a WTO Fortress”) contests that a choice must be made between politics and law or, put differently, between, on the one hand, democratic representation, participation, contestation and the inherent flexibility that comes with it and, on the other hand, discipline, pre-commitment and some degree of government by experts or export-driven interests shielded from capture and popular ignorance. On the contrary, my claim is that a legitimate and efficient trading system requires both politics and law, more particularly, an appropriate balance between participation and discipline, flexibility and pre-commitment, accountability and insulation, popular support and expertise, input and output legitimacy.

At the time of writing, however, the world trade system is out of balance. Over the years it gradually moved beyond the technicalities of import duties to cover more politically sensitive areas such as health regulation and intellectual property. Now that it matters (it affects not just traders but everyone in society) and its disciplines and law have become for real (WTO rules became stricter and more strictly enforced), the WTO has been unable to meet the correspondingly high demands for participation, accountability and contestation. In large part because of its foundational mechanics (to overcome protectionism by insulating export-interests from domestic politics), the world trade system remains too technocratic and too isolated from popular support and has, in places, become too rigid or legalized to respond to valid flexibility demands of representative politics. In sum, there is not enough participation or politics to sustain the high levels of discipline or law. Put differently, the WTO suffers from a lack of popular support, loyalty or input legitimacy to continue its highly disciplined and legalized operation.

Yet, at the same time, unlike the early years of GATT, this lack of input legitimacy is no longer offset by progress in actual trade liberalization or output legitimacy. The increase in participation or politics that did take place since the GATT’s creation, in particular the insistence by countries on a political veto and decision-making by consensus, is currently stifling further welfare enhancing liberalization and preventing much needed reforms to make the system more equitable for developing countries and more open and supported by civil society. As a result, the WTO now lives in what one could call the worst of both worlds: It misses the benefits of popular support or politics (lack of input legitimacy) and must do without the benefits of further trade liberalization and a rule of law perceived as fair and equitable for everyone (lack of output legitimacy).

The most common proposals to reform the WTO, including the January 2005 Sutherland Report on The Future of the WTO, do not take account of this delicate interaction and balance between law and politics. They focus rather on just one side of the spectrum without weighing the countervailing effects on the other. This article examines in particular the following three proposals: (i) further legalize or de-politicize the WTO with, for example, legal standing for private parties and fewer escape clauses; (ii) facilitate decision-making in the WTO political process through, for example, majority


voting or executive bodies\textsuperscript{21}; and (iii) re-introduce politics into the WTO judicial branch with, for example, political vetoes against dispute rulings.\textsuperscript{22}

Knowing that the present combination is one of high discipline that led to and requires high levels of participation, my claim is that, when implemented in isolation, all three proposals are counterintuitive. First, further legalization, without the necessary political support, would put even more pressure on the voice mechanism and demand even higher levels of participation in an organization where such levels are already too low. It would only worsen the deadlock in the political branch and risk being counterproductive by putting pressure on some members, in particular the most powerful ones, to leave the organization. Second, although majority voting could facilitate the decision-making process and thus, like further legalization, boost the WTO’s short-term output legitimacy, the limitation in voice and participation that it would engender (through members losing their veto over new rules) risks undermining the support for, and legitimacy of, the strong dispute process and, in the long run, the trade system as a whole. In the absence of a high enough level of loyalty or support for the WTO, more – not less – voice or participation from individual WTO members and their constituencies is needed. Third, reverting to GATT, diplomatic-style dispute settlement, re-injecting politics into the dispute process itself, may entangle decision-making deadlocks. Less discipline would, indeed, require less participation. Yet, this proposal neglects almost 100 years of trade history. If the inter-war period and GATT has taught us one lesson it is that for actual trade liberalization to occur, trade commitments must have legal value and be backed by a strong, independent dispute mechanism. This is all the more necessary today where most trade restrictions take the form of covert non-tariff barriers, often going to the heart of state sovereignty, for which countries would be hard-pressed to exercise a veto if they had one.

Rather than portraying constitutionalization or detachment from politics as the system’s normative goal (as the utilitarian and constitutional schools described earlier\textsuperscript{23}), this article stresses the usefulness and need for politics, participation, flexibility and occasional crisis. Equally, instead of advocating a wholesale re-introduction of representative politics in the world trade system (as both conservative sovereigntists\textsuperscript{24} and left-leaning cosmopolitans tend to do\textsuperscript{25}), this article accepts the need for pre-

\begin{thebibliography}{99}
\bibitem{note22} Barfield, \textit{supra} note 17, at 7.
\bibitem{note23} See, respectively, McGinnis & Movsesian, \textit{supra} note 10 and Petersmann, \textit{supra} note 14.
\bibitem{note24} See, for example, Barfield, \textit{supra} note 17.
\bibitem{note25} See, respectively, Barfield, \textit{supra} note 17 and Wallach, \textit{supra} note 9 and, to a lesser degree, Robert Howse, \textit{From Politics to Technocracy – And Back Again: The Fate of the Multilateral Trading System}, 96 AM. J. INT’L L. 94 (2002).
\end{thebibliography}
commitment and discipline to tame the protectionist excesses of representative politics. Without such hand-tying, the WTO would soon be ineffective and fail to fulfill its crucially important mandate of welfare enhancing trade liberalization. Hence, as much as law needs politics, so politics needs law. The difference between these two, in my view, flawed extremes (focused, respectively, on ‘just more law’ or ‘just more politics’) is, however, that discipline or legalization without sufficient politics or accountability risks an unsupported and unsustainable system which in the meantime imposes its wimp on the people in the name of economic efficiency (efficiency without loyalty). In contrast, politics, participation and flexibility without sufficient discipline or pre-commitment would lead to an inefficient, even inactive, trade regime where important gains from trade are foregone (loyalty without efficiency).

As an alternative to such reform proposals, focusing exclusively on either law or politics, discipline or participation, this article pleads for a more comprehensive reform package that takes account of both the law and politics poles. On the law or discipline side, my claim is that rather than embracing ever more legalization, the WTO needs to maintain a certain level of flexibility or exit options, especially those fine-tuned to consumer welfare and democratic politics. In particular, it must move away from the single package orthodoxy and permit differentiation through a multiple-speed WTO. In addition, the system must continue to provide for broad substantive exceptions, meaningful safeguard mechanisms, waivers, tariff and other re-negotiations, temporary compensation or suspension in the event of non-compliance and the scope to settle disputes -- and regulate trade-related questions in other international fora -- in deviation from WTO rules for as long as third party rights are left untouched. Rather than birth defects that need to be cured through gradual legalization, these flexibility and exit options must be clarified and maintained.

On the politics or participation side, the article rejects the relatively easy way-out of decision-making by executive bodies or qualified majority. Instead, at this point in time, the WTO needs the high levels of voice, participation and contestation linked to the consensus principle. Although the WTO’s decision-making practice is messy, takes time and can be made more inclusive, the benefits linked to consensus (not to be confused with unanimity) outweigh its costs. More importantly, if the WTO is to survive as a legitimate institution that effectively liberalizes trade it will need the participation, loyalty and support, not just of governmental trade elites and technocrats but also of consumers and citizens at large. In addition to procedural reforms that enhance the transparency of, and access to, the WTO, such loyalty and support requires a substantive shift in the trade system’s paradigm, mechanisms and rules and exceptions, away from the proxy of export-driven, producer interests with allegedly only majority concerns in mind, and more directly aligned with consumer and citizen interests in both poor and rich countries for whose benefit the world trade system was set up in the first place.

I do realize that the combination of maintaining politically responsive flexibility or exit options and increasing levels of voice or participation by both governments and their peoples, including that required for new agreements, implies that global economic integration may not always be optimal. It will make progress toward further
liberalization messy, slow and difficult to achieve and will face the occasional political deadlock. My claim is, however, that this lourdeur is the price to pay for the long-term survival and legitimacy of the world trade system. Moreover, the subtle combination of more participation and limited but clearly defined exit options in the background ought to facilitate political agreement. Given the ex post flexibility, countries will be less nervous to engage in new rules. In turn, when rules are agreed to with higher levels of participation and support, they are more likely to be complied with and resort to the exit options enshrined in the system ought to be exceptional. As a result, limited exit options may actually reinforce rather than undermine the system’s credibility.

PART I THE EXPLOSION OF THE GATT CLUB

Part I of this article tells the alternative story of the transformation of the world trade system as a bi-directional interaction between law and politics in lieu of the conventional from-politics-to-law narrative focused exclusively on the trade system’s dispute settlement branch. It describes three distinct periods: (i) the original creation of GATT in 1947 (“The Politics of a Gentlemen’s Club”), (ii) the GATT in operation between 1947 and 1994 (“GATT’s Quiet Mutation”), and (iii) the creation of the WTO and its first 10 years of operation (“The WTO Eruption”).

A. GATT 1947: The Politics of a Gentlemen’s Club

1. Why was a world trade regime needed in the first place?

“If economists ruled the world”, Paul Krugman notes, “there would be no need for a World Trade Organization.”26 Following standard economics, free trade maximizes national welfare. Therefore, rational governments ought to liberalize trade unilaterally, without the need for an international regime. The reality, of course, is different. Governments face both economic and political incentives to restrict trade, and international coordination was needed to effect its liberalization.

One school of thought (the terms-of-trade school) focuses on economic incentives.27 In economic terms, they argue, large countries (that is, those big enough to influence world prices) are tempted to increase their terms of trade (i.e., reduce import prices) and thereby enhance national welfare through the imposition of a so-called optimal tariff rate. Doing so harms foreign exporters. However, since foreigners do not vote, governments are unlikely to factor in those externalities. At the same time, if all nations impose such an


optimal tariff – be it unilaterally or to retaliate against the tariff of another nation -- most gains of trade are neutralized and all countries are likely to be worse off compared to a situation without tariffs.\textsuperscript{28} This puts countries in a so-called Prisoner’s Dilemma. For the terms-of-trade school, the creation of GATT is explained as a way out of this dilemma. Through the exchange of reciprocal “concessions” of market access (originally tariff reductions) countries steered away from so-called beggar-thy-neighbor policies making everyone worse off. Instead, reciprocal commitments to liberalize trade, backed up by the threat of retaliation in the event of defection, forces countries to take account of the harm they cause to others. As a result, GATT ensures a win-win situation for all sides.

Another school of thought focuses on political incentives to restrict trade.\textsuperscript{29} They use public choice and constitutional theories to explain the creation of GATT. The benefits of free trade are long term, diffuse and fragmented across consumers, while its costs (though mostly smaller) are felt immediately and directly in layers of society that are best organized (import competing industries, organized labor, etc.). Because of collective action problems, the supporters of free trade (consumers) have less incentive to incur the cost of lobbying. Those suffering from liberalization, in contrast, are geographically concentrated. Their contributions to the industry’s cause are more readily mobilized and monitored. As a result, protectionist groups wield more political clout. Consequently, governments face pressures to restrict trade that, more often than not, outweigh those in support of free trade. International coordination, that is, the exchange of reciprocal “concessions” of market access, is then explained as adding the weight of exporters to the less organized domestic free trade camp of consumers in order to overcome the disproportionate impact of protectionist groups (import competing industries and labor).\textsuperscript{30} For the constitutional branch of this school of thought, trade agreements fulfill a true constitutional function, namely the protection of economic liberties and majority interests against government interference and abuse by special interest groups.\textsuperscript{31}

\textsuperscript{28} H.G. Johnson added, though, that a large country could be better off by imposing a tariff even in the case of foreign retaliation as long as its price elasticity of import demand is larger than the corresponding elasticity of its trading partners. Johnson, supra note 27.


\textsuperscript{30} See McGinnes and Movsesian, supra note 12.

A third perspective focuses on the discriminatory nature of pre-GATT trade relations largely determined by colonial preferences and overlapping bilateral trade agreements.\(^{32}\) Rather than pursuing the internalization of cross-border externalities (the terms-of-trade school) or the maximization of national, consumer welfare against abuse by protectionist minorities (public choice and constitutional schools), on this view, the GATT emerged to deal with “the mess of the existing bilateral and discriminatory trade policies”:\(^{33}\) In support of this approach, it is pointed out that, to this date, the world trade system remains focused on non-discrimination (not economic efficiency) and the protection of producer (not consumer) welfare.\(^{34}\) From this perspective, the system neither avoids harmful cross-border externalities nor does it inherently protect domestic consumers. Instead of inherently protecting the majority, the trade system, thereby, risks elevating special (producer) interests above consumer concerns and beyond the control of domestic politics.\(^{35}\)

2. The original GATT bargain: It’s all politics

Whatever the underlying theory of why a multilateral trade system was, and remains, needed, the immediate context of GATT’s creation in 1947 was the jolt of the Great Depression and World War II.\(^{36}\) The conclusion of GATT constituted a major departure

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\(^{32}\) Between 1934 and 1945 the United States, for example, negotiated and accepted 32 so-called reciprocal trade agreements. JACKSON, supra note 2 at 37. Especially for the United States the GATT was more efficient than endless bilateral agreements – in addition, GATT was the United States’ only institutional option under which to achieve its trade objectives given that the United States, unlike other major trading nations (France, Britain, etc.), had no regional alternative and could not count on existing imperial or regional trade ties. John Odell & Barry Eichengreen, The US, the ITO and the WTO: Exit Options, Agent Slack, and Presidential Leadership, in THE WTO AS AN INTERNATIONAL ORGANIZATION 181, 183 (Anne Krueger ed., 1998).

\(^{33}\) Patrick Messerlin, Non-Discrimination, Welfare Balances and WTO Rules: A Historical Perspective, in PREPARING THE DOHA DEVELOPMENT ROUND: CHALLENGES TO THE LEGITIMACY AND EFFICIENCY OF THE WORLD TRADING SYSTEM 137 (E.-U. Petersmann ed., 2003), at 154, 156. Interestingly, as Messerlin points out, when GATT was created in 1947 the notions of producer and consumer welfare remained underdeveloped. It is, therefore, hard to conclude that the GATT was based on economic analysis (“If the key economic concepts were largely discovered by the late 1800s and formalized by the 1930s, their operational form, that is, their capacity to answer questions raised by decision makers in a straight forward and computable manner, was non-existent,” id. at 155.)


\(^{36}\) World War I shook the very foundations of economic liberalism and destroyed the economy of Europe, CLAIR WILCOX, A CHARTER FOR WORLD TRADE 5-9 (1949). In the interwar period (the Great Depression), a major wave of protectionism swept across the globe. One after the other, in a cascade of retaliatory action, countries imposed quantitative restrictions on imports,
from previous forms of trade cooperation. Ever since the creation of the League of Nations after World War I, international conferences had been convened to address deteriorating trade conditions, but the world needed the wake-up call of another world war to move beyond the lofty rhetoric of hortatory declarations and agree to more specific commitments that would be supported by a normative structure.

Whilst GATT did inaugurate the creation of a legal-normative regime for world trade, at its core it remained a profoundly political bargain. Although GATT negotiators realized that some degree of normative pull was needed, if only to avoid the mistakes of the past, they also voiced a strong distrust of lawyers and the rigid legal method, which, in their minds, would not enable flexible responses to real trade problems. As a result, what kept GATT together was not so much an abstract respect for legal rules, but rather the political and economic need to keep intact a negotiated balance of tariff concessions, originally exchanged in 1947 and subsequently expanded in further rounds of trade negotiations. Reciprocal tariff reductions (Part I of GATT) were at the apex of this GATT bargain. This tariff deal was, in turn, supported by the standard trade policy rules set out in Part II (such as national treatment and prohibitions on quantitative restrictions). Part II was crucial to ensure that commercial opportunities offered by tariff reductions would not be nullified by trade policy instruments other than tariffs. No strong enforcement mechanism to keep this balance afloat was needed. After all, the balance was struck because of reciprocal gains reaped from exchanging tariff reductions. This balance was, in turn, kept because of the threat of reciprocal withdrawals of concessions in case a country would not meet its end of the bargain. This was the secret of the GATT’s early success.

The original GATT was, therefore, more like a gentlemen’s club than a legal regime. Its objective was to settle trade problems, not to create or clarify trade law. Flexibility to adapt to economic and political realities prevailed over the predictability of the rule of law. The GATT club was inspired and run by what became known as “embedded liberalism”, that is, a common belief amongst the technocratic elites of the original 23 GATT contracting parties -- after all, a limited set of like-minded, capitalist countries -- that trade liberalization increases welfare and requires international coordination and prohibitively high tariffs and manipulated their exchange rates. These “beggar-thy-neighbor” policies, rather than achieving their purpose of increased competitiveness and lower unemployment rates, caused economic chaos and, according to many observers, were responsible to a some degree for World War II itself. See Richard Gardner, Sterling Dollar Diplomacy (1956).

37 Hudec, supra note 19, at 5-9.

38 See Hudec, supra note 19, at 25-6 (quoting from a 1932 report of the League of Nations’ Economic Committee, calling for a nonjudicial procedure to resolve economic disputes); id. at 29 (quoting a UK memorandum submitted to the London drafting session of the ITO Charter in 1946, insisting on the importance of economic judgment).
discipline, albeit with sufficient room left for domestic politics to redistribute income and sustain the safety-nets of the welfare state at home.\textsuperscript{39}

In this club-like context, it should come as no surprise that in the text of GATT the equilibrium reached between law and politics, discipline and participation, exit and voice, was one of relatively low levels of politics or participation combined with equally low levels of law or discipline.

\textit{a. Low levels of discipline and law}

The original GATT maintained multiple escape routes and safeguard mechanisms for countries seeking to avoid GATT basic principles. First, the GATT included broadly defined substantive exceptions: Article XII permitted trade restrictions to safeguard a country’s balance of payments, Article XVIII allowed for governmental assistance to economic development and Articles XX and XXI provided for a broad range of general exceptions ranging from public morals and health to the protection of national security, historic treasures and natural exhaustible resources. Second, and more importantly, GATT also permitted trade restrictions without the need to base them on specific non-protectionist concerns (as is required under most substantive exceptions). Article XIX introduced so-called safeguard measures that permit the reinstatement of trade restrictions when countries are faced with a sudden influx of imports causing serious injury to their domestic industry. Article VI permitted extra tariffs to offset so-called dumping, that is, exports sold at less than the normal value of the products concerned. Article XXVIII set out different procedures for parties to renegotiate tariff concessions, for whatever reason, on condition that they offer equivalent liberalization in other products or suffer reciprocal suspensions by other parties. In addition, under Article XXV:5, GATT parties acting jointly and by 2/3 of votes cast could, in exceptional circumstances, grant a waiver from any GATT obligation. Finally, the so-called ‘existing legislation clause’ in the GATT’s Protocol of Provisional Application (in force until the creation of the WTO in 1995) grandfathered pre-1947 legislation under Part II of GATT.\textsuperscript{40}

In the same vein, GATT’s enforcement mechanism (Article XXIII) was a diplomatic procedure set up to maintain a balance of concessions in the face of future uncertainties\textsuperscript{41},


\textsuperscript{40} Protocol of Provisional Application of the GATT, Oct. 30, 1947, 61 Stat. pts. 5, 6 TIAS No. 1700, 55 UNTS 308, paragraph 1(b).

\textsuperscript{41} As one draftsman put it: “We shall achieve, under the Charter, if our negotiations are successful, a careful balance of the interests of the contracting States. This balance rests upon certain assumptions as to the character of the underlying situation in the years to come. And it involves a mutuality of obligations and benefits. If, with the passage of time, the underlying situation should change or the benefits accorded any Member should be impaired, the balance would be destroyed. It is the purpose of [GATT Article XXIII] to restore this balance.” U.N. Doc. EPCT/A/PV/6, at 5 (1947).
not an independent judicial system to ensure the impartial enforcement of GATT rules.\(^{42}\) As a result, instead of tackling breaches of international law obligations, the GATT dispute process focused on the “nullification or impairment” of GATT benefits. By the same token, the GATT’s remedy of last resort was to “suspend concessions or other obligations”.\(^{43}\) The resulting enforcement regime was therefore distinctly un-legal and, somewhat paradoxically, both lenient and strict. On the one hand, the system was lenient: the customary consequences linked to a breach of an international law obligation – in legal terms, cessation and reparation, and in political terms, the reputational costs of breaking the law – were avoided. On the other hand, however, the system was uniquely strict: parties were held “responsible” not only for breaches of GATT obligations, but also for “nullification or impairment” caused by conduct that did not conflict with any specific GATT provision (under so-called non-violation or situation complaints\(^{44}\)). Finally, confirming the relatively low levels of discipline or constraint, withdrawal from GATT was easy. It sufficed to give 60 days notice.\(^{45}\)

\(\text{b. Low levels of participation and politics}\)

If the original GATT reflected low levels of discipline and law, on the politics or voice axis, it built upon equally low levels of participation and approval. GATT was, and was seen as, a highly technical, tariff-focused operation driven and inspired by an expert-consensus on embedded-liberalism. Far from being the result of democratic politics, one of the GATT’s core objectives was to curtail the excesses of representative democracy and the logrolling and protectionism that came with it. Confirming the distance between Geneva-based negotiators and the people they represented, the US Congress, like many other parliaments, never even ratified the GATT agreement. Technically speaking, it was


\(^{43}\) GATT art. XXIII:2.

\(^{44}\) GATT art. XXIII:1(b) & (c). Since it was realized that also domestic measures, such as subsidies or product safety standards, that did not directly relate to trade policy, could affect the benefits from tariff reductions and it would be impossible to catalogue all such possibilities (as well as politically unfeasible for countries to severely circumscribe their domestic powers in this respect in a mere tariff agreement), the remedy of non-violation and situation complaints was added as a final check to uphold the GATT bargain. See HUDEC, *supra* note 19, at 23-24.

\(^{45}\) GATT art. XXXI refers to 6 months. However, paragraph 5 of the Protocol of Provisional Application (which made and kept GATT operational for 47 years until the WTO was created), reduced this period to 60 days. Hence, as Jackson noted, “if a nation objected strenuously enough to a decision of the CONTRACTING PARTIES, it could simply withdraw if it felt the balance of the advantages obtained through GATT were not sufficient to offset the disadvantages of the particular decision.” JACKSON, *supra* note 2, at 127.
only provisionally applied and never formally entered into force until the creation of the WTO 47 years later.\textsuperscript{46}

In addition, when it came to making new rules or amendments, equally low levels of approval and participation were seen as adequate. Pursuant to GATT Article XXV, broad competences were delegated to GATT contracting parties acting jointly, including to meet and decide “with a view to facilitating the operation and furthering the objectives of [GATT]”.\textsuperscript{47} Even more surprising, unless explicitly provided otherwise, these competences could be exercised by a \textit{simple majority of the votes cast}\textsuperscript{48} with each contracting party entitled to only one vote and no GATT party entitled to veto power.\textsuperscript{49} Joint action under GATT Article XXV, albeit taken by the slightest majority, was binding on all parties, even those who voted against the particular decision.\textsuperscript{50} Crucially, in the original GATT, also the enforcement mechanism was subject to the decision-making rule of Article XXV. Since the mechanism was set up as a diplomatic process to be run jointly by all GATT parties (not by independent dispute panels), complaints, investigations and eventual recommendations were, therefore, to be initiated, conducted

\textsuperscript{46} As is well documented, the 1948 Havana Charter which was supposed to establish a new International Trade Organization (ITO) -- as well as its 1955 spin-off, the Organization for Trade Cooperation (OTC) -- never came about. \textit{See supra} note 36. On several occasions the United States Congress refused ratification. As a result, the GATT was provisionally applied (never actually entering into force) for 47 years until, finally, in 1995 the WTO saw the light of day.

\textsuperscript{47} As Frieder Roessler, former GATT legal advisor, noted: “The \textit{Contracting Parties} were given the right to meet with a view to furthering the objectives of the General Agreement to enable them to respond to future, possibly unforeseen, changes … What is decisive is whether in the current circumstances the discussions of the subject-matter furthers the objectives of the General Agreement.” Frieder Roessler, \textit{The Competence of the GATT}, 21 \textit{J. WORLD TRADE L.} 73, 76 (1987). This sweeping provision can be compared to art. 235 of the original Treaty of Rome establishing the European Community. In similar fashion, art. 235 grants broad powers to the Community, in particular the Council, to take “action … necessary to attain … one of the objectives of the Community”.

\textsuperscript{48} GATT art. XXV:4.

\textsuperscript{49} GATT art. XXV:3. Since the Rules of Procedure set the quorum for valid decision-making at a simple majority of contracting parties, Rules of Procedure for Sessions of the CONTRACTING PARTIES, GATT, 12\textsuperscript{th} Supp. B.I.S.D. 10, Rule 16 (1964), in theory, joint action under Article XXV could be taken by $\frac{1}{4}$ of the membership (that is, even if only half of the membership is present, half of those present and casting a vote can still adopt decisions).

\textsuperscript{50} Art. 235 of the EC Treaty, in contrast (see \textit{supra} note 47), required unanimity. As John Jackson noted in 1969: “Looking at the language of [GATT Article XXV], without considering preparatory history, practice, or circumstances, one might conclude that sweeping obligations concerning trade could be entered into by a majority of the contracting parties and be made binding upon other members, even those not voting for the proposal”. \textit{Jackson, supra} note 2, at 127.
and adopted by simple majority of the votes cast. Based on Article XXV, a single defendant could not block the dispute process.

Finally, GATT amendment procedures permitted equally low levels of participation. Most GATT rules could be changed by a 2/3 majority of the parties. Although any amendment bound only those GATT parties that accepted it, GATT parties could thus be outvoted on an amendment. This permitted normative differentiation between countries or a multiple speed GATT.  

3. GATT 1947 as a bi-directional interaction between law and politics

The previous section demonstrates that the original GATT bargain combined relatively low levels of discipline or pre-commitment (e.g. multiple escape clauses and a largely political enforcement procedure) with relatively low levels of politics or participation (e.g. lack of formal ratification and joint action by majority vote). One way to explain this early balance is self-referential, pointing to the internal history or logic of either the law or politics pole. For example, as hinted at earlier, GATT law was probably soft because of a general aversion amongst negotiators of strict legalism, the club-like atmosphere of the early GATT days, and the prevailing idea of embedded liberalism that permitted flexibility and room for domestic maneuvering. That GATT decision-making, in turn, required relatively low levels of politics or participation (a simple majority sufficed) could also be explained internally, within the politics or voice pole, by, for example, the technical, low politics nature of tariff negotiations and the GATT as an experts-club set up to operate in a business-like fashion, estranged from politics and amenable to rapid reactions in changed circumstances. Yet, in my view, a crucial factor explaining the equilibrium found in the original GATT text is not internal or self-referential to either the law or politics axis. Rather, it relates to the bi-directional interaction between the two poles.

First, how did GATT manage to so successfully reduce tariff levels and how could negotiators possibly agree to simple majority voting rules, that is, such low levels of participation or voice (in the EC, for example, it took decades to shift to majority voting and even then only for limited fields and pursuant to some super majority, not a simple majority)? In my view, it is the GATT’s weak legal-normative structure, i.e., its low level of discipline and many exit options that explain GATT’s early success and majority voting rules. Is it not logical that when countries know that if worst comes to worst exit from obligations is possible, they will more easily make commitments? And that they will, moreover, not bother too much about how new rules are created nor even mind that their voice, protest or veto may get lost in a majority voting procedure? In other words,

51 Note, however, that art. XXX:2 puts a potential break on the possibility for countries to opt out of GATT amendments: “The CONTRACTING PARTIES may decide that any amendment … is of such a nature that any contracting party which has not accepted it within a period specified … shall be free to withdraw from this Agreement, or to remain a contracting party with the consent of the CONTRACTING PARTIES”.
when levels of discipline or pre-commitment are low and obligations are not rigidly enforced, is it not normal that countries make broader and deeper commitments and more easily agree to future decision-making by majority vote? Any new rule that would emerge against their will can, in any event, still be exited from thanks to the thinness of the legal-normative structure. A similar balance was struck in the UN Charter.

Second, how can one explain the low levels of discipline, many escape clauses, weak remedies and essentially political enforcement mechanism of GATT 1947, all of which deviate from general international law? Conversely, and here is the bi-directional (even circular) force of the law-and-politics narrative, the GATT’s low levels of politics and participation (e.g. lack of formal ratification and majority-voting rules) explain the low levels of discipline and multiple exit options under the original GATT (e.g. the ‘existing legislation clause’ and weak dispute process). Indeed, when faced with low levels of politics, participation and contestation, including a system of easy, majority-based decision-making, is it not normal that countries insisted on escape clauses and a hard law enforcement mechanism was seen as undesirable? Given the inherent risk of being outvoted in the creation of new rules and the uncertainties of the future (e.g. shifts in supply and demand, technological advance, election cycles, changes in political majorities, and domestic social preferences) could it not be expected that negotiators be averse to strong rule-enforcement, and want to keep certain exit options open?

In sum, because of low levels of law or discipline (escape clauses and weak dispute settlement), the low levels of politics or participation (majority voting) became digestible and could be sustained. At the same time, because of low levels of participation or politics, only relatively low levels of discipline or law could be agreed to and only such low levels were manageable.

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52 As Jackson pointed out, “nations often can simply violate [GATT] obligations or CONTRACTING PARTY decisions without the fear of much penalty … Since Article XXV is so loosely and broadly drafted, it may be that a very important escape valve and check upon the CONTRACTING PARTIES’ power is the practical ability of most states to refuse to obey GATT”. JACKSON, supra note 2, at 127-8.

53 See UN Charter, art. 18 (UN General Assembly resolutions are not legally binding, hence countries could agree to their adoption by majority vote).

54 See Pauwelyn, supra note 42 (standard international law imposes cessation of breach and reparation).

B. GATT’s Quiet Mutation (1947-1994)

Departing from an early balance between low discipline and low participation, as soon as GATT became operational, the original equilibrium gradually shifted toward more discipline and harder law (including less exit) and more participation or politics (including more demands for voice). This occurred piecemeal and over time, hence the reference to GATT’s quiet mutation. It demonstrates the living, dynamic interaction between law and politics, exit and voice. A change on one side of the spectrum, however small, necessarily affects the other.

1. More law: From a political enforcement process to gradual legalization

That GATT’s legal-normative structure gradually thickened is well documented. As pointed out earlier, most discussions of the evolution of the world trade system focus on just that. On substance, 7 rounds of tariff negotiations dramatically reduced import duties on industrial goods and in 1979 the Tokyo Round Codes expanded GATT discipline to include also the far more sensitive field of non-tariff barriers. Moreover, whilst in the text of GATT, the enforcement mechanism was part and parcel of the political structure, over time GATT’s dispute process was detached from mainstream decision-making. At an early stage GATT parties rather than making rulings themselves within the diplomatic process, referred Article XXIII complaints to a so-called Working Party. This was a smaller group of countries, generally including the principal actors in the dispute as well as a number of interested parties and so-called “neutrals”. The countries in the Working Party discussed, negotiated and eventually voted on the questions before them and, when successful in reaching some agreement (albeit one imposed by majority vote), recommended a way forward to the GATT membership, which, in turn, adopted or declined to adopt the recommendation under the Article XXV majority voting rule. Soon the number of neutrals exceeded the number of interested parties and the Working Party process transformed from a purely diplomatic exercise to a modified form of third-party adjudication. The next step was to replace the Working Party with a so-called “panel” made up exclusively of neutral countries before which the disputing parties would plead their case, and later composed of individuals acting in their own,

56 See supra notes 1-2.

57 The Tokyo Round Codes dealt with Government Procurement, Technical Standards, Customs Valuation, Aircraft, Import Licensing Procedures, Anti-Dumping and Subsidies.

58 HUDC, supra note 19 at 75-78.

59 The Australian Subsidy case (complaint by Chile) was a trendsetter in this respect, Panel Report, Australia – Subsidy on Ammonium Sulphate, adopted April 3, 1950, GATT B.I.S.D. (2d Supp.) at 188 (1952) [hereinafter the Australian Subsidy case].

60 The first such panel was created at the Seventh Session of GATT contracting parties in 1952. Interestingly, it was set up to deal with all complaints raised during that session, not just one particular dispute (SR.7/5, October 9, 1952; SR.7/7, October 14, 1952).
individual capacity. With the establishment of “panels” – a word derived from the term “panel of experts,” evoking notions of technical expertise and impartiality – the role and input of the GATT Secretariat increased. Highlighting the increased focus on an objective application of the rules, rather than an evaluation of the political sensitivities at stake, in 1981 the GATT, for the first time in its history, established a legal office.62

After the conclusion of the Tokyo Round in 1979, GATT parties further streamlined and legalized the dispute process. In 1980, they adopted an Agreed Description of Customary Practice and an Understanding on Dispute Settlement.63 In 1982, a Ministerial Declaration issued recommendations on how to make GATT adjudication more effective (expediting the process, strengthening the role of the GATT Secretariat, calling for clearer decisions and recommendations, and clarifying the implementation stage).64 In a 1984 Decision, important improvements were made in the procedures for panel selection.65 In a 1988 Midterm agreement (in the context of the new Uruguay Round), further procedural rules were set out.66

2. More politics: From majority voting to a consensus practice

As described earlier, the actual text of GATT opened the door for surprisingly low levels of participation or politics, in particular, joint GATT action by simple majority and relatively flexible amendment rules. In 1948, for example, Part II of the GATT was amended with less than unanimity.67 In 1959 GATT parties adopted a recommendation on freedom of contract in transport insurance by majority decision.68 When granting waivers and deciding on the accession of new countries, GATT parties traditionally voted, each decision requiring just 2/3 of the votes cast.69 Equally, most results of the

61 See SR.9/7, November 5, 1954; HUDEC, supra note 19 at 90.


65 GATT B.I.S.D. (31st Supp.) at 9-10 (1985). A roster of nongovernmental individuals for use on panels was set up and the Director General was given the power to appoint panel members in case the parties disagreed.


68 GATT B.I.S.D. (8th Supp.) at 26 (1960); SR.14/9, p. 115.

69 GATT arts. XXV:5 & XXXIII. See JACKSON, supra note 2 at 123.
various GATT trade negotiation rounds were accepted by only a fraction of GATT parties. They were implemented through tariff protocols amending the GATT (under the 2/3 majority rule), or separate side agreements (such as the Tokyo Round Codes on non-tariff issues).70 In this multiple-speed GATT, most developing countries steered away from additional obligations (in particular the Tokyo Round Codes) and even obtained exemptions from existing GATT provisions.71

At the same time, voting soon became the exception72 and consensus decision-making (albeit sometimes in smaller groups) the rule. In 1955, for example, GATT parties adopted, by consensus, resolutions on investment for economic development, the disposal of surplus products and the liquidation of strategic stocks.73 In 1979, a number of the Tokyo Round results were implemented by decision-making under Article XXV – including the so-called Enabling Clause in favor of developing countries – each time by consensus.74 In the majority of cases, prior to formal meetings an agreement was worked out. Only subsequently was a decision taken and this mostly by consensus,75 as interpreted by the Chairman, that is, in the absence of a formal objection from any contracting party present on the floor (to be distinguished from unanimity of all parties). This consensus practice guaranteed higher levels of participation and voice than the majority-voting rule on the books. Each GATT party could make its voice heard, a voice that was, at least on paper, the same for each party pursuant to the one-member-one-vote

70 See Roessler, supra note 47 at 79.

71 In 1964 a Part IV on Trade and Development was added to GATT, GATT B.I.S.D. (13th Supp.) at 10 (1965). The crucial element in Part IV was the abandonment of the basic GATT principle of reciprocity or balance of concessions as it applies to the relation between developed and developing countries. Furthermore, first through a 1971 waiver, GATT B.I.S.D. (18th Supp.) at 21 (1972), and then permanently in 1979 (the so-called Enabling Clause, GATT B.I.S.D. (26th Supp.) at 203 (1980)), developing countries obtained approval for major deviations from another corner-stone of the GATT system, the principle of non-discrimination. Most importantly, developed countries were now permitted to grant tariff preferences to developing countries without having to extend them to the developed world.

72 For exceptions, see the vote in 1985 in favor of holding a special GATT session to launch the Uruguay Round of trade negotiations and the vote in 1990 on a waiver for the German Democratic Republic’s trade preferences to the former Soviet Bloc countries, both reported in Claus-Dieter Ehlermann and Lothar Ehring, Decision-Making in the WTO: Is the Consensus Practice of the WTO Adequate for Making, Revising and Implementing Rules on International Trade?, 8 JIEL (2005), forthcoming.


75 As a former legal adviser of GATT concluded, “[t]here is no instance in the history of the GATT in which the Contracting Parties have used their powers under Article XXV:1 to impose new policy obligations [to be distinguished from non-binding recommendations] on contracting parties unwilling to accept them,” Roessler, supra note 47 at 79.
rule. Moreover, under the consensus rule, each GATT party could threaten with a veto, a risk that increased debate, contestation and participation, in short, amplified the level of politics in the decision-making process.76

Although gradually legalized and extracted from the political process, crucial decisions in GATT dispute settlement – such as panel establishment and the adoption of panel rulings – followed this general trend. Like other decisions under Article XXV, they gradually required consensus, instead of simple majority. In theory, this granted each GATT party the right to veto or block progress in the dispute process.77 Unlike the impression sometimes created by WTO commentators, however, in most GATT disputes such blocking did not materialize,78 and the adoption of Working Party and panel reports occurred by consensus, often with little discussion.79 It was only in the late 1980s and especially the early 1990s, that the possibility of vetoing progress in the GATT dispute mechanism led to serious foot-dragging, blocking, refusals to conform to panel rulings, and non-authorized retaliations.80 In other words, over time, GATT dispute settlement

76 The informal nature of the consensus practice also permitted giving a voice to countries that were only provisional or de facto GATT parties. Those countries were also actively participating in the decision-making process without much regard for their formal lack of a vote. JACKSON, supra note 2, at 123.

77 A 1982 Ministerial Declaration, GATT B.I.S.D. (29th Supp.) at 10 (1983), explicitly confirmed, for the very first time, the consensus principle for any decision by GATT parties in dispute settlement. The subsequent 1988 Midterm agreement, GATT B.I.S.D. (36th Supp.) at 66 (1990), in somewhat ambiguous terms, took away the veto for the establishment of panels (paragraph F(a)), but confirmed the veto for the adoption of panel rulings and authorizations to suspend concessions (paragraph G(3)).

78 The very first time in GATT history that a defendant blocked the establishment of a panel occurred only in 1972 in the US-EC Compensatory Taxes on Imports case, HUDEC, supra note 19 at 54. Even then, the reason was not some systemic objection to GATT deciding the dispute, but rather that the tax in question would be abolished the same year, a promise which the EC eventually kept, case 65 in HUDEC, supra note 62, at 453-54. The adoption of panel reports had only been vetoed once in GATT history up to 1986, namely in the very contentious 1976 DISC case between the US and the EC, id. at 46, and even there the report was eventually adopted, albeit only five years later, DISC panel report, 2 November 1976, L/4422, GATT B.I.S.D. (23d Supp.) at 98-114 (1977), adopted 7-8 November 1981 (C/M/154), as reported in case 69 of HUDEC, supra note 62 at 456.

79 HUDEC, supra note 19, at 80 (discussing the Australian Subsidy case, approved virtually without discussion, Australian Subsidy case, supra note 64) and at 89 (remarking that the substance of reports of the Seventh Session Panel were not even debated).

80 In the politically charged Imports of Sugar from Nicaragua, Nicaragua v. US, GATT B.I.S.D. (31st Supp.) at 67-74 (1985), the US refused to defend the complaint in GATT, but did not block the process. Once adopted, though, the US announced that it had no intention of complying with the panel ruling, HUDEC, supra note 62, at 176; case 125 in id. at 513. Both the Pasta and Citrus panel rulings were blocked by the EC. The US then retaliated in the Citrus case by increasing tariffs on EC pasta imports, thereby linking the two cases. The EC counter-retaliated with higher
was not uniformly legalized (neutral panels, an increased role for the Secretariat), some aspects of it actually became more and more political (in particular, panel establishment and adoption).

3. **GATT’s quiet mutation as a bi-directional interaction between law and politics**

Like the low levels of discipline and participation in the text of GATT 1947, the gradual thickening of the GATT’s normative structure (more discipline or law) and the increased politicization in its decision-making (more participation and contestation, including a move to a consensus practice), can be explained on the basis of self-referential factors, internal to either the law or politics pole. On the law or discipline side, for example, the legalization of dispute settlement could be explained by a mounting belief in the rule of law amongst GATT parties and GATT panelists alike and the resulting conviction that third-party adjudication is the best and fairest method for dispute resolution. In addition, the stricter enforcement of GATT can be explained as a necessary feature to maintain support for trade liberalization. With tariffs gradually reduced, GATT had to tackle non-tariff barriers such as environmental or health standards, anti-dumping duties and subsidies, which were increasingly used to circumvent tariff commitments. This exercise proved far more contentious, stirring the attention of democratic politics, and required more open-ended rules. To obtain a minimum of compliance with the new disciplines, which were much harder to monitor and enforce, a stronger enforcement mechanism was needed.

Equally, the consensus practice and general increase in the levels of politics and contestation in GATT affairs has explanations self-contained within the politics pole. The 1960s marked the beginning of a gradual erosion of the club-like GATT, centered on an expert consensus on how to improve postwar trade relations.\(^81\) Due to a stream of new and extremely diverse GATT members (in particular, the EC, Japan and newly independent, developing countries\(^82\)) and the emergence of novel trade problems for tariffs on US lemon and walnut imports. The year after, the parties reached a settlement in both cases, *id.* at 495.

\(^81\) See *HUDEC*, *supra* note 19, at 67.

\(^82\) The EC replaced six key GATT parties with one new economic superpower whose goals and commercial policies were not part of the ITO/GATT heritage, *HUDEC*, *supra* note 19, at 209. The EC was, according to many, concerned more with creating its own internal market than with liberalizing world trade. Japan’s rapid economic growth led to GATT membership in 1955, introducing another key player that was not part of the early ITO/GATT consensus and had yet another perspective on trade matters. Finally, thanks to decolonization, a steady stream of developing countries joined the GATT, most of them through simple sponsorship by their former colonial master. From its original 23 signatories, the GATT expanded to 100 participants in 1973 the increase made up almost entirely of developing countries (GATT, *Activities in 1973* (Sales No.: GATT 1974/3), 64-5).
which the original GATT did not provide a blueprint (in particular, non-tariff barriers), deep substantive disagreements came to the open. In this new context, levels of contestation and politics rose naturally and consensus decision-making became a necessity if everyone was to be kept on board.

Although the above internal explanations elucidate much of the GATT’s quiet mutation, in my view, they miss a key factor. This key factor resides not on either side of the law-politics spectrum but in the interaction between the two poles. In the same way that low discipline and low participation mutually supported each other in the original GATT text, during the GATT’s 47 years of operation, gradually increasing levels of politics, participation and contestation enabled, and were the consequence of, progressive levels of discipline or law. More politics enabled more law. In turn, more law required more politics.

On the one hand -- and perhaps most importantly -- the higher levels of contestation and politics in the decision-making process (in particular, the consensus rule and effective veto power for each GATT party) enabled the thickening of the GATT’s legal-normative structure (including the legalization of its enforcement regime). Indeed, if GATT parties have full control, including veto power, over the creation of GATT rules as well as the adoption of GATT panel rulings, why would they fear the legalization of the GATT system? In this sense, higher levels of politics (e.g. the consensus practice) explain GATT’s increase in law (e.g. the legalization of the dispute process). The consensus practice made GATT legalization acceptable and digestible to GATT parties. On the other hand -- and here again is the bi-directional (even circular) interaction between law and politics -- GATT legalization called for and cemented the need for more politics, participation and contestation, including the GATT consensus practice. Faced with the gradual legalization of GATT dispute settlement is it not normal that GATT parties became more aware of and sensitive to how GATT rules were made and how GATT rulings were adopted? As Weiler, put it in the context of the EC’s evolution: “The “harder” the law in terms of its binding effect both on and within states, the less willing states are to give up their prerogative to control the emergence of such law or the law’s “opposability” to them. When the international law is “real”, when it is “hard” in the sense of being binding not only on but also in states, and

83 New topics emerged on GATT’s agenda, both because of the new membership and because of the replacement of the early postwar problems, which had gradually been resolved, by new questions of world trade around which no easy consensus emerged, namely: the creation of the EC (and the discrimination and new trade restrictions that came with it), the worsening trade position of the developing countries (and the call for special economic development exceptions), the radical effects of postwar agricultural programs, and the emerging industrial competition from the non-Western world, especially in the field of textiles. HUDEC, supra note 19, at 209. More generally, whilst 6 rounds of tariff negotiations had reduced the average level of customs duties between the major developed countries to levels approaching commercial insignificance (under 10 per cent), id. at 19, new protectionism emerged in the form of so-called non-tariff barriers (ranging from quotas and import licenses to technical standards and anti-dumping restrictions). To define and reduce protectionist non-tariff barriers proved much more difficult than making tariff reductions.

84 As Weiler, put it in the context of the EC’s evolution: “The “harder” the law in terms of its binding effect both on and within states, the less willing states are to give up their prerogative to control the emergence of such law or the law’s “opposability” to them. When the international law is “real”, when it is “hard” in the sense of being binding not only on but also in states, and
become for real, countries made sure that no rule passes the political process without their consent, hence the consensus practice?


In the previous section, I referred to the changes that took place in the world trade system from 1947 to 1994 as a silent mutation. In this section, I put the creation of the WTO in perspective, calling it an eruption rather than a big bang that in one instant transformed the trade system. My view, in other words, is that often the transformation that took place in the 47 years operation of GATT is underestimated, while that of the creation of the WTO is somewhat overblown. In the previous section, I elaborated on the incremental, but overall crucial changes that occurred in the world trade system from 1947 to 1994. The creation of the WTO can only be understood, and was only made possible, in the context of those multiple but less visible mutations. It is to the changes that occurred with the creation of the WTO that I turn next.

1. Drastic increase in discipline and law

The WTO treaty significantly thickened the trade system’s legal-normative structure. To begin with, almost 50 years after the failed ITO, a true international organization emerged with legal personality and an almost universal membership of close to 150 countries. A host of new substantive agreements (GATS, TRIPS, SPS, TBT) were adopted and became binding on all WTO members pursuant to the single-package approach. With few exceptions, the multiple-speed GATT came to a halt and was transposed into a uniform WTO. Also dispute settlement was streamlined. Most importantly, the right to veto the establishment of panels or the adoption of dispute rulings was taken away. To block the process a so-called negative consensus of all members is now needed, making the process virtually automatic. In addition, the creation of a new, standing Appellate Body to hear appeals against panel rulings added significant weight to the independence and further legalization of the enforcement branch. Unlike GATT Article XXIII, which focused on maintaining a mere balance of concessions, the DSU for the first time (albeit implicitly) imposes a legally binding obligation to comply with WTO rules and WTO dispute rulings. Crucially, the DSU

when there are effective legal remedies to enforce it, decision-making suddenly becomes important, indeed crucial”. Weiler, supra note 16, at 34.

85 See supra note 6.

86 Trade compensation and reciprocal suspensions of concessions are explicitly defined as temporary solutions only (DSU art. 22.1). The ultimate objective of the DSU is, thereby, either settlement or compliance. Paying compensation or suffering trade retaliation can no longer end a dispute. See John Jackson, The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligation, 91 AM. J. INT’L L. 60 (1997); Pauwelyn, supra note 42; John Jackson, International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to ‘Buy Out’?, 98 AM. J. INT’L L. 109 (2004). But see Judith Bello, The WTO Dispute Settlement Understanding: Less is More, 90 AM. J. INT’L L. 416 (1996); Alan Sykes & Warren
not only increased the level of discipline imposed on reluctant defendants (read: the EC which had blocked the GATT process in a number of cases brought by the United States). It also limited the exit options of what could be called aggressive complainants (read: the United States which previously pursued its GATT rights unilaterally under Section 301 of the 1974 Trade Act). Article 23 of the DSU obliges all WTO members to submit their WTO complaints to the WTO and not to pursue them unilaterally. In other words, complainants unhappy with the progress or result in WTO dispute settlement can no longer exit the WTO system and revert to self-help.

The strengthening of the trade system’s normative structure was confirmed in the first 10 years of the WTO’s operation. Close to 350 dispute proceedings were started and in all cases in which a panel was requested, it was established, notwithstanding the objections of defendants in certain cases. Similarly, in all cases in which a panel or Appellate Body ruling was circulated, it was adopted, even if the losers had major problems with the results. Illustrating the closure of exit for aggressive complainants, a crucial WTO panel ruled that core aspects of Section 301 of the US Trade Act were not in violation of DSU requirements, however, only because the United States solemnly promised not to seek redress of its WTO rights inconsistently with the multilateral track imposed by the DSU. Apart from a few borderline situations, the United States has, indeed, no longer reverted to the unilateral enforcement of its WTO rights. From the perspective of other WTO members, especially the weaker ones, this is a remarkable achievement. The new Appellate Body, in turn, streamlined panel case law and, like more conventional judicial bodies, has opted for a rigorous, impartial and strictly legal approach to analyzing trade


88 See in particular the US - Cuban Liberty and Solidarity Act dispute where the US threatened not to attend panel meetings. The case was subsequently settled.

89 See, e.g., the controversial ruling in EC – Asbestos admitting amicus curiae briefs, Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-containing Products, WT/DS135/AB/R, adopted March 12, 2001 [hereinafter EC – Asbestos], or the decision to grant a retroactive remedy in the Australia – Leather dispute against the request of the complainant (US) itself, Panel Report, Australia - Subsidies Provided to Producers and Exporters of Automotive Leather, WT/DS126/RW, adopted January 21, 2000. Both rulings were adopted.


complaints. It also placed WTO rules squarely within the broader field of public international law, thereby confirming their legally binding nature.

2. Modest but important increase in participation and politics

With the creation of the WTO, crucial though less visible and noted changes were implemented also on the politics or participation pole. Importantly, for the first time ever, the WTO Agreement explicitly confirmed that the WTO “shall continue the practice of decision-making by consensus followed under GATT 1947”. This confirmation – in deviation from the simple-majority voting rule in GATT Article XXV – offers stricter guarantees of participation and voice than a mere consensus practice developed over time. It cements the veto right of each and every WTO member. At the same time, the old majority-voting rule of GATT Article XXV was not entirely taken off the books: If, but only if, a decision cannot be arrived at by consensus, the matter can be decided by voting. The WTO Agreement did, however, introduce higher majority rules – insuring higher levels of participation or voice -- for specific decisions (to be resorted to, however, only if no consensus can be reached). A waiver now requires a ¾ majority of all WTO members (in some cases even consensus), in contrast to GATT 1947, which merely required a 2/3 majority of votes actually cast. The adoption of an authoritative interpretation of WTO rules now requires a ¾ majority of all WTO members, in contrast to the GATT 1947 practice of adoption by simple majority of votes cast pursuant to Article XXV.

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92 See ROBERT HOWSE, GLOBAL GOVERNANCE BY JUDICIARY, THE WTO EXPERIMENT WITH APPELLATE REVIEW (2005).


94 WTO Agreement art. IX:1. A consensus is defined as a situation where “no Member, present at the meeting when the decision is taken, formally objects to the proposed decision” (note 1). Art. XVI:1 confirms the importance of GATT practice: “Except as otherwise provided … the WTO shall be guided by the decisions, procedures and customary practice followed by the CONTRACTING PARTIES to GATT 1947”. WTO Agreement art. XVI:1.

95 WTO Agreement art. IX:1.

96 WTO Agreement, n. 4 (waivers of obligations subject to a transition period or a period for staged implementation “shall be taken by consensus only”).

97 WTO Agreement art. IX:3; GATT art. XXV:5.

98 WTO Agreement art. IX:2.

99 See JACKSON, supra note 2, at 132-137.
Besides embracing stricter decision-making rules, the WTO Agreement also reigned in the scope of joint action by WTO members. Whilst under GATT Article XXV contracting parties had the power to meet and decide “with a view to facilitating the operation and furthering the objectives of [GATT]”, Article IX of the WTO Agreement on decision-making does not confer any powers to WTO organs beyond those explicitly granted elsewhere in the treaty (such as Article XII on accessions, the DSU on dispute settlement, etc.). As a result, WTO organs, such as the Ministerial Conference or General Council, no longer have the broad ranging competence of deciding matters to facilitate the operation or further the objectives of the WTO treaty. Although the broad powers in GATT Article XXV were only occasionally exercised, this change represents an important cutback on the powers of the GATT/WTO.

Finally, the rules to amend the WTO treaty were tightened, thereby ensuring, once again, higher levels of participation. Instead of the 2/3 majority required for most amendments under GATT 1947, the WTO Agreement explicitly confirms the consensus practice.\(^{100}\) Although the fallback rule of 2/3 majority continues to apply in many cases when no consensus can be reached,\(^{101}\) an increased number of amendments require unanimity\(^{102}\) or consensus without fallback majority voting. In particular, amendments to the DSU\(^{103}\) and the addition of new plurilateral agreements to the WTO treaty\(^{104}\) require consensus of all WTO members. The latter ensures the consent of all WTO members before the WTO adds a new agreement to its mandate even if such new agreement is eventually not binding on all WTO members. Put differently, a multiple-speed WTO is thereby only possible with the consent of all WTO members.

Whilst the rules on the books might still leave some doubt as to the importance of consensus (in particular given the remaining fallback of simple majority voting), the actual practice of WTO decision-making in its first 10 years of operation eradicates all doubts. WTO members have zealously protected the consensus rule, and are clearly

\(^{100}\) WTO Agreement, art. X:1.

\(^{101}\) WTO Agreement, arts. X:1, X:3 & X:5. WTO members not accepting the 2/3 majority amendment remain unbound by the amendment unless the amendment is “of a nature that would not alter the rights and obligations of the Members” (in which case the amendment is binding on all WTO members), WTO Agreement art. X:4, or ¾ of WTO members decide that either a member must accept the amendment or it “shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference,” WTO Agreement arts. X:3 and X:5; see also GATT art. XXX:2.

\(^{102}\) See WTO Agreement, art. X:2 (referring to WTO Agreement arts. IX & X, GATT arts. I & II of GATT, GATS art. II:1, and TRIPS art. 4).

\(^{103}\) WTO Agreement, art. X:8.

\(^{104}\) WTO Agreement, art. X:9.
determined to defend their veto right and high levels of participation or voice. Apart from one decision on the accession of Ecuador and a few close calls where some countries pushed for a vote, in the first 10 years of the WTO, no voting has taken place, not even on waivers or the appointment of director-generals. All decisions were taken by consensus. Hence, notwithstanding the relatively light fallback voting rules on the books – ¾ for waivers and interpretations, simple majority for most other decisions – all WTO activity occurred with the (albeit sometimes tacit) agreement of all WTO members. Even though developing countries make up ¾ of the WTO membership, they as well vehemently defended the consensus rule. As Lorand Bartels points out, “so anxious are developing countries about their position in the WTO that both the Singapore and Doha Ministerial Declarations state expressly that any decision to negotiate on new issues … must be taken on the basis of explicit consensus. Mere silence [consensus] is no longer sufficient.”

3. The WTO as a bi-directional interaction between law and politics

As was the case for the other two periods – the text of GATT 1947 and the 47 years operation of GATT – the changes that took place with the creation of the WTO can be explained in a self-referential manner, limited to either the law or the politics pole. For example, the monumental closure of exit in the DSU is, one hopes, at least partially due to the high-spirited belief in the rule of law cherished by many Uruguay Round negotiators. In particular, developing countries had long been supporters of legalization as they hoped that a rules-based system, without political vetoes, would put them on a level playing field with economically more powerful parties. Another, probably more important, internal reason that explains the DSU revolution is of a blunter, real politics nature, namely a deal between the United States, on the one hand, and most other countries (in particular the EC and Japan), on the other. In exchange for automaticity in

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105 See, for example, the WTO Secretariat legal opinion that even the appointment of a facilitator to assist in the resolution of the Brazil-US cotton dispute under the WTO Subsidies Agreement requires an “affirmative consensus” (DSB, Minutes of the Meeting of 15 April 2003, WT/DSB/M/147, paras. 68-72, criticized in Ehlermann and Ehring, supra note 72, at 8).

106 General Council Decision of 16 August 1995 (WT/ACC/ECU/5), n. 1 (“This Decision was adopted by the General Council by a two-thirds majority”).

107 See the US-EC Bananas dispute where the EC pushed for a vote against a US request for sanctions authorization (reported in Ehlermann and Ehring, supra note 72, footnotes 32 and 33) and the contentious 1999 selection process for a new Director-General eventually leading to a split appointment of two individuals each for three years (General Council Decision of 22 July 1999, WT/GC/26).


the dispute process (e.g. the EC and Japan relinquishing their veto rights), the United States agreed to stop unilateral enforcement through Section 301.\textsuperscript{110} Finally, the 47 years of GATT experience, in particular the increasing difficulty of implementing trade agreements on non-tariff measures, such as the Tokyo Round codes, had taught a lesson: if the ambitious Uruguay Round agreements were to be worth the paper they were written on, they had to be backed-up by a credible and effective dispute settlement mechanism. Previous experience had shown that this had to include, eventually, the surrender of the veto right. For the GATT/WTO to be a way out of the prisoner’s dilemma of trade policy, a credible enforcement mechanism had to be in place to dissuade defectors. To outweigh the opposition to freer trade, the supporters of the WTO had to be reassured that this time the concessions obtained would stick.

As with the other two periods, my claim is, however, that these internal explanations miss a key factor. That key factor is encapsulated in the bi-directional interaction between law and politics. One of the main objectives of this article is to demonstrate that legal change occurs gradually, in tandem with developments in the political process. The surrender of the veto right in the new DSU was not a big bang that emerged out of the blue. Like the magical date of 1992 in the EC’s transformation\textsuperscript{111}, the concessions in the DSU that still mystify international lawyers were indeed a landslide, but one having its roots in a long history of smaller and bigger earth-shocks. The veto right itself was not written in the GATT itself (GATT provided, on the contrary, for simple majority voting) and came about only gradually (first invoked as late as 1972\textsuperscript{112}), through subtle inter-actions between law and politics. The surrender of the veto occurred through a similar incremental process, closing off a major exit route, while injecting new levels of voice.

As expected under the law-and-politics paradigm, the closure of exit, harder law and general increase in discipline (automatic DSU procedures as well as an obligation to follow the multilateral DSU track) called for equally important inputs of politics or voice including harder law-making. As squeezing a balloon on one side will automatically inflate the other, squeezing exit options inflated the need for voice or participation. As a result, the WTO’s further legalization led quite naturally to higher demands for voice or participation, including veto rights in the political-decision making process, higher fall-back majority rules and tougher amendment provisions. Because WTO norms can now be enforced through an automatic dispute process with limited exit options, control of the norm itself, that is, at the time it is created, is the only possible solution for individual

\textsuperscript{110} HUDEC, supra note 62, at 222-31, 237 (“Governments who preferred a more cautious, more voluntary adjudication system had apparently persuaded themselves that the risk of unchecked US legal aggression was a greater danger than an excessively demanding GATT legal system”). For reasons why the European Community could conclude the DSU, see Theofanis Christoforou and Allan Rosas, A preliminary assessment of nearly ten years of participation by the European Union in the WTO dispute settlement system (2004) (unpublished manuscript on file with author).

\textsuperscript{111} See infra text at note 137.

\textsuperscript{112} See supra note 78.
WTO members. This also explains why, to this date, WTO members continue to zealously defend the consensus rule and carefully preserve their veto right over any changes to the WTO bargain. As noted earlier, with one exception, no WTO decision was taken by vote, all passed pursuant to the consensus rule.\footnote{See supra note 106.}

Crucially, this pressure for voice or participation at the state-party level emerged with equal force for non-state actors outside the WTO. The former strengthened the system’s internal legitimacy, the latter questioned its external legitimacy. Because trade obligations gradually moved from the dry, technical field of tariffs to the hard-core political controversies of, for example, health and environmental standards, the world trade system affected and drew the attention, protest and voice not just of governmental trade elites and businesses, but also of NGOs, consumers and citizens at large. As Keohane and Nye argued in the broader context of international economic institutions: these pressures on international institutions are, ironically, reflections of their success. If international institutions were unimportant … no one would care about their legitimacy. But it is now recognized that the policies of the IMF, the World Bank, and the WTO make a difference. Hence they are judged not only on the quality of the results that these policies yield, but on the procedures through which the policies are developed.\footnote{Robert Keohane & Joseph Nye, The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy, in Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium 10 (Roger B. Porter et al. eds., 2001).}

Put differently, because the WTO matters -- in the words of the Appellate Body, it is about “the real world where people live and work and die”\footnote{Appellate Body Report, EC Measures Concerning Meat and Meat Products (Hormones) WT/DS26/AB/R, WT/DS48/AB/R, adopted February 13 1998, DSR 1998:1, 135, para. 187 [hereinafter EC – Hormones].} and its rules are for real (exit options are reduced), questions of international governance and legitimacy arise. This was not the case in respect of GATT 1947 (focused on tariffs, with multiple options to exit), nor are legitimacy and democratic deficit hot topics at institutions that the public continues to perceive as largely technical (such as the International Telecommunications Union (ITU) or the World Meteorological Organization (WMO)). The same applies for organizations that, like GATT 1947, have a weak enforcement mechanism, even if they deal with high politics topics and decide by majority vote (such as the UN General Assembly, whose resolutions are not legally binding and hence do not attract the same levels of contestation and voice).\footnote{See supra note 53. Eric Stein, after reviewing four intergovernmental organizations “confirms the correlation between the level of integration (normative-institutional and empirical-social), on the one hand, and the intensity of the discourse on the democracy-legitimacy deficit, on the other.” Eric Stein, International Integration and Democracy: No Love at First Sight, 95 AM. J. INT’L L. 489, 510 (2001).}
Conversely -- and here again is the bi-directional (even circular) force of the law-and-politics narrative -- it was not only the increase in discipline or law that enhanced the need for politics or participation (although in this third period, and contrary to the second, GATT’s operation, that trend was probably the strongest). The reverse was also true: Countries could only accept the dramatic increase in legalization and digest the automatic and compulsory enforcement of WTO obligations under the new DSU once they were reassured that, in the political process, no new obligations could arise without their consent.\footnote{As Weiler explains in the Community context: “Instead of a simple (legal) cause and (political) effect, this subtler process was a circular one. On this reading, the deterioration of the political supranational decisional procedures [in the WTO, the consensus-based, inefficient rule-making procedures] … constituted the political conditions that allowed the Member States to digest and accept the process of constitutionalization. Had no veto power existed, had intergovernmentalism not become the order of the day, it is not clear to my mind that the Member States would have accepted with such equanimity what the European Court was doing. They could accept the constitutionalization because they took real control of the decision-making process, thus minimizing its threatening features”. Weiler, supra note 16, at 36.}

It is this enhanced voice or participation in the political process that gave WTO members the confidence to engage in the revolutionary transformation of the dispute process and to accept it with relative equanimity.\footnote{It is, indeed, those increases in voice or participation (consensus decision-making, creation of a new Appellate Body which permits countries to voice their concern about panel rulings) that John Jackson pointed at in his 1994 Congressional testimony when trying to convince the US Congress that the new WTO, and particularly the DSU, would not infringe US sovereignty (John Jackson, Testimony Prepared for the US Senate Committee on Foreign Relations, June 14, 1994, in GOVERNMENT PRINTING OFFICE, HEARINGS ON THE WTO AND U.S. SOVEREIGNTY).}

In sum, higher levels of participation or politics at the WTO were not only a consequence of further legalization, they were, at the same time, an absolute precondition without which further legalization could not have taken place. Put differently, as much as higher levels of law and discipline increased the need for participation, voice and politics, stronger outlets for voice and more politics enabled and supported further legalization. The consensus rule in the political process, prevailing under this balance, unmistakably led to a lourdeur in WTO decision-making. However, viewed through the law-and-politics paradigm, it was and remains the crucial factor, the price to be paid for, an automatic and compulsory DSU. Without the consensus rule and other reinforcements of politics, WTO members could not have accepted and digested the dramatically more legalized WTO.

In this light, the WTO’s hard law combined with its hard law-making process or, as most put it these days, the combination of a highly efficient dispute process and a consensus-based, inefficient rule-making procedure, should no longer strike us as an “institutional paradox”.\footnote{See supra note 17.} To the contrary, this asymmetry can now be explained as a perfectly logical
– though not necessarily optimal – balance between high discipline or law and high participation or politics. In addition, contrary to common perception, the thicker normative structure of the trade system, though undoubtedly strengthening the WTO, did not come at the expense of individual members. On the contrary, through the consensus rule and related veto, the power of individual members was strengthened. Legalization only materialized because of more – not less – politics (including consensus decision making). Similarly, further legalization required and can only be maintained with more – not less – politics.

D. The Law-and-Politics Curve of the World Trade System

The law-and-politics narrative of the transformation from GATT to WTO can now be summarized in Chart 1 below. The left axis (‘politics’) represents levels of participation and contestation, and the flexibility, accountability and input legitimacy that come with it. The right axis (‘law’) depicts levels of discipline, pre-commitment and legalization, and the rule of law and welfare enhancing trade liberalization that flow from it (both providing output legitimacy). The diagonal curve depicts the trajectory of international organizations addressing subject matters that are politically sensitive and contestable. At those ‘politically sensitive’ organizations, deeper integration requires more law and more politics. More discipline or law leads to more participation or politics. As countries know that the rules are for real, they want a greater voice in their creation. Conversely, more participation or politics is what permits and sustains the imposition of higher levels of discipline or law. Without participation, contestation and accountability, high levels of discipline or legalization in politically sensitive areas would not be digestible and could

120 From this perspective, the period of the creation and early years of the WTO is not unlike what Joseph Weiler described as the “foundational period” of the European Community (from 1958, the creation of the EC, to the middle of the 1970s). Analyzing this early period, Weiler discovered an apparent paradox similar to the now fashionable complaint heard in WTO circles about the imbalance between the WTO judiciary (fully automatic and compulsory) and the WTO political branch (deadlocked by the consensus rule). He describes the paradox as follows: “from a legal-normative point of view, the Community developed in that first phase with an inexorable dynamism of enhanced supranationalism. European legal integration moved powerfully ahead [especially with the adoption by the European Court of Justice (ECJ) of core Community doctrines, such as direct effect of Community law before domestic courts and supremacy of Community law over domestic law]. From a political-decisional-procedural point of view, the very same period was characterized by a counter-development towards intergovernmentalism and away from European integration.” Weiler, supra note 16, at 16. Under the law-and-politics paradigm, the successful legal-normative activity in this foundational period of the EC (spurred, in particular, by the ECJ) meant higher levels of discipline or law, i.e., “Community obligations, Community law, and Community policies were ‘for real.’” Weiler, supra note 16, at 30. More discipline and closure of exit from the Community system had to increase the need for voice and participation. And so it happened. As Weiler recalls: “In what may almost be termed a ruthless process, Member States took control over Community decision-making”. The best example of this ‘revenge by the Member States’ was the legally dubious Luxembourg Compromise whereby de facto each and every Member State could veto Community proposed legislation, notwithstanding the majority voting rules in the treaty itself.
not be sustained. The horizontal curve, in contrast, depicts the trajectory of technical institutions (such as the ITU or the WMO) addressing low politics questions that the public gladly leaves to expert decisions. This curve is horizontal, at a constant low level of politics or contestation. No matter how strictly imposed or disciplined the organization’s rules, the level of politics or participation remains the same (government by experts rather than government by representative politics). Depending on the technical or political nature of the subject matters covered, the curve of an organization may be steeper (more politically sensitive) or flatter (more technical) and, as happened with the GATT, can change over time. Crucially, deviations to the left of the diagonal curve (too much politics and/or not enough discipline) risk an ineffective organization (such as the UN General Assembly (UNGA) or GATT in the 1960s). Deviations to the right of the diagonal curve (too much law or discipline and/or not enough politics or participation) risk an unsupported organization (such as currently the WTO). Put differently, deviations to the left may engender loyalty or input legitimacy but lack efficiency or output legitimacy (loyalty without efficiency). Deviations to the right, in contrast, threaten a situation of efficiency without loyalty.

The text of GATT 1947 is best situated on the horizontal, ‘technical organizations’ curve, somewhere to the right of the diagonal, ‘politically sensitive organizations’ curve (Point 1: ‘GATT 47’). As discussed earlier, the original GATT was framed as a technical, expert-driven organization dealing with low politics issues (tariffs), in a club-like, low discipline fashion (lack of formal ratification, majority decision-making, many escape clauses and weak enforcement). In its early years of operation, however, the GATT quickly shifted to higher levels of participation and politics, including decision-making by consensus, and somewhat higher levels of discipline (relatively effective dispute settlement) (Point 2: ‘GATT 50s’). Spurred by the increasingly contested nature of its activities (including non-tariff barriers) and a steady flow of new and diverse members, the GATT gradually changed tracks from the horizontal to the diagonal curve, from a technical to a more politically sensitive organization. In the 1960s and early 1970s, the increased levels of contestation and politics even brought the GATT to a temporary standstill and a virtually dormant dispute process (Point 3: ‘GATT 60s’). Thereafter, the organization, with renewed political impetus, continued its gradual process of legalization and expansion of trade disciplines to arrive, with the creation of the WTO, at a balance between relatively high levels of politics and participation (albeit state-centered, e.g. formal confirmation of the consensus practice) and dramatically increased levels of law and discipline (e.g., single package of around 30 agreements and a strengthened dispute process without vetoes) (Point 4: ‘WTO 94’). As elaborated below, the current situation after 10 years of WTO is, however, one of too much discipline or law for the prevailing levels of participation and politics. As a deviation to the right of the diagonal curve, the trade system thereby risks efficiency without loyalty.

121 See Hudec, supra note 19, at 209-210 (“In one situation after another the rules could not be enforced and were put aside. Formal renegotiation was attempted in a few areas, but for the most part the old rules were simply allowed to lapse while parties searched for whatever ad hoc settlement could be found”).
CHART 1: Law and Politics from GATT to WTO
PART II  THE THREAT OF A WTO FORTRESS

Part I of this article told and explained the story of the transformation of world trade using the alternative law-and-politics narrative instead of the conventional from-politics-to-law approach. Through this lens three distinct periods were discerned: the text of GATT 1947, the operation of GATT (1947-1994) and the WTO (1994-2004). My central claim was that for all three periods a crucial explanatory factor was the bi-directional, even circular, interaction between law and politics, discipline and participation. Contrary to conventional wisdom, the system did not evolve from trade politics to trade law. Rather, both the level of law and the level of politics gradually increased. More politics enabled more law. More law required more politics. While both trends were continually present and reinforcing each other, the former was particularly strong during the GATT’s operation, the latter especially prevalent since the creation of the WTO.

Part II of this article shifts gears to savor the prescriptive force of the law-and-politics approach. Let there be no mistake: Things are far from perfect in the world of trade. Gone are the days of a cozy GATT-club. Instead, the threat of a WTO fortress is looming, both for those outside and those inside the system. Many countries and people, in particular the poor and vulnerable, feel left behind or locked outside the WTO. For most developing countries, participation in the system remains elusive. Ordinary citizens in both poor and rich countries perceive the WTO as a fortress hard to penetrate, a system that operates, behind closed doors, in the interest of powerful producers and exporters, but is oblivious of the rural poor and the plight of workers or the environment. In this sense, the WTO suffers, first and foremost, from a lack of popular support, loyalty or input legitimacy. Yet, at the same time, unlike the early years of GATT, this lack of input legitimacy is no longer offset by progress in actual trade liberalization or output legitimacy. The increase in participation or politics that did take place over the years, in particular the insistence by WTO members on a political veto in decision-making, is currently stifling further welfare enhancing liberalization and preventing much needed reforms to make the system more equitable for developing countries and more open and supported by civil society. The deadlock in the political branch, combined with an automatic dispute process, also risks giving too much power to what many see as un-elected, faceless bureaucrats on the judicial branch. As a result, the WTO is perceived as a fortress even by those inside, that is, governments and domestic polities, tied-up in the straightjacket of the WTO single package, with no way out, or forward, either because of economic realities or because of the consensus rule and

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122 See, for example, OXFAM, RIGGED RULES AND DOUBLE STANDARDS: TRADE, GLOBALIZATION AND THE FIGHT AGAINST POVERTY 5 (2002) (“The problem is not that international trade is inherently opposed to the needs and interests of the poor, but that the rules that govern it are rigged in favour of the rich”).


124 Barfield supra note 17 at 1.
an ever stricter enforcement mechanism. In sum, the WTO now lives in what one could call the worst of both worlds: It misses the benefits of popular support or politics (lack of input legitimacy) and must do without the benefits of further trade liberalization and a rule of law perceived as fair and equitable for everyone (lack of output legitimacy).

In Part II of this article, I first analyze the conventional proposals for WTO reform and explain why, in isolation, they are counter-productive. As an alternative to those proposals, focused exclusively on one side of the law-politics spectrum, I then suggest a more comprehensive reform package that takes account of both the law and politics poles. My central claim is that such balanced package, though less spectacular than other proposals, is more likely to make the trading system both more legitimate and more efficient.

A. How not to reform the WTO

Knowing that the trade system currently reflects a combination of high discipline or law and high politics or participation (albeit focused on participation by member states) -- if you wish, a combination of a highly efficient dispute process and a consensus-based rule-making system – three major proposals for reform have most commonly been suggested: (i) soften the WTO’s decision-making rules so as to unlock the recurring political stalemates (in other words, reduce politics or participation by means of, for example, majority-based decision-making); (ii) revert to a more political dispute process with more control by individual members over the results in specific trade disputes (in other words, reduce discipline by, for example, granting members the right to block the adoption of dispute rulings); and (iii) further legalize and/or de-politicize the WTO’s normative structure to better resist political pressures obstructing trade liberalization (in other words, further increase discipline through, for example, legal standing for private parties under the DSU or scrapping the system’s escape clauses).
1. Facilitate decision-making in the political process

A first group of commentators suggests that we leave the WTO enforcement mechanism intact but facilitate its rule-making process, in particular, by dropping the consensus requirement. Pascal Lamy, the former EU trade commissioner, for example, has called the WTO’s decision-making process “medieval”. Those commentators would, in other words, maintain the high levels of discipline (a strong DSU) but reduce the strictures of high voice and participation through softer law-making procedures (e.g. through weighted or majority voting). This proposal is depicted in Chart 2 above, at Point 1 (‘Majority Voting’). Debra Steger, for example, argues that the remedy lies in a smoother and more efficient rule-making system. She explains her position thus:

If the system is working very well in one aspect [dispute settlement] and poorly in another aspect [decision-making], should the effective part be changed to make it less effective, or should the ineffective part be improved to make it stronger and more effective? Simple logic dictates that Members should fix the part that does not work, and leave the well-functioning part alone.126

Along the same lines, Claus-Dieter Ehlermann, a former Appellate Body member, argues that the “ideal solution is, of course, to facilitate and thus unblock the political decision-

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making process”. In the same breath, he adds that he is also “opposed to all suggestions that tend to turn the wheel of history back, in reintroducing elements of the original ‘diplomatic’ model of dispute settlement”. Robert Keohane is of a similar view:

The institutions are a mess: too much judicialization, too little legislation … If this is the problem, why not strengthen the legislative elements of the WTO … [T]his change should correct the overweening influence of the Appellate Body, as Qualified Majority has limited the ability of the [ECJ] to make new law.  

Other authors make more specific suggestions for the facilitation of WTO decision-making. Amrita Narlikar, for example, calls for the establishment of an ‘executive board’ similar to that in the IMF and the World Bank. Thomas Cottier and Satoko Takenoshita have proposed the introduction of a system of weighted voting, based on each WTO member’s trading power. Less drastic, the Sutherland report on The Future of the WTO proposes the creation of a Consultative Body with membership restricted to a maximum of 30 countries.

This first solution may be called the softer lawmaking or symmetry solution, favored mainly by insider, institutionalists, for it would introduce a degree of symmetry between the powers and efficiency of the judicial and the political branch of the WTO. Notwithstanding its apparent logic and symmetrical feel-good factor, considering the law-and-politics curve above, the symmetry solution is not a solution at all. If, as I explained earlier, the lourdeur in the political WTO process is a natural response to higher levels of law and discipline (in particular, a stricter dispute process) and this lourdeur is, moreover, a political condition or sine qua non for WTO members to establish the DSU as well as to digest and accept the WTO’s increased levels of discipline, taking away this lourdeur or safety-valve of consensus and veto would undermine the support for a strong WTO dispute mechanism. It could eventually

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127 Ehlermann, supra note 17 at 305. See also Ehlermann and Ehring, supra note 72, (“Consensus … inherently favours the status quo and … does not provide for equality … it is questionable whether it is also more democratic than the majority rule”).

128 Id. at 307.

129 BARFIELD, supra note 17, at 223, n.52 (quoting from an email by Robert Keohane to Claude Barfield, dated 11 June 2001).


131 Cottier & Takenoshita, supra note 21, at 184-6. The authors define trading power in terms of share of trade, Gross Domestic Product, market openness (defined as proportion of imports to GDP) and population. See also Dmitri V. Verenyov, Vote or Lose: An Analysis of Decision-Making Alternatives for the World Trade Organization, 51 BUFF. L. REV. 427 (2003).

132 See supra note 18, at 70-71.
threaten WTO disciplines more broadly in that WTO members, faced with weaker outlets for voice and the prospect of being outvoted, would more frequently seek to exit. This, in turn, would re-establish the expected equilibrium: less politics or participation (brought about by the “more efficient” rule-making system) would lead to more pressure on the exit side (a weaker DSU and more problems with non-compliance), or even total exit as in withdrawal from the WTO altogether. In the end, rather than resolving the problem, the symmetry solution risks undermining the entire WTO regime. Hence the situation of the proposal at Point 1 (‘Majority Voting’) in Chart 2 above, deviating to the right of the law-and-politics curve with the risk of an “unsupported” regime or efficiency without loyalty. Consensus decision-making is arduous, messy and time consuming. However, it is the price to pay for a broadly supported and legitimate word trade system. Political deadlocks are unavoidable and serious crises and threats of exit from the system part of the game. They should not be overblown133 as in the past they have proven to be crucial triggers for further progress.

a. The lessons from European Integration

The history of European integration offers useful lessons in support of maintaining high levels of voice or participation for each WTO member, at least in the foreseeable future. According to Joseph Weiler, the Community’s foundational period (1958 to the mid 1970s) witnessed a dramatic increase in discipline or law (constitutionalization mainly through the European Court of Justice), coupled with a surge in the need for member state voice or participation (epitomized by a veto for each member state under the Luxembourg Compromise).134 In some way, this is where the WTO stands today, toward the end of its foundational period, with an equilibrium between high discipline (the DSU) and high participation (consensus decision-making). Determining what happened after this foundational period in Europe may prove illustrative of what is in store for the WTO. Although consensus politics, in the shadow of the veto in the Luxembourg Compromise, was needed to establish an equilibrium in the first, foundational period and to digest the expansion of Community powers in what Weiler discerns as a second crucial period135, the costs of such consensus politics became apparent toward the end of the 1980s: the Community became increasingly unable to respond to new challenges, that called for real policy choices. Thus, while consensus politics (the manifestation of enhanced Voice) explains the relative equanimity with which the jurisdictional limits of the Community broke down in the 1970s, this very consensus model also

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133 As in, for example, Sunjoon Cho, A Bridge too Far: The Fall of the Fifth Ministerial Conference in Cancun and the Future of Trade Constitution, 7 JIEL 219 (2004) or the Sutherland Report, supra note 18 (exaggerating the threat of regionalism, a form of exit from the WTO, as a major threat to multilateralism even though it has in the past proven to be a catalyst for multilateral agreement).

134 See supra note 120.

135 Weiler discerns a second crucial period, which he calls a period of mutation, during which Community competences were drastically expanded and became virtually limitless (1973 – mid 1980s). Weiler, supra note 16, at 43.
explains why, within the Community’s expanded jurisdiction, it was unable to realize its most traditional and fundamental objectives, such as establishing a single market in the four factors of production.136

This political deadlock – not unlike the one we now witness at the WTO – led to what Weiler distinguishes as the third period in the transformation of Europe: the modern era of 1992, i.e., the enactment of the Single European Act (SEA), and beyond. Key to the SEA’s success was an agreement among EC member states to shift to (qualified) majority voting, at least for those decisions required to complete the single European market. However, the exit-voice, law-politics equilibrium was thereby out of balance (majority voting meant reduced voice). So what was required in response? Indeed, a counterbalancing decrease in discipline or law, in other words, a number of cracks in the constitutional structure of the Community (among other things, a national safeguard mechanism137 and the official acknowledgement of a multiple-speed Europe138). At the same time, Weiler argues that further challenges to the Community’s legal-normative foundation may have been prevented by the member states’ sense of loyalty toward the European project:

acceptance of Community discipline may have become the constitutional reflex of the Member States and their organs. A Loyalty may have developed that breaks out of the need for constant equilibrium. The two decades of enhanced Voice thus constitute a learning and adaptation process resulting in socialization; at the end of this period decisional changes affecting Voice will not cause a corresponding adjustment to Exit.139

Yet, loyalty in the Community sphere, Weiler explains, “is precarious because there is a legitimacy dissonance between the constitutional claims of the polity and its social

136 Id. at 66.

137 EC TREATY art. 100A(4) (permits member states, subsequent to a harmonization measure at the Community level, to enact national measures as long as they are proven to be necessary, taken on legitimate grounds and non-discriminatory). See Weiler, supra note 16, at 69.

138 EU TREATY arts. 11(2), 40(a)(2) & 43(g) (enabling closer or enhanced cooperation between a limited number of member states with the option for other member states to stay out). See Weiler, supra note 16, at 73 and 99-101. Along the same lines, note that the new European Constitution, for the very first time, explicitly includes a provision permitting members to leave the EU altogether (TREATY ESTABLISHING THE CONSTITUTION FOR EUROPE, December 16, 2004, O.J. (C310) 1 (2004) [hereinafter EUROPEAN CONSTITUTION], art. I-60). This explicit option for total exit can be seen as another response to lower levels of voice. Although it may never be resorted to it provides an important, symbolical safety valve.

139 Weiler, supra note 16 at 77.
reality". Challenges of democracy and legitimacy, especially social legitimacy (that is, “social acceptance of the system”), remain:

People accept the majoritarian principle of democracy within a polity to which they see themselves as belonging. … The current shift to majority voting might therefore exacerbate legitimacy problems. Even an enhanced European Parliament, which would operate on a co-decision principle, will not necessarily solve the legitimacy problem. The legitimacy crisis does not derive principally from the accountability issue at the European level, but from the very redefinition of the European polity.

In other words, for Weiler, at the European level, as at any other level of governance, there can be no democracy without demos.

What lesson can the world trade system learn from this European story? In my view, it is this: If even at the more integrated European level the need for voice or participation of individual member states was so strongly felt in response to increases in law or discipline, and an equally strong pressure to reduce law or discipline emerged when faced, for example, with majority voting, then a fortiori these interacting needs for participation and discipline, voice and exit, must play a role at the more loosely integrated and wildly more diverse WTO. At the WTO level, individual members insist all the more on their sovereignty and the member-driven nature of the organization. As a result, executive or majority-based voting at that level is likely to put even more pressure on the exit side. In addition, in Europe, decades of strong voice, participation and vetoes gradually nurtured a sense of loyalty toward the European project, through “decades of enhanced Voice [and] … a learning and adaptation process resulting in socialization”. At the WTO, in contrast, the process of socialization has hardly begun. On the contrary, to the extent WTO legalization is equated with de-politicization, or keeping the trade game removed as far as possible from domestic politics, non-trade concerns and social contestation, the raison d’être of the WTO is to skirt engagement with the broader society. Indeed, it would not be unfair to say that at this moment most layers of society have serious doubts as to the WTO project, be it because they feel left behind, such as developing countries, or because they perceive the WTO as a front for big business and dehumanizing capitalist values. As a result, as the WTO stands today, not enough loyalty exists to either replace voice or to keep exit at bay. In this context, without drastically reducing current levels of discipline or law and thereby weakening the system’s normative structure and effectiveness, it is hard to imagine that any WTO

140 Id. at 99.
141 Id. at 80.
142 Id. at 83, 85.
143 JACKSON, supra note 17 and Sutherland Report, supra note 18, at 69.
144 Weiler, supra note 16, at 77.
member could accept to be outvoted based on some majority-voting rule, be it a majority of WTO members (which would give disproportionate power to countries like Luxembourg and Trinidad and Tobago) or, even less so, a majority of the people living in WTO members (which, of course, would hugely favor countries like China and India). If the emergence of a European demos is questionable, the feasibility of a worldwide, WTO demos is even more elusive. Whatever other forms may exist to legitimate international governance, in the WTO none are currently strong enough to support the revolutionary shift from consensus to majority-based decision-making without seriously undermining the trade system’s effectiveness, including its strong dispute process. The European story – and its ongoing quest for legitimacy notwithstanding the existence of a European parliament -- ought to warn the world trade community to be patient and to build on incremental changes and improvements.

b. The lessons from the failed New International Economic Order (NIEO)

The difficulty of setting up an effective and legitimate system based on majority voting at the world level is further illustrated by the failure of the NIEO. Strengthened by growing numbers and their power in the world economy (in particular because of the oil crises), in the 1960s and 1970s developing countries became increasingly frustrated with the strictures of the GATT system and the need for consensus to change it. As a result, they turned their attention to the UN and, through the much softer law-making process prevalent there (simple and 2/3 majority147), created “their own” United Nations Conference on Trade and Development (UNCTAD).148 Through a series of hotly contested UN General Assembly Resolutions (all adopted without the support of the developed world)149 they unilaterally declared the existence of a New International

\[\text{\footnotesize 145 Crudey put, the big WTO players, such as the United States and the EC, zealously defend the consensus rule so as not to be constantly outvoted by the large majority of WTO members, ¾ of which are developing nations. Equally, developing countries strongly defend the consensus rule because it protects them against the whim of the most powerful and gives them the security (or at least the illusion) of a veto for all WTO decisions. Recall in this respect that developing nations do not always form a homogeneous group and often have contradictory interests. Hence, for them as well there is a risk inherent in majority voting even in an organization that consists of ¾ developing countries.}\]


\[\text{\footnotesize 147 See UN Charter, art. 18.}\]


\[\text{\footnotesize 149 See F.V. GARCIA-AMADOR, THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT (1990).}\]
Economic Order (NIEO), excusing themselves from any meaningful reforms and trade liberalization efforts (which should, after all, be beneficial to developing countries themselves) whilst imposing strict obligations on the developed world and its economic operators active in developing countries. Hence, instead of working out a consensus at GATT, developing countries created the NIEO through the UN without the support of the developed world. In other words, without any voice or support from those who, in economic and political terms, mattered most, they created a new regime hoping it would change the landscape of world trade.

Viewed through the lens of the law-and-politics paradigm, the effort was doomed to fail: low or no voice at all cannot possibly keep exit at bay. As a result, the NIEO never had any real impact, especially not on developed countries, and ultimately ended in utter failure. With the benefit of hindsight, the consensus requirement in GATT (which blocked the most extreme developing country demands) may, therefore, have been the GATT’s savior as well as the secret of its further success (compared to the stagnation, ineffectiveness and political infighting often seen in those days at, for example, the UN General Assembly or, in the 1960s, UNCTAD). The harder law-making entailed by the consensus requirement was, indeed, a necessary feeding ground for the corresponding hardening of the GATT normative regime and the reduction in trade barriers and increase in welfare that came with it. In contrast, had developing countries been able to push ahead their NIEO demands within the GATT, without the support or voice from the major trading nations, the GATT would most likely have met the same fate as the NIEO: commercial irrelevance.

c. Hidden benefits of the WTO consensus rule

Let it be clear, finally, what the WTO consensus rule stands for. Consensus does not require the positive vote of each and every WTO member. In this sense, it differs from unanimity. A consensus decision implies a proposal that was not explicitly objected to by any WTO member present at the particular meeting. It is much easier to reach than unanimity, if only because there is no need to get the explicit vote of all 150 members. Countries not affected by, or interested in, the issue at hand can remain silent. Given the

150 See Thomas Franck, Lessons of the Failure of NIEO, in INTERNATIONAL LAW AND DEVELOPMENT, CANADIAN COUNCIL ON INTERNATIONAL LAW, PROCEEDINGS, XV ANNUAL CONFERENCE 82 (1986); Stephen Zamora, Voting in International Economic Organizations 74 AM. J. INT’L L. 566, (1980). “An international economic organization that does not reflect actual economic forces, in its operations as well as in its decisionmaking processes – has little promise as an active, effective agency.” Id. at 608. The NIEO was a failure not the least because it meant that for decades many developing countries missed the opportunity to reform their political and economic systems, thereby depriving themselves from participation in the world economy.


152 See supra note 94.
shadow of the future, members have an incentive to use their veto sparingly, that is, only for decisions vital to them. This makes consensus decision-making not completely unlike decision-making by executive committee.\textsuperscript{153} Crucially, the consensus rule also resembles weighted-voting in that it gives more weight to politically and economically powerful players.\textsuperscript{154} A consensus rule does not mean that every player has equal power.\textsuperscript{155} It thereby has the positive attribute of weighted voting in that it reflects power realities and does not give disproportionate weight to small or non-affected countries.\textsuperscript{156} This should go a long way in countering the criticism that consensus decision-making at the WTO gives too much power to \textit{developing nations} who represent a small share in world trade but a \(\frac{3}{4}\) majority of the WTO membership. There still remains the criticism that under the consensus rule the \textit{big players} have too much power. This risk is real but can be mitigated by repeat play and the shadow of the future. Evidence shows, for example, that recent developing country participation in WTO General Council meetings has increased dramatically as compared to the early years of the WTO.\textsuperscript{157} Moreover, when it comes to actual decision-making, even a coalition of the most powerful WTO players can eventually be blocked by the veto of a single developing country. Although small countries will not be able to use their veto often, for those questions that are crucial to them, the veto remains a viable option.

Finally, it must be recalled that the WTO treaty maintained a relic of decision-making of GATT 1947, namely the rule that if no consensus can be reached on an issue, the fallback

\textsuperscript{153} Without having to make the politically sensitive decision of which countries sit on the committee, and with the benefit of having the flexibility of different “committees” depending on the issue.

\textsuperscript{154} \textit{See Jackson} supra note 2 at 128 and \textit{Hirschman}, supra note 15, at 40 (“voice is ... conditioned on the influence and bargaining power customers and members can bring to bear with ... the organization to which they belong”).

\textsuperscript{155} \textit{See Steinberg}, supra note 1512, at 365 (“The GATT/WTO decision-making rules have allowed adherence to both the instrumental reality of asymmetrical power and the logic of appropriateness of sovereign equality”).

\textsuperscript{156} \textit{See Zamora}, supra note 151. At the same time, the consensus rule avoids some of the major drawbacks of weighted voting: There is no need to agree \textit{ex ante} on a list of votes by country, nor on the criteria that will be used to divide the votes. Within the informal structure of consensus decision-making, the major stakeholders, as well as their weight, can differ depending on the question and interests at hand.

\textsuperscript{157} To give an indication, when comparing country participation during the first nine General Council meetings (Jan. 1995 – Dec. 1995) to that during nine more recent General Council meetings (Dec. 2002 – Feb. 2004), both in terms of intervention frequency and number of words, developing country participation has boomed. During the former period (1995), the first developing country in terms of intervention frequency was only ranked 6\textsuperscript{th} (Argentina, 3.6%, compared to the EC, ranked 1\textsuperscript{st}, with 10.8%). During the latter period (2002-4) interventions were spread far more equally, with the US ranked 1\textsuperscript{st} at 5.4%, EC and India second with both 3.6% and Kenya 6\textsuperscript{th} with 2.8%. Data and statistics are on file with author.
is, unless otherwise provided, majority voting. Although this option has not been exercised in the first 10 years of the WTO’s existence, it may still play a role in the future. It would be sufficient for the threat of majority voting to become real. If so, consensus decision-making would operate in the shadow of a vote. This would facilitate consensus building and may strengthen the voice of weaker countries. It may be appropriate, in this respect, to distinguish between different types of WTO decisions. So-called housekeeping or internal WTO decisions – such as the appointment of a new WTO Director-General\(^\text{158}\) – could at times be taken by majority voting or at least in the shadow of majority voting. The same could be done for decisions that do not alter WTO rights and obligations, in particular authoritative interpretations which, on paper, need only a $\frac{3}{4}$ majority. Such authoritative interpretations, even if taken only in the shadow of a vote, could facilitate legislative correction of unpalatable dispute rulings, i.e., offer an insurance policy for voice in the event dispute settlement goes wrong. This, in turn, could rectify one of the most important drawbacks of the current balance between high law or discipline (efficient dispute process) and high politics or participation (consensus rule in the political process).\(^\text{159}\)

2. Revert to a GATT-like, diplomatic dispute settlement process

Instead of strengthening the political branch (through, for example, majority voting), a logical alternative to cure the current asymmetry between the WTO judicial and political branches is to weaken the judicial arm, in particular, to lower discipline or law under the DSU. The most vocal proponent of this solution is Claude Barfield of the American Enterprise Institute (a conservative think-thank). When it comes to the asymmetry problem, Barfield’s focus is not so much on the inefficient rule-making process, but rather on the new, judicialized WTO dispute system. He sees the DSU as “politically unsustainable … because the imbalance between ineffective rule-making procedures and highly efficient judicial mechanisms will increasingly pressure the panels and the AB to ‘create’ law, raising intractable questions of democratic legitimacy”.\(^\text{160}\) To correct the asymmetry, which Barfield considers to be both an imbalance and a “constitutional flaw” (although earlier, I explained why it is rather a logical – though not necessarily optimal -- equilibrium), he recommends alternatives that would reintroduce some of the former elements of “diplomatic” flexibility that characterized the earlier GATT regime. In Barfield’s view, conciliation, mediation, and voluntary arbitration need to be added as real alternatives; in addition, if a substantial minority of WTO members clearly opposes a

\(^{158}\) See Procedures for the Appointment of Directors-General, General Council, 10 December 2002, WT/L/509, stating in paragraph 20 that in the event no consensus can be reached by the deadline, “Members should consider the possibility of recourse to a vote as a last resort by a procedure to be determined at that time”.


\(^{160}\) BARFIELD, supra note 17, at 7.
decision, a blocking mechanism should be used to set aside that decision until further negotiations produce a consensus. By reintroducing the possibility for defendants, assisted by a minority of WTO members, of blocking the adoption of panel and Appellate Body reports, Barfield would obviously increase the options for WTO members to exit from their WTO obligations. Hence the situation of his proposal at Point 2 in Chart 2 above (‘Veto in Dispute Process’). Through the lens of the law-and-politics curve, less law or discipline (re-introduction of vetoes in the dispute process) would, indeed, reduce the need for politics and voice and ought to lead to a more efficient rule-making process: Once WTO Members experience that the law they create is softer, they are more likely to agree to the creation of new law, hence, the political process of rule-making is likely to become more efficient (softer law leads to softer law-making; less discipline, requires less participation).

Granted, therefore, that less discipline or law may lead to a smoother decision-making process and facilitate legislative correction of the Appellate Body (Barfield’s main objective), the reform has one major flaw: It overlooks almost 100 years of trade history. This history, as recounted in Part I, tells us that through a process of trial and error, it was discovered that for the word trade system to be effective, in particular once it started addressing more elusive non-tariff barriers, it had to be coupled with an independent and automatic enforcement mechanism. Softer forms of mediation or consultations alone will not do. In other words, for the political consensus to stick and, in particular, for trade liberalization to materialize in the face of domestic pressures for protectionism, the rules of the game had to be backed up by a strong legal-normative system. Similar to proposals for a wholesale re-introduction of representative politics in the world trade system161 (depicted at Point 3 in Chart 2 above, ‘Representative Politics’), re-introducing vetoes in the dispute process overlooks the need for pre-commitment and discipline to tame the protectionist excesses of representative politics. Without such hand-tying, the WTO would soon be ineffective and fail to fulfill its crucially important mandate of welfare enhancing trade liberalization162. Hence the situation, in Chart 2 above, of both the proposal for a veto in the dispute process (Point 2) and a wholesale re-introduction of representative politics (Point 3) to the left of the law-and-politics curve with the risk of an “ineffective” regime or loyalty without efficiency.

The experience of the Great Depression and World War II prompted GATT negotiators to go beyond the lofty rhetoric of political declarations and to agree to more specific, legally binding commitments in 1947. The 47 years of operation of GATT have one recurring theme: the gradual independence of the dispute resolution mechanism spurred by the realization that without strong normative pull trade liberalization will not materialize. This was painfully experienced, in particular, in the 1960s and 1970s when

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161 See supra note 123 and, to a lesser degree, Howse, supra note 25.

162 See George Downs et al., Is the Good News about Compliance Good News about Cooperation? 50 INT’L ORG. 379, 395-7 (noting that “deeper” international cooperation that requires more extensive changes to domestic laws and practices requires a strong monitoring and enforcement mechanism).
many GATT rules were simply put aside and the entire trade system almost collapsed. The need for a strong enforcement mechanism was again felt in the years leading to the Uruguay Round when a combination of exit pressures – ranging from the blocking of panel reports to the conclusion of regional trade deals and US unilateralism – seriously undermined the world trade system. Indeed, it was exactly the type of mechanism that Barfield now proposes – the possibility for countries to block dispute settlement – that triggered US unilateralism and necessitated the DSU reforms, including the setting aside of vetoes. Without those DSU reforms, the United States, in particular, would not have signed off on the WTO treaty.

Whilst reintroducing political vetoes in the dispute process would, therefore, be “a regression towards some of the very important problems in the GATT era” and risk an ineffective world trade regime, a better solution to alleviate Barfield-type fears –

163 Although the GATT dispute process with vetoes worked reasonably well (according to Robert Hudec, for example, 80% of all GATT cases were resolved in a satisfactory manner, see HUDEC, supra note 62; Robert Hudec, Daniel Kennedy & Mark Sgorbossa, A Statistical Profile of GATT Dispute Settlement Cases: 1948–1989, 2 MINN. J. GLOBAL TRADE 1, 32–34 (1993)), this success is relative and not guaranteed in the context of the WTO. First, it is relative because the GATT figures do not include those disputes that members never bothered to raise formally because they knew that the process would be blocked. Second, and more importantly, the relative success of the GATT system with vetoes is unlikely to transpose to the much broader and deeper commitments made in the new WTO treaty. WTO commitments go well beyond tariff questions and impose disciplines in far more sensitive areas (such as health, safety, services trade and intellectual property protection). When faced with complaints in those fields, WTO members would be much more inclined to use their veto, thereby risking the paralysis of the entire process. This was apparent already in the late 1980s and early 1990s when, according to Hudec’s own statistics, 40% of disputes were blocked especially those involving non-tariff barriers (such as the US-EC Hormone Beef case), reaching the point of undermining the entire dispute process. Hence, in the context of the WTO, a system with vetoes is unlikely to transpose to the much broader and deeper commitments made in the new WTO treaty. The possibility of (a minority of) individual WTO members blocking the dispute process would seriously taint the objectivity and legal quality of dispute rulings. As happened in the

164 It is, therefore, no small irony that it is exactly the United States that recently espoused Barfield-type reforms. Faced with a number of losses in WTO dispute settlement, the United States proposed to permit the partial adoption of dispute rulings by the DSB, in case the parties disagree with a particular finding (Negotiations on Improvements and Clarifications of the DSU on Improving Flexibility and Member Control in WTO Dispute Settlement, Contribution by Chile and the United States, TN/DSW/28, 23 December 2002). In the process, much like Barfield himself, the United States seems to have forgotten about the original reasons why it pushed so hard for DSU automaticity in the first place: foot-dragging and blocking by the EC and other GATT parties, threatening support for trade liberalization at home.

165 Sutherland Report, supra note 18, at 56.
essentially, that the WTO judiciary acts _ultra vires_ – is to prevent judicial activism by WTO panels and the Appellate Body. This direction is already made very explicit in the current DSU, prohibiting panels and the Appellate Body to “add to or diminish the rights and obligations” of members as set out in the WTO treaty. Of course, the line between applying existing law and making new law is a notoriously thin one. However, with sufficient membership control and quality checks on the personnel active in dispute settlement, a degree of sensitivity and deference of that personnel to the needs and fears of individual WTO members and common judicial techniques that can translate political sensitivities into legal results (such as deference, judicial minimalism, putting the burden of proving an obligation on the complainant and even declaring a _non liquet_), one can ensure that the WTO judicial branch respects the sovereign prerogatives of WTO members whilst at the same time applying the rules that those members themselves agreed to. Legislative correction of the Appellate Body can take forms other than formal vetoes of Appellate Body rulings. In particular, the political

GATT days, when panels operated in the shadow of a veto, WTO panels would again have to take up a political role and craft their decisions in such a way that they would pass muster with the required majority of WTO members. The adoption process, as well, would inevitably lead to power games and nasty political infighting, bargaining and trade-offs (of the sort, “I support blocking your ruling if you support blocking mine”). This combination of factors would bring into question the foundations of the WTO normative structure (“why should I comply with a ruling if you refuse to do so?”) and with it the effectiveness and legitimacy of the world trade regime itself.

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167 DSU arts. 3.2 & 19.2.

168 Including the appointment and reappointment of Appellate Body members by consensus of all WTO members (DSU art. 17.2); the _de facto_ reservation of a US, EC and Japanese seat on the Appellate Body with the other four seats rotating on a geographical basis; and the practice that even nationals of a disputing party can sit on an Appellate Body division.

169 See Steinberg, _supra_ note 19; James McCall Smith, _WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings_, 2 WORLD TRADE REV. 64, 75 (2003) (“courts will act with restraint, cognizant of their political context and perceived legitimacy … Appellate Body members are … eager to avoid adverse political responses by WTO member states.”).


171 See Hudec, _supra_ note 1, at 215, 219 (“Courts do have legal tools that permit them to deflect pressures to legislate … the best option at the present time would be to continue dealing with the problem cases as they come, under the present DSU rules, subject to whatever technical improvements governments may agree to.”).

172 See Tom Ginsberg, _International Judicial Lawmaking_ (2005), unpublished manuscript on file with author (“While formal mechanisms to over-rule international judges are relatively difficult to
control that the DSB currently exercises over dispute settlement ought not be underestimated. As the umbilical cord between the political and judicial branch, it is a crucial interface and forum of contestation or voice to which both panels and the Appellate Body are most receptive. The outcry in the DSB against the Appellate Body’s acceptance of *amicus curiae* briefs in the *EC – Asbestos* dispute offers a good example.173 Ever since, the Appellate Body has not drawn information from such briefs (even if they were formally accepted) and a number of panels even refused outright to accept *amicus* briefs.174 Finally, as pointed out earlier, authoritative interpretations correcting dispute rulings remain a possibility and, at least on the books, require a mere ¾ majority. As elaborated below, resisting the temptation of ever more legalization (including the temptation of judicial activism and a strict rule of precedent), and maintaining crucial exit options (such as meaningful escape clauses and relatively weak remedies) would take some steam off the judicial branch. This, in turn, should facilitate political consensus building and legislative correction, and could even make ¾ majority interpretations digestible. Equally, more participation and contestation in WTO affairs, as suggested below (more politics), should help avoid overreaching by the Appellate Body and lay a broader basis of support for its rulings.

3. Further legalize/de-politicize the WTO

A third group of commentators focus their attention on further improving the legal-normative branch of the WTO (see Chart 2 above, Point 4: ’More Legalization/De-politicization’). Ernst-Ulrich Petersmann, for example, is a strong advocate of further constitutionalization of the WTO. He construes WTO rights and obligations as individual human rights and at the domestic level would give direct effect to those rights before domestic courts.175 In various ways and degrees, Cottier (direct effect of WTO rules before domestic courts),176 Weiler (ending the diplomatic remnants of dispute settlement in favor of a more openly legalized approach),177 Ragosta (standing for private exercise, states have at their disposal various informal mechanisms to communicate their views to judges”).

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173 General Council, Minutes of Meeting, WT/GC//60, 22 November 2000.


parties under the DSU\(^{178}\), Bhala (calling for a \textit{de jure} rule of precedent\(^{179}\)) and Horlick and Mavroidis (tougher remedies\(^{180}\)) have also advocated a further thickening of the WTO legal system. Authors expressing support for judicial activism or constitutionalization through Appellate Body rulings fall under the same category.\(^{181}\) In a more sweeping theory, McGinnis and Movsesian endorse WTO adjudicative power but warn against any attempt to draw the WTO into the politics of non-trade concerns.\(^{182}\) In their view, de-politicization or separation of trade law from domestic and international politics is not so much a problem. Rather it is the very purpose of the WTO and a prerequisite to economic liberalization.

\textbf{a. The risks and illusions of further legalization}

How would this harder law approach -- if implemented in isolation -- play out under the law-and-politics curve? To begin with, further legalization would only worsen the current asymmetry between the judicial and the political branch. Judicial activism by the Appellate Body, in particular, risks lawmaking with almost no voice, participation or guidance from WTO members. Under the law-and-politics curve, in a politically sensitive organization like the WTO, such activism, though it may trigger short-term liberalization and predictability gains, would not be sustainable (more discipline or law requires more, not less, participation and politics).\(^{183}\) Indeed, if a choice had to be made

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\(^{178}\) Ragosta, \textit{supra} note 20.


\(^{182}\) McGinnis & Movsesian, \textit{supra} note 12.

\(^{183}\) Given the consensus rule, and the need to keep it for the time being, the WTO judiciary cannot afford to be as activist as, for example, the ECJ. The ECJ could, for example, extend the list of Article 30 EC Treaty exceptions (similar to GATT Article XX) as well as more easily strike down member state measures since it knew that EC member states acting jointly could respond and enact secondary legislation such as an EC-wide environmental regulation that no longer restricts intra-Community trade but takes account of the concern originally expressed in the condemned member state measure. The WTO does not have similar legislative powers.
between judicial lawmaking and voting by qualified majority (the softer law-making proposal discussed earlier), the latter would be the least of two evils (this is exactly how majority voting was sold in the EU, in the wake of judicial activism by the ECJ\textsuperscript{184}). Conversely, knowing that legalization or increased discipline unequivocally calls for more politics and expression of voice or participation, the harder law solution would only worsen (not resolve) the current deadlock in the political, rule-making process: countries would insist even more on their veto rights. Moreover, since harder law (more discipline) cannot be sustained without more political support (more politics), it is highly questionable, as things stand today, that sufficient political support – be it at the state or broader societal level -- is available to make such further legalization digestible.\textsuperscript{185} In this context, further legalizing the WTO is unlikely to offer tangible gains in trade liberalization.\textsuperscript{186} It risks rather serious pressure on the exit side (even under increased legalization, WTO members, especially the most powerful ones, could walk away from their obligations). This, in turn, may undermine, rather than strengthen, the legitimacy and effectiveness of the trade regime. Hence the situation of this proposal in Chart 2 above at Point 4 (‘More Legalization/De-politicization’), deviating to the right of the law-and-politics curve with the risk of an “unsupported” regime or efficiency without loyalty.

In each stage of the transformation of the world trade system, the maintenance, even selective increase in, exit options was an absolute pre-condition for reaching consensus and concluding new agreements. As pointed out, without broad exceptions and multiple escape clauses (safeguards, tariff renegotiations, waivers, weak remedies etc.) the original GATT could not have been concluded. Equally, the Tokyo Round agreements would not have been finalized but for certain exit options, in particular, the \textit{à la carte} nature of the Tokyo Round Codes on non-tariff barriers and the exclusion of GATT developing countries from both new and existing GATT disciplines through, for example, the Enabling Clause.\textsuperscript{187} The successful conclusion of the Uruguay Round, as well, required


\textsuperscript{187} See \textit{supra} note 71.
the confirmation of certain exit options. Notwithstanding the general thickening of the WTO legal structure, GATT’s original safety valves were maintained, some were even expanded and most of them were transposed also to new WTO agreements on trade in goods, GATS, and TRIPS. Moreover, the remedies to counter violations under the streamlined DSU remained as weak as those in GATT Article XXIII: no reparation for past damage is awarded, compensation for ongoing harm is still subject to agreement between the parties and a reciprocal suspension of concessions remains the measure of last resort. On the contrary, in at least one respect, WTO remedies were actually weakened: the DSU reduced the scope for retaliation from suspension as determined “to be appropriate in the circumstances” to suspension “equivalent to the level of the nullification or impairment” caused by the original violation.

Given the uncertainties of the future, both political and economic, negotiators needed these exit options as safety valves. Rather than birth defects that must be cured as soon as possible through ever more legalization, my claim is that those exit options were, and remain, crucial pre-conditions for trade deals to stick. Without them, the breadth and depth of substantive WTO commitments would not have materialized. Similarly, weak remedies were a crucial pre-condition for the otherwise strengthened WTO dispute

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188 Reservations to renegotiate tariff concessions pursuant to GATT Article XXVIII:5 (i.e., outside the three year interval and without authorization) increased as GATT evolved into the WTO. For the period between 1994-6 more such reservations (37 in total) were made than in any other period (compare to 4 in the period 1958-60). See ANWARUL HODA, TARIFF NEGOTIATIONS AND RENEGOTIATIONS UNDER THE GATT AND THE WTO, PROCEDURES AND PRACTICES 89 (2001).

189 See the broad substantive exceptions in, for example, GATS art. XIV, TRIPS art. 13 and TBT art. 2.2. Based on GATT art. XXVIII (tariff re-negotiations), Article XXI of GATS permits members to re-negotiate GATS specific commitments. GATS also calls for the consideration of a safeguards mechanism for trade in services (art. X), but none has been introduced yet. However, as it stands, GATS already includes a series of built-in safeguards (e.g. unlike GATT art. III, under GATS, there is no general obligation to provide national treatment; this obligation is only triggered to the extent a member has made a specific commitment, see GATS art. XVII). Finally, waivers under art. IX of the WTO Charter apply across all WTO agreements including GATS and TRIPS.

190 DSU art. XXIII:2.

191 Whilst the old GATT rule thus left open, at least in theory, the possibility for punitive sanctions, the new DSU provision limits suspension to equivalence to the harm caused. See also Subsidies Agreement, art. 4.10 (permitting “appropriate countermeasures” but clarifying in n.4 that “[t]his expression is not meant to allow countermeasures that are disproportionate in the light of the fact that the subsidies dealt with under these provisions are prohibited”).

process. Knowing that they could no longer block dispute rulings, WTO members were eager to limit the remedies or sanctions that would follow any WTO condemnation.\(^{193}\) To drastically reduce or eliminate those exit options, that is, to further legalize the WTO – without countervailing increases in participation, loyalty and support for the WTO project – risks undermining both the substantive commitment to the WTO and to the DSU in particular.

\(b. \quad \text{The risks and illusions of de-politicization}\)

Like further legalization, calls to transform WTO rules into immutable human rights or, more generally, to keep WTO affairs extracted from politics and non-trade concerns, would increase levels of discipline and pre-commitment (more law). In addition, such calls would also move the system away from, rather than closer to, participation, democratic accountability and contestation (less politics). Hence their depiction in Chart 2 above at Point 4. McGinnis and Mosvesian\(^{194}\), for example, argue that the WTO must limit itself to antidiscrimination principles and avoid dealing with non-trade concerns such as health or environmental protection, human rights or poverty. In their view, liberal trade (and hence the WTO) is inherently in the interest of the majority: It reinforces democracy by neutralizing protectionist interest groups at home. International efforts to address non-trade concerns, in contrast, must be avoided. They are necessarily captured by special interest groups aimed at skewing a decision in their favor, against majority welfare.\(^{195}\)

This theory obscures that the WTO is as much about protectionism as it is about free trade. As one commentator observed: “Global economic rules are not written by Platonic rulers, or their present-day pretenders, academic economists. If WTO agreements were truly about “free trade,” as their opponents like to point out, a single sentence would suffice (“there shall be free trade”). The reality is that there is as

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\(^{194}\) \textit{See supra} note 10.

\(^{195}\) \textit{Id.}, at 557 (rejecting international regulation other than the WTO’s anti-discrimination model since “concentrated interest groups … will be able to exercise substantial influence to bring about policies that serve their interests, rather than the public interest”); John McGinnis & Mark Movsesian, \textit{Against Global Governance in the WTO}, 45 HARV. INT’L L.J. 353, 355 (2004) (such “regulatory bargains … are not as likely to be efficient in terms of nations’ true preferences … [they are] more likely to represent ‘amoral’ wealth transfers among different groups of citizens”).

much politics at the WTO, with special interest groups clamoring for favors, as there is in domestic parliaments. Protectionist agreements such as those concerning agriculture, textiles, or anti-dumping, and agreements that favor one group of countries over another (such as TRIPS\textsuperscript{197}), illustrate that the WTO does not necessarily lead to free trade in favor of the majority, but represents a political deal brokered in the context of power and special interests. To limit this political bargaining game at the WTO to producer/exporter interest groups, as McGinnis and Mosvesian suggest (on the ground that they are a proxy of majority welfare) is effectively elevating one set of special interests above all others.\textsuperscript{198} Equally, to isolate the WTO from non-trade concerns – which, to begin with, is a fiction\textsuperscript{199} – puts one societal concern above all others.

To this date, the world trade system remains focused primarily on non-discrimination (not economic efficiency) and the protection of producer (not consumer) welfare.\textsuperscript{200} No matter how inefficient a regulation or trade policy is (i.e. irrespective of consumer welfare) GATT permits it as long as it is (inefficiently) applied across the board to everyone (including foreign traders). From this perspective, the system neither avoids harmful cross-border externalities nor does it inherently protect domestic consumers. Both in the rules and exceptions that it sets up (equal competitive opportunities, rather than efficient regulation; major carve-outs for textiles and agriculture) and the escape clauses it provides for (triggered each time by injury to domestic producers, not harm to consumers), the system was created and continues to operate at the behest of producers. It is wed as much to liberal trade as protecting existing producers. Instead of inherently protecting the majority, the trade system, thereby, risks elevating special (producer) interests above consumer concerns and beyond the control of domestic politics.\textsuperscript{201} To arbitrarily bind governments to any WTO rule because it is supposed to increase economic welfare (which in many cases is not true), and to reject international law in non-trade fields because it must be tainted by special interests, imposes a double


\textsuperscript{198} See, e.g., Chantal Thomas, Challenges for Democracy and Trade: The Case of the United States, 41 HARV. J. ON LEGIS. 1 (2004); Benvenisti, supra note 35 and Keohane and Nye, supra note 123.

\textsuperscript{199} To exclude non-trade concerns from the WTO debate is a fiction. Even anti-discrimination principles require decisions on non-trade questions (e.g., to decide whether two products are like or whether a discrimination can be justified, for example, by health concerns). See Kal Raustiala, Sovereignty and Multilateralism, 1 CHI. J. INT’L L. 401 (2000). In the end, therefore, McGinnis and Mosvesian’s theory will either lead to very minimal liberalization (since it would discipline only discrimination that does not involve non-trade concerns) or lead to lopsided outcomes where trade always trumps other preferences.

\textsuperscript{200} See supra note 34.

\textsuperscript{201} See Benvenisti, supra note 35.
standard. Both processes are intensely political and both need more, rather than less, participation, accountability and contestation. Equally, both need safeguards against abuse by special interest groups and to ensure fair treatment of weaker countries.

The risk of exploitation by special interests at the WTO is further increased by a general lack of domestic control, especially by national parliaments, over a country’s trade policy. Moreover, once a WTO agreement is concluded, unlike domestic law (including domestic constitutions), any one particular WTO member cannot change it, even by special or super-majority of its population. This immutability of treaties is, of course, all the more worrying in the context of an international regime, like the WTO, where its rules and decisions matter and are for real. As a result, rather than increasing discipline and pre-commitment (more law) or de-politicizing the WTO (less politics), the trade regime requires certain exit options (e.g. escape clauses and flexible remedies) and needs more, not less, space for politics, participation and contestation, including more control by domestic politics, democratic safety valves and counterweight of international agreements on non-trade concerns. If the WTO is to survive as a legitimate institution that effectively liberalizes trade it will need the direct support of consumers and citizens. Until now, export-driven, producer interests with allegedly only majority interests in mind have dominated the agenda at the WTO, effectively isolating the issues from any broader political debate; this will no longer suffice.

B. A Better Framework for Reform

The core message of the previous section is that current proposals for WTO reform are focused exclusively on either the politics pole (e.g., getting rid of the consensus rule) or the law pole (reverting to old GATT practices or, in contrast, further legalization/de-politicization). Conventional suggestions for reform do not take sufficient account of the interaction between law and politics, in particular, the fact that any change on one side calls for a reaction on the other. This law-and-politics, exit-and-voice balance is in constant flux and under constant threat. A minute alteration on one side can change the

\footnote{See Thomas, supra note 184; Mini-Symposium on Challenges to the Legitimacy and Efficiency of the World Trade System, 7 J. INT’L ECON. L. 585 (2004).}

\footnote{Robert Howse, How to begin to Think about the ‘Democratic Deficit’ at the WTO, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS 79, 94 (Stefan Griller ed., 2003) (“these costs of and constraints on reversibility, combined with the impact of new era trade rules in freezing or limiting regulatory choices in many policy areas … [that] constitute the most troubling aspect of the WTO’s ‘democratic deficit’). This combination of factors led Weiler and Motoc to the following conclusion: “You take the obedience claim of international law and couple it with the conflation of government and State which international law posits and you get nothing more than a monstrous empowerment of the executive branch at the expense of other political estates.” J.H.H. Weiler & Iulia Motoc, Taking Democracy Seriously: The Normative Challenges to the International Legal System, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS, supra at 47, 67. See also Armin von Bogdandy, Legitimacy of International Economic Governance: Interpretative Approaches to WTO Law and the Prospects of its Proceduralization, in INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS, supra at 103, 107.}
balance the way pulling out one brick at one end of a building can cause major cracks on the other end, even the demise of the entire construction. A better framework for reform realizes the fluid equilibrium between law and politics, discipline and participation and the bi-directional relationship that brings it about. Although my line of reasoning could stop here, the final section of this article does venture into a particular set of reforms that would, in my view, improve the legitimacy and effectiveness of the world trade system.

To remedy the WTO’s problems – lack of input and output legitimacy -- my claim is that the WTO needs more, not less, politics and participation of individual members and non-state actors; and more, not less, control by domestic politics and consideration of non-trade concerns. Moreover, it must maintain, not eliminate, the possibility for exit especially when supported by consumer welfare or democratic decision. Depicted in Chart 2 above, my reform package is therefore situated at Point 5 (‘Suggested Reform ‘): with seriously more participation and politics, and slightly less discipline or law, as compared to the present system.

Importantly, when implemented with care, the increase in politics and participation ought not deadlock the political process; nor should maintaining certain exit options undermine the WTO’s normative structure. On the contrary, the mere availability of certain exit options (for example, safeguards or temporary compensation/suspension in the event of violation) should facilitate reaching a political consensus and thus make rulemaking more efficient. Equally, stronger outlets for voice and participation (more politics and hence more support for WTO rules) should increase the legitimacy of the trade system, strengthen the support for the DSU and eventually reduce pressure on the exit option. Coming full circle, this reduced pressure to exit (because of higher levels of support) would mean that the flexibility or exit options built into the system would be used only in exceptional circumstances. They would, in other words, strengthen, not undermine, the credibility of the WTO.

1. More politics, participation and contestation

Rather than decrease politics and participation -- as some have suggested, for example, by getting rid of the WTO consensus rule or de-politicizing WTO affairs -- I suggest to broaden the space for political debate and contestation. For the world trade system to be legitimate and sustainable, especially with a strong normative structure, more (not less) politics are needed. In large part because of its foundational mechanics (to overcome

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204 See, for example, the increase, with the creation of the WTO, in reservations to renegotiate tariff concessions pursuant to GATT art. XXVIII:5 (referred to supra note 188). This increase in reservations or potential exit options, however, did not result in more actual renegotiations taking place. On the contrary, during the period 1995-9 the lowest number of tariff renegotiations actually took place (8 as opposed to, for example, 56 between 1980-9). See Hoda, supra note 188 at 88 and 107. This shows that the mere existence of exit options can be enough and need not necessarily lead to more instances of actual exit.

205 See David Kennedy, The Forgotten Politics of International Governance, EUR. HUM. RTS. L. REV. 117 (2001); von Bogdandy, supra note 19; Howse, supra note 39; Robert Howse and K.
protectionism by insulating export-interests from domestic politics), the world trade system remains too technocratic and too isolated from popular support. To increase participation and support, the consensus rule must be maintained\textsuperscript{206} but the participation of individual WTO members as well as non-state actors increased. The role consensus plays in the internal and external legitimacy of the world trade system largely compensates for the delay and \textit{lourdeur} in WTO decision-making, as well as for the sometimes limited outcome in trade negotiations.\textsuperscript{207} The so-called bicycle club of trade must be disbanded. It takes exporters and producers as the core constituency of the system and assumes that, to keep their support, the world trade system requires ever more liberalization (otherwise, the bicycle will fall over). To survive as a legitimate organization, the WTO must extend its base to include consumers and citizens. It must, in other words, play out its strongest card: that free trade benefits the masses, not the few. Now that those majority groups are increasingly better organized, be it in the political process or through NGOs, their voice must be heard directly. The proxy of exporters/producers allegedly representing majority interests is no longer needed and can, in any event, no longer suffice.

In practical terms, political reinforcement and higher levels of contestation could be achieved through more active participation of senior policy-makers in Geneva-based discussions\textsuperscript{208}, obliging countries that plan to block a broad consensus to explain in writing why the matter is one of vital interest to them\textsuperscript{209} and implementing the (currently dead letter) rule that when consensus cannot be reached at a particular meeting, the matter must be transferred to the WTO’s General Council, thereby exposing contentious issues to a more visible and political debate.\textsuperscript{210} Other ways to ensure participation and contestation in WTO decision-making is more transparency in the process itself, such as

\textsuperscript{206} In support of the consensus rule, see supra Section II.A.1.

\textsuperscript{207} In terms of the trilemma introduced by Dani Rodrik -- deep economic integration \textit{versus} nation state \textit{versus} democratic politics -- limited economic integration or results in trade negotiations because of the consensus rule, may well be the price to pay for placating concerns of state sovereignty and democracy. \textsc{Dani Rodrik, Feasible Globalizations} (Nat’l Bureau of Econ. Research, Working Paper No. W9129, 2002). \textit{See also} Jeffrey Dunoff, \textit{Mission Impossible: Resolving the WTO’s Trilemma}, presented at the International Trade Round Table, Boalt Hall (January 2003) (on file with the author); Markus Krajewski, \textit{Democratic Legitimacy and Constitutional Perspectives of WTO Law}, 35 J. World Trade 167 (2001).

\textsuperscript{208} \textit{See} Sutherland Report, \textit{supra} note 18, at 70.

\textsuperscript{209} Id., at 64.

\textsuperscript{210} \textit{See} Rule 33 of the respective rules of procedure of the WTO’s subordinate Councils, Committees and other bodies, referred to in Ehlermann and Ehring, \textit{supra} note 72, at 14.
public meetings, readily available and readable documents and position papers and openness in the formation and membership of smaller informal groups that meet even before an issue is put on the WTO table.\textsuperscript{211} When it comes to developing countries, regional and issue groupings can strengthen their voice or participation, as is increasingly the case through, for example, the African Group, the Group of 20 (mainly large developing countries) and the Group of 90 (a broader cross-section of developing countries including in particular the poorest ones).\textsuperscript{212} In addition, more attention to developing countries (as well as technical assistance from the rich world) is needed to ensure that the poorest countries are at least represented at WTO meetings that affect them, and to clearly define what the interests of a given developing country are in a specific trade matter. Too often it is not so much that developing country interests are not sufficiently defended, it is that they are not sufficiently defined.

Increased voice or participation by non-state actors, such as NGOs, small businesses, the rural poor and citizens at large, ought not focus so much on having a seat or microphone in WTO meetings,\textsuperscript{213} nor does it require any explicit approval by WTO members. Given that the WTO matters and is for real (exit from it has been significantly reduced), state and non-state actors alike are using the voice mechanism and injecting politics in the debates, whether the WTO as an organization or its individual members like it or not. Voice is activated, for example, when citizens protest at WTO Ministerial Meetings, when NGOs issue reports or give interviews criticizing the TRIPS agreement or export subsidies in the rich world, or when business associations bash the latest WTO panel report.\textsuperscript{214} In other words, non-state actors can and do influence the WTO political process even without a formal say or vote in WTO decision-making. In fact, rather than NGOs and citizens needing the help or blessing of the WTO (e.g. through formal permission to attend WTO meetings), it is the WTO that needs the input and support of


\textsuperscript{212} Such groupings or coalitions need not be permanent and may, given the heterogeneous nature of the vast number of developing countries, depend on a particular issue. The changing coalitions that can be formed within the informal consensus process offers a distinct advantage over weighted voting where coalitions are fixed for all questions based on, for example, regional geography.

\textsuperscript{213} See, e.g., Daniel Esty, Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion, 1 J. INT’L ECON. L. 123 (1998); Gabrielle Marceau & Peter N. Pedersen, Is the WTO Open and Transparent?, 33 J. WORLD TRADE 5 (1999).

\textsuperscript{214} As Hirschman points out, voice is broader than formal input in decision-making. It can be equated with “interest articulation” and “is a far more ‘messy’ concept [than Exit] because it can be graduated, all the way from faint grumbling to violent protest”, from contestation to “kicking up a fuss”. HIRSCHMAN, supra note 15, at 16.
NGOs and citizens to implement and legitimize its activities.215 Crucially, the sounding board of NGOs is not limited to, or even most important in, Geneva. Although NGOs have an important lobbying and information role to play at the WTO itself (adding social and expert legitimacy to the organization), their activity is even more crucial at the grassroots level. They constitute a direct, transnational interface or voice mechanism where citizens and consumers can transmit concerns and obtain information about WTO activities and decisions. To enable and foster these diverse forms of participation, contestation and dissemination, the WTO itself must improve the transparency of its activities, including its dispute settlement process. To bring the WTO closer to the public, the creation of regional WTO offices must be considered. In addition, thought could be given to setting up a WTO inspection mechanism similar to that available in the World Bank and regional development banks.216

More voice or input ought finally be given to other international organizations including those addressing non-trade concerns. Because of the strength of the WTO’s legal-normative structure, in particular its automatic dispute process, the WTO is too often portrayed as a set of rules that prevail over other international law.217 Given the broad field and scope of the trade system – at least tangentially affecting the protection of the environment, human rights, cultural diversity, etc. – this WTO “superiority complex” frequently takes other international negotiations hostage.218 Both in its law-making and dispute settlement, the WTO must take account of activities and rules created elsewhere, in particular those that the disputing parties themselves have consented to. This is not a call for the WTO itself to engage in environmental or human rights law-making.219


216 See WORLD BANK INSPECTION PANEL, ACCOUNTABILITY AT THE WORLD BANK: THE INSPECTION PANEL 10 YEARS ON (2004). A similar system for the WTO could increase its accountability in that it permits affected groups and individuals to challenge the substance of official WTO activities – such as technical cooperation – under the guidelines and rules of the WTO itself.

217 Keohane speaks of “partial globalization.” ROBERT KEOHANE, POWER AND GOVERNANCE IN A PARTIALLY GLOBALIZED WORLD (2002). For Ruggie, a crucial element in the globalization backlash is “a growing imbalance in global rule making. Those rules that favor global market expansion have become more robust and enforceable … But rules intended to promote equally valid social objectives, be they labor standards, human rights, environmental quality or poverty reduction, lag behind and in some instances actually have become weaker.” John Ruggie, Taking Embedded Liberalism Global, The Corporate Connection, in TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE (David Held & Mathias Koenig-Archibugi eds., 2003).


Rather, let other organizations do this, but when such is done, the WTO, as a part of the broader international system, must take cognizance and when appropriate defer to the rules agreed to in those other fora.\textsuperscript{220} WTO cooperation with other international rules and organizations is part and parcel of greater contestation and participation in the world trade system itself.

2. Slightly reduce discipline and maintain and clarify exit options

The increase in politics, voice and participation of both state and non-state actors advocated above, ought to offer a more solid basis of support for a strong WTO normative regime. Yet, to facilitate this messy voice mechanism – in particular, consensus building and the varied avenues for input from non-state actors – and to prevent deadlock in the political, decision-making process, it is important to keep certain exit options open and not to over-legalize the system. With the assurance of exit in the worst-case scenario, WTO members will more easily join a political consensus to create new rules. Crucially, limited exit options and slightly lower levels of discipline may offer important democratic safety valves and thereby respond to criticisms of a WTO constitution-type construct that imposes free trade over and above anything else. In large part because of its foundational mechanics (to overcome protectionism by insulating export-interests from domestic politics), the world trade system risks being too rigid or legalized to respond to valid flexibility demands of representative politics.\textsuperscript{221} Limited exit options, when combined with the suggested high levels of participation, would eventually not often be resorted to: Given the high levels of participation in law-making and the other pressures felt through the voice mechanism (in particular from consumers and businesses that are harmed by trade restrictions), countries ought only exercise these exit options in exceptional circumstances. In the end, therefore, rather than undermine the normative structure of the WTO, limited exit or somewhat lower levels of discipline -- in tandem with higher levels of participation and politics -- is the best recipe for an effective and legitimate world trade system.

In practical terms, the WTO should relinquish its obsession with the single package idea.\textsuperscript{222} Given the huge diversity between WTO members, both in terms of economic development and non-economic preferences, WTO agreements and rules ought not always be binding on all WTO members. With close to 150 members, differentiation or a multiple-speed WTO is unavoidable. Rather than force new commitments on unwilling countries through majority voting or block the entire process by insisting on consensus amongst all players, the system must recognize its diversity and tailor-make its rules to its different constituencies. Even soft law, or political declarations or targets that are not legally binding, as an alternative to the usually hard WTO commitments could, in certain

\textsuperscript{220} See Joost Pauwelyn, Conflict of Norms in Public International Law, How WTO Law Relates to Other Rules of International Law (2003).

\textsuperscript{221} See supra note 203.

\textsuperscript{222} In support: Sutherland Report, supra note 18, at 65-66 (referring to “variable geometry”).
cases, be considered. The need for consensus amongst all WTO members to add a plurilateral agreement to the WTO treaty, even if such agreement is binding only on some WTO members, must be revisited. Even within the EU, with its far more homogeneous membership, this strict requirement for differentiation no longer applies. Although some control by the entire WTO membership over new agreements is useful (e.g., to make sure that plurilateral agreements do not harm the rights of third parties), a single member ought not have a veto to block further WTO progress by others.

In addition, the WTO must maintain its broad substantive exceptions, tariff and other renegotiation provisions, waiver system, and safety valves in case of violation (temporary compensation and suspension of concessions). The scope for bilateral settlement of trade disputes and the conclusion of non-trade agreements in other fora must be clarified. Given that WTO obligations are not collective obligations binding \textit{erga omnes partes}, settlements and non-WTO treaties in deviation of WTO rules must be accepted as permissible for as long as they do not affect the rights of third parties.

In turn, safeguards remain an important safety valve under existing commitments and a crucial instrument in obtaining new commitments. The Appellate Body, in contrast, has taken an openly unsympathetic stance against safeguards, calling them purely protectionist measures in response to fair trade (i.e. a sudden increase in imports). It has contrasted safeguards, in particular, to anti-dumping measures, which it regards as a reaction to unfair trade (i.e. dumped imports). As a result, the Appellate Body has strictly interpreted the conditions for safeguards and so far not found a single safeguard.

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\begin{itemize}
  \item \footnotemark[227] See Alan O. Sykes, \textit{The Safeguards Mess: A Critique of WTO Jurisprudence}, \textit{2 WORLD TRADE REV.} 261 (2003). The distinction between fair and unfair trade is questionable. Any economist will explain why dumping, as it is defined by the WTO (which permits the artificial reconstruction of cost of production and provides wigging room to find dumping for many imports, if one looks and calculates hard enough), is most often \textit{not} unfair.
\end{itemize}
measure to be in line with WTO rules.\textsuperscript{228} The Appellate Body’s strict interpretation of safeguards and rather loose approach to anti-dumping measures provides an incentive for WTO members to exploit the loopholes of the anti-dumping agreement. Unlike safeguards -- which must, in principle, be imposed on all imports, offset only injury caused to the domestic industry and be compensated for, at least after 3 years, in some cases, as of their enactment -- anti-dumping measures are discriminatory, offset the entire dumping margin (which is often higher than the injury caused) and must never be compensated for.\textsuperscript{229} Rather than inciting the use (and abuse) of anti-dumping, the Appellate Body should recognize the crucial role, transparency and benefits linked to safeguards and promote safeguards over anti-dumping measures, or at least put them on an equal footing.

At the same time, WTO contingency measures –safeguards, anti-dumping and countervailing duties to offset subsidies -- focus exclusively on harm to competing producers. They share one common feature: the re-introduction of trade restrictions is permitted only when producer welfare has been, or threatens to be, negatively affected either as a result of cheap imports, subsidies to foreign producers or increased imports (triggering, respectively, anti-dumping duties, countervailing duties and safeguards). Harm to consumers or considerations of consumer welfare play no role whatsoever. First, before raising trade barriers against cheaper imports, countries currently must not consider the harm they thereby cause to consumers. Second, no escape clause or safety valve exists to re-introduce trade restrictions based on consumer concerns or so-called collective preferences of citizens on non-trade issues (ranging from the death penalty and cultural preferences to GMOs and welfare state interventions).\textsuperscript{230} Even when democratically expressed as a majority opinion, such consumer concerns can only be taken into account under the limited list of substantive exceptions (e.g. GATT Article XX). The exclusive focus of WTO contingency measures on producer welfare confirms the system’s exporter/producer driven nature. As pointed out earlier, if the WTO is to survive as a legitimate institution, it must expand its base of supporters beyond exporters/producers and include consumers and citizens at large, who are, after all, the main beneficiaries of liberalized trade. Much as safety valves were needed to attract and maintain producer support in the form of safeguards, anti-dumping and countervailing duties in the original GATT, a WTO genuinely transformed into a consumer-driven


organization must have sufficient safety valves to attract and maintain consumer support.\textsuperscript{231}

Finally, given that the possibility and comfort of exit options is so important in the WTO structure, it must be guaranteed equally for all WTO members, including developing countries. One of the major concerns for developing countries in the WTO is not, as many perceive it today, how developing countries will succeed in pushing their complaints against rich developed countries.\textsuperscript{232} Rather, the big question will be how developing countries can take equal advantage as defendants, of the escape clauses and other exit options just described, especially against rich countries. Few of those options\textsuperscript{233} include differential treatment for developing countries. Thought should be given about whether and how such differential rules could be included without making escape clauses too easy an option for developing countries (after all, in most cases, trade rules are beneficial also for the country reducing trade barriers). The costly and complex procedures for the imposition of safeguards could, for example, be simplified when pursued by developing countries; waivers for developing countries could be granted by a lower majority and extended for longer periods; the compensation that developing countries should pay under tariff or GATS re-negotiations or when settling a dispute as a defendant could be lowered, as could the level of suspensions in response to breach by developing countries. With developing countries committing themselves to ever more WTO rules, the importance of flexibility and limited exit options for those countries -- and for the sustainability and legitimacy of the world trade system as a whole -- will only increase.

\textsuperscript{231} For such alternative safeguard mechanism, linked to compulsory compensation, see Lamy, \textit{supra} note 208. \textit{See also} Patrick Messerlin, \textit{Antidumping and Safeguards}, in Jeffrey Schott (ed.), \textit{THE WTO AFTER SEATTLE, INSTITUTE FOR INTERNATIONAL ECONOMICS} (Jeffrey Schott ed., 2000); Heinz Hauser & Alexander Roitinger, New Concepts for Dispute Settlement Implementation (2004) (unpublished manuscript, on file with the author, suggesting the replacement of anti-dumping and safeguards with one safeguard mechanism that can be invoked for any reason, not just injury to the domestic injury, but coupled with an obligation to pay compensation).

\textsuperscript{232} \textit{See} Marc Busch & Eric Reinhardt, \textit{Developing Countries and GATT/WTO Dispute Settlement}, 37 J. \textsc{World Trade} 719 (2003). In most cases such complaints will be successful, if they have legal merit, because of the peer pressure on, and example-setting function of, those rich members, not because of tougher remedies. Indeed, not a single panel or Appellate Body recommendation involving a WTO dispute by a developing country against a developed country remains unimplemented. Almost all of the problems with non-compliance were disputes between the EC and the US.

\textsuperscript{233} Apart from certain substantive exceptions and safeguards which cannot be applied \textit{against} certain developing countries. Safeguards Agreement art. 9.3.
CONCLUSION

This article challenges a number of common perceptions about the world trade system. Contrary to conventional wisdom, the system did not evolve from trade politics to trade law. Rather, both the level of law and the level of politics gradually increased. More politics and participation, in particular consensus decision-making, enabled more law and discipline, including the legalization of GATT’s dispute process. Conversely, more law and discipline, in particular the WTO’s smooth and automatic enforcement mechanism, required more politics and participation, including a vigorous defense by countries of the consensus rule. More than the traditional from-politics-to-law story, this interactive narrative between politics and law, participation and discipline, voice and exit, better explains why, for example, decision-making evolved from majority voting to consensus, and why enforcement evolved from a political system to a quasi-judicial one. The alternative narrative demonstrates further that increased legalization (more supervision by the WTO) must not come at the expense of less politics (less input from member countries). Rather, more discipline and law led to and requires higher levels of participation and contestation (more politics). Moreover, through this lens, the current combination of a highly efficient dispute settlement system and a consensus-based, inefficient rule-making process no longer strikes one as a paradox. Instead, it is seen as a logical – though not necessarily optimal – balance between high discipline or law and high participation or politics.

In prescriptive terms, this article portrays the picture of a fortress WTO or a regime that currently lacks both input and output legitimacy. Given the prevailing schools of thought, the risk of a fortress WTO - over-legalized, depoliticized and forcing a uniform, regulatory straitjacket upon countries and their peoples – is, indeed, looming. To avoid this threat, the article rejects the most common proposals for WTO reform. First, replacing the consensus rule with majority-based decision-making (the insider, institutionalist perspective), further legalizing the system with less exit options and a stronger dispute process (the legalist view) or a stricter separation of WTO affairs from domestic politics (advocated by both the utilitarian and the constitutional/human rights schools), may each make the system more efficient in the short term. However, when implemented in isolation, these reforms would undermine the support and legitimacy of the world trade system (efficiency without loyalty). Second, re-introducing political vetoes in the dispute process (the conservative, sovereigntist perspective) or subjecting the system to full control by representative politics (as advocated by left-leaning cosmopolitans) are reforms that may increase the short-term support for, and legitimacy of, the WTO. Yet, they would quickly render the system ineffective and dramatically reduce gains from trade (loyalty without efficiency). As an alternative to these two strands of proposals which focus exclusively on one side of the law-and-politics spectrum and, quite surprisingly, lump together unlikely allies (such as utilitarians and human rights scholars; sovereigntists and cosmopolitans), this article suggests a more balanced reform package that tackles both sides of the spectrum. First, the WTO needs more, not less, politics, participation and contestation, both from state and non-state actors, both in and outside the WTO. Second, the system must maintain and clarify, not eliminate, certain escape clauses and exit options, especially those tailored to consumer welfare, and
make them viable also for weak countries. With the right balance between flexibility and pre-commitment, politics and law, participation and discipline, the world trade system can combine efficiency and legitimacy, that is, reap the gains from trade and enjoy broad-based support.