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A Post-Montesquieu Analysis of the WTO

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INTRODUCTION

In writing *The Spirit of Laws* in 1748, baron de la Brède et de Montesquieu does not foresee the establishment of the World Trade Organization (WTO) (Montesquieu 1748). Nevertheless, one can employ Montesquieu's methodology to analyse the functions and dysfunctions of the WTO because his cogent framework, although written for the national level, is translatable to the international level of government. Although Montesquieu has been discussed tangentially in WTO scholarship,¹ this chapter places him at the centre of an analysis of how the WTO can be improved.

This chapter is titled 'post-Montesquieu' because it will update Montesquieu's framework in a few important respects. Montesquieu did not anticipate the ubiquity of democracy (much of his book discusses monarchies), the political importance of public participation, and the rise of international organisations. More telling, though, is how little of *The Spirit of Laws* needs to be updated, because of the presence of Montesquieu's spirit in modern political institutions and

*The author appreciates the comments received on this paper when it was presented to the Faculty of the University of Notre Dame Law School in March 2010.

¹ For example, see Petersmann (1995: 161, 163), Bhala (1999: 150), and Charnovitz (2002: 219–20). WTO Director-General Pascal Lamy has argued that Montesquieu's theory of separation of state powers 'is less pertinent' in international organisations 'since the main actors remain the Westphalian nations-states' (Lamy 2007).

economic development. Although many scholars anthropomorphise the WTO, I have come to the view that it (like any international organisation) ought to be viewed primarily as a community. The actors in the WTO community are the Members represented by ambassadors, the Director-General (DG), the Secretariat, the private enterprises that trade, and civil society.² Of course, the WTO still lags behind other major international organisations in providing for ongoing participation by civil society (see Ripinsky and van den Bossche 2007: Chapters 11–12).

This chapter proceeds in three sections: Section I summarises the ideas from *The Spirit of Laws* that are most relevant to the WTO, and explains where Montesquieu’s analysis needs adaptation. The second section uses Montesquieu to benchmark the WTO and point out areas for improvement. The last part of this section uses the post-Montesquieu framework to discuss the relationship between the WTO, business enterprises, civic society, and Member governments. The third section provides a conclusion, kept brief due to space limitations.

MONTESQUIEU AND THE POST-MONTESQUIEU FRAME

The subjects of Montesquieu’s analysis are governments that rule nations through human law (and the law of nature). Human law includes the law of nations, politic law, and civil law. In ‘so great a planet’ on which we live, Montesquieu posits that a ‘variety of nations’ is necessary, and that the inhabitants will need laws ‘relative to their mutual intercourse, which is what we call the *law of nations*’. The law of nations relates ‘to all societies’ he says (Montesquieu ed. Carrithers 1977: 103–04).

²Manfred Elsig has termed the WTO a ‘complex agent’ containing ‘sovereign principals’, ‘proximate principals’ and other ‘agents’ such as international civil servants. Elsig 2010: 5.

In this passage and others, Montesquieu describes the law of nations as benefiting the public directly. For example, he explains that ‘the safety of the people is the supreme law’ and that the ‘body politic’ can change a destructive political law. Yet in other passages about the law of nations, Montesquieu does not directly address the individual; for example, he says that the law of nations is ‘the civil law of the universe, in which sense every nation is a citizen’ (1977: 355). Government is the direction of a society by laws, and Montesquieu distinguishes two kinds of laws. One of them is ‘politic’ law, which is the law from the governors to the governed. The other is ‘civil’ law, which is the law for the mutual communication of citizens among themselves (1977: 103, 200).

Montesquieu discusses law and its relations to power using the example of the constitution of England. ‘In every government,’ Montesquieu says, there are ‘three sorts of power’: legislative, executive, and the judiciary power (1977: 201). The legislative power is ‘enacting laws’, ‘raising of public money’, and ‘settling the subsidies’ (1977: 202, 211). The executive power is ‘executing the public resolutions’ including ‘things dependent on the law of nations’ (1977: 201–02). The judicial power punishes crimes ‘and determines the disputes that arise between individuals’ (1977: 201).

Montesquieu’s model of legislative power begins with the people. He says: ‘The people in whom the supreme power resides, ought to do of themselves what they conveniently can; and what they cannot well do, they must commit to the management of ministers’ (1977: 109). The ministers they ‘intrust with part of their authority’ (1977: 109) are representatives. Montesquieu explains that ‘the people should act by their representatives’ and that the representatives should be elected by inhabitants in every considerable place (1977: 108–09, 204).³ The people themselves ‘ought to have no hand in the government but for the choosing of representatives, which is within their reach’, he says

³ Note that Montesquieu sees representation as being based on geography. He does not address representation by interest. Note also that Montesquieu’s views contain a principle of subsidiarity and a principle of reserved power to the people.

(1977: 205).

Governmental power is subject to ‘abuse of power’, Montesquieu explains, and a way to prevent such abuse and protect liberty is through the manner in which power is ‘distributed’ (1977: 200, 214). He presents a ‘model of the constitution’ in which power is distributed so that ‘power should be a check to power’ (1977: 200, 214). *The Spirit of Laws* emphasises the importance of preventing a joining of power between the judicial and the legislative, between the judicial and the executive, and between the executive and the legislative (1977: 202, 206–07). While he does not use the term ‘accountability’, Montesquieu postulates that the legislative body, besides the enacting of laws, should ‘see whether the laws already enacted be duly executed, a thing they are capable of, and which none indeed but themselves can properly perform’ (1977: 205).

Without using the word ‘pluralist’, Montesquieu clearly recognises that the individual is governed by plural laws rather than a singular law. For example, he explains that ‘Men are governed by several kinds of laws (...)’, including the ‘law of nations’ (1977: 355). Furthermore, he explains that ‘every particular law is connected with another law, or depends on some other of a more general extent’ (1977: 91).

Although Montesquieu wrote before the founding of international organisations, there are many reasons to understand his analysis as being relevant to them. He notes that ‘Law in general is human reason’ and that law is the relation between reason ‘and different things, and the relations of these beings among themselves’ (1977: 89–99, 104). In addition, Montesquieu posits that ‘No society can subsist without a form of government’ (1977: 104). From these conclusions, one can infer that Montesquieu might perceive an international organisation as a society that needs a government, and that the relations between the international organisation and states, or international organisations

among themselves, requires a law based on reason.⁴

Montesquieu strongly favours ‘commerce’, which he defines as the exportation and importation of merchandise (Montesquieu 1748: Book XX, Chapter 13). He says that ‘Commerce is a cure for the most destructive prejudices’ and that ‘Peace is the natural effect of trade’ (1748: Book XX, Chapters 1, 2) (Howse 2006: 703). Although he advocates an establishment of a ‘free port’ (1748: Book XX, Chapter 11), Montesquieu evinces an understanding that ‘freedom of commerce’ does not entail ‘a power granted to the merchants to do what they please’ (1748: Book XX, Chapter 12). In other words, he recognises that free trade is not to be equated with the absence of government regulation.

Montesquieu looks beyond the nation state in affirming a global economy. He explains that ‘movable effects, as money, notes, bills of exchange, stock in companies, vessels, and, in fine, all merchandise, belong to the whole world in general; in this respect it is composed of but one single state, of which all societies upon earth are members’ (1748: Book XX, Chapter 23). Unfortunately, Montesquieu does not elaborate on the implications of economic *mondialisation* for global economic law.

Defining post-Montesquieu political thought

The post-Montesquieu framework builds on *The Spirit of Laws* by updating it for subsequent political developments. Although Montesquieu recognises the ‘law of nations’ as the civil law of the universe in which every nation is a citizen, he does not discuss voluntary public law treaty arrangements, which, using his categories, would be politic law rather than civil law. In other words, he does not seem to anticipate the governing potential of international law regimes to help states do to one

⁴ He describes a ‘convention’ of states as an ‘assemblage of societies’ (Montesquieu ed. Carrithers 1977: 183).

another all the good they can in time of peace. Nevertheless, Montesquieu would surely have welcomed further enhancement of his political theory. After all, he urges the application of ‘the sublimity of human reason’ (1977: 355) to distinguishing between different orders of laws. And he warns against viewing ‘only one side of the subject, while it [the mind] leaves the other unobserved’ (1977: 92).

Montesquieu’s most profound philosophical legacy, his theory about the proper distribution and separation of power within a national constitution, is also central to the post-Montesquieu frame. Jeffrey Dunoff and Joel Trachtman have employed the term ‘horizontal’ to refer to the division or allocation of authority among legislatures, executives, and judiciaries and contrast that with ‘vertical’ federalism (Dunoff and Trachtman 2009: 19). The separation of powers prescribed by Montesquieu needs to be refit for the international level to take into account the more complex vertical relationships between national governments and transnational entities.

Another area of adaptation relates to the philosophy of representation. Montesquieu favours a passive electorate, with ‘no hand in government but for the chusing of representatives’ (1977: 205). Perhaps that was apposite for eighteenth-century democracy. But it is a poor description of subsequent democratic developments in which political parties, non-governmental organisations (NGOs), and activist citizens were not willing to keep their hands to themselves. Indeed, it was Montesquieu’s own countryman, Alexis de Tocqueville, who, one century later, offered a normative basis for understanding why social and political groups are indispensable to democracy.⁵

The rationale for individual and NGO input at the international level is the same as at the national level except more so. At the national level, the inhabitants elect official representatives but

⁵ See de Tocqueville (1850), especially Vol. One, Part II, Chapter 4 & Vol. Two, Part II, Chapter 5. Montesquieu does take note of ‘associations of merchants’ (Montesquieu 1748: Book XX, Chapter 10).

then keep their hands in governmental decision making through communications about facts and sentiments. That same process occurs at the international level in place of electoral methods, which are absent (Macdonald 2008: Part II). This lack of elections does not mean that democratic norms are irrelevant beyond the nation state. Rather, at the international level, new pathways have developed for accountability to various publics. International level activism by NGOs can also be a potent antidote to economic nationalism by government bureaucrats.

Although Montesquieu does discuss the individual being, the context typically is the individual as an object of government rule. In a few passages individual volition appears (see Montesquieu ed. Carrithers 1977: 103, 108, 281–84, 289–91), but *The Spirit of Laws* is largely written from a top-down perspective. The Post-Montesquieu frame, therefore, will need to explicitly account for individuals and their advocacy associations.

Another refinement needed is considering how to achieve governmental compliance with international law. While Montesquieu characterises treaties as being ‘obligatory’ (even those made by force (1977: 366)), he does not discuss how to achieve treaty compliance. He notes that nations can ‘bind themselves’ by treaty with respect to tariffs and customs (Montesquieu 1748: Book XX, Chapter 7), but he does not discuss how to enforce such treaties.

APPLYING THE POST-MONTESQUIEU FRAMEWORK TO THE WTO

This section applies the Montesquieu and post-Montesquieu frames to the WTO. It starts with an introduction to the WTO and then discusses in turn each of the three branches of the WTO’s tripartite legal structure. Next there is a discussion of the relationship between the WTO and its Member governments and of the relationship between the WTO and social and economic actors.

Acknowledging these relationships renders Montesquieu more pertinent to international organisations.

The WTO is a society of Member governments. Its constitution is the Marrakesh Agreement establishing the World Trade Organization ('WTO Agreement') (Steger 2004: 25). The WTO Agreement and the WTO Dispute Settlement Understanding (DSU) contain the structural provisions on institutional competence and the distribution of power. All three sorts of governmental power – legislative, judicial, and executive – are found in the WTO Agreement. The legislative power is conferred on the Ministerial Conference and the General Council. The judicial power is conferred on the Dispute Settlement Body (DSB) and the WTO Appellate Body, panels, and arbitrators. The executive power is conferred on the WTO's DG and Secretariat. Each of these three powers will be discussed below.

The Legislative Power in the WTO

The main legislative business of the WTO is negotiating trade liberalisation and writing new rules, and so it is unfortunate that the Doha Round, which has been going on since November 2001, is tied up in knots. Concluding the Doha Round has been strongly supported by the WTO Executive, particularly DG Pascal Lamy,⁶ but resistance has come from many Member governments – particularly the United States, which has been rudderless in trade policy under the Obama Administration (Yerkey 2009: A-2).

Ironically, the greatest single legislative achievement of the WTO has been an amendment to the most controversial of WTO agreements, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS Protocol makes provision for a system of compulsory licensing

⁶ In July 2006, Lamy told the Trade Negotiations Committee: 'All your leaders and governments have repeatedly stressed their desire to conclude the Round, and it cannot be acceptable that this commitment is not acted upon' (Lamy 2006).

of pharmaceuticals for the benefit of other countries. This amendment would not have been enacted but for the extraordinary and influential bottom-up campaign carried out by NGOs, particularly health NGOs (see Deere 2009: 134).

The most recent WTO Ministerial conference was held in Geneva in December 2009. Four years had elapsed since the previous conference, held in Hong Kong, and no reason was offered to the public as to why the WTO rule calling for conferences ‘at least once every two years’ was not being followed.⁷ This long delay cannot have been helpful in completing the Doha Round. As Montesquieu points out, ‘Were the legislative body to be a considerable time without meeting, this would likewise put an end to liberty’ (Montesquieu ed. Carrithers 1977: 207).

Certainly, the WTO cannot be a rule-based system if it does not follow its constitutional rule to hold ministerial conferences at least once every two years.⁸ One way to prevent such a scenario from happening again is to empower the DG to convene the Ministerial Conference if the Members cannot otherwise agree to set a time for a meeting. In that regard, it is noteworthy that Montesquieu recommends that ‘the executive power should regulate the time of convening as well as the duration of [legislative] assemblies (...)’ (1977: 208).

In my view, it may be time to put aside the practice of consensus decision making in favour of supermajority voting (see Araki 2009: 102–116); Tijmes-Lhl 2009: 417) or more plurilateral decisionmaking.⁹ The WTO should avoid a situation where one or two governments can stop progress in emancipating international trade. Indeed, Montesquieu warned against such an outcome: that is, a procedure that that ‘would give each deputy a power of controlling the assembly; and on the

⁷ See WTO Agreement, Art. IV:1.

⁸ The author recalls Professor John Jackson making this point at a dinner in the late 1990s.

⁹ See also Elsig and Cottier, this volume and Narlikar, this volume.

most urgent and pressing occasions the springs of the nation might be stopped by a single caprice' (Montesquieu ed. Carrithers 1977: 204).

One field in which the WTO has been able to legislate is the adoption of accession agreements to admit new WTO Members. So far, twenty-six governments have joined by accession. Although 'enlarging the WTO family through accessions' (WTO 2009c) has strengthened the WTO, the accession process has been an embarrassment due to the long delays and non-transparent procedures used in the WTO. At present, twenty-nine nations still await WTO membership. Longest waiting by the door is the Russian Federation, which first sought membership in 1993. Unfortunately, the WTO website provides little information about the Russian accession negotiations, and so the public cannot tell on which parties the blame for the delays should be placed.¹⁰

The main reason why accession negotiations take so long is that WTO bodies require applicants not only to commit to following WTO rules but also to commit to a set of WTO-plus rules (Jones 2009: 279). These rules sometimes allow incumbent WTO Members to discriminate against the new Member for a lengthy period. Applicants have to carefully weigh the benefits of joining the WTO against the costs of WTO-sponsored discrimination against them.

Although the WTO has failed to consummate the Doha Round, there is important work being done internally within the various WTO committees (Lang and Scott 2009). For example, the Trade Policy Review Mechanism has monitored trade and trade-related measures during the financial crisis. In February 2009, Pascal Lamy described this monitoring as a 'home-grown initiative that started in the WTO (...)' (Lamy 2009a). In April 2009, the G20 Communiqué called 'on the WTO, together with other international bodies, within their respective mandates, to monitor and report publicly on

¹⁰ The most recent document posted comes from December 1997.

our adherence to these undertakings on a quarterly basis.’¹¹ The new G20 role in tasking the WTO is noteworthy.

Although the WTO has many committees, it does not have a Committee on Trade and Employment. I have long recommended such an addition (Charnovitz 1995: 221, 233), and believe that it would complement the WTO Committee on Trade and Development and the Committee on Trade and Environment. At present, there is no institutionalisation of employment issues in the trading system. The role of this committee should be to discuss trade-related workplace issues such as the movement of natural persons in services trade (Mode 4), labour standards in export processing zones, and worker retraining and adjustment assistance.¹² Such discussions and ensuing actions could lead to a better political foundation for progress in the WTO. As Pascal Lamy has noted, ‘market opening’ needs to be accompanied by ‘domestic policies that provide a safety net for workers against the sometimes painful impact of competition (...)’ (Lamy 2009c).

Setting up such a committee should not be as controversial as it was when I recommended it in 1995, because WTO Members have authorised the WTO Secretariat to engage in cooperation with the International Labour Office (ILO). A recent joint report of the two institutions concludes that ‘coherence between trade and labour market policies must be sought (...)’ (WTO Secretariat and International Labour Office 2009). Pending the establishment of such a committee, the WTO Secretariat should include ‘Employment’ in the list of ‘Trade Topics’ on the WTO website.

¹¹Global Plan for Recovery and Reform, 2 April 2009, para. 22, available at <http://www.g20.org/Documents/final-communicue.pdf>. The trade and finance undertakings are listed in para. 22.

¹² It is interesting to recall that one of the functions of the International Trade Organization (ITO) was ‘to promote and encourage establishments for the technical training that is necessary for progressive industrial and economic development’ Charter, Art. 72(c)(iv) (1948) (not in force).

The judicial power in the WTO

The judicial power in the WTO has been operating near the top of its legal capacity. Governments are increasingly using the dispute system to adjudicate complaints (Bracken 2010, p. A-11). Unlike some other areas of international law, WTO rules are ‘enforceable’, according to the Appellate Body.¹³ Pascal Lamy refers to WTO dispute settlement as ‘the jewel in the crown of the WTO’.¹⁴ If he has explained why the WTO wears a crown, I have not seen it. In my view, the success of the WTO judiciary is not based on a symbol of authority, but rather on judicial independence. Aside from one unfortunate episode, the *Asbestos* dispute, where the WTO General Council sought to intrude in the Appellate Body’s decision making (see Bartels 2004), the Appellators have had their independence respected. The creation of the Appellate Body has been an important achievement in international law, and the automatic adoption of reports has established what Lamy calls a ‘Dispute Settlement mechanism whose decisions bind WTO Members (...)’ (Lamy 2009e). In addition, even without positive law, a salutary practice has developed whereby WTO panels and Appellate Body hearings will open up to public observation when both parties agree (Weiss 2008: 269, 286–87).

To be sure, the Appellate Body and panels have at times gone too far in declaring national measures illegal. Perhaps the most troubling decision occurred in the *US – Gambling Services* case, where the Appellate Body ruled that US laws making Internet gambling illegal violated the General Agreement on Trade in Services (GATS) (see Regan 2007: 1297). In particular, the Appellate Body equated an origin-neutral US prohibition with numerical limitations prohibited by the GATS.¹⁵ The

¹³ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8, 10, 11/AB/R, adopted 1, November 1996, p. 31.

¹⁴ ‘WTO disputes reach 400 mark,’ WTO Press Release, 6 November 2009, <http://www.wto.org>.

¹⁵ Appellate Body Report, *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, paras. 237, 238, 252.

Appellate Body erred in failing to recognise that a government should be not required to grant market access to a service for which there is no legal market.

With respect to the DSU rules, there has been considerable scholarship on ways in which its procedural rules could be improved, such as the well-known proposal to give the Appellate Body remand authority. In this chapter, I will not replough that ground. Rather, I will inject several new ideas into the debate for improvements to the WTO judiciary.

The Appellate Body is directed in the DSU to adopt Working Procedures, which are amended from time to time.¹⁶ Although a process is now in place for the Appellate Body to receive comments on proposed amendments from WTO member governments (Donaldson and Yanovich 2006: 386, 394–95), the Appellate Body has not adopted a process to solicit comments from the public regarding proposed amendments; in particular, comments could be solicited from the Advisory Centre for WTO Law (Bown 2009: Chapter 6), NGOs, and practitioners in the private sector (see Sacerdoti 2005: 125) who regularly appear before it. Another way to improve transparency would be for the Appellate Body to include the names of the counsel who argue for governments in individual cases. The International Court of Justice has done this from its inception in 1946, and I do not see any reason why the Appellate Body should keep this information confidential. Disclosing the names of the counsel can be done under the existing rules.

I would also like to see the panelists keep their decisions to a readable length. More succinct writing might also inspire WTO panels to similar self-restraint. As Greg Shaffer (2008) has noted with respect to the *EC – Biotech* panel decision, the length of it (1087 pages) obfuscates the judicial role, submerging legal conclusions and analysis in a sea of text.

My final proposal would require a change in the DSU because it would potentially open up

¹⁶ DSU Art. 17.9.

the dispute settlement system to complaints by individuals. Although the DSU has been invoked for over 400 disputes, many violations of WTO law are going uninvestigated because no government has brought a case. I propose that the WTO enact an Optional Protocol for a private right of action. Under such a protocol, a WTO Member that becomes a party would recognise the competence of the DSB to receive and consider communications from individuals who claim to be victims of a violation by that Member of any WTO rule. The protocol would be optional in the sense that a WTO Member could choose whether or not to become a party to it. In establishing a panel under the protocol, the DSB would act by consensus following the suggestion of any WTO member government that a panel would be warranted even though no WTO member government formally seeks to invoke dispute settlement.

The executive power in the WTO

The WTO Agreement states that the Ministerial Conference shall ‘appoint the Director-General and adopt regulations setting out the powers, duties, conditions of service and term of office of the Director-General’.¹⁷ The WTO constitution does not state any specific powers and duties, and thus leaves it up to the Ministerial Conference. As far as I am aware the Ministerial Conference has not legislated a regulation setting out the powers and duties of the DG. This lack of regulation has led to uncertainty as to the proper role of the WTO Executive. A leading treatise on the WTO explains that the DG ‘has no power of initiative’ and ‘has no real agenda-setting power either’ (Wouters and De Meester 2007: 220).

As noted above, Montesquieu wrote that to prevent an abuse of power it is necessary that there should be a check to power. Yet sometimes the WTO DG and the Secretariat act without any

¹⁷ WTO Agreement, Art. VI:2.

apparent checks and balances. Below I will discuss some episodes where the Executive has legislated, engaged in unjustifiable discrimination, or kept information from the public. I will also make a recommendation for a new procedure to enhance oversight and debate within the WTO.

In May 2009, the WTO joined three other international organisations in issuing a statement saying that when pork products are handled in accordance with good hygienic practices, such products ‘will not be a source of infection’, and therefore that there is ‘no justification’ under international standards for the imposition of trade measures on the importation of pigs or their products.¹⁸ The three other international organisations were the World Health Organization, the Food and Agriculture Organization, and the World Organisation for Animal Health. Although these three organisations pursue policies to protect public health, the WTO does not, and so the WTO was presumably invited to lend authority regarding trade. In coming to an agreement with other international organisations¹⁹ on whether a trade restriction would be justified, the WTO Secretariat has created a source of WTO law (see Mavroidis 2008: 421, 435). Unfortunately, before signing this Statement, the Secretariat neglected to seek approval from the General Council or any other WTO body.

In June 2009, a similar episode occurred when the WTO became Secretariat-driven rather than Member-driven. The Secretariat committed the WTO to signing on to a ‘Joint Statement’ in favour of a ‘Green Economy’, authored by ‘A group of international organizations, including the

¹⁸ WTO and Other Organisations, ‘Joint FAO, OIE, WHO and WTO statement on A(H1N1) virus,’ 9 May 2009, <http://www.wto.org>, accessed on 6 April 2010.

¹⁹See Kelly 2008: 629 discussing lawmaking partnerships among international organizations.

WTO.²⁰ Besides the WTO, the group includes the World Bank Group, the ILO, the United Nations, the UN Environment Programme, the World Intellectual Property Organization, the UN World Tourism Organization (UNWTO²¹), and a few others. Before agreeing to sign on to this statement, the Secretariat did not seek or receive approval from the General Council or any other WTO body. In my view, the Secretariat's action here was *ultra vires*. It is interesting to note that an ILO official signed on to the statement without any apparent consultation with the ILO's employer group.

The Joint Statement commits the WTO to a number of norms not included in the current WTO agreement. For example, it declares that 'Both carbon pricing and the reform of perverse subsidies, however, must be accompanied by measures to protect the access by the poor to food security and energy.' One wonders then what would happen if a government engaged in carbon pricing and yet did not enact measures to protect the access by the poor to food security and energy. Would that be a violation of WTO law? Or suppose a government did utilise measures to enhance food security and energy. Would these be immunised from being a WTO law violation?

I blame the WTO Secretariat for signing on the WTO to overly simplistic policies such as these without gaining approval of the WTO's legislative bodies. But I would also blame the WTO General Council for not insisting that the Secretariat be accountable. The General Council should hold regular oversight hearings (see Esty 2007: 509, 516) on the Secretariat, and should invite public testimony regarding the Secretariat's programmes and reports. As Montesquieu explained, the legislative power 'has a right and ought to have the means of examining in what manner its laws have

²⁰ WTO and Other Organisations, 'Green Economy: A Transformation to Address Multiple Crises. An Interagency Statement of the United Nations System,' 30 June 2009. .reference list WTO and Other Organizations (2009) move to the references...

²¹ The World Tourism Organization got its name under a multilateral treaty of 1970 and was called 'WTO' until the World Trade Organization pirated its acronym in 1995. About a decade later, the tourism WTO changed its name.

been executed' (Montesquieu ed. Carrithers 1977: 208).

Such poor legislative oversight of the WTO executive is the best example of poor constitutional performance within the WTO. In other areas where power could potentially check power, the branches of the WTO lack the competence that one might normally expect in a constitution.²² For example, the judicial branch of the WTO has no authority to review the actions of the Ministerial Conference or the Director General (Dunoff 2009: 183). If there were such judicial review, the discriminatory actions discussed below might have legal remedies.

The WTO website proclaims that 'The trading system should be (...) without discrimination (...).' ²³ Director-General Lamy often refers to 'WTO's fundamental principles of non-discrimination, transparency and procedural fairness' (Lamy 2010a). Nevertheless, the Secretariat regularly discriminates based on national origin.²⁴ For example, in August 2008 the WTO organised an architectural competition to design an extension to the Centre William Rappard, built originally for the ILO in 1926. In describing the WTO, the Secretariat explained that 'Our founding principles are openness, non-discrimination and transparency' (WTO 2009d). Yet in announcing in February 2009 that a German firm had won the competition, the Secretariat revealed that the competition had only been 'open to all architects in WTO member countries (WTO 2009b). Remarkably, the WTO had

²²Indeed, as Jeff Dunoff has carefully pointed out, the WTO is at most, 'a very weakly constitutionalized order' because the system lacks virtually all of the features that are normally associated with constitutional regimes. Dunoff 2009: 181, 184. Although I do not dispute Dunoff's analysis, my own approach may be more open to the osmosis of constitutional norms onto the transnational plane of governance, although I would agree with Dunoff that the transfer of domestic concepts 'is neither simple nor straightforward' (Dunoff 2009: 203).

²³ Principles of the trading system, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm; accessed on 10 April 2010

²⁴ No evidence has come to light suggesting that this discriminatory act was insisted upon by all WTO member governments.

refused to grant market access to architects from non-member countries.²⁵ In my view, the competition results should be annulled.

Take another example of WTO discrimination: The WTO website contains a page titled ‘Job vacancies in the WTO.’²⁶ But instead of being open to all, the website warns that ‘a person wishing to apply for a professional post should be a national of a WTO member state and be under 62 years old’. This double-barrelled discrimination based both on national origin and on age is unacceptable.²⁷ Although discrimination based on national origin is endemic to the trading system,²⁸ I do not understand why the WTO chooses to engage in age discrimination, particularly against someone as young as 62 (younger than Director-General Lamy).

As noted above, the Secretariat claims that transparency is a founding principle of the WTO. And yet the WTO keeps so much vital information secret. For example, the first trade monitoring report in January 2009 has a ‘JOB’ symbol and is not available on the WTO website.²⁹ The July 2009 report was released to the public, but reveals that the Secretariat is selective in the data that it reports. For example, the report mentions the \$2 billion loan to General Motors (GM) by the U.S.

²⁵ To be sure, the WTO has not filed a GATS schedule and so it has no legal commitments under Mode 4 for architectural services (CPC 8671).

²⁶ See http://www.wto.org/english/thewto_e/vacan_e/vacan_e.htm, accessed on 10 April 2010.

²⁷ And hypocritical. See Lamy (2009f): ‘As to recruitment, I will continue to adhere to the principles of expertise, merit and diversity.’ His statement would have been more honest if Lamy had added to the list the principle of ‘age discrimination’.

²⁸ See Agreement on Rules of Origin.

²⁹ Report to the TPRB from the Director-General on the Financial and Economic Crisis and Trade-Related Developments, WT/TPR/OV/W/2, p. 1 note 1. (this should also be in the references...

government,³⁰ but fails to note other aid to GM, particularly the administrative guidance given the American public by President Barack Obama that ‘If you are considering buying a car, I hope it will be an American car (Obama 2009).’³¹ Another example of non-transparency is the WTO’s database on national notifications of quantitative restrictions, which ‘is not accessible to the general public’ (Van den Bossche 2008: 445). This non-accessibility is puzzling because, as Pascal Lamy has observed, ‘it is often the private operators, not the governments, who will be most affected by the proposed or enacted measures that are notified’ (Lamy 2007).

Having made several criticisms, this subsection will now offer a constructive suggestion for how debate can be enhanced in the WTO. As Montesquieu explained, ‘The great advantage of representatives is their being capable of discussing affairs’ (Montesquieu ed. Carrithers 1977: 204). Yet too often in the WTO its affairs are not well debated by national representatives (see Cottier 2007: 497, calling for regularisation of the structural debate in the WTO). Consider the Sutherland Report, for example. This was a high-level commission appointed by the WTO DG for the purpose of making recommendations for ways in which the WTO could be improved. Although the Sutherland Report was debated among WTO scholars (see the Mini-Symposium in JIEL, various authors 2005), as far as I know no general debate on the report was held in the WTO General Council. Another example is the DG’s Annual Report on the ‘International Trading Environment’, presented to the Trade Policy Review Body. The most recent Report was presented in November 2009 and contains several good recommendations such as the call for governments ‘to devise and announce exit strategies to remove trade restrictions and production subsidies that they have introduced temporarily

³⁰ *Ibid.* p. 45.

³¹ The Secretariat’s report is unclear as to the extent to which it relied solely on government self-reporting in compiling its vaunted protectionism monitoring report. If so, then the report has less value than generally thought.

to counteract the effects of the crisis (...).³² As far as I know, there is no dedicated time in Trade Policy Review Group meetings to discuss and debate the annual DG reports. The absence of a deliberative function in the WTO General Council and other bodies should be remedied.

My proposal is to import a discursive technique pioneered in the ILO, which is the setting aside of time at the ILO Annual Conference for a discussion of the annual report of the ILO's DG. At the end of this discussion over several days, the DG gets an opportunity to reply.³³ The ILO method is not a perfect model by any means, since it exhibits more discussion than debate. Nevertheless, the ILO is an appropriate model for the WTO because it gives the DG a platform to offer new ideas, provides time for governments to react to them, and then provides the DG with an opportunity to respond.

The WTO could also fruitfully adopt another ILO practice, the use of intentionally non-binding Recommendations. At present, no legislative techniques exist in the WTO for the Conference or Council to issue normative decisions that fall short of obligations. Yet such nonbinding declarations (sometime called "soft law" or non-contractual lawmaking) are widely used in international governance in other areas of international law.

The WTO and its constituents

In the three preceding subsections, this article has addressed the legislative, judicial, and executive functions of the WTO. This discussion largely uses a Montesquieu frame in the sense that it focuses on aspects of government analysed by Montesquieu such as representation, transparency, and checking abuses of power. If Montesquieu had analysed the WTO, one can imagine him making

³² WT/TPR/OV/12, 18 November 2009, p. A-5.full references...

³³ See, e.g., Reply by the Director-General to the discussion of his Report, June 2006, available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/pr-25.pdf>.

these points. In the next two subsections, this chapter will move beyond the letter of Montesquieu's oeuvre while staying within its spirit.

Although *The Spirit of Laws* discusses 'a convention by which several small states agree to become members of a larger one' (Montesquieu ed. Carrithers 1977: 183), Montesquieu does not discuss the role of the state within an international organisation and how the organisation can assure compliance by its member states. Nor does he discuss how an international organisation should develop policies, or what role individuals should play in providing information and expressing volitions. He argues that the people are 'unfit' for the purpose of 'discussing affairs' (1977: 204), but he wrote a century before NGOs began to discuss public affairs internationally.

The WTO constitution provides spaces for 'consultation and cooperation' with NGOs.³⁴ Each year the WTO organises a Public Forum for NGOs and the private sector. In addition, the Secretariat accredits NGOs to observe public sessions of ministerial conferences (Elsig 2007). And recently, in January 2010, the WTO Secretariat invited public comments on the challenges of global trade in natural resources and the role that the WTO could play.

But, so far, NGOs have not been welcomed into WTO committees, where almost all of the work is done. Yet even without that accession, according to DG Lamy, 'Civil society has been instrumental in bringing to the negotiating table issues such as subsidies to fisheries or cotton farmers and access to essential medicines' (Lamy 2008). The value already added by NGOs to the WTO suggests that if the WTO opened up more to public participation, the WTO's effectiveness in boosting the world economy could be improved.

Some progress is also being made in inviting parliamentary contributions to the WTO (see also Krajewski, this volume). The WTO website has a dedicated page for 'Parliamentarians', which

³⁴ WTO Agreement, Art. V:2.

notes how WTO officials participate in the Parliamentary Conference of the WTO. In December 2009, the Steering Committee of the Parliamentary Conference held a meeting alongside the WTO Ministerial Conference. Although parliamentarians from the European Union, China, and Japan were present, the US parliamentary delegation was marked ‘absent’.³⁵

Acknowledging all this progress, I see much more that ought to be done. Below I make several recommendations for enhancing WTO access to economic and social actors.

First, NGO and business group participation in the WTO needs to be expanded. Recognising that opening up the WTO debate to competing ideas is still politically sensitive among WTO ambassadors, I have recommended using two venerable international institutions, long a part of the Geneva community, as a platform for non-governmental input. To wit, the WTO should invite the ILO and the International Union for the Conservation of Nature (IUCN) to be WTO observers.³⁶ As a start, the ILO could be an observer to the new Committee on Trade and Employment and the IUCN could be an observer to the Committee on Trade and Environment. In welcoming the ILO, the WTO could get participation by the full tripartite membership, which includes labour unions and employer groups. In welcoming the IUCN, the WTO could get participation by 80 states, over 900 NGOs, and numerous subnational government agencies.

Second, more subnational governmental participation would help the WTO interface effectively with regional and local governments. In recent years, the climate regime has learned that even an inherently global problem like climate change can benefit from bottom-up governance

³⁵ In 2003, I tried to get some Members of Congress to participate in the Parliamentary meetings at the WTO’s Cancun Ministerial. I failed. Later I learned that some members of the House Ways and Means Committee had actually travelled officially to Cancun, but had not bothered to attend the parliamentary meeting.

³⁶ The WTO has not granted the ILO observer status in any WTO body, http://www.wto.org/english/thewto_e/igo_obs_e.htm, accessed on 10 April 2010

actions (Bederman, 2007: 201, 214; Osofsky and Levi 2008: 409). In my view, this insight can be brought to the WTO through a recognition that local and regional governments often see the benefits of exports and imports more keenly than do national governments, which are too often captured by protectionist interests. I recommend that the WTO hold an annual Assembly of Local, State, and Regional governments to discuss how to achieve and carry out trade liberalisation. As Pascal Lamy (2009d) has noted, the legitimacy of international organisations ‘would be greatly enhanced if international issues become part of the domestic political debate’.

Third, WTO councils and committees should regularly hold public hearings where private sector enterprises (PSEs) and NGOs would be invited to give testimony. For example, it is well recognised that preferential trade agreements have costs both for the WTO and for the global economy (Bhagwati 2008). Yet there is no public vetting of such agreements within the WTO. A Committee on Regional Trade Agreements exists, but it has very limited mandate, and has never held a public hearing. Such hearings should be routine for new agreements such as the new free trade agreement between Europe and South Korea.

The fourth idea relates to dispute settlement. Right now, a government that loses a WTO case has a choice either of complying, of compensating, or of suffering a trade sanction from the winning complainant. But there is another obvious way to get compliance, which is through the domestic court of the scofflaw country. At present, the WTO Agreement contains no norms regarding the direct effect of WTO dispute recommendations. Adding such norms would be difficult because most governments are loath to lock themselves into obeying international trade law all of the time (see Bronckers 2008; Petersmann 2008: 959). But the WTO could help by providing a process for a voluntary declaration that a particular government agrees to make WTO law and WTO judicial decisions self-executing in its national court on a reciprocal or non-reciprocal basis.

Fifth, when the WTO Secretariat publishes a list of NGOs accredited to Ministerial Conferences (see WTO 2009a), it assigns all the NGOs to a state when in fact many of them are international. For example, characterising the International Trade Union Confederation as being headquartered in Belgium and the International Chamber of Commerce as being headquartered in France misses the point that these are transnational NGOs.

The final recommendation relates more broadly to the WTO judiciary and to the relationship between the WTO and member governments. The WTO should follow other regimes that have fostered judicial conversations. What I have in mind to start is to convene sub-global conferences of jurists from the WTO and national governments in order to discuss how judicial enforcement of trade law could be improved. The participation of plural levels of jurists is important because there is a constant interplay between DSU and national court decisions. A conference could consist of current and former Appellate Body members and national judges (for example, the U.S Court of International Trade) who regularly deal with customs and trade cases. In using the term ‘sub-global’, I mean that the meeting could be organised geographically or by trade issue area (e.g., contingent trade measures).³⁷ In a conference of judges, the ideas should flow vertically in both directions. In other words, just as discussion of WTO caselaw should benefit the national judges, the discussion of national caselaw could sometimes benefit the WTO adjudicators.

CONCLUSION

³⁷ The Secretariat’s *World Trade Report 2009* is titled *Trade Policy Commitments and Contingency Measures* and runs to 171 pages. Oddly, it says nothing about the national judges and courts that issue decisions on dumping and countervailing duties.

For Montesquieu, ‘The law of nations is naturally founded on this principle, that different nations ought in time of peace to do one another all the good they can, and in time of war as little harm as possible, without prejudicing their real interests.’ (Montesquieu ed. Carrithers 1977: 103) This seems an apt description of international trade law in 2010 in encompassing the ideas that governments do not have identical interests, and that the WTO is a community where governments cooperate in international trade relations to render their peoples better off. Because commerce and trade require legalisation,³⁸ the language of international trade is a common language for the international community. I have often marvelled that in whatever country I visit there are government officials and academics with whom I can converse about cutting-edge issues in international trade law.

Using Montesquieu’s concepts for empowering and checking power, this chapter has analysed the three branches of the WTO and pointed out where they are underperforming. The article also introduces a post-Montesquieu framework to take account of the norm of public participation that Montesquieu had not anticipated in pre-revolutionary France. Even in an organisation as revolutionary as the WTO, there are still many improvements to be made, and this article presents several new ideas. At one point in his essay, Montesquieu avers that ‘When things are examined with ever so small a degree of extent, the sallies of imagination must vanish (...)’ (1977: 92).³⁹ I agree with Montesquieu, and yet would also make the point that, even with careful analysis of the smallest detail, the sallies of imagination can help us envision a better future for world trade.

³⁸ According to Montesquieu: ‘There should be a code of laws of a much larger extent, for a nation attached to trade and navigation, than for a people who are contented with cultivating the earth’ (1977: 283).

³⁹ Thanks to Sally M. O’Brien for her insights on Montesquieu’s philosophy.

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