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# The Democratic Legitimacy of WTO Law – On the Dangers of Fast-food Democracy

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**Samantha Besson\***

Abstract: For the last fifteen years or so, the democratic deficit of World Trade Organization (WTO)'s law has been a recurrent and dominant concern among international economic lawyers and international relations specialists alike. The impact of those debates on the democratic deficit of the WTO has been surprisingly limited, however. This may be explained, the paper argues, by the way in which the debates have been conducted. To start with, recent discussions of the democratic legitimacy of WTO law have taken place in isolation of those pertaining to that of international law in general, as if it were possible to enhance the democratic legitimacy of the WTO regime without considering that of other international law regimes at the same time. Furthermore, discussions of the democratic legitimacy of WTO law focus almost exclusively on what can be done at the level of international institutions, without reference to domestic democratic processes that transpose and enforce WTO law, and how those subject to both WTO law and domestic law can participate in them. Finally, the way authors usually proceed is by identifying and isolating certain democratic building blocks within (domestic) democratic theory or practice which they then re-assemble in different ways and add to the WTO institutional structure, hoping thereby to 'democratize' WTO law-making. The problem with those approaches to what the paper calls 'fast-food democracy' is that they are oblivious to the most important element in democracy: its subjects. Those subjects are also subjects to other norms of international law and to other norms of domestic law whose legitimacy is therefore better approached as a whole, and it is by reference to their political equality that reforms of WTO law-making processes may be devised most successfully.

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# The Democratic Legitimacy of WTO Law –

## *On the Dangers of Fast-food Democracy*

*Samantha Besson*

‘For all the efforts of the WTO to overcome its failings, and these efforts [...] have been substantial and well in advance of the other international economic institutions since the turn of the century, a democratic deficit remains.’ (Higgott and Erman, ‘Deliberative Global Governance’, 470)

### Introduction

For the last fifteen years or so, the democratic deficit of the World Trade Organization (WTO)’s law has been a recurrent and dominant concern among international economic lawyers and international relations specialists alike. In short, the legitimacy or justification of the authority of WTO law has been in question especially since the WTO became a source of binding international law norms, norms that impact on individual lives in almost all areas of domestic trade regulation and are enforceable by a compulsory and binding dispute settlement mechanism, without, however, corresponding equal and public inclusion of those affected in the decision-making process.<sup>1</sup> In view of the corresponding loss in authority of the relevant domestic law and in particular of involvement of domestic parliaments, and hence of the deficit in domestic democratic legitimacy, it is the *democratic* legitimacy of WTO law that has been mostly questioned.

The debate about the democratic deficit of the WTO is burgeoning and publications on the legitimacy of WTO law, and on its democratic legitimacy in particular, have become so numerous over the last few years that it proves difficult to keep track of them.<sup>2</sup> However, despite repeated theoretical critiques of the democratic legitimacy of WTO law and practical efforts at reforming institutional structures and decision-making processes within the WTO,<sup>3</sup> not much has changed overall.<sup>4</sup> Of course, this may be explained by a certain degree of institutional stickiness and entropy, but also by conservative reactions and efficiency concerns following an unprecedented economic crisis.<sup>5</sup> This is regrettable as it is precisely at times of deep recession and resurgent national sovereignty that democratic legitimacy is most needed.

More importantly, I would like to argue that it is the way the debate has been conducted that may also explain the little impact those many publications have had on the institutional structure of WTO law-making. To start with, recent discussions of the democratic legitimacy of WTO law have taken place in

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<sup>1</sup> See Higgott and Erman, ‘Deliberative Global Governance’, 452-4.

<sup>2</sup> See the list of references at the end of this research paper, and the bibliographical survey essay by Schneller, ‘Conceptions’.

<sup>3</sup> For a useful account of the various efforts, see Howse, ‘The Legitimacy of the World Trade Organization’; Howse, ‘How to Begin’; Higgott and Erman, ‘Deliberative Global Governance’, 469.

<sup>4</sup> See Elsig and Cottier, ‘Reforming the WTO’; Krajewski, ‘Zur Demokratisierung’, 220-4.

<sup>5</sup> See e.g. Elsig and Cottier, ‘Reforming the WTO’, on the efficiency downsides of democratization for WTO member states.

isolation of those pertaining to that of international law in general, as if it were possible to enhance the democratic legitimacy of the WTO regime without considering that of other international law regimes at the same time. Furthermore, discussions of the democratic legitimacy of WTO law focus almost exclusively on what can be done at the level of international institutions,<sup>6</sup> without reference to domestic democratic processes that transpose and enforce WTO law and how those subject to both WTO law and domestic law can participate in them. Finally, the way authors usually proceed is by identifying and isolating certain democratic building blocks within (domestic) democratic theory or practice which they then re-assemble in different ways and add to the WTO institutional structure, hoping thereby to ‘democratize’ WTO law-making.<sup>7</sup> This piecemeal approach to democracy *qua* ensemble of separable features partakes arguably in the efficiency concern that prevails in WTO institutional reforms and that only allows for a modest tinkering with the institutional structure of the organization. The problem with those approaches to democracy on demand, and with what I will call ‘fast-food democracy’ in this paper by reference to a quick and structurally uncomplicated fix, is that they are oblivious to the most important element in democracy: its subjects. Those subjects are also subjects to other norms of international law and to other norms of domestic law whose legitimacy is therefore better approached as whole and it is by reference to their political equality that reforms of the law-making processes may be devised more successfully.

In short, if the contours of WTO multi-level<sup>8</sup> governance or authority<sup>9</sup> have long been explored,<sup>10</sup> it seems that the literature on the legitimacy or justification of that authority has not yet fully come to terms with its multi-level and multi-lateral<sup>11</sup> dimensions and how the legitimacy of the law produced on those different levels necessarily co-evolves.<sup>12</sup> In response to those concerns, I propose to address the democratic legitimacy of WTO law in a more integrated international and domestic fashion and the way to

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<sup>6</sup> When authors actually refer to the domestic level, they assume the international level remains untouched as if it were possible to handle one side of the equation without the other. See e.g. Keohane, Macedo and Moravcsik, ‘Democracy-Enhancing Multilateralism’ (in general); Elsig, ‘Democratizing Effect’ (in the WTO context). For an effort to encompass all levels at the same time, however, see e.g. Cottier, ‘Legitimacy of WTO Law’.

<sup>7</sup> See e.g. Krajewski, ‘Legitimizing Global Economic Governance’; Bonzon, ‘Institutionalizing Public Participation’; Ziegler and Bonzon, ‘How to Reform WTO Decision-making?’.

<sup>8</sup> By ‘multi-level governance’, I understand the exercise of political and legal authority by many different institutions over the same territory and the questioning of the territorial exclusivity of authority as a result. See van der Vossen, ‘Legitimacy and Multi-Level Governance’. Interestingly, the term ‘multi-level governance’ retains a dimension of closure and an all-encompassing element, but also a territorial flavour that bring it closer to domestic federal governance, even though it need not imply the existence of an overarching political community of individuals and usually does not actually entail such a community. I am using this term, however, as it is widely used in the WTO context (see e.g. Cottier and Hertig, ‘Prospects of Constitutionalism’ whose ‘multi-storey house’ is not only multilayered but is also a house, just as a one-storey house is a house).

<sup>9</sup> I will not address the question whether sovereignty may be shared or pooled and will assume it may be (see Besson, ‘Sovereignty’), but will focus exclusively on whether legitimacy itself, and especially democratic legitimacy, may be shared and how.

<sup>10</sup> See e.g. Cottier and Hertig, ‘Prospects of Constitutionalism’.

<sup>11</sup> Multi-level governance is usually also multi-lateral to the extent that many states exercise it together transnationally but also internationally. Hence the most complete idea of multi-level governance is also multi-lateral: states and international organizations count among the international law-makers. On multilateral democracy, see Cheneval, *Government of the Peoples*, 15-9.

<sup>12</sup> For exceptions (outside the field of WTO law and outside the question of democratic legitimacy, however), see e.g. van der Vossen, ‘Legitimacy and Multi-Level Governance’; Buchanan, ‘Legitimacy of International Law’; Besson, ‘Authority of International Law’.

do so is to go back to those who are the subjects of the democratic legitimacy of WTO law.<sup>13</sup> So-doing, I hope to rebut the widespread idea that democratizing international institutions in general, and the WTO in particular can be done piecemeal and that any new ‘democratic’ feature added to the international and WTO law-making is necessarily a good thing from the perspective of democratic legitimacy.

Rather than dwell into detailed and technical issues of WTO law-making and into institutional design,<sup>14</sup> the present research paper approaches the topic from the other angle: that of political and legal theory. Arguably, indeed, the validity of a lot of the theoretical and practical proposals for reform one may make hinges in this context on one’s theoretical understanding of democratic legitimacy and how well it fits WTO law-making.<sup>15</sup> However, the paper does not seek to provide a new model for the development of transnational or supranational democracy.<sup>16</sup> It elaborates on existing ones, and adapts them to the circumstances of WTO law.

My argument is three-pronged as a result. In a first section, it starts with a few introductory considerations about the chosen model of legitimate authority of international legal norms, and adopts a content-independent and piecemeal model of legitimacy based on various competing grounds including democratic coordination and supplemented by content-dependent legitimacy and consent as a ground for respect albeit not of legitimacy (I). The second step of the argument turns more specifically to the question of the democratic legitimacy of international law and elaborates, after rejecting the voluntary association of democratic states model for its general egalitarian shortcomings and the global democracy model for non-fulfilment of its conditions, on a third model, i.e. the fair association of democratic states model, that attempts at protecting both the political equality of citizens of domestic democratic states and the fairness of the relations between statespeoples (II). The third section is devoted to the democratic legitimacy of WTO law itself, and concludes by emphasizing the piecemeal nature of the legitimacy of multi-level law-making in the WTO depending on the subjects and the grounds, and by stressing the importance of domestic democratic legitimacy in the mutual legitimation between domestic and international law and institutions (III).

## I. The Legitimacy of International Law

After explaining the concern for the legitimate authority of international law, it is useful to present the model used in the paper. That model of legitimate authority of international law is best captured by explaining, first, the concept of legitimate authority of international law that is chosen and, second, the conception that is applied to WTO law.<sup>17</sup>

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<sup>13</sup> For such an attempt generally, see e.g. Besson, ‘Deliberative *Demoi*-cracy’; Besson, ‘Authority of International Law’.

<sup>14</sup> See e.g. Elsig and Cottier, ‘Reforming the WTO’; Krajewski, ‘Legitimizing Global Economic Governance’; Cottier, ‘A Two-Tier Approach’; Cottier, ‘Legitimacy of WTO Law’; Ziegler and Bonzon, ‘How to Reform WTO Decision-making?’.

<sup>15</sup> For similar attempts, see Higgott and Erman, ‘Deliberative Global Governance’; Herwig and Hüller, ‘Towards Normative Legitimacy’; Nanz, ‘Democratic Legitimacy’; Steger, ‘Challenges to the Legitimacy’; Howse, ‘Legitimacy of the World Trade Organization’ and Howse, ‘How to Begin’; Keohane and Nye, ‘Club Model’; Krajewski, ‘Democratic Legitimacy’.

<sup>16</sup> See e.g. Besson, ‘Deliberative *Demoi*-cracy’; Besson, ‘Authority of International Law’; Christiano, ‘Democratic Legitimacy’; Pettit, ‘Legitimate International Institutions’; Cheneval, Government of the Peoples.

<sup>17</sup> This section is borrowed in large part and summarized from Besson, ‘Authority of International Law’.

## 1. The Concern for the Legitimate Authority of International Law

In a nutshell, the legitimate authority<sup>18</sup> or legitimacy of international law is international law's justification in generating obligations to obey.<sup>19</sup> Its exercise binds its subjects by imposing duties of obedience.<sup>20</sup>

Qua practical authority, international law provides its subjects with reasons for action.<sup>21</sup> Those reasons for action are moral reasons. Moral duties to obey the law *qua* law ought to be carefully distinguished from moral duties to obey the law because its content is moral, on the one hand, and from legal duties to obey the law, on the other.<sup>22</sup> While the latter are important duties that can co-exist with the former, they do not capture the core of legitimate authority, i.e. a moral duty to obey the law not because it is morally correct but *qua* law.<sup>23</sup>

Importantly, the existence of international law's moral right to rule is the result of an objective evaluation: international law may have legitimate authority whether or not its subjects think it does and whether or not they have consented to its authority. It is not therefore, the perceived or sociological legitimacy of international law this paper is concerned about, but its normative legitimacy.<sup>24</sup>

Of course, like domestic law, international law usually benefits from *de facto* authority by the mere fact of exercising power over its subjects and/or being effectively complied with in practice. This pertains independently from its actual legitimacy and right to authority.<sup>25</sup> By virtue of its legal validity, international law also lays a claim to legitimate authority<sup>26</sup> and that claim largely explains, and to a certain extent reinforces its *de facto* authority.<sup>27</sup> The fact that international law inherently makes a claim to legitimacy does not, however, entail that it actually or entirely possesses it, or even that it is capable of possessing it under realistic conditions. Nor, conversely, would international law's lack of legitimacy deprive it of its legal

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<sup>18</sup> In what follows, I will use 'authority' to mean legitimate authority. For the same use of the term, see Raz, *Morality of Freedom*; Raz, *Ethics*; Raz, 'Problem of Authority'.

<sup>19</sup> The present paper focuses on legal authority in contrast to private authority, but also to political authority in general. On the distinction, see Raz, *Authority of Law*; Raz, *Morality of Freedom*, 23, 38 and 70; Raz, *Ethics*, 210, 341 and 355; Raz, 'Comments and Responses'; Raz, 'Problem of Authority'. Interestingly, some authors, influenced by international relations literature, focus on political authority only, and not legal authority in order to grasp the specificity of law-making by international organisations: see, for example Bodansky, 'Legitimacy'; Clark, *Legitimacy in International Society*; Coicaud and Heiskanen (eds), *Legitimacy of International Organizations*. This approach faces the risks of: being too broad (by covering political duties distinct from duties to obey the law), of begging the question of the existence of an international political community and, finally, of conflating too quickly law and law-making institutions.

<sup>20</sup> See Raz, *Morality of Freedom*, 23.

<sup>21</sup> See Raz, *Morality of Freedom*; Raz, *Ethics*; Raz, 'Problem of Authority' for the distinction between theoretical and practical authority.

<sup>22</sup> See Hart, *Concept of Law*, 227-30 on the difference between international legal norms and morality.

<sup>23</sup> See Raz, *Ethics*, 342-3.

<sup>24</sup> See Raz, 'Problem of Authority', 1006-7. See also Buchanan, *Justice, Legitimacy and Self-Determination*, 16-19; Buchanan, 'Legitimacy of International Law'. See, however, Franck, 'Legitimacy in the International System', 706; Franck, 'Power of Legitimacy', 91 and 93 for a conflation of the sociological and normative approaches to legitimacy.

<sup>25</sup> On *de facto* authority, see Raz, *Morality of Freedom*, 65; Raz, 'Problem of Authority', 1005-6. *De facto* authority implies a claim to legitimate authority, albeit not necessarily a justified one. However, legitimate authority does not necessarily imply *de facto* authority, even though they are likely to be connected. As a result, international legal norms can be legitimate without being effectively complied with and vice-versa; the question of practical compliance with international law (and of its motivation) is an altogether different question. On that question, see O'Connell, *Power and Purpose of International Law*; Besson and Tasioulas, 'Introduction'.

<sup>26</sup> See Hart, *Concept of Law*, 220.

<sup>27</sup> See Raz, *Morality of Freedom*, 27-8.

status.<sup>28</sup> In most cases where international law lays a general claim to obedience, it claims more legitimacy than it can effectively have. In fact, there may even be a deeper hiatus between the extent of international law's claim to legitimate authority and the effective scope of its legitimacy than there is in domestic law.

International law can therefore remain valid and even retain its *de facto* authority without its claim to authority being justified and its authority legitimated. In fact, the threat of the use of power is an even more widespread means of securing collective action around certain directives among international actors than it is in the domestic context.<sup>29</sup> More importantly, there may be other (instrumental and non-instrumental) reasons for the attitude of respect or recognition developed by some of its subjects which are distinct from authoritative reasons.<sup>30</sup> One may mention state consent or strategic reasons for state compliance with international law.<sup>31</sup> Furthermore, there may be moral reasons to create and support just international institutions because they are just<sup>32</sup> or because they are fair.<sup>33</sup> There may even be moral reasons to create and sustain the rule of international law independently from that law's legitimacy.<sup>34</sup> However, all those reasons ought not be confused with moral reasons to obey the legal rules generated by those institutions. And the present paper is concerned with those latter reasons only.<sup>35</sup>

All the same, the existence of an entirely illegitimate, albeit valuable for different reasons,<sup>36</sup> legal order would not be sustainable in the long run. The law's distinctive contribution to the advancement of other valuable goals lies precisely in successfully laying down authoritative directives to reach those goals.<sup>37</sup> Furthermore, the fact that valid law necessarily claims to be legitimate implies that it should be capable of being authoritative and hence be produced so that it can be. In those conditions, ensuring the legitimacy of international law has a key influence on the organisation of international law-making processes. Finally, due to the increasingly direct impact of international law norms on individuals in areas previously covered by legitimate national law, a legitimacy gap is gradually widening and the legitimation of international law

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<sup>28</sup> This view contrasts with that of Kumm, 'Legitimacy of International Law', 917. International legality cannot therefore be used as a presumption of legitimacy. See Besson, 'Sources of International Law'.

<sup>29</sup> Legitimate authority ought not therefore be understood as excluding power-play in international relations. Scope precludes, however, addressing this topic here. See Bodansky, 'Legitimacy', 707. Note that *de facto* authority implies the exercise of actual power, albeit not necessarily coercive power.

<sup>30</sup> See Raz, Ethics, 80; et seq Raz, Morality of Freedom; Raz, 'Problem of Authority' on consent as a source of simple voluntary obligations and as a source of respect or recognition of an institution, but according to whom consent can only be accepted as a source of authoritative obligations if the other conditions of legitimacy are fulfilled independently.

<sup>31</sup> See, for example Guzman, How International Law Works; Goldsmith and Posner, Limits of International Law, 185 et seq for a rational choice account of states' compliance with international law. See critiques by Buchanan, 'Commitment to International Law'; Franck, 'Power of Legitimacy'.

<sup>32</sup> See, for example Rawls, A Theory of Justice, 114-17 and 333-7; Waldron, 'Special Ties'. Of course, traditional critiques against the justice-based justification of authority are less incisive when applied to international law. Many general principles of international law such as equality, human rights or good faith, may actually also be principles of justice, and international subjects may therefore have independent or additional duties of justice to abide by those principles. Scope precludes, however, addressing this topic here. In any case, the justification of the law's moral right to rule *qua* law remains essential in an international community ridden by cultural and moral disagreements and needs to be addressed as such.

<sup>33</sup> See, for example Franck, Fairness in International Law. Scope precludes addressing this topic in the present paper.

<sup>34</sup> See, for example Buchanan, 'Commitment to International Law', 315-16; Buchanan, 'Legitimacy of International Law'; Waldron, 'Rule of International Law' on the relationship between the legitimacy of international law and the rule of international law. See section 4b, below.

<sup>35</sup> See, for example Raz, Morality of Freedom, 66; et seq; Raz, Ethics; Raz, 'Problem of Authority' on the distinction. See also Buchanan, 'Legitimacy of International Law'.

<sup>36</sup> On these reasons, see, for example Tasioulas, 'Legitimacy of International Law'.

<sup>37</sup> See Tasioulas, 'Legitimacy of International Law'.

in those areas has become more pressing.<sup>38</sup> Unsurprisingly therefore, the justification of the authority of international law has become a central concern for international legal scholars ever since the late 1980s.<sup>39</sup>

## 2. The Concept of Legitimate Authority of International Law

The first difficulty facing any explanation of the legitimacy of international law lies in the identification of a concept of legitimacy that can account for the legitimacy of (at least some part of) international law.

The differences between international and national law in that respect are well-known<sup>40</sup>: international law is mostly the product of horizontal interstate law-making practice and, to be more precise, of different interstate practices. Some international legal norms are more akin to making contractual promises and others to general legal rule-making for all subjects of international law. As a result, international law is said to lack a centralized and hierarchical ensemble of law-making institutions and processes that may be equated with domestic law-making authorities and legislating procedures, on the one hand, and is mostly exempt from sanctions backing up its norms, on the other.<sup>41</sup>

To make things more complex, new forms of international law have arisen in recent times that question the exclusivity of the horizontal interstate law paradigm. Subjects no longer only include states making law for other states, but also international organizations (IOs) and individuals as subjects of rights and obligations. With respect to its object, international law no longer pertains only to interstate relations, but also, for instance in the case of WTO law, to intrastate relations and therefore directly regulates the life of individuals alongside domestic law. Finally, and maybe as a result, the sources of international law and its law-making processes have become more diverse and have developed to include, besides the ‘famous three’ (treaties, customary law and general principles), general multilateral interstate law-making processes that often associate individual actors, and unilateral legislation by IOs. Interestingly, those very sources which include subjects of international law other than states regulate matters previously covered by domestic law only and often through majority rule.<sup>42</sup> In terms of normativity as well, international law no longer offers a unified face. International legal norms can bind subjects universally or not (e.g. *erga omnes* and *omnium* duties) and to varying degrees (e.g. *jus cogens* norms and, more controversially, soft law).<sup>43</sup>

Thus, either the concept of legitimacy that is chosen accounts for the legitimate authority of both national and international law, but in a way that can capture not only their differences but also the sheer diversity of international law-making itself, or two (or more) separate concepts of legitimacy are used in each case.

<sup>38</sup> See, for example Kumm, ‘Legitimacy of International Law’, 909-17.

<sup>39</sup> See, for example Franck, ‘Legitimacy in the International System’; Franck, *Fairness in International Law*; Teson, *Philosophy of International Law*; Bodansky, ‘Legitimacy of International Governance’; Buchanan, *Justice, Legitimacy and Self-Determination*; Kumm, ‘Legitimacy of International Law’; Teson, *Humanitarian Intervention*; Goldsmith and Posner, above n15; Buchanan and Keohane, ‘Legitimacy of Global Governance Institutions’; Buchanan, ‘Commitment to International Law’; Bodansky, ‘Legitimacy’; Wolfrum, ‘Legitimacy in International Law’; Bodansky, ‘Concept of Legitimacy’; Buchanan, ‘Legitimacy of International Law’; Tasioulas, ‘Legitimacy of International Law’; Besson, ‘Authority of International Law’.

<sup>40</sup> See Buchanan, ‘Legitimacy of International Law’.

<sup>41</sup> The absence of sanctions is not a constitutive element of the legality of international law, and it is even less a requirement of its legitimate authority (see Hart, *Concept of Law*, 216-220, Ch. 8).

<sup>42</sup> See the discussion of the changes in the sources of international law in Besson, ‘Authority of International Law’; Kumm, ‘Legitimacy of International Law’; Wolfrum, ‘Legitimacy in International Law’.

<sup>43</sup> See on relative normativity, Weil, ‘Relative Normativity’; Tasioulas, ‘In Defence of Relative Normativity’.



Given the increasing intermingling of international and domestic legal orders and, arguably, their reciprocal legitimation,<sup>44</sup> but especially given the common individual subjects of those legal orders, authors writing about the legitimacy of international law ought to choose and use one of the concepts of legitimate authority developed for the domestic context and apply it in a transitive manner.<sup>45</sup> Of course, this does not imply that the specific justifications for the authority of international law or its consequences will be the same as those applicable to domestic law given the differences identified before between those two legal orders. The remainder of this paper is actually devoted to exploring the specificities of the legitimacy in international law, and in WTO law in particular. Rather, what matters for our purpose is that the model and the concept that is used when assessing the legitimacy of legal norms stemming from both orders is the same.

There is a second difficulty looming large, however. Besides the virtues of conceptual unity in a pluralist legal order, it is important, when choosing a concept of legitimate authority of international law, that it can also be applied to individual legal subjects and not only to states.<sup>46</sup>

When states are bound by obligations of international law, their institutions and citizens<sup>47</sup> are bound indirectly and have to comply with them through the actions of their state and, in some cases, are even bound directly. As a result, assessing the legitimacy of international law and national law with the same concept, but on an interstate basis in the case of international law and on a state-individual basis in the case of national law is unhelpful. The legitimacy of international law can only be understood if the reasons for action it provides to all subjects of that authority are assessed at the same time and by reference to individual subjects as ultimate subjects of authority. Of course, this is not to deny that international law may provide different subjects with different reasons: states with some reasons and individuals with others. However, because the relationship between those subjects is one of constituency, separating the justifications for those reasons or, worse, eluding some of them blinds to an essential connection between them. When a state is bound by an international legal norm, its institutions and citizens are bound at the same time, whether directly or indirectly, and this must necessarily affect in return the way in which the state itself can be bound.<sup>48</sup>

It is essential, in other words, to lift the state veil if one is to understand the scope of the authority of international law.<sup>49</sup> A state may or may not be conceived as an entity ‘over and above’ the people who constitute it, but if states can act, and be held in duty, this is only because there are people involved. This is true even if legal doctrine, in treating corporate entities such as states as legal persons, neglects the

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<sup>44</sup> See on reciprocal domestic and international (institutional) legitimacy, Buchanan, ‘Reciprocal Legitimation’; Besson, ‘Human Rights and Democracy’.

<sup>45</sup> See Tasioulas, ‘Legitimacy of International Law’; Besson, ‘Authority of International Law’.

<sup>46</sup> See Besson, *ibid.* For a similar argument but in relation to the application of the international rule of law to states, see Waldron, ‘Sovereigns’; and Besson, ‘International Law, Sovereignty and Democracy’.

<sup>47</sup> The reference to ‘citizens’ covers more than those individuals actively taking part in the political life of the state, and is a shorthand for all individuals residing in a state and being subjected to the decisions taken in that state provided they have equal and interdependent stakes on the same bundle of issues as formal citizens of that state.

<sup>48</sup> See Kumm, ‘Legitimacy of International Law’, 910; Murphy, ‘International Responsibility’.

<sup>49</sup> Besson, ‘Authority of International Law’. I owe this expression to Murphy, ‘International Responsibility’.

relationship those entities have to people. The potential moral effect of the law on people is in need of justification. This does not mean that all legitimate authority of international law is, in the end, authority over individuals. It means that practices of ascribing duties to collectives of people like states must make moral sense and this implies that the moral position of individuals cannot be ignored in that context.<sup>50</sup>

Of course, states remain free, rational (albeit artificial) agents and as such they can enter into binding agreements the way an individual would enter into a contract.<sup>51</sup> This can be the case for many contract-like treaties and other international agreements, although consent does not necessarily bind in all cases.<sup>52</sup> The opposite view would simply strip from states their right to bind themselves and hence from any of the meaningful implications of their quality as primary international legal subjects.<sup>53</sup> Further, states' international legal obligations to obey would remain in place even if they are illegitimate, as they are often backed-up by legal sanctions.<sup>54</sup> And so would states' moral obligations to abide by morally correct directives which bind individuals (and states for them collectively) in any case. However, populations that are not represented by those states would not be morally bound by those legal directives *qua* law. Nor could those non-democratic states be bound in that strong way as a result.

Those two points are particularly important for the kind of international law that stems from and is applied within a system of multi-level governance where both international and domestic institutions act as law-makers over the same subjects. It is the case of WTO law whose content overlaps with that of domestic commercial and trade law and whose subjects overlap with those of domestic law. In that respect, it is crucial to assess the legitimate authority of WTO law for its member states, but with individual members of the domestic polity in mind and this whether WTO law is given direct effect or not in domestic law.

### 3. The Conception of Legitimate Authority of International Law

#### a. Razian Authority

Joseph Raz's seminal and refined account of authority, and of legitimate legal authority in particular,<sup>55</sup> constitutes a useful starting point for any discussion of international law's authority.<sup>56</sup> It is also the conception that constitutes the basis of the model of democratic authority that I propose, albeit complemented with a democratic procedural requirement.<sup>57</sup>

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<sup>50</sup> See Murphy, 'International Responsibility'. See also, albeit in the domestic context, Raz, *Morality of Freedom*, 72.

<sup>51</sup> On the difficulties this raises in the context of loans contracted out through treaties by corrupt governments, see Murphy, *ibid.* See also Pogge, *World Poverty and Human Rights*.

<sup>52</sup> See Raz, *Morality of Freedom*, 87-88.

<sup>53</sup> See Buchanan, 'Legitimacy of International Law', 53 on the 'Vanishing Subject Matter Problem'.

<sup>54</sup> Of course, this does not exclude correctives within the legal system itself from protecting states against themselves and in particular against corrupt governments.

<sup>55</sup> See Raz, *Morality of Freedom*; Raz, *Ethics*; Raz, 'Problem of Authority'.

<sup>56</sup> See also Tasioulas, 'Legitimacy of International Law'.

<sup>57</sup> I have argued elsewhere for this complement to the Razian basic account of legal authority: Besson, *Morality of Conflict*; Besson, 'Democracy, Law and Authority'. Unlike Christiano, *Constitution of Equality*, 232-40, I think the Razian model can be expanded into an account of democratic authority and come very close to Christiano's model (see e.g. Christiano, 'Democratic Legitimacy').

In a nutshell, the Razian conception of legal authority is comprised of two elements: A has legitimate authority over C when A's directives are (i) content-independent and (ii) exclusionary reasons for action for C. In other words, the directives are authoritative reasons for action, first, by virtue of the fact that A issued them and not because of the content of any particular directive,<sup>58</sup> and, second, because these reasons are not simply to be weighed along with other reasons that apply to C but, instead, have the normative effect of excluding some countervailing reasons for action.<sup>59</sup> The authority of those reasons for action is justified, according to Raz, if two conditions are fulfilled: (i) the dependence condition (DC); and (ii) the normal justification condition (NJC). Both conditions are intrinsically related. First, A's directives have to match (objective) reasons that apply to C independently of A's directives.<sup>60</sup> Second, A has legitimate authority over C if the latter would better conform with those reasons that apply to him or her if he or she intends to be guided by A's directives than if he or she does not.<sup>61</sup> So, an authority is legitimate when its subjects would likely better conform with the reasons that apply to them by treating the authority's directives as content-independent and exclusionary reasons for action than if they did not. This is what is meant by the so-called 'service conception' of legitimate authority: it facilitates its subjects' conformity with the (objective) reasons that already apply to them and hence respects their autonomy.<sup>62</sup> By autonomy, I mean having and exercising the capacity to choose from a range of options.<sup>63</sup>

Among the content-independent reasons that may trigger the application of the NJC, one usually mentions the authority's epistemic expertise, its cognitive, decisional or volitional ability, its executive capacity or its coordinative ability.<sup>64</sup> The specific justification will vary depending on the circumstances and the concrete ability of each legal norm or set of legal norms, on the one hand, and the subject's own objective reasons, on the other. This explains the piecemeal nature of law's legitimate authority in Raz's account, i.e. the fact that the law cannot have general legitimate authority over all subjects at one given time, and this realisation is quite illuminating when the piecemeal nature of legal authority contrasted with the law's general claim to authority.

## **b. Democratic Coordination Authority**

One of the major content-independent sets of reasons for action that can be provided by a public authority in the legal context is a salient set of coordinative reasons.<sup>65</sup> When there is an independent reason to choose one single interpretation or course of action in circumstances of reasonable disagreement and hence to coordinate, legal authority can help identify some of the conflicting reasons for action or orderings of reasons as salient and hence can help legal subjects coordinate over them.

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<sup>58</sup> See Raz, *Morality of Freedom*, 35 et seq; Raz, 'Problem of Authority', 1012-20.

<sup>59</sup> See Raz, *Morality of Freedom*, 57 et seq; Raz, 'Problem of Authority', *ibid.*

<sup>60</sup> See Raz, *Morality of Freedom*, 42 et seq; Raz, 'Problem of Authority', *ibid.*

<sup>61</sup> See Raz, *Morality of Freedom*, 53; Raz, 'Problem of Authority', 1014.

<sup>62</sup> See Raz, 'Problem of Authority', 1012 et seq.

<sup>63</sup> See Griffin, *On Human Rights*, 33.

<sup>64</sup> See Raz, *Morality of Freedom*, 75 et seq.

<sup>65</sup> See, for coordination-based accounts of legal authority founded on Razian authority, Besson, *Morality of Conflict*; Waldron, 'Authority for Officials'.

In fact, as I have argued elsewhere, coordination on issues of common concern<sup>66</sup> is a much more common requirement in the pluralist circumstances of contemporary politics than legal theorists are usually ready to concede. In conditions of pervasive and persistent reasonable disagreement about justice, the creation of a legal order as a means of general coordination over matters of justice is actually in itself a requirement of justice.<sup>67</sup> And the law constitutes the best coordination mechanism one may think of: it provides a framework through which one may identify in a determinate and public manner a salient solution from a range of morally eligible solutions. This has to do with its decisional and expressive abilities, but also, although not only, with the sanctions it can provide in case of non-conformity.<sup>68</sup> As a result, the reason to coordinate over certain issues is not restricted to certain contexts and legal areas where so-called ‘coordination problems’ arise, such as environmental law, migration law or disarmament law, but it is a more general reason to constitute a legal system and then to abide by the rules of that legal system as a whole, whether or not those rules effectively solve coordination problems in practice.

The kind of coordination I have in mind here is (partial-conflict) coordination over moral concerns when people disagree reasonably over them and therefore have an independent reason to coordinate over a common take on those issues if they know others will do so as well and can identify what all of them will coordinate over – even if this means not doing things the way they separately think would be the right way to go about doing them.<sup>69</sup> As a result, common objections pertaining to the shortcomings of the Lewis model of coordination in cases of classic coordination problems and coordination over arbitrary matters are easily met.<sup>70</sup> First, coordination in the cases concerned in the previous paragraph implies coordinating over pre-existing objective moral reasons, and not over mere subjective interests and preferences. Second, the coordinative scheme can provide a separate set of dependent albeit exclusionary reasons and need not simply choose either of the existing sets of reasons; without the law, participants would not be able to act together on an abstract set of reasons.

Scope precludes expanding here on the question of law and coordination, but any form of coordination over matters of common concern cannot be judged in the same way. Democratic coordination provides the most legitimate mode of coordination in circumstances of reasonable disagreement over matters of justice.<sup>71</sup> It respects equality by including all those subjected to decisions into the decision-making process over issues of disagreement. More precisely, majority rule provides all participants with an equal chance of giving salience to their own views over what ought to be done over matters of common concern and thus

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<sup>66</sup> According to Waldron, *ibid.*, a question is a question of common concern among a group of people, if it is better for a single answer to be accepted among them than for each person to deal with the question on their own, the best they can.

<sup>67</sup> See Besson, *Morality of Conflict*, 164 et seq; Waldron, ‘Special Ties’, 14-15; Waldron, *Law and Disagreement*, 101-113. See also Finnis, ‘Authority of Law’.

<sup>68</sup> See Besson, *Morality of Conflict*, 459, 503; Waldron, *Law and Disagreement*, 101-113.

<sup>69</sup> On the difference between consent and coordination, see Besson, *ibid.*, 473-475; Waldron, ‘Special Ties’, 25-27. Consent can enhance coordination, but is not necessary for coordination to take place.

<sup>70</sup> See, for example Raz, ‘Problem of Authority’, 1031-1032.

<sup>71</sup> See Besson, *Morality of Conflict*, 459 et seq; Waldron, *Law and Disagreement*, 101-113 on democratic coordinative authority. See for a non-coordination based account of democratic authority that is very similar, Christiano, *Constitution of Equality*, 231-259.

by taking turns in the decision-making process.<sup>72</sup> Democratic legitimacy is another dimension that escapes most recent accounts of law's authority that are still, and questionably so, focused on a hierarchical divide between rulers and governed.<sup>73</sup>

If all this pertains, democratic coordination provides one the main justifications for the law's authority. It is a justification that may actually overlap with some of the others mentioned above, including epistemic expertise and executive or volitive ability in certain cases,<sup>74</sup> but it also applies much more broadly than most. This has consequences for the piecemeal approach to legal authority presented before – although law's legitimate authority is not necessarily as general as the law claims it is, its scope can be much broader than conceded by proponents of the Razian account.

In any case, since democracy is rarely fully realised, the proposed account of coordination-based authority does not exclude non-democratic forms of legitimate coordination.<sup>75</sup> Nor does it prevent the coordination-based account from coexisting with other reasons for respect and recognition of law's authority that usually fill the gap between the law's general claim to legitimate authority and the piecemeal scope of its objective legitimacy. It is the case, for instance of consent. Consent is neither a sufficient nor a necessary condition of legitimacy *per se*.<sup>76</sup> And this applies both at the domestic and the international levels. Nor is it correct to identify democratic consent with democratic legitimacy.<sup>77</sup> However, state consent still has an important role to play in the ascertaining and strengthening of international legal authority. It may indeed be a ground of respect for the law, albeit not of justified authority. Further, in the absence of international democracy, consent may play an identification role in the generation of democratic state duties in a fair association model,<sup>78</sup> but this should not be mistaken with a ground of democratic legitimacy among states. It is an internal requirement of domestic democracy and the expression of states' democratic representation of their people's will on the international plane.

### c. Revised Razian Authority

Importantly, the coordination-based approach to authority just presented ought not be understood as an alternative to the Razian account described before, but, on the contrary, as a re-interpretation of that account in circumstances of ordinary law-making and public authority.<sup>79</sup>

This re-interpretation requires specifying the concept of justified authority and its conditions, in order to accommodate the way the law provides, first, a whole class of subjects, and not each of them separately, and, secondly, a class of subjects who are also authors of the law they are subjected to, rather than dominated by the law and its authors, with reasons for coordinated action over matters of justice and

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<sup>72</sup> In contrast to what is often said (see, for example Tasioulas, 'Legitimacy of International Law') and presumably derived from a skewed idea of participatory practices in a democracy, individual consent ought not therefore be conflated with democracy as a justification of authority. See Hershovitz, 'Legitimacy', 215.

<sup>73</sup> See, for example Hershovitz's, 'Legitimacy', 209-210 critique of Raz's account of legal authority.

<sup>74</sup> See Raz, 'Problem of Authority', 1031.

<sup>75</sup> See Raz, 'Problem of Authority', 1031 fn. 20, 1037-1040.

<sup>76</sup> See Buchanan, Justice, Legitimacy and Self-Determination; Besson, 'Authority of International Law'.

<sup>77</sup> See Besson, *ibid.*; Hershovitz, 'Legitimacy'; Besson, 'Democracy, Law and Authority'.

<sup>78</sup> See e.g Christiano, 'Legitimacy of International Institutions'.

<sup>79</sup> See Waldron, 'Authority for Officials'; Besson, Morality of Conflict, 490-498; Besson, 'Democracy, Law and Authority', 89.

common concern.<sup>80</sup> Interestingly, most of these points have actually been taken on board by Raz's recent re-statements of his account of legal authority and of the three conditions mentioned above.<sup>81</sup>

First of all, the pre-emptive nature of authoritative reasons should be read so as to accommodate the need to identify, in ordinary circumstances of political law-making, both the existence of an issue of common concern over which coordination is needed and the existence of an authority able to provide a salient point over which others will coordinate, before its authority can actually be confirmed. *Prima facie*, this would seem to contradict Raz's contention that if an authority is to make an authoritative determination in a case of coordination, it is precisely because it pre-empts the subjects' own reasoning on the need to do so. Accordingly, it would undermine the whole point of authority to have to identify it as a coordinative authority before it can effectively be such. However, according to Jeremy Waldron, Raz's pre-emption point can be satisfied if we distinguish serially the recognition of an authority as coordinative from that authority's determination of what is to be done about it.<sup>82</sup> Second, pertaining to the DC, the correspondence between the subject's reasons and those given by the authority cannot be direct, if independent reasons to coordinate have to be recognised.<sup>83</sup> As Raz has since conceded, however, all the dependence thesis requires is that we have the abstract reasons which the public authority gives us new opportunities to pursue, even though we did not have the opportunity to do so on our own beforehand.<sup>84</sup>

Finally, and more importantly, before a public authority can satisfy the NJC, it has to be recognised as a public authority that others will regard as such and coordinate around. This has to take place before the authority can provide a salient point of coordination, but this may contradict Raz's condition according to which an authority should not have to be identified as an authority before it gives reasons which are effectively legitimate and actually becomes an authority. Such an account of authority would simply undermine the point of having an authority in the first place. According to Waldron, however, this could be fixed by reference to Raz's considerations about *de facto* authority and the role of power as a necessary albeit insufficient condition for legitimate authority.<sup>85</sup> For the NJC to apply in cases of coordination over matters of common concern, it is useful to distinguish between the individual application of the NJC and the additional requirement that a large number of people regard the NJC as being satisfied as well.

This last point also explains how the NJC can be reconciled with the proposed account of democratic coordination. *Prima facie*, indeed, what looks like a procedural account of legitimacy would seem to run against Raz's more substantive theory of legitimacy.<sup>86</sup> This objection fails on one major count: the proposed justification of authority builds upon Raz's substantive concept of legitimate authority and is not

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<sup>80</sup> This should help placate Buchanan, 'Reciprocal Legitimation', 17-19's objection pertaining to the justification of the institutional agents' reasons for acting, echoing the democratic and institutional critique first articulated by Van der Vossen, 'On Legitimacy and Authority'; and Christiano, 'Authority of Democracy'.

<sup>81</sup> See the replies by Raz, 'Comments and Responses'; Raz, 'Problem of Authority', 1040-1044. See Besson, 'Democracy, Law and Authority'.

<sup>82</sup> See Waldron, 'Authority for Officials', 59-61. See also Buchanan and Keohane, 'Legitimacy of Global Governance Institutions' at 408 for a similar concern in international law.

<sup>83</sup> See Waldron, *ibid.*, 61-63. See also Besson, 'Morality of Conflict', 497-498.

<sup>84</sup> Raz, 'Comments and Responses', 260.

<sup>85</sup> See Raz, 'Morality of Freedom', 75-76.

<sup>86</sup> See, for example, Herschovitz, 'Legitimacy', 216 et seq.

purely procedural. What a legal authority does, when understood along those lines, is provide legal subjects with reasons to coordinate over an abstract set of reasons they share objectively even if they disagree about it or its internal ordering concretely. In circumstances of reasonable disagreement about issues of justice and other matters of common concern, they will be able to abide by their own reasons better over time if they coordinate on a morally suboptimal solution, getting their turn in identifying a salient point of coordination, than if all of them decide (even more correctly) for themselves in each case.<sup>87</sup> This explains how the NJC can be respected individually in each case, besides also having to be shared by all participants.<sup>88</sup>

This reasoning also applies to a non-epistemic account of democratic deliberation,<sup>89</sup> i.e. even if the procedure itself does not necessarily improve the chances of reaching the correct result in all cases.<sup>90</sup> What matters in circumstances where no epistemic guarantees can be provided, is to make sure all perspectives are given equal respect and get a chance to become the group's coordinating position. In those circumstances and given the need to choose a single set of rules for all on most issues of common concern, the best way to comply with one's own reasons is to coordinate with others. As a result, what satisfies the NJC is not so much the epistemic quality of the process, but its coordinative ability in circumstances where there is a matter of common concern over which there is an independent reason to coordinate. Due to our epistemic limitations we are better off coordinating than trying to work things out on our own.

Thanks to its minimal and flexible features, the revised democratic coordination-based of Raz's service conception of authority provides the perfect account of the legitimacy of international law and of WTO law in particular. It is piecemeal and does not understand the legitimate authority of law to be general and applicable to all subjects in a similar fashion, on the one hand, and it encompasses many different justifications that can fit different social and cultural contexts, on the other. Those two features fit the many authors, subjects and sources of international law, and in particular of WTO law. The proposed conception of legitimacy corresponds, in other words, to the fragmented and non-monolithical nature of international law, and of WTO law in particular.

The question that needs to be addressed now, however, is whether one of the grounds or justifications for the authority of international law, and in turn of WTO law, can also be democracy and how.

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<sup>87</sup> See Besson, *Morality of Conflict*, 496-498; Waldron, *Law and Disagreement*, 101-113. This view contrasts with that of Raz, *Ethics*, 347.

<sup>88</sup> See Waldron, 'Authority for Officials', 66. Even though it is a different sort of reason, it affects the way the NJC is satisfied individually – in conditions of reasonable disagreement over matters of common concern, the existence of a coordinative authority around which people know they might be able to coordinate necessarily affects the ways in which the NJC is satisfied individually. See also Perry, 'Political Authority and Political Obligation' for a non-aggregative conception of the NJC in the political context.

<sup>89</sup> See Raz, *Ethics*, 117 on the NJC and the epistemic qualities of democratic authority.

<sup>90</sup> This view differs from that of Hershovitz, 'Legitimacy', 212 et seq.

## II. The Democratic Legitimacy of International Law

There are two questions to clarify in relation to the democratic coordination-based legitimacy of international law: the question of the subject and the question of the process. Too often, indeed, discussions of the legitimacy of WTO law jump directly to issues of process without having clarified the subject question.<sup>91</sup> The problem is that a given institutional process may only be deemed democratic by reference to a subject and how the process protects that subject's equality.

### 1. The Subject

#### a. The Alternatives

Among the questions raised by the democratic legitimacy of the law adopted outside domestic boundaries, the question of the subject of democracy is one of the most controversial ones. Countless publications have been released recently on the identity and the boundaries of the *demos* or *demoi* in transnational and supranational democracy.<sup>92</sup> Discussions have addressed issues such as the non-democratic nature of the determination of democratic boundaries,<sup>93</sup> the criteria that turn a group of individuals into a political community and into one that has a right to democracy,<sup>94</sup> the co-existence of many *demoi* without constitution of a united *demos* and so on.

The point here is not to rehearse those discussions, but merely to focus on an issue that seems to have gone amiss in recent debates about the subject of post-national democracy. Those debates have focused on the democratic legitimate authority of international law only and whether it is for states or individuals. The question that has curiously been omitted, however, is the question of the democratic subject in circumstances of multi-level governance where the post-national polity does not grow out of nowhere and cannot be constituted from scratch, but from domestic democratic states.<sup>95</sup> More specifically, the circumstances at stake are those where individuals are not (yet) part of an international political community, but where international institutions act outside the unanimous consent of their democratic member states. In those circumstances, there are or could potentially be more than one democratic polity at stake within the same territorial boundaries and this raises the question of the exclusive nature of democratic legitimacy.<sup>96</sup> In short, then, the question is not so much how cosmopolitan democracy should look like, but how one may protect functioning domestic democracies in circumstances of multi-level governance while at the same time enhancing the democratic legitimacy of the law-making processes that

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<sup>91</sup> See e.g. Ziegler and Bonzon, 'How to Reform WTO Decision-making?'.

<sup>92</sup> See e.g. Goodin, 'Enfranchising'; Näsström, 'The Challenge of the All-Affected Principle'.

<sup>93</sup> See e.g. Whelan, 'Democratic Theory'.

<sup>94</sup> See e.g. Näsström, 'The Challenge of the All-Affected Principle'.

<sup>95</sup> See Erman, 'Should All Political Contexts be Democratic' for this critique. Contra: Näsström, 'The Challenge of the All-Affected Principle'; Cheneval, *Government of the Peoples*, 79.

<sup>96</sup> Interestingly, Van der Vossen discusses the non-exclusive nature of legitimacy in general, including political legitimacy, but without addressing the exclusive or non-exclusive nature of democratic legitimacy (van der Vossen, 'Legitimacy and Multi-Level Governance'). He assumes indeed the subject to multi-level authority is the same, but the question of democratic authority in multi-level governance circumstances raises the question of a multi-level democratic subject submitted to multi-level authorities.



occur beyond the state in that multi-level environment. What this boils down to then is the scope of the political communities whose members' political equality ought to be protected and how.

In those circumstances, traditional references to indirect democratic legitimation by states, on the one hand, or to direct cosmopolitan democracy, on the other, are unhelpful: the former because the reality of multi-level governance and law-making can no longer be held in check by indirect democratic control and actually even undermines domestic democracy, and the latter because there is no global *demos* and the conditions of individual political equality across borders are not fulfilled (yet).<sup>97</sup> More generally, those traditional alternatives focus exclusively on the democratic legitimacy of international law and institutions, without paying sufficient attention to the integration of the former in the domestic context and the impact of the former on the latter.<sup>98</sup> The democratic legitimacy of each of the different governance levels co-evolves: one cannot be reinforced without impacting on the other. It is this mutual influence that needs to be addressed more carefully.

In order to understand what the problems are, it is useful to start with the two models usually opposed in this context: the status quo model of voluntary association of democratic states and the ideal model of cosmopolitan democratic community of individuals.<sup>99</sup> The opposition between those two models is often justified by reference to a gradualist approach that preserves the statist domestic form and, once the time is ripe, transfers it to the global level. This is problematic as domestic democracy is itself being transformed through multi-lateral and multi-level decision-making and is best approached in its hybrid and transforming shapes.<sup>100</sup> The other difficulties with both models are well-known, but I will focus on some of them more specifically in what follows.

In the voluntary association of democratic states, the only subjects to democracy are individuals and their community is the state. Democratic states enter into associations and agreements by mutual consent with one another and that consent secures the indirect democratic legitimacy of international law.

While that model protects democratic self-determination in external relations by having states promoting the interests of their people, it can also affect individual political equality in the long run. As Thomas Christiano explains very well,<sup>101</sup> there are at least two problems for domestic democracy that arise from the model: first of all, the lack of representativeness of the people by the state and the direct threat on political equality; and, secondly, the asymmetrical nature of international relations and the indirect threat on political equality. The first issue stems from the role played by the executive in international law-making at the detriment of the parliament, but also in locking in minorities.<sup>102</sup> The second one pertains to the unequal power balance that prevails in interstate relations and the impact this has indirectly on

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<sup>97</sup> See e.g. Dahl, 'Can International Organizations be Democratic?'

<sup>98</sup> See e.g. Archibugi, 'Cosmopolitan Democracy'.

<sup>99</sup> See Christiano, 'Democratic Legitimacy', 122 ff.

<sup>100</sup> See also Cheneval, *Government of the Peoples*, 24-5 on gradualism and transformationalism, and 4 on the domestic/global leap in mainstream global democracy literature.

<sup>101</sup> See Christiano, 'Democratic Legitimacy', 124-6.

<sup>102</sup> See Christiano, 'Democratic Legitimacy', 125.

individual political equality within the state whose will cannot be fully mediated by their state.<sup>103</sup> A further difficulty with the voluntary association of democratic states model as we know it, is the lack of recognition and protection of individual equality and the equal advancement of their interests across domestic borders as opposed to domestically only. This hiatus between that global egalitarian aspiration and the constraints of domestic democratic boundaries is one of the main shortcomings of the first model.

The second model, i.e. the cosmopolitan democratic community of individuals, solves those issues by having as primary subjects, individuals and, as primary political community, the global one. Here neither the problem of state representativeness nor that of imbalance of power between states occur. Furthermore, what the second model secures is individual political equality across domestic borders.

The main difficulty, however, is that the model is not (yet) realizable in international relations. The main preconditions for democracy are indeed the interdependence and the rough equality of stakes between individuals worldwide.<sup>104</sup> For political equality to give rise to democratic decision-making, participants need to have packages or bundles of issues over which they share interdependent interests or stakes and, if possible, roughly equal ones. This is function of taking turns in deciding on issues over which there are reasonable disagreements. As things stand, while stakes may be interdependent and roughly equal at a regional level, and the European Union (EU) is a good example thereof, the same may not be said for the global level.<sup>105</sup> International governance and legal regimes are specialized and as a result largely fragmented. It would be illusory in view of the regionalization and specialization of international law-making and institutions to expect stakes to become interdependent and equal in the short run.

Of course, if the preconditions were fulfilled, and political equality were to be granted to individuals globally, there would still be ways to manage local diversity by recognizing democratic self-determination at the domestic level the way this is done in federal regimes. This is the case in the European Union, for instance, where both states and individuals are political subjects of a larger democratic polity.<sup>106</sup> Federalism enhances democracy by triggering deliberation, dispersing power and protecting minorities in particular. The reason federal regimes may be regarded as democratic, however, is that they rely on and protect individual political equality while also managing local diversity. Federalism without a political community of individuals (overlapping with the community of polities) may not yet or no longer be deemed democratic.<sup>107</sup> This explains why it is not enough from the perspective of democratic theory to gesture to the existence of a federal organization of democratic states:<sup>108</sup> global democracy also requires a community of individuals with interdependent and equal stakes.<sup>109</sup>

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<sup>103</sup> See Christiano, 'Democratic Legitimacy', 125-6.

<sup>104</sup> See Christiano, 'Democratic Legitimacy', 130 ff.

<sup>105</sup> Contra e.g. Cheneval, *Government of the Peoples*, 5, who sees the EU as an (advanced) example of multilateral democracy.

<sup>106</sup> As I have argued elsewhere, the EU is a regional multi-level democratic polity of democratic states and individuals organized along federal lines (Besson, 'Deliberative *Demoi*-cracy'; see also Cheneval and Schimmelfennig, 'Democracy in the EU').

<sup>107</sup> On federalism and the tensions between individual political equality and the equal rights of sub-entities, see Dahl, 'Federalism and the Democratic Process'.

<sup>108</sup> For an example of an author who reverts to federalism when faced with the question of the relationship between individual political equality and the equality between democratic states, but without questioning the democratic underpinnings of

The question then is when the stakes could become sufficiently interdependent and equal to give rise to democracy beyond the state. This is a largely indeterminate question. The only historical example we have is the European Union. In that context, the institutional framework was progressively revised to allow not only the inclusion of individuals as political subjects and the development of a parliamentary democracy, but also the inclusion of an interdependent and equal set of issues within the ambit of EU law-making.<sup>110</sup> While the former does not seem to be realistically feasible in the short run within global international organizations, the latter is even more problematic: those organizations are specialized and cannot, outside the United Nations, hope to expand their material scope that broadly. Through regionalization and material specialization, multi-level governance and multi-level institutions enhance that difficulty even more.<sup>111</sup> Besides the lack of interdependent stakes on a sufficiently broad bundle of issues, the inequality of those stakes is even more worrying. To start with, the circumstances of individuals globally are so different that they are bound to have very different stakes in the same issues, but, more importantly, the fact that related issues are treated for some at the international level and for others at the domestic level enhances the inequality of stakes between individuals.<sup>112</sup>

Once equal and interdependent stakes have developed, it follows that the best model would be that of a global multi-level democratic polity with individuals and democratic states as subjects. One may, of course, not exclude centralization on democratic grounds, but it is likely that the democratic benefits of federalism alluded to before may also be particularly valuable in a multi-level governance context where power could easily become concentrated and in which distinct democratic polities should therefore also be preserved for inherently democratic reasons.<sup>113</sup>

### **b. A Third Way**

In view of the complexity but also the ‘messy’ nature of the current situation,<sup>114</sup> the question becomes what to do in those non-ideal circumstances. Christiano has proposed a third model: the fair association of democratic states. And it is the one that is also endorsed here.

This is only a second best, of course, but it remedies some of the shortcomings of the *status quo* model for domestic democracy and individual political equality. The proposed model ensures that the bargaining between democratic states is fair (for instance, by reference to the population’s size, on the one hand, and their need of the agreement, on the other) and that the representativeness of democratic states is secured

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federalism and hence begging the question of political equality, see e.g. Cheneval, *Government of the Peoples*, 144. Elsewhere, the same author (Cheneval, *Government of the Peoples*, 64-5) actually argues against the all-affected-principle on the basis of the encompassing community in the federal model.

<sup>109</sup> Of course, that community need not replace the various democratic communities on this federal model (see e.g. Schütze, *From Dual to Cooperative Federalism on the false opposition between the international federation of sovereign states and the sovereign federal state*). This is the key feature to multi-level democratic governance and legitimacy.

<sup>110</sup> To that extent, I have argued elsewhere that there can be multi-level democratic legitimacy in the EU (Besson, ‘*Deliberative Democracy*’) depending on the sets of issues being decided over.

<sup>111</sup> See Christiano, ‘*Democratic Legitimacy*’, 132.

<sup>112</sup> See Christiano, ‘*Democratic Legitimacy*’, 132 ff.

<sup>113</sup> See also Besson, ‘*Human Rights and Democracy*’ (based on a human rights theory argument); Cheneval, *Government of the Peoples*, 83.

<sup>114</sup> See Christiano, ‘*Democratic Legitimacy*’, 120.

through domestic measures (e.g. repatriation of external questions), but also external ones (e.g. minority protection and human rights).

Interestingly, Christiano's model is not referred to as a democratic model:<sup>115</sup> the democratic subject remains the individual and her political community the domestic one. The conditions for global democracy are not fulfilled indeed, and in particular the interdependence and equality of stakes outside of the domestic community. All the same, the model is an egalitarian one that focuses on individual political equality within each democratic state, but also on individual general equality across different states, at least to the extent that fairness in interstate relations reflects their demographic size and the populations' interest in the negotiation and hence contributes to protecting transnational individual equality.

In this respect, the proposed model differs from *demoi*-cratic models which take democratic states<sup>116</sup> as subjects of democracy beyond the state (on top of individuals,<sup>117</sup> but also sometimes as sole democratic subjects).<sup>118</sup> The difficulty with those accounts is that, while they rush to identify a new democratic subject and rightly aim at accommodating the existence of domestic democratic states in their democratic accounts of international relations and as an alternative to cosmopolitan democratic models,<sup>119</sup> they downplay the individuals and their political equality. *Demoi*-cracy and its concern for egalitarian and inclusive relationships between democratic statespeoples can only be deemed a democratic model if it also protects individual political equality. After all, democratic states only retain their democratic relevance if they constitute a political community in which individuals have interdependent and equal stakes and in which they exercise their claim to political equality and democracy as a result. Concentrating only on the relations between democratic states, however, obfuscates the key question of individual political equality and of the political community in which the latter is exercised: the domestic political community and/or one or many broader political communities (e.g. regional and/or international ones).

Of course, an alternative reading of the *demoi*-cratic models may be a complete shift to a new subject of democracy, at least of democracy beyond the state: peoples. There are three difficulties with such a move, however. The first one is the methodological and normative individualism that prevails in democratic theory and for good reason.<sup>120</sup> It is unclear indeed how one could vest peoples with any other rights and

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<sup>115</sup> See Christiano, 'Democratic Legitimacy', 129.

<sup>116</sup> It is important to refer to 'democratic states' and not only to 'peoples' or *demoi*. Indeed, states are the legal and political subjects acting for the people in international relations. Also, democratic states also comprise an executive and a judiciary next to the legislative that represents the people. Hence the concept of 'statespeoples' that is used sometimes (see e.g. Cheneval, *Government of the Peoples*, 11). See also Besson, 'Authority of International Law'.

<sup>117</sup> Even in *demoi*-cratic accounts that claim to accommodate both statespeoples and individuals as democratic subjects, the exact relationship between the two gets lost. See e.g. Cheneval, *Government of the Peoples*, 10-11, who talks of statespeoples and citizens, and refers to statespeoples' citizens as 'citizens', but also often seems to be gesturing as them as a group of citizens of the encompassing ensemble of statespeoples (e.g. in his opposition of the original position of statespeoples and the original position of citizens (of all *demoi* together): 121 or 144). He also refers to a 'demoi-cratic order' (10), but remains silent about the political nature of that order and whether there can be democracy as a regime without a people of peoples (besides statespeoples and their citizens) (20).

<sup>118</sup> For authors who defend such a model of 'democracy' between democratic states, see e.g. Nicolaidis, 'New Constitution' (pertaining to the EU only); Besson, 'Deliberative *Demoi*-cracy' (with individuals and pertaining to the EU only); Bohman, *Democracy Across Borders*; Besson, 'Institutionalizing Global *Demoi*-cracy' (with individuals); Cheneval, *Government of the Peoples*.

<sup>119</sup> See e.g. Higgott and Erman, 'Deliberative Global Governance', 457.

<sup>120</sup> See also Cheneval, *Government of the Peoples*, 119 ff.

duties than those of the people whose rights and duties they are mediating and representing. The second concern is the split this would create between domestic democracy focused on individuals and accessorially on collective equality, on the one hand, and democracy beyond the state focused on purely collective subjects, on the other. The danger eventually is to undermine domestic democracy and individual political equality by turning the representative state into an independent and ultimate subject that behaves as an individual in the international sphere, a tendency that has often been criticized in international law theory for ignoring that sovereign states act as trustees of their constituency. By personalizing peoples and forgetting their citizens, *demoi*-cratic theories may fall prey to the very personification of states in international relations which they denounce and against which they have developed the idea of ‘statespeoples’<sup>121</sup>. Finally, the proposed split between the subjects of domestic democracy and those of transnational democracy does not correspond to the way the sources of international law and the enforcement of international law have evolved in close interaction with domestic law. That close interaction in the legality of those sources of law also warrants, I would like to argue, a close interaction in their legitimation by reference to their ultimate subjects: individuals.<sup>122</sup>

Thus, the question about the fair association of democratic states model becomes how to maintain a balance between the protection of domestic democracy and individual political equality while, at the same time, making sure interstate relations between democratic states are fair. The split between domestic equality and international fairness makes maintaining that balance a very difficult task. For instance, introducing majority voting between democratic states instead of consensus may seem fair internationally and may even be defended as a form of equality between states and their peoples,<sup>123</sup> but may be unequal from a domestic perspective and that of individual citizens of those democratic states. It is as if, therefore, fairness on the international plane and equality on the domestic level were in inescapable tension. Moreover, whatever one does at the level of international law-making processes will affect domestic law-making processes and vice-versa. Thus, what may be equal internationally, may not be domestically. Of course, this is a well-known dilemma in federal regimes where the one man, one vote interpretation of individual political equality is affected by the equality of federal entities.<sup>124</sup> Here, by contrast, however, there is no encompassing political community of individuals and it is, as a result, difficult to consider fair relations between democratic states, even with the usual federal correctives of the size of their population and their respective stakes, as transnational relations of individual equality.<sup>125</sup>

At the same time, however, democratic states act as trustees of their people, and the mediated rights and duties of those people ought therefore to affect what is fair between them and in their external relations to other democratic states. Democratic states do not merely act as individual agents on the international

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<sup>121</sup> See e.g. Cheneval, *Government of the Peoples*, 5.

<sup>122</sup> See Besson, ‘Authority of International Law’.

<sup>123</sup> See e.g. the discussion in Elsig and Cottier, ‘Reforming the WTO’.

<sup>124</sup> See e.g. Dahl, ‘Federalism and the Democratic Process’; Beaud, *Théorie de la fédération*, on the union of states without an union of peoples in the EU.

<sup>125</sup> This is a problem multilateral democracy authors usually fail to see. See e.g. Cheneval, *Government of the Peoples*, 144.

plane.<sup>126</sup> Importantly, however, those external duties of statespeoples *qua* democratic entities cannot include full-blown democratic duties such as political equality duties, or only at the risk of undermining their own. It is essential therefore to distinguish between respecting democratic standards, values or principles in international relations, on the one hand, and democracy itself as a political regime, on the other.<sup>127</sup> Thus, one may argue for duties of respect, reciprocity or fairness, for instance. Of course, this equation is made more complex by the fact that individuals have non-democracy related global duties to other individuals outside their state, such as duties of justice for instance, and their state also represents those duties in international relations.<sup>128</sup> It is on the determination of what this hybrid form of fairness/equality in interstate relationships amounts to that our efforts should be invested, while keeping an eye on domestic democracy and the ways to protect it at the same time. As long as the democratic subject remains the domestic people, indeed, the legitimate authority of international law has to be determined by reference to domestic democracy.

All this does not mean, however, that international law and institutions cannot be legitimate as things stand. The other grounds of (piecemeal) legitimacy mentioned in the first section of the paper apply. They may also be supplemented by content-dependent justifications and state consent most of the time. Furthermore, spheres of legitimacy are not watertight and domestic legitimacy extends to the international level. This is captured by Buchanan's idea of mutual legitimation of domestic and international institutions and law.<sup>129</sup> Different grounds of justification will be provided in each context, and whereas democratic ones will stem mostly from the democratic context, they may be invoked in the reciprocal legitimation of international law as well.

## 2. The Process

Those considerations about the subject of democracy in multi-level governance and law-making should make us wary of using terms such as 'democratization'. Of course, stakes may become more interdependent and eventually equal on a global plane and one should remain open to that evolution. According to Christiano, 'we must think of international institutions and law as works in progress'.<sup>130</sup> What democratization refers to, however, is a proactive set of punctual institutional reforms aiming at making law-making processes beyond the state more democratic. In the absence of democratic subject and of a systematic approach to the processes through which the community decides for itself, it is unclear how such a democratization process is even plausible and how it can even be said to duly protect domestic democracy.

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<sup>126</sup> See e.g. Waldron, 'Sovereigns'; Besson, 'Authority of International Law'; Besson, 'International Law, Sovereignty and Democracy'.

<sup>127</sup> Contra Cheneval, *Government of the Peoples*, 2, 7, who conflates justice and democracy in this context. Moreover, it is also important not to identify the non-discrimination principle (e.g. on the basis of nationality) that is used in international relations and between states and has a rational justification, with individual political equality that is based on basic equal moral status (contra Cheneval, *Government of the Peoples*, 140-2 who conflates them).

<sup>128</sup> See Miller, 'The Responsibility to Protect Human Rights' on the conflicts between democratic duties to one's fellow citizens and responsibilities to others.

<sup>129</sup> See Buchanan, 'Reciprocal Legitimation'; Besson, 'Human Rights and Democracy'.

<sup>130</sup> See Christiano, 'Democratic Legitimacy', 137.

All the same, concerns for process are in order, even as things stand and before the multi-level democratic polity has developed. Among the elements to be secured in terms of process, and besides the importance of fairness, transparency and power balance discussed before, one should mention deliberation and human rights protection (including minority protection).

First of all, deliberation is the uncoerced and public exchange of reasons. It should be understood in a broad sense to cover representative as much as direct deliberation by the people, on the one hand. On the other, it is also very important that democratic deliberation is oriented towards decision-making;<sup>131</sup> this means that one should adopt the Habermasian dual-track model whereby informal deliberation in civil society and formal deliberation in official institutional settings go hand in hand. This means that efforts should be made not only at the international institutional level, but also in the context of the reinforcement and regulation of civil society and of ways of making it sufficiently accountable and transparent. And this dual-track system should encompass domestic as well as global institutions. Secondly, human rights contribute to the protection of political equality and therefore are grounded in the same value as democracy. They enable individual political equality by mediating collective power. They counterbalance the collective nature of democracy as it were.<sup>132</sup>

Following the model proposed by Richard Higgott and Eva Erman for the political process of global democracy, one may suggest a double-tier system with formal and informal deliberation by individuals domestically and informal deliberation by them globally, on the one hand, and formal and informal deliberation by states internationally, on the other.<sup>133</sup> Importantly, the domestic polity should be seen as the point of convergence of formal and informal deliberation and of the individual-state relationship.

### III. The Democratic Legitimacy of WTO Law

WTO law-making is a form of law-making by multi-level and multi-lateral governance. As a result, its democratic legitimacy raises the question whether and how one may conceive of the democratic legitimacy of the law and institutions in a multi-level context as opposed to a merely international or democratic context. It follows from what was argued in the previous section about democracy beyond the state and within multi-level circumstances that the democratic legitimacy of WTO law is best understood together with that of domestic law and other parts of international law. Democracy is a claim to decide equally on bundles of issues over which people have interdependent and roughly equal stakes. However, bundles of issues only arise if there is sufficient material ambit of decision-making, as exemplified by the EU, and this may not be the case as things stand for the WTO.

One of the major difficulties with current discussions of the legitimacy deficit in the WTO law-making process have to do with the failure to identify the democratic subjects in the WTO multi-level and multi-lateral institutional structure, on the one hand, and a heightened focus on process and punctual institutional measures meant to 'democratize' the process, on the other. The time has come to turn to the

<sup>131</sup> See Besson, 'Deliberative Democracy'; Higgott and Erman, 'Deliberative Global Governance', 454 ff.

<sup>132</sup> See Besson, 'Human Rights and Democracy'.

<sup>133</sup> See Higgott and Erman, 'Deliberative Global Governance', 456 ff.

WTO therefore and to discuss some of the issues raised in the previous section in the context of WTO law: the democratic subject and the democratic process in WTO law-making.

**a. The Subject**

The current way in which the WTO institutional regime works corresponds to the voluntary association of (democratic) states model. Democratic states enter into associations and agreements by mutual consent with one another and that consent secures the indirect democratic legitimacy of WTO law.<sup>134</sup>

While that model protects democratic self-determination in external relations, it also affects it in the long run. The two problems for domestic democracy that arise from the model and described before affect the WTO even more than other regimes of international law. The first issue stems from the role played by the executive in international law-making at the detriment of the parliament. In many countries, trade agreements are not submitted to the parliament's approval and can be negotiated and ratified by governments only. The second one pertains to the unequal power balance that prevails in interstate relations, and the impact this has indirectly on individual political equality within the state whose will cannot be fully mediated by their state. This is particularly clear in the WTO realm where economic power is used to obtain asymmetrical benefits from trade agreements.<sup>135</sup>

The main difficulty, however, with any prospect of moving to a global community of individuals in the context of the WTO is that the model is not realizable in that regime. The preconditions for political equality are indeed the interdependence and the rough equality of stakes between individuals worldwide. As things stand, while stakes may be interdependent and roughly equal in some regional trade regimes such as the EU that also extend to other areas than trade issues, the same may not be said for the WTO. To start with, the WTO governance and legal regime are specialized and as a result largely fragmented. Moreover, some trade issues are still regulated and enforced at the domestic level or at the regional level. It would be illusory in view of the regionalization and the specialization of international law-making and institutions to expect stakes to become interdependent in the short run. The equality of stakes in the WTO context is also a source of concern. Indeed, states do not participate to the same extent in the international trade system and, even when they do, the fact that some aspects are still addressed domestically or regionally dilutes the equality of those stakes.

So, the model of fair association of democratic states proposed by Christiano, and elaborated over in the previous section, seems to fit what we should hope for the WTO within the context of broader multi-level and multi-lateral governance institutions. This is only a second best, of course, but remedies some of the shortcomings of the *status quo* model for domestic democracy and individual political equality in the WTO framework.

To start with, there are ways to ensure in the third model that the representativeness of democratic states, within the international trade system, be secured through domestic measures (e.g. reparlamentarization of

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<sup>134</sup> See Howse, 'How to Begin', 4 ff.

<sup>135</sup> See Narlikar, 'Politics of Participation'.



external questions), but also external ones (e.g. minority protection and human rights). More representativeness at the domestic level is actually among the requirements that the IMF and the World Bank have been posing to their member states recently.<sup>136</sup> The protection against persistent minorities is more difficult to ensure, however, given the controversial relationship between WTO and general international human rights law, but also the lack of robust and reliable civil society channels.<sup>137</sup> Things are a bit more complicated with unfair bargaining, however. True, recent years have seen new bargaining groups constituted within the WTO. Moreover, non-democratic duties of individuals and therefore of states towards other individuals, e.g. global justice duties to the poor, have corrected some of the imbalance in the benefits of international trade negotiations. The fact remains nevertheless that economic inequalities give rise to unequal bargaining power and agreements, and to greater individual inequalities domestically as a result.<sup>138</sup> The only solution would be to regulate by adopting fairness standards on trade agreements and by establishing, for instance, that a state negotiating power should be proportionate to its stakes, i.e. to its population's size and the population's relative need for agreement.<sup>139</sup> Alleviating poverty would therefore diminish bargaining and stake inequalities at the WTO and hence contribute to the fairness of the decision-making system.<sup>140</sup>

Thus, the question with the fair association of democratic states model becomes how to maintain a balance between the protection of domestic democracy and individual political equality while, at the same time, making sure interstate relations between democratic states are fair. The split between domestic equality and international fairness makes maintaining that balance a very difficult task. Whatever one does at the level of international law-making processes will affect domestic law-making processes and vice-versa. For instance, introducing majority voting between democratic states, as some have suggested for the WTO, may seem fair internationally, but may be unfair from a domestic perspective. For similar reasons, one may object to the WTO judicial decisions' impact on domestic democratic legitimacy.

At the same time, however, democratic states act as trustees of their people and their mediated rights and duties ought therefore to affect what is fair between them.<sup>141</sup> Democratic states do not merely act as individual agents on the international plane. All the same, statespeoples' duties of justice and fairness ought not be conflated with duties of democracy and political equality. Thus, the existence of a non-discrimination principle between states within WTO law cannot be used as evidence of the premise of political equality between statespeoples; the prohibition of discrimination based on nationality is justified on rational grounds and ought not be conflated with the principle of equal moral and political status of individuals.<sup>142</sup> As a result, it is on the determination of what this hybrid form of fairness in interstate

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<sup>136</sup> See Keohane and Nye, 'Club Model', 219.

<sup>137</sup> See Christiano, 'Democratic Legitimacy', 134-5.

<sup>138</sup> See Narlikar, 'Politics of Participation'; Kapoor, 'Democracy and the WTO', 529; Krajewski, 'Democratic Legitimacy'.

<sup>139</sup> See Christiano, 'Democratic Legitimacy', 127-9; Higgott and Erman, 'Deliberative Global Governance', 467 ff.

<sup>140</sup> On those possibilities, see the exchange between Pogge, 'The Role of International Law in Reproducing Massive Poverty' and Howse and Teitel, 'Global Justice, Poverty and the International Economic Order'.

<sup>141</sup> On the role of some of those democratic values between WTO member states, see Howse, 'How to Begin', 20-1.

<sup>142</sup> Contra: Petersmann, E.-U., 'Economic, Legal and Political Functions of the Principle of Non-Discrimination'; Cheneval, *Government of the Peoples*, 140 ff.

relationships that our efforts should be invested, while keeping an eye on domestic democracy and the ways to protect it at the same time. As long as the democratic subject remains domestic, however, the democratic legitimacy of international law has to be determined also by reference to domestic democracy.

All this does not mean, however, that WTO law and institutions cannot be legitimate as things stand. The other grounds of piecemeal legitimacy mentioned in the first section of the paper apply. They may also be supplemented by content-dependent justifications and state consent most of the time. Furthermore, spheres of legitimacy are not watertight and domestic legitimacy extends to the international level in a mutual legitimation process. Different grounds of justification will be provided in each context, and whereas democratic ones will stem mostly from the democratic context as things stand, they may be invoked in the reciprocal legitimation of international trade law and WTO law as well.

## **b. The Process**

### **i. General Requirements**

Those considerations about the subject of democracy in multi-level governance and law-making should make us wary of using terms such as ‘democratization’ to refer to a process, or of referring to the WTO as being ‘more democratic than most international organizations’<sup>143</sup>. Of course, stakes may become more interdependent and eventually equal on a global plane and one should remain open to that evolution. What democratization is usually applied to, however, is a proactive set of punctual institutional reforms aiming at making law-making processes beyond the state more democratic. In the absence of democratic subject, it is unclear how this can be plausible and how it can even be deemed respectful of domestic political equality.

All the same, concerns for process are in order in the WTO institutional framework as well. Among the elements to be secured in terms of process, one should mention deliberation (e.g. transparency) and human rights (including minority protection, but also procedural rights and non-discrimination rights). The two-track model proposed by Higgott and Erman would make the most of the strengths of the current institutional system in place at the WTO level, but also of the democratic structure in its member states below.<sup>144</sup> Of course, this assumes, as it did in the previous section, that we have a political community of individuals that extends to the WTO and were are not there yet. Moreover, the weakness of the global civil society overall leaves it to the state to mediate between the individual and global institutions. Minority protection in those conditions is very difficult to secure.

What should be stressed therefore are ways of improving the current process in order to secure greater fairness in the fair association of democratic states model proposed in the previous section. Among the shortcomings of the current model in terms of fairness, lack of representativeness and imbalance of power feature high on the list. The former may be fixed by internal measures, as well as external ones such as minority protection. The latter requires an external set of measures as well and in particular ways of

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<sup>143</sup> See Higgott and Erman, ‘Deliberative Global Governance’, 465.

<sup>144</sup> See Higgott and Erman, ‘Deliberative Global Governance’, 464-9.

making sure entry into and exit from the WTO are regulated fairly and that the decision-making process becomes more inclusive, transparent and deliberative. Thus, existing mechanisms and procedures in place such as Green Room processes, for instance, would not fit those requirements.<sup>145</sup>

Difficult questions arise, however, with respect to the co-evolution of domestic democracy within the WTO multi-level regime. This is a question raised, for instance, in view of the introduction of majority voting. To some, it epitomizes political equality and constitutes an important step in ‘democratizing’ WTO law-making as a result.<sup>146</sup> The difficulty again is whose equality is at stake, whether one may consider the equality of states a form of democratic equality and whether the equality of states is a democratic benefit to the peoples of the WTO both writ large and within each democratic member state. Of course, one may think of correctives to the mere equality of states, as in the EU, such as qualified majorities and weighted voting by reference to the population’s size.<sup>147</sup> Again, however, this is a federal measure that implies the existence of a political community of individuals encompassing the sub-units. Currently, the system works by reference to *de facto* market strength, but it is not formalized.<sup>148</sup> Formalizing it would require a justification and such a justification is difficult to give either by reference to fairness between states or by reference to domestic democracy and individual political equality within it. The former is blind to the latter, or only very weakly related to the equal advancement of the interests of the states’ population, and the latter does not have anything to say about relations between peoples.

## ii. Three Institutional Proposals

There have been various institutional proposals in the recent literature as to how best to ‘democratize’ law-making processes at the WTO. I have criticized their piecemeal nature so far, but would like to focus now on three of them that seem very important, provided one focuses first on the subject and the process in general, as suggested in this paper, before assessing how to enforce them.

Alexia Herwig and Thorsten Hüller rightly argue that any institutional proposal should make the most of what is already available institutionally within the WTO framework. And that is, above all, a formalized legal decision-making framework and a strong binding adjudication mechanism.<sup>149</sup> If one looks at ways of improving the fairness of those mechanisms, while at the same time keeping an eye on domestic democracy, one may suggest three institutional measures: interparliamentary cooperation; enhanced executive cooperation; and adjudication cooperation.<sup>150</sup>

The first institutional measure one may propose to enhance interstate fairness while also taking care of domestic democracy is clearly interparliamentary cooperation.<sup>151</sup> It is a measure that has been used in the EU since the 1990s with great benefit for the integration of the levels of governance and their reciprocal

<sup>145</sup> See Higgott and Erman, ‘Deliberative Global Governance’, 466.

<sup>146</sup> See e.g. the discussion in Elsig and Cottier, ‘Reforming the WTO’.

<sup>147</sup> See Cottier, ‘Legitimacy of WTO Law’, 40-1.

<sup>148</sup> See Higgott and Erman, ‘Deliberative Global Governance’, 466-7.

<sup>149</sup> See Herwig and Hüller, ‘Towards Normative Legitimacy’; Higgott and Erman, ‘Deliberative Global Governance’, 464 ff.

<sup>150</sup> On those propositions, see e.g. Cottier, ‘The legitimacy of WTO law’; Cottier, ‘Preparing for Structural Reform in the WTO’; Elsig and Cottier, ‘Reforming the WTO’; Howse, ‘The Legitimacy of the World Trade Organization’, 375-94.

<sup>151</sup> See Cottier, ‘Legitimacy of WTO Law’, 40-1; Krajewski, ‘Legitimizing Global Economic Governance’.

democratic legitimation, and has now been more deeply entrenched in the Lisbon Treaty. The next institutional measure one may propose is enhanced executive cooperation. This would require building a stronger secretariat general at the level of the WTO, but linking it at the same time to domestic executives through a committee whose role would be intergovernmental on the model of the EU Council. The final measure one may suggest is enhanced judicial cooperation. This could be done through extensive use of the subsidiarity of jurisdiction, the respect for the margin of appreciation of domestic courts and preliminary ruling mechanisms on the model of what has been done within the EU in the past fifty years.

### **Conclusion**

It is tempting when faced with the democratic deficit of the WTO institutions and law-making to resort to quick and punctual democratization measures. In this paper, I have argued against such measures and warned against the dangers of fast-food democracy.

Before concentrating our efforts on one level of international governance among many others, on the international level at the detriment of the domestic one and on punctual democratic measures instead of the process as a whole, it is useful to focus on understanding who is the democratic subject and the subject to the laws whose democratic legitimacy is in question. Only then will it be possible to devise reform processes that pay due account to the inclusion and the equality of those who are subjected to those laws.

Of course, as discussed in the paper, more questions than answers arise from the exploration of those whose stakes are concerned, of what their relationship should be both individually and collectively and of how to tie them back to law-making processes. Regulatory complexity and efficiency concerns are no valid excuses, however, for not trying harder in caring for the *acquis* of the democratic state, on the one hand, while responding to the challenges of multi-level governance, on the other.

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