

Can international trade law promote democratic legitimacy?

MICHAEL IOANNIDIS — 23 April, 2015



The participatory dimension of WTO law

In the Berlin workshop [Freihandel versus Demokratie](#) I would like to discuss an argument that to some extent seems to challenge the title of the meeting. My thesis is that international trade law, and WTO law in particular, can be also seen as an opportunity to promote international democratic legitimacy, rather than simply as a danger to domestic self-determination.

Due process and participation in WTO law

My contribution develops two ideas. Firstly, that WTO law has an important, but rather neglected participatory dimension. Beyond substantive rules, such as tariff concessions and the prohibition of export subsidies, procedural norms, including participation and due process rights, occupy a central place in the Uruguay Round agreements and the case-law of the WTO adjudicating bodies. For example, a number of WTO provisions require domestic public authorities [to give prior notice](#) before adopting trade rules, to consult interested parties, and to give them the opportunity to have the final decision [reviewed](#) by an independent court. These procedural rules benefit both states and not state actors. Sometimes it is foreign governments that enjoy participation opportunities and in other cases, individuals, such as exporters.

Despite their importance, these relevant provisions are fragmented and seemingly unconnected with each other. In contrast with domestic jurisdictions, where there is usually an overarching guarantee of due process and participation enshrined in constitutional law, no such general concept of participation and due process exists in WTO law. Some due process rights can be found in [anti-dumping WTO law](#), others in the [TBT](#) and [SPS](#) agreements, while some guarantees have been developed by the adjudicating bodies. [As Steve Charnovitz notes](#), the Uruguay Round agreements make no attempt to articulate an overall purpose for the due process guarantees dispersed in WTO law. I would suggest that behind the various and dispersed procedural guarantees contained in the WTO covered agreements and case-law an overarching rationale exists: to open domestic procedures to foreign interests.

Disregard, participation, and limitations

The second idea of my proposal is to investigate the potential of these WTO due process and participation rights in enhancing the democratic legitimacy of the world trading system. The starting point of this argument is that the regulation of international trade is mainly at the hands of domestic (rather than international) regulators. This bears the potential danger of important foreign interests being disregarded. As in many other areas of social organization, such as environmental protection, globalization has made domestic decisions on trade highly relevant to foreign constituencies as well. EU market-access conditions, for example, may literally be a matter of life and death for farmers in Côte d'Ivoire. Miguel Poiares Maduro, former Advocate General of the CJEU, makes a similar point in the context of the EU, arguing that decisions made individually by EU Member States in the field of trade may neglect legitimate foreign interests that are not adequately represented in domestic procedures.

WTO rules offering to external actors affected by a national trade-relevant decision adequate notice, a fair opportunity to voice their arguments, and access to independent courts can contribute to addressing this incongruence between impact and participation. Participation in international trade law is not only a way to improve the efficiency of decision-making by contributing foreign expertise and knowledge before the adoption of trade regulations or the imposition of trade remedies. Most importantly, WTO-based access rights, by requiring that those affected by a certain decision have a fair opportunity to present their arguments, might enhance the deliberative quality of decision-making and the overall legitimacy of the international trading system. These rules have a significant potential in remedying the problem of disregard and exclusion of foreign interests from domestic decision-making procedures with impact upon their condition, as Richard B. Stewart and Michelle Ratton Sanchez Badin have also argued.

The WTO adjudicating bodies can also significantly contribute to that direction. WTO adjudicators might have recourse to participation-reinforcing standards of review. That is, standards of review the intensity of which depends on the openness of the procedure that led to the adoption of the reviewed measure. Domestic decisions taken following open and transparent procedures should deserve more deference than those taken behind closed doors.

This suggestion, to view WTO law as an opportunity to promote international participatory democracy by opening domestic fora to external voices, faces, however, limitations that should not be underestimated. The most obvious is that some of the participants might be “more equal than others”. Economically powerful exporters might enjoy informational and other resources that allow them to make better use of international participation opportunities than, say, third world farmers. The issue of agency capture is well-documented at the domestic level and should be also a concern at the international level. There is no easy remedy for these problems but I would like to argue that they do not defeat the argument for a participatory reading of international trade law; exactly like similar problems do not defeat the need for participatory governance at the domestic level.

Is a more procedural international trade law the alternative?

A procedural, participation-reinforcing model of international trade law might be a promising way to approach the question of its democratic legitimacy. If one starts from the premise that international trade is an affair of *international* concern, to simply “protect” domestic democracies is not sufficient from a legitimacy point of view. New and innovative mechanisms are needed to allow for interested actors to voice their arguments. International trade regulation should focus less on establishing detailed,

substantive rules that are very difficult to amend and more on setting procedural standards to domestic decision-makers. This would not only address the well-known and justified concerns for the weak democratic credentials of international trade law-making but even contribute to enhancing international accountability.

Michael Ioannidis is senior research fellow at the Max Planck Institute for Comparative Public Law and International Law. The argument presented here is further developed in his book *Due Process and Participation Rights in WTO Law*, forthcoming with Cambridge University Press.

This post is part of our [Symposium Trademocracy](#). More contributions can be found here and on [Juwiss blog](#).

ISSN 2510-2567

Tags: Democracy, Free Trade, TTIP



Related

TTIP and the WTO: Anatomy of a murder story and the future of the world trading system
29 February, 2016
In "Discussion"

"P" for Partnership or "R" for Regime?
23 March, 2016
In "Discussion"

Megaregionals and the Others – A Rejoinder
29 June, 2016
In "Megaregionals and the Others"

PREVIOUS POST

< Die „Regulatory Cooperation“ in TTIP

NEXT POST

Online-Debatte: Freihandel versus Demokratie >

2 Comments

LEGITIMATION DER REGULIERUNGSZUSAMMENARBEIT DURCH EINBINDUNG DER ZIVILGESELLSCHAFT?

23 April, 2015 at 14:29 (Edit) – Reply

[...] die Beiträge von Corinna Dornacher ebenfalls zur Regulatory Cooperation sowie von Michael Ioannidis zu Partizipation im [...]

FREIHANDEL VS. DEMOKRATIE 2.0

23 April, 2015 at 14:50 (Edit) – Reply

[...] Michael Ioannidis, Can international trade promote democratic legitimacy auf dem Völkerrechtsblog. [...]

Leave a reply

Logged in as [ajv2016](#). [Log out?](#)

SUBMIT COMMENT

- Notify me of follow-up comments by email.
- Notify me of new posts by email.