

Effective Global Governance Structures: Regionalization and Legalization in the WTO

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“Politics is arbitrary. Law is not. With the rule of law, the law is certain, not arbitrary. With the rule of law, the law is written beforehand, and the rules are defined and known in advance. With the rule of law, the law is written to apply to all equally, and all, in practice and in reality, are equal before the law.”

Bacchus (2003, 546)

“We view law as deeply embedded in politics: affected by political interests, power, and institutions. As generations of international lawyers and political scientists have observed, international law cannot be understood in isolation from politics. Conversely, law and legalization affect political processes and political outcomes. The relationship between law and politics is reciprocal, mediated by institutions.”

Goldstein, Kahler, Keohane and Slaughter (2000, 387)

ABSTRACT: Considering the effectiveness of the WTO and global governance in general as insufficient to overcome growing problems in governing a globalizing world, I pursue four objectives. By shedding light on the changes in the environment of the WTO and their implications for the working of the WTO, I first want to underpin the case for structural reforms. My second, and central, aim is to recommend a more effective structure for the WTO. Thirdly, I draw general lessons for global governance from the example of the WTO. And finally, I assess the adequacy of my innovative research design.

The research design is characterized by a broad analytical framework that traces how regional integration among nation states and legalization of international institutions affect bargaining and enforcement of international agreements; additionally, it considers trends that affect the WTO. The interdisciplinary theoretical framework combines insights from the fields of international relations, international law, and international economics, and builds upon rationalist and constructivist perspectives.

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List of Abbreviations

CFCs	Chlorofluorocarbons
DSU	Dispute Settlement Understanding
ECJ	European Court of Justice
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
MFN	Most-favored-nation
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
TRIPs	Trade-related Intellectual Property Rights
UNCLOS	United Nations Convention on the Law of the Sea
U.S.	United States (of America)
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

PART I: FOUNDATIONS

1 Introduction

In 1929, the world economic system tumbled into crisis. With demand plummeting, countries attempted to reserve domestic markets to domestic suppliers. In the ensuing spiral of protectionism, the economic system based on the division of labor and capital mobility was utterly demolished. The socio-political repercussions of the economic break-down paved the way for domestic political radicalization and international conflict which eventually led up to World War II.

To prevent such disastrous dynamics in the future and to harness trade for prosperity and peace, the General Agreement on Tariffs and Trade (GATT) was formulated and signed in 1947. Although the Cold War disappointed the hopes for worldwide cooperation, several multilateral trade rounds conducted under the GATT contributed to far-reaching trade liberalization. In the Uruguay negotiations finalized in 1994, the GATT was transformed into the World Trade Organization (WTO). The WTO Agreement broadened the scope of international obligations, disciplined exemptions from international law, and strengthened the dispute settlement system.

Already during its first decade, however, the WTO faltered. In 1999, street protesters flocked to a WTO ministerial meeting in Seattle, massively criticizing the WTO's external intransparency and unaccountability. In the meantime, developing countries militated against the WTO's internal decision-making procedure for favoring powerful countries. Prospects brightened in 2001 when WTO member states agreed in Doha on a new trade round, separating their negotiators from civil society protests and focusing on the needs of developing countries. Yet, disputes over agriculture derailed the negotiations on the Doha Agenda that began in 2003 in Cancun.

There is reason to suspect that these recent failings have systemic roots. The institutional structure of the WTO appears to be incapable of dealing with as many as 145 member states with heterogeneous backgrounds, who attempt to negotiate complex regulatory policies under vocal pressure from civil society. Against this background, fears arise that the WTO will not cope with the pace of growing economic interdependence. The experience with the Asian financial crisis of 1997/98 has created additional breeding ground for concerns. The crisis has demonstrated how even disruptions in the management of global interdependence that are limited in depth, space, and time, can cause substantial damages.

Furthermore, the Asian financial crisis has discredited the faith that self-regulating markets will substitute for governance. Keohane and Nye (2000, 1) express the consensus that, "Complete laissez-faire was not a viable option during earlier periods of globalization and is not likely to be viable now. The question is not – will globalization be governed? – but rather, *how* will globalization be governed?"

Critically, globalization reduces the capabilities of nation states, which are traditionally the main source of governance, to autonomously reach their ends. More and more problems become global

phenomena that withstand efforts of national authorities with a territorially limited reach. No promising alternative is available yet to replace the existing system of territorial governance. Companies and civil society may assume certain functions that nation states cannot fulfill to satisfaction. For instance, companies may develop codes for self-regulation if they hold essential information which governments lack. Civil society may contribute together with nation states to the fulfillment of other tasks. For instance, non-governmental organizations (NGOs) may monitor compliance with environmental agreements passed by nation states. Yet, civil society and alternative (functional) concepts of governance are no panacea. Global governance arising from cooperation between state actors is, therefore, a prerequisite to solving the global challenges ahead and reaping the benefits of integration.¹

1.1 Effectiveness of the WTO

What exactly is at stake in the WTO? What are the objectives which the WTO should promote and which could serve as criteria for evaluating the effectiveness of the WTO? In the first place, members of the WTO strive for economic benefits that can be attained by the reduction of tariffs and non-tariff barriers to trade, integrating the markets for goods and services. Such economic benefits are manifold pertaining to trade, productivity, capital allocation, and internal costs of protectionism.

Apparently, a reduction in tariffs creates additional trade. If a tariff on one and the same good differs depending on the country of origin, this tariff diverts trade if the price of relatively efficient suppliers is artificially raised. Thus, a reduction of tariffs levied on more efficient suppliers will allow them to increase their market share at the cost of less efficient suppliers who have been favored by lower taxation in the past. As tariff reductions create trade and to the extent that they diminish trade diversion, global welfare increases.

Larger markets also allow exploiting internal and external economies of scale and scope and they enable more rapid learning to improve production processes. Furthermore, market integration stimulates increased competition, particularly just after integration but to a lesser degree in the long run as well, depending on the specific sector. Since knowledge flows along with goods, integration further contributes to global welfare by spreading efficient production processes.

Integration of the markets for goods and services also affects the allocation of capital. Tariffs set incentives for companies to invest inefficiently from a global welfare perspective. For instance, companies move production sites into the country where the products are sold to avoid tariffs or to make provisions for sudden, sharp increases in the level of protectionism. Finally, increasing integration lowers the internal costs associated with protectionism, like the administration of barriers and rent-seeking by protected private agents.

Considering the interdependencies between trade and other issue areas, the WTO cannot be evaluated solely based on its performance in governing trade. Widespread poverty in developing countries, the erosion of social welfare systems in industrialized countries, corruption, environmental destruction, and violent threats to human rights, such as torture, terrorism, and warfare, show that today's

¹ See section 2.1.1.

international institutions do not meet the world's need for global governance in many issue areas.² The severity of these problems and the ability of other international institutions to cope with them are affected by trade-related global governance. A reduction of the scope of the WTO, in order to deal more efficiently with limited core responsibilities, does not automatically improve global governance effectiveness because the discarded responsibilities would have to be shouldered by other international institutions. Rather than ignoring linkages and jettisoning responsibilities, the contributions of the WTO to the governance of these other issue areas have to be accounted for.

Beyond direct contributions to the governance of other issue areas, the WTO is a testing ground for future global governance.³ Legalization has well progressed with relatively high precision of obligations, sophisticated disciplining of exemptions, an advanced dispute settlement system, and relatively powerful enforcement mechanisms.⁴ Regional cooperation among nation states, as well, has made the greatest advances in the area of trade. In addition, many trends that will shape global governance in the future can be observed particularly well in the context of the WTO. Against this background, experience with reformed WTO structures should benefit global governance in other issue areas.

Finally, the WTO holds a symbolic promise for global governance in general. Bacchus (2003, 541) praises that "the WTO is offering persuasive evidence to the world for the very first time that there truly can be something deserving of being called international law, and, thus, that there truly can be the international rule of law."

In summary, no self-organizing force could justify a sanguine prospect on the future without governance, while globalization obstructs autonomous governance by state actors. To avoid the costs of failure in managing interdependence in a globalized world, global governance, therefore, cannot afford set-backs, and even standstill may rapidly turn towards protectionism and fragmentation.⁵ The WTO fulfills an outstanding role within the global governance architecture based on the economic benefits it creates and its direct, laboratory, and symbolic contribution to global governance at whole. Yet, recent experiences in and trends surrounding WTO negotiations indicate fundamental problems. This calls for improving the performance of the WTO.

² See Hauchler, Messner and Nuscheler (2001).

³ Zürn (2002) ascertains that today's governance of trade comes closest to the emerging 'postnational constellation.' Landau (2000) views economic negotiations as reflecting developments in the international political system, such as globalization and increasing complexity, particularly well.

⁴ See Abbott and Snidal (2000), Hoekman and Kostecki (2001), Jackson (1997), Kahler (2000), Keohane, Moravcsik and Slaughter (2000) and Reich (1996).

⁵ Ostry (2003, 145) warns that, „A growing fragmentation in a world of ever-deepening integration represents more than a threat to trade. The Cold War involved a spillover from 'high' to 'low' policy. The opposite may well be the case in the future."

1.2 Global governance structures

Institutional structures have two important characteristics that make them suitable levers for improving global governance. Firstly, structures strongly influence the effectiveness of global governance; secondly, structures can be designed. This sets structures apart from other influential determinants of global governance effectiveness that are part of larger developments, like technological progress, or hinge on situational happenstance, such as individual leadership. Leadership can make a difference,⁶ but the suggestion to “leave the formal decisionmaking structure alone and put in place people of talent and wisdom who know how to make it work” cannot warrant lasting success.⁷

If we aspire to design structures, we first need to identify those aspects of structure that are particularly appropriate for reform. Regionalization and legalization are two aspects of structure that seem to be of fundamental significance and appear to be susceptible to political influence. Regionalization concerns the identity of the constitutive actors of global governance. Either nation states or integrated regions like the European Union (EU) can be the main pillars of global governance. The move from nation states to integrated regions as constitutive actors of global governance is labeled regionalization.⁸

Legalization addresses the design of international institutions and, thus, the relationship between the constitutive actors. Legalization signifies the move towards institutional design that vests substantive authority in international institutions and adopts the form of law for international institutions. This means that legalized international institutions resemble domestic institutions in liberal democracies. I construct legalization by five determinants: decision-making process, delegation of authority to the judiciary, precision of rules of global governance, exemptions from rules of global governance, and punishment to enforce the rules.

The significance of regionalization on the effectiveness of global governance is apparent.⁹ In particular, regionalization lowers the number of actors involved in global governance, thus reducing complexity in the international sphere. Furthermore, regionalization provides an intermediate level between the nation state and global institutions to which authority can be delegated. This promotes effectiveness, subsidiarity, and legitimacy of governance. Today, most scholars also agree on the importance of international institutions and international law and they have moved from the question *whether* international institutions matter to the question *how* they matter.¹⁰

At question is if scientific knowledge and discourse can influence regionalization and legalization by

⁶ See Young (1991).

⁷ Yerxa (2001, 384).

⁸ When I speak of actors, I refer to nation states and integrated regions which are members of the international institutions under consideration. All actors together form the international society, the collective of actors who are recognized as subjects of international law and who are connected through a web of social relationships governed by a set of shared norms. See Brown (2001) and Bull (1977). Occasionally, I single out agents on the domestic level of actors, such as governments, domestic societies, and bureaucracies.

⁹ See Cho (2001) and Hauchler, Messner and Nuscheler (2001).

¹⁰ See Haas, Keohane and Levy (1994), Mitchell (1994), Reich (1996) and Young (1999b).

informing decision-makers. To demonstrate the impact scientific knowledge can have, I first sketch how deeply regionalization and legalization have changed in the past. Acknowledging that structures are not immutable facts, but subject to considerable dynamics, places us in a position where we can consider changing structures actively. I back this idea by arguing that the future development of structures is not fixed. Then, I suggest that knowledge about the effectiveness of structures can direct their future route.

In the 1930s, a wave of protectionist ‘destructive regionalism’ deepened the Great Depression and formed the basis for imperial blocs. After World War II, European integration opened a new, singular chapter in regional integration. This move was followed in the 1960s by an up-swell of regional integration activity, which came to be known as ‘first regionalism.’ The Latin American Free Trade Association (LAFTA), guided by anti-colonialist sentiments and dependency theory, is characteristic for this wave that neglected the economic incentives behind regionalization, created little trade, and collapsed eventually.¹¹

Since the late 1980s, the ‘second regionalism’ thrives focusing on economic benefits.¹² Existing integrated regions deepen their scope of integration and widen to include additional members. Dormant integration agreements are reinvigorated and new integrated regions are created. Whether the trend of regionalization is currently abating is not clear. On the one hand, existing integrated regions like the Asia-Pacific Economic Forum (APEC) and the EU, with its failure in 2003 to agree on a constitution, encounter difficulties in living up to their aspirations. On the other hand, ambitious projects do exist. Diverse plans for extending existing regional integration agreements are being discussed in America. In East Asia, the net of regional integration agreements is growing. The paradigm shift towards a multiple-track approach in East Asia, viewing regionalization as compatible with multilateralism, is accompanied by a developing sense of interdependency and common identity together with plans for deeper integration.¹³ The vibrant, albeit poorly coordinated, regionalization movement in Africa may also be turning towards deeper and better structured integration.¹⁴

The history of legalization reveals comparable fluctuations. With the establishment of the League of Nations and the conclusion of numerous bilateral and minilateral treaties, institutionalization of international relations expanded in the interwar period, and then collapsed in the conflicts preceding and during World War II.¹⁵ Splendid plans for postwar international organizations did not materialize as the Cold War came to dictate politics. Nevertheless, legalization of GATT/WTO and other international institutions advanced in the following decades and accelerated in the recent past.¹⁶ As a result, Goldstein, Kahler, Keohane and Slaughter (2000, 386) observe, “The discourse and institutions

¹¹ See Cho (2001).

¹² See Cho (2001), Fernández (1997), Fawcett and Hurrell (1995), OECD (2003), Sbraiga (2002) and World Bank (2000).

¹³ See Choi (2003).

¹⁴ See Rocha (2003).

¹⁵ Minilateralism refers to cooperation among a limited number of powerful actors. See section 5.4.2.

¹⁶ See *supra* note 4.

normally associated with domestic legal systems have become common in world politics.”

This development is uneven over issue areas and regions, however, with particularly Asian and Latin American nations being cautious.¹⁷ All over the world, politicians and domestic societies are concerned with the risk they incur by (gradually and selectively) abandoning their sovereignty. The interests of powerful actors may increasingly conflict with legal obligations. Current United States (U.S.) policies, in particular, might lead to a considerable retreat of legalization. Therefore, we cannot be certain whether the tendency towards legalization will persist.¹⁸

Although we witness important developments in regionalization and legalization, no political master plan concerning a desirable direction for these developments exists on the global level. The EU gladly promotes regionalization to sell its own experience as a model for success to the world. The U.S. used to be skeptical about and tended to impede regionalization; however, in the last decade, it changed its stance to become an active player in regionalization.¹⁹ In Asia, an ‘open’ model of regionalization is promoted which grants outsiders all of the benefits that are negotiated intraregionally.²⁰

Given the absence of clear political direction, better understanding of effective global governance structures can change the stance which actors adopt towards regionalization and legalization. This affects how they individually participate in regionalization, how they bilaterally influence regionalization efforts of other actors, and how they attempt to enable or restrain regionalization multilaterally. Better institutional design knowledge also influences what kind of international institutions actors create and how actors and international organizations interact in modifying existing international institutions.

1.3 Designing effective global governance structures

We have seen that structures are important determinants of effectiveness which lend themselves to rational design. Still, the question remains whether structures should be designed rationally in a centralized process or left to evolutionary forces.²¹

Rational design ideally implies a single, intentional agreement on the institutional setup with expected institutional working and performance in mind. Evolution can either arise from many spontaneous, decentralized, though rational decisions or through manifold enactments and incremental changes without intentionality and awareness of consequences concerning institutional design. Institutional evolution can take place within institutions – like the development of GATT and, in particular, its

¹⁷ See Goldstein et al. (2000).

¹⁸ See Brock (2003), Goldstein et al. (2000), Kahler (2000) and Keohane and Nye (2000). List and Zangl (2003) expect legalization to proceed as long as globalization continues. By contrast, Hufbauer (2003, 265) expects future economic global governance to be “conducted by shifting clubs rather than permanent organizations.”

¹⁹ See Jackson (1997).

²⁰ See Choi (2003).

²¹ Fukuyama (1999) develops a matrix of norm evolution according to whether norms are spontaneously or hierarchically and whether they are rationally or arationally generated. With rational design I refer to hierarchical, rational creation, whereas I consider hierarchical creation that is arational – e.g. by religion – as irrelevant. Evolution comprises rational and arational spontaneous creation.

dispute settlement procedure²² – or through selection among institutions, like the shift of intellectual property right issues from the World Intellectual Property Organization (WIPO) to the agreement on Trade-Related Intellectual Property Rights (TRIPs) under the umbrella of the WTO.²³

Hayek (1988) believed that long-term evolution creates valuable institutions which rational design threatens to destroy. According to Hayek, rational design theories erroneously assume that designers can improve welfare by rationally constructing objectives and by discarding norms which they cannot rationally justify. Moreover, institutional designers could not handle the causal effects of institutions that work through complex channels by which many actors jointly produce outcomes without aiming at the collective outcome. For this lack of understanding, and because of subsequent disrespect for micro-processes that do not aim at macro-objectives, rational design failed to effectively employ institutional design to achieve its objectives. Evolution, by contrast, successfully adjusted to uncertainty as it utilized the experience which many actors, connected through flows of information, such as prices on markets, acquire over time.

While Hayek voices an important caveat against hubris, design knowledge is necessary for three reasons. First, for developing global governance structures in the current context, rational design is better than laissez-faire. Whatever might eventually develop without rational design by representatives of global society will be the result of many egoistic and incoherent design efforts of particularistic interests. Coherent, democratically accountable design committed to global social welfare is preferable to a fragmented process of institutional evolution arising from particularistic design efforts.²⁴ Particularly in the face of path dependency, when current structures influence the future development of structures, evolution does not necessarily lead to effective outcomes even in the long run.²⁵ Institutions shaped by evolution may, thus, be functional – but only in serving the needs of the powerful or in tackling historical problems.

Secondly, the complex institutions we need in order to solve contemporary global problems are unlikely to evolve on their own within reasonable time. Globalization is progressing, weakening the capacity of state actors for autonomous governance. As a consequence, global problems harden while frustrated individuals and societies turn to ethnic or religious movements. Swift improvements of global governance are, thus, direly wanted, yet the history of the GATT shows that institutional evolution proceeds incrementally.

Thirdly, one can purposefully combine design and evolution. Some aspects of institutions can be designed, while others can be left to evolution. Concerning the content of global governance, actors

²² See Petersmann (2003).

²³ See Koremenos, Lipson and Snidal (2001a).

²⁴ Miller (2000, 535) warns that “rational choice by actors with conflicting preferences for institutions may result in institutions that are suboptimal.”

²⁵ See North (1990) on circumstances, such as incomplete competition, friction in the flow of information, and high transaction costs of institutional change that are conducive to inefficient, path-dependent institutional development. These conditions suggest that the likelihood for inefficient, path-dependent development in global governance is substantial.

could, for instance, favor mutual recognition agreements over common standards and wait whether standards evolve via competition and learning. Concerning global governance structures, one might think of creating overlapping authority between and within institutions and letting allocation of authority evolve over time. Another way to combine design and evolution is to accelerate evolution by intelligent experimenting. These softer forms of institutional design – less susceptible to Hayek’s perils – also depend on design knowledge.

Initial formation and continuance at reshaping of real-world institutions always involves a combination of design and evolution. Young (1999a, 48) cautions that, “It would be a mistake, therefore, to exaggerate the role of institutional design in the processes involved in the creation of international regimes. Even so, opportunities exist to steer these processes, and much can be said for thinking carefully about such opportunities in advance in order to make the most of them when they do arise.”

Indeed, global governance has attracted outstanding scientific attention subjecting virtually all international institutions to scientific discourse and covering diverse topics, such as security, economics, environment, democracy, and human rights. However, as most research focused on explaining institutional creation and demonstrating that institutional effects exist, understanding the link between institutional design and “the effectiveness of institutions in solving regulatory problems associated with globalization” has long been neglected.²⁶ Only recently, the effectiveness of global governance has moved to the center of political and scientific debate.²⁷ Accordingly, our contemporary understanding of what constitutes effective structures is insufficient to best exploit the occasional windows of opportunity for design.

Practitioners and scholars both disagree even on the basic issue whether legalization is a good or a bad thing and whether more or less legalization is needed. Frequently, legalization is lauded for its improvement in bargaining and enforcement of international agreements.²⁸ On the contrary, Goldstein and Martin (2000, 604) utter doubts whether legalization can improve effectiveness, “The weakly legalized General Agreement on Tariffs and Trade (GATT) regime was remarkably successful at liberalizing trade; it is not apparent that the benefits of further legalization will outweigh its costs.” Barfield (2001) even calls for partial reversal of legalization in order to strengthen nation states. Scientific evidence on the effects of regionalization – submitted in the following chapter – is equally contradictory.

²⁶ Coglianesse (2000, 298).

²⁷ See Helm and Sprinz (2000), Martin and Simmons (1998), Sprinz (2003), Young (1999a) and Zürn (1998). Sprinz (2003) points out that especially research about effective global governance structures is in an early stage. Furthermore, Young (1999a, 119) observes that “much remains to be learned about the role of regime attributes as determinants of effectiveness. While many see the widespread use of consensus rules at the international level as a source of weakness, for example, the links between decision rules and regime effectiveness are poorly understood.”

²⁸ See Bacchus (2003), Franck (1990), Kahler (2000) and Keohane, Moravcsik and Slaughter (2000).

At this point, we have established that quickly improving global governance – and in particular the effectiveness of the WTO – is indispensable, that structures are a key factor for effective global governance, that purposeful design can play a constructive role in improving structures, and that we currently lack adequate understanding in order to design structures when windows of opportunity open.

I aspire to help mending this lack of knowledge through findings on four counts. My central aim is to recommend a more effective global governance structure for the WTO. In addition, I consider three ancillary objectives. One objective is to shed light on the changes in the environment of the WTO and on their implications for the working of the WTO; this underpins the case for reforms.²⁹ A further objective is to draw general conclusions for global governance from the example of the WTO.³⁰ Finally, I intend to reflect on the adequacy of my own research design.

1.4 Analytical framework

Above, we have seen that actors pursue diverse economic objectives in the WTO. These objectives are primarily attained through falling barriers to trade, reduced discrimination among trading partners (i.e. less trade diversion), and reduced discrimination among goods (i.e. less tariff escalation). I do not distinguish which economic objectives the WTO aims to achieve and by which means. Instead, I focus on the scope of global governance as the potential to achieve objectives. This scope of global governance increases with the number of issue areas that are regulated and with the intensity of global governance within these issue areas. The intensity of global governance grows with more rules in a given issue area and with rules that require greater changes in the behavior of the rule addressees.

The assumption is common that the benefits of scope extension outweigh its costs, so that scope extension enhances global social welfare.³¹ This is not to say that any advancement in integration promotes global social welfare. In particular, spill-overs on linked objectives have to be taken into account, like the social and ecological effects of free trade. Nevertheless, a consensus exists that more, well-designed global governance enhances global social welfare.³²

²⁹ The majority of scholars perceives a need for institutional reform of the WTO. See Esty (2002), Hoekman and Kostecki (2001), Jackson (2000b), Ostry (2003) and Petersmann (2001). But there are also dissenting voices like Zutshi (2001, 387), who believes that, “The institutional design of the World Trade Organization is basically sound.” A strong scientific case for institutional reform is especially needed because the Doha Agenda gives short shrift to institutional reform. See Horlick (2002) and Schott (2002).

³⁰ In order to facilitate generalization, I usually speak of international institutions and global governance instead of the WTO whenever my argument pertains to global governance in general.

³¹ This implies that actual scope, witnessed in current international institutions, is less than optimal scope, which maximizes global social welfare. What constitutes optimal scope depends partly on the social welfare function that is used to aggregate actors’ utility. It is useful employ pareto-efficiency with costly side-payments between actors as criterion for determining optimal scope.

³² See Frankel (2000), Frankel (2001), Helm and Sprinz (2000) and Young (1991). In addition to assuming that the content of global governance is chosen wisely, employing scope as objective implies that scope is chosen optimally for given structures. Thus, the point is not simply to widen scope but to develop structures that allow

If actors faced no obstacles, they would immediately agree on optimal scope. However, bargaining and compliance problems, as well as risks of global governance, cause actual scope to fall short of optimal scope.³³ To visualize how negotiations move from optimal scope to actual scope, assume firstly that actors reject all proposals that cannot be enforced. Among this set of enforceable proposals, actors then exclude all proposals that are overly risky. Due to bargaining problems, actors finally fail to agree on a proposal which is on the efficiency frontier of all proposals that are enforceable and entail an acceptable level of risk, so that they end up with the inefficient, actual scope.

The better structures cope with global governance problems and risks, the greater scope of global governance can be attained and the more corresponding benefits can be reaped. This means that I consider this structure which allows most scope of global governance to be negotiated and enforced to be most effective. In the following, I sketch my line of analysis for the bargaining and the compliance problem. I then turn to my definition of exogenous determinants and my treatment of linked objectives.

1.4.1 Bargaining

According to Fearon (1998, 274), “a bargaining problem refers to a situation where there are multiple self-enforcing agreements or outcomes that two or more parties would all prefer to no agreement, but the parties disagree in their ranking of the mutually preferable agreements.” In other words, actors have a common interest to co-operate, but disagree how exactly to co-operate.³⁴ Disagreements can originate from many sources. Actors can argue about the distribution of benefits. Normative divides can hinder agreement. Furthermore, different perceptions of the state of the world and different causal beliefs can disrupt negotiations.

Chapter 5, dedicated to bargaining, begins with a review of possible bargaining strategies that actors may employ. This is an essential groundwork for my further analysis because the reasons for bargaining inefficiencies and the effectiveness of structures differ depending on the bargaining strategy.

The number and nature of veto players, the toughness of their bargaining strategies, and the internal complexity of negotiating issues are all discussed as factors that determine bargaining effectiveness. While the trends suggest that more actors will be involved in negotiations, that they will choose tougher bargaining strategies, and that the negotiating issues will become more complex, appropriate global governance structures can ease the bargaining problem. However, certain structures detract from the influence powerful actors have over decision-making, whereas other structures forcefully expose weak actors to the intentions of the powerful. These risks need to be heeded if structures are to be acceptable to all actors.

for beneficial scope extension. Note also that optimal scope falls short of complete integration. Keohane and Nye (2001, 269) speak of “useful inefficiency” as a “buffer for domestic political differences”.

³³ I use the terms compliance and enforcement interchangeably. Fearon (1998) suggests that bargaining and enforcement problems exist independently of the issue area concerned. See also Hauchler, Messner and Nuscheler (2001) and Koremenos, Lipson and Snidal (2001a) for typologies of obstacles to global governance.

³⁴ See Muthoo (1999).

Finally, I address the possibility of delegating authority to the judiciary. Judicial delegation provides diverse benefits. For instance, judicial delegation can improve bargaining if courts create focal points, and judicial delegation can substitute for bargaining if courts assume legislative functions. Yet, judicial delegation involves a principal-agent risk and it harms the interest of those actors who would have fared better if disputes had been resolved in diplomatic negotiations. Therefore, the question arises how judicial delegation can be designed in a way that actors consent to the transfer of authority.

1.4.2 Compliance

Compliance (or enforcement) problems exist if governments face an incentive to defect from agreements. Chapter 6 presents several compliance mechanisms which counteract the incentive to defect. If governments deem the WTO legitimate, they feel normatively obliged to comply. Domestic societies, bureaucracies, and courts can impose domestic audience costs on governments if they violate agreements. Furthermore, defecting actors incur reputational costs on the international level. Actors also abstain from defection because protectionism is often costly in economic terms. Additionally, defecting actors may be exposed to sanctions by other actors. Finally, actors desire to prevent systemic damage to the WTO which arises from defections. By comparing the strength of the compliance mechanisms with the incentives to defect, we can then develop structures which approximately achieve a desirable level of compliance.

1.4.3 Exogenous determinants

Chapter 3 deals with exogenous determinants and trends in these exogenous determinants. The exogenous determinants are factors that influence the impact of endogenous determinants on effectiveness, although they themselves are not affected by the choice of structures. Since changing the fundamental global governance structures is likely to require a long period of time, proposals for fundamental governance reform have to ground in the problems dominant within the next decade. Hence, major trends in the ambit of global governance relevant to future problems are dissected and their effects are integrated into the analysis. The primary trends concern: relative effectiveness of global governance, linkages within global governance, depth of global governance, actor participation, and involvement of civil society.

Secondary trends that are driven by these primary trends include, among others, the number of actors, the heterogeneity of actors, and the uncertainty about efficiency and distributional effects of agreements. Defining trends in advance allows proceeding economically in the analysis with an abstract line of argument while being strongly rooted in real-world developments.

In addition, I reason in Chapter 3 that the trends incorporate the requirements to attain linked objectives. If global governance structures deal effectively with the cooperation problems in the face of linked and deep global governance and with involvement of developing country actors' and civil society, then the global governance structures are capable of contributing to linked objectives.

1.5 Theoretical framework

In this section, I firstly explain why I see the need to employ an interdisciplinary theoretical framework for recommending global governance structures. I then outline which theories I integrate into my theoretical framework and I sketch which stances I take on particularly important issues of theorizing.

Two arguments can be brought to bear against integrating (especially rationalist and constructivist) theories in the analysis of international institutions. One argument aims at promoting scientific progress. Its adherents prefer studies to focus on one theoretical approach to stimulate competition among theories.³⁵ The opposing thought propounds that eclectic middle range theories are the best way to the creation of long-term general knowledge.³⁶ In any case, my aim is not to judge on scientific disputes but to combine existing scientific insights for recommendation of governance structures.

The other argument is brought forward by scholars who want to combine insights from different scientific approaches but not integrate the different approaches into one argument. Convergent results are deemed particularly reliable, whereas contradictions demand further efforts.³⁷ From my own perspective, such an analysis can never lead to reliable results because essential aspects are excluded. Firstly, separate analysis either fails to include mechanisms that work through a combination of rationalist and constructivist channels or it perceives these mechanisms overly narrowly.³⁸

Secondly, separate analysis ignores interaction effects between mechanisms that fall into different approaches. In a setting with low compliance, for instance, a severe punishment of norm violations may improve the legitimacy of the norm as actors observe improved compliance. If compliance is already high because actors feel a normative obligation to comply, a severe punishment of norm violations that occur in outstanding situations is likely to weaken the norm's legitimacy and possibly compliance. Neither a purely rationalist nor an exclusively constructivist account can capture such interactions.

Thirdly, even in the absence of mechanisms that reach across scientific approaches and of interaction effects among mechanisms belonging to different approaches, separate analysis cannot reveal the best instrument mix. This is because separate analysis is not equipped to select from substitutive mechanisms that belong to different approaches. Hence, I employ an integrated framework to analyze how endogenous and exogenous determinants interact in the cooperation problems and risks.³⁹

³⁵ See Wendt (2001).

³⁶ See Odell (2000, Ch. 1).

³⁷ See Young (1999a, Ch. 8).

³⁸ See section 6.2.1 about rhetorical action, the rational and strategic use of normative statements, for an example of such a mechanism that can only be fully understood with an interdisciplinary approach.

³⁹ This is in accordance with many scholars calling for more integrated research on global governance. See Dunoff (1999), Hemmer and Katzenstein (2002), Jönsson (2002), March and Olsen (1998), Onuma (2003) and Slaughter, Tulumello and Wood (1998). See, in particular, Fearon and Wendt (2002) on the potential for 'conversation' between rationalism and constructivism.

My own framework draws on resources from the three main sciences occupied with international institutions: international relations, international law, and international economics. Each of these sciences contains different schools of thought with diverging epistemological, ontological, and methodological commitments. Due to this diversity, most strands share some assumptions while they differ on other dimensions. I avoid the intricacies of presenting the different approaches in the introduction, and throughout the analysis, I generally evade tracing arguments back to particular schools of thought.

Instead, I briefly summarize from which schools of thought I borrow arguments in my own analysis. Within international relations theory, I engage (Neo-/Liberal-) Institutionalism, Liberalism, and Constructivism.⁴⁰ While I address the concerns of realism, this theory assumes minor importance in the present study. Within international law theory, I focus on international legal process as a causal mechanism and on the role of law for the social construction of the international system, whereas I generally sidestep the significance of domestic and transnational law for the international system.⁴¹ Economic scholarship serves as basis for international relations and international law theory about the WTO. In addition, international economists conduct studies of international institutions and they provide insights for the assessment of regionalization.⁴²

In particular, my theoretical framework integrates stances taken along five salient dimensions in the study of global governance. The first dimension is the level where explanation is sought. On the one hand, I take structural considerations into account. These can be shared knowledge that establishes focal points or interaction dynamics following from structure, for instance, in the context of the risk for actors associated with voting rules. On the other hand, I also look at the unit-level of actors. For instance, I ask how structures affect the domestic audience costs of non-compliance and, thus, the behavior of actors in the international sphere. Beyond this dichotomy, many observers point to the blurring between the national and international realm. Accordingly, I consider the direct impact of

⁴⁰ For overviews of international relations theories, see Carlsnaes, Risse and Simmons (2002), Eichengreen (1998), March and Olsen (1998), Martin and Simmons (1998) and Wendt (1999).

⁴¹ See Slaughter, Tulumello and Wood (1998) for a review of international-relations oriented, international law theory along these three schools of thought. In terms of the methods of law as categorized by Ratner and Slaughter (1999), my analysis builds primarily on different strands of *legal process*, *international law and international relations*, as well as *law and economics*. *Positivism* and *critical legal studies* are of secondary importance, while I am not concerned with *feminist jurisprudence*. See Haas (2000), Koh (1997), Guzman (2002) and Raustiala and Slaughter (2002) for reviews of legal and international relations scholarship specifically about compliance with international institutions.

⁴² Bagwell and Staiger (2000) are a good example of advanced economic thinking about the WTO, which is at the same time governance-oriented and characteristically economic. Bhagwati, Greenway and Panagariya (1998), Cho (2001), OECD (2003), Panagariya (1999), Winters (1999), World Bank (2000) and Zimmermann (1999) provide overviews on economic research about regionalism and multilateralism. Important studies on the dynamics of regionalization include Andriamananjara (1999), Baldwin (1993), Bond and Syropoulos (1996), Conconi (2001), Frankel, Stein and Wei (1997), Freund (1998), Freund (2000), Goto and Hamada (1995), Kubota (1999), McLaren (2002), Nordström (1995) and Perroni and Whalley (2000).

civil society on the international level.

The second dimension relates to the factors that determine actors' behavior. Materialist theories infer all behavior from material conditions reducing ideas to intervening variables at best. Radical idealist theories, on the contrary, deny a causal influence of material factors. They explain the world solely with reference to the human mind, language, and discourse that gives meaning to material objects. In the present study, material factors play a role, as do ideational factors, such as norms.⁴³ The ideational factors open the door for learning so that actors' ideational properties change in the course of negotiations.⁴⁴

Thirdly, one can discern two main approaches that explain how individuals make decisions. Under a 'logic of consequences,' "human actors choose among alternatives by evaluating their likely consequences for personal or collective objectives, conscious that other actors are doing likewise."⁴⁵ In addition to this traditional view of the 'rational man,' I work with bounded-rational actors who face limitations in their ability to store and process information. Contrary to the logic of consequences, actors can pursue a 'logic of appropriateness,' attempting to comply with norms.⁴⁶

Fourth, approaches to international relations differ in their treatment of law and power. International relations theory traditionally focuses on power and assigns no independent causal role to law. The theory of international law traditionally takes sovereign equality among states serious and ignores the impact of power disparities on the creation and application of law.⁴⁷ Perceiving actors as considering material and ideational factors while following the logic of consequences, as well as the logic of appropriateness, suggests taking law and power serious and provides ample opportunities to closely link these two concepts in the analysis.

Finally, I adopt a principal-agent perspective to mediate between two opposing views on the role of international institutions. One side argues that international institutions reflect state preferences. To the degree institutions affect outcomes, they change the constraints which states face in terms of transaction cost in accordance with states' preferences. The other side locates all causal power with international institutions and diminishes states into powerless spectators of supranational processes beyond their control. This controversy is most pronounced in the dispute between intergovernmentalists and functionalists/supranationalists on the subject of European integration. Principal-agent theory opens intermediate ground in granting agency to states *and* international institutions and by explaining outcomes by their interplay.⁴⁸

⁴³ Finnemore and Sikkink (1998, 891) define a norm as "a standard of appropriate behavior for actors with a given identity".

⁴⁴ See Chapter 4 on ideational properties and learning. I generally speak of ideational properties instead of ideational factors or simply ideas. I do so firstly in order to emphasize that ideas have to be internalized to influence behavior. Secondly, I thus highlight that ideas generally display stability or develop only gradually over many situations in which actors make decisions.

⁴⁵ March and Olsen (1998, 949).

⁴⁶ See Finnemore and Sikkink (1998) and March and Olsen (1998).

⁴⁷ See Byers (1999).

⁴⁸ See Barnett and Finnemore (1999) and Pollack (1997).

Hence, I consider states and international institutions as actors behaving with regard to consequences and appropriateness in response to material and ideational factors stemming from the international and domestic sphere. This prepares the stage for an encompassing set of effects that global governance structures can exert on actors' behavior. By necessity, I have to select the most important effects; in addition, preference is given to (more) direct effects that can be established with (more) stringency.

Since ideational properties shape actors' behavior and because ideational properties are influenced by interactions at the international level, we have to consider how interaction constitutes actors by changing their ideational properties. Chapter 4 considers the logics according to which actors make decisions and it presents the fundamental ideational properties that shape behavioral decisions regarding bargaining and compliance. These ideational properties comprise values, norms, perceptions, causal beliefs, the perspective on relative versus absolute gains, and collective identity. Among the effects of global governance structures and trends on learning, particular attention is paid to the question of how structures stimulate deliberative negotiating processes, in which actors collectively search for the best solution to a problem. Examination of all constitutive effects on actors in Chapter 4 allows treating actors as exogenous in the analysis of bargaining and compliance.

Consideration of ideational properties and learning through constructivist theories confronts my theoretical approach with a further challenge in addition to complexity. Constructivism is still developing from a magnitude of partly unrelated, partly competitive proposals into one or several coherent theories.⁴⁹ Even more recent and dynamic are efforts to combine constructivist and rationalist insights.⁵⁰ Working with this theoretical tool-kit necessarily gives my account an idiosyncratic touch.

⁴⁹ See Jachtenfuchs (2002) and Zehfuss (2002). See also Schimmelpfennig (2000), who observes a profusion of micro-economic foundations and lacking theoretical and terminological coherence in constructivism.

⁵⁰ See Jupille, Caporaso and Checkel (2003).

1.6 Procedure

Now we have established all important elements of the analysis, which can therefore formally be presented in *Figure 1*.

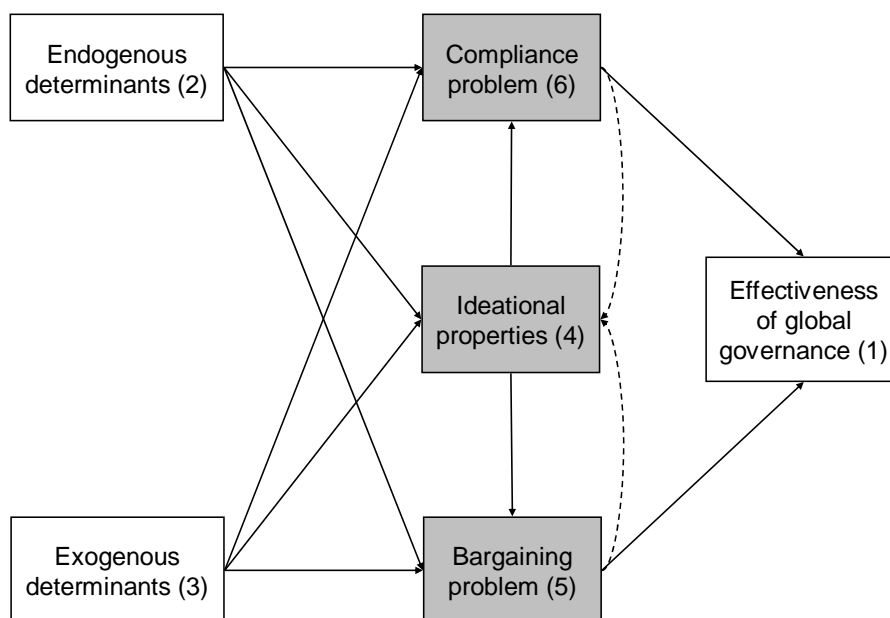


Figure 1: Analytical framework

This study is divided into three parts. The first part contains the foundations. In this Introductory Chapter, I have argued for the relevance of the research question and research design in a political and a scientific context. Furthermore, I have outlined the study and I have brought forward my understanding of effectiveness in relation to the cooperation problems and risks in global governance. Chapter 2 about the structures of global governance provides more detailed discussion of the endogenous determinants. Chapter 3 then delves into the trends affecting global governance in order to develop the exogenous determinants.

The second part of the study is dedicated to actual analysis. Chapter 4 deals with ideational properties and learning, whereas in Chapter 5 on bargaining and in Chapter 6 on compliance the actors' ideational properties are held constant.

The final part draws conclusions. Chapter 7 demonstrates the need for reform and recommends a reformed structure for the WTO. Chapter 8 discusses possibilities for generalizing my main findings of the WTO to other international institutions. Concluding Chapter 9 then assesses the research design and points to avenues for future research.

2 Endogenous determinants: Global governance structures

In this chapter, I specify and justify my understanding of regionalization and legalization, which are the endogenous determinants of effectiveness in this study. As in Chapter 3 on trends and in Chapter 4 on ideational properties and learning, I do not elaborate on the effects of these concepts under consideration beyond what is required for their proper definition. Their role for effectiveness of global governance is analyzed in Chapter 5 on bargaining and in Chapter 6 on compliance.

2.1 Regionalization

Currently, nation states are the dominating actors in global governance. They negotiate, implement, and enforce the majority of global agreements. Yet, nation states are not the only actors active in global governance affairs. There are also integrated regions in which several nation states cooperate above the national but below the global level. In particular, several European nation states have integrated into the EU and now speak with one voice in the WTO. On the scale below the nation state, regions and cities cooperate across borders. In addition, private agents engage in governance activities beyond the nation state, such as companies which develop voluntary global standards and NGOs which attempt to hold multinational companies accountable to global rules of conduct of varying origin. In these ways, different types of actors with diverse concepts of governance compete for influence.

To qualify for inclusion in the global governance structure, actors need to have the capacity to beneficially serve as pillars of a global governance architecture. Furthermore, they have to be powerful enough to win the contest for influence in case they are promoted as an effective and legitimate solution. Thus, I take a middle-ground between realism and utopianism in believing that we can choose among possible constitutive actors, albeit constrained by existing power constellations.

In the following section, I argue that nation states are especially able providers of governance and that they will preserve their preeminence against lower-level, territorial actors and transnational, private agents. Then, I reason that starting from a world of nation states regionalization is a viable option. In this context, I also describe and justify the properties I impute to integrated regions and the dynamics I expect from regionalization. While we are well informed about the properties and interactions of nation states, the characteristics of integrated regions and a world composed of integrated regions are less clear.⁵¹

2.1.1 Nation states as constitutive actors

Nation states evolved in a historical process competing with alternative forms of governance such as religious rule and cooperation among free cities.⁵² Nation states succeeded in controlling an increasing number of governing functions within their territory and in bringing social spaces into conformity with

⁵¹ On nation states, see *supra* note 40; on integrated regions, see *supra* note 42.

⁵² See Luhmann (1998) and Osiander (2001).

their political territory. Such a unitary system of governance, where one authority directly commands many governance functions and accomplishes primacy over those governance functions which it does not directly provide, is labeled territorial governance. Nowadays, globalization widens social spaces beyond territorial borders, while accompanying fragmentation shifts the emphasis towards social spaces that are smaller than the nation state.

These developments exert pressure on nation states from two sides. Within territorial governance, lower-level actors claim more authority in the name of subsidiarity and federalism, and they directly engage in cooperation with similar entities across national borders.⁵³ The second competition arises from functional governance. Under this model, several sources of authority co-exist as equals, each providing specific functions for social spaces that do not necessarily coincide with traditional political territories.⁵⁴ Private agents play an important role in functional governance in cooperation with, or even without, nation states, for instance, multinational enterprises, NGOs, and scientific communities that accept voluntary codes of conduct or agree on standards for efficient cooperation.

It appears convincing that nation states accommodate these claims to authority without losing their prime position in formulating, legitimizing, controlling, and implementing global governance. This implies that *governing through government* and *governing with government* dominates *governing without government*. Though attention is increasingly paid to direct involvement of lower-level state actors and private agents in governance beyond the nation state, the assumption that states remain the central actors of global governance is still widely shared among scholars of international relations. Accordingly, realism and (Liberal-/Neo-) Institutionalism, as well as many liberal and constructivist scholars, all treat nation states as constitutive entities of the global, political system.⁵⁵ In addition, most studies of global governance explicitly expect nation states to remain the single most important type of actors.⁵⁶

They do so for several reasons. Firstly, nation states are endowed with unique resources and capabilities, so that they are essential for implementing global governance. Secondly, based on a strong collective identity, shared culture and institutionalized discourse, nation states enjoy particularly high legitimacy. Civil society involvement contributes to the legitimacy of global governance dominated by nation states and integrated regions, but it cannot replace the legitimatization through territorial democracies.⁵⁷ Thirdly, nation states have proven to be flexible and

⁵³ On territorial re-organization of authority in response to changing social spaces and on the growing autonomy of lower-level actors in particular, see Albert (1998), Blatter (2001), Goodman (1998), Pieterse (1998), Wolf (1998) and Zürn (1998).

⁵⁴ See Cerny (2000), Luhmann (1998), Messner (2003), Rosenau (2000) and Wolf (1998).

⁵⁵ See Wendt (1999).

⁵⁶ See Commission on Global Governance (1995), Keohane and Nye (2000), Malanczuk (2002) and Zürn (1998, Ch. 5). Wendt (1999, 9,) points out that, "It may be that non-state actors are becoming more important than states as initiators of change, but system change ultimately happens *through* states."

⁵⁷ See Thaa (2001). Section 3.5. provides further discussion of civil society involvement in global governance.

resilient in the past, and they display self-interest in reproduction.⁵⁸ Even if governance by private agents grows in importance, nation states will preserve traditional and find new tasks. The need for nation states for maintaining the legal framework – and especially for allocating property rights and regulating markets – will not abate.⁵⁹ While we can see only blurred outlines of actors' new roles in the future, we can expect new tasks to involve managing interfaces between different modes of governance and launching initiatives.⁶⁰

2.1.2 Welfare effects of integrated regions

The following discussion demonstrates that regional integration of nation states is a viable option, and it derives properties of integrated regions that allow treating them realistically as actors of global governance. To this end, I consider in turn the direct welfare effects of regionalization, the interaction of regionalization with multilateral liberalization in the WTO, and dynamic time-path properties of regionalization.

The formation of an integrated region causes economic benefits and costs for members as well as non-members of the integrated region.⁶¹ Let me firstly address the economic benefits. Regionalization creates the same economic benefits on a smaller scale which we have seen in Chapter 1 arising from multilateral liberalization. Regionalization creates additional trade, investment, and knowledge flows inside integrated regions. Larger markets enable internal and external economies of scope and scale, spur learning of more efficient production processes, and intensify competition. Regionalization can engender additional gains if it facilitates the movement of natural persons and the coordination of national policies. Furthermore, actors can lock in reforms by entering into integrated regions. This assures private agents that policies will be maintained even though the government under whose

⁵⁸ See Wendt (1999, Ch. 5). See also North (1981), who shows how nation states responded throughout history with fundamental structural reforms to external changes, e.g. in the stock of capital and in military technology. Since nation states were repeatedly able to adopt new structures that were more efficient in reducing the transaction costs of governing and in coping with political pressure from domestic groups and foreign states, we can expect states to adapt to the current challenges of globalization as well. A second argument can be built on North's observation that nation states systematically failed to provide the most efficient institutional framework, in particular for economic growth. Accordingly, nation states do not need to provide an approximately efficient response to globalization in order to persist.

⁵⁹ On the importance of institutions for economic wealth, see North (1990). He demonstrates that institutions can significantly lower the transaction costs of assuring the quality of exchanged goods and services, of monitoring and enforcing contracts, and of hedging against risks in economic transactions. Informal institutions such as reputation and norms are appropriate to fulfill certain functions in lowering transactions costs. Sophisticated economies with highly specialized modes of production, however, require also formal institutions. It is convincing that states remain indispensable sources of such institutions.

⁶⁰ See Messner (1998) and Wolf (1998).

⁶¹ See *supra* note 42. On economic effects, see also Baldwin, Cohen, Sapir and Venables (1999), Bhagwati, Krishna and Panagariya (1999), DeRosa (1998), Fernández (1997), Schiff and Chang (2000) and Soloaga and Winters (1999).

jurisdiction the private agents conduct business is troubled by a time-inconsistency problem. A frequent time-inconsistency problem is that a government that offers generous conditions for investment is tempted to raise the taxes on the returns from investment and to complicate withdrawal of capital once substantive investments have been made. External suppliers also benefit from larger markets that carry the fixed costs of market entry more easily, so that trade and investment are promoted.

Contrary to these positive effects for members and non-members of integrated regions, the welfare of actors outside the integrated region is harmed as trade is diverted away from efficient external suppliers to intraregional suppliers, which are exempted from tariffs and face less non-tariff barriers to trade. Investment in suppliers who benefit from paying lower tariff results in misguided specialization. Furthermore, investment is diverted as external suppliers invest in production facilities within integrated regions in order to secure market access for the case of sharp increases in the level of protectionism. In addition, the management of rules of origin distorts investment decisions and creates transaction costs for governments, as well as for companies.⁶²

The more protectionist the integrated region becomes, the less benefits the external suppliers receive from regionalization and the stronger the diversionary effects grow. There is reason to suspect that the level of protectionism established by the integrated region exceeds those levels of protectionism that the participating actors would have chosen on their own. Actors can set their tariffs in order to manipulate the terms of trade – the conditions of exchange on the world market – in their favor. The resulting optimal tariff that maximizes the welfare of a tariff-setting actor rises the larger the actor is in comparison with her trading partners. To the extent that regionalization intensifies asymmetries in market size, regionalization, thus, leads to higher tariffs. Furthermore, the political economy – the interplay of different interest groups in influencing politics – favors high levels of protectionism. Regionalization already offers many advantages of liberalization to intraregional export industries, so that the lobby for multilateral liberalization may be critically weakened, while intraregional suppliers that benefit from trade diversion resist multilateral liberalization.⁶³ In addition, trade policy of integrated regions may be systematically biased in favor of those members that prefer the most protectionist stance on a given issue.⁶⁴

2.1.3 Interaction of regionalization with multilateral liberalization

Regionalization also affects the viability of multilateral liberalization in the WTO through several effects, which are related to the strategic interaction among actors, to the intraregional decision-making process, to the political economy of integrated regions, and to the question of whether

⁶² See Bhagwati, Krishna and Panagariya (1999). Rules of origin describe the value creation activities or the share of value creation that has to take place inside the integrated regions if a product is to be considered of intraregional origin.

⁶³ See *supra* note 42. On political economy effects, see especially Bhagwati, Krishna and Panagariya (1999), Cadot, De Melo and Olarreaga (1999), Grossman and Helpman (1993), Krishna (1998) and Levy (1997).

⁶⁴ See Meunier (2000). For instance, the majority of EU member states repeatedly fails to reform expensive protectionism of agricultural production against resistance by the beneficiaries, such as France and Italy.

integrated regions are a force for convergence or divergence of actors' policies.

In regard to a strategic interaction among actors, regionalization undermines the sophisticated workings of non-discrimination and reciprocity norms in the WTO.⁶⁵ In particular, actors agree on less multilateral liberalization if they have to fear that subsequent 'opportunistic' regional integration devalues the concessions they have conceived in multilateral negotiations.⁶⁶ Furthermore, the opportunity of regional integration agreements offers an incentive to large actors to maintain tariffs in multilateral negotiations as these tariffs serve as a bargaining chip when negotiating for non-trade concessions with smaller countries in regional negotiations.⁶⁷

Concerning the intraregional decision-making process, integrated regions are seen as slow decision-makers that hamper multilateral negotiations. Worse, intraregional disagreement may deadlock multilateral negotiations.⁶⁸

Regionalization is a force towards multilateral convergence of regulations if integrated regions adopt regulations of the WTO or of other integrated regions as implicit standards, or if the WTO develops policies based on the experience inside integrated regions. This appears to dominate the opposite effect by which regionalization deepens and ingrains the regulatory differences between those actors uniting in integrated regions compared to extraregional actors.⁶⁹

2.1.4 Properties of integrated regions

Concerning the welfare effects of regionalization, these considerations indicate that regionalization entails benefits and costs, and that intraregional welfare is more likely to rise than the welfare of external actors. Regarding the interaction of regionalization with multilateral liberalization that regulate strategic interaction among actors, we have observed that regionalization tends to undermine the proper working of multilateral norms, to burden the multilateral bargaining process, and to weaken the free-trade interests within the political economy; by contrast, regionalization appears to propel regulatory convergence. Welfare effects and interaction with multilateral liberalization significantly depend on the depth of integration and the level of protectionism which integrated regions adopt, as well as on the dynamic of multilateral liberalization.

These findings have a twofold significance for the present study. They serve as background for the following argument about the properties of integrated regions, and they present the current scientific assessment of regionalization. The abounding literature about the effects of regionalization tended to be critical of integrated regions; recently, opinion has moved towards a more positive evaluation as research has broadened its perspective from purely economic to socio-political effects. The present study does not confirm or contradict the effects which the current literature propagates; instead, it complements it by further extending the subject and methodology of research to include additional

⁶⁵ See Bagwell and Staiger (2000) and Bagwell and Staiger (2001).

⁶⁶ See Bagwell and Staiger (1999).

⁶⁷ See Freund (2003) and Limao (2002).

⁶⁸ For instance, dispute about protectionism in agriculture divided the EU, jeopardizing successful conclusion of the Uruguay Round. See Piazolo (1995).

⁶⁹ See OECD (2003).

effects of regionalization on global governance.

To arrive at a realistic treatment of integrated regions within global governance, I look at the dynamic time-path properties of regionalization. One strand of this research looks at intraregional dynamics asking: How does the economy within integrated regions develop? Which changes occur in their political economy? What does that mean for further liberalization? The other strand is occupied with the extraregional dynamics of regionalization, and is, thus, interested in questions like: Under which circumstances do regions integrate? Under which circumstances are outsiders applying for membership and when are they admitted to the club? Will integrated regions merge? Though extensive research has been conducted on the dynamics of regionalization, clear answers are mostly missing and the research community is far from consensus. However, there are some convincing results that are helpful for evaluating global governance structures based on integrated regions.⁷⁰

Firstly, regionalization seems to be a self-reinforcing process. The spread of regionalism increases the advantages of establishing an integrated region or joining an existing one. With a growing degree of regionalization (or the anticipation thereof), the existing integrated regions are induced to enlarge in order to gain relative power.⁷¹

Secondly, regionalism is no shortcut to one global union. In a unitary actor perspective, integrated regions compare the advantages they receive and those they have to forgo if they merge. The larger the integrated regions become, the more gains from liberalization they reap, and the less they gain by agreeing on global free trade. This gain may be insufficient to outweigh the advantages which large integrated regions would lose by moving to global free trade. These advantages include increased power compared to their weaker rivals, particularly in optimal tariff setting, and larger home markets for their companies to gain competitive advantage. Furthermore, the political economy of integrated regions makes a global union unlikely. To make matters worse, non-economic concerns, like cultural identity and transaction costs of cooperating which increase with heterogeneity, reduce the chances of a global union arising from merging integrated regions.

The third conclusion is that integrated regions display a tendency towards deeper integration. From an extraregional perspective, deepening integration furthers the regions relative power. Intraregionally, dynamics within the political economy propel integration as a self-reinforcing process.⁷² Furthermore, coordination of policies at the international level deepens the need for internal interactions and the experience of joint representation invigorates the collective identity.

⁷⁰ While nation states join into integrated regions for many reasons, security and economic motives are considered to dominate their initial decision to form as well as subsequent behavior of integrated regions. Security motives lend themselves less for formal theorizing, have been less thoroughly researched, and are only of secondary importance for the WTO. Therefore, the following review of the dynamics of regionalization will draw mostly on economic literature adduced at *supra* note 40. See furthermore Choi (2003) and Sampson and Woolcock (2003) for recent case studies.

⁷¹ Such extraregional effects carry less weight in comparison with intraregional objectives of regional integration as integration deepens, regulating additional issue areas beyond trade policy within integrated regions.

⁷² However, counterforces that are ignored by functionalist integration theory limit integration. See Alter (2000) and Meunier (2000).

These findings yield important insights. We can reasonably envision a world of several (maybe 5 to 20),⁷³ mostly large and deeply integrated regions that feel no inclination to merge into one global union. Thus, a world of integrated regions is a possible stable state of the world. These insights are important for the treatment and evaluation of integrated regions. If we expect regions to merge into one global integrated region, we will be much more willing to accept (temporary) detrimental effects of regionalization than if we believe integrated regions are here to stay.

It is tempting to complement these general findings with experience from the EU as a model that can inform our expectations about regionalization. Yet, we have to be careful with drawing conclusions from the EU on other integrated regions. The EU excels in the degree of deep integration and legalization it has accomplished.⁷⁴ The institutional predecessors of the EU developed already in the aftermath of World War II. If we consider the significance of ideas and institutions and the time they need to develop, it appears unlikely that other regions can arrive at the same point within a short time. Furthermore, the European integration has developed through a peculiar political and legal process.⁷⁵ Finally, the EU has enjoyed valuable advantages, such as a comparably homogenous, high level of wealth and a positive experience with the rule of law that many former colonies lack.⁷⁶ This lowers the transaction costs of cooperating in supranational institutions of substantial scope and depth. Hence, other integrated regions may integrate less deeply than the EU and choose different paths of integration.⁷⁷ In addition to these substantive obstacles to drawing analogies from the EU on integrated regions in general, little comparative work on integrated regions has been carried out.⁷⁸

Therefore, I cannot predict which common features of regionalism are likely to develop in detail. Instead, I constrain my definition of integrated regions to the requirement that they are defined by their status as subjects of international law and their representation with one voice in international negotiations.⁷⁹ There may be outliers – particularly important issues combined with particularly great

⁷³ A common, alternative scenario envisions a world of only three or four major blocs. See Hufbauer (2003), Jackson (2000b) and Krueger (1995).

⁷⁴ See Kahler (2000) and Sbraiga (2002).

⁷⁵ See Parsons (2002) on the importance of political ideas and discourses; see Alter (2000) and Stone Sweet and Brunell (1998) on the role of European Court of Justice (ECJ) in European integration.

⁷⁶ See Sbraiga (2002). These advantages may be partly lost as the EU enlarges to include Eastern European countries and possibly Turkey and as fragmentation within the EU gives more weight to heterogeneous lower-level authorities. See Langhammer (1998).

⁷⁷ This explanation emphasizes path dependency and efficiency arguments based on the new institutionalism. This approach is in line with Choi and Caporaso (2002), who expect functional needs to override cultural preferences in the formation of integrated regions. On the contrary, Parsons (2002) stresses the independent causal power of ideas in regional integration. To the extent that cultural preferences matter in the formation of integrated regions, generalization from the EU to integrated regions in general becomes even less permissible.

⁷⁸ See Sbraiga (2002).

⁷⁹ Besides the EU, the Caribbean Community (CARICOM) develops towards an external negotiating responsibility. See Page (2001). Customs unions are automatically required to speak with one voice in tariff negotiations.

disagreements like the dispute over the war on Iraq in 2003 – that split even the EU. In cases where integrated regions do not speak with a single voice, regionalization, nevertheless, reduces the heterogeneity of negotiating positions. This can happen because integrated regions provide stable institutions for caucusing ahead of international negotiations and, if necessary, for side-payments. Moreover, regionalization reduces heterogeneity among members continuously and incrementally.

2.2 Legalization

Legalized institutions are a particular subset of institutions that adopt the characteristics of law and, thus, resemble domestic political institutions in liberal democracies. This implies that legalization does not equal institutionalization as we can observe institution-building that is non-legalistic, like the Association of Southeast Asian Nations (ASEAN).⁸⁰

While I spend considerable effort on clarifying my understanding of legalization, I do not purport an elaborated definition of (international) institutions. My working definition of international institutions refers to those international *regimes* that are supported by international *organizations*.⁸¹ Thus, I do not include informal networks and (implicit) constitutive principles in my working definition of international institutions. The restrictions on actors of global governance made for this study further narrow international institutions to those run primarily by nation states and integrated regions. Finally, this study focuses on international institutions as part of the global level of governance, meaning that they at least aim at universal membership.

In order to develop endogenous determinants that characterize *legalized* international institutions, I fall back upon a customary categorization of law. This categorization stems from Hart (1961) who circumscribes law as a peculiar form of social control characterized by rules, moral obligation, and sanctions, where rules can be divided into primary rules that impose obligations and secondary rules that organize recognition, change, and adjudication of rules. Similar to Hart's distinction between 'primary rules' and 'secondary rules,' Diehl, Ku and Zamora (2003, 50) discern between a 'normative system' and an 'operating system' in international law. The normative system is meant to "mandate particular values and direct specific changes in state and other actors' behavior", while the operating system "provides the framework within which international law is created and implemented and defines the roles of different actors as well as providing mechanisms for the settlement of disputes."

Table 1 presents the determinants of legalization based on this categorization. Of the secondary rules, I adopt decision-making and judicial delegation design as endogenous determinants. Decision-making stands for the creation of law through the actors of global governance; judicial delegation refers to the

⁸⁰ See Choi and Caporaso (2002) and Kahler (2000).

⁸¹ Krasner (1983, 2) frames regimes as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations." Young (1999a) defines regimes as "sets of rules, decision-making procedures, and/or programs that give rise to social practices, assign roles to the participants in these practices, and govern their interactions." International organizations stand for bureaucracies that support and administer international cooperation. See also Zürn (1999, Ch. 5) for a taxonomy of international institutions.

authority transferred to courts.⁸²

Within the primary rules, I distinguish between specific normative content and structural aspects of this content. I consider the level of precision, exemptions, and punishment as structural aspects of primary rules. These structural aspects are constitutive aspects of law; rules which are precise, which show a moderate degree of exemptions, and which threaten violators with punishment are most likely to be recognized as law. The specific normative content of law, by contrast, defines rule-following behavior and possible sanctions for rule violations. Specific normative content is interchangeable without affecting our definition of law. For instance, for which industry and to which degree a WTO agreement prescribes tariff cuts is a matter of specific normative content, whereas the precision of the agreement is a structural aspect.

I do not include the specific normative content of law into my definition of legalization. The reason is, firstly, that extensive additional analysis would be required in order to argue what should be regulated by global governance as opposed to actors’ autonomous governance or markets and by which substantive rules global governance could achieve its objectives best. Secondly, optimal substantive rules, which most effectively serve actors’ interests, are very specific to issue areas. Findings on optimal substantive rules of the WTO could, thus, be generalized to other international institutions on a very limited scope only.

Therefore, I do not take a stance on interesting questions such as: Should non-discrimination in a system of heterogeneous domestic regulation be the focus of the WTO or should the WTO attempt to harmonize domestic regulation around global standards? How should the WTO be substantively linked to other issue areas and in which cases should the WTO defer to other international institutions? Which WTO policies can contribute to balancing effectiveness and equity? Nevertheless, this study provides a sound starting point to address such concerns; the analytical framework of this study can be employed to discuss the implications of alternative substantive policies for bargaining, compliance, and risk.

Table 1: Determinants of legalization

	<i>Primary rules / normative system</i>		<i>Secondary rules / operating system</i>
	Specific normative content	Structural aspects of content	
<i>Determinants of legalization</i>	Not included into this study	Precision Exemptions Punishment	Decision-making Judicial delegation

⁸² I use the term ‘court’ with reference to institutions of binding third-party dispute resolution, such as the panels and the Appellate Body in the WTO. The terms ‘judicialism’ and ‘juridification’ carry a meaning similar to legalization, albeit usually with a narrower focus on judicial delegation.

2.2.1 Endogenous determinants of legalization

Legalization is then characterized by the design of decision-making, judicial delegation, precision, exemptions, and punishment. Each of these determinants is attributed several characteristics that specify the determinant in more detail. In the following, I give a brief description of each determinant with its characteristics.

Decision-making

Decision-making refers to the process by which decisions are crafted in negotiations between actors. Generally, I have full-fledged trade rounds in mind when I speak of negotiations. In addition, decision-making can occur on a frequent basis and at lower levels, such as committees.

Vital elements of the decision-making process include the identity of the participants and the manner in which decisions are passed. If legalization of decision-making is low, powerful actors tend to negotiate agreements among themselves and exclude weak actors. Legalized decision-making designs, on the contrary, prescribe multilateral participation and either consensus or majority voting.⁸³

Judicial delegation

Conflicts over agreements arise as actors disregard rules or misinterpret rules to their individual advantage, when those rules are genuinely unclear or conflicting, or when rules are incomplete and in need of amendments. Judicial delegation signifies the degree of authority attributed to the judiciary in such disputes, covering the judicial process from the filing of a case to the final ruling. The ruling adjudicates the specific dispute but also clarifies existing rules and creates case law with prospective effect for all actors. Judicial delegation is characterized by ease of access, legal proceedings, legal mandate, and administrative control mechanisms, all of which have an important impact on judicial scope – the number and significance of rulings – and on the independence of courts from the influence of actors.⁸⁴

The ease of access depends on the range of subjects that are entitled to file disputes and on the costs they incur from litigating.⁸⁵ A direct effect of international agreements improves access as it allows individuals to invoke international law at domestic courts. The more restrictive the access is, the lower the judicial scope and independence will be.

Legal proceedings can be consensual or compulsory.⁸⁶ This concerns, in particular, whether all parties in a dispute need to consent to an institutional dispute settlement or whether one actor can initiate such proceedings regardless of the other actors' endorsement. The rules for adoption of rulings differ fundamentally between international institutions. Rulings can require support of the whole or a majority of actors, they can enter into force unless rejected by a consensus, or they can automatically apply without further political control. The more automatic the legal proceedings are, the greater the

⁸³ See section 5.4.2 for further discussion of decision-making design.

⁸⁴ See section 5.6 for further discussion of judicial delegation.

⁸⁵ See Keohane, Moravcsik and Slaughter (2000) and Trachtman and Moremen (2003) on access to the judiciary.

⁸⁶ See Peters (2003) for an overview of legal proceedings in international disputes.

judicial scope and independence will be.

The breadth of legal mandate depends on the objective and authority assigned to the judicial system. In the WTO, the courts are not allowed to add or diminish the rights and obligations of any member of the WTO.⁸⁷ More specifically, standards delineate judicial competency. Such standards prescribe what can be subject of judicial review – for instance, only procedural aspects of actors’ autonomous governance or also its content – and what standard of deference to national fact findings and legal interpretations courts have to adopt in their review.⁸⁸ Whether courts take an active or passive role in fact finding and whether they are allowed to accept *amicus curiae* briefs, third-party submissions to courts, broadly belongs to the standard of review. Standards of interpretation determine the autonomy granted to courts to interpret agreements. On the one hand, courts can stay close to the wording of agreements, but on the other hand, they can interpret the meaning of agreements in the light of diverse objectives and under consideration of the law of other international institutions. This non-exhaustive list should illuminate the concept of legal mandate and suggest that judicial scope and independence increases with the breadth of legal mandate.

The foremost administrative control mechanisms that influence judicial independence consist of the selection of judges, their tenure, their future career, and courts’ control over material and human resources. Judges who are specialized experts, who have a long tenure, whose careers are independent of the actors’ benevolence, and who are endowed with ample resources, are most prone to deviating from the interests of (powerful) actors who are involved or take sides in a dispute.⁸⁹

Precision

Precision can concern content or structures.⁹⁰ In the case of content, highly precise agreements exactly detail substantive obligations, whereas agreements with low precision only call for vague obligations to be heeded. If rules relate to structure, precision refers to procedures for voting, adjudicating, granting exemptions, and punishing defectors. For instance, ambiguous procedures for implementing rulings allow actors to delay implementation of sanctions or even to avoid sanctions altogether. Actors can claim to conform to a ruling after superficial modifications in their targeted policies. Without

⁸⁷ See DSU Art. III:2.

⁸⁸ See Zleptnig (2002) and Oesch (2003) on standards of review. See Cass (2001), in particular, for a discussion of legal doctrines and techniques of judicial review that give the WTO a constitutional dimension.

⁸⁹ With these characteristics, different ideal types of delegation can be construed. Keohane, Moravcsik and Slaughter (2000) discern between two ideal types of courts. At the low end of legalization, actors enjoy influence on the courts, the courts have limited legal discretion, and state actors maintain gate keeping control over access to the judiciary. Keohane, Moravcsik and Slaughter label such courts ‘interstate courts’. At the upper end of legalization, ‘transnational courts’ are situated with highly independent courts, broad legal mandate, as well as automatic and convenient private access. Abbott, Keohane, Moravcsik, Slaughter and Snidal (2000) describe the ideal type of ‘anarchic’ conflict resolution at the low end of legalization as interest-driven, power-based, interstate bargaining unaffected by any institution, except for those institutions that make up the international system in the first place, like sovereignty.

⁹⁰ See Jackson (1997) and Hoekman and Kostecki (2001) on precision of content and structure in the WTO.

concise provisions about the quality of compliance, litigating actors may have to sue again to receive authorization for sanctions or already authorized sanctions may no longer be legally applied in such a case.

Unless I explicitly refer to structures, precision connotes the precision of substantive obligations. Note that precision relates to the formal agreement. Clarification by courts is not regarded as part of precision because the degree of judicial clarifications already follows from judicial delegation.

Exemptions

Exemptions stand for the leeway afforded to actors to deviate from their usual obligations without violating the agreement.⁹¹ The value of exemptions depends on the magnitude of exemptions available and the restrictiveness of criteria that entitle an actor to resort to the exemptions. Restrictive application criteria set demanding standards to qualify for exemptions, for example, that domestic industries have to suffer severe damage to deserve temporary protection and that the damage has to result directly from liberalization. Furthermore, restrictive criteria can require large majorities to grant exemptions, they can definitively limit the duration of exemptions, or they can contain sunset clauses so that exemptions expire after a certain deadline unless they are renewed.

My definition of exemptions does not include initial phase-in provisions or exemptions for certain subsets of states, like special and preferential treatment for developing countries. Only those exemptions are included which give flexibility to all actors at any time.

Punishment

Punishment refers to the severity of sanctions which international institutions authorize against defecting actors, and the procedures that govern the implementation of these sanctions.⁹² Legal scholars go back and forth between the numerous legal remedies. In the case of illegal subsidies, for instance, actors could be obliged to cease the wrongful action, recollect the subsidies from the beneficiaries, retribute the damage caused to other actors, or be condemned to pay punitive damages to deter future illegal acts. I do not enter the discussion of specific remedies but make the simplifying assumption that remedies can be constructed, so that they differ in severity without differing significantly along other dimensions that would require consideration.

Weak actors may abstain from implementing authorized sanctions as they lack the clout to change the defecting actor's behavior; instead, weak actors have to fear retaliation by the powerful. Indeed, even powerful actors may prefer to strike agreements with defecting actors and forgo implementation of authorized sanctions. In this context, implementation procedures can more or less promote the actual application of sanctions that actors are entitled to by the judiciary. Central coordination of the decentralized punishment capacities can strengthen the power of sanctions and lower the costs for the sanctioning actors. For high degrees of legalization, participation in sanctioning could even be made obligatory.

⁹¹ See Hoekman and Kosteci (2001) and Rosendorff and Milner (2001) on exemptions in the WTO.

⁹² For a detailed analysis of actual and possible WTO remedies and implementation procedures, see Mavroidis (2000). See also section 6.5 for further discussion of punishment design.

Conclusion

Table 2 presents all determinants of legalization with their characteristics. This is an ideal-typical representation, juxtaposing low and high degrees of legalization. What matters later in the analysis is how the determinants affect the cooperation problems and risks of global governance. As long as increases in legalization of several characteristics belonging to one determinant have parallel effects in the cooperation problems and risks, I, therefore, do not distinguish between the characteristics. I only refer to the characteristics where they make a difference in the analysis. In decision-making, for instance, the characteristics – how many actors are involved and which majority threshold is prescribed to pass decisions – influence effectiveness in significantly different ways.

Note also that I generally assume convergence of design and practice with regard to the determinants. Only at certain points do I distinguish between behavior that is prescribed or enabled by structures and the ways actors behave in practice. For instance, actors can decide habitually in consensus though decision-making rules provide for majority voting. Also, the design of exemptions solely provides a possibility to eschew obligations, but whether actors execute this option in practice depends on further factors.

Table 2: Characteristics of the determinants of legalization

<i>Determinants</i>	<i>Low degree of legalization</i>	<i>High degree of legalization</i>
Decision-making	Few actors involved, consensus voting	Many actors involved, low majority thresholds
Judicial delegation	Difficult access, political influence on legal proceedings, narrow legal mandate, strict administrative control	Easy access, automaticity in legal proceedings, broad legal mandate, loose administrative control
Precision	Ambiguous obligations	Detailed obligations
Exemptions	Extensive exemptions, generous procedures to qualify for them	Few exemptions, restrictive application procedures
Punishment	Soft sanctions, weak implementation procedures	Severe sanctions, stringent implementation procedures

In the remainder of this chapter, I clarify my general understanding of legalization. Firstly, I reflect about alternative approaches to international law; in particular, I discuss the omission of legal obligation as a determinant of legalization. After that, I comment on the relationship between legalization and constitutionalization. I then present the processes-oriented understanding of the creation and functioning of law that is supported by the interdisciplinary theoretical framework. Finally, I contemplate on the position of legalization towards international relations theory.

2.2.2 Legalization and legal obligation

Koskenniemi (1990) considers a rule approach and a policy approach as inherent antipodes of law. The rule approach considers those rules to be law that have been created in conformance with recognized processes of law creation; the policy approach perceives those rules to be law that are effective, especially in constraining state actors. The rule approach establishes an artificial separation between law and non-law that does not correspond to the functions which law fulfills; formally legal agreements may have little effect, whereas formally non-legal agreements may have substantial effect through mechanisms that are generally associated with law.⁹³ By contrast, the policy approach does not grasp the normative quality of law and runs the risk of becoming an “apology for the interests of the powerful.”⁹⁴

The understanding of law implied in the definition of legalization clearly does not follow a rule approach. Yet, my definition does neither fully correspond to a policy approach. Instead, I define law by a number of structural characteristics and law-specific functions that are closely associated to legal structure and which I expect to influence actors’ behavior.⁹⁵ Staying close to structure in my definition of legalization is appropriate for recommending structures. If I subscribed to a policy approach and employed functional characteristics of law, such as judicial independence or enforcement capacity, directly in my analysis, then practitioners would have to translate this functional advice into recommendations for structural reform. This would be laborious given the many options in which structural characteristics can be combined to achieve a certain function; worse, no structure may exist that is able to realize the functional advice.

Congruent with the view of law and non-law forming a continuum based on institutional structure and working, I do not include legal obligation as a determinant of legalization.⁹⁶ According to Abbott et al. (2000, 401), legal obligation measures to which degree actors “are *legally* bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules,

⁹³ In favor of a policy approach, Guzman (2002, 1887) suggests to consider “any international promise or commitment that has a substantial influence on national incentives to be law.” Reich (1996) measures legalization by the severity of limitations imposed on state behavior. Brunee and Toope (2000, 68) espouse a policy-oriented view of law that centers on its influence on international interaction from a constructivist perspective. They conclude that “law as interaction suggests that there is no radical discontinuity between law and non-law, that the process of building legal normativity requires many of the same building blocks as other forms of social normativity.”

⁹⁴ Koskenniemi (1990, 11).

⁹⁵ My definition aspires to be no more than a working definition appropriate for analyzing legalization in global governance. It is not meant to define the nature of law, which is so complex that it “stubbornly resists specification,” as Chayes and Chayes (1995, 116) note. In particular, I focus on those characteristics that can be manipulated – that law is usually practiced by experts, e.g., may be a characteristic, but is not suited to serve as an endogenous determinant.

⁹⁶ See also Brunee and Toope (2000), Guzman (2002), Hillgenberg (1999), Reich (1996) and Shelton (2000) on the policy-oriented notion that the functioning and (thus) existence of law do not crystallize in an explicit, binary recognition of an agreement as international law.

procedures, and discourse of international law, and often of domestic law as well.” This is considered to set formal treaties apart from explicit agreements that do not have legal status, such as declarations of intent or codes of conduct, as well as from non-legal rules that do not arise from explicit agreements among states, such as informal norms.

Let me address these three features, relating to general rules and procedures of law, legal discourse, and domestic embeddedness, which legal obligation characteristically invokes, in order to assess the consequences of excluding legal obligation as endogenous determinant.

The application and meaning of general treaty law and customary law and the general principles of international law in the interpretation of an agreement depend on the status of an agreement. These additional rules and procedures are most importantly found in the Vienna Convention on the Law of Treaties signed in 1969 and the customary law in the process of being codified by the International Law Commission.⁹⁷ The additional rules and procedures restrain actors if they choose a legal form for their agreements, strengthen as well as contain the judiciary, and promote legal discourse. Legal form, thus, makes a difference as to when and how general legal sources and specific agreements are relevant under legal procedures.

Legal discourse is a specific form of communication that involves actors in a non-hierarchical process of competitive justification in terms of pertinent rules and facts.⁹⁸ Legal discourse arises if a sufficiently influential audience requires actors to interact under the procedures of legal discourse. Legal status empowers courts and invites international and domestic society to judge actors’ claims in legal terms; however, legal discourse does not depend on legal status. Even without legal status can international and domestic society base their evaluation of actors’ claims on legal validity. Note also that actors may engage in deliberations that strongly resemble legal discourse without pressure by an external audience that expects legal discourse.

Whether states grant international rules a direct effect within their jurisdiction depends on their national legislation. Formal legal status is a suitable characteristic for governments to designate those international rules that they want national courts to consider. Even if international law is not formally embedded in the domestic legal system, domestic audience costs of violating an agreement may increase if an agreement takes legal form.⁹⁹

These considerations demonstrate that the characteristics of legal obligation, pertaining to general rules and procedures of law, legal discourse, and domestic embeddedness, indeed set legal obligation apart from other types of obligation, such as obligations stemming from norms or tacit understanding. Yet, the characteristics of legal obligation do not exclusively rest on legal status, but they are influenced by other factors as well. Hence, I can explain most of the prevalence of the characteristics

⁹⁷ On international customary law, see Byers (1999) and Mavroidis (2000). On soft law, see Lipson (1991) and Shelton (2000).

⁹⁸ See section 4.2.4 for further discussion of legal discourse.

⁹⁹ The status of an agreement also determines whether and how international courts consider an agreement in their rulings. See Charnovitz (2002a), who contemplates whether the Doha Declaration possesses legal status and whether it would be appropriate for WTO courts to draw guidance from the Doha Declaration.

of legal obligation by determinants of legalization other than legal status, most importantly judicial delegation, as well as by legalization in general as the sum of the single determinants.

Legalization as a general category is useful in this context as practices associated to law depend on the comprehensive perception of a rule as law-like. Whether an agreement is considered a binding treaty depends solely on the will of the contracting parties, not on the degree of legalization.¹⁰⁰ Actors and individual agents who apply legal practice to formal law, even if it ranks low on all legalization determinants, can be expected to approach formally non-legal agreements that are highly legalized from a legal perspective as well.

So far, the argument claims that excluding legal form from the definition of legalization signifies a loss, albeit one that can be compensated in the course of analysis. The benefits of excluding legal form are twofold. Firstly, law is more comprehensive than any reasonable number of determinants; sacrifices for the sake of parsimony are unavoidable if we intend to cut law into operational variables. Secondly, different forms of agreements are chosen for many reasons that do not relate to the present study, such as domestic approval procedures or eligibility of participants in an agreement to conclude treaties under international law.¹⁰¹ Therefore, I cannot recommend certain forms to be preferred on the basis of my analysis.

2.2.3 Legalization and constitutionalization

Constitutionalization is associated with direct effect of WTO rules within the jurisdiction of the actors and supremacy over national law. Individual rights stemming from international agreements, thus, constrain national legislators; this elevates international agreements into a set of incontestable laws.¹⁰² In the absence of a formal constitution, the presence of constitutionalization can be derived from judicial decision-making practice that resembles national constitutional court practice, which is characterized by constitutional norm generation and particular judicial techniques.¹⁰³

While a constitution is a legal institution, not every legalized institution commands constitutional status. Constitutional orders tend to rank very high on legalization, in particular in terms of judicial delegation. In theory, however, constitutional status can be combined with low degrees of legalization, for instance, extensive exemptions and soft punishment.

2.2.4 Legalization and process

At least as important as the inclusion or exclusion of single variables and their definitions in detail is

¹⁰⁰ See Hillgenberg (1999).

¹⁰¹ See Hillgenberg (1999), Lipson (1991) and Shelton (2000) on the motives for choice and the effects of different forms that agreements can take.

¹⁰² See Cass (2001), Howse and Nicolaidis (2003), Trachtman (2001) and Zleptnig (2002) for a discussion of constitutionalization in the context of the WTO. In contrast, Petersmann (2001) defines constitutionalism primarily by the functions which law provides. In particular, law is seen to prescribe a democratic rule of law with checks and balances and to aim at promoting human rights, especially through the restraint of power within and among nations.

¹⁰³ See Cass (2001).

the theoretical framework that gives meaning to the determinants. The constructivist elements in the theoretical framework emphasize connections between law and process.¹⁰⁴ Four links between law and process deserve attention. Firstly, law arises gradually from processes of state practice and judicial dispute settlement. Thus, customary law and case law are relevant companions of treaty law in legalized environments. Secondly, the process of law creation affects the working of law. Whether the process of law creation is considered legitimate is an important determinant of compliance pull. Thirdly, law affects political processes, particularly when it transforms power-based bargaining into legal discourse.

The fourth conceptualization of law as process allows a link to power, viewing the creation and application of law themselves as political processes.¹⁰⁵ Power affects whether suits are brought to court, how courts rule, and whether rulings are implemented. Furthermore, powerful actors have an over-proportionate say even in legalized decision-making. Beyond additional influence of powerful actors on the creation of formal law, customary law reflects power constellations. The formation of new customary law is partly influenced by formal and customary law, and partly by state practice. Powerful actors engage in state practice more frequently and can more successfully alter opposing state practice to their advantage.¹⁰⁶ Therefore, law does not only work in the shadow of power, but in its very creation, it is partially a product of power.

Law is not only an instrument of power, however, but also a constraint on power. Consequently, the risks of legalization are conceptualized from two perspectives. Powerful actors worry about the restraining capacity of law, whereas weak actors fear that law subjugates them to the interests of the powerful. The interplay between law and power is more than a transitional period on the move towards more legalization. Incomplete legalization may be the most effective configuration, and correspondingly, power matters even in highly legalized domestic systems.¹⁰⁷ An entirely lawless international system is equally unlikely as complete legalization because weak and powerful states both benefit from law.

¹⁰⁴ The *Richer Views of Law and Politics* which Finnemore and Toope (2001) advocate are helpful for such a process-oriented treatment of law. However, Finnemore and Toope (2001, 747) take their focus on process one step too far when they dismiss the importance of structural characteristics, “Why delegation and precision should be defining features of legalization and what they add to the analytic power of this concept is simply not clear.” Whether processes are primarily legal in nature but occur under the shadow of power, or whether they are genuinely political though influenced by law, actors’ practice is shaped by legal structure. Delegation, for instance, sets law apart from non-legal, normative obligations and strongly shapes the social practice of interstate communication.

¹⁰⁵ The close relationship between law and power has often been noted. Goldstein et al. (2000, 387) state, “The relationship between law and politics is reciprocal, mediated by institutions.” Keohane, Moravcsik and Slaughter (2000, 488) consent, “It is the interaction of law and politics, not the action of either alone, that generates decisions and determines their effectiveness.” Diehl, Ku and Zamora (2003, 43) caution that the relevance of law depends on the “political consensus and will of the system’s members to use the law”.

¹⁰⁶ See Byers (1999).

¹⁰⁷ Abbott et al. (2000, 405) note that “the combination of relatively imprecise rules and strong delegation is a common and effective institutional response to uncertainty, even in domestic legal systems”.

2.2.5 Legalization and international relations

Realist and, in particular, neo-realist scholars of international relations do not assume law and power to interact, but they deny law significant causal power.¹⁰⁸ They perceive the international system as an anarchy since a global government to enforce agreements and to protect actors from interstate violence is missing. This anarchical structure dictates state behavior in a competitive international system.¹⁰⁹

The set of design-driven determinants and particularly the scope of changes discussed cannot establish a global state. As long as the world population is not deeply socialized in a global culture, does not lead a global political discourse, and does not share a substantial feeling of collective identity, a powerful world government can neither be legitimate nor effective. Therefore, I search for structures that can effectively supply a ‘moderate’ intensity of global governance – more than today’s world witnesses, but still short of a global state.

While such legalization does not end anarchy in realist terms, I assume that legalization can change the conditions of anarchy. This rests well with the approach Axelrod and Keohane (1986, 226) take in stating that, “Anarchy, defined as a lack of common government in world politics, remains constant; but the degree to which interactions are structured, and the means by which they are structured, vary.” Anarchy neither precludes the existence of authority, nor of cooperation, in the international system.

Authority and order, as the opposite of anarchy, can be construed along two dimensions: the degree of centralized authority and the degree of decentralized authority originating in norms.¹¹⁰ Both dimensions are continuous – even nation states are not monolithically hierarchical. From a certain degree of centralized authority onwards, we speak of a hierarchical system instead of anarchy. Systems of authority can display different patterns of centralized and decentralized authority, which they uphold by different means.

Legalization can be characterized by a particular pattern of authority which it establishes and by particular means it employs. In my definition, legalization causes moderate increases in centralized authority, in decision-making and judicial delegation but without resources for centralized enforcement, while resting on increases in decentralized, normative authority. The means of legalized global governance are the practices associated to the rule of law, such as generalized rules and judicial dispute resolution. Certainly, different patterns of authority can be supported by legal means; however, legalization currently points to a specific, moderately decentralized pattern because a central government resting on the rule of law (and arising from voluntary cooperation) appears unviable for decades to come. Thus, law can be set apart not only from other means – like brute force or religious beliefs – but also from other patterns of authority, like central government or highly decentralized, evolutionary cooperation.

That substantial cooperation under anarchy is possible, even with actors who are socialized to a competitive and virulently violent anarchical system, has been amply demonstrated by neo-liberal

¹⁰⁸ See Copeland (2000) and Grieco (1988).

¹⁰⁹ See section 4.1.3 for further discussion of realist positions.

¹¹⁰ See Wendt (1999, Ch. 6). See also Bull (1977) and Cerny (2000) on patterns of authority and order.

institutionalists. Actors cooperate spontaneously out of self-interest. Additionally, institutions that create limited centralized authority or otherwise lower transaction costs promulgate cooperation. Even greater cooperation is attainable if actors adopt different norms and identities suited to and sustaining a more hospitable international system that still is anarchic in realist terms.¹¹¹

2.3 Conclusion

This chapter has defined the global governance structures for which the study shall recommend a design in order to improve global governance effectiveness. The first dimension of global governance structures pertains to the constitutive actors. Either nation states or integrated regions will be the main actors in future global governance. Predicting the behavior of integrated regions and the properties of a world of integrated regions is a difficult undertaking. Based especially on insights from international economics, we can nevertheless reasonably envision a stable state with several, mostly large and deeply integrated regions.

The second dimension concerns the legalization of international institutions. The design of decision-making, judicial delegation, precision, exemptions, and punishment are central elements of many international institutions that display different degrees of legalization. Since the meaning of legalization is contested among different schools of thought, I have specified my own understanding and suggestions in the context of scholarship in international law and international relations.

¹¹¹ See Wendt (1999, Ch. 6).

3 Exogenous determinants: Trends in global governance

Globalization is the overwhelming background trend of the recent past and seems likely to maintain its domineering position for decades to come. Accordingly, globalization has invited manifold descriptions and definitions, converging around several characteristics.¹¹² Globalization is usually considered a multifaceted, uneven and unfinished process of growing interdependence, affecting diverse objects in diverse ways. Interdependence of ideas and communication, natural persons and capital, goods and services, the environment and violence grows as more linkages develop and as these linkages gain in intensity and depth. While no one characteristic is uniquely new, the total of growing interdependence beyond borders is set apart from former processes of exchange and joint production between nation states. Although globalization is by nature not a well-defined phenomenon, globalization can also be perceived as distinct from other global developments, such as technological progress. Hence, the term can be used meaningfully in scientific debate.

Yet, globalization is inherently such a broad concept that it needs to be separated into more palpable sub-trends, if globalization is to be employed as major input for analysis. This more fine-grained analysis is undertaken for five primary trends that affect global governance, as one aspect of globalization, and that are (partly) caused by other aspects of globalization. These are relative effectiveness of global governance, linkages within global governance, depth of global governance, actor participation, and civil society involvement.

To each of these primary trends, which change exogenous determinants relevant to global governance effectiveness, a separate section is dedicated. First, the exogenous determinant is defined, and then its driving factors are discussed to establish a trend for this exogenous determinant. For all trends, I assume that no fundamental disruptions alter the background scenario of continuing globalization.¹¹³ Afterwards, secondary trends, which will be useful as references in the later analysis, are derived from the primary trends. Finally, I consider the requirements to attain linked objectives.

3.1 *Relative effectiveness of global governance*

With global interdependencies thickening, the effectiveness of autonomous, territorial governance is decreasing, while the advantages of global governance yield higher pay-offs. This means that the relative effectiveness of global governance is rising when compared to autonomous governance.

How sharp the increase in costs is, which autonomous governance has to incur in order to reach its

¹¹² See Keohane and Nye (2000) and Zürn (1998).

¹¹³ Diseases, terrorist attacks, and wars are among the potential causes that could thwart this development. Cerny (2000) suggests that the increasing complexity of governance makes global conflicts less likely. Brock (2003) emphasizes the potential of global governance to pacify conflicts and regulate the use of force, thus creating favorable conditions for global governance in general. Hufbauer (2003) and Zürn (1998) consider continuation of globalization and global governance along familiar lines as most probable scenario.

regulatory objectives, depends on the type of regulation.¹¹⁴ Heavily hampered are macroeconomic policy and production process regulation, like social and environmental standards, which inflict costs on production without corresponding short-term benefits for producers. Firstly, globalization hampers such policies by increasing competition and factor mobility. Thus, companies affected by costly regulation that adds no value to the products concerned, are likely to either lose market share or use their exit option to relocate production sites.¹¹⁵ Secondly, widening negative integration, which forbids actors to establish certain policies autonomously, limits the competence of nation states to regulate.¹¹⁶ The old GATT prohibited process standards that restrict imports based on the production processes of foreign goods, unless in extreme cases, such as prison labor. The WTO forbids less thoroughly the establishment of process standards for imports, especially pertaining to compliance with intellectual property rights in the production process.¹¹⁷ Still, the use of process standards is severely limited so that actors either cannot attain their objectives or have to implement inefficient instruments which are not restricted by international agreements.

The regulation of product standards is less burdened.¹¹⁸ While ‘races to the bottom’ may occur, upward competition is also possible, in particular, if fulfilling product standards is a requirement for market access. Domestic regulation of product standards is also subject to international regulation; for instance, the Agreement on Technical Barriers to Trade (TBT) of the WTO forbids unjustifiable discrimination between foreign suppliers through product standards. It also forbids that product standards restrict trade by more than what is necessary to attain domestic objectives. These obligations leave actors considerable freedom in setting product standards, in particular in comparison to the extensive prohibition of process standards in the WTO.

Overall, the perception of decreasing effectiveness of autonomous governance is justified.¹¹⁹ To evaluate the decline of autonomous governance correctly, however, we have to guard against

¹¹⁴ The diversity of effects on the effectiveness of autonomous governance explains the differing results of specific empirical studies. See Scharpf (1998).

¹¹⁵ See Garrett (1998), Lorz (2003) and Scharpf (1999). However, Garrett (1998, 823) finds autonomous governance less constrained than often thought because “governments provide economically important collective goods – ranging from the accumulation of human and physical capital, to social stability under conditions of high market uncertainty, to popular support for the market economy itself – that are undersupplied by markets and valued by actors who are interested in productivity.” Furthermore, Lorz (2003) points out that locational competition between actors may have positive implications for national welfare if public expenditures are cut that serve only powerful special interests groups.

¹¹⁶ On negative integration, see section 3.3 about the depth of global governance.

¹¹⁷ Appellate Body rulings have further expanded the right of actors to set process standards for imports. See, for instance, Biermann (2001), Hoekman and Kostecki (2001) and Pfahl (2000) on disputes about actors’ right to restrict imports based on the ecological effects of production processes.

¹¹⁸ See Scharpf (1998) and Scharpf (1999).

¹¹⁹ Altvater and Mahnkopf (1999), Cerny (1998), Chayes and Chayes (1995), Habermas (1998a), Perraton, Goldblatt, Held and McGrew (1998), Rosenau (2000), Scharpf (1999), Weiss (1999) and Zürn (1998) all make this diagnosis though with differing limitations on the nature, extent, and causes of decreasing capacity of autonomous governance.

idealizing past performance of nation states.¹²⁰

Changes in effectiveness are even harder to demonstrate empirically for global than for autonomous governance.¹²¹ Yet, we can take the unprecedented boost in the scope of global governance as an indicator for its effectiveness. This is particularly convincing if we are aware of the reluctance of nation states to cede jurisdiction to international institutions. If actors nevertheless transfer authority to the international sphere, it is reasonable to assume that substantial gains in effectiveness are the driving factor.¹²² In addition, growing experience in global governance suggests increasing absolute effectiveness. Even if scope extension can be better explained by decreasing effectiveness of autonomous governance, relative effectiveness of global governance still increases.

We can conclude that autonomous governance has become less effective and global governance probably more successful. In the future, both globalization and negative integration are likely to proceed and to continue diminishing the effectiveness of autonomous governance. This spurs the demand for global governance, which restrains autonomous governance even further. Contrary to this self-reinforcing decline in autonomous governance, the unabating run towards international institutions suggests that the prospects for global governance are deemed promising. Therefore, the relative effectiveness of global governance appears set to grow further.

3.2 Linkages within global governance

Linkages within global governance refer to interdependencies in the governance of different issue areas that affect global governance.¹²³ Linkages within global governance are, thus, subjective and related to political action: Actors connect their behavior pertaining to global governance in one issue area with governance and external developments in other issue areas.

Linkages within global governance are driven by substantive linkages and by the opportunity to form strategic linkages.¹²⁴ *Substantive linkages* between issue areas describe real-world interdependencies in which governance of one issue area inherently affects the outcomes of governance in other issue areas. *Strategic linkages* connect substantively unrelated issue areas politically, for instance, to expand the negotiation set.

¹²⁰ See Höffe (1999) and Werner and Wilde (2001).

¹²¹ On the difficulties of measuring effectiveness of international institutions, see section 9.1.

¹²² Domestic interests that benefit from and lobby for more global governance offer an alternative explanation for the extension of global governance. Yet, interest groups that resist scope extension are also well organized, and there is no satisfying explanation why the domestic political balance should have shifted in favor of more scope in most countries.

¹²³ Linkage between and scope of issue areas are interdependent concepts. The more expansively we demarcate issue areas, the fewer linkages we are to find. Still, issue areas are a helpful concept in thinking about linkages. See Leebron (2002) and Young (1999a, Ch. 1). Since issue areas and international institutions do not need to converge, linkages can exist within and among international institutions.

¹²⁴ See Leebron (2002).

3.2.1 Substantive linkages

As mentioned above, substantive linkages exist if the governance of one issue area affects the outcomes of governance in another area. The background trend of globalization establishes increasing interdependence between different nation states and agents throughout the world with regard to various issue areas. From this we cannot immediately infer that increasing interdependence among issue areas arises. Indeed, it seems more convincing that the issue areas have always been interwoven on a global scale, yet with growing importance of this global dimension, their interdependency moves to the center stage of interest as well.

Owing to the rising importance of substantive linkages, the WTO expanded into other economic issue areas, like the movement of capital and labor and the regulation of intellectual property, as well as non-economic issues.

As regards economic issue areas, the linkage between goods and service markets on one side and factor markets on the other has become particularly apparent with the liberalization of services under the General Agreement on Trade in Services (GATS). For instance, tight restrictions on the movement of labor contort the choice by which mode services are supplied. If national laws inhibit the plan of a service provider from one country to set up shop in a neighboring country to serve her customers directly, her foreign customers have to go abroad to benefit from her services. The interdependence between goods and factor markets is not limited to services, however, since domestic laws affecting factor mobility also distort the location of production sites.

The WTO is linked to non-economic issues to the extent that their regulation on the domestic or international level can cause barriers to trade. On the domestic level, protectionism increasingly hides behind non-economic objectives.¹²⁵ Therefore, the WTO has to evaluate more closely whether domestic policies contain hidden discrimination or lead to inadequate trade restriction.

Concerning international environmental regulation, WTO rules are, for instance, in conflict with the ban on round-log exports to protect forests, with the Basel Convention on hazardous waste trade, and with restrictions on trade in regulated chemicals under the Montreal Protocol.¹²⁶ The more that regulation originating in other international institutions affects trade, the more the WTO will have to be involved to warrant that trade implications are duly considered and that legal obligations are compatible across international institutions.

Particularly relevant linkages to the WTO exist where other international institutions directly regulate trade or authorize trade sanctions. Charnovitz (2002c) suggests that such trade measures will be used less by other international institutions for three reasons. Firstly, economic integration makes them less efficient and more costly. Secondly, they fit poorly with market-based instruments that replace 'command-and-control' regulation. Thirdly, national and supranational courts facilitate enforcement without having to rely on trade-based sanctions. However, the scope of global governance in non-

¹²⁵ See section 3.3 on the depth of global governance.

¹²⁶ See Biermann (2001), Conca (2000) and Pfahl (2000) on tensions between the WTO and multilateral environmental agreements. Biermann (2001, 423) reports that, "The trend of establishing multilateral environmental rules with trade effects continues".

economic issue areas will grow and its value will increase, so that actors are ready to accept associated costs. Moreover, measures that apply only to traded goods cannot be substituted in certain cases, for instance, if the objective is to prevent the invasion of alien animal or plant life. Therefore, trade measures authorized by other international institutions will continue to concern the WTO.

The WTO is not only expanding into non-economic fields, but non-economic interests are equally pushing into the WTO as trade affects the pursuit of their objectives. Among these non-economic, substantively linked interests, environmental, social and developmental concerns stand out.¹²⁷

3.2.2 Property rights and substantive linkages

Bagwell, Mavroidis and Staiger (2002) show in a model that a mechanism based on improved definition of property rights can relieve the WTO of having to deal with certain substantive linkages. The mechanism mends two imperfections in how the WTO handles the relationship between standards, which have protectionist effects, and tariffs. Since standards and tariffs can function as substitutes regarding their protectionist effect on trade, alternative policy combinations are possible for a given level of market access.

Bagwell, Mavroidis and Staiger (2002, 61) point out that, “The first imperfection – that under GATT/WTO rules market access commitments are not secure against unilateral infringement by adjusting standards in import-competing industries – can lead to a race to the bottom, in which standards in import-competing industries are lowered. The second imperfection – that under GATT/WTO rules a government is not free to adjust its policy mix as it desires so long as it maintains its market access commitment – can lead to a ‘regulatory chill,’ in which governments refrain from raising standards in import-competing industries. If GATT/WTO rules were enhanced to secure market access commitments against unilateral infringement through changes in trade or standards policies, while allowing each government to fulfill its market access commitment with the policy mix that it prefers, there would be no race-to-the-bottom or regulatory-chill problems of this nature.”

Based on this framing, Bagwell, Mavroidis and Staiger (2002) propose that problems associated with pecuniary externalities, those externalities that are transmitted through markets, can be eliminated by improving market access rights. If a country then desired to lower its standards for import-competing industries, it would have to cut back on its tariffs correspondingly. Along the same line, if a country intended to raise standards for exporting industries, it would be allowed to increase its subsidies up to the point where current terms of trade are maintained. If such a solution worked, it would free the

¹²⁷ According to Dunoff (1999), environmentalists highlight negative external effects of trade on the environment, competitive advantages stemming from low environmental standards leading to a ‘race to the bottom,’ and WTO provisions that override domestic environmental regulation. See also Helm (1995) and Pfahl (2000) on the linkages between trade and the environment. Pfahl (2000) and Shaffer (2001) show how boundaries of the WTO are drawn in the WTO Committee on Trade and Environment. Concerning further issue areas, see Wai (2003) on the influence of global governance in trade on individual social rights, and Hoekman (2002a), Hoekman (2002b) and Mattoo and Subramanian (2003) on trade and development. Focusing on development and peace, Nuscheler (2000) gives an account of linkages in global governance that also affect the WTO. Charnovitz (2002c) provides a detailed discussion of diverse substantive linkages pertaining to trade.

WTO of many problems caused by linkages and transfer the resolution of many conflicts about values and norms back to the national level.

Noting the developing countries' inability to finance the subsidy programs, Bagwell, Mavroidis and Staiger (2002) see the need for negotiations in which actors trade changes in standards. They concede that such negotiations would be hampered by intricate complexities; yet, leaving this task to the judiciary would unduly burden courts.¹²⁸

It is difficult to imagine how consent of all (or just the most strongly affected) actors to the frequent domestic policy changes that would occur is to be achieved. Such negotiations would, first, require the evaluation of market access effects of standard changes and of compensational tariff changes, while every country has a strategic incentive to misrepresent how it is affected. Secondly, it would necessitate finding a new policy mix to balance these effects, which are likely to be dispersed over many actors, affecting them differently.

Therefore, improving market access rights cannot easily rid the WTO of the problems of pecuniary externalities. Furthermore, non-pecuniary externalities cannot be tackled by this market access mechanism.

3.2.3 Strategic linkages

Aside from substantive linkages as a response to interdependence, linkages also have strategic purposes. Six such strategic incentives can be discerned.¹²⁹ The first is the interest of actors to enhance their relative bargaining power in one issue where their power is insufficient to satisfy their aspirations, by linking this issue to another issue in which they enjoy a strong position. At the 1999 WTO ministerial meeting in Seattle, developed countries attempted to link trade to social and environmental standards because developed countries deemed their ability to negotiate strict standards insufficient without strategic linkage. Actors also unilaterally link trade with non-economic concerns. For instance, the EU and U.S. tie their General System of Preferences for developing countries to adherence of (labor) standards.¹³⁰ Linkage that serves to enhance bargaining power expands as actors become more concerned with externalities that were of minor significance in former times. In the environmental realm, for instance, growing physical externalities and concerns over common goods, as well as an increasing 'non-use value' that is perceived in nature, give incentives to interfere with other actors. Furthermore, traditional humanitarian motives gain influence in politics, in particular, with more civil society involvement.

A second, related rationale for strategic linkages is to expand the scope of negotiations in order to open up additional possibilities for mutually advantageous trade in concessions. This is necessary since international relations are a barter system where monetary side-payments are rare. The larger the number and heterogeneity of actors involved in negotiations and the lumpier the agreements, the

¹²⁸ Bagwell, Mavroidis and Staiger (2002) annotate that non-violation complaints work exactly into that direction.

¹²⁹ See Charnovitz (2002c), Leebron (2002), Trachtman (2002) and Young (1999a, Ch. 7).

¹³⁰ See Bagwell, Mavroidis and Staiger (2002).

greater the need to enlarge the negotiation set to forge a mutually advantageous grand bargain. As we will see later in this chapter, number and heterogeneity of actors are indeed rising, and agreements become increasingly lumpy because positive integration gains importance. Contrary to negative integration, positive integration requires actors not to refrain from but to implement certain policies. Since agreements of positive integration need internal coherence, they cannot be incrementally adapted to distributional requirements without significant efficiency losses.¹³¹ Hence, linkages as an efficiency-enhancing negotiating strategy become more attractive.

A third motive for strategic linkages is building domestic political coalitions. Politicians may find more support at home if they combine issues in one package that provides benefits for every critical constituency. They may also encounter less political obstacles in domestic implementation of new initiatives as part of existing international institutions.

Fourth, actors link institutions together for the sake of ‘regime borrowing.’ Regime borrowing occurs if capacities such as sanctioning, legitimacy, or funding are extended or transferred between institutions. In this way, an institution well-endowed with a certain capacity assists another institution lacking in this capacity. We can expect to see more regime borrowing to occur in the coming decade because civil society promotes thrusts that fall into the core responsibility of mostly weak institutions. As civil society’s influence is likely to grow and as fostering institutions will take time to fulfill civil society’s requests, regime borrowing, particularly with regard to the WTO, seems a probable intermediating solution. Only after international institutions in other issue areas have been considerably strengthened, regime borrowing – and ‘regime lending’ as the WTO needs to regulate linked issues for lack of specialized global governance – will abate.

Fifth, economies of scale can lower the costs of negotiating and administering different issues linked in one institution. Finally sixth, a shared vision for a cluster of issues, like in the negotiations leading to the law of the sea, can ease negotiation and administration.

3.2.4 Political linkages

If actors note substantive linkages or strategic linkage opportunities, they tend to respond by installing political linkages. Political linkages connect governance in one issue area through political means to the governance in another issue area. Political linkage occurs, for instance, if two issue areas are negotiated together or even incorporated into one institution. Linkages within global governance can also exist without any political linkages if actors individually take substantive linkages and strategic linkage opportunities into account in negotiating and implementing global governance.

Beyond mere expression of substantive linkages and strategic linkage opportunities, political linkages influence linkages within global governance in their own right. Political linkages do not necessarily live up to the substantive linkages or strategic linkage opportunities. Actors do not need to be aware of all substantive linkages or strategic linkage opportunities, and they can decide to ignore them at costs. Adversely, political linkages can outreach the demand posed by substantive linkages and strategic linkage opportunities. That is, substantive linkages and strategic linkage opportunities do not dictate

¹³¹ See section 5.3.2 about linkages in bargaining.

the degree of linkages within global governance alone. It also matters how actors react to these external factors in forging political linkages.

Several mechanisms are available to link issue areas in global governance.¹³² The simplest structure, negotiating linkage, implies that negotiations on two issues are interdependent for one 'negotiating transaction' similar to a spot market. Alternatively, issues can be linked enduringly in an institutional form. This can happen selectively. For instance, the WTO cooperates with the IMF when dealing with certain monetary issues.¹³³ Furthermore, the IMF participates as an observer in the WTO. More comprehensive is incorporation of several issue areas into one institution.¹³⁴

These mechanisms are mostly substitutes with similar results for global governance for similar degrees of substantive and strategic linkage. Whether substantive linkages are coped with through frequent one-shot negotiations in an integrated manner, through a web of specific institutionalized linkages, or by incorporation into one institution, is of secondary significance for the effectiveness of global governance structures. Negotiating linkage only seemingly provides more flexibility in creating a negotiation set than does incorporation into one institution. As witnessed in the WTO, not all issues that are part of the WTO have to be on the negotiating agenda in all trade rounds, while frequent negotiating linkage of issues can shape perceptions that two issues belong together. In that case, these issues are hard to sever, even if doing so would be supportive for coming to an agreement.

In addition to those linkage mechanisms mentioned above related to negotiations, courts can link international institutions. Courts can interpret the rules of the international institution to which they belong with reference to other international institutions. Furthermore, courts with superior authority can resolve conflicts of competing authority.

Linkage through courts makes a difference to global governance because it lowers bargaining complexity for actors. Thus, the analysis of the bargaining problem should be affected by the degree of linkage through courts.

Yet, the role of linkage through courts is limited. Linkage through courts is beset with legal and political problems, especially if all concerned actors, who are members of the institution interpreting its rules in the light of the rules of another institution, are not also members of this other institution. Institutional bias is likely to make linkage through courts, which elevates one international institution above another, unacceptable for resolving norm conflicts between issue areas and corresponding institutions on a large scale. Only an overarching world Supreme Court could impartially cope with the tremendous task of balancing competing values, world views, and cause-and-effect systems of linked issue areas. This would shift considerable complexity from bargaining to the judiciary, as potential flaws and unanticipated interdependencies could later be resolved. However, judicial delegation risk among other obstacles is likely to prevent the establishment of a world Supreme Court

¹³² See Leebron (2002). For an alternative classification, see Trachtman (2002).

¹³³ See GATT 1947 Art. XV.

¹³⁴ Not only the expansion of the WTO to new issue areas in the Uruguay Round increased the degree of political linkages. The adoption of the 'single undertaking' in the WTO, making plurilateral agreements applicable to all members, worked into the same direction.

for many years to come.

Overall, we can conclude that substantive linkages and strategic linkage opportunities entice actors to perceive global governance comprehensively across issue areas and that they call for political linkages.¹³⁵ Yet, no particular political linkage architecture can avoid aggravating the complexity of global governance.¹³⁶ Therefore, the effects of linkages can be considered in the cooperation problems without knowledge of the specific linkage architecture.¹³⁷ Most linkage mechanisms are substitutes, whereas linkage through courts, which can actually make a difference, is inherently limited or out of reach for political reasons for the foreseeable future.

3.3 Depth of global governance

Shallow and deep integration are commonly used concepts to describe the depth of global governance. Shallow integration combines negative integration and border regulation, whereas deep integration displays positive integration and domestic regulation. I establish the trend towards increasing depth of global governance by first showing a trend from negative towards positive integration and then demonstrating a trend from border towards domestic regulation. Finally, I highlight the reduction of actors' governance autonomy following from deep integration.

3.3.1 Positive integration

The main difference between negative and positive integration is that negative integration forbids a certain action, while positive integration prescribes an action.¹³⁸ Along with this fundamental difference between the two modes of integration come two further differences. First, negative integration only applies if a country chooses to regulate, while positive integration always poses demands on autonomous regulation. Secondly, negative integration, which only needs to define what is forbidden, is less complex than positive integration. While defining prohibited policies becomes a cumbersome task at times, like determining which subsidies shall be illegal under WTO rules, positive integration is far more comprehensive, usually requiring detailed elaboration on standards and often requiring far-reaching domestic legal efforts for implementation.¹³⁹

Market-correcting and positive integration are often used interchangeably in the literature. However, positive integration perceived as prescriptive, compelling, and relatively complex regulation does not inherently aim at correcting markets in the pursuit of non-market, political objectives. Positive regulation can also intend to create markets, for instance, in the realm of competition policy.¹⁴⁰ In this

¹³⁵ For further elaboration on this topic, see Knodt and Jachtenfuchs (2002) and the special issue of the *American Journal of International Law* 96 (1) dedicated to the boundaries of the WTO.

¹³⁶ This is not to say that political linkages do not matter. See, for example, Biermann (2001) and Helm (1995) on effective political linkages between governance of trade and the environment.

¹³⁷ Trachtman (2002) shares the view that the formal scope of institutions is secondary to the real workings of linkages.

¹³⁸ See Scharpf (1999) and Sbraiga (2002).

¹³⁹ See Petersmann (2001).

¹⁴⁰ See Scharpf (1999) and Sbraiga (2002).

context, positive regulation interferes with markets in order to overcome market failure and to make markets more efficient, not in order to subjugate markets to political objectives.

In the WTO, the market-creating and the market-correcting function of positive integration is increasingly needed.

Let us first address the argument about the function of positive integration for attaining economic integration. Within the WTO, the prevailing negative integration forbids certain kinds of regulation: Tariffs are not allowed to be higher than the rate at which an actor has bound its tariff in the WTO Agreement, quotas are largely forbidden as a way to protect domestic industries, and export subsidies are also interdicted. With progress in negative integration, however, the marginal benefits from further negative integration decline. In developing countries, (domestic and even border) barriers to trade stem less from protectionist policies than from lacking institutions, such as customs and certification agencies, which require positive integration for upgrading.¹⁴¹ In addition, actors resort to contingent protection to replace protectionist instruments forbidden under negative integration. Thus, barriers to market access that can be removed only by positive integration gain in relative importance.¹⁴²

Moreover, successful negative, market-creating integration increasingly requires positive, market-creating integration to offset its economic flip sides. For instance, with high barriers to trade, competition policies in other countries had little effect on domestic competition. Now that barriers have fallen, companies that make extraordinary profits due to lax competition policies in one market can engage in strategic pricing in other markets. Thus, fair competition requires positive integration to harmonize competition policies and to cope with the adverse effects of divergent national policies.¹⁴³

The second reason for increasing positive integration is growing demand for market correcting, positive integration.¹⁴⁴ With global wealth rising, the demand for non-economic objectives also grows, calling for more governance to serve these non-economic ends. At the same time, globalization and negative integration decrease the effectiveness of autonomous governance. Thus, positive integration becomes vital to empower the actors to supply non-economic goods.¹⁴⁵ In addition, while the willingness of civil society to accept a purely competitive, market-based world trade regime is waning, its voice becomes harder to ignore.¹⁴⁶

¹⁴¹ See Hoekman (2002b).

¹⁴² See Frankel (2001), Hormats (2001) and Krueger (1995).

¹⁴³ See Dunoff (1999). Though no agreement on competition policy could yet be reached, Jackson (2002) finds almost sixty clauses already in the WTO treaty dealing with competition policy.

¹⁴⁴ See Beck (1998), Gehring (2002) and Zürn (1998, Ch. 7).

¹⁴⁵ Svaleryd and Vlachos (2002) find that financial markets allow risk diversification and, thus, lessen the need for a welfare state despite increasing economic volatilities due to globalization. But the insurance function of capital markets cannot substitute for positive integration.

¹⁴⁶ See section 3.5 about civil society involvement.

3.3.2 Domestic integration

The trend towards positive integration is accompanied by a shift from regulation of border-related barriers towards regulation of domestic policies that are not formally targeted at trade.¹⁴⁷ Historically, the WTO set out to reduce tariffs. As tariffs fell, non-tariff barriers to trade rose. First, border-related barriers like classification and valuation of goods were prominent, but later the focus shifted to domestic regulation inhibiting free trade in the form of subsidies, competition law, government procurement, and standards concerning diverse issues like health or the environment. As a consequence, the WTO was compelled to move into domestic regulation.

While the initial approach to domestic regulation was to enforce national treatment, that is, non-discrimination of foreign companies, the WTO now tackles all barriers to trade. Most notably, the WTO reduced in the Uruguay Round the set of defensible barriers by restraining the reasons which can justify an exemption from WTO rules. For instance, sanitary and phytosanitary measures restricting trade must now be based on scientific principles, subject to the ruling of the Dispute Settlement System. This subtly promotes harmonization of product standards, as it allows judicially challenging product standards on other grounds than discrimination.

Insofar, the trend towards domestic integration follows a logic similar to the trend towards positive integration: decreasing marginal benefits of border regulation compared to increasing gains from domestic regulation, and the need to curb circumvention of border regulations.

In addition, two further dynamics propel domestic regulation: scope enlargement to issues that are prone to domestic regulation and linkages within global governance that convert the WTO into an instrument of good governance.

Concerning the ascent of new issues with a propensity to domestic (and frequently also positive) integration, the liberalization of services is most prominent.¹⁴⁸ Due to the often sensitive nature of services and prevailing information asymmetries, services require relatively strong regulation to protect customers. This opens the door to hidden protectionism, which in turn necessitates WTO disciplines. Even without domestic protectionist regulation, service markets may be hard to contest as many 'backbone' services, such as telecommunication or energy, display network externalities. Here, international disciplines may be required to enhance market access for foreign competitors. Furthermore, the liberalization of services partly rests on the movement of natural persons, which is an extraordinarily heavily regulated area of domestic politics. With a strong interest of developing countries and a growing interest of developed countries with aging populations, the movement of

¹⁴⁷ See Fried (2001), Landau (2000), Ostry (2001) and Zampetti (2001). See Frankel (2001) and Das (2002) on possible gains from domestic integration and their reflection in the negotiating agenda. While the trends towards positive and domestic regulation are related in their causes and effects, it is important to remain aware that positive and domestic integration are different concepts that can arise in any combination. Restraining certain production subsidies combines negative and domestic integration, while setting standards on the classification of goods is a measure of positive border integration.

¹⁴⁸ See Hoekman and Kostecki (2001).

natural persons is likely to increase and will have to be adequately regulated by international institutions.¹⁴⁹

Another new issue area that requires domestic regulation is trade in cultural goods. A loss of cultural identity to foreign cultural influences is increasingly felt in many countries. Besides patriotic sentiments, protection of cultural goods can also be based on economic reasoning. Francois and Ypersele (2002) make such an economic case for protecting the French movie industry. High investments by Hollywood combined with increasing returns to scale in production wipe out alternative U.S. and foreign production of movies that is sensitive to cultural context. These movies are highly valued by a share of the public that cannot express its preferences as price discrimination is not feasible. Thus, protectionism that keeps the culturally sensitive movie industry alive creates a consumer surplus, which can outweigh losses in the Hollywood movie industry. As witnessed in France, we have to expect increasing protectionism in favor of domestic culture, which needs to be disciplined by domestic regulation.

This dynamic towards domestic regulation could intensify if the WTO further relaxes its focus on trade and takes linked objectives more into account. For instance, if trade is considered an instrument for development and if the WTO is already regulating domestic issues for the purpose of trade, the temptation is imminent to take development objectives directly into account and attempt to improve domestic governance when designing WTO rules.¹⁵⁰ If this point of view comes to dominate the WTO, it will accelerate the trend towards domestic regulation.

3.4 Actor participation

Actor participation rises if new actors become members of the WTO, if passive or weak members participate more actively, or if their participation becomes more important.¹⁵¹ At this point, I only describe the trend in light of the negotiation history. The rationale behind the trend will be delivered in Chapter 5 about bargaining where I reason that decision-making exclusively among the powerful actors is on the decline.

In the past, the role of developing countries in the WTO was of secondary importance. Steinberg (2002) dissects the influence of powerful actors throughout the negotiating process in GATT/WTO trade rounds. He finds in the first stage, the launching of a new trade round, that developing countries

¹⁴⁹ See Winters (2001).

¹⁵⁰ See Fried (2001), Hoekman (2002b) and Zampetti (2001). The assessment of Hoekman (2002a, 2) that the “Doha Development Agenda” puts development concerns at the core of WTO deliberations” foreshadows a possible shift. In the environmental realm, Pfahl (2000) appreciates that WTO dispute settlement entices actors to employ efficient environmental policies, since the WTO does not tolerate environmental policies that do not effectively serve environmental objectives or that overly restrict trade. At the same time, she is concerned that the WTO overly restrains actors’ environmental policies by its subsidy disciplines, so that actors cannot compensate domestic suppliers for high environmental standards.

¹⁵¹ The participation of developing countries has also been termed ‘internal transparency,’ opposed to the participation of civil society labeled ‘external transparency.’ See Ostry (2001). Yet, transparency does not exhaust the participative claims of these two groups.

were able to push their issues into the mandate for negotiations. Yet, in the second stage of informal agenda setting, powerful actors, particularly the U.S. and the EU, took over. They dominated the development of initiatives into broad conceptualizations, the fine-tuning of proposals as legal texts, and the packaging of proposals into a ‘final act’ by means of their superior resources, negotiations with selective sets of actors, and their influence on the secretariat. In this stage, Steinberg (2002, 355) annotates, “initiatives from weak countries have a habit of dying”. Under pressure from the powerful actors, the resulting packages were usually accepted in formal plenary meeting without modifications or with only minor amendments.

Kahler (1992, 707) draws a similar picture for past global governance in general, “The collective action problems posed by multilateral governance were addressed for much of the postwar era by unilateral great power collaboration disguised by multilateral institutions and by derogations from multilateral principles in the form of persistent bilateralism and regionalism.”

Yet, the power of the U.S. and the EU declines as developing, newly-industrialized, and formerly communist countries participate (more actively) in the WTO.¹⁵² Unilateralism in the Uruguay Round had declined in comparison to the Kennedy Round finalized in 1967 and the Tokyo Round finished in 1979.¹⁵³ It is also worth noting that the U.S. and the EU had to implement a severe threat – exiting the GATT and entering the WTO – in order to conclude the Uruguay Round. Such a strategy cannot be employed frequently without fundamentally damaging the legitimacy of global governance. In 1999, the Seattle negotiations failed partly because of resilience to the unilateral decision-making model.¹⁵⁴ Following negotiations involved developing countries more actively in decision-making.¹⁵⁵

3.5 Involvement of civil society

Civil society refers to voluntary associations that aim to shape politics without pursuing public office or pecuniary gains.¹⁵⁶ Such associations may come in a variety of forms, such as professional NGOs, grass root movements, think tanks, and religious institutions. Civil society involvement may take different shapes. Through *participation* in formal meetings or preparatory working committees, through *advocacy* on public events or in writing, or through *lobbying* may civil society introduce opinion and expertise into governance processes, thus, affecting single decisions as well as overarching learning. If civil society deems its voice not sufficiently heeded, it may *protest* against global governance policies, international institutions, or selected governments through various forms of activism.¹⁵⁷

¹⁵² On the growing participation of developing countries, see Drahos (2003), Ford (2002), Hormats (2001), Kahler (1992), Keohane and Nye (2001), Page (2001), Singh (2000), Sjöstedt (1994) and Zampetti (2001).

¹⁵³ See Kahler (1992).

¹⁵⁴ See Page (2001) and Zampetti (2001).

¹⁵⁵ See Page (2001).

¹⁵⁶ See Scholte (2001).

¹⁵⁷ The terms in *italics* relate to the most important civil society strategies as selected from the literature by Arts (2003). For alternative classifications of the wide range of civil society activities, see Albin (1999) and Charnovitz (2002c).

The interest of civil society in global governance has increased tremendously since the Rio Summit in 1992.¹⁵⁸ With the introduction of the WTO in 1994, public scrutiny turned to global governance in trade. The 1999 WTO ministerial meeting in Seattle marked a watershed as the number of participating NGOs soared and the variety of groups widened to include, for instance, health and human rights groups.

The WTO reacted on growing public interest in its work in 1996 when it formulated “Guidelines for Arrangements on Relations with Non-Governmental Organizations” and initiated a series of WTO sponsored symposia with NGOs. The results of these conferences were rejected by many actors and the practice of high-profile exchange between the WTO and civil society was reduced. To date, no veritable, formal channel of direct participation in the WTO’s decision-making process exists, though the WTO conducts briefings and dialogue discussions and publishes information comprehensively and timely thanks to an accelerated declassification process.

On the judicial side, the Appellate Body ruled in 1998 that panels and the Appellate Body itself had the authority to consider unsolicited amicus briefs, statements pertaining to a dispute filed by third-parties to the dispute such as NGOs. This ruling met with vigorous resistance from the majority of actors. While the Appellate Body upheld its ruling in general, amicus briefs were rarely accepted after continuing attacks on the Appellate Body.

For legislative and executive processes alike, the WTO expanded its efforts in recent years to manage its external relations with civil society. Information now is declassified more broadly and rapidly, and is disseminated actively through the WTO website and targeted briefings.¹⁵⁹

Civil society participation is seen as a function of demand for and supply of access to the WTO. If supply and demand increase, civil society participation rises. If demand exceeds supply, civil society involvement turns to protest.

First, I turn to the demand for participatory rights. I then consider advantages and disadvantages of civil society participation with the assumption that they are the best indicator for future supply of access.¹⁶⁰ The discussion of the advantages and disadvantages of civil society participation furthermore prepares the argument about the effects on global governance which civil society participation will exert. Note that I do not aspire to normatively assess to which extent civil society should participate in the WTO.

3.5.1 Demand for participation

The pressure from civil society demanding access will further rise. Democratization and direct participation of civil society in domestic governance accustom individuals to the expectation that they are entitled to have an audible say on issues relevant to their lives. An increase in relative

¹⁵⁸ See Brown, Khagram, Moore and Frumkin (2000), Charnovitz (2000), Charnovitz (2002b), Dunoff (1999), Keohane and Nye (2001), Florini (2003) and Ostry (2001).

¹⁵⁹ See Charnovitz (2000) and Charnovitz (2002b).

¹⁶⁰ This conclusion appears particularly warranted as Charnovitz (2002c) observes that the needs of governments can explain much of the cyclical pattern of civil society participation in the past 150 years.

effectiveness, scope, and depth of global governance makes the WTO more significant to the individual agent so that she desires to voice her concerns also in the WTO. Tariffs affect individuals through their influence on prices of imported goods and on economic growth. The relationship between tariffs and other economic parameters are complicated in theory and frequently difficult to pin down empirically in concrete and current cases. More apparent, detrimental effects of tariffs on foreign economies may be disapproved of by private agents, but they lead only to limited political activity by idealists. Private agents can, thus, generally be expected to remain poorly informed and passive about tariffs. On the contrary, deep integration affects private agents significantly, directly, and evidently. Accordingly, private agents expect high standards of legitimacy for issues such as the regulation of genetically modified organisms.¹⁶¹

Civil society insists especially vigorously on its involvement as long as global governance appears unbalanced in its efforts to promote different objectives and in its trade-offs between competing values and norms. The strengthening of individual economic rights, through the protection of foreign investment and of trade-related intellectual property, contradicts an understanding of international agreements as utilitarian-consequentialist bargains between states. This invites civil society to claim other individual (human) rights in the WTO.¹⁶²

While the desire to participate rises, organizing civil society and influencing global governance becomes cheaper through technological advances and more common with time. As civil society experiences the effects of transnational activism – such as acceptance of amicus briefs, the derailing of the Seattle ministerial meeting and of the Multilateral Agreement on Investment in the OECD – it will activate additional resources and shift existing resources to the global level.

3.5.2 Advantages of civil society participation

One main advantage of civil society participation for the effectiveness and legitimacy of global governance pertains to the quality of WTO policies.¹⁶³ Civil society participation improves the quality of WTO policies by contributing to deliberations since the intellectual competition in the WTO is limited by several factors.

First, many actors lack sufficient resources to contribute meaningfully in deliberations, whereas numerous organizations of civil society command special expertise. While actors can theoretically build on these private resources and embody them in their argument, in reality, the transfer of knowledge faces friction. In particular, participation warrants that civil society can relate information about its political reaction to different policy proposals, undistortedly and timely. Secondly, the perspective of governments is crafted by traditional territorial, often competitive mindsets. Civil society, on the contrary, is mostly characterized by a universalist approach that promises to be more suited to solving global problems. Thirdly, governments filter information consciously. Governments

¹⁶¹ See Skogstad (2002).

¹⁶² Wai (2003, 41) suggests that “international human rights law may provide a basis to frame serious claims based on suppressed policy goals that disturb dominant policy discourses of international trade law.”

¹⁶³ The argument about the advantages of civil society participation builds on Albin (1999), Arts (2003), Charnovitz (2000), Charnovitz (2002b), Esty (1999), Esty (2002), Keohane and Nye (2001) and Scholte (2001).

may benefit from serving special interests or from avoiding the risk of standing exposed in international negotiations. Civil society, thus, leads to more pluralist and creative input into deliberations.

Decisions of better quality will be considered more legitimate in their own right. In addition, participation of civil society enhances the legitimacy of the WTO in several further ways. In the real world, democracy within countries is never perfectly achieved. Many members of the WTO grant their citizens no, or only rudimentary, democratic rights. Even in advanced democracies, the political process is partly corrupted by special interests. Furthermore, attitudes of politicians and political parties concerning the WTO constitute only a minor aspect in elections; politicians may change their stances when in office, and the positions of representatives in negotiations commonly diverge from initial bargaining positions. For all these reasons, even individuals that have voted for the government in power may be discontent with the behavior of their country in international negotiations. Yet, the ability of *ex-post* control through ratification is fictitious. Blocking negotiation results does not directly further alternative goals and is associated to often tremendous costs. Therefore, civil society involvement contributes to the legitimacy of global governance by offsetting deficiencies in domestic democratic processes.

Even if excellent mechanisms for democratic representation are in place on a national level, civil society participation will be needed on a global level for legitimate governance. Democracy is more than voting. Civil society participation is needed on the actor level to enrich the deliberative side of democracy that complements representative mechanisms, to give voice to minorities, to hold governments accountable beyond elections, et cetera. The same functions are needed in global governance.

Moreover, actor-based global governance suffers from particular weaknesses that can be mended through civil society participation. Countries become an increasingly unsuitable level to aggregate preferences about global governance. Individual identities become less shaped by nation states and better reflected in civil society organizations. With the end of the cold war and no security cleavages in sight that would again separate the world along national boundaries, issues other than non-security concerns move to the center stage of political debate about which domestic preferences are more heterogeneous. This makes it more likely that opinions, which are in the minority on the domestic level and, therefore, systematically disregarded in domestic political processes, carry more weight if they are aggregated directly at the global level. Furthermore, individual agents in an interdependent world are increasingly affected by decisions of foreign actors who are not democratically accountable to them. Defending their interests through actor-based negotiations alone is less effective than additional activism of concerned individuals at the international stage. Particularly for private agents from small or weak countries, chances are dim that their governments can protect their interests.

In addition to improving the quality decisions and the legitimacy of decision-making processes, civil society participation provides a credible channel to disseminate information about global governance to a skeptical public. This enhances popular support for global governance. If civil society organizations that participate in global governance lend their support to global governance policies or

at least demonstrate understanding for the inevitable, popular resistance to global governance is attenuated. This has an important political effect: The greater the support for global governance is in domestic society, the more willing governments are to cooperate and to cede authority to international institutions.

3.5.3 Disadvantages of civil society participation

A number of arguments speaks against civil society participation for principled or functional reasons pertaining to the effectiveness and legitimacy of global governance. Rather principled is the argument that no global *demos* exists so that global democracy is self-contradictory. Global governance correspondingly cannot evolve beyond inter-state bargaining. However, a sense of global common fate and a global transnational political discourse evolve, and democracy can be reconfigured to new spaces beyond the nation state.

A further principled argument claims that civil society organizations are non-representative, intransparent, and unaccountable. Consequently, civil society may promote special interests that should be isolated from global policy making. This argument carries little significance if civil society only observes meetings and contributes arguments; the market for ideas considers their arguments only if they are meritorious. Furthermore, accreditation disciplines can complement market control. If civil society indeed causes public choice distortions, then wielding inappropriate influence in formal meetings is far more difficult than informally. Another consequence of non-representativeness may be that civil society influence weakens developing countries as the majority of civil society organizations is based in developed countries. Yet, civil society is forming increasingly in developing countries as well. Furthermore, developed countries' civil society frequently supports positions of developing countries.¹⁶⁴ Finally, more deliberative decision-making, which civil society struggles to promote as this is its channel of influence, favors weak actors.

On the functional side, Charnovitz (2002b, 324) debunks the claim that civil society leads to over-politicization, "Another argument against NGO participation is that trade politics should be cabined at the national level and screened out of the WTO. This view is puzzling because the WTO is solely about politics. In contrast to many other international organizations that address market failure, the WTO addresses mainly government failure. So the idea of preserving an unpolitical WTO is fantasy ... [the WTO's] mission is to put controls on the way governments use discriminatory and protectionist trade measures. That is an additional reason why the WTO should not insist that NGOs filter their ideas through national governments. A consumer NGO may advocate an idea like free trade that its government will be unwilling to relay to the WTO."

A related argument warns that civil society lacks commitment to free trade and that civil society participation infuses more heterogeneity into the WTO. However, the increasing heterogeneity stems from scope, linkages, and deep integration and is not artificially created by civil society. Dealing with this heterogeneity in negotiations and court rulings is necessary to achieve appropriate and widely

¹⁶⁴ Contrarily, Shaffer (2001) notes that in Seattle many environmentalists took Northern attitudes inimical to development.

accepted decisions.

Other critics point out that deals which disadvantage special interest groups are easier to strike behind closed doors. Civil society involvement that implies more transparency would accordingly add to the influence of special interest groups and lead to more distortions in the political process. However, such distortions are generally best attenuated through transparency and deliberations.

Comparing advantages and disadvantages of civil society participation, we see that international institutions can reap many benefits at limited costs. In the future, experience and continuing research will improve institutional capabilities to integrate civil society at even lower costs.¹⁶⁵ Moreover, civil society participation is self-enforcing. The more access the WTO grants to civil society, the more transparent the WTO becomes and the greater the influence civil society has in the future.¹⁶⁶ Another self-reinforcing mechanism is peer pressure. The more civil society participation spreads, the harder it becomes for single international institutions to withdraw from this trend.¹⁶⁷ Therefore, we can expect the growing demand for participation to be at least partly matched by more access for civil society to the WTO.

3.6 Secondary trends

In the remainder of the study, I frequently refer to the primary trends presented so far. At other occasions, I refer to effects that result from a combination of the primary trends. Defining these recurring effects as secondary trends in advance allows me to argue more specifically and economically in the later analysis.

3.6.1 Number of participating actors

In WTO decision-making, a greater number of actors will participate more actively and with growing influence. In addition, further agents are likely to receive a place at the table, time to speak, and the right to submit proposals. Civil society will probably be directly involved in WTO processes. In order to balance diverging norms and interests pursued in different issue areas and in order to combine the knowledge required for coherent governance, other international institutions increasingly need to be represented in WTO processes.

3.6.2 Ideational heterogeneity of actors

Ideational heterogeneity means the heterogeneity of values, norms, perceptions and causal beliefs within international society.¹⁶⁸ The trends expose the WTO more strongly to ideational heterogeneity. Trade in a strict sense can be considered as an issue area with universally shared knowledge and a

¹⁶⁵ See, for instance, Albin (1999) on possible criteria for accreditation of NGOs at international institutions.

¹⁶⁶ See Shaffer (2001).

¹⁶⁷ See, for instance, the OECD (2000) comparison of civil society participation in five international institutions and the Global Accountability Report written by Kovach, Neligan and Burall (2003) for the One World Trust, ranking 18 international governmental organizations, corporations, and NGOs according to their accountability.

¹⁶⁸ Ideational properties have been briefly introduced in Chapter 1 and are discussed in detail in Chapter 4.

universal, material logic of action. Economic knowledge differs little between actors as gauging economic trade effects is an international and specialized science mostly independent of a national context.¹⁶⁹ The logic of action is similar as the consequences of trade regulation in a strict sense are material and as every actor is striving to maximize material wealth.¹⁷⁰ Any domestic income distribution that could be subject to value judgments resulting from trade regulation can be altered domestically afterwards.¹⁷¹ Differences between actors in knowledge, values and norms can, thus, be largely neglected in negotiations about tariff reductions.

However, the same does not hold for negotiations about the complex economic effects of deep integration. When designing intellectual property rights or liberalizing trade in services, actors negotiate issues for which clear scientific advice is missing. Consequently, they bring divergent (and partly poorly developed) concepts to the negotiating table.¹⁷²

With scope extension to non-economic issue areas, heterogeneity of knowledge is even more present, and heterogeneity of values and norms matters decisively. For instance, knowledge of environmental destruction and preferences for environmental goods significantly differ between actors,¹⁷³ and they are discussed in a strongly normative international discourse. Global governance becomes even more difficult as one issue can touch on several non-economic value systems. Trade in genetically modified organisms, for instance, arouses ethical and religious concerns, health concerns, and environmental concerns.¹⁷⁴ Trachtman (2002, 93) notes, “Indeed, I see the ‘trade and ...’ problem as the working out in the international system of something we long ago worked out – but continually revise – in the domestic system: how should society integrate its values expressed in the market with its values expressed through nonmarket mechanisms (politics and law)?” The analogy to the domestic level provides an image to gauge the even more daunting difficulties in reconciling the conflicting norms

¹⁶⁹ See Reich (1996).

¹⁷⁰ Landau (2000) and Wendt (2001) observe that normative thinking is less important if economic issues are concerned than if other issues, such as the environment, are affected. Indeed, we may consider serving one’s own interest as normatively appropriate economic behavior based on Adam Smith’s invisible hand that guides self-interested agents towards collective welfare.

¹⁷¹ Clearly, domestic distributional effects of trade agreements are not fully offset by domestic redistribution and, thus, trade policy has a real-world distributional effect which is subject to normative reasoning. See Kapstein (2000). However, the normative importance of distributional effects is moderate compared to the many normative concerns that arise from global governance of non-economic issues. Moreover, domestic distributional effects are subject to a normative dispute mostly at the domestic policy stage. The normative distributive discourse on the international level instead focuses on the *international* distribution of wealth. Here, we have a near-consensus that reciprocal liberalization is best for developing countries. By contrast, domestic normative effects and the international normative effects of governance in non-economic issues are discussed intensively and confrontationally at the international level.

¹⁷² See Sjöstedt (1994).

¹⁷³ See Helm (2000).

¹⁷⁴ See Safrin (2002).

and value systems on a global level.¹⁷⁵

Global governance needs to account for further ideational differences beyond ‘ethical’ issues of risk assessment for human beings, adequate treatment of animals, and environmental protection. For instance, regulation in the food sector is confronted with mundane problems – such as diverging consumption patterns, informational problems on the food market, and agency and capture problems within national regulatory institutions – that require specific regulatory responses.¹⁷⁶

Increased ideational heterogeneity originates not only in new issue areas regulated or affected by the WTO, but also in the number and nature of actors who are recently involved in global governance. Developing countries and civil society bring in new perspectives and force the WTO to recognize the new nature of issues with their effects on ideational heterogeneity.¹⁷⁷ This undermines a core mechanism of how international law manages cultural differences. Kennedy (1997, 571) observes in the traditional international law system that “most cultural differences simply do not rise to the level of the international. Differences are manageable when they can remain internal matters, below the waterline of sovereignty.” In the future, global governance has to face heterogeneity increasingly on the global stage.

Ideational differences can be intensified through domestic institutions. Skogstad (2002) reasons that based on varying attitudes towards science in the EU and the U.S., different mechanisms for domestic decision-making have developed. The divide between the participatory, deliberative approach of network governance in Europe and the decision-making approach in the U.S., by experts that are accountable only to elected politicians, accentuates the original ideational heterogeneity between societies.¹⁷⁸

Furthermore, the relevance of ideational heterogeneity can be increased through domestic institutions if they embody ingrained ideas about how things should be done. If policy proposals are at odds with domestic norms, agreeing to such proposals constitutes normatively inappropriate behavior and causes domestic audience costs.¹⁷⁹ If ideas are ingrained in domestic institutions, this increases the costs of compromising beyond what would be warranted by ideational differences on a clean slate.¹⁸⁰

¹⁷⁵ Albrow (1998) points out that even issues that are of technical nature on the domestic level involve value conflicts on the global level where the heterogeneity of values is greater. On increasing norm and value conflicts in global governance, see also Dunning (2000), Dunoff (1999), Howse and Nicolaidis (2003), Zampetti (2001) and Zürn (2002).

¹⁷⁶ See Joerges and Neyer (1998).

¹⁷⁷ See Commission on Global Governance (1995), Chayes and Chayes (1995) and Zampetti (2001).

¹⁷⁸ See also Shaffer (2001) on how the involvement of ministries and civil society in trade policy formulation differs between actors.

¹⁷⁹ See Börzel and Risse (2002). See also the discussion of domestic audience costs in section 6.2.

¹⁸⁰ See Jackson (2000a). See Bailey (2002) about problems in the EU with dissonance in regulatory style.

3.6.3 Material heterogeneity of actors

Material heterogeneity stands for the heterogeneity of actors' material properties, such as natural resources and infrastructure. Deep integration and broader actor participation raise the degree and relevance of material heterogeneity. Negative integration, such as the prohibition of import quotas in the WTO, tends to more similarly affect materially different actors than positive integration like TRIPS. Generally, industrialized countries prefer demanding standards that provide competitive advantages to their industries and result in relatively low costs, compared to the expenses developing countries have to incur in order to achieve demanding standards.¹⁸¹

With an increasing participation of developing countries in the WTO, the gap between developing and industrialized countries, as well as the heterogeneity within the group of developing countries, matters more. For instance, tariff revenues have entirely different implications for an industrialized country, an oil exporting developing country, and a developing country poor on natural resources.

3.6.4 Governance autonomy of the actors

Deep integration limits the ability of materially and ideationally heterogeneous actors to reach their objectives through autonomous governance. To reduce tariffs, actors need only to agree on a limited amount of figures. How to cope with the domestic consequences of tariff reductions, for instance, on employment or health, is left to the individual actors as long as they do not impair or nullify their concessions.¹⁸²

With deep integration, actors increasingly agree on comprehensive courses of actions that leave less opportunity to modify the consequences of WTO agreements to their specific ideational and material properties.¹⁸³ A major case in point is the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). This agreement restrains actors' rights to impose regulation which aims to protect human, animal, and plant life. Thus, the WTO increasingly regulates issues that are strongly affected by ideational and material heterogeneity, and leaves at the same time less space to actors to attenuate the resulting repercussions.

3.6.5 Scope of global governance

Scope is defined by the number of issue areas subject to global governance, as well as the intensity of regulation within the issue areas.¹⁸⁴ The WTO embodies new issues such as services and intellectual property rights, which were not covered under the old GATT. Regulation became also more intensive as the use of non-tariff barriers has been regulated in more detail and more strictly, as waivers in textiles and agriculture have been scaled back, and as temporary exemptions have been subjugated to

¹⁸¹ See Joerges and Neyer (1998) and Scharpf (1998) on the quarrels arising from distributional implications of standards which hinder positive integration even in the comparably homogenous EU.

¹⁸² See Howse and Nicolaidis (2003).

¹⁸³ See Dunoff (1999).

¹⁸⁴ Thus, increasing scope is analogous to 'institutionalization' in the terminology of Goldstein et al. (2000).

tighter control.¹⁸⁵ Expanding scope can also be witnessed in other areas.¹⁸⁶

Global problems are pressing for the most effective form of governance. Since relative effectiveness of global governance is growing, we can accordingly assume the trend of scope expansion to continue. This conclusion is even more compelling as global governance often reinforces interdependencies, creating its own demand for further global governance.¹⁸⁷

3.6.6 Uncertainty about efficiency and distributional effects of agreements

Actors become more uncertain about the distributional implications of agreements and their efficiency properties.¹⁸⁸ One explanation for growing uncertainty is a widening span of possible wealth effects of agreements. The wealth effects of agreements can diverge so widely for different actors that even the sanguine promises of trade theory on traditional trade bargains do not hold anymore; integration ceases to be a mutual gain phenomenon by nature, but actors can loose through integration.¹⁸⁹

Increases in the depth of integration not only widen the span of possible wealth effects but also aggravate a prediction of these effects. Assessing the impact of tariff reductions on traditional industries is easier than estimating the effects of health provisions for the bio-tech industry. As actors become aware and care more about non-pecuniary effects of WTO regulations, accurate predictions about effects of agreements become even harder to achieve.

Linkages within global governance are also responsible for unreliable assessments. A clarification of the consequences of agreements in advance is more important and difficult at the international than at the domestic level because no superior authority exists that could coordinate competencies of international institutions. The interaction between international institutions must be foreseen and adequate coordination mechanisms must be integrated into agreements. For instance, concerns arose about the relationship between the WTO and the Biosafety Protocol, which regulates transboundary movement of bioengineered living organisms. While the Biosafety Protocol and the WTO Agreement both contain similar precautionary language and an obligation for actors to base their decisions on scientific principles for risk assessment, even modest differences in wording led to fear of treaty collision. In addition, so many linkages from the Biosafety Protocol to other issue areas, such as medicine, food, and forests, arose, that actors feared to unintentionally modify already existing agreements.¹⁹⁰

The need to consider the dynamic effects of linkages further exacerbates assessing and handling

¹⁸⁵ See Hoekman and Kostecki (2001), Jackson (1997) and Reich (1996).

¹⁸⁶ See Scherer, Blickle, Dietzfelbinger and Hütter (2002) on social standards and labor rights, Clark (2001) and Vogler (1998) on environmental protection, Lake (2001) on security issues, Schiff and Winters (2002) and Solimano (2001) on development, and Diehl, Ku and Zamora (2003) and Zürn (1998) on scope extension in general.

¹⁸⁷ See Höffe (1999, Ch. 6).

¹⁸⁸ See Haas (1992) and Hoekman (2002b).

¹⁸⁹ See Bhagwati (2001), Howse (2002a) and Howse and Nicolaidis (2001).

¹⁹⁰ See Safrin (2002). See Biermann (2000) on the possibility to clarify the relationship between the WTO and international environmental institutions in order to attenuate tensions between trade and environmental rules.

linkages. Once social and environmental standards are incorporated into the WTO, developing countries fear that there will be no halt to industrialized nations and civil society pursuing their social and environmental thrusts on a far broader scale in the WTO.

Increasing uncertainty about efficiency and distributional effects of agreements was reflected only partly in the Uruguay Round, as actors were often unaware that agreements would not necessarily lead to win-win outcomes.¹⁹¹ In particular, we have to expect that developing country actors will be more careful in accepting obligations in the future.

3.6.7 Value of having a good reputation

Actors derive value from specific reputations that suggest a certain behavior in certain situations.¹⁹² Moreover, diffuse trust enables international cooperation.¹⁹³ Defined in reputational terms, trust can be understood as expectations of continuing good-natured behavior across issues. On flagrant transgression, emotional responses that disturb cooperation across the board and for a long time can occur.¹⁹⁴

The value of having a good reputation is rising. The greater the scope of the WTO and the greater relative effectiveness of global governance by the WTO, the greater the value is which actors ascribe to the WTO. With increasing value of global governance, the value of having a good reputation and the reputational costs of rule violations rise.¹⁹⁵

Besides, reputational costs are spread through negative reputational spill-overs. Concerning legalization and reputational spill-overs, Abbott and Snidal (2000, 427) state, “Another way legalization enhances credibility is by increasing the costs of renegeing. Regime scholars argue that agreements are strengthened when they are linked to a broader regime. Violating an agreement that is part of a regime entails disproportionate costs because the reputational costs of renegeing apply throughout the regime. Legal commitments benefit from similar effects, but they involve international

¹⁹¹ Jackson (2000b, 8) formulates provocatively, “Probably no nation which accepted the Uruguay Round really knew quite what it was getting into.” See also Dunning (2000) and Raghavan (2000).

¹⁹² Reputation is often understood as a valuable mechanism to signal an enduring quality, such as law obedience. Less discussed yet also important for the WTO is a second understanding of reputation, as a device for signaling the relative importance of issues in negotiations. Sartori (2002) shows how such signaling allows actors mutually beneficial trade of issues over time, as actors gain on those issues that are particularly important to them and concede on others. While this reputation hinges on truthful representation of issue valuation, we can expect to see this particular reputation be affected by more diffuse trust. An actor that cannot be trusted to maintain her treaty obligations is, thus, not to be trusted in negotiations either.

¹⁹³ See Schiff and Winters (2002).

¹⁹⁴ See Chayes and Chayes (1993) and Lipson (1991). The potential ‘loss of political good will’ as force for compliance has found entry even into game theoretic modeling, e.g. by Lockwood and Zissimos (2002).

¹⁹⁵ Furthermore, the value at stake in negotiations does matter. The value at stake in negotiations is distinct from the value of the WTO that depends on the gains from cooperation. The value at stake in negotiations hinges in particular on the heterogeneity of actors. If actors are extremely heterogeneous, there is little to win but much to lose in global governance. Thus, in such a situation, the value of the WTO is low, but the value at stake is, nevertheless, high.

law as a whole in addition to any specific regime. When a commitment is cast as hard law, the reputational effects of a violation can be generalized to all agreements subject to international law, that is, to most international agreements.” The greater the relative effectiveness and scope of global governance and the stronger the linkages between the international institutions, the more severe these indirect reputational costs become.

Having a generally good standing among the actors who together form the international society becomes more important in addition to the value of specific reputations in specific issue areas. Being recognized as a legitimate state entails benefits concerning security, autonomy, and participation in global governance, including decision-making and material benefits.¹⁹⁶

3.7 Requirements to contribute to linked objectives

Before we turn to the claim that the trends incorporate the requirements to contribute to linked objectives, we should notice that the coherence and overall effectiveness of global governance depends to a large extent on aspects that are not subject to this analysis. Most conflicts between the WTO and proponents from other issue areas are rooted in content, not in structure. As far as structure is concerned, many issues in interface management relevant to global governance coherence do not correspond to my level of resolution. Proposals for a world Supreme Court, or a corresponding political body that could solve deference conflicts between international institutions, are above the scope of my analysis which models only one institution. On the other side, advice on operational management of institutional interfaces is too detailed. Therefore, the impact of structure, as defined in this analysis, on the attainment of linked objectives is limited.

Which capabilities should structures lend to the WTO within these limits to contribute to linked objectives in issue areas, such as environment, health, and development? Evidently, the WTO has to be able to deal with linkages. As argued above, managing linkages in global governance is a challenge the organization has to face anyway to reach its core objectives. Moreover, the WTO has to cope with challenges in the related issue areas that differ from the task of lowering traditional trade barriers. Yet, these challenges are not that alien to the current and future WTO either. Involvement in the design of environmental or health standards and in policies to fight poverty requires domestic and positive integration. Again, developing the capabilities to manage deep integration is a necessity for the WTO in any case. Finally, participation is handled differently in other international institutions. For instance, developing countries play a greater role in the United Nations Conference on Trade and Development (UNCTAD) than in the WTO. Civil society participates more prominently in many agreements of the United Nations Environment Programme (UNEP) than in the WTO. However, developing countries and civil society are enlarging their weight in the WTO so that the WTO cannot circumvent the task to find ways how decision-making can function under broader participation.

¹⁹⁶ See Schimmelpfennig (2000). Chayes and Chayes (1995, 27) even claim that “sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life.”

My point should be clear by now: If global governance structures enable the WTO to solve the bargaining and enforcement problem against the background of the trends affecting global governance, then the WTO can effectively pursue core and linked objectives alike.

3.8 Conclusion

In this chapter, we have established five primary trends, connected to globalization, that affect global governance in the WTO. These are relative effectiveness of global governance, linkages within global governance, depth of global governance, actor participation, and civil society involvement. Furthermore, we have derived several secondary trends from these primary trends. We have also seen that the trends incorporate the requirements for attaining linked objectives.

In addition to the trends presented in this chapter, additional trends that are pertinent only to one specific argument are introduced at a later stage wherever they are relevant, for instance, trends concerning specific investments and the discretion of negotiators.

PART II: ANALYSIS

Before we delve into the analysis, let us briefly piece together the preparatory work we have conducted in the first three chapters. *Figure 2* presents the analytical framework again to provide orientation.

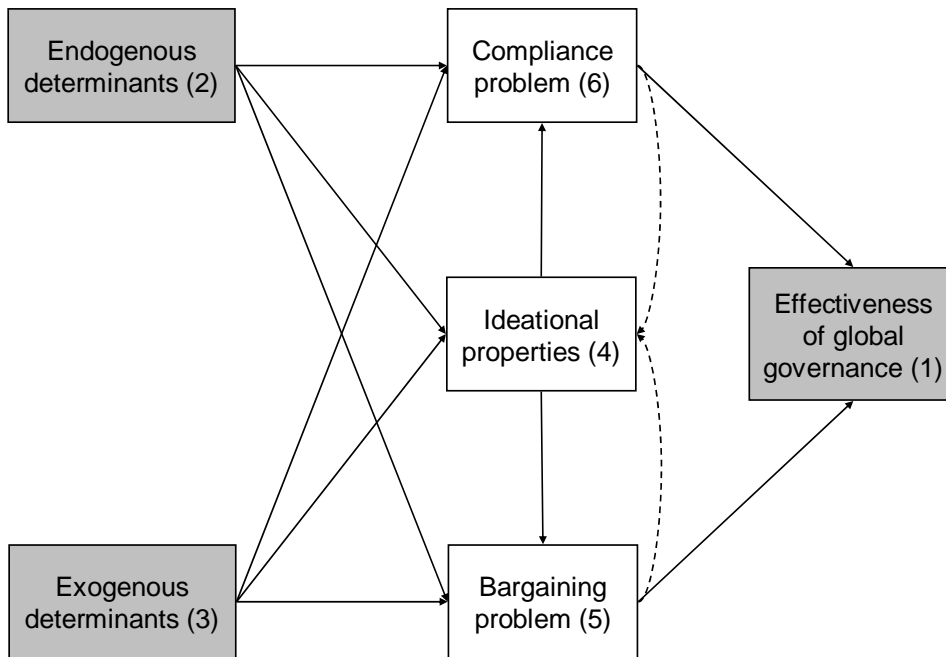


Figure 2: Analytical framework: Review of Part I

In Chapter 1, I have suggested that the effectiveness of the WTO should be measured based on economic and non-economic objectives. Bargaining and compliance problems impede attainment of these objectives. The better the solution of these problems that global governance structures facilitate, the more effective structures are. Furthermore, structures have to cope with the risks that arise from delegation of authority for decision-making and dispute resolution to the WTO.

Actors behavior with regards to bargaining, compliance, and risk is not dictated by material factors but also depends on their ideational properties, which are lasting, internalized ideas, such as norms and causal beliefs. All learning processes, changing actors' ideational properties, are dealt with in Chapter 4, so that actors can be treated as exogenous in the analysis of the bargaining and compliance problems.

In Chapter 2, I have defined regionalization and legalization as endogenous determinants of effectiveness. Regionalization refers to the move from nation states to integrated regions as constitutive actors of global governance. Though predicting the properties of a world of integrated regions is difficult, a world organized in several, deeply integrated regions appears a possible scenario. Legalization signifies the move towards institutional design that vests substantive authority in international institutions and adopts the form of law for international institutions. I have constructed legalization by five determinants: decision-making process, delegation of authority to the judiciary, precision of rules of global governance, exemptions from rules of global governance, and punishment to enforce the rules.

In Chapter 3, I have presented trends in exogenous determinants of global governance effectiveness. *Table 3* presents the primary trends, related to globalization in general and to the WTO in particular.

Table 3: Primary trends

<i>Primary trends</i>	<i>Key elements</i>
Relative effectiveness of global governance	Decreasing effectiveness of autonomous governance as opposed to probably increasing effectiveness of global governance
Linkages within global governance	Increasing importance of substantive and strategic linkages to economic and non-economic issue areas, independently of political linkage architecture
Depth of global governance	Shift towards positive integration and domestic regulation due to decreasing returns from shallow integration, new issues such as services, and demand for global governance that corrects markets and promotes good governance
Actor participation	New members enter the WTO, passive members become more active, and weak actors' participation turns more influential
Civil society involvement	More civil society involvement as civil society demands it, as it enhances the quality of decisions, as it improves the legitimacy of decision-making processes, and as it is self-reinforcing

Table 4 provides an overview of the key elements of the secondary trends, which are driven by the primary trends.

Table 4: Secondary trends

<i>Secondary trends</i>	<i>Key elements</i>
Number of actors	More actors, more active and influential participation More participation by civil society and other international institutions
Ideational heterogeneity	New issues in which ideational heterogeneity is substantial New actors and civil society raise degree and relevance of ideational heterogeneity Domestic institutions increase degree and relevance of ideational heterogeneity
Material heterogeneity	New issues in which material heterogeneity is substantial New actors increase degree and relevance of material heterogeneity
Governance autonomy	Deep integration limits actors' capabilities to adjust the effects of global governance to their heterogeneous needs
Scope of global governance	Problems pressing for broader use of global governance given increasing relative effectiveness of global governance
Uncertainty	Wider span of possible wealth effects Increasing depth and linkages make effects harder to predict
Value of having a good reputation	Greater value of the WTO Greater reputational spill-overs to other international institutions

Now we are prepared to move on to the analysis set out in the second part of the study. I begin with a discussion of ideational properties and learning in Chapter 4 and then turn to bargaining in Chapter 5 and to compliance in Chapter 6.

4 Ideational properties and learning

In order to assess how global governance structures affect actors' behavior, we need a theory on how actors make decisions. To this end, we first need to understand the spirit or logic by which actors are led in their decisions. This logic of decision-making determines how actors develop desirable courses of action. Broadly speaking, actors can employ two different logics to make a decision: a logic of consequences and a logic of appropriateness.

Pursuing the logic of consequences, actors behave strategically in order to maximize their utility as defined by their interests. These interests do not directly result from their immediate material needs, but actors construct their interests based on their material needs. Interests are, thus, determined by material factors *and* ideational properties.¹⁹⁷ This construction process is either internalized in readily applicable routines or it is involved in conscious searching for what is in one's best interest.¹⁹⁸ How actors construct their interests depends on how they interpret their material needs, how they perceive the situational constraints, how they causally link actions to outcomes, and how they appreciate their gains from cooperation in relation to the gains that accrue to other actors. This understanding corresponds to the everyday application of the term interest, which usually includes valuations, perceptions, causal beliefs, and perspectives on gains. If we say, for instance, that actors have an interest in liberalization or protectionism, we do not mean that actors derive utility from the act of changing tariffs but that they expect this action to bear fruits further down the road.

Instead of strategically pursuing their interests, actors can attempt to make right decisions, guided by norms. Norms are standards that prescribe appropriate behavior depending on the situation and the identity of the actor. If actors strive to behave normatively right, they follow the logic of appropriateness.¹⁹⁹ Two ideal types of the logic of appropriateness can be juxtaposed. Actors can follow internalized norms unconsciously if norms are taken completely for granted and if they directly prescribe a certain behavior.²⁰⁰ In this case, actors rely solely on norms and on their perception of the situation that triggers the corresponding norm. Alternatively, actors can reason what is normatively appropriate and search for the right behavior in a given situation. Risse (2000, 12) describes such collective truth searching, "Communication in truth-seeking discourses oriented toward reaching a reasoned consensus is not motivated by the players' desire to realize their individual preferences – be they egoistic or altruistic. Communication is motivated by the desire to find out the 'truth' with regard to facts in the world or to figure out 'the right thing to do' in a commonly defined situation." The quest can, thus, involve searching for appropriate norms, perceptions, and causal beliefs. This reflective

¹⁹⁷ See Goldstein and Keohane (1993), Haas (1992), Hall (1993), Hay and Rosamund (2002), Knodt and Jachtenfuchs (2002), Parsons (2002), Ruggie (1998), Snyder (2002), Wendt (1999) and Yee (1996).

¹⁹⁸ Wendt (1999, 126) summarizes this construction as "desire plus belief plus reason equals action."

¹⁹⁹ See Finnemore and Sikkink (1998) and March and Olsen (1998).

²⁰⁰ In the words of Fukuyama (1999, 184), "the norm has become an end in itself – one that is heavily invested with emotion." See Fukuyama (1999) also for an interdisciplinary overview of explanations why human beings have developed a disposition towards arational norm following.

ideal type of the logic of appropriateness has been labeled by Risse (2000) as *logic of arguing*. In the complex world of international politics, solving norm conflicts and normatively ranking the possible outcomes are not trivial undertakings.²⁰¹ For instance, norms connected to free trade and sovereignty reject trade bans for the protection of endangered species, whereas norms connected to the environment are supportive. Furthermore, norms often do not directly point to a course of action, so that the most effective way to achieve an appropriate outcome needs to be evaluated. For instance, it is not always certain that a complete ban on trade in endangered species will actually help protecting these species. In such a case where norms do not directly prescribe behavior but actors construct appropriate behavior in the first place, actors need causal beliefs, in addition to norms and perception of the state of the world. Realistically, intermediate forms between the ideal types of logic of appropriateness are to be expected. Actors consciously reflect on what the appropriate behavior is, while they take some norms, perceptions, and causal beliefs for granted.

For most decisions in the complex real world, actors, in addition, combine the logics of consequences and appropriateness. For instance, one option for behavior is excluded on normative grounds and the choice among the remaining two options is made with regard to both utilitarian consequences and normative appropriateness. Furthermore, the two logics are intertwined at an unconscious level as they influence perception. In particular, actors tend to interpret their normative obligations in a way that fits their interests.²⁰²

Whether actors make decisions according to the logic of consequences or the logic of appropriateness and attempt to behave normatively right, they base their decisions on material factors and ideational properties. Material factors refer to the world that exists outside and independently of the decision-makers' minds. Ideational properties exist inside the decision-makers' minds and influence how decision-makers think of the world. This distinction for the explanation of behavior is purely theoretical; both dimensions play a role in almost all decisions, and material factors and ideational properties are interdependent in their development. Note in particular that reality shapes and constrains our ideas about the material and social world in the long run. While many ideas about the world are possible, certain representations of the world fare better than others. Since the world does not presuppose any specific understanding, global governance structures can affect the ideas which actors hold. But their ideas have to remain within the limits set by reality, otherwise actors would fail.²⁰³

This chapter deals with the ideational properties of actors and explains how they develop under the influence of global governance structures and trends. The first section presents the fundamental ideational properties that shape behavioral decisions. These are values, norms, perception, causal beliefs, the perspective on relative versus absolute gains, and collective identity. The ideational properties play a different role depending on the logic which actors apply. The second section scrutinizes the circumstances under which interaction at the international level changes the ideational

²⁰¹ See Finnemore and Sikkink (1998), Risse (2000) and Wendt (1999, Ch. 3).

²⁰² See Herrmann and Shannon (2001).

²⁰³ This precludes exclusively ideational accounts that deny the relevance of material factors. See Wendt (1999, Ch. 2).

properties. Instead of ‘changes in the ideational properties of actors,’ I also simply speak of learning. The argument centers on deliberating as a special mode of communication, which is particularly conducive to learning. In the third section, I focus on norms as one type of ideational properties, explaining the influence of structures and trends on the legitimacy of norms.

4.1 Ideational properties

In the following section, I describe the ideational properties that determine behavior, and I argue that actors learn when interacting on the global level.

4.1.1 Values and norms

Values and norms are both concerned less with *what is* and more with *what is desirable*. I understand values as beliefs about what is valuable from a utilitarian perspective; values shape actors’ desires at the core of actors’ interests, which actors pursue with the logic of consequences. Wendt (1999, 123) relates, “Beliefs define and direct material needs. It is the *perception* of value in an object that constitutes the motive to pursue it, not some intrinsic biological imperative.”

Norms establish standards of desirable behavior under the logic of appropriateness. In the WTO, norms serve actors’ cooperation in distinct ways. Norms call for integrative bargaining which emphasizes the overall gains over distributional bickering. Furthermore, they require compliance with agreements and compel actors to conform to court rulings.²⁰⁴

Legitimacy is the feeling of obligation which a rule or international institution can invoke through the logic of appropriateness. The more legitimate a rule is, the stronger its compliance pull becomes. The more legitimate an organization is, the more normative weight the organization can lend to a rule it endorses.²⁰⁵ If norms become more legitimate in the process of learning, this suggests a gradual shift in the relative weight from the logic of consequences towards the logic of appropriateness.

The feeling of obligation does not directly correspond to ‘objective’ factors, such as democratic quality of the decision-making process or effectiveness of governance. Instead, legitimacy depends on the subjective perception of rules and international institutions by governments, negotiators, and domestic agents.²⁰⁶

²⁰⁴ Occasionally, scholars differentiate between constitutive and prescriptive/regulative norms. In a WTO context, a constitutive norm would say what a quota restriction on trade is, while a prescriptive norm would say that quotas are forbidden instruments of trade policy. I follow Wendt (1999, Ch. 4), who argues that most norms have constitutive and causal effects. Then, the discernment of a constitutive norm structure with constitutive effects from a prescriptive norm structure with causal power adds little analytic value.

²⁰⁵ See Franck (1990, 16), who defines legitimacy as “a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively.” See also the definition by Diehl, Ku and Zamora (2003, 52), who formulate, “Compliance pull is induced through legitimacy, which is powered by the quality of the rule or the rule-making institution.”

²⁰⁶ Hurd (1999, 381) emphasizes the subjective dimension when he defines legitimacy as the “normative belief by an actor that a rule or institution ought to be obeyed. It is a subjective quality, relational between actor and institution, and defined by the actor’s *perception* of the institution.” Horlick (2001, 259) speaks in this context of

4.1.2 Knowledge

When speaking of knowledge, I mean actors' perception of the state of the world and the causal beliefs which actors harbor about the functioning of the world. I have suggested that actors construct their interests and normative obligations in reference to their perception and their causal beliefs. For instance, liberalization and globalization are assessed in widely diverging representations across countries.²⁰⁷ Such different perceptions of the situation suggest different interests and call for different strategic responses under the logic of consequences. Under the logic of appropriateness, perception determines whether a certain situation fulfills the requirements for a norm to apply. For instance, actors first have to come to the conclusion that a domestic policy functions as an export subsidy before they consider countermeasures to be justified. Furthermore, if more than one norm applies, how actors perceive a situation is relevant to their ranking of norms. Causal beliefs, which link actions to expected outcomes, matter whenever actors pursue the logic of consequences. Causal beliefs matter also when actors consciously search for appropriate behavior.

Knowledge that shapes actors' behavior is largely socially constructed. Young (1999a, 206) takes discourses as the means by which actors form their beliefs, "*Discourses* are systems of thought that not only provide a way of framing and addressing problems and the behavioral complexes within which they are embedded but also contain normative perspectives on the importance of the problems and appropriate ways to resolve them." Discourses, thus, entail more than exchanging information. They are social processes generating explicit and implicit shared understanding. Social construction takes place primarily in domestic society.²⁰⁸ However, social construction also

"popular legitimacy". Accordingly, my presentation of legitimacy differs from philosophical accounts as espoused by Rawls (1972) and Höffe (1999). Though legitimacy is defined subjectively, it is not equivalent to the power which norms exert on governments to comply. The power of WTO norms rests also on domestic politics and institutions that shape how the government, society, bureaucracies, and courts – all influenced by WTO norms – interact in determining their national or regional policy towards the WTO. Furthermore, the reputational costs that defecting actors incur within international society and on global markets depend, aside for legitimacy, on the international political and economic system. Chapter 6 on compliance elaborates on these institutional factors.

²⁰⁷ See Hay and Rosamond (2002).

²⁰⁸ Goldstein (1989) gives an excellent example for the social construction of knowledge and the influence of knowledge on interest formulation. She shows how the discourse of U.S. economists and politicians in the 1930s can explain the diverging policy stances of the U.S. on agriculture and manufactures. Neither international structure, nor domestic interests, nor functional necessity can explain the different sectoral policies. Instead, expert advice which differed for policies on agriculture and manufactures was decisive for the choice of diverging policies. When the theoretical void between desirable export expansion and domestic market access was recognized, the U.S. followed strong recommendations by economists and, in 1934, undertook a radical policy shift towards liberalization of manufactured goods. On the contrary, economists' short-term recommendations for agriculture, a sector in which the U.S. was running a deficit, were mixed. Political discourse favored protectionism in agriculture, and by the time economists clearly recommended agricultural liberalization, protectionist policies were already entrenched and institutionalized.

occurs within the international society of states. Wendt (1999, 372) argues that “ideas held by individual states are given content or meaning by the ideas which they share with other states – that state *cognition* depends on states’ systemic *culture*.”

4.1.3 Relative versus absolute gains

How utilitarian actors perceive the gains of cooperation affects whether actors consider policy proposals sufficiently beneficial to agree to them and whether they consider agreements sufficiently beneficial to comply with them. Consequently, the perspective on gains matters for the effectiveness of global governance. I look at two aspects of the perspectives which actors adopt towards the gains from cooperation. In the next section, I deal with collective identity which delineates actors’ definition of Self; in this section, I discuss actors’ consideration of relative versus absolute gains. Either actors assess their own gains in absolute terms, independently of other actors’ gains from cooperation, or they adopt a positional stance and compare their (relative) gains to those that accrue to other actors. I reason about the respective significance of relative versus absolute gains in neo-realist and social identity theory, which both claim predominance of relative gains.

Neo-realists perceive states as dominant actors in world affairs and as rational unitary entities. According to neo-realists, actors’ behavior is dictated by the security dilemma in which actors are trapped at the international level. Under anarchy, states have to constantly worry about being attacked by other states. The current motives of other actors can be misinterpreted and other actors can strategically misrepresent their true intentions. Thus, actors can never be certain that seemingly peaceful actors do not harbor expansionist ambitions. Even more uncertain are future preferences which can change with domestic political processes. Though actors can influence the interests and identities of other actors through international interactions, domestic political processes predominate. Actors cannot be sure then that a security seeking state will not turn aggressive. Since relying on seemingly good intentions and domestic stability of other states could prove fatal, states are unwilling to take this risk. Instead, even non-aggressive states are compelled to care about their relative power positions in order to deter or fight aggressors. To the extent that gains from cooperation can be translated into military capabilities, actors are, therefore, concerned about relative gains.²⁰⁹

This neo-realist core proposition about the security dilemma under anarchy and the corresponding importance of relative gains needs modification on several accounts. Within a neo-realist framework, military technology, like nuclear weapons and a reconnaissance revolution, makes surprise attacks less threatening.²¹⁰ In addition, the value of conquered territory has fallen with current modes of production and destruction, while the costs of occupation have risen due to national consciousness.²¹¹ Finally, relative-gains problems appear to be of minor relevance empirically in the economic issue area and even more so in other issue areas, such as environmental protection, where it is hard to transform gains

²⁰⁹ See Copeland (2000), Grieco (1988), Mearsheimer (1995) and Waltz (1979).

²¹⁰ See Copeland (2000).

²¹¹ See Zacher (2001).

into military capabilities.²¹²

Wendt (1999) provides a constructivist critique of the security dilemma. He claims that different international cultures under anarchy are possible. Conflict is not an inherent feature of anarchy but the product of a certain culture among different, viable cultures of anarchy. Wendt distinguishes among three ideal types of anarchy. In a Hobbesian culture, actors resolve conflicts by force without restraint. In a Lockean culture, actors resort to violence in their conflicts but abstain from eliminating defeated opponents. Finally, actors ban in a Kantian culture violent conflict resolution. Importantly, even those actors who do not share the norms of a given international culture have rational incentives to conform to those norms, in order to avoid sanctions. Therefore, the system will remain peaceful, even if the motives of a limited number of actors are aggressive or turn aggressive in the future.

The liberal perspective, focused on the domestic level, suggests that the spread of democracy will make the international system more peaceful. Adjacent theories hold that the expansion of capitalism and the continuance at global economic integration also promote peace.²¹³

Moreover, Fearon (1998) shows that relative gains only pose a cooperation problem if actors cannot credibly refrain from abusing relative gains against cooperation partners. In addition, the relative gains problem presupposes a bargaining problem that prevents acceptable sharing. The better the structures of global governance are able to cope with bargaining and enforcement problems, the less relevant the relative-gains problem becomes.

These arguments ease, but do not completely remove, the risk that follows from less favorable power positions stemming from participation in global governance. Yet, actors appear willing to accept a minor risk and to tolerate relative losses in exchange for absolute gains.

Social identity theory offers a second argument for the significance of relative gains. Groups surprisingly display competitive behavior in situations where no threat to security looms. This finding applies even to ‘minimal groups.’ These are groups whose members share nothing systematically in common, apart from membership in the group. Hence, the group shares no culture that could give meaning to membership and demand competitive behavior towards other groups. Social identity theory explains such inherent group competitiveness in social psychological terms. Actors are seen to seek positive self-identity, which benefits from favorable comparison of the own group with other groups. This suggests that actors, who are more densely socialized than minimal groups, behave at least as competitively.²¹⁴

Empirical studies on the significance of relative versus absolute gains are scarce and contradictory.²¹⁵ The behavior of individuals and groups is mostly studied in experiments as inferences from field observations on the perspectives on gains are difficult. What has been revealed is that actors apply complex combinations of absolute and relative gain considerations, contingent on situational factors.

²¹² See Rousseau (2002).

²¹³ See Höffe (1999, Ch. 8 and 9), MacMillan (1998), Owen (1998) and Zacher (2001). Sceptical views on the liberal peace theory are espoused by Layne (1998) and Mansfield and Snyder (1998).

²¹⁴ See Mercer (1995).

²¹⁵ See Rousseau (2002).

Cross-cultural variation exists, albeit to a limited degree.²¹⁶

The theoretical debate on relative versus absolute gains, as well as the empirical findings, suggests two conclusions. First, actors pursue relative and absolute gains. Their respective weights depend on many circumstances; in the WTO, relative gains are at least not the domineering concern. Secondly, the importance that actors assign to relative and absolute gains is partly a question of culture. Actors can be conditioned by culture to focus on absolute gains, and a prevalent culture of cooperation increases the weight rational actors give to absolute gains. International interaction can, thus, change how actors evaluate gains, and there is reason to expect that cooperative, deliberative interaction shifts the focus towards absolute gains.

4.1.4 Collective identity

Collective identity exists if an actor identifies herself with another actor so that the distinction between Self and Other partly or entirely blurs.²¹⁷ The most important effect of collective identity formation is the change of the perspective on gains among those actors sharing a collective identity. Actors include the gains that accrue to those actors with whom they share a collective identity, as if they accrued to them individually.²¹⁸ Attitudes towards actors outside the collective identity are not necessarily affected; accordingly, actors sharing a collective identity may behave competitively towards outsiders and maximize relative gains. A second effect of collective identity is its transformation of perceptions and expectations concerning the behavior of other actors. Actors who share a collective identity hold more optimistic views of one another and of the opportunities for cooperation.²¹⁹

Collective identity formation is seen as a gradual process requiring diffuse reciprocity and mutual understanding. Actors led by a sense of diffuse reciprocity do not expect equal rewards at every bargain and do not renege at every possibility. Instead, they rely on the stability and overall distributional fairness of cooperation. They are convinced that the long-term benefits of generous and frank cooperative behavior outweigh the short-term gains from bickering, deceiving, and cheating.²²⁰ The sense of diffuse reciprocity is stimulated if collective results can only be attained when the interests of the others are heeded, as if they were part of one's own interests. In such cases, diffuse reciprocity enables more beneficial cooperation and, thus, is rational from a long-term perspective.²²¹ Therefore, rational, long-term oriented cooperative behavior tends to, with the passage of time, receive backing by norms calling for diffuse reciprocity and mutual responsiveness. By and by, the rational motives underlying diffuse reciprocity fade in favor of a genuine sense of reciprocal commitment.

²¹⁶ See Mercer (1995) and Rousseau (2002).

²¹⁷ See Wendt (1999, Ch. 5).

²¹⁸ Indeed, Finger, Reincke and Castro (1999) report from the Uruguay Round that delegations were significantly motivated by collective gains, even for a global collective.

²¹⁹ See Hemmer and Katzenstein (2002), who show how a feeling of collective identity or absence thereof shaped U.S. security policy differently in Europe and Asia after World War II.

²²⁰ See Fukuyama (1999), Lewis (1998) and Ruggie (1992).

²²¹ Lewis (1998, 499) speaks of "collective rationality which transcends individual, instrumental rationality."

To see how the behavior, beliefs, and norms associated with diffuse reciprocity are a stepping stone towards collective identity formation, let us look at two actors, Ego and Alter. If Ego assists Alter only if she expects a direct reward, Ego's assistance will not affect her definition of Self. Yet, if Ego assists Alter because she believes in the long-term value of their cooperative endeavor and feels a sense of commitment to stick to her partner, and if all this becomes a habit rather than a conscious consideration at each instance, then collective identity can arise. This process is likely to be reinforced by corresponding role casting from Alter's side. Responding to Ego's friendly behavior, Alter comes to treat Ego as if Ego shared a collective identity with Alter. This inclines Ego to actually adopt this role and, eventually, the corresponding collective identity.²²²

Mutual understanding is beneficial to the emergence of diffuse reciprocity. Actors need knowledge about other actors, in order to understand each other's behavior. Only then are role casting and role taking likely to develop into collective identity. Otherwise, this process boils down to "ethnocentric projection".²²³ Moreover, mutual understanding enables actors to discern strategic pretenses from domestic obstacles to cooperation, which actors adduce to justify the need for consideration. With sufficient mutual understanding, actors can accept justified, temporary, asymmetric distributions of benefits and maintain a sense of control.

Interaction at the international level is the place where role casting and role taking occurs, where diffuse reciprocity can evolve, and where mutual understanding is fostered. Deliberation as a mode of discourse aims at fairness based on generalized principles. As Ruggie (1992) notes, this promotes diffuse reciprocity. Druckman (2001, 283) also considers deliberation to induce collective identity formation, "Intense problem-solving activities may lead to a sharing of identities as the parties progress through stages of awareness, acceptance, identification of similarities (and differences), and shared identity."

Furthermore, judicial delegation and legal discourse have a distinctive influence on collective identity formation. Since we will see that actors face growing difficulties in discerning between justified and unjustified accounts for defections, judicial delegation furthers mutual understanding by empowering courts to verify motives behind defections. Concerning legal discourse, Verweij and Josling (2003, 10) suggest, "The continuous attempts to justify one's position, and convince others thereof, also encourages mutual understanding." Therefore, deliberating in general, which strives for mutual understanding, and legal discourse in particular, which requires justification, contribute to collective identity formation.

4.2 Deliberating

So far, I have presented actors' ideational properties, I have shown which role they play in decision-making, and I have argued that their formation partly depends on interaction on the international level. Now I look at deliberating as a particular mode of communicative interaction. According to Verweij and Josling (2003, 10), we can understand "deliberation as decision-making based on a search for

²²² See Wendt (1999, Ch. 7).

²²³ Mercer (1995, 249).

consensus among all those who have a distinct opinion on the issue at hand, rather than by using force, voting, or bargaining.”

When deliberating, actors challenge the ‘validity claims’ involved in communication. They do not take and accept their identities from social structure, but actively and consciously construct their identities.²²⁴ Through recurrent deliberating, actors instead establish social structure in a “process by which agent action becomes social structure, ideas become norms, and the subjective becomes the intersubjective.”²²⁵

Deliberating implies that both sides are willing to change their attitudes. Alternatively, one party may attempt to consciously alter ideational properties of another party without changing its own ideas.²²⁶ If actors engage in communication with strategic motives, they can all nevertheless learn and advance to genuine deliberating.

In the following, I first show that substantial deliberating and learning arise on the international level, and then I ask how trends and structures affect deliberating. Afterwards, I look at the link between negotiators, who are primarily involved in negotiations and, correspondingly, learn most, and governments, who set negotiating mandates and control negotiating outcomes.

In explaining the prevalence of deliberating and learning, I ignore interaction effects. These interaction effects can occur between different ideational properties. For instance, knowledge or worldviews affect the legitimacy of norms and institutions.²²⁷ Interaction effects can also arise between ideational properties and learning processes which concern other ideational properties. For instance, legitimacy on its part influences learning.²²⁸ In their desire to conform to the surrounding group, actors are inclined to adopt widely-held ideational properties. The more legitimate the WTO is, the more willing actors are to adopt ideas which are widely promoted in the WTO. In particular, actors are more open to persuasion if they perceive the process of interaction as legitimate.²²⁹ Furthermore, collective identity makes deliberating and learning more likely. Egeberg (1999, 471) points at the difference collective identity can make for learning, “A considerable degree of collective responsibility may be reflected in the overall willingness of participants to move and reformulate their positions during and subsequent to meetings.” I do not trace these interdependencies but assume that deliberating fosters learning in all ideational properties in a mutually reinforcing process.

²²⁴ See Habermas (1998b) and Risse (2000).

²²⁵ Finnemore and Sikkink (1998, 914).

²²⁶ See Finnemore and Sikkink (1998) and Payne (2001) on strategic framing and persuasion.

²²⁷ See Hall (1997), who shows how the spiritual legitimacy of the medieval church depended on a religious worldview. Indeed, the relationships between ideational properties are so rich that many different categorizations can be adopted. Goldstein and Keohane (1993, 8), for instance, discern between causal beliefs, principled beliefs, and world views, which are “embedded in the symbolism of a culture and deeply affect modes of thought and discourse. They are not purely normative, since they include views about cosmology and ontology, as well as about ethics. Nevertheless, world views are entwined with people’s conceptions of their identities, evoking deep emotions and loyalties.” This definition manifests the kinship between knowledge and norms.

²²⁸ See Checkel (2001).

²²⁹ See Kohler-Koch and Edler (1998).

4.2.1 Deliberating and learning on the international level

Despite all mutual reinforcement, learning on the international level faces limitations. Generally, ideational properties are resilient to change. According to Lepgold and Lamborn (2001, 19), this stability arises as “cognitive and affective processes usually work to keep people’s beliefs and expectations stable ... Because actors rarely realize their biases in noticing and interpreting information, their beliefs tend to grow stronger over time as new evidence seems only to confirm them.”

If ideational properties change at all, then this is more likely caused by domestic level factors than through international processes. Individual agents receive stronger incentives from the domestic level and socialization is thicker at the domestic level. Therefore, priors that stem from domestic socialization limit learning at the international level.²³⁰

Learning is particularly difficult if actors do not share basic ideas. Basic ideas channel communication by connecting certain ideas and making them more or less appealing. Additionally, basic ideas provide standards for assessing statements and establishing intersubjective meaning.²³¹ On the international level, actors have only a limited supply of basic ideas in common, upon which they can build more sophisticated or tailored shared understanding.

Nevertheless, empirical research indicates considerable learning processes at the international level. Sjöstedt (1994) reports learning among actors of the Uruguay Round, especially in the early negotiating stages when actors attempt to develop a common understanding to make issues ‘negotiable.’ In later stages, when informal drafts were consolidated into official documents, conflict-prone bargaining gained the upper hand. Ford (2002) finds that developing countries changed their role fundamentally during the Uruguay Round. They moved from a protectionist role in opposition to developed countries towards the role of liberalizers. Based on this new mindset, they pressured developed countries to open markets based on liberal norms, and they criticized TRIPs, environmental and social standards, as well as immigration restrictions, for inhibiting trade.

Despite accounts that relate numerous instances of learning in the WTO, the importance of learning must not be overestimated. While providing a major example for learning, interpretation of the Uruguay Round negotiations demonstrates the difficulties in proving that learning matters. Ideational accounts always compete with explanations based on material incentives. In the case of the Uruguay Round, the debt crisis, looming American protectionism, or new trade patterns may have changed developing countries incentives.²³² Furthermore, some negotiations are clearly not deliberative, even in

²³⁰ Egeberg (1999, 461) warns against overestimating the degree of collective identity formation among negotiators as “national officials *cannot* be expected to shift their loyalties profoundly from a national to a supranational level ... Most obligations, expectations, information networks, incentives and sanctions are connected to the institutions that employ them nationally.” See also Checkel (2003), Hooghe (1999), Jachtenfuchs (2002), Legro (1997) and Wendt (1999).

²³¹ See Yee (1996).

²³² Ford (2002) makes this concession herself. For a critical position concerning learning in the Uruguay Round, see Steinberg (2002).

small settings and in early stages of negotiations removed from final treaty-making. For instance, Shaffer (2001, 35) finds “mercantilist” bargaining dominant in the negotiations of the WTO Committee on Trade and Environment.

Studies from other international institutions support the relevance of learning triggered by interaction at the international level. These studies stress the importance of civil society involvement for learning, as opponents and partners of actors.²³³ Extensive research that has been conducted on learning in the context of the EU also indicates considerable learning. According to Egeberg (1999, 467), forty-five percent out of forty-seven officials in EU Commission committees on the road and rail sector state that positions are often “modified or altered during, or subsequent to, meetings”. Checkel (2003) reports committee deliberation about even highly divisive issues and despite apparent tensions. In the course of EU biotechnology regulation, Skogstad (2002) observes learning through deliberation in informal networks comprised of representatives from civil society, companies, governments, and the EU, despite massive divergence of their initial objectives. Eriksen and Fossum (2000b, 258) see integration through deliberation even as a marked feature of the present-day EU, which is “less the manifestation of a particular conception of governance and more of a meeting ground in which different conceptions of democracy and justice are discussed and assessed.” Nevertheless, deliberation is limited even in the relatively dense European society. Pollack (2003), for instance, finds few deliberations even in those committees where deliberation should be expected most.

Taking this evidence from the WTO, other international institutions, and the EU together, we receive a mixed picture. Deliberating and learning at the international level is less pronounced than in domestic societies; yet, significant deliberating and learning does occur. Furthermore, the degree of deliberating and learning varies according to factors that correspond to the trends and structures identified in this study.

4.2.2 Effects of trends on learning

The effects which the trends exert on learning are ambivalent. The increasing heterogeneity of knowledge and cognitive complexity of issues inhibit learning; the broader the differences in perceptions and causal beliefs and the more difficult it is to bring them more into line, the less common ground exists to endeavor reconciling diverging values and norms.²³⁴ Growing normativity and increasing heterogeneity of values and norms make learning more difficult as progress is stalled by broad disagreements.²³⁵ As policy proposals for deep and linked global governance have to be internally consistent in order to be efficient, gradual convergence, which is relatively easy to accept for

²³³ On human rights, see Risse, Jentschke and Schmitz (2002). On the environment, see Clark (2000) and Young (1999b). For a generalized model of ideational change involving norm entrepreneurs from civil society, see Finnemore and Sikkink (1998).

²³⁴ As an example, one might think of scientific disagreement about environmental destruction, such as climate warming, inhibiting serious deliberation about sustainable consumption patterns.

²³⁵ Druckman (2001, 282) observes that, “Polarized values increase the intensity of conflicts over interests which, if not resolved, serve to further polarize the values.”

actors, becomes less feasible.²³⁶ Finally, increasing transparency impedes learning as individuals are more ready to change beliefs in settings that are protected from public scrutiny.²³⁷

Other trends further deliberative learning. Civil society is active in framing deliberations and changing ideational properties of actors.²³⁸ Especially civil society's universal perspective, expertise, and value-synthesizing capacities are deemed conducive to intercultural learning. Brown et al. (2000, 20) conclude that, "The construction of shared international values and norms is central to the creation of a global culture, and international NGOs can be important catalysts for constructing parameters that shape meaning and interpretations in the shrinking world."

Furthermore, uncertainty about distributional and efficiency properties of policy proposals makes actors more willing to engage in deliberating.²³⁹ Actors also involve experts more readily in complex negotiations where uncertainty is high.²⁴⁰ This promotes further deliberation as experts tend towards this mode of interaction.²⁴¹

4.2.3 Effects of structure on deliberating

Research about the role of ideas in international politics focuses on demonstrating that ideas affect outcomes and on explaining how ideas can acquire causal significance. A second research topic asks how social processes, such as deliberating, change ideas. However, deliberation does not take place in an institutional vacuum, but hinges on the structural background within which deliberative processes unfold.²⁴² This relationship between structures and learning processes has been less thoroughly researched.²⁴³ Nevertheless, we can make three cases on how global governance structures impact deliberation. The number of actors involved in negotiations and the decision-making design governing those negotiations directly affect deliberating. Furthermore, legal discourse in dispute settlement, which is influenced by judicial delegation and precision, supports deliberations.

Number of actors

Deliberation is more likely to occur with few actors involved. A face-to-face discussion is personally more involving than a series of statements made to a large audience. With many actors, a large share of communication is redundant and frequently devoted to protocol and ceremony, and the

²³⁶ On the requirement of internal consistency, see section 5.3.2.

²³⁷ See Checkel (2001) and Checkel (2003).

²³⁸ See Arts (2003), Brown et al. (2000), Finnemore and Sikkink (1998), Price (1998) and Risse (2000).

²³⁹ See Risse (2000).

²⁴⁰ See Zürn (2002, 232). Haas (1992, 16) notes, "In less politically motivated cases, epistemic communities have a greater hand in the various stages of the policymaking process".

²⁴¹ See Checkel (2003) and Pollack (2003).

²⁴² Finnemore and Sikkink (1998, 905) suggest that "procedural changes that create new political processes can lead to gradual and inadvertent normative, ideational, and political convergence." See also Habermas (1998b), Kohler-Koch and Edler (1998) and Schmalz-Bruns (2002).

²⁴³ See Haas (2000, 64), who urges, "Further research is called for to combine institutional and constructivist analysis to better understand how institutional design can enhance learning".

manageability of conferences may become intractable.²⁴⁴ Furthermore, if fewer persons are involved, personal relationships tend to be more lasting and in-depth, allowing friendships to develop, reputations of impartiality and expertise to strengthen, and trust to grow.²⁴⁵

In addition to deliberating, the mechanism of role taking and role casting, as a further process of learning, works more powerfully with small numbers. I have argued that if society casts an actor in a certain role – for instance, as if she was genuinely complying with norms or as if she was furthering the common interest – she is induced to adopt that role. For large numbers, actors are likely to receive weaker and more contradictory signals that cast them into certain roles. Their role taking efforts may go unnoticed by a share of international society. As social interaction becomes less dense, actors' roles become less important and less pronounced and international society becomes more anonymous.

A likely disadvantage accompanying regionalization and smaller numbers of actors is that a greater share of actors is likely to have a stake in each dispute over existing agreements or disputed aspects of agreement-creating negotiations. Actors who are unaffected or have only a minor interest in a debate form an impartial audience that can sort out the legitimacy of competing normative claims and that is more open to persuasion.²⁴⁶ Comparing this disadvantage with the positive effects of enhanced communication and role casting, smaller numbers of actors appear to contribute to deliberating.

Decision-making design

Deliberating can be a distressing process. Kohler-Koch and Edler (1998), for instance, trace how norms, interests, and causal beliefs changed in the course of European negotiations aimed at the establishment of a joint research and development policy. Governmental research and development policy were traditionally imbued with an egoistic and competitive mentality that inhibited effective cooperation. Reframing the issue of research and development policy and reaching consensus on an innovative agreement necessitated a time-consuming, laborious, deliberative process.

Consensus voting forces actors to take on these efforts if they want to come to an agreement, whereas majority voting makes decision-making after briefer discussion possible. Though actors still have an incentive to reach a consensus, they do not need to convince everybody. Hence, the spirit of interaction is likely to be less deliberative under majority voting.

4.2.4 Legal discourse

Deliberation within the heterogeneous international society is naturally a form of intercultural discourse. My first task, thus, is to show that legal discourse provides an effective language for intercultural discourse. I then propose that legal discourse entails certain characteristics that dispose it

²⁴⁴ See Leigh-Phippard (1999).

²⁴⁵ See Checkel (2001), Checkel (2003), Joerges and Neyer (1998) and Wendt (1999, Ch. 7). Indeed, Sjöstedt (1994) reports instances of learning in the Uruguay Round particularly from informal, small-group consultations, whereas formal meetings among 100-odd actors with formal position papers produced little change in established positions.

²⁴⁶ See Fisher, Schneider, Borgwardt and Ganson (1997, Ch. 15) and Keohane (2001).

towards deliberation. In a third step, I reason which global governance structures favor legal discourse. At last, I point out that the practice and effects of deliberating in disputes about existing agreements spill over into agreement-creating negotiations.

Law as language appropriate for intercultural communication

Whether law is appropriate for intercultural discourse can be assessed based on its communicative performance, as well as from a critical perspective. Considering its communicative function, law stands out as the only globally valid language for negotiating international agreements, based on a rich set of rules and principles that can readily serve as common framework.²⁴⁷ The definition of discourse as “systematic statements linked to social practices,”²⁴⁸ points to a further strength of law in facilitating intercultural discourse. Legal discourse is particularly clearly and closely associated with a set of stable and well-defined practices. If an actor claims to have a right, she has to engage in a well-delineated practice of claiming this right at court. This sets law apart from indirect, subtle, even tacit forms of communication, as well as from high-rising, idealistic rhetoric that is not anchored in social reality.

The critical perspective lays stress on the crucial lesson from history that discursive structures must “eschew ethnocentrism and overcome cultural barriers, combining diverse, participating entities into a single, unified whole.”²⁴⁹ Kennedy (1997, 568) appraises international law as “universal, in the sense that it has no *particular* culture of its own and can remain agnostic as between cultures.” Yet, the appropriateness of legal discourse as polycultural language is subject to debate.

Against the criticism that international law is imbued with Western culture, I bring forward three arguments, claiming that the basic structure of law is shaped rather by efficiency needs than by any particular culture, that whatever cultural imprint exists in international law is benign, and that law is indeterminate, stimulating increasingly universalist evolution of its specificities.

First, the procedures, principles, and discourses of international law are tailored more to efficiency needs than to the interests of powerful actors.²⁵⁰ Though the efficiency of law, as of all institutions, depends on the cultural context, this still suggests that efficiency properties have considerable weight also in comparison with cultural forces.

Secondly, while legalization is not entirely independent of and indifferent towards particular cultures, Kennedy (1997) and Koskeniemi (1990) rightly note that this cultural heritage is bound to universalist, instead of particularistic ambitions. In other words, the European foot-print in international law is that of cosmopolitan Enlightenment and not that of ethnocentric nationalism.

From a dynamic perspective, the specificities of international law are, thirdly, a product of continuous evolution within the legal framework. Since this evolution is shaped by legal discourse disposed

²⁴⁷ See Onuma (2003).

²⁴⁸ Yee (1996, 99).

²⁴⁹ Cohen (1999, 13).

²⁵⁰ Byers (1999) shows that this applies even to customary law, which is the primary suspect for reflecting power constellations because it reflects state practice.

towards deliberating, the evolution of international law is directed by the better argument.²⁵¹ This makes legal discourse unsuspecting for criticism of rigid, power-based, cultural imposition.

More problematic than the particular specification of law are the tensions that arise from law inherently as mode of interaction. For instance, law as a candid and confrontational language may conflict with cultures that practice consensus-oriented communication and shun open controversy and loss of face.²⁵² Additionally, law as a generalized, principled language may contradict cultures that emphasize in-group ties, such as family and clan loyalty. The spread of the rule of law as a domestic governance device, as well as cultural changes in traditional societies furthered by globalization, appear to weaken cultural inclinations opposed to legalization of global governance.

All in all, I do not consent to Bull (1977, 142), who concludes, “That modern international society includes international law as one of its institutions is a consequence of the historical accident that it evolved out of a previous unitary system, Western Christendom, and that in this system notions of law – embodied in Roman law, divine law, canon law and natural law – were pre-eminent.” Nor do I agree with Bull’s notion that “moral rules or supernatural rules” could equally well be the cornerstone for providing international order. Rather, I consent to Koskenniemi (1990, 4) who believes that in our world of sovereign nation states “the Rule of Law seems indeed the sole thinkable principle of organization – short of a *bellum omnium*.” Legal discourse is an appropriate approach for intercultural discourse in global governance – not without its disadvantages, but with the potential to grow into an ever more polycultural, universal language.

Law as language disposed towards deliberating

Based on their review of legal scholarship about international relations, Slaughter, Tulumello and Wood (1998, 381) conclude that “the processes of persuasion and justification on the basis of norms play a *constitutive* role in the formation of actors’ identities and interests and in the structure of the

²⁵¹ Critical legal studies point out that international law is indeterminate in principle and that its concreteness in solving disputes bases on (hidden) political judgments. See Barker (2001) and Koskenniemi (1990). To the extent that legal discourse is indeed indeterminate, political deliberation can improve upon the concrete specification of international law towards a genuinely universal law. One might counter that deliberation is a Western concept as well. See Cohen (1997) on alternative negotiating styles. However, the core characteristics of deliberation can be inferred from abstract, ethical philosophy, which suggests transcultural validity. Whatever ethnocentric share remains is marginal when compared to the functional necessity of deliberating for effective and legitimate global governance.

²⁵² Cohen (1999, 15) notes that such a culture has evolved within ASEAN, and he warns, “Confrontation between consensual and adversarial modes may be a recipe for abrasion and misunderstanding. The botched handling of the negotiations between Britain and China over the future of Hong Kong, perennial US-Chinese and Australian-Malaysian diplomatic friction, and brutal and often counter-productive US-Japanese trade negotiations are cases in point.” And Ostry (2001, 373) warns that China is “a country that has not adopted the Western concept of law based on individual rights. Separation of powers is an alien idea; there is no independent judiciary. The Chinese concept of rule by law rather than rule of law is deeply embedded in thousands of years of history, in a tradition far older than Western legal tradition.”

international system itself. On a deeper level, this approach rejects a simple law/power dichotomy, arguing instead that legal rules and norms operate by changing interests and thus reshaping the purposes for which power is exercised.”

How legalization achieves these ideational changes can be explained by three broad characteristics that dispose legal discourse towards deliberating.²⁵³ First, legal discourse stimulates rhetorical competition in disputes. Secondly, legal discourse warrants fairness, participation, and stability in discursive relations as a background condition for turning rhetorical competition into deliberation. Thirdly, the move towards deliberation is further promoted by the specific ground rules of legal discourse. Abbott and Snidal (2000, 429) elaborate the specificities of legal discourse, “Legalization entails a specific form of discourse, requiring justification and persuasion in terms of applicable rules and pertinent facts, and emphasizing factors such as text, precedents, analogies, and practice. Legal discourse largely disqualifies arguments based solely on interests and preferences.” Neyer (2002, 14) emphasizes the normative criteria and normative hierarchy legalization provides, “Legalisation is a necessary instrument to structure the discourse and to provide normative criteria against which preferences can be assessed.”, and deliberation “necessitates from governments and societies alike to accept that their preferences are not intrinsically legitimate – even if they are the products of domestic democratic procedures. Deliberation relies on a well-established normative hierarchy. Although deliberation is unlikely to happen under conditions of material hierarchy, which is when an actor commands the resources to act as benevolent or coercive hegemon, a legal or normative hierarchy is a necessary condition.” Fisher et al. (1997) also appraise the benefits of principled solutions based on impartial criteria.

In summary, legal discourse prescribes that actors have to compete, that they have to compete under fair and stable general conditions, and that they have to observe particular rules of rhetorical competition.

When we perceive the essence of legal discourse in these competitive terms, we notice tensions between legal discourse and collective truth searching, which is an undertaking that requires good-will and trust. Legal discourse is part of a broader legal culture. As Weiler (2001, 339) observes, “Juridification is a package deal. It includes the rule of law and the rule of lawyers. It does not affect only the power relations between members, the compliance pull of the agreements, the ability to settle disputes definitively, and the prospect of authoritative interpretations of opaque provisions. It imports the norms, practices, and habits ... of legal culture.” Weiler directs attention to the adversarial nature of this legal culture. Lawyers become more central and push towards litigation. Once a panel has been established, the chances for compromise dwindle as actors want to fight it out. A case is no longer settled, but won or lost. The result can be rulings that create tensions instead of compromises.

Whether legalized dispute settlement renders interaction more or less conflict-prone depends largely on the diplomatic culture it replaces. Legal culture has relatively clear implications compared with diplomatic culture, which varies more broadly. If diplomatic culture means hard-nosed, power-based

²⁵³ My argument builds on Abbott and Snidal (2000), Abbott et al. (2000), Habermas (1998c, Ch. 5), Joerges and Neyer (1998), Neyer (2002), Onuma (2003) and Risse (2000).

bargaining, legalization is clearly an improvement. On the other hand, diplomatic culture can be inspired by a sense of common fate and a shared vision. In this case, legal culture that tolerates the exploitation of law for individual advantage leads to inferior results.

The claim that legal discourse generally improves learning can be based on three arguments. First, the adversarial aspects of legal discourse must not be overrated. Actors have an interest in long-term socialization of other actors to reduce norm conflict and strengthen the legitimacy of global governance.²⁵⁴ Even if actors are initially not inclined to learn and engage in purely rhetorical action, discourses may evolve into genuine reasoning.²⁵⁵ Secondly, experience shows that diplomatic culture in global governance is rather conflict-prone when it comes to important and disputed matters. When we look at legal discourse, we automatically witness disputed cases, and the whole conflict is revealed openly. Amicable impressions of diplomatic culture are often invoked by conciliatory speeches on consensual issues, whereas conflicts are fought out behind closed doors. Thirdly, if a serious interest in collective well-being dominates, diplomatic culture may be better equipped to fully exploit this lucky condition. But legal discourse does not need to be a strait jacket that binds actors to legal form and culture if they agree to settle a conflict diplomatically.

Effects of structure on legal discourse

The main prerequisite for legal discourse is judicial delegation. Courts offer the stage for legal discourse where they instigate rhetorical competition by rewarding the better argument, and they administer and refine the rules of rhetorical engagement. Furthermore, precise agreements offer more and clearer rules upon which actors can base their legal claims, while they leave less space for power-based dispute settlement. Finally, those structures that weaken the power of threats and achieve strong enforcement capacity support legal discourse. By leveling the playing field, they firstly create a less hierarchical negotiating situation conducive to deliberation. By impeding power-based bargaining, they secondly make deliberation as alternative negotiating approach more attractive. Thirdly, if external pressure forces resistant actors to submit to legal discourse, even reluctant participation can engender learning.²⁵⁶

Spill-over effects of legal discourse into negotiations

Actors negotiate when creating new agreements and they negotiate if disputes over existing agreements occur. Dispute-related negotiations not only shape the meaning of agreements but also set directions for future agreement-creating bargaining. If an actor changes the opinion of another actor who holds opposing ideas in the process of a legal dispute, the learning will then carry over to multilateral negotiations and may influence additional actors beyond the parties to the initial dispute. Moreover, learning may occur after a ruling has been implemented if the defeated party realizes that

²⁵⁴ See Schimmelpfennig (2000).

²⁵⁵ Risse, Jetschke and Schmitz (2002) show in a number of case studies how even adversarial, strategic communication in human rights discourses moves gradually towards deliberating. See also Börzel and Risse (2002) and Risse (2000).

²⁵⁶ See Koh (1997).

its concerns had been exaggerated. Rulings can force actors to make experiences with policies they resent to; rulings provide a rationale for adopting disliked policies and they pave the way for changing one's point of view without loss of face because acceptance of court rulings can be better justified at home than defeat by other actors in negotiations.

This means that learning that arises in dispute settlement is valuable for existing agreements and for the creation of new agreements. In addition, deliberating as a mode of interaction itself may spill-over to agreement-creating negotiations. Deliberating is not what actors expect and it is a demanding form of communication for which people are not prepared. Fisher et al. (1997, Ch. 10) consider this as the main reason why deliberating as a superior form of conflict resolution is not more wide-spread. Actors who have practiced legal reasoning may be better able to deliberate in negotiations. That legal discourse can assist in training people for the art of deliberating is pointedly reflected in the following advice Fisher et al. (1997, 139) give to negotiators, "See negotiations as a joint search for a principled solution (as with two judges seeking a basis for a joint decision)."

A second reason to expect that legal discourse carries over to general negotiations is that actors, domestic audiences, and civil society come to expect deliberating. The more deliberation is practiced, the more despised power-based bargaining and unwillingness to learn becomes.

Thirdly, actors anticipate that a current agreement will later be the basis of legal disputes. The anticipation of legal disputes provides incentives for actors to develop agreements in deliberations. Incoherent agreements that clearly reflect power-based bargaining undermine the legitimacy of courts that have to apply such agreements. Recurrent, reasoned application of such agreements also reflects badly on those actors whose arm-twisting lead to awkward rules.²⁵⁷ Thus, actors have a systemic and a reputational interest in deliberating.

Hence, learning as the result of legal discourse and deliberating as negotiating style stimulated by legal discourse carry over to agreement-creating negotiations. In addition, legal discourse entices actors to develop their negotiating positions in a way that reduces actors' ideational heterogeneity. Since courts expect actors to base justifications of their behavior on scientific knowledge, actors have to take scientific evidence into account – either in order to defend themselves in front of the court or in order to avoid litigation proactively. If actors work with this evidence and engage scientists to formulate their policies, then they are likely to adopt a share of the perceptions and causal beliefs espoused by the international scientific community.

4.2.5 Negotiators and governments

We have seen that the structure of negotiation and enforcement processes can elicit deliberating and learning. Small numbers of actors and consensual decision-making design promote deliberating in (agreement-creating) negotiations. Legal discourse engenders deliberation in dispute settlement, which spills over into (agreement-creating) negotiations. So far, the argument has implicitly attributed learning only to negotiators as those persons directly involved in global governance processes. What

²⁵⁷ One might think of the TRIPs agreement, created under massive U.S. pressure and damaging U.S. reputation, as illustration.

remains to be demonstrated is that it makes a difference for the effectiveness of global governance when negotiators learn.

The importance of negotiators rests on two factors. They enjoy a degree of discretion within their negotiating mandate and they influence the mandate they receive. Governments grant discretion to negotiators mostly for efficiency purposes. To understand negotiators' influence in shaping their mandate, we have to recall that deliberating is particularly likely to occur and to succeed in situations where identities and interests are not yet strongly established.²⁵⁸ In international negotiations, this is frequently the case because heterogeneous interests have to be aggregated into a national position with a long-term perspective. Since day-to-day, foreign politics contribute little to defining national positions, international negotiations serve as instances for interest formation.²⁵⁹ Negotiators with their expert knowledge about the international sphere can affect how the national interest is defined and how their negotiating instructions are formulated ahead of negotiations.²⁶⁰

Since negotiators prefer playing a constructive role in negotiations for social and professional reasons, they are motivated to change the ideational properties of governments towards cooperation in negotiations and towards compliance with agreements.²⁶¹ Sharing more collective identity and more commitment in reaching agreements than national political leaders, negotiators at times even cooperate in order to produce more cooperative mandates.²⁶² Occasionally, negotiators also overstrain their mandate with the hope that their governments will not overturn their unauthorized commitments.²⁶³

Given the important role negotiators assume, diminishing discretion for negotiators and their decreasing ability to influence their negotiating mandates constitute a trend that hinders learning. Keohane and Nye (2001, 5) see the "club model of multilateral cooperation" coming to an end, which isolated the trade ministry from involvement by other ministries and the general public and immunized agreements from disaggregation. Esty (2002, 12) consents that "the closed-door style of negotiations that lies at the heart of the Club Model is no longer workable."

Similarly, Petersmann (2001, 27) notices that the "special 'fast-track legislation' facilitating reciprocal tariff liberalization agreements in GATT and their speedy incorporation into national implementing legislation" are not suited to new deep-integration issues. The first reason he gives is that the welfare and legitimacy enhancing function of GATT to restrain policy makers in pursuing special interests becomes less salient with deep integration. The second reason is that the parliamentary ratification of increasingly comprehensive and intrusive agreements, proceeding under time pressure and without real choice, develops into a "democratic nightmare". Furthermore, we have seen in Chapter 3 how increasing relative effectiveness, scope, and depth of global governance spur civil society involvement

²⁵⁸ See Checkel (2001), Egeberg (1999) and Haas (1992).

²⁵⁹ See Chayes and Chayes (1993).

²⁶⁰ See Egeberg (1999, 469), Haas (1992) and Lewis (1998).

²⁶¹ See Chayes and Chayes (1995).

²⁶² For instance, negotiators have been reported to fake outrage against uncooperative actors in order to provide the respective negotiators with ammunition to change negotiating position at home. See Lewis (1998).

²⁶³ See Lewis (1998).

and politicize the formulation of negotiating mandates. Increasing scope and linkages require coordination between ministries producing rigid compromises. With less need for negotiators' discretion and increasing political problems in granting negotiators discretion or letting them strongly influence their mandates, governments and domestic society will assume tighter control of actors' behavior on the international stage.²⁶⁴

4.3 Legitimacy

In the last section, I have analyzed how one factor, deliberating, influences all ideational properties. In this section, I focus on one ideational property, norms, and explain how diverse factors impact their legitimacy, defined as the feeling of obligation which a rule or international institution can invoke through the logic of appropriateness. I consider whether rules are created and administered under legitimate processes, whether rules produce valuable and reversible results contributing to their output legitimacy, whether rules resonate with other norms, whether conforming to rules furthers self-esteem and social esteem, and whether rules are determinate so that they clearly prescribe appropriate behavior and bar unjustified accounts of violations. These factors influence the legitimacy of single rules, as well as the legitimacy of the WTO at whole. Additional discussion in Chapter 5 about bargaining appends factors that specifically influence the legitimacy of the judiciary.

4.3.1 Process legitimacy in the creation of agreements

Process (or input) legitimacy conveys the idea of governance by the people, leading to policies that adequately reflect the preferences of the people.²⁶⁵ Rule addressees concede legitimacy to a rule or institution if they "believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."²⁶⁶ These principles and standards of democratic processes are increasingly applied to international institutions as a test of their legitimacy.²⁶⁷

Traditionally, theories of democracy can be most broadly discerned into a liberal and a republican category. Liberal democratic theory separates society from state. Individuals elect representatives who pass decisions by majority. Republican democratic theory aspires to converge society and state, so that individuals can directly participate in forming a collective will based on their shared culture and community.²⁶⁸

²⁶⁴ As negotiation mandates become tighter and more subjected to domestic politics, learning in civil society and domestic institutions becomes more important. Putnam (1988) has called attention to direct linkages between the international and the national realm, and constructivism, as well as transnational legal process theory, has deepened our understanding of the role of domestic and transnational civil society and domestic institutions in learning. While I focus on the learning of negotiators and how they forward their learning to governments, a case could also be made that legal discourse is conducive to learning among and championed by civil society and domestic institutions.

²⁶⁵ See Scharpf (1999) and Zürn (1998).

²⁶⁶ Franck (1990, 24). See also Chayes and Chayes (1995) and Shelton (2000).

²⁶⁷ See Keohane and Nye (2001).

²⁶⁸ See Eriksen and Fossum (2000a) and Habermas (1998b).

To achieve and assess democratic legitimacy of governance beyond the nation state, traditional nation-based models have to be combined and adapted.²⁶⁹ Size, heterogeneity, and weak collective identity of world civilization impede implementation of the republican model. Long chains of representation detract from the principle of accountable representation upon which the liberal model rests. Proper delineation of the electorate, to warrant that all those affected by decisions have a say, is equally problematic. The underdeveloped collective discourse and the weak collective identity further devalue the legitimacy of liberal democracy. If an actor has to assume that a democratic decision was informed by collective discourse and made with collective welfare in mind, she can be expected to accept the decision as legitimate. In an adversarial context, aggregation of non-reflective preferences by majority voting confers little legitimacy.

Therefore, accountable representation has to be accompanied by deliberation. Deliberating creates legitimacy because actors participate actively in forming a consensus through a fair process led by the most persuasive argument.²⁷⁰ Global governance structures that foster deliberating, thus, enhance legitimacy directly; in the long run, they additionally improve those community conditions on which the republican model lays stress.

Moreover, deliberative processes are legitimate because they master the technical difficulties of developing coherent law.²⁷¹ Coherence has been defined by Franck (1990, 144) as requiring “that distinctions in the treatment of ‘likes’ be *justifiable in principled terms*.” Franck (1990, 147) states more precisely, “Coherence legitimates a rule, principle, or implementing institution because it provides a reasonable connection between a rule, or the application of a rule, to 1) its own principled purpose, 2) principles previously employed to solve similar problems, and 3) a lattice of principles in use to resolve different problems.” Since rules are to be connected to common principles, Franck (1990, 153) understands coherence “to convey an intrinsic, usually logical, relationship not only between a rule, its various parts, and its purpose, but also between the particular rule, its underlying principle, and the principles underpinning other rules of the society.”

Decision-making design

The current WTO system, in which large numbers of actors with highly uneven capabilities interact, weakens legitimacy. We have already seen that smaller numbers of actors involved in negotiations contribute to deliberating, which is one factor of process legitimacy. Reducing the number of actors can enhance equal representation in further ways.

First, smaller numbers make consensus decision-making more viable, which enjoys particular legitimacy. Secondly, certain approaches for reducing the number of actors distribute power more

²⁶⁹ See Abromeit and Schmidt (1998), Beisheim and Nuscheler (2003), Eriksen and Fossum (2000a), Goodman (1998), Habermas (1998b), Höffe (1999), Keohane and Nye (2001), King (2003), McGrew (1998) and Zürn (1998).

²⁷⁰ See Börzel and Risse (2002), Chayes and Chayes (1995) and Kohler-Koch and Edler (1998) on active participation in norm creation as a significant determinant of the norm’s legitimacy.

²⁷¹ See Finnemore and Toope (2001) for further criteria for the quality of law that influences legitimacy.

equally among actors, which also improves process legitimacy. While the WTO formally grants equal rights to all members, actors face highly uneven opportunities to influence the course of the WTO. Powerful actors use threats to bias outcomes in their favor. In the extreme, powerful actors make decisions among themselves and then force them upon weak actors. Since wringing concessions by threats weakens legitimacy, the tighter global governance structures restrain the power of threats, the more legitimate international institutions become. Furthermore, smaller numbers make the exclusion of weak actors less attractive for powerful actors, as will be seen in Chapter 5 about bargaining.

Thirdly, poor actors lack the resources to fully exploit their rights to participation.²⁷² Global governance structures that enhance the relative capabilities of poor actors, thus, receive additional legitimacy. Indeed, certain approaches that reduce the number of actors level the playing field with regard to resources.

Therefore, I consider four approaches which prescribe alternative participation modes in decision-making. These are delegation to experts, common-interest groups, institutionally mandated representation, and regionalization. In order to select among these approaches, I assess their legitimacy and their practical viability.

Delegating authority to experts promises increasing efficiency and quality of decision-making while lessening the impact of power. Nevertheless, large-scale expert delegation is not an attractive option. Delegation to experts lengthens the chain of representation. This implies principal-agent risks, thereby weakening legitimacy. Furthermore, doubts have to be cast on the quality of expert decision-making for political decisions that involve normative judgments. In an environment that turns more normative and political and less willing to accept technocratic decision-making, delegation to experts appears especially problematic and remains marginal from an empirical perspective.²⁷³ Esty (2002, 10) observes that, "Trade is no longer considered to be an obscure policy domain best left to technical experts. Instead, trade issues and initiatives are now a major focus of public attention and discussion across the world. The trade regime can no longer function on the basis of technocratic rationality and quiet accomplishments." A preparatory and advisory role for experts within a democratic process appears more suited than ample delegation of decision-making authority.

A special case is judicial delegation. Though judicial delegation is problematic viewed from the principle of accountable representation,²⁷⁴ the gains in terms of other criteria of legitimacy and effectiveness justify a considerable degree of judicial delegation.

Group formation resting on common interests was frequent at the large international negotiations of the last two decades, like in the Uruguay Round and in the negotiations leading up to the Chlorofluorocarbons (CFCs) regime and the United Nations Convention on the Law of the Sea (UNCLOS). These groups can be formed solely on the basis of shared interests in one negotiation, or

²⁷² See Drahos (2003), Leigh-Phippard (1999) and Shaffer (2001).

²⁷³ See Kahler (1992). See also Skogstad (2002) on the shift from expert delegation to participatory political processes in EU risk regulation.

²⁷⁴ See Trachtman (1999b, 334) and Chayes and Chayes (1995). The inherent principal-agency problem and other risks of judicial delegation are discussed in Chapter 5 about bargaining.

groups can extend over several negotiations.

Common-interest groups can reduce the problem of large numbers.²⁷⁵ Kahler (1992, 696) concludes from UNCLOS negotiations that “through a messy and often ad hoc process of institutional innovation, the participants negotiated rules that both satisfied the major powers and won the necessary consent of the developing countries.” These institutional innovations include ‘contact groups’ for those excluded from negotiations and internally rotating entitlements to participate in negotiations. Membership practice in common-interest groups is also benign. Membership is voluntary, and entry and exit are generally possible at low-cost. Since members, thus, can influence their group position or switch to other groups, common-interest groups represent the preferences of their members adequately.

Yet, practical challenges overtax common-interest groups. Hormats (2001) sees little willingness to delegate negotiating authority. He considers the coherence of the Cairns Group as a scarcely replicable exception that stemmed from the important common ground in agriculture overriding differences in most other accounts. Drahos (2003) and Shaffer (2001) observes growing fragmentation of interests among developing countries. In general, Kahler (1992) and Leigh-Phippard (1999) note that internal heterogeneity causes problems in developing a common proposal for international negotiations. This leads to incoherent proposals and inflexible negotiating mandates. If actors participate in several issue-specific groups at the same time, each group can focus on a narrow set of issues with overwhelmingly shared interests, attenuating the problem of internal heterogeneity. Yet, multiple membership weakens the association of actors to groups, disables narrowly focused groups to handle linkages, and increases the number of groups. From my perspective, common-interest groups are useful bridging devices for the current negotiating system but are too weak institutionally and too unreliable to serve as main pillars of a global governance structure.

Institutionally mandated representation, assigning actors to mandatory groups that have to agree internally on proposals and representatives, is used in some international institutions as a device to reduce the number of actors involved in their negotiations. The Bretton Woods organizations, for instance, organize their constituencies on a roughly geographical basis.

Like common-interest groups, institutionally mandated groups lack the prerequisites for decision-making that is at once effective and legitimate if they are heterogeneous. These prerequisites include collective identity, established institutions for deliberation, and opportunities for side-payments. Due to their rigid membership rules that do not allow members to choose the group they want to participate in, institutionally mandated groups are faced with problems of substantive heterogeneity more frequently than common-interest groups.²⁷⁶ Therefore, a model based on institutionally mandated

²⁷⁵ See Drahos (2003), Kahler (1992), Leigh-Phippard (1999) and Young (1999a).

²⁷⁶ While common-interest groups are legitimate but insufficiently effective representatives of their members, institutionally mandated groups tend to solve the trade-off between legitimacy and effectiveness in favor of proper institutional working to the detriment of legitimacy. For instance, Strand (2003) reports that powerful members problematically dominate voting groups that elect a representative to the executive board in the inter-American development bank.

groups is unlikely to work for the WTO, and it has been rejected by developing countries during the Uruguay Round and at other occasions.²⁷⁷

The fourth and last approach is regionalization. Several factors explain superior effectiveness and legitimacy of decision-making processes in integrated regions. Formal decision-making procedures are in place, supported by communicative practices, deliberative institutions, trust, and crescent collective identity.²⁷⁸ Bargains across issues and time, as well as side-payments, are relatively advanced to offset distributional asymmetries. Actors are particularly interested in their reputation as the other regional members are highly relevant to them and closely scrutinize each other's behavior.

Clearly, integrated regions suffer from greater heterogeneity as an initial disadvantage compared to *ad hoc* groups that assemble common interests for each negotiation. Yet, with increasing depth of regional integration, intraregional heterogeneity diminishes. Notably, a gradual reduction in material and ideational heterogeneity within integrated regions affects all issue areas. This confers an advantage to integrated regions over common-interest groups as increasing scope and linkages render common-interest groups increasingly heterogeneous themselves. More scope of global governance with stronger linkages needs to be negotiated, so that common ground on single issues will be insufficient to override the many differences within common-interest groups. Furthermore, increasing relative effectiveness, scope, and depth of global governance will make actors even less willing to delegate negotiating authority to loose groupings.

Regionalization is, thus, a way to combine actors into groups that work relatively legitimately, effectively, and reliably. Moreover, regionalization bundles resources of several actors. Since poor actors benefit more from uniting resources than rich actors, regionalization equalizes capacities.

A pragmatic counter-argument against regionalization is that integrated regions are overly slow for the important process of last-minute consensus finding in international negotiations. However, if certain characteristics of integrated regions are problematic for the current international negotiating process, then this process will likely be adapted to the new needs of a world of integrated regions.

Adherence

The argument up to this point claims that the process of rule creation can confer legitimacy to rules based on its democratic quality, which is measured particularly by equitable representation and deliberation in rule making. Regionalization has been shown to be the most viable and advantageous approach to promote equitable representation and deliberation by reducing the number of actors.

As a further determinant of process legitimacy, Franck (1990, 193) adds adherence of rule creation to a framework of organized normative hierarchy, "A rule has greater legitimacy if it is validated by having been made in accordance with secondary rules about rule-making."

²⁷⁷ See Hormats (2001) and Raghavan (2000). Unwillingness to delegate authority also makes other models of mandated representation unacceptable, e.g. election of temporary representatives as practiced in the UN Security Council.

²⁷⁸ Drahos (2003) perceives these mechanisms as critical determinants of group effectiveness. He views the weakness of these mechanisms as major impediment to fruitful common-interest group cooperation in the past.

Franck continues that these secondary rules rest on the ultimate rule of recognition, which “tells us that agreements, once validated, are binding, whether or not states wish to abide by them. These three rule categories constitute a validating hierarchy each level of which legitimates the next. The legitimacy of the primary rule may be demonstrated by showing that it was entered into in accordance with the right process outlined in the secondary rules. The legitimacy of the secondary rules may be demonstrated by the specific or implied consent of states. The legitimacy of the ultimate rule of recognition, however, cannot be demonstrated by reference to any other validating rules or procedures, but only by the conduct of nations manifesting their belief in the ultimate rules’ validity *as the irreducible prerequisites for an international concept of right process.*”

In other words, primary rules of legalized global governance, which impose obligations, are linked to higher rules, which rational actors have to accept as precondition for their statehood and for orderly conduct within the community of states. If an obligation adhering to the normative hierarchy of a community is violated, this positions the violator in opposition to the functioning of the community.²⁷⁹ Legalized decision-making and extensive judicial delegation engender rule-creation processes that promote the adherence of primary rules to the orderly functioning of the community.

4.3.2 Process legitimacy in the operation of agreements

Rule application is considered legitimate if rules are applied because of their moral value as individual right rather than with regard to their consequences.²⁸⁰ Rule application is also considered legitimate if rules are applied coherently.²⁸¹ Application of law, which aims at maintaining its moral value and coherence, equalizes power asymmetries. This further enhances legitimacy.²⁸² Accordingly, applying rules coherently and regardless of their consequences is particularly important, yet difficult, for legitimacy if powerful actors are concerned. The equalizing effect of legalized dispute resolution extends beyond those cases brought to court. In the majority of cases when actors settle disagreements in bilateral or unilateral negotiations, the procedural alternative of formal court proceeding influences outcomes as well.²⁸³

The operation of agreements becomes more legitimate with legal discourse and particularly with judicial independence as courts are more committed to and more experienced in upholding the moral values and coherence of law than states that display a more instrumental attitude towards international law. Therefore, the more disputes the legal mandate adequately covers and the more automatically lawsuits proceed, the more legitimate rule application becomes. If courts are restrained by their mandate or if the legal proceeding is blocked by actors, the loss tends to stay where it falls and

²⁷⁹ For a further eloquent connection of law observance to the ends of humanity including equality and freedom, see Bacchus (2003).

²⁸⁰ See Petersmann (2001).

²⁸¹ See Franck (1990).

²⁸² See Bacchus (2003) and Chayes and Chayes (1995).

²⁸³ See Abbott and Snidal (2000), Brinza (2003) and Roessler (2001).

powerful actors tend to dominate over weak actors.²⁸⁴

Coherent treatment at court produces coherent results only if enforcement mechanisms are capable of binding both weak and powerful actors. If enforcement mechanisms treat actors formally alike but impose costs on defectors which powerful actors perceive as small and weak actors as high, then powerful and weak actors are not treated equally in the face of law, as only the powerful actor is able to break the law.

4.3.3 Output legitimacy

Output legitimacy connotes governance for the people that improves collective welfare. With all other things equal, legitimacy rises with the effectiveness of global governance.²⁸⁵ Within limits, global governance structures, which are highly effective but perform otherwise poorly in terms of legitimacy, can still be accepted as legitimate. Importantly, the legitimacy of the WTO is measured not only based on its performance in governing trade but also based on its impact on linked objectives.²⁸⁶

Another aspect that can be subsumed under output legitimacy is reversibility.²⁸⁷ In an international institution like the WTO with sluggish decision-making and high exit costs, decisions are difficult to reverse. This harms legitimacy as decisions that can be altered at later stages enjoy more legitimacy than those decisions that foreclose future options. The better a structure solves the bargaining problem, the more flexible institutional decision-making becomes, so that policies can be reversed more easily. If global governance policies cannot be changed, the possibility of exemptions, non-compliance, and exit enables actors to evade unwanted obligations.²⁸⁸

4.3.4 Norm resonance

Process legitimacy bases on the normative quality of the processes by which rules are created and administered; output legitimacy bases on the normative quality of the results which the rules produce. The following two criteria for legitimacy, norm resonance and esteem, do not carry normative significance. Their effects on (perceived) legitimacy rest on human peculiarities; we appreciate what fits into our currently held worldview and we want others and ourselves to think well about us.

Norms resonate if they prescribe identical or mutually supportive actions for a given actor in a given situation. Norms conflict if they prescribe incompatible actions or if they prescribe actions that detract from the desired effects of other norms. Norms at the international level may resonate or conflict with other norms at the domestic and the international level.

²⁸⁴ As Trachtman (1999b, 350) points out, a broad legal mandate is particularly necessary at the international level because “in international law, there is not a very complete body of customary or other general law that can be applied to supply missing terms to incomplete treaties.”

²⁸⁵ See Scharpf (1999). Reich (1996) perceives the effectiveness of the WTO as the basis for its legitimacy.

²⁸⁶ Esty (2002) notes that the WTO’s inadequate application of economic science on linked issue areas erodes the WTO’s legitimacy.

²⁸⁷ See Zürn (1998).

²⁸⁸ I discuss this more extensively in the context of uncertainty in Chapter 5 about bargaining.

Resonance with generally shared international norms can increase the legitimacy of a particular norm or institution.²⁸⁹ For instance, reference to interpretative norms of general public international law enhances the legitimacy of courts. Referring to specific pertinent international law, like reference to the Rio Declaration in the Tuna-Dolphin case, strengthens legitimacy as well. Thus, growing linkages in global governance have the potential to raise the legitimacy of global governance overall. Yet, norm conflicts on the international level weaken the legitimacy of the conflicting norms and of global governance in general.

Resonance with domestic norms increases the legitimacy of international norms even more strongly, whereas conflicts with domestic norms often lead to non-compliance.²⁹⁰ The greater the heterogeneity of norms between actors is, the more the norm conflicts occur. Deliberation, thus, enhances legitimacy as it initiates learning and reduces the heterogeneity of norms within international society. Without affecting the heterogeneity of norms, exemptions and weak enforcement provide flexibility to actors, easing conflicts between international and domestic norms.

A further mechanism by which deliberation contributes to legitimacy is by nesting specific rules in broader norms. Nesting means that actors deliberatively negotiate rules with a strong reference to international norms. This intensifies the relationship to those norms with which a given rule resonates. Neyer (2002, 10) observes, “As opposed to policy outcomes conducted by means of bargaining, deliberative norms are part of an overarching normative framework, in which the coherence of basic norms with more specific norms implies that non-compliance with a specific rule equals non-acceptance of the implications of basic rules. Non-compliance with the outcome of a deliberative procedure, therefore, not only rejects a specific deal but implicitly opposes the whole normative structure of which the specific norm is part.” In the context of the WTO, let the general norm be non-discrimination and the specific rule fair government procurement. If the specific rule has been deliberatively based on the general norm, instead of being the result of horse-trading, then the fundamental norm of non-discrimination will demand fair procurement and will be damaged if the specific rule of fair procurement is violated.

4.3.5 Esteem

Decision-makers are human beings and human beings desire esteem.²⁹¹ One psychological motive for compliance is the need to maintain a positive self-image bound to conforming to the behavioral expectations that flow from one’s self-image. Another motive rests on the human need for positive peer evaluation. The more that other states comply with a norm, the greater the psychological need to

²⁸⁹ See Börzel and Risse (2002), Ehlermann (2003), Howse and Nicolaidis (2001), Howse and Nicolaidis (2003) and Shelton (2000).

²⁹⁰ See Cortell and Davis (2000), Legro (1997), Payne (2001) and Yee (1996). See also Chapter 6 about compliance.

²⁹¹ See Finnemore and Sikkink (1998), Fukuyama (1999) and Shannon (2000). I set the need for social appreciation apart from reputational costs as the latter is treated in a rationalist way.

comply becomes.²⁹² Thus, legitimacy increases with compliance.²⁹³ Also, actors learn by experiencing or observing punishment, which deepens the divide between acceptable and inappropriate behavior.²⁹⁴ Judicial delegation is important in this regard to warrant consistent and reasoned condemnation which is conducive to learning.

Esteem plays a further role in explaining how enforcement mechanisms influence actors' attitudes towards norms. Contrary to legitimacy-based or incentive-induced compliance, coercion hurts the self-esteem of actors who are targeted by sanctions. Thus, coercion creates resentment and erodes legitimacy among targets of sanctions.²⁹⁵ Yet, actors also internalize practiced norms in order to raise their self-esteem. If actors behave in a way compatible with a norm without genuinely sharing the norm, these actors are induced to adopt the norm with time so that their norms correspond to their changed behavior.²⁹⁶ Consequently, incentives and pressure to comply can create compliance pull *ex post*, as long as the emotional resistance to external pressure does not dominate.

4.3.6 Determinacy

In order to be induced to comply, actors have to construct what constitutes appropriate behavior for a given situation. This is not trivial because actors tend to perceive their policies as conforming to WTO norms and to give accounts of violations of WTO norms. Accounts are justifications of norm violations with which governments aim to convince themselves, as well as domestic and international society, that norm violations were conducted in good faith. Convincing accounts reduce the psychological tensions resulting from rule violations. Furthermore, convincing accounts ease domestic audience and reputational costs of violations. Accounts can also lower the damage that violations cause to the legitimacy of the violated norm and of the international institution endorsing this norm.²⁹⁷ To understand the justifying power of accounts one needs to consider that rule violations can be involuntary. Actors may not live up to their obligations involuntarily if they are caught in implementation problems or if they are uncertain about the meaning of agreements. Since telling voluntary and involuntary defections apart is difficult, actors can justify rule violations as involuntary. In addition to implementation problems and ambiguity of the meaning of rules, diverging knowledge and competing values and norms can serve as the basis for accounts.

Implementation problems

Involuntary violations can occur if actors are unable to implement the measures set forth in agreements or to reach agreed-on targets. As Chayes and Chayes (1993, 194) note, compliance may be so demanding on "scientific and technical judgment, bureaucratic capability, and fiscal resources" that

²⁹² See Finnemore and Sikkink (1998) and Price (1998).

²⁹³ See Jackson (1997) and Legro (1997).

²⁹⁴ See Shannon (2000).

²⁹⁵ See Hurd (1999).

²⁹⁶ See Finnemore and Sikkink (1998).

²⁹⁷ The impact of accounts on domestic audience costs, reputational costs, and systemic damage to legitimacy, which arises from violations, is discussed in Chapter 6 about compliance.

even developed states cannot be confident to achieve the contractual objectives. Furthermore, political obstacles may impede ratification or implementation.²⁹⁸ Even if governments have the resources and political power to implement appropriate measures, policies may need time to show effects during which actors may not be in compliance.

Implementation problems tend to be greater if rules target many private agents and require considerable changes in their behavior.²⁹⁹ This is increasingly the case. Deep integration shifts the identity of ultimate rule addressees from state actors to private agents and imposes substantive constraints on their behavior.³⁰⁰

Distinguishing voluntary from involuntary violations is difficult because actors attempt to present even voluntary defections as involuntary actions. The existence of a continuum of cases between purely voluntary and completely involuntary defection facilitates such misrepresentations. Extreme cases of voluntary defection may arise, when states can conform with their obligations easily but still choose to defect. On the other extreme, states may be truly incapable of conforming to their obligations at whatever costs. More likely are intermediate cases. So the attention turns from the categorical question “Could a defiant actor have complied?” to the more nuanced examinations “Under what costs could the actor have complied? And could she have been reasonably expected to incur these costs?”

Ambiguity

Whether domestic policies can be justified as conforming to WTO rules depends on the interpretation of the rules’ prescriptions and parameters, as well as on the interpretation of the situation with which the parameters are matched. Perceptions of situations are inherently subjective. Agreements contain gaps and are ambiguously drafted, partly intentionally and partly inadvertently, as precision is costly, as language is naturally imprecise, and as cultural differences breed misunderstandings. Therefore, different constructions of appropriate behavior are possible. Actors’ interpretation tends to be biased in making self-interested behavior normatively acceptable. Shannon (2000, 303) speaks of “creative, subconscious interpretations of one’s normative environment, in the effort to free oneself from a moral dilemma.”

In some cases, the gains from defections are overwhelming, so that actors do not even abstain from blunt violations of clear obligations. In other instances, actors are uncertain about the meaning other actors give to agreements and test for their responses. Usually, actors are aware that their defiant behavior possibly contradicts agreements. With increasing complexity, more interpretations become reasonably viable. Thus, the focus turns to whether actors behaved in good faith and honored the spirit

²⁹⁸ Petersmann (2001, 25) observes “apparent political difficulties of many WTO Members to comply with their WTO obligations (e.g. under the TRIPS Agreement) and with WTO dispute settlement rulings (e.g. on the illegality of the EC’s import restrictions on bananas and hormone-fed beef)”. See also Putnam (1988).

²⁹⁹ See Young (1999a, Ch. 3) and Zürn (1998, Ch. 6).

³⁰⁰ See Zürn (2002), who provides as an example the difference between arms control, where mostly states have to act, and pollution control, which depends on the behavior of private agents. However, later research on the relationship between positive integration and compliance indicates more complexity than reflected in first cuts on the issue. See Börzel, Hofmann and Sprungk (2003).

of the agreement in their self-serving interpretation.

Ideational heterogeneity

In normatively heterogeneous environments, violating one norm can be justified by the necessity to protect competing values or conform to other, overriding norms. Facing increasing normativity and linkages in global governance, it, thus, becomes more and more difficult to authoritatively establish what constitutes appropriate behavior. In addition, such intricate normative conflicts become more frequent with growing depth of global governance and growing heterogeneity of actors.³⁰¹

A second set of ideational differences that triggers conflicts and invites accounts concerns perceptions and causal beliefs.³⁰² If domestic policies are perceived to restrict trade only insignificantly and to substantially promote competing domestic objectives, resorting to exemptions or defection from agreements can be excused. With increasing depth of and linkages within global governance, the reasoning brought forward to justify trade restrictions becomes more sophisticated and different assessments can be justified.

Effects of structure on determinacy

Structures that achieve high determinacy make clear which behavior is appropriate and reduce the possibility to account for rule violations. The more precise rules are, the more determinacy they can provide.³⁰³ Arguing against simple, precise rules from a perspective of legitimacy, Franck (1990) notes that rules need to contain exemptions for coherence. Yet, these exemptions lower rule determinacy. Concerning the option of sophisticated, precise rules, we will see in Chapter 5 about bargaining that actors are neither able nor interested in creating legally complete contracts that precisely prescribe obligations for every state of the world. Therefore, authoritative interpretations are needed to check self-serving interpretations and to maintain the applicability of complex rules. Formal decision-making is one way to interpret rules authoritatively. The alternative and more convenient approach is authoritative interpretation by courts.³⁰⁴

Judicial delegation allows authoritative interpretations of prescriptions, parameters, and the situation at hand. If courts are equipped to distinguish good accounts from weak accounts, and opportunistic violations from justifiable violations that occur in good faith, then judicial interpretation is hard to challenge for actors. An actor faces problems in creating satisfactory accounts for herself if a court, and international society in the wake, condemns her behavior. Wendt (1999, 177) reasons that actors' self-perception rests on the collective creation of meaning, so that "the truth conditions for identity

³⁰¹ In Chapter 6 about compliance, I address unexpected adverse outcomes as a further account for defections. Unexpected norm conflicts are a significant driver of unexpected adverse outcomes.

³⁰² Differences in perceptions and causal beliefs are related to ambiguity. If rules leave no room for interpretations, intellectual differences between actors are irrelevant. However, intellectual differences are accounts in their own right, as the need for interpretation is only an enabling condition.

³⁰³ See Franck (1990), Goldstein and Martin (2000), Kahler (2000) and Shannon (2000).

³⁰⁴ See Bronckers (1999) on the inability of WTO members to agree on how to clarify agreements by authoritative interpretations, even on technical subjects and despite apparent need.

claims are communal rather than individual.” Therefore, judicial delegation strengthens compliance pull.³⁰⁵

Whether courts are able to evaluate accounts adequately and, thus, maintain authority in the long run hinges on their mandate. Chayes and Chayes (1993, 198) conclude that “questions of compliance are contestable and call for complex, subtle, and frequently subjective evaluation. What is an acceptable level of compliance will shift according to the type of treaty, the context, the exact behavior involved, and over time.” In the future, the trends require even more sophisticated rulings to match the complexity of disputes. Increasing depth requires more capacities for implementation. Increasing complexity leads to more ambiguity and more disputes based on differences in knowledge. Increasing normativity of global governance and heterogeneity within international society lead to more disputes based on normative differences. Moreover, linkages are currently not adequately regarded in WTO dispute settlement as Trachtman (1999b, 376) notes, “While present WTO law seems clearly to exclude direct application of non-WTO international law, this position seems unsustainable as increasing conflicts between trade values and non-trade values arise.” This means that courts have to catch up with a reality that, at the same time, turns more complex. Therefore, courts need a broad judicial mandate to cope with the complexity of compliance questions.

The standard of review by which courts must abide is of preeminent importance in courts’ dealing with accounts. Two extreme standards of review can be distinguished.³⁰⁶ On the one side, courts can practice total deference to fact findings and legal interpretations of the defendant. Such an approach unduly weakens the obligatory character of WTO commitments. On the other side, courts can entertain a *de novo* review, reassessing factual and legal matters. This grants courts constitutional powers that actors have not vested in the legal system. Winters (2001, 112) warns, “If the genuineness of certain differences in taste between countries and the right of governments to respond to these differences are not recognized, the whole of the trading system could be undermined.” While courts can respect the

³⁰⁵ See Abbott and Snidal (2000), Chayes and Chayes (1993), Franck (1990) and Keohane, Moravcsik and Slaughter (2000). Chayes and Chayes (1995, 205) prefer international society to evaluate accounts diplomatically without resorting to international adjudication which they perceive as “slow, costly, cumbersome, and inflexible ... risky and unpredictable.” They see problems of resolving delicate disputes by adjudication that awards all advantages to the winner. Chayes and Chayes (1995, 206) caution that, “The issues cannot be disposed of once and for all in a sweeping court judgment but must be managed over time, in a more flexible and mediative process.” The practice of the WTO dispute settlement system, however, shows that adjudication does not need to be slow and cumbersome but can proceed reliably within a streamlined process. Rulings are neither unpredictable, since courts are committed to increasing the determinacy of incomplete rules as consistently as possible, nor are rulings inflexible, since courts appreciate situational contingencies in highly sophisticated rulings. Finally, the winner does not take all, but the losing party does have to make certain adaptations to bring her policies in conformity with WTO rules. Providing additional scientific justification or reshaping regulatory policies to be less discriminatory can be sufficient to comply with rulings. Therefore, courts do not issue sweeping, once-and-for-all rulings, but they are the impartial audience for legal discourse and they catalyze mediative processes.

³⁰⁶ See Jackson (2000a), Oesch (2003) and Zleptnig (2002).

heterogeneity of actors even in a *de novo* review, we will see in Chapter 5 on bargaining that actors will not transfer such power to courts in order to avoid the risk inherent in judicial delegation.

Oesch (2003, 642) stresses the importance of finding a middle-way, “Acceptability of, and compliance with, panel and Appellate Body reports largely depends on whether they succeed in achieving a trade-off between appropriate deference to important national policy values and the need to strengthen the multilateral trading system and its disciplines.”

Protection of obligations and deference to diverging national policies arising from heterogeneity can be partly reconciled through a strict procedural standard of review.³⁰⁷ In the case of risk assessment, this means that courts may verify that a risk assessment has been provided timely and that the risk assessment is based on recognized scientific opinion. Yet, courts refrain from second-guessing the scientific evidence and the normative evaluations that underlie actors’ policies.

A particular aspect of procedural review concerns procedural legitimacy. In this review, courts probe whether deliberative conditions have been established for the domestic decision-making process that has led to the disputed policy. The better the deliberative conditions are, the more reason the court has to assume that the disputed policy genuinely reflects the values and norms broadly shared within the defendant actor’s domestic society. Accordingly, courts show particular deference in such cases. In addition, national deliberations provide courts with ample information and expertise upon which courts can base their rulings. This enables courts to give specific justifications of their rulings. Such justifications are more acceptable to losing actors than court-conducted expert hearings, which override the scientific evidence brought forward by actors, and normative trade-offs by courts, which contradict national preferences.³⁰⁸

A strong procedural standard of review reduces the number of cases for which contestable rulings on substance are necessary. However, a strong procedural standard of review cannot always relieve courts of developing sophisticated rulings, which reconsider scientific evidence in substance and address normative evaluations. For instance, courts determine whether the litigated party has a true interest in the value that the party promotes at the cost of the complainant. Courts also consider whether the value is internationally recognized. This is a subjective task as soft law and law to which actors involved in the current dispute are not members may serve as indicator that a disputed value deserves recognition. Finally, courts may have to weigh competing values.³⁰⁹ Hence, courts need a sufficiently strong standard of review for ruling on substance if this is necessary in order to legitimately distinguish between weak and strong accounts. If a limited legal mandate biases judicial value trade-offs systematically in favor of economic objectives, rulings will evoke protest by civil society and override legitimate, national legislators who pursue linked values.³¹⁰

³⁰⁷ See Zleptnig (2002). Procedural review refers to the judicial review of national procedure in creating and publishing the disputed policy and in handling the dispute.

³⁰⁸ See Zleptnig (2002)

³⁰⁹ See Sands (2000). See Cass (2001) on the sophisticated techniques which WTO courts apply in assessing discriminatory practices. These techniques include testing for rational relationship, proportionality and less restrictive means – techniques that are known from domestic constitutional reviews.

³¹⁰ See Esty (2002).

4.4 Conclusion

This chapter has argued that actors' behavior is not dictated by material circumstances, but depends also on ideational properties of the actors, especially on values, norms, perception, causal beliefs, the perspective on relative versus absolute gains, and collective identity. These ideational properties can change through interaction on the international level. Global governance structures influence these learning processes; in particular, structures can stimulate deliberation.

How the ideational properties matter for the effectiveness of global governance is discussed in Chapters 5 on bargaining and Chapter 6 on compliance. Since the analysis of bargaining and compliance shows that learning which arises from international interaction and legitimacy of international institutions generally promote the effectiveness of global governance, I also speak of learning and increases of legitimacy as social capital formation. Strong international norms, shared values and knowledge, a focus on absolute gains, and collective identity all form valuable social capital. This capital is social as it is constituted socially – there are no international norms without an international society, and a sole actor cannot share values and knowledge, cannot strive for relative gains, nor can she extend her identity to others. This capital is also social from a functional point of view as it helps to create value in cooperation among actors.

The analysis of bargaining and compliance will further clarify the impact of structures on the ideational properties. For instance, legalization does not automatically imply more legitimate governance. Instead, the various effects of legalization have to be analyzed under the circumstances of a specific situation, in order to assess the overall effect on legitimacy. This is most evident in the case of output legitimacy when actors appraise the effectiveness of global governance. In the wording of Trachtman (2001, 354), this means that, “Legitimacy refers to the ‘right’ governance structure for a given social context.” This social context, and the bargaining and compliance problems actors face there, is what I turn to now.

5 Bargaining

Bargaining refers to the attempt of coming to an agreement between exogenous actors who disagree on preferred policy proposals at the outset. While learning and bargaining are intertwined and occur often in the same communicative process, I split my analysis into two distinct phases. First, actors learn thereby adopting more congruent beliefs. Then, actors bargain without any further change in their ideational properties occurring. The effectiveness of bargaining is evaluated by how much scope of global governance it permits to agree on. Distributional considerations trigger strategic behavior that may prevent the attainment of optimal integration. Yet, distributional criteria are not employed in assessing bargaining effectiveness.

5.1 *Bargaining theory*

Bargaining theories can be loosely grouped into a formal, deductive and a verbal, inductive tradition.³¹¹ The formal strand of bargaining theory draws on the theory of games as its dominating methodology. Accordingly, it assumes the virtues and vices of game theory. Game theory provides a language that excels at analytical rigor, broad applicability, and transparency. Yet, game theory is inherently troubled by complexity. Its models need parsimony in order to remain traceable. However, depending on the particular selective perspective adopted for the purpose of modeling, the results can change fundamentally. The more restrictive the assumptions needed to develop a model, the more problematic becomes the sensitivity of game theoretic results to modifications in the underlying assumptions.

In international negotiations, the strategic environment is most complex. Large numbers of players negotiate about many issues. Institutions give a specific, albeit loose structure to the bargaining process. Negotiations take place repeatedly, but one negotiation differs from another. Actors' properties and external circumstances of negotiations change over time in ways that are only vaguely predictable. Actors are uncertain even about the past and the current state of the world and have asymmetric information about each other's preferences. When actors develop strategies for this complex background, they have to select from a rich set of bargaining tactics, knowing that the other actors have similar options at their disposal. Furthermore, they have to take numerous effects of every bargaining tactic into account when they develop their strategies, such as inside options (the pay-offs they receive during the status quo throughout negotiations), outside options (they pay-offs they receive if they terminate negotiations in failure), the enforceability of agreements, and reputational and other long-term effects of their behavior on future negotiations. Therefore, we lack a comprehensive theory how rational actors bargain in international negotiations that would allow calculating effectiveness based on the endogenous and exogenous determinants.³¹²

³¹¹ See Odell (2000, Ch. 1).

³¹² See Jönsson (2002), Muthoo (1999) and Zartman (1994) on the limitations of bargaining theory in the face of such complexity.

The complexity that overstrains game-theoretic modeling also overcharges the intellectual capacities of the actors. In addition, data about national policies that affect trade and data about economic effects of changes in these policies are often lacking.³¹³ This erodes the basis for game-theoretic calculations. Hence, models that assume bounded rationality, placing less demands on preferences, knowledge, and strategizing capability of actors, are more realistic.³¹⁴ In these models, actors limit the information they collect for decision-making in order to save on the costs of acquiring information. Furthermore, they consider only a limited set of strategies and only to a limited depth until they have found a ‘satisficing’ solution.³¹⁵ Such boundedly rational actors can be modeled to apply heuristics to develop their strategies and change their heuristics adaptively throughout negotiations.³¹⁶ During the approximation process, transaction costs amount and negotiations may break-down. An extraordinary property of adaptive learning models is that negotiations become path dependent; negotiations can take trajectories that foreclose efficient agreements.³¹⁷ The problem with the concept of bounded rationality is that an infinite number of alternatives exists how to model actors’ strategizing and that every approach evokes at some point an uneasy feeling that actors would recognize and exploit regularities.

The negotiations studied by the verbal strand of bargaining theory and experiments indicate that actors do not maximize egoistic, well-ordered preferences as postulated by game theory. Instead, actors’ behavior is also shaped by altruism, norms, and emotions. Finger, Reincke and Castro (1999) find in an extensive study of the Uruguay Round that delegations were significantly motivated by collective gains and norms of distributive fairness. Actors did not tally concessions given against concessions received but aimed at average reduction targets for industrialized nations of one-third and for developing nations of one-fourth of their current levels of protection. Such observations are underpinned by experiments that demonstrate that norms coordinate expectations and that emotions like spite affect bargaining outcomes.³¹⁸

We can conclude that bargaining is such an elusive phenomenon that we can neither fully grasp actors’ objectives nor the strategizing they undertake in pursuit of their objectives.³¹⁹ Actors are motivated by a combination of the logic of consequences, the logic of appropriateness, and further emotions. And they apply a highly complex version of bounded rationality that performs somewhere between the heuristics used for modeling bounded rationality and perfect rationality. Nevertheless, formal models, empirical research, and common sense can provide guidance in identification and appraisal of factors

³¹³ See Finger, Reincke and Castro (1999).

³¹⁴ See Aumann (1997), Bernheim (1999), Carpenter (2003), Rubinstein (1998) and Simon, Egidi, Marris and Viale (1992) on rationalities that are less demanding than ‘objective’ rationality, presupposed by traditional game theory.

³¹⁵ See Simon, Egidi, Marris and Viale (1992).

³¹⁶ However, bounded rationality is not related to any methodology - see Zott (2002) for a mathematical model and Odell (2000) for a verbal negotiation analysis.

³¹⁷ See Zott (2002).

³¹⁸ See Carpenter (2003).

³¹⁹ Crump and Glendon (2003, 197) concede: “Understanding multiparty negotiation is hindered by a lack of theory that can adequately explain the multiplicity of interactions that typically characterize such negotiations.”

that influence bargaining effectiveness. With this understanding of bargaining theory in mind, I examine three factors that shape bargaining.

Looking at toughness of bargaining strategies as first factor, I analyze under which circumstances actors try to push through their self-serving proposals with high resolve and when, on the contrary, actors are more willing to compromise and to focus on overall gains. Examination of the second factor reveals various effects that raise the internal complexity of the issues to be negotiated. Here the challenge is that, burdened by uncertainty and communication problems, actors have to select among a large number of reasonable policy proposals that require internal consistency. Finally, I look at the influence of the number and nature of veto players on bargaining.

The explanations of why a certain factor aggravates bargaining vary according to how we theorize the bargaining process. High numbers of actors, for instance, can worsen strategic effects among rational actors, such as free riding or blocking negotiations to increase one's share of the benefits. From the perspective of bounded rationality, high numbers of actors can be expected to prolong the time needed until offers and counter-offers converge. And when actors bargain oriented on norms, agreeing on measures of fairness and maintaining a fairness-based bargaining approach is likely to become more difficult as the number of actors rises. With these three perspectives on actors' bargaining behavior – fully rational and boundedly rational bargaining according to the logic of consequences, and norm-following bargaining according to the logic of appropriateness – I analyze the three bargaining problems.

5.2 Toughness of bargaining strategies

Actors can engage in tough, distributional or in soft, integrative bargaining. When actors bargain integratively, they reasonably deliberate in order to find the most effective policy proposal. In their attempt to maximize overall gains from an agreement, actors are solely interested in the efficiency properties, as opposed to distributional properties, of an agreement. I focus on this pro-social interest as the essential feature of integrative bargaining. Learning properties of deliberating, which are often attributed to integrative bargaining, have already been addressed in the previous chapter.

Soft, integrative bargaining is the more prevalent, the more actors focus on absolute gains, the more they share collective identities, the less they know in what future position they will be concerned by the current policy proposals, the lower the value at stake in negotiations compared to the costs of delay, the lower actors' reservation values, and the more powerfully norms of appropriate bargaining call for integrative bargaining.

5.2.1 Perspectives on gains

While a focus on absolute gains does not imply integrative bargaining, it diminishes relative gains concerns which are antagonistic to integrative bargaining. If relative gains are the dominant motive, “*state positionality may constrain the willingness of states to cooperate,*” so that actors cooperate little even though enforceable agreements promise absolute gains.³²⁰

³²⁰ Grieco (1988, 499). See also Mearsheimer (1995) and Waltz (1979).

Collective identity entails integrative bargaining by definition. Sharing collective identity, actors want to arrive at effective proposals because they care about the well-being of other actors as well. Even if collective identity is shared only by a limited set of actors, it eases bargaining as these actors care less about distributional implications among themselves.

5.2.2 Veil of uncertainty

To assess the impact of uncertainty on bargaining, different kinds of uncertainty have to be differentiated. If efficiency properties of agreements are clear, so that uncertainty concerns solely the distribution of the gains from cooperation, actors face an incentive to maximize overall gains. Uncertainty, which pertains to the efficiency properties of agreements on the contrary, does not alter the bargaining behavior, but it reduces the optimal scope of global governance for risk-averse actors.³²¹

Low precision, which leaves distributional implications open, creates a ‘veil of uncertainty.’³²² Judicial delegation is also considered to contribute to the veil of uncertainty.³²³ This can be justified along two lines of reasoning. Either the workings of courts are deemed so opaque that actors can predict court rulings less than future bargains, which will decide about the distributional aspects that have remained open in the initial agreement. Alternatively, judicial delegation is considered to facilitate low precision, by avoiding continuous bargaining to clarify distributional outcomes.

5.2.3 Value at stake compared to costs of delay

In a seminal paper, Fearon (1998) studies a complete-information game of war of attrition. Actors can choose in each period whether to hold out and incur bargaining costs, or to accept the less favorable among two possible outcomes of cooperation. Fearon (1998, 282) observes that with increasing expected duration of agreements, “*both states choose tougher and tougher bargaining strategies on average, implying longer and longer delay till cooperation begins.*” The reason for this behavior is that the value at stake in negotiations rises with longer duration, whereas the costs of delay remain unaffected. The value at stake is the sum of the benefits and costs from cooperation that are to be distributed in negotiations. The costs of delay correspond to the foregone gains from cooperation, resulting from the benefits minus the costs from cooperation and minus possible transaction costs of bargaining.

This link between value at stake, costs of delay, and toughness of bargaining strategy is even more pronounced in games of incomplete information. Fearon (1998, 283) infers that, “Willingness to hold out, bearing the costs of non-cooperation, acts as a costly signal in the bargaining phase that credibly

³²¹ See Young (1999a, Ch. 3) on this twofold effect of uncertainty. For further effects of uncertainty, see section 5.3.1 in the context of internal complexity of bargaining.

³²² As proposed by Young (1991), I speak of the ‘veil of uncertainty’ as opposed to the ‘veil of ignorance’ introduced by Rawls (1972). The veil of uncertainty has the same effects like the veil of ignorance. The concept is more general, though, as uncertainty does not specifically refer to the future position in society.

³²³ See Keohane (2001).

reveals as state's 'power' of the issue in question." For an infinite number of enforceable agreements, bargaining theory cannot provide robust answers if the same results prevail. Nevertheless, it is reasonable to expect the positive correlation between the value at stake compared to the costs of delay, on the one hand, and the difficulty of the bargaining problem, on the other hand, to apply in a real-world setting with many, instead of only two, available policy proposals.³²⁴

Expected duration of agreements

Since the expected duration of agreements drives the toughness of bargaining, we need to consider whether we can observe changes in the expected duration of agreements. An important determinant of expected duration is the duration which actors intend when designing the agreement. Intended duration refers to the duration for which an agreement is set into force, to the frequency of scheduled renegotiations, and to the ease with which spontaneous renegotiations can be resumed. The greater the intended duration of an agreement, the less frequent negotiations with distributional implications become. Actors can be assumed to aim at optimal duration of agreements, which maximizes their gains from cooperation, when they design agreements. Therefore, I first look at what determines optimal duration. Then, I turn to those factors that drive a wedge between optimal and expected duration.

Optimal duration is a function of (at least) three factors.³²⁵ One factor is the costs of maintaining rules that are not optimally attuned to given circumstances. These costs depend on many difficult-to-predict aspects, such as how dynamic the environment is, to what extent actors can bypass inadequate rules, and which costs they incur if they cannot sidestep inadequate rules that fit their needs poorly.

A second factor is bargaining costs. Here, we can observe two mechanisms pointing into opposing directions. The lower the bargaining effectiveness is, the greater the incentive for actors is to reduce the value at stake, in order to come to an agreement at all. One way to do so is opting for short durations. On the other hand, increasing difficulty of the bargaining problem leads to longer durations, since actors want to avoid the costs of frequent bargaining. This increases the value at stake, which further diminishes bargaining effectiveness.

The third factor is connected to learning about the effects of an agreement. When negotiating an agreement, actors are partially uncertain about its efficiency and distributional properties. Once the agreement is working, actors acquire previously lacking information. Yet, learning is impeded by noise in the environment, that is, changes in factors that lay outside the international institution and whose effects intermingle with the effects of the international institution. Thus, actors cannot be sure whether effects are caused by the international institution or by other sources. The combination of uncertainty and noise determines optimal duration for the purpose of learning.

With greater uncertainty, actors choose shorter durations. The reason for this is twofold. First, the greater uncertainty, the less agreements are suited to external circumstances. Thus, actors benefit more from being able to react to new information. Secondly, when uncertainty increases, the actors can

³²⁴ See Fearon (1998).

³²⁵ See Koremenos (2001).

more efficiently acquire new information. Telling the effect of an agreement and that of noise apart simply becomes easier with greater variation in agreement outcomes. With greater noise in the environment, actors prefer longer durations. Long durations give actors time to compile a reasonable stock of new information, despite the noise, before bargaining anew.

While the trends have shown uncertainty to be increasing, noise can also be expected to rise, in particular, due to increasing linkages within global governance. Tracing back outcomes to specific design aspects of specific institutions becomes increasingly difficult. As uncertainty and noise is rising, actors face opposing incentives in the design of agreement duration.

Since I cannot establish a trend for any of the three factors that determine optimal duration, I can abandon the attempt to establish an overall trend for optimal duration without looking how the three factors interact.

What actually matters for actors in negotiations is not intended, but expected, duration. While intended duration and expected duration may converge in stable environments, expected duration is less than intended duration when actors carry doubts about institutional stability.

Several trends affect institutional stability. The increasing scope and relative effectiveness of global governance raise the costs of break-down. The greater the systemic interest of actors to maintain distressed institutions, the more stable international institutions become. Linkages can be stabilizing if fear of negative spill-overs enhances the systemic interest in the WTO and if other institutions can lend capabilities to the WTO. However, linkages can also destabilize global governance if problems in one international institution infect other international institutions.³²⁶

Escalation of disputes into a trade war requires high resolve on a disputed issue, so that the target of threats does not cave in despite of incurred costs, and so that the sender maintains threats despite of costs the resisting target causes. The increasing relevance of norms in the WTO adds to such resolve in two ways. In normatively charged conflicts, negotiating compromises can be difficult.³²⁷ Additionally, defections based on normative disputes, relating to deep integration, are more likely to trigger drastic consequences, boosting the value at stake. For instance, suspension of future approvals of genetically modified crops by the EU in 1998 led to a 90 percent reduction of U.S. crop exports to the EU.³²⁸

The effects of trends on the stability of the WTO are, thus, indeterminate. The multitude of counteracting effects also prevents conclusions from structures on stability at my level of analysis. For instance, regionalization makes actors less dependent on global governance. This stimulates the use of threats and lowers stability. On the other hand, regionalization enhances decision-making flexibility, so that stability increases.

In addition to instability, a further reason why formally intended and actually expected duration may differ hinges on path dependency. The greater the path dependence is, the more important the current decisions become for future institutional design. If future structures are partly determined in advance,

³²⁶ See Leebron (2002).

³²⁷ See Drezner (2000) on the role of norms in aggravating enforcement conflicts.

³²⁸ See Safrin (2002, 611) and the literature quoted there.

bargaining becomes more difficult.³²⁹

The effects of path dependency differ according to the endogenous determinants, which cause the path dependency. The design of precision, exemptions, and punishment formally pertains solely to the content already agreed upon. Yet, these designs serve as focal points for future negotiations. In particular, it is likely that future content of global governance, passed in following negotiations, will be subject to the same rules on exemptions and punishment that are in place after the current negotiation.

The design of decision-making and judicial delegation, by contrast, formally influences how future global governance agreements are made. Importantly, majority voting and judicial delegation lessen the relevance of today's decisions on precision, exemptions, and punishment for upcoming negotiations.

Heterogeneity

Analogous to Fearon's observation about the impact of duration on bargaining behavior, heterogeneity can increase the toughness of bargaining. The more heterogeneous actors are, the less benefits from cooperation accrue and the more costs need to be distributed in addition to the benefits. Therefore, material and ideational heterogeneity of actors drives up the distributional effects of agreements compared to the gains from cooperation.³³⁰ Since the value at stake corresponds to the *costs and benefits* of cooperation, whereas the costs of delay consist only of the *benefits* from cooperation, the value at stake in comparison with the costs of delay rises.³³¹

The trends show increasing relevance of material and ideational heterogeneity. The ideational heterogeneity can be reduced through learning. Thus, the remaining ideational heterogeneity depend on the degree of ideational heterogeneity at the outset of negotiations and on the effectiveness of learning throughout the negotiations.

Another factor that intensifies the effect of heterogeneity, increasing the distributional effects of agreements compared to the gains of cooperation, is the waning national capacity to cope with global governance policies which are not optimally attuned to the actor's specific needs. The less actors can avoid ill-suited global governance policies, the more they have to fear that negotiations among heterogeneous actors lead to agreements which appeal to actors with needs fundamentally different from their own. Exemptions offer actors the option to escape particularly ill-suited global governance policies. In this way, exemptions significantly lower value at stake, beyond the minor effect of lowering average scope of global governance.³³²

³²⁹ See Koremenos, Lipson and Snidal (2001b).

³³⁰ I exclude from consideration purely re-distributional proposals that are always controversial between egoistic actors with separate identities, even if preferences are symmetrical.

³³¹ Note that with increasing scope and relative effectiveness of global governance, both value at stake and costs of delay rise. Therefore, the overall effect is indeterminate at my level of analysis.

³³² See Rosendorff and Milner (2001). See also Abbott and Snidal (2000), who suggest that 'soft law' with low precision and broad exemptions is easier to negotiate and more adequate for actors with highly diverging preferences than hard law.

5.2.4 Reservation value

The reservation value, also labeled outside option, is the best alternative actors have to a negotiated agreement. An actors' reservation value marks the minimum threshold of gains from cooperation which she demands in exchange for her consent to cooperation. It is important not to confuse tough bargaining behavior, resulting from relatively high value at stake, with claims on a large share of the benefits of cooperation, based on a high reservation value. A rising reservation value, stemming from an attractive outside option, shrinks the zone of agreement, which is at stake in negotiations. But reservation values do not change the value at stake compared to the costs of delay and, thus, do not affect the toughness of bargaining for the distribution within the reduced agreement zone. Put simply, reservation values determine who gets what but they do not determine the difficulty of reaching an agreement, as long as a zone of agreement remains.

However, Odell (2000) makes the empirical observation that actors possessing high reservation values do not only claim most of the benefits, but also tend to invest little effort into integrative bargaining. Lacking a rationale for the latter, I assume that rising reservation values make bargaining, at most, only slightly tougher.

Accordingly, regionalization, which enhances the effectiveness of autonomous governance, leads to slightly tougher bargaining strategies because it raises the reservation value of actors. With rising numbers of actors, on the contrary, the reservation value deteriorates. The reason is that if actors liberalize unilaterally, or in negotiations among subsets of actors outside of regional integration agreements, the concessions are multilateralized under the Most-favored-nation (MFN) clause. Therefore, we can think of liberalization under the MFN principle as similar to a non-excludable, less than entirely rival good. If contributions to the production of a public good are voluntary, groups encounter a collective action problem in the supply of the public good. With greater numbers of actors, the free rider incentive for every actor increases and the actual supply of public goods increasingly falls behind the optimal supply.³³³

5.2.5 Norms of appropriate bargaining behavior

Norms of appropriate bargaining behavior expect actors to heed overall gains in negotiations. Accordingly, governments feel intrinsically obliged and externally pressured by domestic and international society to bargain integratively.³³⁴ In particular, peer pressure leads resenting actors to agree to proposals that are supported by a wide majority. A rough rule of thumb exists, based on the decision-making rules, about how many and which actors have to agree for a substantive consensus to be assumed. Then, the bandwagon rolls and it becomes difficult for any actor to resist formal consensus since actors want to evade the political costs of being the cause of failure, particularly after tenuous negotiations. Furthermore, norms provide focal points and action levers for civil society to

³³³ See Olson (1968).

³³⁴ See Drahos (2003), Evans (1971, Ch. 14), Kahler (1992), MacConnell (1996) and Zartman (2003). Short of requiring actors to behave altruistically, norms about appropriate multilateral bargaining exist that suggest actors not to expect strict reciprocity in every bargain. See Ruggie (1993) and Schimmelpfennig (2000).

pressure isolated nay-sayers into agreement.

The greater the legitimacy of the WTO, the more the actors feel compelled to conform with norms of integrative bargaining and the more inclined actors and civil society are to exert pressure on those who do not comply with the implicit norms of appropriate bargaining. Uncertainty makes it difficult to exert pressure on actors to bargain integratively and to abandon blockades of policy proposals that enjoy broad support.³³⁵ If the costs of policy proposals for resenting actors are not clear, instances cannot be identified when actors strategically block agreements, which imply only minor costs for them, so that reputational pressure could be legitimately brought to bear.

5.3 Internal complexity

Toughness of bargaining strategies, the first set of factors that determine bargaining effectiveness, accentuates the adversarial aspects of bargaining. To the extent that actors approach international bargaining with the logic of consequences, they bargain softer if they emphasize absolute gains, if they share collective identities, and if they do not know in which future position they will be concerned by the agreement. Also, they bargain softer if the value at stake falls compared to the costs of delay and if their reservation values decrease. In addition, norms of appropriate bargaining induce actors to bargain softly under the logic of appropriateness and under the logic of consequences.

This second set of factors that determine bargaining effectiveness turns to difficulties inherent in the issues to be negotiated and in the environment of negotiations. These factors cause problems even if actors employ soft bargaining strategies. I discern among four factors that comprise internal complexity: the uncertainty about the implications of agreements, linkages, the number of relevant policy proposals, and communication.

5.3.1 Uncertainty

Risk-averse actors fail to negotiate agreements that maximize global welfare if they are uncertain about efficiency and distributional effects of agreements. The importance of uncertainty for risk-averse actors depends on how well actors can predict the outcomes of agreements, on how severely actors are hurt if they err in their prediction and fulfill their obligations, and on the costs which actors have to pay in order to escape their obligations, in case they become intolerable.

We have seen that the trends bring about increasing uncertainty about efficiency and distributional implications of agreements. Precision generally reduces uncertainty. However, the effects of precision depend on the type of uncertainty as identified by Knight (1921). Actors can know all possible states of the world but lack information about the likelihood that a given possible state of the world will come true. In this case, high precision lowers uncertainty; agreements can be written contingent on future states of the world. This demands high precision because numerous, possible states of the world

³³⁵ Jackson (2002, 121) observes that reciprocity is difficult to put into practice as it is “almost impossible to ‘quantify’ the different trade treaty results, when the approach is to develop a sort of ‘code’ of rules, which arguably should improve the overall operation of world markets in the long run.” See also Helm (2000), who draws from experience with international environmental negotiations.

³³⁶ See section 5.2.5 about norms of appropriate bargaining behavior.

have to be considered and because obligations for each state of the world have to be specified. The situation is different with genuine, thick uncertainty, when even future states of the world are unknown to actors. Then, precision becomes pointless and even counterproductive.³³⁷

As the scope and relative effectiveness of global governance rise, adverse, unexpected outcomes become more costly. While this does not change the ratio between gains from cooperation and costs of adverse, unexpected outcomes, the costs of adverse, unexpected outcomes increase compared to national determinants of actors' welfare. Therefore, adverse, unexpected outcomes become more important for risk-averse actors. Reduced effectiveness of autonomous governance leaves actors with fewer capabilities to ameliorate adverse surprises. Regionalization enlarges domestic markets in comparison with global markets and strengthens autonomous governance, so that actors become more robust against adverse, unexpected outcomes.

Collective identity and legitimacy moderate the importance of adverse, unexpected outcomes. Actors who share collective identity and consider agreements as legitimate are willing to accept that they receive a smaller share of the gains from cooperation than they had expected, for the collective sake and out of obedience to the agreement.

Actors can escape adverse, unexpected outcomes by resorting to exemptions, by defecting, or by exiting from the international institution. These devices mark an upper threshold of damage which a country can suffer from adverse, unexpected outcomes.³³⁸ Yet, using exemptions, upon which international society imposes (usually low) reputational costs, defections, and exit is costly.

Judicial delegation reduces the costs of defection which aims at evading especially substantial, unexpected, adverse effects. In such cases, actors can expect courts to recognize the exculpating circumstances and to treat defections leniently. Independently of judicial delegation, rules that cause massive, unexpected, adverse effects partly lose their legitimacy, weakening the enforcement of these rules.

While actors may avoid their obligations, they cannot escape the indirect effects of agreements which may be overwhelming. If an international institution sets a global standard, the costs of continuing with an actor-specific standard can be prohibitive.³³⁹ Regionalization lowers the direct and indirect costs of exemptions, defection, and exit.

So far, I have argued that current uncertainty about future effects of agreements complicates bargaining among risk-averse actors, and I have shown which factors determine the importance of uncertainty for bargaining. Now I extend my argument to actors who are not risk averse and to past uncertainty. Uncertainty is even more cumbersome and affects even actors who are not risk averse if information is asymmetric. Actors can usually predict the effects of global governance on themselves better than they can gauge how other actors will be affected. Furthermore, actors have an incentive to

³³⁷ See Abbott and Snidal (2000).

³³⁸ See Bagwell and Staiger (2000), Rodrik (2000) and Rosendorff and Milner (2001) on such flexibility working as insurance in the face of exogenous shocks.

³³⁹ See Scharpf (1998).

misrepresent their benefits and costs of global governance in order to extract a better bargain. While actors can update their information about other players during negotiations, the distribution of information remains asymmetric. Cautiousness, in order to avoid detrimental bargains, and attempted concealment of private information can make bargaining inefficient.³⁴⁰

The second extension of my argument is that bargaining suffers not only from current but possibly also from past uncertainty surrounding an agreement. When the vanishing of initial uncertainty reveals a highly asymmetric distribution of gains and losses, future negotiations are confronted with claims for compensation. Complaints that industrialized actors had not implemented their obligations, though they had enormously profited from the Uruguay Round, were brought forward at the ministerial meeting in Seattle by the developing countries. These implementation issues rank as one major source for failure in Seattle.³⁴¹

5.3.2 Linkages

A further difficulty of deal-making lies with substantive linkages that require internal coherence for efficiency. If tariff concessions have to be re-adjusted in one part of a policy proposal, in order to offset distributional effects of an agreement in another part of the same proposal, efficiency implications are relatively easy to understand (i.e. mostly trade creation and trade diversion). In negotiations on deep integration, distributional and efficiency aspects are intertwined. Change in one part of a proposal may sabotage the efficiency properties of other parts.

Let us assume that industrialized countries were to make a concession to developing countries within property rights negotiations and decided to reduce the burden of implementation by easing the requirements on domestic enforcement. Then the substantial rules on property rights would be less valuable and not optimally attuned to the changed enforcement regime. More generally, Esty (2002, 12) underlines the growing need for coherence of negotiating proposals, ‘While there have been many rounds of trade negotiations over the past 50 years, the central focus of the process has shifted from tit-for-tat reductions to the identification of rules and procedures to manage economic interdependence. In important respects, the next round of negotiations will resemble a Global Constitutional Convention. The process of global constitutionalism – defining core principles, establishing international standards, and creating institutions to manage interdependence – is likely to involve decades or even centuries of discussions and refinements.’

A further problem of linkages concerns deal-breakers. If one issue cannot be resolved in negotiations and if this issue is linked to less divisive issues, negotiations on all issues may fail, though partial agreement could have been reached if the trouble-making issue could have been isolated.³⁴² Sjöstedt (1994, 64) observes in the Uruguay Round that “negotiation work in relatively manageable areas was

³⁴⁰ See Muthoo (1999) and Fudenberg and Tirole (1991) on bargaining under asymmetric information.

³⁴¹ See Raghavan (2000). Uncertainty-based carry-overs from past negotiations may become even more disturbing in the future. Sjöstedt (1994, 46) reports that the individual GATT negotiations together “represent a comparatively continuous process. The impact of this continuity seems to have increased over time.”

³⁴² See Leebron (2002).

severely restrained by the outstanding politically sensitive problems in other areas. Part of the reason is that some negotiation problems can be resolved only in a final and decisive exchange of concessions. The dilemma is that negotiating parties will not engage themselves fully in bargaining over such outstanding matters until they are certain that negotiations are, in fact, in the process of being terminated once and for all.” Therefore, even linkage to issues that are highly contested but do not thwart agreement in the final phase of negotiations hinders negotiations of more consensual issues.

5.3.3 Number of policy proposals

The obvious effect of large numbers of policy proposals submitted in negotiations is to congest the bargaining process. In particular, high numbers of reasonable policy proposals sabotage information collection. Putting forward proposals to trigger a response is an important instrument for actors to collect information in bargaining.³⁴³ Actors who disapprove of proposals have an incentive to reveal their disapproval as ‘estoppel by acquiescence’ is practiced in the WTO. If an actor does not reject proposals that enjoy considerable support, other actors assume that she consents. Introducing new arguments, in order to justify disapproval at late stages, is sanctioned with reputational costs. Early presentation of interests and arguments allows actors to verify whether arguments are strategic or sincere. As the number of proposals and reasoned disapprovals grows, it becomes increasingly difficult to evaluate the arguments and to infer on genuine preferences. Evaluating arguments becomes even more intricate as arguments are increasingly complex and increasingly based on normative grounds, so that the common method of comparing an actor with other countries in similar situations fails.

Moreover, it becomes harder to exert reputational pressure for integrative bargaining with more reasonable policy proposals. If an actor refuses liberalization, in order to protect ailing industries, the other actors can often make a convincing claim that the resisting actor would fare better by liberalization, in combination with domestic measures for promoting economic structural change and for softening social repercussions. Also, the other governments can point out that a given policy proposal entails for them commensurate domestic political problems, stemming from structural change. By contrast, if the reason for disagreement lays in conflicting values and norms, a sound argument of resistant actors being better off by adopting the values and norms of other actors is hard to produce. Arguing that all actors face similar obstacles and bring similar sacrifices, becomes equally difficult. Therefore, a large number of policy proposals diminishes bargaining effectiveness by paralyzing the bargaining process and by weakening normative pressure for integrative bargaining.

How many proposals actually are made in negotiations depends on the number of actors, on the heterogeneity among them, and on the number of possible, reasonable policy proposals. If many proposals are reasonably possible and if many, heterogeneous actors are involved, the number of actual proposals will be large.

Generally, the trends raise the number and heterogeneity of actors. Only under special circumstances, the inclusion of additional agents into the WTO diminishes the number of actual proposals. In

³⁴³ See Steinberg (2002).

particular, strong resistance from civil society against certain policy approaches can reduce the number of proposals significantly. Regionalization and majority voting lower the number of actors whose proposals need to be acknowledged for decision-making.

More linkages and greater depth in global governance augment the number of possible, reasonable agreements, while focal points based on tariff reductions can less and less anchor negotiations.³⁴⁴ The global governance architecture of the postwar period, such as the regimes for international trade and monetary affairs, critically rested on the idea of ‘embedded liberalism.’ This idea promoted multilateral liberalization while protecting actors’ sovereignty and maintaining their autonomous governance capacities, so that every actor could maintain a welfare state according to her preferences.³⁴⁵ This idea guided single negotiations and brought coherence among international institutions. Free trade as the final objective for the WTO was generally accepted, as well as the path to free trade via multilateral, reciprocal liberalization and via rules applicable to every member (with special and preferential treatment and plurilateral codes as temporary aberrations and with regional integration agreements as continuing exemption).

The days when a shared paradigm provided orientation are over. Linkages and deep integration make broader concepts necessary. Embedded liberalism is too limited in application if development or the environment is concerned; neither does the paradigm of embedded liberalism contain answers to complicated issues of global economic regulation. Furthermore, growing interdependence and relative effectiveness of global governance undermine the focus of embedded liberalism on autonomous governance.

No alternative, overarching, guiding principle stands ready to replace embedded liberalism. Sustainability is still too contested as it contains no agreement on priority objectives and priority means that would be deeply shared among actors. Consequently, diverse worldviews make their way into the WTO, so that different ideas about optimal degrees and configurations of global governance, as well as desirable paths, become normatively defensible and acceptable. For instance, there is not one competition policy unanimously considered the best for the world, but instead, many reasonable proposals.

Therefore, structural mechanisms that can serve to narrow down the increasing number of policy proposals, which have to be seriously considered in negotiations, become more valuable. Deliberation and legal discourse both work as a filtering device. Only proposals that can be defended on normative grounds can pass the test.³⁴⁶ Furthermore, courts can set directions for following official negotiations based on their impartiality and expertise and they can create focal points, intensifying the reputational pressure on resisting governments exerted by international and domestic society.³⁴⁷

³⁴⁴ The concept of focal points stems from the theory of games, employing a mechanism to select among several possible equilibria. See Goldstein and Keohane (1993) on focal points in international relations.

³⁴⁵ See Howse (2002a) and Ruggie (1992). Similarly, Jackson (1997) perceives ‘liberal trade’ as central paradigm though modified by non-economic goals, such as security and development.

³⁴⁶ See Neyer (2002).

³⁴⁷ Barnett and Finnemore (1999) show how international institutions can apply their communicative capacities and shape the discourse about issues such as development and security.

5.3.4 Communication

Horse-trading in negotiations can only begin if negotiators share basic knowledge, as well as a discourse that embodies this shared understanding.³⁴⁸ For instance, once the basic principles of ecosystem science are acceptable to the members of specific regimes, actors can build on these principles in future negotiations.³⁴⁹

In stable environments, negotiators develop such social capital that enhances bargaining effectiveness. In the past, WTO negotiations were led by trade officials with similar professional backgrounds, who were socialized by years of service in WTO networks away from public scrutiny. These unique organizational circumstances fostered not only shared knowledge and discourse, but they also imbued WTO negotiators with a diplomatic ethos and a set of shared norms.³⁵⁰ Beyond the WTO, the shared discourse of embedded liberalism assumed a comparable function in the past by providing a consensus worldview from which to start negotiations.³⁵¹

The trends devalue these established collective assets. The old ways are not suited to negotiating linked and deep global governance, and they are incompatible with advancing legalization, transparency, and civil society involvement in global governance.³⁵² Negotiations are less often conducted solely between professional trade diplomats, but rather include a more diverse set of agents such as politicians and civil society activists.³⁵³ These diverse negotiators, often with strong domestic ties, are less used to a global outlook and share less organizational culture and language.³⁵⁴

As a consequence, communication styles between negotiators become less compatible.³⁵⁵ In addition, negotiators who do not share basic knowledge interact with one another, we have seen in Chapter 4 about ideational properties and learning that developing shared knowledge on the international level is generally difficult. For many issues in global governance, developing shared knowledge is especially difficult because few templates from domestic experience exist for synthesizing diverse policies towards coherent, sustainable global governance.

The breaking-away of shared organizational culture is particularly devastating because normative disputes, arising from differences in domestic cultures, can be best solved if actors share an organizational culture.

³⁴⁸ See Frankel (2001), Haas (1992), Sjöstedt (1994) and Young (1999a, Ch. 8).

³⁴⁹ See Young (1999a, Ch. 8).

³⁵⁰ See Keohane and Nye (2001) and Weiler (2001).

³⁵¹ This is not identical to the function of embedded liberalism as a focal point. A focal point selects one among several possible equilibria, whereas embedded liberalism as shared knowledge enables actors to identify and compare possible equilibria in the first place.

³⁵² See Esty (2002), Keohane and Nye (2001) and Petersmann (2001).

³⁵³ See Meerts (1999).

³⁵⁴ See Cohen (1999).

³⁵⁵ Safrin (2002) observes, for instance, that representatives from environment ministries are inclined towards more emotional discussions instead of detached analysis, which characterized traditional diplomatic discourse. Shaffer (2001) also notes different attitudes between ministries.

Shared rules is a special category of shared knowledge. Bargaining rules are essential for boundedly rational actors.³⁵⁶ The more experience boundedly rational actors have within a sufficiently stable environment, the more effective bargaining rules they will learn. Some of these rules become norms, when they are shared by many actors and display temporal stability. In traditional negotiations that aim at lowering tariffs, shared bargaining rules – such as trade in market access, reciprocity, or across-the-board formulas – assist the actors in coming to an agreement. Yet, even for tariff negotiations, agreeing on an adequate measure of reciprocity is a delicate matter. Actors have to agree on how to assess conversion of tariff bindings into tariff cuts, how to reward past unilateral liberalization, and how to take account of current levels of protection.³⁵⁷ Applying these shared bargaining rules to negotiations about deep integration, or developing new shared bargaining rules for such negotiations, is a daunting task, however.

5.4 Number and nature of veto players

This section looks at the influence of the number and nature of decision-making veto players on bargaining effectiveness. We can distinguish among two types of veto players. Power-based veto players assume their relevance independently of decision-making rules from options outside the institution. Institutional veto players are empowered by decision-making rules. Actors are the most important veto players. In addition, civil society may have enough external power to derail negotiations.³⁵⁸

First, I address threats as the source of power. I distinguish between different types of threats and analyze the costs of stating and implementing threats for the threatening actor, as well as the damage inflicted upon targets by implementing threats. Comparing costs and damages allows us to gauge the power of threats in the light of trends and structures of global governance. Then, I present three possible designs for institutional decision-making. After these two preparatory steps, I analyze the effectiveness of the respective decision-making designs in solving the bargaining problem.

5.4.1 Threats and power

I abstain from a general definition of power that would necessarily require extensive justification.³⁵⁹ Instead, I highlight only three aspects of my treatment of power. First, I understand power as adversarial: I consider power not as a general capacity to achieve desired ends but as the capacity to influence other actors towards preferred agreements. Secondly, power does not arise from the capacity to change ideational properties of actors. Deliberative capacity to convince other actors is, thus, not

³⁵⁶ The interaction of boundedly rational actors can be interpreted as a form of communication.

³⁵⁷ See Finger, Reincke and Castro (1999).

³⁵⁸ Brown et al. (2000, 29). I do not consider a possible world Supreme Court – endowed with the right of constitutional interpretations of foundational agreements with which ordinary bargaining outcomes would have to conform – as a further veto player.

³⁵⁹ For a review of power definitions in negotiations, see Zartman and Rubin (2000). The specification of types, costs, and damages of threats draws especially on the experience of past negotiations presented by Fisher et al. (1997), Kahler (1992), Krueger (1995), Odell (2000), Singh (2000) and Steinberg (2002).

part of power. Thirdly, the capacity of powerful actors is not based on law, which reflects the genuine consent of all actors, but arises from actor-level properties. Powerful actors can use law as an instrument, but law is not considered to be a source of power.

Types of threats

Power-based veto players rely on different threats. These threats can be structured along two dimensions. The first distinction concerns the breadth of a threat. Threats can be limited to a specific issue at hand, can comprise a broader issue area, or can extend to other issue areas.

The second distinction pertains to what kind of behavior actors proclaim. If threats relate to non-cooperation, actors threaten to maintain the status quo (or their existing plans for change in autonomous governance) unless global governance agreements are crafted according to their needs.³⁶⁰ In most cases of international institutions, non-participation of actors is costly for the remaining actors as legitimacy and benefits of cooperation increase with the number of participating actors. Therefore, non-cooperation is a threat if it is extended beyond the scope of immediate disagreement to issues on which agreement would be possible.

Alternatively, actors can menace aggressive behavior. This implies changes from the status quo that make other actors worse off than the current status. Threatening to increase tariffs if a certain scheme of tariff cuts is not agreed on is a case of narrow, aggressive behavior. Broader are threats that link behavior across specific issues within an international institution. If the U.S. threatens with unilateral protectionism authorized by their domestic laws, in order to compel developing countries to agree on trade-related intellectual property rights, this is a case in point. Furthermore, threats can pertain to issue areas outside the regulation of the international institution. For instance, threats to withhold financial assistance or to project military capabilities, in order to close a trade bargain, would be of such genuinely external nature.

Costs of threats

The introduction and implementation of threats causes a host of direct and indirect costs to threatening actors.³⁶¹ The direct costs are threefold. First, threats can be expensive in itself. Non-cooperation in efforts aimed at lowering trade barriers and at establishing standards, and aggressive behavior that constructs barriers, both generally decrease welfare. Secondly, stating and implementing threats is charged with reputational costs. Thirdly, actors can incur domestic audience costs for non-cooperative and aggressive behavior. Yet, domestic societies can also support threats that serve their interests or normative convictions. With globalization, more domestic companies have assets in target countries which they see endangered by threats. This raises the domestic audience costs of threatening.³⁶² For

³⁶⁰ Furusawa and Wen (2002) argue that trade war – the ‘Nash equilibrium’ which game theory suggests – is an unrealistic disagreement point. They stress the importance of the status quo which is often maintained if no agreement is reached.

³⁶¹ These costs are similar to the self-inflicted, economic costs, the reputational costs, and the domestic audience costs of defections discussed in Chapter 6 about compliance.

³⁶² See Odell (2000, Ch. 6).

certain threats, particularly if aimed at developing countries, reputational and domestic audience costs rise with more active involvement of civil society that denounces threats.

The indirect costs hinge on actors' systemic interest in the effective functioning of the WTO. I speak of systemic interest to denote the interest which actors take in the preservation of the gains from cooperation in the long run.³⁶³ Even if never carried out, threats can make cooperation less effective as they harm legitimacy and poison the cooperative atmosphere. This means that actors forgo gains from (more effective) cooperation by stating, and even more so by implementing, threats. These costs rise with increasing relative effectiveness and scope of global governance. With increasing relative effectiveness of global governance, threats that prevent scope extension become increasingly costly. Equally, threats that prevent increases in relative effectiveness of global governance become increasingly expensive for greater scope.³⁶⁴

Beyond sabotaging the effective working of international institutions, implemented non-cooperative and (far more) aggressive behavior can lead to a break-down in cooperation. Other actors can retaliate for strategic reasons, or they retaliate because the domestic political balance has shifted in response to the initial blockade or hostility. Unraveling of international institutions is a critical-mass phenomenon. An institution perseveres with few apparent signs of distress and then suddenly breaks down, once a certain amount of stress has been exceeded. Whether an international institution collapses depends on the number and significance of damaging acts and on the identity of the damaging actors.³⁶⁵ It is impossible to predict the blows an international institution can take before breaking down, in which direction harmful interaction dynamics between actors unfold, and the extent to which an international institution will have recuperated before the next stressful situation occurs. Therefore, actors always have to guard against damaging the WTO.

The expected costs of a break-down, following from threats, result from the costs in case a break-down occurs and the likelihood of a break-down which actors assign to threats. The greater the costs of break-down and the lower the stability of the WTO, the more wary actors are of threatening.³⁶⁶ In

³⁶³ In addition to harming global governance, threats may also have more imminent repercussions for threatening states. For instance, threats that destabilize a foreign economy are likely to also harm the threatening actors' economy. With increasing interdependence, threats become thus less credible and advantageous. See Singh (2000).

³⁶⁴ Note that threats harm the systemic interest of the threatening actor not only if they are intended to blockade proposals that would benefit the effectiveness or scope of global governance. The detrimental effects on the effectiveness of global governance arise even if threats aim not only at enhancing the benefits of the threatening actor but also at improving and extending global governance for the majority of actors. The discussion at this point is not about the circumstances under which threats are beneficial or detrimental to the effectiveness and legitimacy of global governance. My intention is to shed light on the costs of threats which influence the power and the frequency of threatening.

³⁶⁵ See Chayes and Chayes (1995).

³⁶⁶ Of course, this also makes the targeted actor less willing to resist and thus provides an incentive to threaten in the first place. However, I assume that the increase in costs generally outweighs the effect of anticipated decreased resistance.

the discussion about the duration of agreements, the effects of trends and global governance structures on the stability of the WTO have been said to be inconclusive. Given ambiguous effects on stability and significantly increasing costs of break-down, I conclude that actors become more averse to the systemic costs of threats.

The costs of break-down arise from several factors. As the relative effectiveness of global governance and the scope of the WTO grow, the losses from a break-down mount. Stronger linkages and greater scope of other international institutions increase the harm which implementation of threats in the WTO causes to these other international institutions.

Furthermore, investments which are specific to membership in the WTO raise the loss caused by a break-down. Investments are specific to the WTO if their value depends on membership in the WTO. Usually, investments are not completely specific, but they retain considerable value even without membership. Yet, most investments conducted with regard to the WTO do not correspond to first priorities without the WTO.³⁶⁷ Prominent examples are the expenses of developing countries for upgrading domestic trade institutions, as required by the WTO. Surely, these investments are beneficial to trade and are thus in the interest of developing countries regardless of the WTO. However, the amount of resources allocated to trade facilitation, and the way they are spent, are not tailored to developing country needs. For instance, China shoulders massive specific investments, in order to gain access to the WTO.

Regionalization lowers the costs of break-down. It increases the effectiveness of autonomous governance and reduces the specificity of investments that serve international cooperation in the WTO.

Power of threats

Rational actors make threats only if the expected benefits from threatening more than compensate for the costs. When actors calculate the benefits and costs of threatening, they consider whether threats would be credible and whether credible threats would be advantageous.

Threats only have a chance to influence outcomes if they are credible, so that the targeted actors expect the threat to be implemented (with a probability greater than zero), unless they compromise. If targeted actors know that threats are 'cheap talk,' because threatening actors are always better off by not implementing their threat, then targeted actors will make no additional concessions.

Even if targeted actors make concessions to threatening actors, the benefits, which accrue from these concessions, may be smaller than the costs of threatening. This means that actors abstain from threats that are credible once made, unless they are advantageous.

Expected benefits and costs of threatening, and of implementing stated threats, depend on the costs and damage which threats effectuate. The costs and damage caused by threats, thus, determine whether threats are credible and advantageous. The lower the costs the threatening actor incurs from implementing a threat, the more credible and advantageous the threat becomes. The more devastating the damage to the targeted actors if a stated threat is implemented, the greater the price becomes which

³⁶⁷ See Hoekman (2002a).

the targeted actors are willing to pay in order to avoid implementation of the threat. Accordingly, threats become more effective and frequent with falling costs and rising damage.

The damage of implemented threats to targeted actors is similar to the costs of threats to the threatening actor. If threats are implemented, targeted actors suffer a direct damage from the non-cooperative or aggressive behavior of the threatening actor. Furthermore, the systemic interest of targeted actors in the effective functioning of the WTO is harmed. The factors that determine costs and damage are summarized in *Figure 3*.

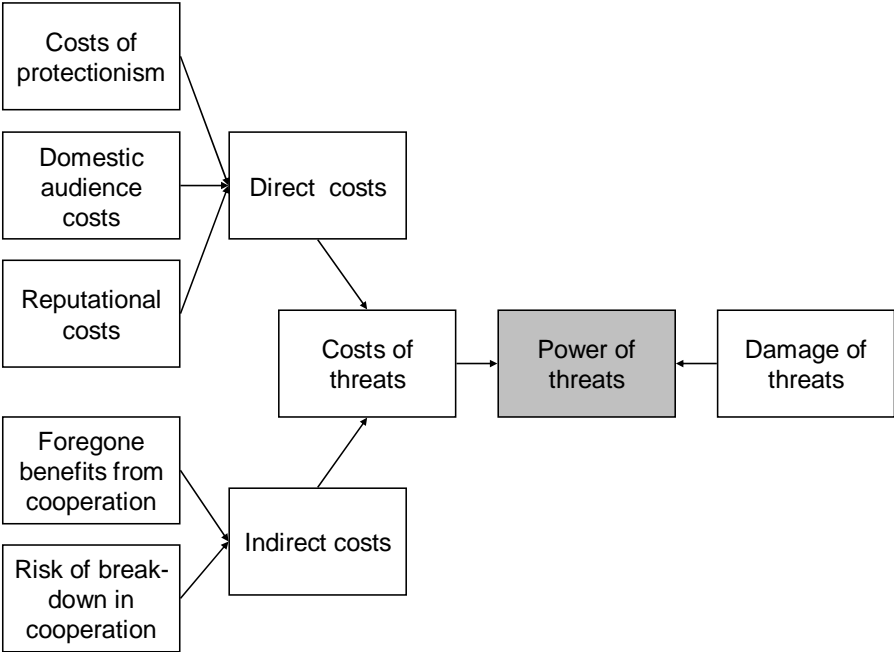


Figure 3: Power of threats

The amount of costs and damages strongly depends on whether targets give way or resist. If actors resist, an ensuing dispute may squander additional benefits from cooperation and possibly lead to a break down in cooperation. On the other hand, standing firm may serve long-term, stable and legitimate global governance as threats are discouraged. Resistance may, thus, be understood not only as self-serving but also as normatively appropriate behavior.³⁶⁸ In addition, reputational concerns favor resistance. Actors benefit from a tough reputation because actors unexpected of caving in become less easily the target of threats. Domestic audiences can support or oppose making concessions to threatening actors. Odell (2000, Ch. 6), for instance, contrasts how domestic societies in Brazil and the EU reacted to U.S. threats. While commercial interests in Europe feared escalation and favored

³⁶⁸ While I use systemic interest as a factor that works through the logic of consequences, we see that such long-term consequentialist behavior that affects international society in general can also be formulated in normative terms. See also Fearon and Wendt (2002) on how many differences between rationalist and constructivist explanations are better understood as nuanced, empirical questions than ontological divides.

compromising, the Brazilian society turned with patriotic sentiments against what they perceived as an assault against their right to economic progress.

Therefore, the incentives to resist are substantial and difficult to predict. Consequently, threats need to imply severe damage, in order to be credible and advantageous. However, we have seen the costs of threatening to be substantial, and these costs rise if more damage is to be attained. From this follows that aggressive, power-based bargaining by a single actor, such as threatening complete and formal withdrawal, is unlikely.

Collectively shifting issues, or political emphasis, to alternative multilateral or minilateral institutions is a popular approach to reduce the costs of threats. Actors can frame a shift between institutions as a positive, justified development, and they can partly disguise its significance from the domestic public. A shift to a multilateral institution can be justified with the need to improve allocation of issues to institutions or to speed up decision-making. Transferring issues to minilateral institutions can be readily explained with more flexibility that allows every actor to select its preferred depth of integration. In any case, actors can lower reputational and domestic audience costs.

If an agreement under the terms of the alternative institution is less desirable for the targeted actors, the threat to shift issues, or political emphasis, to the alternative institution strengthens the collective of threatening actors. Shifting issues to other multilateral institutions is likely to be less costly, while less damaging, than shifts to minilateral institutions.

Looking at the history of GATT and the WTO, we see threats of institutional shifts frequently stated and occasionally implemented.³⁶⁹ When powerful actors moved their efforts to protect intellectual property rights from the WIPO to the WTO, hoping to find a more amenable stage for their proposals, relocation between multilateral institutions occurred. In addition, threats of industrialized countries surfaced periodically to establish deep integration regimes outside of the GATT/WTO, shifting policy priorities from the WTO to international institutions with minilateral membership. Thoughts circulated in the 70s around a GATT-Plus regime; in the 80s a Free Trade and Investment Area was considered. Furthermore, regionalization itself may be understood as a threat to spur multilateral negotiations. The North American Free Trade Agreement (NAFTA) is frequently interpreted as a U.S. threat for reaching concessions from the EU during the Uruguay Round.

When most developing countries stated their intention not to sign on to the agreements about Trade-Related Investment Measures (TRIMs), TRIPs, and GATS, the U.S. and EU joined the WTO and withdrew from GATT 1947. The U.S. and EU had constructed the WTO as a 'single undertaking,' so that all other actors had no choice but to accept all parts of the agreements if they wanted to join as well.³⁷⁰ Thus, by carrying through its threat, the two most powerful actors were able to close the agreement according to their preferences, independently of any voting rules.

³⁶⁹ See Landau (2000) and Steinberg (2002). See also Leigh-Phippard (1999), who relates how the Western bloc shifted issues from the UN to specialized agencies during the Cold War to increase its influence.

³⁷⁰ See Steinberg (2002), who concludes that exiting GATT and creating the WTO involved little financial and limited political costs. Nevertheless, we will see that power-based minilateral decision-making looses appeal.

While the power of threats is influenced mostly by the trends, global governance structures also matter. Reputational and domestic audience costs of threats increase with the legitimacy of international institutions, and in particular, with expectations of legal discourse as appropriate form of interaction, as well as with judicial delegation, so that independent courts condemn implemented threats that are in violation of agreements.

5.4.2 Decision-making designs

Rules about participation and voting are the fundamental legal provisions that structure negotiations. Under multilateral participation, all actors are entitled to take part in the negotiations, whereas under unilateral arrangements, participation is limited to a smaller set of (powerful) actors.³⁷¹ Voting rules state whether actors have to reach unanimity or whether decisions can be passed by majority voting. Based on these ideal types of participation and voting rules, I distinguish between three modes of decision-making: unilateral, consensus, and majority.³⁷² The characteristics of the three approaches are summarized in *Table 5*.

Table 5: Decision-making designs

<i>Design</i>	<i>Participation rule</i>	<i>Voting rule</i>
Unilateral	Unilateral	Unanimity
Consensus	Multilateral	Unanimity
Majority	Multilateral	Majority

Under unilateral decision-making, no norms about participation exist. Powerful actors establish selective participation as they see fit. Decision-making rules either prescribe unanimity or they are absent. In the latter case, sovereignty warrants that no actor can be obligated without its consent. Effectively, this is equivalent to a unanimity rule. However, the unrestrained formation of unilateral groups shapes the character of internal decision-making among the powerful actors forming the

³⁷¹ The juxtaposition of ‘multilateral’ versus ‘unilateral’ bargaining draws on Kahler (1992) and Ruggie (1992). To them, multilateralism conveys rich meaning associated with a particular historical practice rather than simply denoting the number of actors involved. Ruggie (1992) perceives multilateralism as based not only on broad participation but also on generalized principles leading to diffuse reciprocity. He sets this apart from bilateral or unilateral agreements characterized by opportunistic exploitation of current power constellations. Contrary to Ruggie, I do not consider additional multilateral norms which guide bargaining, like MFN and reciprocity, as constitutive for the decision-making designs. If these norms have desirable efficiency properties and if legalization promotes the application of these norms, a further case for legalization could be made. Indeed, Bagwell and Staiger (2000) forcefully argue that reciprocity and MFN enhance bargaining effectiveness. See Pahre (2001) for a skeptical assessment.

³⁷² I do not consider the combination of selective participation and majority decision-making. Such a mode seems both undesirable and unlikely for global governance.

minilateral set of participants. Minilateral groups form with a certain objective in mind and they are driven more by effectiveness than legitimacy considerations – otherwise they would multilateralize. In addition, they can generally be re-created in slightly different form. Unrestrained formation and the focus on effectiveness both undermine claims that point to the formal unanimity requirement, in order to resist power-based bargaining. Therefore, minilateral decision-making leaves participation and internal decision-making among the participants to power.³⁷³

I distinguish among two modes of legalized, multilateral decision-making under which actors negotiate agreements within multilateral institutions based on the institution's decision-making procedures. Under consensus decision-making, the law prescribes unanimity to pass decisions. Under majority decision-making, the law prescribes majoritarian voting.

The ideal of legalized bargaining confers that influence on outcomes is channeled solely through the institutional decision-making system. As Steinberg (2002, 342) formulates, "In a law-based approach, bargaining power in international organizations is derived from substantive and procedural legal endowments. Decision-making rules determine voting or agenda-setting power, which shapes outcomes." This does not preclude strategic voting. Actors can promise or threaten to vote in certain ways, in order to influence the voting behavior of other actors. Yet, the announced actions have to be voting behavior and not extra-institutional actions, such as financial aid or exit from the institution.

In reality, actors do not move entirely from power-based bargaining to legalized bargaining. Instead, power-based bargaining resting on extra-institutional options influences the working of institutional decision-making. This intertwined nature of law and power makes it difficult to categorize our experience with past negotiations. Few institutions are clearly minilateral by formally and effectively excluding weak states. If powerful actors negotiate important aspects of agreements among themselves and if they dominate outcomes, decision-making should be considered minilateral.³⁷⁴

Even to the extent that the ideal of legalized bargaining is attained, this does not imply, in the real world, that the influence of extra-institutional power is eradicated. For a genuine rule of law, decision-making rules need not only to be observed, but they also have to correspond to the spirit of law. This means that decision-making rules have to be coherent. They have to be formulated in general terms, giving all members equal say or differentiating their influence along general and fair criteria. The more the rules are tailored to the needs of the powerful, the more the distinction between multilateral and minilateral decision-making wanes in significance.

The principal supplier rule in the WTO highlights how difficult this distinction is in practice. This rule

³⁷³ Recall that the decision-making designs are ideal types. Of course, legitimacy plays a role in minilateral institutions and costs of effectively excluding resenting actors limit the power of threats within the group. We can think of the 'Green Room' negotiating process dominated by the U.S. and the EU or the Group of 8 (G8) as examples of real-world, softened, minilateral decision-making. The free-wheeling coalition formation of 19th century European great powers is an illustration of less restrained minilateralism.

³⁷⁴ In this sense, Steinberg (2002, 365) summarizes that, "The GATT/WTO decision-making rules based on the sovereign equality of states are organized hypocrisy in the procedural context." See also Drahos (2003) on the persistence of threatening power in the WTO.

gives actors with a high market share in one product a preferred position in negotiations about this product. While the rule is formulated in general terms and can be justified on economic grounds, it privileges large economies that tend to be more often involved as principal suppliers than smaller and less developed countries.

In summary, I assume that in multilateral decision-making law considerably affects outcomes and that law does not mainly reflect the distribution of power. Accordingly, law is understood to be a restraint on power rather than an instrument of power.

5.4.3 Effectiveness of decision-making designs

Number and heterogeneity of veto players, and the size of their individual win sets, are key determinants of the effectiveness of decision-making. The win set of actors comprises all proposals that actors prefer to no agreement. Larger numbers of veto players, greater heterogeneity among them, and smaller individual win-sets make it increasingly difficult to develop proposals that make every veto player better off. Therefore, the chances for cooperation decrease with increasing number and heterogeneity of veto players and with shrinking win-sets.³⁷⁵

For several reasons, the win sets dwindle. First, with more linkages and greater depth of global governance, negotiations increasingly concern norms. Increasing ideational heterogeneity implies that disagreement is to be expected when negotiations affect norms. Therefore, normative disagreements will become more frequent. An agreement about a standard not affecting norms usually improves the welfare of a given actor, even if the standard is not optimally attuned to her needs. However, if the standard contradicts norms in which actors believe, the emotional tensions for the government detract from the benefits of cooperation. And if governments are willing to withdraw from their domestic, normative commitments, in order to facilitate international agreement, domestic societies may impose domestic audience costs. Furthermore, facing normative disagreements, governments may be unwilling to sacrifice normative claims on one issue for gains in another issue. Finally, domestic laws, and, in particular, constitutions, may tie the hands of governments that are willing to compromise.³⁷⁶ Secondly, strong disputes within domestic society often diminish the win-set for governments.³⁷⁷ One reason is that governments are averse to significantly harming any politically relevant domestic group. Furthermore, the win-set shrinks if domestic societies expect governments to advocate the outcomes of domestic discourses. In the extreme, internal deadlock can paralyze actors, so that the individual win-set turns empty.³⁷⁸ With increasing depth and linkages, the WTO affects more issue areas that are

³⁷⁵ See Putnam (1988) and Tsebelis (2000).

³⁷⁶ See Goldstein (1989), Goldstein (1993) and Jackson (2000a).

³⁷⁷ See Shaffer (2001). He furthermore notes that the adverse effect of domestic disagreements may be more pronounced than immediately apparent as governments pretend to support proposals for domestic political advantage. Since governments are aware that they will be blocked and as they do not harbor the intention to break the blockade, governments at the same time avoid confrontations with domestic interests that oppose the proposal. On the other hand, Putnam (1988) notes that domestic heterogeneity can allow forming coalitions flexibly.

³⁷⁸ See Young (1991).

contested domestically. Since many governments become more accountable to their domestic audiences for their behavior on the international stage, they find it increasingly difficult to disrespect standards of domestic, legitimate decision-making, and the policies formulated in these processes, in order to achieve international compromise.³⁷⁹ Moreover, since the discretion of negotiators shrinks, as we have seen in Chapter 4 about learning, disputes in domestic society and their influence on governments increasingly matter to trade policy formulation and bargaining.

Thirdly, governments can normatively commit themselves, in order to improve their bargaining position. Governments that are under pressure to cede grounds in normatively charged, international negotiations may construct an identity based on their opposition to the internationally proclaimed norm.³⁸⁰ Greater transparency of global governance increases domestic audience costs of compromising and, thus, makes normative commitments more powerful. With greater transparency, domestic society can better observe how their governments act in negotiations, so that governments cannot adopt soft bargaining strategies and then explain painful concessions by overwhelming external pressure. Alternatively, governments commit themselves to disputed norms for domestic reasons. Transparency then encourages actors to “play to the gallery”.³⁸¹ Whether governments choose to commit themselves for reasons related to the international or domestic sphere, it is difficult to assess the costs of revoking commitments, in particular, because political dynamics may carry actors further than intended. Minor differences may grow into matters of principle, leading to incompatible commitments that result in failure to agree.

Fourth, even if governments do not commit themselves strategically, civil society challenges those actors who withdraw from normative commitments which civil society champions. Thus, civil society involvement makes it more difficult to compromise if certain normative positions are to be abandoned.³⁸² Finally fifth, involvement of different ministries may lead to internal stalemate.³⁸³ When discussing internal complexity, we have seen that increasingly linked, deep global governance indeed involves more ministries.

For all these reasons, the trends reduce the individual win-sets, causing decision-making to become more difficult. Strategic linkage of issues into comprehensive bargains is a common measure to widen win sets. Yet, this only shifts the problem towards increased complexity.

Now we turn to the number of veto players. Under majority voting, coalitions would be able to form freely in the WTO, so that no institutional (single or compounded) veto player would exist.³⁸⁴ Under consensus decision-making, all actors become institutional veto players. With more actors, the number of veto players increases automatically. Regionalization lowers the number of veto players and, thus,

³⁷⁹ See Skogstad (2002).

³⁸⁰ See Drezner (2000).

³⁸¹ Zutshi (2001, 390). See also in Chapter 6 about compliance in the context of domestic audience costs the discussion about self-entrapment of governments.

³⁸² Ostry (2001, 366) notes that civil society agents “do not resemble the distributional coalitions sparring over the division of the pie.”

³⁸³ See Shaffer (2001).

³⁸⁴ See Tsebelis (2000) on veto players under majority voting.

makes consensus decision-making more effective.

Compared to consensus decision-making, unilateral decision-making rests on fewer veto players. For unilateralism to be effective, agreement only among powerful actors is required as a starting point. Once they have reached internal agreement, powerful actors have to decide whether they attempt to impose their decisions on excluded actors and, thus, to achieve multilateral implementation. Alternatively, they can be content with unilateral implementation which only covers the unilateral group. In the following, I first show that unilateral, as well as multilateral, implementation of unilateral decisions becomes increasingly unattractive. I then argue that attaining unilateral agreement becomes increasingly challenging.

This contradicts Gruber (2000) who suggests that mainstream opinion underestimates the attractiveness of unilateral decisions that remain constrained to the unilateral group. Gruber stresses that actors who have a unilateral or unilateral option enjoy 'Go-It-Alone-Power' that transfers significant power to set the terms of cooperation with those actors who would not be included in the unilateral or unilateral option. Gruber perceives this power to be so strong that those actors without an attractive unilateral option frequently loose from cooperation in absolute terms. While they gain from cooperation compared to non-cooperation with the unilateral action executed, they loose compared to the status quo of non-cooperation without the unilateral action executed.³⁸⁵

Multilateral implementation

As we have seen when discussing the trend of increasing actor participation, developing countries were marginalized in multilateral trade negotiations throughout GATT. An important reason for this was the special and preferential treatment to which developing countries were entitled. This rule eased the obligations of developing countries, set by WTO agreements, to such an extent that developing countries could not substantially commit themselves to liberalization. Thus, they had little to offer in exchange for industrialized countries' liberalization. As a consequence, WTO negotiations were mostly exchanges of concessions between industrialized countries, with developing countries free-riding but gaining only moderately. The Uruguay Round rigorously curbed developing countries' privileges and made developing countries full members of the WTO. The introduction of the 'single undertaking' extended WTO obligations in particular to developing countries as they had participated reluctantly in the 'plurilateral agreements' that committed only signatories instead of all members of the WTO. Hence, the significance of the WTO has risen for developing countries beyond the increases in relative effectiveness and scope of global governance that raise the significance of the WTO for all actors.

The institutional disempowerment of the past was complemented by a cultural dimension. Developing countries had adopted the role of protectionist free-riders, and the regime's *modus operandi* did not expect developing countries to translate commitments into action. This culture has changed, particularly during the Uruguay Round. Governments and domestic audiences in developing countries

³⁸⁵ Mainstream analysis finds weak actors frequently to succeed in negotiations through resolve and creative negotiating tactics. See Singh (2000) and Zartman and Rubin (2000).

have learned about the importance of participation in global governance and about the costs of absence. Domestic audiences now exercise pressure on their governments for more active safeguarding of their interests.³⁸⁶

Developing and newly industrialized countries do not only take more interest in global governance, but their capacities to influence outcomes have also improved. Developing countries' governments and negotiators have upgraded their bargaining skills, such as formulating a position ahead of negotiations, influencing agenda setting, and linking issues strategically. In particular, developing countries have noticed how cooperation with other developing and developed countries can effectuate results.³⁸⁷

More fundamental is that economic growth in (former) developing countries has strengthened their position. Market size is a key determinant of bargaining power in the WTO.³⁸⁸ The damage to the targeted actors of reduced market access increases with the size of the market. The costs of non-participation and exit both fall as the home market provides better opportunities. Also, the costs of aggressive behavior shrink as relatively lower barriers to trade need to be erected for the same level of damage. Improved bargaining skills, dynamic economic growth, and generally declining power of threats, which we have noted above, make developing countries less vulnerable to threats.³⁸⁹

In addition, new entrants join the WTO. These countries include giants like China, who entered in 2001, and Russia, who is engaged in advanced accession talks by 2004. Moreover, civil society builds up pressure to better integrate developing countries into WTO decision-making.

Overall, more actors will resist extension of minilateral agreements with more resolve and greater capacities, assisted by civil society.³⁹⁰ Therefore, multilateral implementation becomes harder to achieve. And even if minilateral decisions can be multilateralized, decreasing power of threats and increasing resistance against minilateral decisions drive up transaction costs. The more the threats are implemented or only announced, the more the costs and damages pile up.

Minilateral implementation

If powerful actors forming a minilateral group cannot extend minilateral decisions to excluded actors at tolerable costs, they can limit the implementation of minilateral decisions to the minilateral group. However, such minilateral implementation lacks appeal for two reasons. First, the value of developing

³⁸⁶ See Ford (2002).

³⁸⁷ See Page (2001) and Singh (2000).

³⁸⁸ See Krueger (1995) and Steinberg (2002). See Drahos (2003) and Singh (2000) for further sources of power.

³⁸⁹ See Singh (2000).

³⁹⁰ Steinberg (2002) believes that all these empowering factors dominate the loss of special leverage, which developing countries suffered with the end of the Cold War. Contrarily, Singh (2000) proposes that developing countries were stymied by the focus on state-centered and hierarchical security negotiations of the Cold War, which dominated also negotiations in other issue areas. Accordingly, developing countries would have gained bargaining power through the end of the Cold War.

countries' participation, which minilateral implementation forgoes, is increasing.³⁹¹ Secondly, excluded actors can be expected to increasingly militate even against minilateral implementation, not only against the multilateral extension of minilateral decisions.

To understand growing opposition to minilateral implementation, it is helpful to consider the benefits and costs that minilateral agreement, which is not completely extended to all actors, can extend to excluded actors. Under the old GATT, industrialized countries traded concessions that were then granted to developing countries based on the MFN principle. Yet, industries in developing countries have become increasingly competitive, so that powerful actors are less ready to expose their import-competing industries to developing country competition without commensurate benefits to their export industries. And as market access to those traditionally excluded actors is increasingly valuable, powerful actors are less willing to give away bargaining chips, which they could trade for market access. Therefore, powerful actors are less willing to give away concessions that benefit excluded actors.

Moreover, WTO policies shift with deeper integration from market access concessions to standards. If standards spread through the market, excluded actors are automatically affected by minilaterally implemented decisions in which they had no say. This means that developing countries do not only benefit less from minilateral implementation, but they can incur losses if the standards are ill-suited to their needs. Even if they are better off with a minilateral standard than without, they are likely to compare the benefits under the minilateral standard with the benefits which they expect if multilateral decision-making would lead to a standard that would suit them better.

We have seen that the beneficial aspects of minilateral implementation for excluded actors decline, whereas the detrimental aspects increase. Since developing countries will, thus, resist more strongly and as the exclusion of developing countries increasingly forgoes gains from cooperation, minilateral implementation loses appeal.

Minilateral agreement

A minilateral group needs to combine sufficient market size to either coerce excluded actors into accepting the minilateral decisions at bearable costs or to keep the losses of minilateral, as compared to multilateral, implementation modest and to shoulder the damage of possible resistance to minilateral implementation.

Given waning power of threats and increasing resistance, maintaining a small minilateral group and overcoming resistance by employing more severe threats is difficult. The minilateral group, thus, has to expand, in order to lower its own costs of threats and to increase the damage to the remaining actors.³⁹² Yet, this increases the number of veto players within the minilateral group. This is critical since internal cooperation is increasingly hampered by ideational heterogeneity among the veto players, particularly between the EU and the U.S..

³⁹¹ See Frankel (2001), Kahler (1992) and Sauv  and Subramanian (2001).

³⁹² Sj stedt (1994) and Singh (2000) observe such an expansion of the minilateral group in the past as the U.S. had to co-opt the EU and Japan who had caught up with the U.S. economically.

5.5 Risk of decision-making

When cooperation in international institutions, and with legalized, institutional decision-making in particular, is effective, this suggests that actors are open to institutionalization and legalization. However, actors take the effects of institutionalization and legalization on their individual welfare as basis for their choice rather than global welfare effects. The individual welfare effects of global governance depend not only on the effectiveness of global governance but also on the distribution of the benefits and costs of cooperation. Therefore, we have to consider how institutionalization and legalization change the distribution of welfare.

In the context of the EU, Moravcsik (1993, 509) suggests that “the decision to adopt qualified majority voting or delegation to common institutions is the result of a cost-benefit analysis of the stream of future substantive decisions expected to follow from alternative institutional designs. For individual Member States carrying out such a cost-benefit calculation, the decision to delegate or pool sovereignty signals the willingness of national governments to accept an increased political risk of being outvoted or overruled on any individual issue in exchange for more efficient collective decision-making on the average.” We can infer from this experience with the EU that, first, actors compare different governance scenarios in order to assess whether institutionalization and legalization are individually beneficial. Secondly, this understanding emphasizes the uncertainty of outcomes under different governance scenarios and, thus, justifies the term ‘risk.’ Actors do not know under which global governance structure they will benefit most, but they can form expectations about the effects of alternative structures.

Whenever the pay-offs of a certain global governance scenario fall short of the benchmark which actors apply, I speak of deviations. I discern among three types of deviations. In the first case, actors compare consensus decision-making with unilateral decision-making. Consensus voting deviations, thus, refer to the degree by which outcomes under consensus voting are less favorable for a given actor than outcomes resulting under unilateral decision-making. Correspondingly, majority voting deviations describe the degree by which outcomes under majority voting are less favorable for a given actor than outcomes resulting under unilateral decision-making.

Institutionalization deviations are different because actors do not compare global governance outcomes produced by different decision-making designs. Instead, actors compare the outcomes under global governance for any kind of institutional decision-making with the outcomes of autonomous governance.

Powerful actors generally prefer global governance with unilateral decision-making over autonomous governance. If unilateralism is fairing poorly, they can still unilaterally agree to (partially) return to autonomous governance. Therefore, consensus and majority voting deviations largely exhaust their concerns.

Institutionalization deviations consequently pertain (mostly) to weak actors who have little influence on global governance but depend on its results as they can do little to escape or offset the effects of detrimental global governance constellations. While weak actors may lose considerably through global governance, they generally gain by legalization which replaces unilateral decision-making

with consensus or majority voting. Accordingly, the fundamental concern of weak actors is deviations stemming from institutionalization.

For all three types of deviations, risk is determined by the degree of deviation in global governance policies and by the costs of deviations.³⁹³ The degree of deviations depends on the specific type of deviation. Accordingly, I address the three types of deviations separately in the following sections. What will become apparent after this discussion, but will not be mentioned explicitly again, is that all three types of deviations increase with the heterogeneity of objectives.³⁹⁴ Consensus voting is more likely to be deadlocked, majorities are more likely to exploit minorities under majority voting, and powerful actors are more likely to disregard weak actors in international institutions with greater heterogeneity. Hence, increasing material and ideational heterogeneity aggravates risk, whereas effective learning reduces risk.

By and large, the costs of deviations equal the costs of unexpected, adverse outcomes which we have already discussed in the context of uncertainty in the section about internal complexity. Note in addition that costs arise even if actors who have voted against a decision can file a reservation exempting them from all obligations flowing from the decision, as practiced in the WTO. Beyond minor reputational costs of exempting themselves, actors can face indirect costs of exemptions. These costs are caused by majority voting if, in the absence of institutional decision-making, a unilateral decision had not arisen. Even if a unilateral decision had occurred otherwise, the costs of exemptions tend to be intensified by majority voting because more actors are likely to follow a majority decision, due to their legitimacy and for reputational concerns, than a unilateral decision. If the costs of exemption-based non-participation increase with the number of other actors adhering to a decision, majority decisions cause costs for dissenting actors. This is particularly salient for a standard setting. Nevertheless, exemptions decrease majority risk as they give actors the choice to select the less costly alternative.

5.5.1 Risk of consensus voting

We have defined consensus deviations as the unfavorable difference between outcomes under consensus voting compared to outcomes under unilateral decision-making.³⁹⁵ For three reasons, powerful actors can be worse off under consensus decision-making than under unilateralism. First, threats become more costly. Institutional veto players hold on to their formal rights and they resist

³⁹³ For a compatible, yet broader definition of 'sovereignty costs,' see Abbott and Snidal (2000).

³⁹⁴ Abbott and Snidal (2000) find sovereignty costs to increase with heterogeneity of objectives. Wendt (1999, Ch. 7) considers homogeneity of objectives to ease fears and thus further cooperation.

³⁹⁵ Consensus voting risk is closely related to uncertainty which we have discussed as an element of internal complexity. Both phenomena arise if actors are dissatisfied with existing obligations. The difference is that uncertainty emphasizes unexpected changes in the environment, whereas consensus risk stresses the substantively or strategically motivated disagreement among actors about how to improve global governance. This difference is smaller than it may appear initially because uncertainty is only relevant if actors expect that they cannot adapt agreements to changing circumstances at no cost. The transaction costs of bargaining and the need for costly concessions are fundamentally driven by disagreement.

threats more vigorously than they would without formal veto power. Also, reputational and domestic audience costs of threats increase if they contradict legitimate decision-making rules.

Secondly, reduced power of threats may enable institutional veto players to successfully block a decision that could have been passed under unilateral decision-making. The costs of possible blockades depend on the circumstances of bargaining. If negotiations take place frequently and under circumstances that are conducive to agreement, the bargaining problem may be surmounted even under consensus voting. However, value at stake, complexity of issues, and number and nature of veto players increasingly form a difficult background for bargaining. Under these circumstances, unanimity is very hard to reach.

Thirdly, powerful actors may have to accept a distribution of gains that is less favorable for them than under unilateral decision-making, in order to overcome blockades without inordinate costs of threatening.

We can conclude that the greater the power of threats and the greater bargaining effectiveness for a given global governance structure, the lower the risk of consensus voting becomes. Moreover, judicial delegation can substitute for deadlocked bargaining. Courts either issue rulings with legislative function out of their own commitment to progress in global governance or powerful actors attain such rulings through pressure on courts. Thus, judicial delegation lowers the costs of possible blockades.

5.5.2 Risk of majority voting

Actors agree on rules for majority decision-making behind a veil of uncertainty.³⁹⁶ Overall gains through improved decision-making effectiveness stand against losses to changing, unknown minorities. Nevertheless, actors may resist majority voting for two reasons. First, actors are risk-averse. Secondly, the veil is somewhat transparent.³⁹⁷ Actors know whether their interests tend to be better served by changes or by the status quo. They also have an estimate about how majority voting would affect their ability to influence changes. In particular, the possibility for weak actors to pass decisions against the will of powerful actors partly offsets the power of extra-institutional threats. Powerful actors, therefore, need to incur higher costs, in order to bias agreements in their favor, or they have to accept less beneficial distributions of the gains from cooperation.

The following analysis of the risk of majority voting first centers on the influence of consensus voting as a supplement to majority voting, based on experience with multi-level governance in the EU and the U.S.. The analysis then shows that determinants of legalization other than decision-making design influence the risk of majority voting. Finally, the analysis considers the impact of these determinants and the trends on self-restraint and external restraints that keep the majority from exploiting the minority.

Analysis of the struggle of lower-level authorities to control higher-level authorities in multi-level governance is similar, whether actors delegate authority to the WTO, whether countries delegate

³⁹⁶ See Moravcsik (1993) and Trachtman (2002).

³⁹⁷ See Moravcsik (1993).

authority to the EU, or whether states delegate authority to the federal level in the U.S..³⁹⁸ Therefore, lessons from other instances of multi-level governance can be applied to risk in the WTO.

Coglianesse and Nicolaidis (2002) discuss four mechanisms related to decision-making that allow principals to maintain control over agents to whom they have transferred authority: delineation of the scope of delegated authority, supervision of the agent, direct involvement in the affairs of the agent, and maintenance of the option to reverse the delegation of authority.

Monitoring and reversal of authority are key factors in judicial delegation risk to which we turn in the next section. Most important for majority voting deviations is delineation of the competency of higher-level authorities, which is in this case the decision-making body of the WTO. This technique requires a constitutive agreement that is protected from simple majoritarian changes. Majority risk is, thus, much reduced if it is combined with consensus decision-making that delineates a boundary for majoritarian decisions.

Before we can ask how precision, judicial delegation, exemptions, and punishment influence majority risk, we have to consider the general validity of the argument that any determinant of legalization other than decision-making design matters. If the endogenous determinants could be changed easily and without costs under majority decision-making, we could not consider the working of different structures under majority voting as the structures could be changed by a majority that feels restrained by them.

But changes in structure are costly. Actors may refrain from changing structure in order to maintain the institution's legitimacy and to avoid permanent changes in structure which lower effectiveness. Risk-averse actors avoid structural changes whose effects are difficult to predict. The institution as an agent may resist change. Additionally, certain structures are likely to be protected by particularly high majority requirements. Hence, structures display considerable stability despite majority voting. The endurance of constitutions in domestic settings can serve as an analogy.

Now we can search for structures that curb majority voting deviations. Here, the problem occurs that effective decision-making and risk appear to come together. Generally, legalized bargaining under a majority rule stands for effectiveness, whereas power is detrimental. However, not every global governance structure that lowers majority risk reduces bargaining effectiveness to a corresponding degree. Different structures, which include majority decision-making, can display more or less advantageous combinations of bargaining effectiveness and risk.

Key to advantageous combinations are mechanisms that prevent abusive voting. I speak of abusive voting if majority voting leads to massively skewed distributions that significantly disadvantage powerful actors. Abusive voting implies use of duly transferred authority to resistant actors' disadvantage, beyond what their 'system consent' to the decision-making design warrants. A moderate deviation from the unilateral outcome in favor of weak and poor actors cannot be considered an abusive exploitation of decision-making rules. Accordingly, if structures prevent only abusive majority voting, decision-making proceeds unimpeded by power in all but rare, abusive cases.

³⁹⁸ See Coglianesse and Nicolaidis (2002).

Generally, we can distinguish between internal or self-restraint and external restraint on abusive majority voting.³⁹⁹ One reason for practicing self-restraint is that actors anticipate that minorities will employ threats to prevent abusive voting and that they will resort to exemptions, defections, and exit, in order to avoid the obligations stemming from abusive voting. Despite incentives for misrepresentation, all actors have some knowledge about this limit. The majority has an incentive not to cross this line, which triggers costly reactions. Therefore, structures that allow for more effective threats, which offer more generous exemptions, and which display weak enforcement mechanisms imply a narrowly drawn line of acceptable deviations and high costs of crossing this line. Thus, such structures experience low majority risk.

Avoiding employment of defensive measures by minorities is one aspect of the systemic interest that speaks against abusive majority voting. Further motives are related to norms prescribing that an international institution cannot be governed with narrow majorities, like in the EU.⁴⁰⁰ With strong collective identity, actors do not enrich themselves at the costs of others. However, in the EU, collective identity is insufficient to grant legitimacy to majority decisions with considerable distributional implications. EU members do not need to suppose that decisions were made with collective well-being in mind and that they should, thus, be respected.⁴⁰¹ Under the logic of consequences, actors comply with the norm requiring sound majorities in order to preserve institutional legitimacy and in order to avoid the possibility of being outvoted themselves. Moreover, actors can comply with self-restraining norms driven by the logic of appropriateness. Even lower collective identity in the WTO delegitimizes majority decisions with considerable distributional implications. Accordingly, even greater self-restraint is required out of systemic self-interest and for normative reasons.

Maintaining legitimacy is a particularly convincing argument for self-restraint in the WTO. We will see that enforcement rests essentially on compliance pull, domestic audience costs, and reputational costs that all hinge, at least to a considerable extent, on the legitimacy of the international institution. Abusive voting weakens legitimacy and, thus, erodes the capacity of the WTO to enforce agreements against powerful actors. Indeed, governments may feel that appropriate behavior towards abusive voting is non-compliance, and they are likely to be supported by domestic society.

In the case of actors' self-restraint failing to prevent abusive decision-making, courts can protect harmed actors. Even without constitutional authority, which is most effective in warranting minority rights, courts can limit abusive majority voting. Courts are interested in institutional stability and they do not benefit from skewed distributions. Therefore, they can be expected to use their discretion against abusive voting.⁴⁰² They can do so, for instance, by strengthening the role of fundamental agreements against continuous decision-making, which may be subject to lower majority

³⁹⁹ See Wendt (1999, Ch. 7) on internal and external constraints on the abuse of power.

⁴⁰⁰ See Kohler-Koch and Edler (1998).

⁴⁰¹ See Kohler-Koch and Edler (1998) and Scharpf (1999).

⁴⁰² On the importance of courts in protecting rights of lower-level authorities in federal states and structures, see Bermann (2002).

requirements. Courts in the WTO consider the rights of the complainant and of the defendant under the Dispute Settlement Understanding (DSU), as well as the decisions of political bodies on the disputed issue.⁴⁰³ If political bodies vote abusively, we can expect courts to give more weight to the rights stemming from fundamental agreements under the DSU.

Abbott and Snidal (2000, 431) observe that, “Even when directly negotiated solutions are permitted, the existence of legal institutions means that states will bargain ‘in the shadow’ of anticipated legal decisions.” Roessler (2001, 320) highlights that “reaching a consensus takes place in the shadow of the procedural alternatives available in the absence of a consensus. These alternatives can effectively dictate the outcome of that process.” Therefore, less abusive voting should occur in anticipation of minority right protection through courts.

5.5.3 Risk of institutionalization

What I have not considered so far is the risk of institutionalization. We have defined institutionalization deviations as the loss to weak actors created by the move from autonomous governance to global governance for any decision-making design. In theory, global governance can become less effective than autonomous governance, in particular if blocked by disagreements under unanimity voting. The more realistic case is that minilateral global governance produces extremely uneven distributions, so that weak actors are made worse off through participation in global governance. While it is unlikely that weak actors lose through participation in global governance in absolute terms, this can be expected to apply from a marginal perspective. From a certain point onwards, the extension of global governance at the costs of autonomous governance becomes too risky. Then actors resist widening the ambit of global governance. They also refuse strengthening the hold of global governance on those issues already within its domain, for instance, by objecting to more precision or tougher punishment.

Institutionalization can undermine the standing of weak actors against powerful actors. Unilateral or minilateral decisions which adversely affect excluded actors face normatively motivated resilience. Yet, if minilateral decision-making is commonly practiced in global governance, if powerful actors find a sufficient majority under majority voting, or if they find an overwhelming majority under consensus voting, then powerful actors have the normative pressure of an institutionally legitimated decision on their side. Within international institutions, the sovereignty norm protects less against intrusions, so that reputational pressures grow stronger. This is critical because the influence of weak actors on global governance may remain weak in the face of extra-institutional power.

Besides for formal decision-making, institutionalization affects the creation and significance of customary law. If customary rules strongly reflect the interest of the powerful, legalization, which gives additional weight to customary rules, disadvantages weak actors through the back door. In practice, the bias of customary law in favor of the powerful is limited, since the formation of customary law is directed by existing customary and formal law which takes balanced distributional

⁴⁰³ See Roessler (2001).

implications as a determinant of compliance into account.⁴⁰⁴

Global governance can be made more enticing to weak actors on two accounts, beyond those measures that lower the costs of deviations. First, deviations can be reduced. Global governance structures that require multilateral decision-making, make threats costly, and induce deliberating improve the standing of weak actors. Regionalization combines the power of weak actors, so that they can better withstand threats. Independent courts oppose attempts by powerful actors to use the law as an instrument of power. Secondly, positive side effects of agreements can off-set disadvantages of institutionalization. In particular, compliance mechanisms that enforce obligations also against strong actors level the playing field to the advantage of weak actors.

5.6 Judicial delegation

WTO rules are imperfect in many regards. They are imperfectly state-contingent. This means that they do not contain optimal provisions for every state of the world. They are legally incomplete as they do not prescribe obligations for every situation within their scope. Furthermore, rules may be ambiguously formulated or conflicting.

These imperfections are partly unintentional. Actors cannot foresee every future contingency. Language is inherently ambiguous and cross-cultural communication breeds misunderstandings. Furthermore, if thousands of boundedly rational negotiators formulate thousands of rules, gaps and conflicts between rules are inevitable. However, imperfections can also be intentional.⁴⁰⁵ If actors accept imperfections, less precision is needed. Thus, actors save transaction costs of bargaining that increase with precision. The transaction costs of operating an agreement can furthermore increase with high precision, because handling overly precise legal arrangements requires costly expertise. Not least of all, unresolved conflicts may be buried under vague formulations.

Imperfect agreements are especially attractive if combined with judicial delegation. Judicial legislation may be more flexible than ordinary rule-making and, thus, produce rules that are better attuned to changed circumstances. Moreover, low precision and extensive judicial delegation create an artificial veil of uncertainty. Actors expect rulings to be efficient, but they are uncertain how court rulings in future disputes will distribute benefits and costs of cooperation. Under this perspective, actors delegate authority to courts until their appreciation of the average gains from judicial delegation is balanced by their aversion to the uncertainty of the distribution of benefits and costs. Finally, leaving agreements imperfect and empowering courts to clarify rules by judicial legislation may both be politically more opportune for actors than spelling out all implications of their agreements themselves and in advance.

A main disadvantage of imperfect agreements is that they evoke disputes. Actors face incentives to defect from incompletely state-contingent agreements. Furthermore, actors disagree how to interpret ambiguous rules, how to fill legal gaps, and how to resolve rule conflicts. To settle these disputes, courts need to interpret and expand existing legislation. Though court rulings are primarily particular

⁴⁰⁴ See Byers (1999).

⁴⁰⁵ See Ayres and Gertner (1992), Chayes and Chayes (1995), Kassim and Menon (2003), Trachtman (1999b), Trachtman (2002) and Young (1999a).

and retrospective, that means, they resolve existing disputes among disputing parties, rulings also indicate how judges intend to settle future similar cases. In this sense, rulings are general and prospective. This endows courts with a legislative function.⁴⁰⁶

Let us summarize the ways in which judicial delegation contributes to the extension of global governance scope. First, judicial delegation contributes to legal discourse and, thus, social capital formation in international society. Social capital formation, in turn, allows negotiating more scope of global governance.

Secondly, judicial delegation enhances bargaining effectiveness. Judicial delegation creates a veil of uncertainty, it reduces the domestic political costs of agreements, and it sets focal points. By containing decision-making risk, judicial delegation indirectly adds to bargaining effectiveness as it allows more effective, though risky, majority voting.

Thirdly, judicial delegation lowers the costs of conflicts that arise from imperfect agreements. Consequently, actors agree on broader scope with lower precision if judicial delegation is extensive.

Fourth, judicial delegation implies judicial legislation which tends to increase the scope of global governance. While judicial legislation is unlikely to extend global governance to new issues, it intensifies the regulation of issues already covered by agreements.

5.6.1 Risk of judicial delegation

While judicial delegation offers many benefits to global governance, transferring power to courts involves risks for weak and powerful actors.⁴⁰⁷ If we define judicial delegation risk in analogy to our definition of decision-making risk, then judicial delegation risk is the deviation of outcomes under judicial dispute resolution compared to the settlement of disputes through negotiations without judicial delegation for a given actor. Two types of judicial delegation risk can be discerned: a principal-agent risk and a collective-principal risk.

In the case of principal-agent risk, courts can pursue their own agenda, thereby violating interests which are broadly shared within international society.⁴⁰⁸ Indeed, we can observe a tendency among international institutions to develop towards the rule of law.⁴⁰⁹ The basic impetus of law appears to oppose the current state-based international system. Held (2002, 38) links legalization to the cosmopolitan project which aims at fundamentally reconfiguring the international system, “The core of the cosmopolitan project involves reconceiving legitimate political authority in a manner that disconnects it from its traditional anchor in fixed territories and instead articulates it as an attribute of

⁴⁰⁶ See Stone Sweet and Brunell (1998), Trachtman (1999a) and Trachtman and Moremen (2003).

⁴⁰⁷ Abbott and Snidal (2000, 438) warn that, “Delegation provides the greatest source of unanticipated sovereignty costs.”

⁴⁰⁸ See Pollack (1997). A situation similar to a principal-agent problem can arise from dysfunctional behavior of international institutions. Organizations can be paralyzed by internal complications such as counterproductive organizational politics or culture. See Barnett and Finnemore (1999). I do not treat this risk separately but subsume it under principal-agent risk.

⁴⁰⁹ See Reich (1996).

basic cosmopolitan democratic arrangements or basic cosmopolitan law”. Petersmann (2001) calls for far-reaching reform of the WTO in accordance with the human rights revolution in international law. His ideas about human rights as the central concept for reshaping the WTO substantially devalue actors’ sovereignty.⁴¹⁰ And while more limited in his aspirations, even the former Chairman of the Appellate Body Bacchus (2003, 548) believes that “much that can be done for the end of freedom through the means of trade simply will not be done unless politics yields to law, and unless diplomacy yields to jurisprudence in the important work of WTO dispute settlement.”

The second type of judicial delegation risk arises from the circumstance that international institutions contract with a collective principal. Whereas the principal confronts the courts externally as a single entity, which speaks with one voice through only one collective decision-making system, the principal is internally composed of the many actors who make up the membership of the WTO.⁴¹¹ As the interests diverge which actors take as participants or observers of lawsuits, courts have to navigate between opposing interests. Even if courts conform to the majority will of the collective principal, they still conflict with a share of the membership. I speak of a collective principal deviation if outcomes of judicial dispute resolution are *systematically* less beneficial for a given actor than the results that would be attainable if bargaining was not substituted by judicial decision-making.

Interests systematically diverge over many cases in particular according to the power actors hold. If courts maintain equality before the law and protect the rights of weak actors, they upset powerful actors, who prefer bargaining instead of impartial courts. Weak actors, on the other hand, fear that courts cave in to the demands of the powerful. If the law is transformed into an instrument of the powerful, weak actors can be worse off under judicial decision-making than under bargaining.

Whether actors prefer bargaining or judicial delegation depends on the decision-making design in place. Powerful actors are more open to judicial delegation if decision-making is legalized, so that their power is restrained in any case. Weak actors are more willing to accept judicial delegation risks if they can, thus, avoid unilateral bargaining.

The difference between the principal-agent risk and collective principal risk is fluid. I speak rather of a principal-agent than a collective principal risk the more actively courts pursue their own agenda and the greater the majority of actors is which opposes a ruling.

More important than any single case is the legal dynamic which can emerge from precedent. This can develop the rules of the WTO in a direction that conflicts with the interests of a set of actors or of the principal as a whole.⁴¹² Courts can strategically construct precedents in order to extend their independence, mandate, and accessibility. For instance, courts can embed decisions with possible long-term consequences in comparatively uncontroversial cases.⁴¹³ In the EU, the ECJ has empowered

⁴¹⁰ See, however, Trachtman and Moremen (2003, 224) arguing against “conclusory assertions of the rightness, fairness, democracy, or legitimacy of private participation in WTO dispute settlement.”

⁴¹¹ See Nielson and Tierney (2003).

⁴¹² See Alter (2000), Stone Sweet and Brunell (1998), Garrett, Kelemen and Schulz (1998) and Keohane, Moravcsik and Slaughter (2000).

⁴¹³ See Garrett, Kelemen and Schulz (1998).

itself, and European law in general, by establishing new obligations for actors. For instance, the ECJ granted direct effect to large parts of European regulations and largely achieved supremacy of EU law over national law.⁴¹⁴

Even if courts do not intentionally lay the groundwork for more authority, their independence can rise. Courts can gain strong legitimacy that elevates their standing beyond what actors had in mind in their agreement. Moreover, accumulating case precedent strengthens courts. The legal situation gains clarity with precedents, so that it becomes more expensive for courts to succumb to powerful actors and even to demands of the collective principal if those are inconsistent.

Like decision-making risk, judicial delegation risk depends on the size and the costs of deviations. Judicial scope and independence determine the size of deviations. Judicial scope reflects the number and significance of rulings, which courts issue. In the definition of Keohane, Moravcsik and Slaughter (2000, 460), judicial independence “assesses the extent to which adjudication is rendered impartially with respect to concrete state interests in a specific case.”

Judicial scope delineates the potential for judicial delegation deviations, whereas judicial independence determines how this potential is realized. The more independent courts become, the greater the collective-principal risk becomes for powerful actors, who cannot apply their extra-institutional means. Naturally, this implies a small risk for weak actors, who fear that the powerful might capture the judicial system. Obviously, the principal-agent problem becomes more severe as the courts gain more independence.

5.6.2 Judicial scope

The degree of imperfection in agreements is an important determinant of judicial scope. The more imperfect agreements are, the more disputes arise and the greater discretion courts enjoy in resolving the disputes.⁴¹⁵ While precision is endogenous, the trends point towards growing imperfections as optimal completeness declines with uncertainty and complexity of the issues that are to be regulated.⁴¹⁶

Judicial scope also depends on the design of judicial delegation. Breadth of legal mandate, legal proceedings, and accessibility of courts each influence the number and significance of rulings. The legal mandate delineates the competency of courts. If courts are entitled to add or diminish obligations, their rulings become more significant than if they are narrowly bound to determining compliance with existing obligations. Accordingly, litigating becomes more attractive. Justifications at court become more difficult with more intrusive standards of review. Consequently, plaintiffs have better chances of winning a lawsuit in more cases, so that more cases will be brought to court. If standards of interpretation give courts broad discretion, their rulings are less restrained by legal text and become more significant on average.

⁴¹⁴ See Stone Sweet and Brunell (1998) and Alter (2000, 492), who concludes that the ECJ succeeded in “significantly advancing legalization in Europe.”

⁴¹⁵ See Bronckers (1999).

⁴¹⁶ See Trachtman (1999b).

The more automatic the legal proceedings go, the fewer the cases blocked by resenting actors. As automaticity increases, even significant cases cannot be dropped from the judicial track, so that the average significance of cases also grows.

To assess the relevance of access, the following definition by Keohane, Moravcsik and Slaughter (2000, 462) is helpful, “From a legal perspective, access measures the range of social and political actors who have legal standing to submit a dispute to be resolved; from a political perspective, access measures the range of those who can set the agenda. Access is particularly important with respect to courts and other dispute-resolving bodies because, in contrast to executives and legislatures, they are ‘passive’ organs of government unable to initiate action by unilaterally seizing a dispute ... access can be viewed as measuring the ‘political transaction costs’ to individuals and groups in society of submitting their complaint to an international dispute-resolution body.”

In the WTO, accessibility is designed restrictively with states as gatekeepers. Lobbying governments to bring cases is costly for private agents as governments have to pay costs for litigating themselves. Transaction costs of going to court, and the danger of being confronted with suits brought up by the litigated actor in revenge, render governments reluctant litigators.⁴¹⁷ The broader the access is, the more cases are brought to court. However, access that is limited to actors does not simply lower the number of cases but it gives actors the possibility to select the cases they bring to court. Since actors, for fear of systemic repercussions, are more reluctant than private agents to legislate on important issues through courts, the significance of cases rises with easier access for private agents.

The selection of cases through actors does have a side effect on the legitimacy of courts. Actors can ignore tensions between their respective actor-level policies and they can negotiate remedies that are different from those courts would prescribe. Access for private agents implies that all tensions between actor-level policies become subject to court rulings and that courts rule even on matters where the concerned actors could settle conflicts peacefully by political remedies. Limited access, thus, lowers the pressure on courts to issue rulings that are possibly damaging to their legitimacy – while it preserves the right for actors to resort to law instead of power for solving conflicts.

5.6.3 Judicial independence

Pollack (1997, 129) notes that independence is “a function of the efficacy and credibility of the control mechanisms established by the member states [of the EU] to monitor and sanction agency activity.” In addition, internal factors influence courts rulings. The main internal factors which judges take into consideration in their rulings are the repercussions of their rulings on their professional recognition, on their legitimacy, and on the stability of the WTO.⁴¹⁸ I do not consider how civil society influences courts as control works mostly through authoritative institutional channels, that is, from actors as

⁴¹⁷ Nevertheless, actors are strongly influenced by potent private agents to bring cases so that access is in the end moderately open. See Keohane, Moravcsik and Slaughter (2000).

⁴¹⁸ See Ehlermann (2003) and Garret, Kelemen and Schulz (1998).

proximate principals to international institutions.⁴¹⁹

External control

External control mechanisms can be divided according to whether they offer *ex-ante* or *ex-post* control.⁴²⁰ *Ex-ante* (or administrative) mechanisms allow preventing deviations from occurring. However, they restrain the flexibility of agents, so that the benefits of judicial delegation suffer. Moreover, many administrative control measures offered by the principal-agent literature, such as control over personnel or budget control, are difficult to apply in real-world situations.⁴²¹ This is particularly true for controlling courts. The heterogeneity of preferences among actors makes an efficient screening process impossible which would warrant that the preferences of judges correspond to the preferences of the collective principal at the point of inauguration. In addition, judges are likely to change their preferences during their long tenure. Furthermore, screening and selecting personnel, in order to employ agents with preferences similar to those of the principal, would contradict the necessity to employ judges with excellent professional expertise and political sensitivity. Hence, administrative control mechanisms are ill-suited for international courts.⁴²²

A different type of *ex ante* control concerns access to courts. Contrary to private agents, actors are able to collectively limit the inflow of cases to courts if courts systematically deviate from actors' preferences.

Ex-post (or oversight) procedures leave more flexibility to agents. However, *ex-post* mechanisms require principals to effectively monitor agents and to threaten with credible sanctions if they discover deviations. The greater the complexity of legal reasoning, the more difficulty actors face in monitoring courts activity. If courts base their rulings on a high number of legal criteria, comparison of single cases becomes difficult as every case becomes unique in its combination of characteristics. Pollack (1997, 121) speaks of "informational asymmetries in favor of the Court resulting from the technical and legal obscurity of the latter's decisions". Thus, weak actors cannot easily assess whether their case was ruled in accordance with the law or whether political pressure played its part. Moreover, monitoring whether courts pursue their own agenda or slowly extend their authority becomes difficult if courts can hide their intentions under opaque layers of legal reasoning.

The case of subsidies illustrates the complexity of WTO rulings.⁴²³ Courts have to establish whether a subsidy has been paid and whether the subsidy violates WTO regulations. To assign disputed subsidies to classes of subsidies that are allowed or forbidden, courts cannot work with rules of thumb. Instead,

⁴¹⁹ See Nielson and Tierney (2003). The principal-agent theory of international institutions is weakly developed. See Barnett and Finnemore (1999) and Nielson and Tierney (2003). Therefore, my framework has to integrate diverse findings in an idiosyncratic manner.

⁴²⁰ See Kassim and Menon (2003) and Pollack (1997).

⁴²¹ See Pollack (1997).

⁴²² Petersmann (2003) and Weiler (2001) promote more legalization concerning selection and tenure of judges.

⁴²³ See Hoekman and Kostecki (2001), Jackson (1997) and McGuire (2002). Bronckers (1999) discusses the complexity of disputes in intellectual property and telecommunication services where different perspectives can reasonably be adopted which make a difference for rulings.

courts have to perform a fine-grained, contextual analysis of the nature and the effects of a subsidy under dispute. To rule, for instance, that a prohibited export subsidy has been paid, courts first have to show that companies have received a benefit. This requires that the subsidy was granted on terms that are more favorable than those terms which the company could have achieved on the open market. Then courts have to prove that subsidies are *de facto* export contingent, for instance, because sales targets could be met only through significant exports. These intricacies arise because courts need to distinguish between subsidies that are intended to confer a competitive advantage, as opposed to subsidies that are justified by market failure or aim at non-economic objectives.

With increasing linkages and deep integration, courts have to take more values and more domestic political necessities into account. Courts can no longer simply assume that there is a first-best, domestic measure available for non-economic objectives that does not affect trade. Instead, courts have to look more realistically at the available tool-kit of governments and they have to leave governments an adequate margin of appreciation.⁴²⁴ All this makes it hard to come by with clear instances of judicial deviation.

If actors nevertheless observe judicial deviations, they can pass decisions to reverse individual rulings or they can modify judicial delegation design to restrain legal expansion in general.⁴²⁵ Modifying judicial delegation structure can be costly if actors have to forgo a share of the aforementioned benefits of judicial delegation. Since global governance has to regulate increasingly complex issues, actors become dependent on the sophisticated performance of courts. If actors are willing to pay the price of modifying judicial delegation design, or if they are content with reversing a particular ruling, they have to be able to pass corresponding decisions. With greater bargaining effectiveness, and lower majority thresholds to reverse judicial rulings especially, threats of *ex-post* control become more credible.⁴²⁶

As the example of the EU shows, actors who are not party to the dispute but who are interested in legislative response to legal deviations assist the party that has lost a law case. Garrett, Kelemen and Schulz (1998, 161) speak of adverse decisions by the ECJ if the ECJ rules that an actor is in violation with EU rules. They conclude that, “The greater the potential costs of a case, the larger the number of governments potentially affected by it, and the larger the number of adverse decisions the ECJ makes in similar areas of the law, the greater the likelihood that the EU member governments will respond collectively to restrain EU activism.” More broadly, Alter (2000, 515) proposes that, “There is much to suggest that the forces for disintegration are created by the process of European integration itself. As European integration expands, it upsets more national policies. As more power is transferred to EU institutions, national actors (national courts, national administrators, national parliaments, and national

⁴²⁴ See Howse (2002b).

⁴²⁵ See Pollack (1997) and Trachtman (1999b).

⁴²⁶ The pertinent literature observes that the more actors are involved, the more diverse their preferences are and the greater the majority required for passing a decision is, the less capable are actors to control the courts. See Keohane, Moravcsik and Slaughter (2000), Garrett, Kelemen and Schulz (1998), Nielson and Tierney (2003), Pollack (1997), Tsebelis (2000) and Tsebelis and Garrett (2001).

interest groups) find their own influence, independence, and autonomy undermined.” This means that *ex-post* control decisions become more likely as deviations aggregate over actors and time. Thus, unrestrained legal self-empowerment by courts is unlikely, even if bargaining is rigid.

Internal control

While the internal factors which judges take into account are also contingent on global governance structures, they cannot be purposefully manipulated by the actors. Instead, they refer to broader considerations about professional recognition, legitimacy, and systemic stability in which judges engage and which depend on a complex interplay of many endogenous and exogenous determinants.

Judges aim at recognition within the legal community. Legalization and, in particular, judicial delegation promote legal culture and professional ethos among judges. The introduction of the Appellate Body, for example, increased the incentive for panels to get it legally right rather than paying attention to the political situation in order to avoid appeals and possibly reversals by the Appellate Body.⁴²⁷ Judges who are socialized to legal culture furthermore strive for legitimacy, which increases their recognition and which they deem fundamental for effective global governance. They feel less like conflict managers, who assist actors in diplomatic dispute settlement, than like champions of law.

Therefore, courts take the effects of their rulings on their legitimacy into account. If actors do not comply with rulings, or if courts are perceived to succumb to power, judicial legitimacy suffers. This poses a dilemma for courts. On the one hand, courts have to consider the political situation to avoid defection, but on the other hand, they have to adhere to the agreement and maintain legal consistency.⁴²⁸ From this we can first conclude that independence increases with better enforcement capacity as courts need to be less concerned about non-compliance. In particular, independence rises with legitimacy. Strong legitimacy not only makes defection less likely but also makes the legitimacy costs of occasional defections more bearable for actors.

Secondly, with high precision courts find it more difficult to deviate from the principal’s intention or to give way to power since courts are perceived as legitimate if they resolve disputes along principles stemming from agreements. The more clearly courts deviate from the agreement, the greater the legitimacy costs they incur.⁴²⁹ Courts are also less likely to succumb to power with ample precedent, produced by broad judicial scope, which contributes to legal clarity.⁴³⁰

How strongly agreements bind courts depends, besides for legal clarity, also on the legal mandate. The more leeway courts enjoy in interpreting agreements and the more aspects of actors’ behavior they can scrutinize, the further the courts can deviate from actors’ intentions without flouting their mandate. Therefore, we can thirdly conclude that a broad legal mandate backs judicial independence.

⁴²⁷ See Weiler (2001).

⁴²⁸ See Garrett, Kelemen and Schulz (1998).

⁴²⁹ See Dunoff (1999) and Garrett, Kelemen and Schulz (1998).

⁴³⁰ Garrett, Kelemen and Schulz (1998).

While I have argued so far that effective bargaining restrains the independence of courts, it also empowers courts. Roessler (2001, 325) proposes that, “Creating the possibility of a legislative response would confer democratic legitimacy, and greater normative force, upon the decisions of the WTO judge.” Without this possibility, courts have to be cautious in determining the scope of their authority and they have to avoid creative interpretations. Also, they have to take political acceptability more strongly into account. Non-acceptable rulings cannot be simply corrected, but they lead to non-implementation that damages the WTO and may trigger a trade-war. According to Roessler (2001, 323), the provision that any one actor could block the adoption of rulings under the old GATT gave legitimacy to rulings, including those “based on creative interpretations advancing the objectives of GATT”. Flexible decision-making on a more continuous basis than trade rounds does not only contribute to judicial legitimacy by regular *ex-post* control but also offers recent political guidelines upon which courts can base their rulings. This lowers the strain on judicial legitimacy.

In addition to the effects on their legitimacy, courts also consider in their rulings the repercussions on the stability of the WTO. The more stable the WTO is, the more freely courts can deviate from the interests of powerful actors, without having to fear that non-compliance leads to a break-down.⁴³¹ Avoiding tensions is particularly difficult for courts if agreements have been formulated in deliberately nebulous terms like in the Uruguay Round. If disagreements are not solved during negotiations, the basis for future conflict is laid. If courts have to rule on these contested issues, they have to be particularly careful not to damage the WTO.⁴³² Therefore, courts will have to continue heeding the political repercussions which their rulings exert on the WTO.

5.7 Conclusion

This chapter has presented theories of bargaining as background for analyzing the bargaining problem. Toughness of bargaining strategies, internal complexity, and the number and nature of veto players have been identified as the main determinants of bargaining effectiveness, and the role of the exogenous and endogenous determinants within these determinants have been discussed. Also, the possibility to ease bargaining by lowering precision and extending judicial delegation has been addressed. Moreover, the risks associated with decision-making and judicial delegation design have been analyzed.

Even if structures solve the bargaining problem effectively, actors will negotiate agreements only if they expect them to be enforceable. Furthermore, the value of adopted agreements hinges on compliance. This is the topic of the next chapter, which is the last piece missing in the analytical part of the study.

⁴³¹ Roessler (2001) warns that legislative activity of the panel may lead via non-implementation of rulings to enormous retaliations. Sauv  and Subramanian (2001, 30) believe that the U.S. and EU are prone to “playing with fire” in their handling of compliance issues.

⁴³² See Sauv  and Subramanian (2001).

6 Compliance

Completely contingent agreements are always optimally attuned to external circumstances and always share the gains of cooperation in a way that no gains are wasted through defections.⁴³³ However, we have seen that friction is ubiquitous in bargaining, so that agreements fall well short of being perfectly state contingent. Judicial delegation and exemptions improve state-contingency. Judicial delegation empowers courts to adapt rules to changing circumstances, and exemptions give actors flexibility in handling their obligations. Despite judicial delegation and exemptions, WTO agreements remain incompletely state-contingent, so that their efficiency and distributional properties are imperfectly suited to the environment. Therefore, actors face diverse incentives to defect from agreements.

While actors may benefit individually from defections, they harm global welfare because defections detract from the scope and predictability of current global governance. Moreover, actors will only expand the scope of future global governance if they expect obligations to be honored. Therefore, compliance mechanisms are needed to prevent violation of agreements.

In standard game theory, an agreement can be enforced if the discounted benefits of defection, accruing to the defecting actor, are smaller than the discounted losses the defector incurs from the punishment following defection. The gains from defection are understood to arise until the defection is discovered and punishment sets in, which then makes the defector worse off than she would have been if she had cooperated.

While my line of argument is informed by game theory, I depart from traditional game theoretic analysis as I do not expect defectors to benefit first and pay the price later. Benefits and costs may coincide. It is even possible that governments first suffer the costs of defections and benefit in the long run from less domestic opposition or an improved bargaining position.

A more fundamental deviation from standard game theoretic analysis, in which the costs of defection are exclusively determined by the punishment strategy, is that I consider a host of costs which actors incur by defecting. In addition to punishment-induced costs, domestic audience costs, reputational costs, self-inflicted costs arising from protectionism, and the costs of systemic damage to the WTO all determine compliance. Although these factors change the interest calculus of governments that are led by the logic of consequences, most of these factors also depend, to a differing degree, on legitimacy. In addition, legitimacy directly influences compliance because norms exert a compliance pull on governments. *Figure 4* provides an overview of the factors driving compliance.

⁴³³ See Guzman (2002).

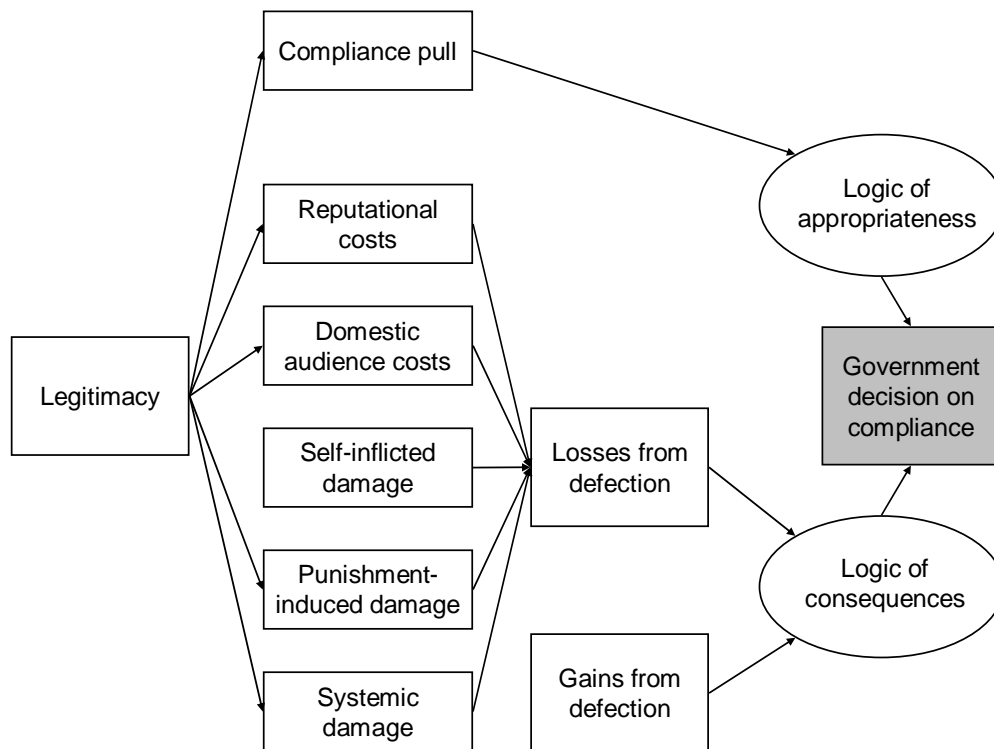


Figure 4: Compliance

In the following sections, I turn to those factors that keep actors from violating agreements one by one, beginning with compliance pull and working my way down to factors that are less influenced by legitimacy. I define these factors and I show how they are affected by structures and trends. Afterwards, I address the incentives to defect. I contemplate how the trends change these incentives and what this implies for the capacity of structures to effectively solve the compliance problem.

The relative brevity of this chapter does not indicate that *ex ante* enforcement is less relevant to the WTO, but it results from the extensive preparations in the preceding chapters. In comparison with earlier chapters, I disaggregate actors more frequently into governments, domestic societies, and domestic institutions.

6.1 Compliance pull

As argued in Chapter 4 about ideational properties and learning, governments partly follow the logic of appropriateness. They feel obliged to comply with rules which have been created and operate in legitimate processes, and which produce valuable and reversible outcomes. Moreover, actors desire to comply with norms for self-esteem and to remain an esteemed actor of international society. The more that determinacy originates from rules and authoritative interpretations, the better the actors know what constitutes appropriate behavior and the less they are able to account for violations.

Resonance with domestic and international norms further strengthens legitimacy, whereas conflicting norms can cause non-compliance. For instance, norms calling for protection of human rights or the

environment can weaken the commitment to the MFN principle in the WTO.⁴³⁴ Increasing depth and linkages make it more likely that WTO regulation affects powerful domestic norms.

Another type of compliance pull is based on routinization. Routinization means that actors follow routines of standardized behavior to save transaction costs instead of specifically contemplating every action.⁴³⁵ Since actors comply with WTO rules most of the time, the routines prescribe compliant behavior. Moreover, Chayes and Chayes (1995, 119) point out, “It is almost always a good argument for an action that it conforms to the applicable legal norms, and against, that it departs from them. The argument may not persuade, but there is no doubt where the burden of proof lies.” While the burden of proof is irrelevant to perfectly rational actors, it biases actors in favor of compliance if strategizing processes incur friction.

6.2 Domestic audience costs

Now we change our perspective and consider those factors that influence governments under the logic of consequences. Governments no longer feel normatively obliged to comply, but they “confront the standards of legitimacy as an external institutional fact which impacts upon their cost-benefit calculations.”⁴³⁶ As we will see later, actors who violate norms damage their reputation in the international sphere. On the domestic level, governments who violate norms risk suffering from domestic audience costs. I understand domestic audience costs to arise from political measures, such as voting or protesting, with which domestic societies and domestic institutions sanction their governments for violating international norms.

6.2.1 Domestic society

Domestic society appreciates compliance for numerous reasons pertaining to the domestic and the international level, related to the act of violation and the specific rule that is violated, and based on normative obedience and self-interest. In combining these different motives, I present several mechanisms that encourage civil society to impose domestic audience costs.

Domestic society expects its government to behave consistently, and it holds its government accountable to normative statements. Consistency can be expected for normative reasons if domestic society adheres to norms of truthfulness and reliability. Alternatively, benefits of reliable governance provide a reason to insist on consistency out of self-interest.

According to Schimmelfennig (2001), governments endorse norms for three reasons despite the risk of being held accountable to them. First, governments may refer to norms out of sincere belief in their rightness. Secondly, governments may relate to norms strategically to gain support from domestic society. In liberal societies, appeals to market economy and multilateralism make an argument sound

⁴³⁴ See Leebron (2002).

⁴³⁵ See Bull (1977, Ch. 6), Chayes and Chayes (1993), Shannon (2000) and Young (1999a, Ch. 4). Routinization is related to the logic of appropriateness as actors follow routines, but it is also similar to the logic of consequences because actors further their own interest in following the routines.

⁴³⁶ Schimmelfennig (2000, 116).

coherent and normatively motivated, thus, increasing its legitimacy in front of an internal audience. Thirdly, norms can also be used strategically to shame other actors into compliance, or into compromise in bargaining.

Whether in a domestic or international setting, reference to norms is, therefore, omnipresent. Risse (2000, 17) asserts that, “Even rhetorical arguments that try to justify egoistic interests must normally refer to some universalistic values or commonly accepted norms.” Actors are particularly inclined to engage in ‘rhetorical action,’ the strategic application of normative communication, when the corresponding costs on the domestic and international level are low. When the costs of norm compliance rise, governments have trapped themselves by their own normative statements.⁴³⁷ Given increasing normativity of global governance, actors can be expected to succumb to self-entrapment more frequently.

Even stronger than the expectation of consistent normative proclamations is the belief in the rule of law. Rule-of-law societies appreciate if governments abide by domestic *and* international law.⁴³⁸ The ultimate rule of recognition – “Pacta sunt servanda” – is not only part of the Vienna Treaty but often even national law. With the expansion of Western culture, appreciation of the rule of law is spreading.⁴³⁹ Appreciation of international norm-compliance does not need to be normatively motivated but can also arise from consequentialist thinking. Domestic society is increasingly aware of the importance of international reputation making the international standing a criterion for domestic legitimacy of governments.⁴⁴⁰ With growing awareness of globalization and of the significance of international institutions, we can assume that domestic societies increasingly fear the systemic damage from defection to the WTO as well.

The argument above rests on the inappropriateness or adverse consequences that the act of defection implies *per se*, independently of the international rules that are violated. Yet, the feeling of normative obligation in domestic society to warrant that its government obeys international obligations also rises with the legitimacy of the specific rule that is at stake. Furthermore, compliance with international rules can entail government policies that are in the utilitarian interests of private agents. If private agents cannot cheaply monitor government behavior directly, they take the judgment on compliance, provided by international institutions, as an easily observable signal of whether governments pursue the preferences of domestic society.⁴⁴¹ In this case, domestic society has a rational incentive to impose political costs on defecting governments. This mechanism gains importance, since domestic society becomes increasingly aware of international institutions and as international institutions more

⁴³⁷ Schimmelpfennig (2001) demonstrates the significance of such self-entrapment for the EU decision to include Eastern European countries.

⁴³⁸ Abbott and Snidal (2000, 428) remark that, “Law observance is ... highly valued in most domestic societies; efforts to justify international violations, thus, create cognitive dissonance and increase domestic audience costs. Legal obligations are widely perceived as having particular legitimacy.” See also Simmons (2002).

⁴³⁹ See Onuma (2003).

⁴⁴⁰ See Finnemore and Sikkink (1998).

⁴⁴¹ See Mansfield, Milner and Rosendorff (2002).

intensively monitor whether actors adhere to standards of ‘good governance.’

Given that domestic society cares about compliance with international agreements, the question arises whether domestic society can influence its government’s decision on compliance. Indeed, domestic society can inflict substantial costs upon defecting governments through diverse channels like voting, lobbying, and ‘naming and shaming.’⁴⁴² The more difficult it is for governments to excuse their defections with accounts, the greater the domestic audience costs become.

Another determinant of the size of domestic audience costs is whether the dispersed and heterogeneous private agents can coordinate their actions. The better they cooperate, the more effectively they will project their disapproval into domestic audience costs for defecting governments. Without getting into the intricacies of the domestic political process, we can make the general observation that with more precision and judicial delegation, domestic society is better able to coordinate and exert political pressure.⁴⁴³ In particular, the mass electorate, that can impose the largest audience costs, lacks the information to evaluate defections on its own. Organizations, such as NGOs, are needed to focus its expectations and assist it in exercising its power diligently. With precise agreements and court rulings they can fulfill this function more effectively.

6.2.2 Domestic institutions

Domestic bureaucracies that administer international agreements can become proponents of compliance for a number of reasons.⁴⁴⁴ Civil servants can feel normatively committed to the ends of an agreement. They can take a personal career interest in compliance with an agreement. Bureaucracies can rely on international institutions for expertise or political shielding. Furthermore, bureaucracies champion the status quo, once they have institutionalized compliance as standard operating procedure, to avoid the costs of constantly recalculating the costs and benefits of defection. Koh (1997, 2654) notes that “institutional arrangements for the making and maintenance of an international commitment become entrenched in domestic legal and political processes. Domestic institutions adopt symbolic structures, standard operating procedures, and other internal mechanisms to maintain habitual compliance with the internalized norms. These institutions become ‘carriers of history,’ and evolve in path-dependent routes that avoid conflict with the internalized norms. These institutional habits lead nations into default patterns of compliance.”

Since more domestic bureaucracies become involved in WTO affairs due to increasing depth and linkages of global governance, they play an increasingly significant role for compliance. Like in the case of pressure from domestic society, bureaucratic resistance gains strength with increasing precision, judicial delegation, and legitimacy of global governance. Against their governments, bureaucracies can argue for compliance best if they can base their case on legitimate and precise agreements and on legal precedent created by legitimate courts.

⁴⁴² See Börzel and Risse (2002), Haas (2000) and Keohane and Nye (2001).

⁴⁴³ See Kahler (2000), Keohane, Moravcsik and Slaughter (2000), Lohmann (2003) and Young (1999a).

⁴⁴⁴ See Chayes and Chayes (1995), Koh (1997), Haas, Keohane and Levy (1994) and Young (1999a, Ch. 4) on the motives and capabilities of domestic bureaucracies to impose domestic audience costs.

The domestic audience costs that governments incur who defy international law rise dramatically if domestic courts defend international law.⁴⁴⁵ In liberal democracies, domestic court rulings are backed by domestic society and are protected from governmental infringements by constitutional means. Judicial internalization of international law may occur directly if individuals can sue for rights stemming from international law at domestic courts. A ‘softer’ point of entry for international law into the domestic legal system rests on courts who construe domestic law consistently with international law. As the experience from the EU shows, courts enjoy considerable discretion to endorse or act as a break on international law.⁴⁴⁶ They use this discretion according to the legitimacy they perceive in international law. If international law is legitimate, courts promote compliance at the costs of defecting governments.

Given the close social ties between governments, bureaucracies, courts, and domestic society, these entities do not only impose costs on each other but they also teach and learn.⁴⁴⁷ Therefore, precision, judicial delegation, and legitimacy of global governance are further validated as important drivers of learning, once we move from a unitary actor perspective towards more fine-grained analysis.

6.3 Reputational costs

Non-compliance with agreements damages reputation. The amount of reputational costs depends on the circumstances of the breach. Since agreements are incompletely state-contingent, the breaking of agreements can enhance global welfare. This possibility of ‘efficient breach’ is understood at the time of contracting and vindicates defecting actors. Moreover, agreements can serve further objectives than creating obligations, and they can maintain value despite violations. Therefore, actors excuse defections at moderate reputational costs as long as defectors can provide convincing accounts, so that they are not perceived as contradicting the spirit of the agreement and its generally binding quality.⁴⁴⁸

The more determinate a rule, the more severely violations damage reputation. Abbott and Snidal (2000, 427) stress the significance of legal discourse and authoritative interpretations, “Because legal review allows allegations and defenses to be tested under accepted standards and procedures, it increases reputational costs if a violation is found.” It is widely recognized that reputational costs within international society are an important mechanism for compliance and that structures and trends that affect the possibility to give credible accounts significantly influence compliance.⁴⁴⁹

In addition to determinacy, deliberations link reputational costs to structures. When deliberating, actors shoulder the cumbersome task of explaining their positions, of listening carefully to other actors to understand their concerns, and of finding a satisfactory solution together. If an agreement is the

⁴⁴⁵ See Keohane, Moravcsik and Slaughter (2000), Koh (1997) and Trachtman (1999a).

⁴⁴⁶ See Alter (2000) and Stone Sweet and Brunell (1998).

⁴⁴⁷ See Cortell and Davis (2000), Koh (1997) and Young (1999b).

⁴⁴⁸ See Bilder (2000), Bull (1977, Ch. 6) and Guzman (2002).

⁴⁴⁹ See Bull (1977), Chayes and Chayes (1995), Franck (1990), Guzman (2002), Lipson (1991), Reich (1996) and Shelton (2000). Legro (1997) observes that even in the face of violations by others, actors may comply in order to gain sympathy in comparison with the violators.

outcome of genuine deliberations, we can, therefore, expect that defections will upset international society most and that trustworthiness and international standing of defecting actors will suffer most.

Besides reputation within international society, actors care about their reputation on global markets. If an actor has a reputation for violating international law, a premium is charged on investments within its territory and on transactions with its government and its citizens under the jurisdiction of this actor.⁴⁵⁰ With increasing market integration and transparency, the disciplining force of global markets gains strength. On the contrary, regionalization enlarges domestic markets and, thus, weakens the disciplining force of the global market.

This points to a second link how overall quality of compliance affects the individual actor's decision to comply or not. We have seen in Chapter 4 about ideational properties and learning that wide-spread compliance intensifies actors' desire to enjoy the esteem of being a law-abiding member of international society. We can now add that the reputational costs, which defecting actors incur in international society and on global markets, rise with the level of overall compliance. The reason is that international society and markets can single out and sanction a small number of defectors but not a majority of actors.⁴⁵¹

6.4 Self-inflicted costs

According to standard trade theory, protectionism (and trade-related subsidies) always decreases welfare of small countries, so that they benefit from abolishing tariffs (and trade-related subsidies) even unilaterally.⁴⁵² By raising trade barriers, large countries, however, may influence the terms of trade in their favor, so that they may be best off under optimal tariffs greater than zero. If WTO agreements bind their tariffs below this optimal tariff, actors gain from defection.

Strategic trade theory justifies trade restrictions also for small countries. It upholds that under imperfect competition, unilateral liberalization fails to be the dominant strategy because governments can shift gains from foreign suppliers to domestic suppliers. In particular, the 'infant industry' argument has achieved significant attention, even in non-academic thinking. It suggests that weak industries with great potential should first be nourished and protected to learn and to grow, so that they benefit from increasing returns to scale. This shall prepare them to later succeed in global competition and to reap extraordinary gains in imperfectly contested markets.

After an initial excitement, the prevalent opinion among economists goes that strategic trade management can do little good and considerable harm.⁴⁵³ Strategic trade policies are beset with

⁴⁵⁰ Simmons (2000) arrives at this result based on her examination of global governance in monetary affairs. Ho (2002) comes to similar conclusions in his examination of the Basel Accord of 1988 on banking regulation.

⁴⁵¹ See Simmons (2000).

⁴⁵² On the economic effects of protectionism in the light of different theories, see Baldwin (1992), Bagwell and Staiger (2000), Eaton and Grossman (1986) and Krugman (1987). Concerning the Uruguay Round, Nunnenkamp (1996) and Hoekman (2002a) stress the gains from domestic liberalization which may outweigh the gains from improved market access.

⁴⁵³ See Baldwin (1992), Krugman (1987) and Martin (1999).

information and rent-seeking problems, which aggravate practical implementation. Even if strategic trade management is efficiently implemented, the size of the global market and of the investments required for competing on the global market, as well as the pace of global competition and innovation, lower the value of protected home markets. At last, the object of strategic trade management, the national firm, fades into global players and global virtual networks.

In particular situations, actors who defect for terms-of-trade benefits and gains from strategic trade management may increase their welfare. In most cases, however, defection implies economic losses for the defecting actor.

The economic costs outweighing the benefits becomes the more likely, the more standards are involved in global governance. Indeed, deeper integration makes standard setting in international institutions more frequent. At the same time, deviating from standards becomes more expensive with increasing relative effectiveness of global governance. Thus, the economic costs of defection become prohibitive for an increasing share of global rules. Only actors with a strong market demand position and a strong dislike of certain standards can consider adopting individual standards, which are not compatible at low cost with international standards. By enlarging domestic markets, regionalization, thus, lowers the self-inflicted, economic costs of defections.

6.5 Punishment-induced costs

Punishment-induced costs arise to defecting actors from sanctions with which other actors, directed by utilitarian interests and feelings of normative obligation, react to defections. Punishment serves to coerce defecting actors back into compliance and to deter future defections. The current WTO practice concerning sanctions is authorization of actors who have been harmed by violations to withdraw equivalent market access concessions, in order to re-establish reciprocity between actors. Since gains usually accrue before sanctions are authorized and implemented, withdrawing equivalent concessions alone is often insufficient to achieve compliance.⁴⁵⁴ Sophisticated punishment strategies, such as targeting vulnerable and politically influential industries, selecting industries in politically critical constituencies, and rotating between industries, can intensify the political costs for defecting governments. In principle, any incentive to violate WTO rules can be matched with sufficiently severe sanctions.

Nevertheless, sanctions are ineffective as a main pillar of compliance management.⁴⁵⁵ One reason against massive sanctions is that tough punishment implies higher levels of risk for a given level of enforcement than legitimacy-based mechanisms.⁴⁵⁶ Further problems with a punishment approach to compliance are connected to actual implementation of decentralized sanctions. Under a system of

⁴⁵⁴ See Bütler and Hauser (2000).

⁴⁵⁵ For especially skeptical accounts of sanctions, see Brunee and Toope (2000) and Chayes and Chayes (1995). See also Börzel and Risse (2002).

⁴⁵⁶ See the discussion of compliance and risk in Chapter 7 about the recommended global governance structure. Since we will see that the recommended structure effectively copes with the enforcement problem, whereas risk imposes a serious limitation on the choice of structures, this is a considerable disadvantage.

decentralized sanctions, only those actors are authorized to implement sanctions that have litigated, whereas all other actors must abstain from punishing the defector independently of whether they have been harmed by the defection or not.

The first problem with this decentralized approach is that tough punishment leads to selective and unequal enforcement.⁴⁵⁷ Weak states are unable or unwilling to implement massive sanctions against powerful actors. Fearing retaliation powerful actors are more hesitant to sanction other powerful actors than weak actors. Moreover, decentralized sanctions are inconsistently applied, depending on domestic political factors. Secondly, sanctions do not only change behavior in single instances, but they also contribute to the general level of compliance with an international institution. Decentralized sanctioning by harmed actors, thus, leads to a lack of sanctions. The sanctioning actors gain only a fraction of the systemic benefits, but they shoulder all the economic costs. These costs are especially high if the punished actor can substitute sales to sanctioning actors with sales to non-sanctioning actors.⁴⁵⁸

Centralized punishment, which obliges all actors to sanction deviations, independently of their individual harm, levels the playing field between powerful and weak actors. Furthermore, it allows optimal provision of sanctions. Since trade substitution is no longer feasible under centralized punishment, the target's terms of trade deteriorate more strongly. Therefore, centralized punishment increases the costs for the targeted actor in comparison with the sanctioning actors. However, multilateral implementation of sanctions faces problems with internal bargaining between sanctioning states and with possible backsliding of actors from sanctioning coalitions, which may lead to a breakdown of all sanctions.⁴⁵⁹ While these cooperation problems may be solved by international institutions, centralized enforcement, managed by strong international institutions, worsens risk further.

An additional reason against sanctions-based enforcement follows from its negative side effects on learning and legitimacy.⁴⁶⁰ It is true that sanctions may put pressure on actors to submit to legal discourse in the first place.⁴⁶¹ However, tough punishment is less and less needed, since alternative mechanisms for making actors comply with legal discourse become increasingly potent. Rather than contributing to deliberating, tough punishment damages deliberative processes. Tough punishment renders the communicative culture more adversarial and it may evoke resentment by those who feel unjustly targeted.

Sanctions are especially adequate for defections which are motivated by pressure of special interest groups on governments. Export interests within the defecting country are harmed by sanctions because their access to foreign markets is restricted. Therefore, sanctions mobilize export interests to lobby against import-competing industries on the domestic level. With increasing normativity and civil society participation, political pressure from industrial interests is only one among many factors,

⁴⁵⁷ See Chayes and Chayes (1995).

⁴⁵⁸ See Drezner (2000) and Guzman (2002).

⁴⁵⁹ See Drezner (2000).

⁴⁶⁰ See Börzel and Risse (2002) on interaction effects between compliance mechanisms.

⁴⁶¹ See Bacchus (2003).

which governments take into account in deep integration agreements. If sanctions are directed against governments that defect in correspondence to the genuine preferences of their populace, the WTO loses legitimacy. This means that tough sanctions are less important to correct domestic, political distortions, induced by the lobbying efforts of import-competing industries, while they increasingly evoke protest that enjoys broad public support within domestic societies.

Finally, defecting actors may resist even tough sanctions, thus provoking even tougher sanctions. They may retaliate against the sanctioning actors and eventually may trigger a trade war. Such tensions directly waste gains from cooperation and they damage legitimacy.

Taken together, all these negative side effects make punishment-based enforcement unsuitable for assuming a central function in future global governance, for which avoiding risk and promulgating social capital formation is vital.

6.6 Systemic costs

We have noticed in Chapter 5 about bargaining that actors may refrain from employing threats, in order to avoid systemic damage to the WTO. Out of the same mutual interest in the effective functioning of the WTO, actors may abstain from defecting.⁴⁶² Increasing scope, linkages, and relative effectiveness of global governance, as well as specific investments, make effectiveness and stability of international institutions more desirable. Therefore, the costs of systemic damage to the WTO act as an increasingly significant barrier to defections.

Regionalization counteracts these trends, since it enhances the effectiveness of autonomous governance and as it increases the value that remains of WTO specific investments if global governance breaks down. The more that actors share a collective identity, the less willing they are to sacrifice stability and effectiveness of the WTO for their particularistic gains from defection.

Moreover, actors refrain from self-serving interpretations of rules for fear of finding themselves at the other end of the stick in the future. If an actor succeeds in accounting for a behavior that is currently considered a defection and should be considered a defection for the proper working of the system, the altered meaning of the rule will be applied to everybody and will allow other actors to defect with impunity as well.⁴⁶³

6.7 Overview of compliance mechanisms

Table 6 provides an overview of the compliance mechanisms. What catches the eye is the pervasive influence of the logic of appropriateness. The logic of appropriateness influences compliance directly, through the compliance pull, and indirectly, by motivating domestic and international society to impose costs on defectors.

Table 6: Compliance mechanisms

⁴⁶² See Bacchus (2003), Bull (1977, Ch. 6), Chayes and Chayes (1995) and Reich (1996).

⁴⁶³ See Onuma (2003).

<i>Compliance mechanisms</i>	<i>Who imposes costs according to ...</i>		<i>Led by which logic do governments decide on compliance?</i>
	<i>... the logic of consequences?</i>	<i>... the logic of appropriateness?</i>	
Compliance pull	No cost-imposing agents		Appropriateness
Domestic audience costs	Domestic society	Domestic society	Consequences
Reputational costs	International society, global markets	International society	Consequences
Self-inflicted damage	No cost-imposing agents		Consequences
Punishment-induced damage	International society	International society	Consequences
Systemic damage	No cost-imposing agents		Consequences

Compliance pull, domestic audience costs, and reputational costs are those compliance factors which rest particularly strongly on legitimacy. Though it is difficult to empirically establish the significance of these legitimacy-based compliance mechanisms, manifold research indicates that compliance pull, domestic audience costs, and reputational costs are powerful mechanisms for compliance.⁴⁶⁴ Legitimacy appears as a relevant factor throughout times and cultures.⁴⁶⁵ However, this also suggests that domestic norms, which arise in more densely socialized domestic societies, become strong incentives to defect if they contradict international rules (and that they can also constitute resilient impediments to effective bargaining).

Besides their strength in achieving compliance, legitimacy-based compliance mechanisms are advantageous levers for managing compliance in that they are susceptible to changes in structure and in that they have advantageous properties for controlling risk.

This sets legitimacy-based compliance mechanisms apart from the other mechanisms. Structures cannot be purposefully manipulated in order to influence self-inflicted and systemic costs of defections. And while the severity of punishment-induced costs can be freely set by designing sanctions, their detrimental side effects forbid extensive usage.

⁴⁶⁴ See Franck (1990), Guzman (2002), Koh (1997), Onuma (2003), Shelton (2000), Simmons (2000) and Young (1999a).

⁴⁶⁵ See Hall (1997), who prods into legitimacy in medieval times, and Snyder (2002), who conducts a comparative study on the culture of war that shapes how different civilizations lead war.

6.8 Incentives for defection and optimal compliance

In order to conclude the preparations for recommending structures that solve the compliance problem effectively, we need to understand which level of compliance is optimal for the WTO. The degree of compliance is optimal if the marginal gains of defections for international society equal the marginal costs of defections for international society. In this situation, increases and decreases in the power of compliance mechanisms lower global social welfare. In the WTO, defections generally harm compliant actors, while they may benefit defecting actors. The higher the gains to defecting actors in comparison with the damage caused for compliant actors is, the lower optimal compliance becomes.

In the WTO, the economic harm of occasional violations to compliant actors is limited in comparison with the benefits which actors derive from global governance. Neither is complete compliance necessary to sustain the legitimacy and stability of the WTO. Possible gains for the defecting actor depend on the benefits and costs that accrue to her from defection. Governments may gain politically from defection though defection lowers the social welfare of their countries. Yet, the social welfare of actors may also rise through defections. The various incentives for defection and their consequences for the social welfare of defecting and compliant actors are discussed in the following. Overall, the optimal degree of compliance for the WTO is less than complete.⁴⁶⁶

6.8.1 Changes in the incentives for defection

In order to shed more light on the optimal level of compliance, let us consider the following questions about the incentives which motivate defections: Which are these incentives? How important are they? How does their importance change in the future? And what difference does the changing relevance of incentives make for the optimal degree of compliance? To answer these questions, I consider seven different incentives for defection: strategic trade management, terms-of-trade effects, political-economy effects, expected gains from renegotiations, domestic opposition to agreements, changes in government, and unexpected effects of agreements.

We have seen in the discussion of self-inflicted costs of defections that strategic trade management is an increasingly unlikely candidate for frequent and substantial defections. While the size of terms-of-trade effects is debated in general, defections seem usually to be too small to offer considerable gains from changes in the terms of trades, particularly when compared to the disruptions which protectionism causes in an increasingly integrated world economy.

Even if protectionism does not work to the benefit of the national economy, governments may be enticed by political advantages to promote certain companies or industries, in violation with international commitments and at the costs of consumer and export-industry interests.⁴⁶⁷ While these political-economy motives were a major reason for defections in the past, their significance will decrease in the future. The more that economic globalization proceeds, the more uncompetitive companies are driven out of the market. As a consequence, fewer companies and workers with less

⁴⁶⁶ See Chayes and Chayes (1995), Lipson (1991) and Trachtman (1999a).

⁴⁶⁷ See Bagwell and Staiger (2000) and *supra* note 63.

resources lobby for protectionism. In addition, we have seen that trade policy formulation is politicized and the influence of special interest groups is weakened with increasing normativity and civil society involvement. On the other hand, political pressure for protectionism will rise if social welfare systems are massively cut back in the face of global competition.⁴⁶⁸ I expect effective global governance structures to preserve the option of choosing a welfare state model and, thus, conclude that political-economy incentives for protectionism will slowly abate.

Now I turn to anticipated gains from renegotiations, domestic opposition, changes in government, and unexpected effects of agreements as motives for defections. In the case of anticipated gains from renegotiations, actors do not defect for the direct benefits of defection but for long-term bargaining advantages. By defecting, actors can credibly signal the costs they have incurred from integration, in order to ask for compensation in upcoming negotiations. By defecting, actors can also discourage further integration on the issue concerned, since the international society will not push for non-enforceable contracts. The more value is at stake in future negotiations, the more such strategic considerations weigh.

Another incentive for defection occurs if governments face domestic opposition to agreements they did not expect. Domestic audiences can call for defection if global governance directly restrains actors in the pursuit of their preferences within their territories. For instance, domestic audiences may favor strict traceability requirements for genetically modified organisms, which impose high costs on suppliers from countries that lack corresponding regulation and which may be in violation with agreements.⁴⁶⁹ Alternatively, domestic audiences support defections which aim at changing policies of other actors or at neutralizing policy differences between actors.⁴⁷⁰ This can help actors indirectly in the pursuit of their preferences within their own territory. If, for instance, country A has more stringent social and environmental standards than country B, and if producers in country A and B are competing intensively, then country A may only be able to maintain its standards and its industry if it installs a barrier against imports from country B. An alternative motive for changing foreign policies arises if domestic audiences take a genuine interest in the conditions in other territories. For instance, they may care about child labor and the extinction of species abroad.

With greater depth, global governance is more likely to restrain actors in the pursuit of their preferences, whether directly or indirectly. Furthermore, globalization invigorates the motive to alter policies of other actors, in order to protect domestic policies or to change conditions abroad for its own sake. Therefore, it becomes increasingly difficult for governments not to err in predicting domestic preferences for the long durations of agreements. Misleading expectations of governments become more likely to lead to defections as domestic audience costs become more influential.

Changes in government are rather a cause than an incentive for defection. They are especially likely to lead to defection if governments attempt to bind their successor governments by entering into

⁴⁶⁸ See Sapir (2001).

⁴⁶⁹ See Skogstad (2002).

⁴⁷⁰ See Jansen (2000) and Sands (2000). See also Biermann (2001) on 'The Rising Tide of Green Unilateralism in World Trade Law'.

international agreements.⁴⁷¹ Current governments design agreements in a way that restrains consecutive governments, yet within acceptable limits. If current governments go wrong in anticipating how severe restrictions future governments will tolerate, their successors are induced to defect from agreements. Since deep integration covers more issues where current governments are interested in binding their successors and as increasing enforcement capacity of the WTO makes binding successor governments more attractive, this practice is likely to spread, together with the corresponding miscalculations.

Finally, actors can fail to correctly anticipate the outcomes of their agreements. As we have seen, uncertainty about the effects of agreements is increasing. Moreover, as the value at stake rises, unexpected effects imply greater costs. Hence, the incentive to defect in order to avoid unexpected, adverse outcomes will grow in the future.

6.8.2 Effects of different incentives for defection

Let us now assess the welfare effects of violations according to the different incentives. With strategic trade policy and optimal tariff policy, which manipulates the terms of trade, one actor may gain at the costs of other actors, while attainable benefits from integration are wasted.

Protectionism that is driven by political-economy motives reduces the social welfare of all actors. Only import-competing industries and politicians benefit from the opportunity for defections, which works as an insurance against unanticipated national distributional effects and resulting political-economy problems. If governments re-establish trade barriers in violation with agreements, they grant (temporary) protection to capital owners and workers in import-competing industries from particularly rapid structural change in the wake of liberalization. This also benefits governments themselves, as they can alleviate the political pressure directed at them. However, this comes at overwhelming costs for consumers, as well as for domestic and foreign export industries.⁴⁷²

Anticipation of gains from renegotiations is an apparently competitive motive. Actors tolerate transaction costs and damage to legitimacy, in order to increase their share of overall gains from cooperation. Defections that are led by motives pertaining to strategic trade, optimal tariff, political economy, and anticipated gains from renegotiations are, therefore, harmful to global social welfare and tend to trigger protectionist countermeasures.

Domestic opposition, changes in government, and unexpected effects of agreements are different. In the case of political-economy motives, uncertainty concerns domestic, distributional effects and the strength of special interest groups. By contrast, if governments misinterpret the preferences of domestic society, resulting in domestic opposition, and if they miscalculate the outcomes of agreements, they err in the effects which global governance has on domestic, social welfare.

⁴⁷¹ See Gruber (1999).

⁴⁷² Nevertheless, social welfare may rise if governments can escape from obligations that are costly in political economy terms because governments will agree on more scope of global governance. Improving the political process so that governments choose welfare-maximizing scope, however, is superior to accommodation to distortionary political processes.

International society may expect that actors accept some unpleasant surprises from agreements, in exchange for their consent to the agreements and for the sake of global social gains. Yet, the greater the unexpected, adverse effects, the better the governments can justify defections by their democratic responsibility towards their domestic societies. The opportunity of defections serves as insurance for actors and, thus, broadens optimal scope of global governance. Defections can even be directly welfare improving, for any reasonable social welfare function, if one actor gains clearly more from avoiding inadequate policies than the other actors loose together.

Generally, international society appreciates if governments bind their successors because binding liberal policies to WTO rules stabilizes market access. If governments bind their successors overly tightly, international society needs to punish the defecting successor government to maintain the WTO's value as commitment device. However, international society can understand the successor government's desire to free itself from certain commitments. Defections are, thus, not interpreted as breach of trust or as a sign of dwindling legitimacy and do, therefore, relatively mild harm to legitimacy. In summary, defections that are motivated by domestic opposition, unexpected effects and changes in government are less pernicious.⁴⁷³

6.8.3 Implications for optimal compliance

When we piece the severity of damage, which defections cause depending on the incentives for defection, together with the changing prevalence of incentives, we receive interesting implications for optimal compliance. In the past, defections were motivated more by strategic trade, terms-of-trade, and political-economy considerations, which are all strongly detrimental to the purpose of the WTO. In the future, incentives for defections will shift towards the desire to influence the results of negotiating, to better correspond to domestic preferences, to escape from overly binding agreements previous governments entered into, and to ameliorate unexpected effects of agreements. On the average, defections which are guided by these incentives are more benign. This means that they lead to less costs to compliant actors in comparison with the gains accruing to defecting actors than defections which are motivated by the traditionally dominant incentives.

This does not mean that no costs should be imposed on defecting actors. Expecting gains from renegotiations is a harmful motive for defections. And independently of the motive, governments have to pay a price for defecting if WTO rules are to be stable and reliable. This is in particular true because governments can influence domestic political processes.⁴⁷⁴ If defections, which can be justified with

⁴⁷³ In this list, I do not include risk-related incentives to defect. In general, these cases are especially tricky to evaluate because a majority of actors is likely to disapprove of defections while the minority nevertheless holds a right to defect under certain circumstances. Concerning judicial principal-agent risk, however, a strong argument can be made. To the extent that WTO courts are less legitimate than governments and that governments are motivated by legitimate concerns such as offsetting principal-agent deviations, overriding illegitimate rulings by defecting tends to increase global governance legitimacy. See Trachtman (1999a).

⁴⁷⁴ Jackson (2000b, 4) comments, "Political leaders in some countries or sub-federal regions often feel helpless to 'deliver' for their constituents in the face of external trade and monetary pressures, and some succumb to the temptation to play upon similar frustrations of their constituents." See also Hay and Rosamond (2002).

high domestic audience costs of living up to international obligations, are costless, governments engage less in arguing in favor of international agreements and they are even tempted to inflame domestic discontent with international obligations.

Hence, the degree of optimal compliance falls due to changing incentives for defection, albeit only moderately. Telling the different incentives apart – in other words: correctly evaluating accounts – and, thus, tailoring costs to the severity of violations once again becomes increasingly important.

The same argument supports more extensive exemptions. In the past, incentives to resort to exemptions were beneficial only for politicians and special interests. In the future, exemptions will increasingly benefit actors at whole and promote legitimacy. Exemptions should be sufficiently extensive to warrant that most behavior which is not in line with substantive obligations is covered by exemptions. Using exemptions damages legitimacy less than violating agreements.

6.9 Conclusion

This chapter has presented domestic audience costs, reputational costs, self-inflicted costs arising from protectionism, punishment-induced costs, and the costs of systemic damage to the WTO as mechanisms that counteract the actors' incentives to defect. These incentives hinge on strategic trade management, the terms of trade, the political economy, expected gains from renegotiations, domestic opposition to agreements, changes in government, and unexpected effects of agreements. We have seen that changing incentives for defection cause optimal compliance to fall, easing the compliance problem.

PART III: FINDINGS

Let us pause for a moment and contemplate on *Figure 5*, which visualizes the tasks accomplished in Part II in the context of the analytical framework.

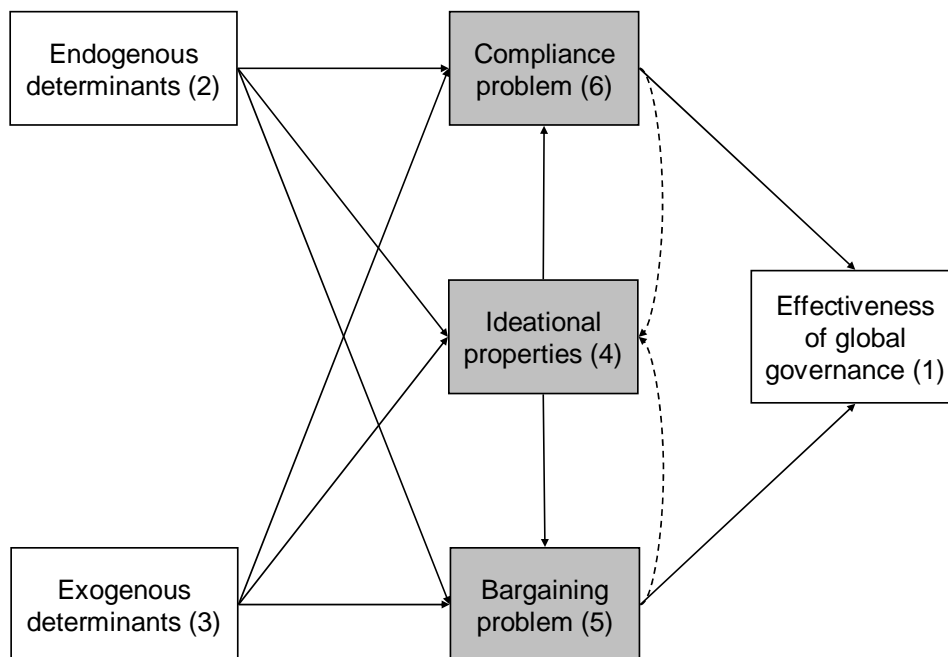


Figure 5: Analytical framework: Review of Part II

In Chapter 4, the impact of exogenous and endogenous determinants on the ideational properties has been explained. Actors behavior depends on the decision-making logic they employ and on the ideational properties they hold. Pursuing the logic of consequences, actors behave strategically in order to maximize their utility as defined by their interests. Alternatively, actors can attempt to make right decisions under the logic of appropriateness, guided by norms. Values, norms, perception, causal beliefs, the perspective on relative versus absolute gains, and collective identity are ideational properties that shape how actors define their utilitarian interests and their normative obligations.

Ideational properties can change through interaction at the international level. If actors deliberate, attempting to find the best solution to a problem at hand led by the best argument, they are especially prone to learning. Global governance structures can foster deliberation; structures that reduce the number of actors through regionalization, that require consent of every actor through unanimity voting, and that promote legal discourse through extensive judicial delegation engender deliberations.

Legitimacy is the feeling of obligation which a rule or international institution can invoke through the logic of appropriateness. Actors feel obliged to comply with rules which have been created and operate in legitimate processes, and which produce valuable and reversible outcomes. In addition, actors desire to comply with norms for self-esteem and to remain an esteemed actor of international society. The more that determinacy originates from rules and authoritative interpretations, the better the actors know what constitutes appropriate behavior and the less they are able to account for violations.

In Chapter 5, we have considered three sets of factors that determine bargaining effectiveness. The first set, toughness of bargaining strategies, accentuates the adversarial aspects of bargaining. To the extent that actors approach international bargaining with the logic of consequences, they bargain softer if they emphasize absolute gains, if they share collective identities, and if they do not know in which future position they will be concerned by the agreement. Also, they bargain softer if the value at stake falls compared to the costs of delay and if their reservation values decrease. Furthermore, norms of appropriate bargaining induce actors to bargain softly under the logic of appropriateness and under the logic of consequences.

The second set of factors, internal complexity, turns to difficulties inherent in the issues to be negotiated and in the environment of negotiations. Uncertainty about the implications of agreements makes actors reluctant to commit for fear of striking an unfavorable bargain. Linkages complicate bargaining as internal coherence of policy proposals has to be heeded if agreements are to be efficient and as linkage to deal-breaking issues can spoil agreement. Large numbers of relevant policy proposals congest the bargaining process and aggravate information collection. Finally, communication problems hamper bargaining as the traditional organizational culture of the WTO breaks away.

The third set of factors concerns the number and identity of veto players. Agreement becomes more elusive with rising number and heterogeneity of actors whose consent is needed and with declining individual win-sets, which embody all proposals that improve the welfare of an individual actor in comparison with no agreement.

Although majority voting and judicial delegation ease the bargaining problem, actors are hesitant to delegate authority to the WTO as they take their individual welfare as basis for their choice rather than global welfare effects. How delegation of authority for decision-making and judicial dispute resolution affects individual welfare depends not only on the effectiveness of delegation but also on its impact on the distribution of the benefits and costs of cooperation. I have defined risk as the costly difference between two global governance scenarios of varying global governance scope, decision making design, and judicial delegation design.

In the case of *consensus voting risk*, powerful actors fear deadlock of global governance that leaves them worse off than they would be under unilateral cooperation. Concerning *majority voting risk*, powerful actors fear being outvoted and being less able to apply threats as main source of extra-institutional power. *Institutionalization risk* affects primarily weak actors who worry that the benefits of expanding global governance, dominated by powerful actors, do not outweigh the losses in autonomous governance capacity.

In the case of *principal-agent risk*, courts pursue their own agenda, thereby violating interests which are broadly shared within international society. *Collective principal risk* arises if outcomes of judicial dispute resolution are systematically less beneficial for a share of the actors than the results that would be attainable if diplomatic dispute resolution was not substituted by judicial decision-making, while another share of the actors benefits from judicial dispute resolution.

In Chapter 6, we have discussed several compliance mechanisms. On the one hand, governments follow the logic of appropriateness by attempting to behave normatively right. Thus, governments are inclined to conform to legitimate rules, whereas they are tempted to violate rules that are in conflict with other norms on the domestic or international level. On the other hand, governments consider the following factors under the logic of consequences in their decision whether to abide by WTO rules. Domestic audiences impose political costs on governments who defect from the WTO, partially because they perceive a utilitarian interest in compliance – as they appreciate political reliability, international reputation, and openness to trade – and partially because they consider the WTO legitimate. Violation of WTO rules also damages the international reputation of actors, harming their standing in the WTO, in other international institutions, and on global markets. Punishment by other actors, such as withdrawal of equivalent market access concessions, serves to coerce defecting actors back into compliance and to deter future defections. Furthermore, governments harm their country's economy as the costs of protectionism generally outweigh gains from improvements in the terms of trade and from strategic trade management. Finally, defections undermine the stable working of the WTO in which actors have a systemic interest.

In addition, we have observed that optimal compliance with WTO rules is less than complete, depending on the incentives for defection. In the past, the incentives were mostly competitive between actors or they served special, import-competing interests. In the future, defections will be more likely to enhance global social welfare and to correspond to the democratic responsibility of governments. Hence, the level of optimal compliance decreases.

In the introductory chapter, I formulated four objectives for this study: underpinning the need for reforms in the WTO, recommending structures for the future WTO, developing and assessing an innovative research design, and developing general design rules for global governance structures. Chapter 7 demonstrates the inevitability of reforms and recommends a global governance structure. Chapter 8 contemplates whether my recommendations for the WTO can be generalized to other international institutions. The concluding Chapter 9 evaluates the present research design, draws attention to its limitations, and suggests improvements in future research.

7 Recommended global governance structure

Based on the analysis conducted in this study, I recommend the following governance structure for the WTO: Regional integration of nation states should be promoted. All nation states and integrated regions should be involved in decision-making for global governance. Decisions of fundamental importance should require consensus voting, whereas ordinary decisions and, in particular, decisions to reverse rulings should be subject to majority voting.

Furthermore, actors' collective decision-making should be assisted, supplemented, and controlled by independent and adequately empowered courts. To this end, legal proceedings should advance with automaticity unless a dispute is settled peacefully. The legal mandate should be broad, involving courts in disputes and enabling adequate rulings. Actors should refrain from interference with the judicial system by means of administrative control mechanisms. The access of private agents to courts should be handled restrictively, so that state actors maintain their gatekeeper roles.

Finally, precision of specific obligations should be low, exemptions should be extensive, and punishment should be soft. Exemptions and punishment should be endorsed and disciplined by highly legalized implementation procedures.

Table 7 summarizes these suggestions for convenient reference.

Table 7: Recommended structure for the WTO

<i>Determinants</i>	<i>Recommended degree of legalization</i>
Decision-making	Combination of consensus and majority voting
Delegation	Weak administrative control, automatic legal proceedings, broad legal mandate, restrictive access
Precision	Low precision of specific obligations
Exemptions	Extensive exemptions, strict application procedures
Punishment	Soft sanctions, strict implementation procedures

In the following, I discuss the performance of the recommended global governance structure for bargaining, compliance, risk, and social capital formation in separate sections.⁴⁷⁵ Afterwards, I compare the performance of the recommended global governance structure with the performance of alternative global governance structures. This strengthens the case for the recommended structure and highlights the contribution which this study makes to diverse political and scientific debates. Finally, I touch upon the status quo of the WTO in comparison with the recommended structure.

Before proceeding with this line of argument, I would like to justify the form I have chosen for the presentation of my reasoning. The analysis in Part II has revealed how complex the influence of the determinants on the effectiveness of global governance is. Accordingly, a linear presentation of the findings is impossible. In particular, the ideational properties and the cooperation problems are interdependent. To manage this interdependence, I first turn to the cooperation problems and assume that the recommended structure effectively fosters social capital formation. With this assumption, the recommended structure effectively solves the cooperation problems at tolerable risk. Then, I show that social capital formation is indeed effectively fostered given the effective solution of the cooperation problems.

Exhaustive reasoning would require evaluation of all possible combinations of the endogenous determinants to arrive at the most effective structure. Realistically, the number of possible combinations prevents such an undertaking. An alternative approach would be to sequentially fix the values of the determinants. This would be viable if we could argue that a certain design of one determinant is beneficial independently of the design of the other determinants. However, while regionalization appears to be a dominant strategy, I cannot make a case for any determinant of legalization without fixing the values for the other determinants. Moreover, such a sequential proceeding would entail exhausting redundancies in my line of argument. Therefore, I propose and analyze in detail only the one global governance structure which I deem most effective.

In addition, I contrast this recommended structure with alternative design choices that enjoy scientific or political support. This proceeding does not guarantee that indeed the most effective global governance structure is suggested. For every endogenous determinant, however, I can show that a design which strongly differs from the design implied in the recommended structure makes the entire global governance structure ineffective, independently of the design of the remaining endogenous determinants. This strongly supports the case for the recommended structure. Furthermore, this demonstrates that the good performance of the recommended structure is not simply a product of the approach, taken in this chapter, to bracket aspects of global governance and to assume good performance for the bracketed aspects.

The discussion of how the recommended structure affects the cooperation problems is accompanied by a review of the trends. This is necessary as we have to be aware of the significance and specific nature

⁴⁷⁵ In order to integrate the comprehensive analysis, I strongly rely on the earlier chapters and employ a compact line of argument. Note that the following sections are structured similarly to the analytical part of this study; this makes conferring with more elaborated explanations convenient.

of the cooperation problems and of the different risks that follow from the trends. Individual design characteristics can have opposite effects in bargaining, compliance, and risk. For instance, structures can be beneficial to bargaining and detrimental to compliance. Thus, the relative significance of the problems and risks has to be known to make trade-offs between opposing effects wisely. The same reasoning applies within the cooperation problems and within the risks, requiring knowledge of their specific nature. In other words, different aspects within bargaining, compliance, and risk pose different needs, so that it is important to see which aspects are most relevant.

Experience from the WTO and other international institutions gives an additional clue to which extent structures need to be tailored to tackling bargaining versus compliance problems. Empirical work indicates that compliance rates are generally high.⁴⁷⁶ However, some scholars suggest that compliance is highly problematic. Downs, Roake and Barsoom (1996) caution that a selection effect systematically distorts optimistic empirical accounts of compliance. This selection effect implies that serious negotiations take place only if agreements are considered enforceable. Thus, enforcement is a more important impediment to cooperation than the number of observed defections would indicate. Concerning the WTO, Peters (2003, 18) believes that “the compulsory character of the dispute settlement mechanism is mitigated by the fact that the dispute settlement institution’s recommendations are not centrally enforced and that compliance is currently the weak spot of the system. Arguably, the Member States’ veto power has simply been shifted to the enforcement stage”.

I agree with those who interpret the experience with WTO negotiations as indicating minor compliance problems in comparison with bargaining problems. Fearon (1998, 289) finds that “the major obstacles to the conclusion of each of the last three GATT rounds were not intractable problems of monitoring, commitment, enforcement, or information flows to make enforcement possible. Instead, negotiations have regularly stalemated on questions of who would make the concessions necessary to conclude an agreement.” Koremenos, Lipson and Snidal (2001a, 776) consent that in the last three GATT rounds, “The critical issue was who would make what concessions, not whether the resulting agreements would be enforced.” The fact that developed countries pushed for an uneven distribution of gains and losses in the Uruguay Round indicates that they anticipated compliance mechanisms to be strong enough to suppress developing countries discontent.

7.1 Solving the bargaining problem

In this section, I first review how the trends impact the effectiveness of bargaining, in order to expose the challenge which the recommended structure has to cope with. Then, I consider how the recommended structure influences the toughness of bargaining strategies adopted by the actors, the internal complexity of negotiated issues, and the number and nature of veto players. In concluding, I add the contribution of extensive judicial delegation to the performance of the recommended structure.

⁴⁷⁶ See Chayes and Chayes (1995), Koh (1997) and Simmons (2002). Onuma (2003) suggests that enforcement is more effective than often thought by international relations scholars because they are mostly from the U.S. and focus on the U.S., which is among the least constrained actors.

7.1.1 Effects of trends on the bargaining problem

The impact of trends on the toughness of bargaining is mixed. On the one hand, the trends amplify the significance of having a good reputation and, thus, augment the power of norms calling for integrative bargaining. On the other hand, norm-guided bargaining is weakened by several developments. First, it becomes more difficult to assess the costs which actors incur who resent agreements and to discern opportunistic and justified motives for blockades, since the effects of global governance become more uncertain and, in particular, concern more domestic norms. Secondly, the number of reasonable policy proposals is growing. Thirdly, the trends devalue existing bargaining rules and aggravate the creation of new bargaining rules. All this impedes the collection of a majority for a proposal and the application of reputational pressure on resistant actors.

Beyond this, devalued bargaining rules make it more difficult for actors who are driven by the logic of appropriateness to define what constitutes appropriate bargaining behavior. Also, devalued bargaining rules can give less guidance to boundedly rational actors.

Finally, increasing heterogeneity and reduced autonomy for actors increase the value at stake in negotiations and lower the gains from cooperation. Therefore, the value at stake rises in comparison with the costs of delay, favoring distributional bargaining. Overall, those factors that induce actors to bargain tougher dominate.

Internal complexity rises comprehensively. Uncertainty about efficiency and distributional implications of agreements increase with the trends, so that outcomes become harder to predict. At the same time, the costs of erring and suffering from adverse, unexpected outcomes rise with increased scope and relative effectiveness of global governance and with decreased autonomy for actors. Furthermore, the costs of avoiding unexpected, adverse outcomes mount with growing costs of exiting the WTO. Since increasingly deep global governance sets more standards, the indirect costs of escaping obligations, whether through exemptions, defection, or exit, also grow. In their attempt to avoid adverse, unexpected outcomes and to bargain strategically under asymmetric information, actors will, therefore, increasingly fall short of reaching globally optimal scope in their agreements. Moreover, increases in the level of uncertainty, in the costs of adverse, unexpected outcomes, and in the costs of escaping obligations indicate that actors are confronted with more unexpected costs from previous agreements. Thus, claims for compensation originating in existing agreements increasingly burden negotiations.

Growing linkages overtax boundedly rational negotiators who have to consider not only distributional effects, in order to make proposals acceptable to all relevant actors, but also internal coherence, in order to draft efficient proposals. Furthermore, it becomes more likely that negotiable issues are inseparably linked to deal-breakers.

With the loss of embedded liberalism as a focal point, the number of reasonable policy proposals rises. Due to the growing number and heterogeneity of actively participating actors, a growing share out of the growing number of possible proposals will actually be presented in negotiations. Since proposals become more complex and affect more norms, they are, in addition, harder to evaluate.

The WTO has outlived not only embedded liberalism but also its traditional organizational culture. The former diplomatic culture dissolves into a varied set of negotiators with incompatible

communication styles and incongruent basic understandings.

In summary, problems related to uncertainty, linkages, the number of policy proposals, and communication all add to internal complexity.

Regarding the number and nature of veto players, we have seen that agreements become harder to reach as the heterogeneity of actors grows and as their individual win sets shrink, independently of the decision-making design in place. Individual win sets dwindle for several reasons: Agreements increasingly concern norms, bargaining is increasingly affected by domestic disputes within society and between ministries, governments increasingly commit themselves domestically, civil society punishes normatively flexible actors, and domestic laws increasingly bind governments. Apart from all this, civil society may blockade global governance decisions under all decision-making designs.

Further implications of the trends on the number and nature of veto players have to be differentiated according to the decision-making design in place. The perspective for unilateral decision-making is gloomy on all counts. Unilateral decision-making is particularly affected by the weakened power of threats. The trends devalue threats in several ways. First, the direct costs of protectionism and non-participation in standards rise with economic integration. Secondly, the reputational costs of threatening increase with the growing value of having a good reputation and with a bolder civil society that 'shames' threatening actors whose objectives it opposes. Thirdly, the systemic interest in the effective and stable working of the WTO rises with increasing relative effectiveness, scope, and linkages of global governance, as well as with more specific investments.

Weaker threats fail to overcome resistance against unilateral extension of unilateral agreements by more actors, with greater resolve, and with enhanced capacities. The pressure from excluded actors on unilateral implementation is mounting, as well, because unilateral implementation extends less benefits and more costs to excluded actors. In addition, the gains from cooperation, which powerful actors forgo if they implement their decisions only unilaterally, are increasing. Finally, increasing heterogeneity and the inclusion of more actors into the unilateral group, necessitated by weaker threats, complicate unilateral agreement in the first place.

Consensus decision-making is beset with growing actor participation because every actor automatically is an institutional veto player. Since unilateralism as the most powerful threat against resistant actors is on the decline, it becomes, in addition, more difficult to pressure resistant actors into agreement.

Overwhelmingly, the trends aggravate future bargaining. Actors will bargain with tougher bargaining strategies and on more complex issues. Furthermore, unilateral and consensus decision-making become more problematic, whereas only majority voting is not significantly impeded by rising actor participation and heterogeneity, shrinking individual win sets, and falling power of threats.

7.1.2 Toughness of bargaining strategies

Now we look at the performance of the recommended structure in counteracting the trends. Effective social capital formation implies relatively strong collective identity and an emphasis on absolute gains, so that actors are more interested in integrative bargaining. Effective social capital formation also strengthens legitimacy, so that normative considerations and reputational pressures entice actors to

bargain integratively. Furthermore, low precision, combined with judicial delegation, creates a veil of uncertainty that stimulates the interest in overall gains.

Moreover, bargaining effectiveness and extensive judicial delegation reduce path dependence. Thus, the expected duration of agreements falls and the value at stake compared to the costs of delay decreases. Effective learning diminishes ideational heterogeneity among actors. Therefore, the value at stake falls, whereas the gains from cooperation and, accordingly, the costs of delay rise. Exemptions leave more flexibility to actors, further reducing the value at stake in comparison with the costs of delay.

In summary, the recommended structure motivates actors to bargain more integratively on all accounts. This occurs, in particular, indirectly through social capital formation, which reduces heterogeneity and fosters absolute gains and collective identity. Yet, even with improved learning, heterogeneity will increase. Especially in cases of important and deeply held norms that conflict in negotiations, the generally optimistic assessment does not hold. In these cases, learning is likely to be ineffective and the normative dispute is likely to override the willingness to bargain integratively. Hence, we have to expect tough bargaining strategies in these instances.

7.1.3 Internal complexity

The significance of uncertainty depends on the difficulty to accurately predict the implications of agreements, the costs of adverse, unexpected outcomes, and the costs of escaping obligations. Containing low precision, the recommended structure does not attempt to reduce uncertainty by writing more state-contingent agreements. In the face of complexity and thick uncertainty, precisely spelling out provisions in advance confronts obstacles in curbing uncertainty, in any case. Furthermore, actors are particularly concerned with large adverse, unexpected outcomes. Precision cannot forestall this danger as exhaustively as the opportunity to avoid obligations. If actors go entirely wrong in their assessments, even highly precise, contingent provisions cannot avoid substantial adverse effects.

The costs of adverse, unexpected outcomes are diminished through regionalization. Furthermore, collective identity, fostered by the recommended structure, makes those adverse, unexpected outcomes that at least benefit other actors more tolerable.

In the case of large surprises, the recommended structure allows actors to avoid obligations at moderate costs. Extensive exemptions and the opportunity of defection in case of unbearable, unexpected outcomes mark upper thresholds. Legitimacy-based compliance mechanisms impose only low costs on defecting actors in such situations.⁴⁷⁷ Strong judicial delegation facilitates clarification of whether adverse, unexpected effects are really that costly and surprising, so that domestic audience and reputational costs are moderate if actors sidestep obligations with justified accounts. Furthermore, low precision leaves actors with leeway to interpret obligations generously, and courts are likely to tolerate lenient interpretations. Finally, regionalization lowers the direct and indirect costs of resorting to exemptions, defection, or exit.

⁴⁷⁷ On legitimacy-based compliance mechanisms, see section 7.3 about risk in this chapter.

Overall, the recommended structure appears to be suited to cope with increasing uncertainty-related problems.

Regionalization provides a remedy against the rising number of policy proposals by reducing the number of actors who can contribute proposals. Majority voting allows disregarding proposals from actors who are not required for attaining a formally sufficient and politically viable majority. Deliberation and legal discourse exclude proposals from consideration that cannot be defended on normative grounds. Considerable judicial delegation eases the problem of many reasonable policy proposals further as courts create focal points for negotiations.

Overall, the performance of the recommended structure is positive. However, structures can ease the adverse effects of the trends only moderately and only with regard to uncertainty and the number of policy proposals. Since linkage and communication problems remain unmitigated, internal complexity constitutes a serious challenge to bargaining.

7.1.4 Number and nature of veto players

Regionalization increases home markets, thus lowering the costs of protectionism and non-participation in standards. Regionalization also weakens the systemic interest in the WTO which is harmed by threats. In addition, regionalization appears to enhance the power of threats by uniting the markets of several actors. However, if regionalization is comprehensive, then the targets of threats have larger home markets at their disposal, as well, so that the power of threats does not necessarily rise. Since regionalization tends to increase the power of weak actors by more than the power of already powerful actors, the playing field is leveled and the power of threats may fall overall.

Besides, extensive judicial delegation, and expectations of legal discourse as appropriate form of communication, make it more difficult to account for threats. Together with strong legitimacy, this increases domestic audience and reputational costs of threats. Therefore, the structures further weaken the power of threats.

In light of the trends, consensus decision-making, which the recommended structure designates for major decisions, is extremely complicated. Since the recommended structure reduces the power of threats even further, consensus decision-making becomes even less effective; resenting actors cannot be pressured into agreement. On the other hand, regionalization significantly lowers the number of veto players. This makes consensus decision-making a viable option in the first place.

Majority decision-making, prescribed for decisions of low or moderate importance, is effective independently of the number of actors involved. The reduced power of threats makes majority decision-making even more effective, since powerful actors can less easily block majority decisions.

7.1.5 Conclusion

The recommended structure considerably softens the tough bargaining strategies which the trends elicit. The recommended structure also copes well with internal complexity, albeit the influence of structures on this aspect of bargaining is regrettably poor given the adverse effects stemming from the trends. Regionalization, which strongly improves consensus decision-making, and majority decision-

making moderate the growing problems associated to veto players.

The positive performance of the recommended structure along all three factors, to the extent that structures can influence these factors, is favorable as we do not know how the factors aggregate in determining bargaining effectiveness. Improving bargaining effectiveness with regard to the toughness of bargaining strategies, the internal complexity, and the number and nature of veto players make it less likely that insufficient performance regarding one factor devalues good performance regarding the other factors.

Moreover, we will see that the recommended structure leads to broad scope and strong independence of the judiciary. Since this enables courts to resolve imperfections in agreements, less precision needs to be achieved in bargaining. Hence, broader scope can be negotiated. Furthermore, judicial legislation, which accompanies judicial conflict resolution, broadens the scope of global governance.

7.2 Solving the compliance problem

In the following, I first review the strength of the single compliance mechanisms. I then consider whether the compliance mechanisms collectively are strong enough to achieve optimal compliance, given the influence of structure and trends on the incentives to defect.

7.2.1 Compliance mechanisms

Let me first address self-inflicted, punishment-induced, and systemic costs of defections which are not, or only moderately, influenced by legitimacy. The trends strengthen these compliance mechanisms. The self-inflicted costs of defections rise; the reason is, firstly, that the gains from strategic trade management decline and, secondly, that standards become more important in global governance, while deviations from standards become more expensive. Furthermore, increasing relative effectiveness, scope, and linkages of global governance, as well as more specific investments, elevate the systemic interest in the WTO.

Regionalization makes actors more robust against all three compliance mechanisms. In addition, the sanctions contained in the recommended structure are soft. Hence, the recommended structure diminishes the strength of these compliance mechanisms, with the exception of relatively strong collective identity which makes the actors more reticent to damage the WTO.

Now I turn to compliance pull, domestic audience costs, and reputational costs as strongly legitimacy-based compliance mechanisms. These mechanisms benefit from legitimacy, which, as we will see, is high for the recommended structure, and especially from determinacy. Negotiating determinate agreements becomes increasingly difficult as implementation problems, ambiguity, and competing norms provide actors with arguments to account for their defections. This makes the broad legal mandate and the strong judicial independence especially valuable because they allow for authoritative interpretations that distinguish between justified and unjustified defections with adequate sophistication and impartiality.

Due to the trends, domestic audience costs increase with regard to the domestic political setting. Governments are more likely to entrap themselves in references to international norms. Domestic

societies feel more committed to observing international law, and they perceive a greater interest in compliance, in order to avoid reputational and systemic costs. Since international institutions monitor actors increasingly in their promotion of good governance, domestic societies take non-compliance increasingly as a signal of poor governance performance. All this means that domestic society is more and more motivated to sanction defecting governments.

With increasing transparency and civil society involvement in global governance, the distance between domestic and international politics shrinks and the capacity of domestic society to impose domestic audience costs grows. In addition to domestic society, domestic bureaucracies and courts increasingly support compliance.

Furthermore, the reputational costs of violations rise, influenced by developments in the international political and economic structure. The importance itself of having a good reputation in international society grows. Deliberative decision-making, which is supported by the recommended structure, leads actors to expect compliance more strongly and raises reputational costs of defections further. In addition, the disciplining force of markets gains stronger hold on actors with advancing global market integration. Regionalization increases home markets, thus detracting from the force of global markets.

7.2.2 Conclusion

The recommended structure eases enforcement problems from the outset by tackling the gains from defection. Learning counteracts increases in heterogeneity, which is at the root of incentives to defect with the intention to escape from risk or adverse, unexpected outcomes. If heterogeneity is reduced after a treaty has been signed, the incentives to defect fall beyond what has been anticipated when the agreement was drafted.

Extensive exemptions, and effective bargaining that allows for successful renegotiations, further reduce the strain on the enforcement system. If contracts are blatantly unsuited to the needs of an actor, she can temporarily modify her obligations herself or change them in accordance with international society.

In order to deal with the remaining incentives for defection, the recommended structure achieves considerable force for compliance. Furthermore, I have concluded that lacking enforcement capacity is currently not the weak spot of the WTO. Finally, I have argued that the changing motives for defection lower the optimal degree of compliance.⁴⁷⁸ If all this is true, then the recommended structure provides sufficiently powerful compliance mechanisms to approximately achieve optimal compliance.

The important point is that the recommended structure does not only solve the compliance problem but that its compliance approach, resting on legitimacy, and especially on process determinacy created through authoritative interpretations of broadly empowered and independent courts, comprehensively contributes to cooperation.

This approach recognizes justified accounts of defections and treats vindicated defections leniently.

⁴⁷⁸ Recall the concept of optimal compliance. Compliance is optimal if the marginal benefits of defection for global welfare equal the marginal costs of defection for global welfare. As long as the benefits outweigh the costs, breach of agreements is efficient and optimal compliance is less than complete.

This reduces the costs of avoiding adverse, unexpected outcomes and, thus, eases the bargaining problem. Furthermore, we will find that the compliance approach reduces risk and strengthens social capital formation. This corresponds to the general notion that legitimacy as compliance mechanism leads to superior long term performance.⁴⁷⁹

7.3 Managing the risks of global governance

Risk has been defined to depend on the degree and the costs of deviations. In analogy to the costs of adverse, unexpected outcomes, the increasing relative effectiveness, scope, and depth of global governance, as well as decreasing autonomy for actors, exacerbate the costs of deviations.

We have seen that the recommended structure implies relatively low costs of shouldering or avoiding obligations that cause adverse, unexpected outcomes. The recommended structure lowers the costs of deviations in similar ways. In particular, actors comply with rules that cause deviations with less reluctance because they accept the rules as legitimate and because they share relatively strong collective identity.

Exemptions, legitimacy-based enforcement, extensive judicial delegation, and regionalization reduce the costs of avoiding obligations that arise from those decisions or rulings which constitute deviations. The reason that legitimacy-based enforcement decreases the costs of deviations is that substantial deviations erode legitimacy as the basis of enforcement. Governments do not feel normatively obliged to comply with illegitimate obligations, domestic audiences do not impose significant costs on their governments for violating illegitimate obligations, and reputational costs of defection are also smaller if obligations lack clear legitimacy. In particular, powerful actors, who are bound less by self-inflicted, punishment-induced, and systemic costs of defection can avoid obligations that constitute substantial deviations. This is the more so as excessive deviations damage the systemic interest in the WTO.

Before turning to judicial delegation and decision-making deviations, we have to note the effects of the trends and the recommended structure on heterogeneity, which is influential in all types of deviations. Let us first consider judicial delegation risk, consisting of the principal-agent and the collective-principal risk. The greater heterogeneity is, the less able actors are to control courts that pursue their own agenda. Furthermore, the collective principal risk, which implies that rulings favor one group of actors above another, can only exist if actors differ.

Let us now turn to decision-making risk, which comprises consensus voting, majority voting, and institutionalization risk. The greater heterogeneity is, the more likely consensus decision-making is to collapse. With greater heterogeneity, the incentive for majority voting deviations increases for several reasons. Developing policies that avoid substantial deviations for every actor becomes more challenging. Accordingly, deliberating until consensus is reached or an overwhelming majority is assembled becomes more difficult, so that on average smaller majorities pass decisions. Furthermore, policies that clearly favor the majority can be better justified as a necessity of consistency and they require less openly distributional mechanisms if heterogeneity is pervasive.

⁴⁷⁹ See Börzel and Risse (2002), Commission on Global Governance (1995), Eriksen and Fossum (2000b), Hurd (1999) and Wendt (1999, Ch. 6).

Institutionalization deviations grow with heterogeneity for similar reasons. Difficulties with deliberating make threatening more attractive in comparison with more consensual decision-making, and policies that favor powerful actors can be better justified as they do not need to entail openly distributional provisions.

Therefore, the trend of increasing heterogeneity renders all kinds of risk more severe. Effective learning can offset this effect only partly.

7.3.1 Judicial delegation deviations

Judicial delegation deviations depend on the scope and independence of the judiciary. More uncertainty and rising complexity make increasing imperfections in agreements optimal. This engenders more cases and leaves courts more discretion in resolving them. Furthermore, broad legal mandate and automatic legal proceedings increase the number and relevance of lawsuits. Judicial scope, therefore, is broad, though restrictive access diminishes number and relevance of rulings.

The degree of judicial independence hinges on whether we consider the ability of courts to rule independently in single cases or whether we consider the ability to rule independently and deviate systematically throughout many cases. Furthermore, judicial independence hinges on whether only a minority or whether a broad majority of actors opposes rulings. First, I assume that a broad majority resists rulings that systematically diverge from their interests; this is the case of principal-agent deviations.

External control is based on *ex-ante* and *ex-post* control mechanisms. The recommended structure contains weak *ex-ante* (or administrative) control mechanisms because they perform poorly in controlling courts in comparison with their costs. *Ex-post* (or oversight) control mechanisms increasingly struggle with complexity that impedes the supervision of courts. If actors can nevertheless pinpoint judicial deviations, growing benefits of judicial delegation signify increasing costs of interfering with the independent working of the judicial system. Since the recommended structure warrants effective bargaining and entails particularly low majority thresholds for reversing rulings, actors can nevertheless reign in courts that cause high costs for actors in the pursuit of their own agenda.

In addition, courts practice self-restraint. Influenced in their self-perception by extensive judicial delegation, judges strive for recognition in the legal community and for legitimacy. This motivates judges to rule independently and to strengthen the rule of law in the long run. Furthermore, the recommended structure supports independent rulings as a mean to enhance legitimacy. The good performance of compliance mechanisms assures compliance with independent rulings in most cases and high legitimacy allows weathering occasional defections. Low precision does not bind judges tightly to agreements. The broad legal mandate even covers judicial legislation explicitly under particular circumstances. And broad judicial scope produces ample precedent that can underpin judicial legislation.

However, legitimacy-based enforcement implies that, once deviations accumulate, the enforcement capacity suffers, so that courts face frequent non-obedience which damages its legitimacy further. Since access is limited to actors, they also can diminish the inflow of cases to courts if discontent with

rulings is broadly shared. Moreover, courts need to continue to consider the repercussions of their rulings on the stability of the WTO. This limits their independence.

Like in the previous case of systematic deviations, courts' independence in single rulings is high due to weak administrative control mechanisms, monitoring difficulties, and the broad legal mandate. Low precision weakens the independence of courts against infringements by actors, but this is partly compensated by the ample precedent which requires legal consistency. If courts do not systematically deviate from the interest of the principal, it is therefore unlikely that actors reverse rulings.

In summary, courts are highly independent in single rulings. Nevertheless, the principle agent risk is modest because actors can prevent systematic deviations. Actors pass controlling decisions, feel free to disobey rulings, tolerate non-obedience by others, and agree on reducing the inflow of cases only if courts deviate systematically.

Independence in single rulings combined with the possibility to pass decisions in order to reign in systematically deviating courts allows courts creative rulings within the limits set by the principal. Unless a ruling is overturned by the collective principal, it has to be considered legitimate as it does not upset a large part of international society.

The critical difference between principal-agent and collective principal deviation is that *ex-post* control does not work if the court favors a group of actors who can block decisions. In this situation, the disadvantaged actors cannot reverse rulings or reform judicial delegation design, even if they strongly disagree with courts. Furthermore, if international society is split, protest against and non-obedience with court rulings do less damage to professional recognition of judges and legitimacy of courts less.

Powerful actors, who are likely to execute administrative control mechanisms and whose opposition strongly hurts legitimacy and systemic stability, are less exposed to collective principal deviations. Therefore, it is important that the weak administrative control eases the fear of weak actors that powerful actors can subordinate courts.

Overall, the influence of the recommended structure on the collective principal risk is mixed. Substantial scope of judicial delegation, broad legal mandate, and low precision increase the risk, whereas effective learning that reduces heterogeneity, weak administrative control, and low costs of deviations make it less problematic.

7.3.2 Decision-making deviations

Consensus voting deviations are moderate. While the trends worsen the bargaining problem, the recommended structure still achieves moderate bargaining effectiveness for consensus decision-making. In addition, extensive judicial delegation lowers the risk of a complete standstill in global governance. In comparison with increasingly ineffective unilateral decision-making, which serves as base case for assessing multilateral decision-making deviations, consensus voting deviations will at least not increase.

Deviations arising from majority voting are limited by delineation, self-restraint, and judicial protection of minority actors. Delineating the scope for majority decisions and, thereby, reserving

important decisions to unanimity voting substantially lowers majority voting risk. The combination of consensus and majority decision-making offers a beneficial combination of deviations. In essential issues, actors are more willing to accept standstill rather than a global governance policy that contradicts their norms and interests. In day-to-day business, actors value effective decision-making more highly than extremely low deviations. The reason is that in essential issues a single substantive deviation may be unbearable, whereas minor deviations in day-to-day business partly offset each other in the long run.

Within the scope for which majority voting is assigned, the majority is strongly enticed to practice self-restraint in order to avoid defensive measures of the minority and to maintain the value of the WTO. Though the power of threats, which protects minorities consisting of powerful actors, is low, broad exemptions and the compliance approach that enforces illegitimate decisions only weakly allow minorities to avoid obligations stemming from abusive majority voting. Since abusive majority voting also harms the systemic interest of powerful actors in the WTO, powerful actors can be expected to violate rules which have been passed by abusive majority voting and to resist subsequent punishment. Hence, such decisions cannot be enforced and are unlikely to be passed in the first place.

The systemic interest of the majority aims not only at maintaining legitimacy and compliance. Out of fear of being outvoted themselves in the future, actors recoil from establishing the practice that narrow majorities can decide disputed issues. Finally, the sense of collective identity nourished by the recommended structure slightly diminishes deviations as actors sympathize with the minority.

If self-restraint fails, broad judicial scope and independence empowers courts to shield actors partially from abuses of majority voting. In comparison with unilateral decision-making, majority voting is, therefore, attractive.

Concerning the risk of institutionalization, reduced power of threats, multilateral decision-making, and extensive deliberation strengthen weak actors in bargaining. Broad scope and strong independence of the judiciary, as well as enforcement of legitimate rules even against powerful actors, protect the rights of weak actors in disputes. Furthermore, regionalization improves the standing of weak actors concerning bargaining, compliance, and risk. All this makes the proposed global governance structure more attractive for weak actors than autonomous governance.

7.3.3 Conclusion

The majority of actors, enabled to pass decisions by majority voting, and courts, which are empowered by extensive judicial delegation, keep checks on each other. Therefore, the risk produced by majority voting and extensive judicial delegation, which both intrude into actors' sovereignty, is relatively low compared to the benefits.

Furthermore, the risk of the recommended structure is relatively low in comparison with the effectiveness and equality in rule creation and application. This is worth noting because generally structures that involve low risk for powerful actors happen to be weak in solving the cooperation problems and in equalizing power asymmetries. The reasons for this advantageous property of the recommended structure lies with its strength in social capital formation. Actors do not perceive learning as violation of their interests. Deliberation results in equality without involving risk.

Integrative bargaining, inspired by collective identity, lowers consensus voting and judicial delegation risks without affecting equality. Furthermore, collective identity inspires self-restraint, which curbs majority voting risk, again without affecting equality. Finally, legitimacy-based enforcement entails low degrees of risk while being similarly forceful towards weak and strong actors.

7.4 Promoting social capital formation

The influence of the trends on learning is ambiguous. On the one hand, the heterogeneity of values, norms and knowledge, together with high cognitive complexity of the issues, increasingly overstrains actors. The requirement of internal consistency for efficiency complicates incremental changes, while transparency makes learning and, in particular, substantive shifts in the position of actors less likely. Finally, less discretion for negotiators, and their decreasing ability to influence their negotiating mandates, reduce the effectiveness of learning.

On the other hand, increasing uncertainty makes actors more willing to deliberate and to involve experts, who are inherently prone to deliberations. Furthermore, civil society attempts to persuade actors, it offers expertise to overcome diverging knowledge, and it assists actors with its universal perspective in overcoming normative divides.

As regards collective identity formation, growing numbers of relevant actors make international society more anonymous and weaken processes of role taking and role casting. Furthermore, increasing difficulties in evaluating accounts harm the evolution of mutual understanding and diffuse reciprocity. By contrast, globalization connects the fate of actors. This motivates them to perceive themselves as one community of shared fate, thus supporting collective identity formation.⁴⁸⁰

7.4.1 Deliberating

Global governance structures can promote social capital formation, in particular by enticing deliberations. Deliberations have been shown to foster legitimacy of international institutions in three ways. As a supplement to representation, deliberating enhances process legitimacy. Also, actors nest specific rules in legitimate, broader norms when deliberating. Thirdly, deliberating reduces the heterogeneity of norms, so that conflicts with domestic norms become less frequent.

Moreover, deliberations bring knowledge more into line and shift the focus from relative to absolute gains. Finally, deliberation fosters diffuse reciprocity while deliberation and legal discourse broaden mutual understanding. This contributes to collective identity formation.

The structures wield strong influence on the frequency of deliberative interaction. Since deliberations are time-consuming and laborious, actors negotiate less if they are not compelled by structures to engage in protracted negotiations. For those decisions which can be passed by majority voting, actors, therefore, undertake less deliberative effort.

Regionalization lowers the share of actors who are not involved in a disagreement. Therefore, fewer actors are open to being convinced by the better argument. Yet, regionalization also enhances deliberation. With fewer participants, interactions in negotiations become more personal and intensive,

⁴⁸⁰ See Wendt (1999, Ch. 7).

while social dynamics unfold more strongly over many negotiating sessions. Furthermore, the mechanism of role taking and role casting gains momentum with fewer actors. Overall, regionalization appears to be conducive to deliberating.

Importantly, the recommended structure promotes legal discourse. Whereas precision, which enables actors to argue with strong reference to agreements is low, judicial delegation, the most important determinant of legal discourse, is extensive. Since the power of threats is weak and the enforcement capacity at the disposal of courts is strong, actors are additionally compelled to participate in legal discourse.

Legal discourse facilitates deliberation based on the communicative capacity of law. Law provides the only globally valid language for negotiating international agreements and it is closely associated to a set of stable and well-defined practices. While law is not equally suited for every actor of the heterogeneous international society, law is an appropriate language for intercultural discourse and it can evolve into an even more polycultural direction. Besides this communicative function, legal discourse disposes interaction towards deliberating as it triggers competing justifications within particular rules and circumstances, dragging even actors who initially employ only rhetorical action into genuine deliberation.

Deliberations that occur in disputes over existing agreements spill over into agreement-creating negotiations. Negotiators acquire skills in the demanding art of deliberating. Domestic and international society come to expect deliberating. In anticipation of legal disputes, actors involve experts in their reasoning, who are naturally inclined towards deliberations. Finally, actors avoid reputational and systemic costs in the case of legal disputes if they develop coherent agreements in deliberative negotiations.

Taking these effects together, the recommended structure points to a high level of deliberation, albeit less than consensus voting for all decisions and high precision of obligations could attain.

7.4.2 Legitimacy

Let us now consider how the trends and the recommended structure affect process legitimacy, output legitimacy, norm resonance, esteem, and determinacy. The recommended structure enhances process legitimacy in the creation of agreements as it promotes equitable representation and deliberation. Multilateral decision-making design entitles all actors to actively participate in WTO decision-making. Reduced power of threats, and especially decreased attractiveness of unilateral decision-making, assure that powerful actors cannot overly hollow out these rights. To the extent that actors deliberate, weak actors are further strengthened as the better argument carries the day. Regionalization combines the resources of developing countries, so that they are better capable of making use of their voting rights and of forwarding proposals that have a chance of winning support in deliberations. Furthermore, legalized decision-making emphasizes the adherence of primary norms to the legalized global governance system and to the functioning of international society.

Process legitimacy in the operation of agreements is considerable as well. The broad judicial mandate and the automatic legal proceeding subjugate most disputes to legal rulings, which apply the law coherently and according to its moral value. Strong judicial independence provides for equality in the

rulings, and strong compliance capacity, which also subdues powerful actors, warrants relatively equal implementation of rulings.

The problem with extensive judicial delegation is that it is at cross-purpose with accountable representation. Yet, the recommended structure has been shown to effectively deal with principal-agent problems, so that courts do not systematically and significantly deviate from the interests of the collective principal.

Effective solution of the cooperation problems engenders high output legitimacy. Since the recommended structure solves the bargaining problem effectively, decisions can, in addition, be made flexibly, so that global governance policies can be reversed. Besides, extensive exemptions enable actors to partially reverse the effects of global governance within their territory; high reversibility further strengthens output legitimacy.

With increasing heterogeneity of actors, global governance norms are more likely to conflict with domestic norms. Effective learning eases this problem. Extensive exemptions curb the repercussions that damage the legitimacy of global governance if international and domestic norms conflict.

Deliberations nest specific global governance rules in broader norms. This lends additional legitimacy to the specific rules.

Good compliance rates nurture actors' desire to conform to international society and to abide by its rules, in order to receive esteem. Strong independence enables courts to condemn defections impartially and consistently, so that actors internalize appropriate behavior. Since exemptions are extensive and punishment is weak, coercive means, which would erode legitimacy, carry little significance. If governments are pressured into compliance with rules which they do not consider appropriate, this is mostly due to domestic audience and reputational costs. Since such pressure evokes less resentment than punishment, actors are more likely to bring their beliefs into conformity with their behavior.

If actors can account for rule violations, they feel less compelled to comply with rules. The trends give actors more opportunities to credibly account for rule violations. Increasing depth requires more capacities for implementation. Increasing complexity leads to more ambiguity and to more disputes based on differences in knowledge. Increasing normativity and ideational heterogeneity cause more disputes stemming from normative differences. The broad legal mandate empowers courts to deal with these intricacies and to establish determinacy in an authoritative process. An emphasis on the procedural aspect of the standard of review supports judicial legitimacy and curbs risks in this delicate interference with actors' sovereignty.

7.5 Comparison with alternative structures

So far, we have established that the recommended structure, based on integrated regions, a combination of consensus and majority voting, extensive judicial delegation, low precision, broad exemptions, and soft punishment, successfully handles bargaining, compliance, and risk. I now consider global governance structures which build on nation states as constitutive actors, which restrict judicial delegation, which contain highly precise obligations, or which entail narrow exemptions. We

have already seen in Chapter 6 about compliance that tough punishment is not necessary given declining optimal compliance and increasingly strong performance of legitimacy-based enforcement mechanisms. Tough punishment has been shown to be even detrimental due to its negative side effects on social capital formation and risk.

Instead of exhaustively addressing the performance of the alternative structures in all aspects of global governance, I focus on those aspects of their performance that make them unsuitable for future global governance.

7.5.1 Nation states

Let us first address the performance of global governance if nation states are the constitutive actors. Different kinds of arguments are brought forward in favor of nation states and against regionalization. In Chapter 2, we have noted that integrated regions are criticized for distorting trade and investment flows, adding to protectionism, engendering transaction costs in administration and rent-seeking related to regionalization, and sabotaging multilateral liberalization in the WTO. I add one further criticism of integrated regions – that they harm the legitimacy of governance – before I demonstrate the overwhelming contribution which regionalization makes to global governance in the present study.

The case that regionalization lowers the legitimacy of governance can be made along two lines. First, regionalization is claimed to be detrimental to the democratic legitimacy of governance within regions that integrate politically. Authority is drained from highly legitimate nation states and channeled into intransparent and unaccountable bureaucracies. I cannot make a judgment on this issue as I do not evaluate domestic and intraregional effects of global governance structures. However, I can contribute an argument about the repercussions of regionalization on a global level. Regionalization improves the legitimacy of global governance; this off-sets possible losses of democratic legitimacy within integrated regions. Thus, the democratically optimal degree of authority, which should be transferred from the national to the regional level, increases. Regrettably, the global level is usually ignored in accounts that consider the effects of regionalization on the legitimacy of governance.

The second line of criticism looks at the dynamics of regionalization. This perspective shows that regionalization can annul the power-equalizing effect of the WTO. When actors negotiate regional integration agreements, powerful actors can exploit weaker actors and extract substantial concessions in linked issue areas by threatening to raise trade barriers.⁴⁸¹ Furthermore, powerful actors are better able to form ‘hub-and-spoke’ systems.⁴⁸² If actors are members in several integrated regions, some actors are in the center while other actors are at the periphery of the ensuing webs of overlapping regional integration agreements. Powerful actors at the hub have preferential access to more markets than weak actors at the spokes. Thus, producers located in powerful countries gain competitive advantages.

⁴⁸¹ See Freund (2003), Limao (2002) and Perroni and Whalley (2000).

⁴⁸² See Ito and Krueger (1997). Note that the appreciation of regionalization derived from this study only extends towards such integrated regions that harbor the potential for deep integration. The study does not support shallow regional integration with ‘hub-and-spoke’ effects.

Possible adverse effects of regionalization on economic wealth and democratic legitimacy have to be compared with its contributions to global governance. To highlight this contribution, I now turn to the performance of nation states as actors of global governance.

If nation states constitute the actors of global governance, consensus voting is overly hampered by the large number of heterogeneous veto players with small individual win-sets. The trends have also shown that minilateral decision-making will fail increasingly in the future. Powerful actors face mounting difficulties in reaching internal agreement within the minilateral group. Extending internal agreements to excluded actors becomes increasingly difficult, while minilateral agreements without multilateral extension become less attractive. Moreover, minilateralism carries for several reasons only low legitimacy, which has been demonstrated to be vital for effective global governance. First, minilateralism precludes equitable representation. Secondly, minilateralism as the rule of the powerful contradicts deliberating, which requires actors to cast aside their power positions and to rely on the force of their reasoning. Thirdly, if powerful actors threaten, in order to extend their minilateral agreement, these coercive means create resentment among the excluded actors. Finally, low effectiveness of minilateralism translates into low output legitimacy.

Hence, majority voting is the only design that facilitates effective negotiations among a large number of nation states. However, majority voting is too risky to be accepted by powerful and weak actors alike because sizeable deviations are likely to occur and because the costs of deviations for nation states are high.

To see this, let us first consider judicial delegation under majority voting. Effective majority voting curbs the principal-agent risk. Nevertheless, actors will accept less judicial delegation in a world of nation states than in a world of integrated regions. As argued below, legitimacy is weak, so that enforcement cannot be primarily based on legitimacy. The corresponding need for tough punishment invalidates an essential check against deviations and increases the costs of deviations. The costs of deviations are even higher as nation states are less able than integrated regions to circumvent obligations stemming from deviations.

Let us take stock: We have a high number of actors, comprehensive majority voting, plus limited judicial delegation and accordingly restrained legal discourse. All this follows necessarily from the choice of nation states as actors of global governance – and all these factors detract from deliberating and collective identity formation. This diminishes the manifold positive effects of social capital formation on bargaining and enforcement.

The problems in bargaining and enforcement, which weak social capital formation causes, further tarnish legitimacy. With low social capital, powerful actors are unlikely to implement obligations they did not consent to. As a consequence, powerful actors frequently defect, leading to riddled and unequal enforcement to the detriment of legitimacy. If actors are allowed to resort to exemptions if they do not consent to a majority decision, they will frequently employ this opportunity given low legitimacy and low collective identity. This undermines majority decision-making and demolishes output legitimacy.

After we have established that the level of social capital in a world of nation states is low, let us now turn to the question of how substantial the decision-making deviations under majority voting will be.

Low collective identity does not entice actors to restrain themselves for the sake of minority actors. Neither will actors practice self-restraint for reasons of appropriateness given weak legitimacy. Furthermore, the inherent barrier of legitimacy-based enforcement is absent. Finally, limited judicial delegation cannot provide a strong external shield against abusive majority voting. Therefore, the risk of majority voting is overly high.

Rare deliberations, only moderate judicial delegation, and weak legitimacy-based enforcement make the risk of institutionalization unacceptable to weak actors as well.

In practice, this means that low effectiveness and low legitimacy of global governance with majority voting cannot reign in unilateral ambitions of powerful actors. Since weak actors are not attracted to multilateral decision-making designs either, they push less for institutional reforms, in order to strengthen international institutions, than attempt to weaken the hold of unilateral global governance. Hence, a world of nation states will live with ineffective and illegitimate unilateralism, regardless of the formally propagated decision-making design.

7.5.2 Restrictive judicial delegation

Proponents of restrictive judicial delegation worry about judicial legislation for different reasons.⁴⁸³ Some critics emphasize that international courts are not the appropriate venue for important disputes on normatively charged issues. Therefore, judicial legislation is seen to tarnish the legitimacy of global governance.⁴⁸⁴ Other champions of restrictive judicial delegation sympathize with courts. They want to protect courts from overly political cases that compromise their standing.⁴⁸⁵ A third opinion fears judicial delegation risk, particularly principal-agent risk.⁴⁸⁶

A general argument against all these skeptical voices rests on the benefits that result from extensive judicial delegation and that become increasingly essential with the trends. Judicial delegation improves social capital formation, bargaining, and compliance. It reduces decision-making risks. And it directly broadens the scope of global governance.

Restricted access, effective bargaining, and low costs of deviations, implied in the recommended structure, keep checks on judicial delegation risk and counter especially the principal-agent risk.

Moreover, several aspects of the recommended structure strengthen the legitimacy of courts, so that

⁴⁸³ See Trachtman (1999b).

⁴⁸⁴ Barfield (2001, 408) expects judicial legalization to raise “intractable questions of democratic legitimacy.” Roessler (2001, 321) considers certain political decisions to be too delicate to be “submitted entirely to the rigidities of a judicial proceeding.” Keohane and Nye (2001) warn that difficult political decisions should not be dodged by shifting them to the judiciary. Bronckers (1999, 547) expects judicial legislation to produce “undemocratic surprises”.

⁴⁸⁵ Dunoff (1999) suggests a right for courts to reject cases which they deem inappropriate to protect their legitimacy. Esty (2002, 17) believes that, “By retreating from its current role as dispute resolution mechanism to the world, perhaps the WTO can reestablish its reputation for authoritativeness, efficiency, and fairness.” Yet, Esty recognizes that this possibility hinges on the functioning of other international institutions.

⁴⁸⁶ See Delich (2002) complaining about the admission of *amicus briefs*, i.e. third party submissions, through the Appellate Body without authorization in the WTO treaty and despite the protest of the majority of actors.

there is no need to protect judicial legitimacy by restraining the mandate. First, the broad legal mandate entitles courts to moderate legislation within the mandate. Thus, courts do not stray off their mandate when legislating and they avoid subsequent harm to their legitimacy. Secondly, the good enforcement capacities of the recommended structure indicate that non-compliance with court rulings should be limited to strongly disputed, particularly salient issues. Thirdly, interference in actors' sovereignty and instances of non-compliance can be further reduced if the legal mandate favors deference to actors in value trade-offs but maintains WTO dominance in certain substantive principles, for instance, non-discrimination, and in procedural principles, for instance, transparency. This means that not only the degree of authority counts, which is conferred to the judiciary, but also the pattern of rights.⁴⁸⁷ Fourth, if actors do generally not feel threatened by courts because the principal-agent problem is under control, if rulings are covered by a clear mandate, and if courts avoid excessive value trade-offs while they take all relevant aspects with their innate complexity into account, then we can expect that most actors and widespread public opinion condemns acts of non-compliance. In this case, non-compliance is significantly less damaging to courts' legitimacy. Finally, the recommended structure promotes legitimacy in many ways, so that courts can endure occasional, wide-spread protest and rare non-compliance with rulings.

7.5.3 High precision and restrictive exemptions

High precision of obligations and restrictive exemptions close loop-holes in global governance. With highly precise obligations, involuntary defections become less likely and self-serving treaty interpretations become more difficult to sustain. Domestic audiences can argue more powerfully against their governments if governments are in breach with international obligations. All this improves compliance. Furthermore, precise definition of obligations lowers judicial delegation risk and contributes to the legitimacy of courts.

However, the trends complicate bargaining thoroughly and bargaining itself remains critical though the recommended structure reduces the bargaining problem effectively. Therefore, resources that promote agreement are precious goods. It appears more effective to invest those resources towards substantive guidelines, which cover a broad set of issues, and into establishing sound institutions for extensive judicial delegation than to spend them on specific provisions governing a narrow set of issues. While lack of precision within the scope governed by the WTO may lead to disputes, the tensions within the WTO that origin from areas not covered by the WTO appear more unsettling. This applies especially to linked issue areas but also to economic issues such as competition law.

At first sight, restrictive exemptions enhance the scope of global governance as global governance rules constrain actors with more regularity. However, exemptions return to actors part of the flexibility which they lose due to decreasing effectiveness of autonomous governance. This reduces the value at stake in negotiations and raises the gains from cooperation, thus leading to softer bargaining strategies. Furthermore, this lowers the incentive to defect. Even more important, exemptions play a vital role in controlling all types of risk. In the recommended structure, and in the alternative structure involving

⁴⁸⁷ See Howse and Nicolaidis (2001) and Zleptnig (2002).

nation states, risk has been identified as a critical factor. Achieving flexibility through exemptions is superior to less scope, less precision, and more defections.⁴⁸⁸

7.6 Comparison with the current structure of the WTO

While I have delineated an effective structure for the WTO, I have not pinned down the status quo of the WTO. Yet, this would be helpful for demonstrating the poor performance of current structures in the future. Furthermore, this is a precondition for spelling out direction and degree of necessary reforms, resulting from the difference between current and recommended structure. Finally, this would allow estimating the risk implied in the current structure, providing a guess about the level of risk which actors are ready to bear.

However, measuring the degree of legalization within an institution is difficult.⁴⁸⁹ From a high-level perspective, determinants of legalization can show different degrees of legalization within one international institution. The Helsinki Final Act, passed by the OSCE in 1975, for instance, scores low on all determinants but precision where it ranks high.⁴⁹⁰ On a lower level of analysis, the different characteristics making up a design-driven determinant can show different degrees of legalization as well. For instance, courts can have a broad mandate but access for litigants may be tightly limited. Therefore, the degree of legalization has to be diagnosed independently for every determinant and every characteristic.

Establishing the status quo is exacerbated by the circumstance that different parts of an institution can display different degrees of legalization. In the WTO, TRIPs is more legalized than institutions like national treatment.⁴⁹¹ It is even possible that within one organization several sub-institutions exist that provide the same functionality, albeit with different degrees of legalization. For instance, several alternative dispute settlement mechanisms exist in NAFTA.⁴⁹² Moreover, institutional form and practice diverge in many processes of the WTO.

Even if we can cope with these problems of aggregation over institutional sub-entities that constitute a full-blown international institution and if we can deal with the gap between institutional form and practice, we are in want of a scale to measure legalization throughout international institutions. Hence, the assessment of the status quo of legalization is necessarily vague and ambiguous, resting on arbitrary comparisons between institutions.

Personally, I consider the need to interpret the findings in order to arrive at concrete suggestions for reform as an adequate remedy against misled application of my recommendations; I cannot sufficiently substantiate my analysis to claim the right for clear-cut advice. Such advice would need to

⁴⁸⁸ See Rodrik (2000). Goldstein and Martin (2000, 626) believe that “even the GATT provisions could be interpreted to have become too tightly binding, not allowing the necessary temporary deviations from rules that contribute to long-term stability.”

⁴⁸⁹ See Abbott et al. (2000) and Koremenos, Lipson and Snidal (2001a).

⁴⁹⁰ See Abbott et al. (2000).

⁴⁹¹ See Abbott et al. (2000).

⁴⁹² See Goldstein et al. (2000).

rest on several integrated studies, which take a look that is closer than the bird's eye view of this study.

My expectations about the results of continued research, which pins down the need for reform in comparison with the status quo, are the following.

1. Majority voting should be prescribed more often, majority requirements should be lowered, in particular for reversal of court rulings, and the institutional design should promote a shift from unilateral and consensual decision-making towards majority voting in practice.
2. Courts should be strengthened against administrative control, for instance, by establishing a stable roster of judges and by allocating more resources to the courts. The high level of automaticity in legal proceedings should be maintained. With certain extensions, the legal mandate should be formalized in accordance with the lines developed by the Appellate Body. Private access should not be introduced.
3. The bargaining capacity should be directed towards more precise formal procedures and towards substantive guidelines, in particular about the relationship to linked issue areas, instead of precisely formulating single obligations.
4. Exemptions should be extended for those rules that restrain actors in their pursuit of linked objectives. Exemptions that serve economic objectives, such as anti-dumping and safeguard measures, should not be extended but rather be subjugated to stricter disciplines.
5. Punishment should be integrated as part of a comprehensive compliance approach, contributing to legitimacy and limiting risks of global governance. This implies firstly clear specification of sanctions that avoids the trade-war spirit of current EU and U.S. attempts to invent more devastating approaches for implementing authorized sanctions. Secondly, this demands implementation routines that make implementation of sanctions more consistent and prevent stockpiling of authorized sanctions. Thirdly, this calls for establishing an upper boundary for sanctions.

Concerning the risk implied in the status quo, the current WTO displays especially two characteristics that indicate a substantive potential for judicial delegation deviations. First, formal provisions that delineate mandate and proceedings for courts are imprecise or absent.⁴⁹³ Secondly, decision-making is rigid. Thus, actors cannot effectively control courts; instead, rigid decision-making entices actors to overburden the judicial system with lawsuits that require judicial legislation.⁴⁹⁴

The degree of principal-agent deviations is difficult to assess in empirical terms.⁴⁹⁵ McRae (2003, 710) points to the “‘disappointed loser’ syndrome” that needs to be subtracted from proclaimed criticism, in

⁴⁹³ See Ehlermann (2003), Jackson (1999) and Zleptnig (2002).

⁴⁹⁴ See Barfield (2001), Bronckers (1999), Ehlermann (2002), Jackson (2000b), Trachtman and Moremen (2003) and Roessler (2001).

⁴⁹⁵ To which extent courts have deviated from the intentions of the member states is also contested in the EU. Whereas Tsebelis and Garrett (2001, 360) believe that “the institutional interactions ... generally reflect the collective will of the member governments concerning their desired trajectory for the evolution of the EU,” Alter (2000) and Stone Sweet and Brunell (1998) see the ECJ promoting change against resilient governments.

order to arrive at justified criticism. And Durling (2003, 147) reassures that “appeals often reflect the political need to continue fighting, as opposed to any genuine argument about the legal merits of the claim.”

The majority view is that the panels and the Appellate Body have overall ruled consistently with legal text and that they have shown reasonable deference to actors’ sovereignty.⁴⁹⁶ Yet, Greenwald (2003) is critical of an overly legislative practice of the Appellate Body and warns that the willingness of actors to accept judicial legislation is less than commonly thought. Dunoff (1999) also observes that non-compliance with a number of recent rulings is caused by courts that reach beyond their mandate and, thus, damage their legitimacy. Overall, we can conclude that actors have accepted a structure that entails a massive potential for deviations which they cannot reliably assess.

7.7 Conclusion

In the future, the cooperation problems will become more severe in many regards. Wavering even under the pressure of current problems, the WTO will not succeed in the future without structural reforms. The recommended structure provides orientation where to head with fundamental reforms. Furthermore, the findings show which suggestions for reform contain pitfalls that have the potential to derail the WTO in the future.

The recommended structure is effective and legitimate. Due to inherent and external restraints, however, we can neither expect to achieve an excellent level of effectiveness nor of legitimacy. Inherently, even the best structure is beset with trade-offs since structures exert an abundance of linked effects. If structures are nevertheless stable, actors expect cooperation to be more lasting and choose tougher bargaining strategies. Thus, it is inherently difficult to improve effectiveness, especially bargaining. Externally, the trends affecting global governance will undo many benefits of reforms.

The risk which is associated with the recommended structure is substantial. However, taking the gains from global governance and the poor performance of alternative global governance structures into account, rational actors should tolerate this risk. We can assume that actors will indeed accept the level of risk implied in the recommended structure because actors are used to living with the substantial risks that flow from current structures.

⁴⁹⁶ See Davey (2001), McGuire (2002) and Oesch (2003).

8 Generalization to other international institutions

In order to assess the possibility of generalizing the findings of this study, we can draw on studies that compare global governance throughout issue areas. Since Young (1999a) perceives problems as specific to regime tasks that are similar throughout issue areas, he is optimistic about the possibility to generalize throughout issue areas. Kahler (1992) finds comparable effects of high numbers of actors on bargaining for the Uruguay Round, the United Nations Conference on the Law of the Sea, and environmental protection agreements. Landau (2000) and Odell (2000) present particularities of multilateral economic negotiations. These particularities do not indicate that analysis of the WTO is strongly issue-area specific on my level of analysis. Yet, Börzel and Risse (2002) discover broadly diverging effectiveness of compliance mechanisms when comparing European environmental and international human right protection. Furthermore, Simonis (2002) notes differences between environmental and trade regulation that contradict transferring the WTO dispute settlement system to environmental agreements. The conclusions drawn in the literature are mixed, but overall supportive of careful generalization.

Apparently, I cannot spell out for different issue areas which findings can be transferred with which modifications. Instead, I contemplate about the nature and severity of differences between the WTO and other issue areas in order to roughly assess the degree of generalization that is possible. Based on these considerations, I suggest certain findings from the analysis of the WTO that I expect to also apply to other international institutions.

I begin with an abstract representation; *Figure 6* shows core elements of the present analysis: the globalizing world as background, exogenous and endogenous determinants, effectiveness in solving cooperation problems, and achievement of objectives. These core elements remain of interest independently of the issue area for which governance structures are designed. Yet, it is unclear to which extent the present specification of the functions that connect the core elements proves adequate for other issue areas and other international institutions than governance of trade-related issues in the WTO.

Beginning with the achievement of objectives, I work my way back to see where the generally applicable core elements are connected through specific functions that resist generalization. First, *additional problems*, which are not directly relevant to the WTO, may impede the attainment of governance objectives. In this case, the proposed global governance structure may solve the bargaining and compliance problems relevant to the WTO perfectly fine but nevertheless fail to reach the objectives.

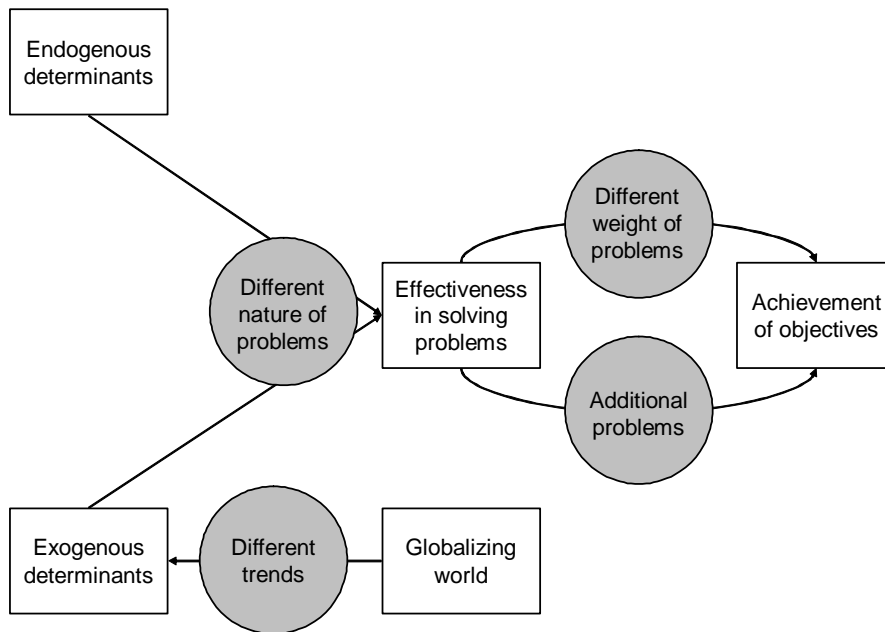


Figure 6: Generalization from the WTO to other international institutions

Secondly, the *nature of problems* that are relevant to the WTO, as well as to other international institutions, may differ. This means that the effectiveness of the recommended structure in solving the same type of problem may vary in different issue areas, though the exogenous determinants exert similar influence.⁴⁹⁷ Thirdly, the background of a globalizing world may adopt different shapes for different issue areas. In this case, the analysis of other issue areas would reveal varying exogenous determinants and *different trends*.

A fourth possible obstacle to generalization exists that is influenced by the aforementioned three obstacles. Additional problems, different nature of problems, and diverging trends may shift the weight between WTO-relevant problems. With *different weight of problems*, the recommended structure may not provide sufficient problem solving capacity for problems that are particularly demanding in specific issues areas.

⁴⁹⁷ At times, it is difficult to distinguish whether the nature of a problem is different or whether the problem is altogether that different that it constitutes an additional problem, which is not relevant to the WTO. For instance, if monitoring is considered to be part of the enforcement problem, it changes the nature of the enforcement problem. Alternatively, monitoring can be treated as a problem in its own right, which is far more relevant in other issue areas than in the WTO. I take the latter perspective and treat those differences which can be treated as coherent problems on its own as additional problems. Only differences that affect the workings of lower-level mechanisms in WTO-relevant problems are considered changes in the nature of problems.

8.1 Different weight of problems

Whatever the context and objective of cooperation, bargaining and compliance arise as generic challenges.⁴⁹⁸ Yet, their relative importance may differ. Different importance of bargaining and compliance problems makes the recommended structure only ineffective if a trade-off between effective bargaining and effective compliance exists. Otherwise, differing importance is irrelevant, since the recommended structure solves each problem independently as effectively as possible.

For the WTO, the recommended structure is geared towards social capital formation to ease bargaining, to promote compliance, and to make effective, but risky decision-making and judicial delegation designs acceptable. Contrary to punishment-based enforcement, compliance management that is based on legitimacy contains no direct trade-off between effective bargaining and compliance.

In other issue areas, additional problems, different nature of problems, and different trends may lead to global governance structures which contain significant trade-offs, in particular concerning the design of punishment. In this case, different importance of bargaining compared to compliance requires adaptations in structure.

Enforcement problems are most relevant in issue areas where even single violations cannot be tolerated. Either a single violation directly imposes unacceptable costs or a single violation triggers chain reactions that may lead to regime collapse. Both categories apply to the ban of weapons of mass destruction and, in particular, to the proliferation and use of nuclear weapons. Especially strong enforcement is also needed where monitoring is problematic. If actors can expect to violate agreements without being discovered, the incentive to defect increases. Therefore, severe sanctions may be required for deterrence.

Enforcement is less relevant than in the WTO in those institutions that primarily set standards, like the International Organization for Standardization (ISO) and the Codex Alimentarius Commission, a subsidiary of the Food and Agriculture Organization (FAO). Even where standards have distributional implications, they are often robust against deviations once thoroughly established, due to specific investments and network externalities.

8.2 Additional problems

Looking for further cooperation problems in addition to bargaining and compliance, the taxonomy of regimes developed by Young (1999a) is helpful. He discerns between regulatory, procedural, generative, and programmatic regimes in global governance. Regulatory regimes administer substantive rules. Procedural regimes guide the alteration or creation of substantive rules. Generative regimes engender and spread ideas. Programmatic regimes pool resources for joint projects such as transferring technology, providing medical services, and managing international wildlife areas. In most cases, international institutions fulfill the tasks of several regime types. Therefore, I prefer to speak of different regime tasks rather than regime types.

In the present study, the WTO assumes solely regulatory, procedural, and generative tasks, while I

⁴⁹⁸ See Fearon (1998).

abstract from programmatic tasks that receive minor attention in the WTO. In other issue areas, programmatic tasks are more prevalent, particularly if implementation problems play a greater role than in the WTO. Governments may find themselves in situations where they are unable to implement agreements even at significant costs. Improving environmental standards in production processes, eradicating torture, and protecting wildlife from poaching may be beyond the reach of genuinely committed governments. This calls for an active role of global governance in assisting actors with implementation.

The problems, and the decisive factors for solving these problems effectively, vary considerably between regime tasks. Therefore, the present findings cannot be transferred to international institutions in which programmatic tasks and corresponding managerial and financial problems loom large. Partly, programmatic tasks require different structures, and partly the structure specified in this study is just not relevant for managing projects.

Generalization is also limited for institutions that place strongly different weights on regulatory, procedural, and generative tasks, such as research institutions that focus on the generation of ideas and knowledge.⁴⁹⁹ Again, the most advantageous structure is either different or the considered dimensions of structure are not pertinent.

Within regulatory tasks, monitoring assumes greatly differing roles. In the WTO, companies detect WTO-illegal market access restrictions and have an incentive to inform their governments of these violations. In other issue areas, monitoring is problematic. Detecting actors who build banned weapons of mass destruction and providing proof for their secret programs is difficult. Complexity, not secrecy, spoils monitoring efforts for CO₂ reductions.⁵⁰⁰ In other issue areas, violations are discovered by private agents, but they lack the incentive to forward their information. Companies may witness corruption but refrain from reporting to their governments or to the public, so that, for instance, violations of the Integrity Pact against corruption, prepared by Transparency International, may go without blame.

If monitoring is a primary concern, higher precision may be needed to ease monitoring problems, as well as tougher punishment to deter violations. Furthermore, an analysis that centers on specific, lower-level, structural and content-related provisions appears more adequate in this case.

8.3 Different nature of problems

To what extent, and how exactly, problems differ in other issue areas, and what this implies for effective structures, introduces the greatest uncertainty for generalization. All I can do is selectively shed some light on how problems differ, in order to demonstrate that the differences are substantial and impossible to evaluate without thorough analysis. I do so along three examples that combine each a specific issue area with a limited set of aspects in which problems differ.

⁴⁹⁹ Haas, Keohane and Levy (1994) mention the promotion of knowledge creation in a context of rapidly outdated scientific knowledge as a task that sets environmental institutions apart from many other international institutions.

⁵⁰⁰ See Zürn (2002, Ch. 7).

The power of different types of threats and the distribution of power among actors differ along issue areas. Compare, for instance, the WTO with environmental regimes that aim at protecting a global public good, such as the ozone layer. Exiting the WTO is unaffordable, in particular, if the WTO perseveres, excluding the exiting actor from most benefits. In environmental regimes, the costs of exiting an international institution are mostly limited to domestic audience, reputational, and systemic costs. Furthermore, the exiting actor benefits if the institution nevertheless continues to protect the common good, so that the exiting actor can free-ride.

Another point is that mid-size powers and coalitions of small countries can exert more power via non-participation threats in environmental issues. China and India as second-tier powers, for instance, were able to push through a compensation fund for developing countries that are phasing out CFCs because an agreement without their cooperation would have been ineffective.⁵⁰¹ This means that more actors possess power-based vetoes in environmental regimes than in the WTO.

Not only does the nature and availability of WTO relevant threats change, but additional threats arise if we move from the WTO to environmental protection. There, substantial resources are needed for global governance, like for the Global Environment Facility (GEF).⁵⁰² Consequently, withholding financial contributions becomes a source of power – as indeed practiced by the U.S. towards the United Nations (UN).

The significance of values and norms in the WTO is indirect via their influence on bargaining and enforcement. By contrast, in human right regimes, values and norms are at the very center of governance and learning is, correspondingly, at the forefront of analysis.⁵⁰³ Global governance in trade is about how to do business together while intruding as little as possible into the ways of life of the trading partner. The WTO is traditionally about free access to national markets and in the end about fair competition on a global market. Very the opposite, protecting human rights necessitates agreement on core values and norms. It is not about how companies but about how people should be treated, and cultural beliefs about the adequate treatment of people are far deeper.

This difference is reflected in an emphasis on the logic of appropriateness in human rights affairs.⁵⁰⁴ Where human right abuse is not a wide-spread social practice, like gender-related oppression, but is a rational strategy of a certain government, however, these governments are particularly resistant to deliberation. Furthermore, domestic audience costs, which should be high on normatively charged issues, can be fatally low if human-right abusing governments effectively control their domestic societies.

The willingness of actors to accept restraints on their sovereignty and to tolerate risks of global governance is moderate in trade issues, albeit with issue specific variations.⁵⁰⁵ While this makes trade a good starting point for generalization, inferences to security issues require caution as sovereignty

⁵⁰¹ See Young (1991).

⁵⁰² See Haas, Keohane and Levy (1994) and Simonis (2002).

⁵⁰³ See Börzel and Risse (2002).

⁵⁰⁴ See Wendt (2001).

⁵⁰⁵ See Abbott and Snidal (2000).

costs are particularly high if national security is concerned.⁵⁰⁶ Thus, actors may reject the level of risk involved in the proposed governance structure.

8.4 Different trends

The trends that affect the WTO are significantly driven by globalization and related meta-trends, such as technological progress. Since these background trends are not WTO-specific, the resulting trends affect global governance in general. Besides, the values of exogenous determinants have been derived from consideration of linked objectives. Whatever the special thrust of an international institution, a similar set of linked objectives has to be considered.

Even when drivers of trends are WTO specific, as it is the case especially with deep integration, other specific trends may take their place in other issue areas, producing comparable results. In security issues, for instance, global governance moves away from limiting numbers of ships, tanks, and missiles towards controlling technologies and exchanging intelligence.⁵⁰⁷ The results are similar to the move from shallow to deep integration; cooperation involves more complex, positive regulation and increasingly concerns domestic policies.

8.5 Conclusion

The above analysis suggest that we can generalize results from the WTO to other issue areas and international institutions but not without detailed analysis, since many divides between issue areas exist whose repercussions are difficult to assess. The endogenous and exogenous determinants, as well as the analytical part of this study, have been formulated with the intention that they can serve as a beneficial framework for future research on global governance in general. The reader who is interested in transferring insights to other issue areas can, thus, recognize the differences to her field of expertise and make necessary modifications herself.

My assumption is that major parts of the present argument can pass with moderate alterations, so that the general results will hold true for many issue areas. In particular, I expect global governance to benefit from regionalization and from selective legalization. While judicial delegation and majority voting need to go together to control risk, I believe that the emphasis should be on judicial delegation. Judicial delegation makes better use of current levels of social capital and it better fosters the creation of additional social capital.

Since current levels of social capital are insufficient to make extensive legalization effective and acceptable, those determinants of legalization should rank high that support decentralized, consensual cooperation. Court rulings replace decentralized decision-making only in case of disputes when decentralized decision-making is characterized less by deliberating than by power-based bargaining. In all other cases, judicial delegation is supportive of consensual and decentralized decision-making as it creates a veil of uncertainty, provides focal points, adapts imperfect agreements to changing circumstances, and assumes limited legislative functions if the consensual decision-making process is

⁵⁰⁶ See Abbott and Snidal (2000) and Rousseau (2002).

⁵⁰⁷ See Heymann (2001) and Walt (2001).

deadlocked. By enhancing flexibility in these ways, judicial delegation diminishes path dependency and, thus, lowers the value at stake in negotiations compared to the costs of delay; this further contributes to bargaining effectiveness. In addition, judicial delegation attenuates the compliance problem which besets decentralized cooperation.

Majority voting, by contrast, replaces consensual decision-making more broadly. Since the provision of social capital is low, majority voting additionally calls for an enforcement strategy based on sanctions. Yet, punishment-based enforcement tends towards centralization and increases risk, which is a critical restraint in the face of low social capital provision.

Judicial delegation is better suited to social capital formation as well. Judicial delegation promotes equality in rule creation and application; it triggers legal discourse and increases determinacy through authoritative interpretations, and it provides reasoned condemnation of violations. In contrast, majority voting relieves actors from the necessity to deliberate, hindering the development of social capital. The inclination of majority voting towards centralized sanctions for enforcement also harms social capital formation.

9 Evaluation of the research design

To evaluate the research design underlying this study, I firstly consider fundamental approaches to acquire institutional design knowledge. Favoring the quest for causal understanding over statistical inference, I then situate the present approach among other approaches aiming at causal understanding. Afterwards, I turn to shortcomings of the present study, suggesting avenues for future research. In the conclusion of this chapter, I propose that the present research design is appropriate to serve as basis for future studies of global governance structures.

9.1 *Competing approaches to gain institutional design knowledge*

Two possible avenues are available to learn which design is effective. One approach is to understand the mechanisms behind effectiveness; the other approach harnesses statistical inference. Under a statistical approach, we can relate observed design choices and observed effectiveness. This procedure aims at direct inferences on effectiveness. Alternatively, we can link observed design choices to specific problems. If we assume that actors tailor institutions effectively to the problems the institutions are supposed to solve, then we can indirectly infer from observed design choices on effectiveness.

9.1.1 **Direct inference from outcomes on the effectiveness of global governance structures**

Statistical inference from outcomes on the effectiveness of global governance structures is beset with a lot of problems. Defining design features in an adequately fine-grained manner leads to a high number of independent variables and entails ambiguous choices. Equally cumbersome is defining and measuring the dependent variable effectiveness.

Firstly, the objectives of international institutions are manifold. Often, seemingly unitary objectives need to be split up into several more fine-grained objectives. If compliance rates with different treaty provisions diverge, for instance, aggregating the compliance rates into one variable ‘treaty compliance’ destroys valuable empirical information.⁵⁰⁸

Secondly, objectives are normatively arbitrary. Within the example of enforcement, this implies, for instance, that different levels of compliance can be deemed satisfactory. Generally, many definitions of effectiveness become possible if we are to be concrete in terms of problems international institutions should solve.⁵⁰⁹

Thirdly, operational definition is difficult even of those objectives that are supported by normative consensus.⁵¹⁰ When objectives are ambiguous, determining whether states are in compliance becomes

⁵⁰⁸ See Mitchell (1994).

⁵⁰⁹ See Young (1999a, Ch. 6) and Young and Levy (1999).

⁵¹⁰ See Helm and Sprinz (2000).

ambiguous as well.⁵¹¹ Even more problematic is selecting, defining, and measuring vague objectives, such as whether learning within international society is promoted by international institutions.

Moreover, the relationship between observed design choices and effectiveness is intricate. Interaction effects among the independent variables constitute one obstacle. In addition, many interfering variables exist that distort the relationship at any point of time. This ‘noise’ is exacerbated by the long time frames that have to be adopted to observe effects of design choices.⁵¹²

One way to control interfering variables is to construct generic problems and possibly a scale to rank problems according to their difficulty. While direct inference could theoretically do without the definition of generic problems and a measure of how hard problems are to solve, sufficient explanatory power can hardly be achieved without these additional independent variables. Problematically, developing such definitions and scales is an elusive undertaking.⁵¹³

Dealing with interaction effects and noise requires large data sets. Yet, categorizing institutional features and outcomes is both laborious and ambiguous. Moreover, reality provides only a meager quantity of changes in institutional structure. Eichengreen (1998, 998) notes, “A time-series investigation, even one with a considerable historical time frame, is unlikely to uncover sufficient variation along the relevant dimensions to yield robust correlations between institutional inputs and policy outputs.” Furthermore, comparing values of dependent and independent variables across international institutions is particularly tricky. Hence, a widely accepted, sufficiently large data set is unlikely to emerge.

Even if all these problems are surmounted, the value of the results may remain limited. Even when we are confident that a certain design feature generally contributes to the solution of a specific problem at hand, we do not know how this design feature affects the set of problems to be solved in an institution while interacting with the set of design choices necessary to form an institution. In other words, real-world complexity is too high for statistical inference to produce reliable results, and if statistical inference could produce reliable results, they would be overly simplified for applying them in complex real-world settings. Note that this is not to dismiss empirical work. I only discard statistical inference on effectiveness without a thorough understanding of the underlying mechanisms which we presently lack.

9.1.2 Indirect inference from frequency on the effectiveness of global governance structures

An alternative statistical approach is indirect inference on the effectiveness of global governance

⁵¹¹ See Haas (2000).

⁵¹² Young (1999a, Ch. 6) makes the great number of causal effects exerted by the independent variables and the long-term and indirect nature of these effects responsible for the problems in assessing effectiveness.

⁵¹³ According to Young (1999a, Ch. 3), a scale to rank problem according to their ‘hardness’ is, at least for the time being, beyond our reach.

structures from the frequency of institutional responses to specific governance problems.⁵¹⁴ This avoids the problems associated with defining and measuring objectives, as well as the difficulty to relate design features to effectiveness.

However, this approach rests on substantive assumptions that are subject to doubt. If institutional designers are rational in the objective sense, then they design the best institution possible with a given set of information. Accordingly, we do not need further knowledge of institutional design and we cannot outsmart the already rational designers.⁵¹⁵ If actors are not supposed to be objectively rational but allowed to err, the obvious thing we learn from observing the past is how past actors have designed institutions. But this alone tells us nothing for future design. In order to produce valuable design knowledge, the assumption is needed that designers err, but what is done often is likely to be effective and should always be done with regard to certain problems. Such an attempt can be criticized on several accounts.

The correlation between frequency of observation and effectiveness is not clear. As argued above, institutions arise from rational design and evolution. Evolution, however, does not necessarily produce effective institutions. Functionalist evolution within institutions and selection among institutions further effectiveness, whereas the pursuit of individual, particularistic interests through institutions and path dependency are detrimental. Thus, it is not clear how strong the signal of the past is.

In addition, we have to read the signal correctly in order to learn from this kind of inference. This means that we have to relate specific design features to specific problems. This engenders problems associated with definition, measurement, and causal significance similar to those presented in the context of direct inferences from effectiveness.⁵¹⁶ In short, the signal of the past is not only ambiguous but also hard to read.

Statistical inference is, thus, unlikely to yield reliable conclusions that are sufficiently specific to add value in institutional design. Moreover, a statistical approach contributes little to the creation of innovative institutional responses. Consequently, the need to prod into the mechanisms behind effectiveness in order to gain applicable knowledge for better institutional design is increasingly acknowledged.⁵¹⁷

⁵¹⁴ This approach has been pursued by a set of studies published in the special issue *The Rational Design of International Institutions* in *International Organization* 55 (4), 2001. For a defense of this rational design project, see Koremenos, Lipson and Snidal (2001a) and Koremenos and Snidal (2003).

⁵¹⁵ See Wendt (2001) on the rejection of objective, teleological rationalism.

⁵¹⁶ Duffield (2003) criticizes the limited set of variables employed in *The Rational Design of International Institutions*. Among important, omitted independent variables, he lists interest and power, existing institutions, and ideas. Domestic politics are not considered, either, though they have considerable impact on outcomes – see for instance the account given by Ruggie (1992) of how domestic politics favored multilateralism after World War II.

⁵¹⁷ Young (1999a, 129) suggests, “Given the constraints on the use of inductive procedures, one way to proceed is to focus more attention on tracing the causal chains through which institutional arrangements impact the behavior of various actors and through such impacts affect the content of collective outcomes in international society.” Slaughter, Tulumello and Wood (1998) map out a research agenda that calls for understanding the

9.2 Competing approaches to gain causal understanding

Among the studies striving for causal understanding, focused, stylized, and holistic studies can be loosely distinguished as three strands of research. The studies are assessed by their analytical and theoretical frameworks. The analytical framework is evaluated firstly by the number and nature of endogenous determinants that are included to model structures. Studies can either trace the effects of a narrow aspect of structure or they model structures broadly and capture interaction effects between endogenous determinants. The analytical framework is secondly assessed by how broadly exogenous determinants are incorporated to make the study contingent on real-world circumstances. Thirdly, I consider how broadly objectives are defined to measure effectiveness. The theoretical framework is assessed by the range of theories which are employed and by how rigorously the theories are applied.

Focused studies typically analyze single endogenous determinants with highly refined analytical methods.⁵¹⁸ High-quality focused studies observe the impact of their endogenous determinant on broadly defined objectives and look at interference from exogenous determinants. Occasionally, these studies even contemplate on the systemic effects of the considered structural features.⁵¹⁹ However, the focus on a tightly delineated fraction of relevant endogenous determinants sets limits on the systemic understanding that can be achieved.

During the 80s and 90s, scholars have conducted *stylized studies* that apply one methodology to a broadly modeled international regime. These studies, however, abstract from specific institutional features in defining the endogenous determinants. They also tend to ignore the institutional environment. Therefore, such studies give advice at a high level of generality rather than distinctive design recommendations. Furthermore, the studies display an awkward similarity that suggests that game-theoretic methodology and the corresponding assumptions conducive to this methodology trump reality.⁵²⁰

Holistic studies on global governance incorporate many objectives of global governance, many endogenous and exogenous determinants that influence these objectives, and many theoretical channels by which the factors impact on the objectives. Yet, this holistic perspective comes at the cost of analytical rigor and often systematic structure. To some extent, this is an inherent trade-off between

impact of legal structures on effectiveness with special regard to processes of negotiation and learning within international society. See also Wendt (2001).

⁵¹⁸ See for instance Koremenos (2001) on contract duration and scheduled renegotiations, Rosendorff and Milner (2001) on escape clauses, Nielson and Tierney (2003) on delegation, Trachtman and Moremen (2003) on private access to international jurisdiction, and Drezner (2000) on multilateral punishment.

⁵¹⁹ Trachtman (1999b, 334), for instance, recognizes the need to transcend narrow perspectives, “This Article seeks to begin to delineate the role of dispute resolution in the international trade law system.” In his article, he closely examines the interplay between precision and delegation.

⁵²⁰ Koremenos, Lipson and Snidal (2001a, 764) remark, “The study of regimes favored theoretical questions and moved the research agenda away from analyzing specific institutional arrangements.” Further criticism of such stylized regime theory comes from Goldstein et al. (2000), Slaughter, Tulumello and Wood (1998), and Young (1999a, Ch. 5 and 8). For an example of such a stylized study, see Oye (1986).

complexity and conciseness. Coglianesse (2000), for instance, contemplates how effectiveness is determined by the fit of six institutional forms of increasing supranationalization with three global governance problems: problems with coordinating national policies, problems with protecting common resources and producing public goods, and problems with globally assuring human rights. This comprehensive approach necessitates very broad definitions of problems and institutional responses, as well as a loose line of argument in explaining effectiveness instead of explicit, detailed discussion of mechanisms. Such work provides a good overview to situate past and subsequent research, but it is far from most institutional design choices.⁵²¹

Table 8 displays what these three types of studies accomplish at their best and how my own work aspires to complement the existing approaches. A (+) in the columns of the analytical framework signifies that a certain type of study broadly includes and defines endogenous and exogenous determinants, as well as objectives. A (+) in the columns of the theoretical framework denotes that the range of theories employed by a certain type of study is broad and that the analytical rigor is high, respectively. A (+/-) stands for intermediate values, whereas as (-) stands for low values, that is, narrow definitions within the analytical framework, a narrow range of theories, and low analytical rigor. An ideal study, which would be represented as (+/+/+/+/+), would boast an interdisciplinary theoretical framework that is rigorously brought to bear on an analytical framework that is broad on all dimensions.

Table 8: Approaches to causal understanding of effectiveness

<i>Research design</i>	<i>Analytical framework</i>			<i>Theoretical framework</i>	
	Endogenous determinants	Exogenous determinants	Objectives	Range	Rigor
Focused studies	-	+	+	+	+
Stylized studies	+/-	-	+/-	-	+
Holistic studies	+	+	+	+	-
Own research design	+	+	+/-	+	+/-

The present study rests on the assumption that an analysis of global governance which combines a comprehensive set of endogenous determinants, high sensitivity to real-world circumstances, moderately broad objectives, an interdisciplinary theoretical tool-kit, and considerable scientific rigor, can now be conducted. This assumption is based on scientific progress made in recent years that has sharpened our theoretical tools and deepened our substantive knowledge.

Progress in general theories relevant to global governance has been made on several accounts. Related developments in economics – game theory, public choice, and new institutional economics – have

⁵²¹ The report by the Commission on Global Governance (1995) is another example of holistic studies.

paved the way for economists to analyze aspects of institutions that before had been reserved for 'softer' social sciences. This has enabled rationalist international relations theorists to move from an abstract regime theory towards incorporating more details of institutional design into their analysis. At the same time, sociology – and constructivism as the leading sociological theory of international relations – has made great strides in advancing to a more operational level. In addition, links between rationalist and constructivist approaches have developed. Furthermore, both approaches to international relations have forged linkages to the theory of law.⁵²² These developments allow for an interdisciplinary approach in studies of global governance, while being strongly rooted in (mostly) well-advanced theories that enable rigorous analysis.

From the perspective of substantive knowledge, the holistic studies on global governance provide orientation on how to frame problems and point to major interdependencies within global governance that have to be considered. The focused studies serve to underpin causal relationships in the present analysis.

Though I can build on this groundwork, the breadth of the present study and the inclusion of constructivist theories make a formal model of maximal analytic rigor impossible. Instead, I refer to numerous studies incorporating formal models as basis for the causal mechanisms I rely on; these existing findings I attempt to connect to one another as concisely as possible.

Despite the study's breadth, important aspects of global governance are bracketed, which I consider my duty to highlight. First, I reconsider the specification of the objectives of global governance. I then review the treatment of the actors and the design of global governance. I do so in order to warrant appropriate application of the present findings and in order to point to avenues for future research.

⁵²² Whereas in the past, economic and sociological influences furthered the decline of legal process as established paradigm of policy-oriented legal theory, Rubin (1996) reports that now different strands of policy-oriented legal scholarship are converging in comparative, institutional microanalysis.

9.3 Objectives

Figure 7 categorizes those objectives of global governance that have been excluded or overly simplified in this study. In the following, I first draw attention to autonomous governance and then to linked objectives. Afterwards, I turn to the robustness, the quality, the content, and the transaction costs of strongly trade-related global governance. Finally, I address issues at the intersection between global and autonomous governance, considering the following questions: How do global governance structures affect the scope of global governance which is politically optimal for governments? Can the recommended structure be implemented politically? And does the recommended structure foster capacities for implementing global governance policies?

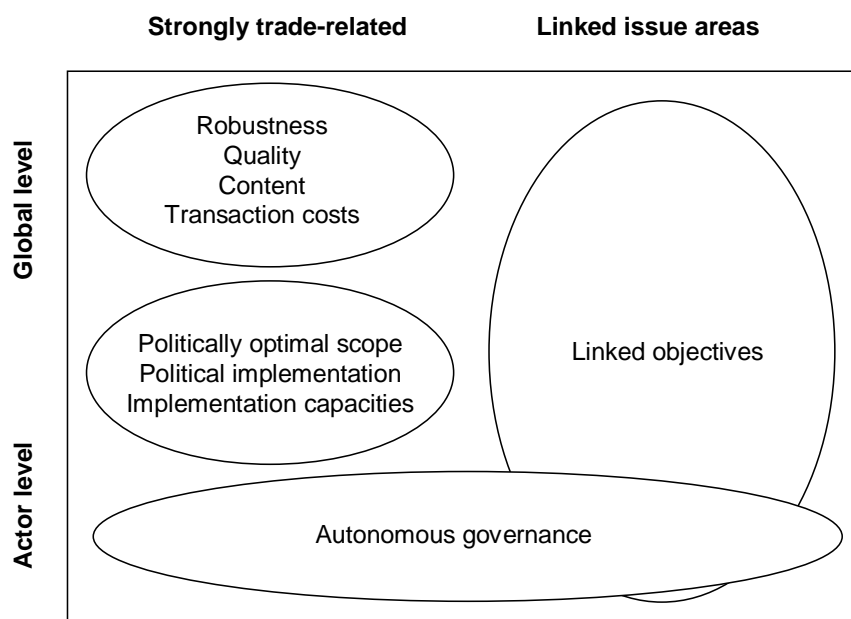


Figure 7: Objectives of global governance

9.3.1 Autonomous governance

In this study, effectiveness of national and regional autonomous governance is only taken into account in determining the effectiveness of global governance structures. The effectiveness of global governance compared to autonomous governance shapes actors' behavior in the context of global governance.

A comprehensive analysis of global governance should aspire to include objectives on all levels of governance. Therefore, the present study needs to be extended to the effects of legalization and regionalization on the effectiveness and legitimacy of autonomous (regional or nation-state) governance.⁵²³

⁵²³ See Alvarez (2000).

9.3.2 Linked objectives

Linked objectives should be integrated more directly by modeling their respective requirements in detail. In particular, possible implications of global governance structures on divergence between more and less developed states should be examined.⁵²⁴ Furthermore, the effects of global governance structures on security, which has been entirely excluded from the present analysis, need to be integrated.⁵²⁵

In addition to the linked objectives themselves, further international institutions, which pursue those linked objectives, should be kept in account of the analysis. Effectiveness, legitimacy, and risk are connected throughout international institutions. It appears convincing that actors view global governance as a whole and are willing to accept a certain degree of risk and lack of legitimacy for their entire global governance involvement. If international institutions augment their effectiveness by exploiting this common pool of actors' patience through certain legalization designs, then the structure that is optimal for a single issue area is different from a structure that takes global governance at whole into account. In other words, externalities between international institutions need to be managed, in order to avoid free-riding.

Externalities also exist with regard to regionalization. If actors within a region cooperate closely in one issue area this strengthens their cooperation in other issue areas. If regionalization generally contributes to global governance, the positive externalities on other issue areas need to be considered when deciding about economic regional integration.

9.3.3 Robustness of global governance

Global governance structures should be robust to internal tensions and external shocks. Risk, legitimacy, bargaining flexibility, and effectiveness in general are important variables for robustness that have been prepared in this study. Yet, an explicit account of robustness is missing. This is a shortcoming that should be cured as regionalization and legalization have important effects on robustness. For instance, institutions which build on generalized principles rather than on power-relations are more stable in the face of power shifts.⁵²⁶

Integrating robustness is especially important because a partial trade-off between robustness and effectiveness seems to exist. Young (1999a, 7) notes such a trade-off when he elaborates on the inclusion of civil society into a complex pattern of decentralized authority, "One of the strengths of this horizontal structure of governance is the capacity of individual regimes to survive serious failures in other components of this system of international order. The opposite side of the coin, however, is an underdeveloped capacity to sort out overlaps and intersections."

⁵²⁴ See Martin and Simmons (1998) and Sachs (2001).

⁵²⁵ See Mansfield and Pevehouse (2000) on the influence of regional integration on intraregional conflict.

⁵²⁶ See Ruggie (1992).

9.3.4 Quality of global governance policies

The present study concludes that with more effective bargaining and enforcement and with less risk greater scope of global governance can be negotiated, which raises global welfare. However, not all global governance policies are equally effective in enhancing global welfare. The present study touches upon this issue in its dealing with risk. High levels of risk mean that global governance policies poorly fit the necessities of a number of actors. What is needed is an explicit discussion of the quality of global governance policies that embodies further links between global governance structures and the quality of global governance policies.⁵²⁷ In particular, the rule of law may promote effective policies. The rule of law restrains powerful actors, who push for self-serving policies and care little about overall effectiveness, while promoting deliberation, which tends towards creative solution finding.

Measuring the quality of global governance directly, according to its content, rests on normative judgments about appropriate objectives and on disputed evaluations of the effectiveness of alternative policies. Alternatively, the quality of policies can be assessed based on more abstract criteria, which do not pinpoint concrete aims but are the prerequisites for diverse substantial benefits to accrue.

One such objective, which refines bare scope of global governance, can be termed *reliable stability*. Implemented scope of global governance and the resulting degree of liberalization can diverge from agreed scope for several reasons. Actors can diverge from the agreed scope of global governance by resorting to exemptions. Actors can defect from agreements. Alternatively, punishment of defections can trigger a trade war and cooperation may break down.

Divergence of implemented scope from agreed scope harms private agents, who have engaged in long-term commitments based on agreed scope. Apart from this direct damage, divergence from agreed scope lowers welfare also indirectly as private agents trust agreed scope less in the future and make less long-term commitments.

Even unstable but predictable scope impairs the economic benefits of global governance. If private agents have to engage in long-term investments in order to reap the benefits of global governance, then these investments are likely to be insufficient to fully benefit from temporarily extended scope of global governance. Thus, for a given average scope, global governance with low variance in scope is more beneficial than highly volatile global governance. Therefore, global governance has to be stable and predictable, particularly in order to best exploit the benefits of efficient allocation of capital.

A further abstract characteristic for the quality of global governance in trade, which might be employed as an objective for designing structures, is *efficiency of protection*.⁵²⁸ Protection is efficient if it minimizes distortions for a given level of protection, which is dictated by political considerations. The question is how the WTO can channel inevitable protectionism into those instruments that impose

⁵²⁷ See Trachtman (1999b) for a discussion of the impact of precision and delegation on governance predictability, public choice distortions, the opportunity to gain experience prior to specification of norms, and on further criteria of governance quality related to transaction costs.

⁵²⁸ Efficient protection is a concept originating in the theory of second best. See Sykes (2001).

the least costs on production processes, trigger the least expenses for rent-seeking, incur the lowest transaction costs, etc.

Escaping negative and border-measure regulation, actors resorted to alternative, more costly barriers that were out of the reach of shallow integration. With increasing positive and domestic integration, the efficiency of barriers is likely to fall further as actors withdraw to ever more costly protectionist instruments. Whether structures can be designed to promote efficient protection is, thus, an intriguing question.

Yet, already the static efficiency properties of alternative instruments are difficult to assess. This difficulty is exacerbated once dynamic considerations are included. These dynamic considerations are concerned with the political-economy consequences of the protectionist instruments. Structures should shun those instruments that are efficient from a static perspective but create political lobbies, who resist further liberalization in the future. Apart from the difficulties of assessing the efficiency properties of protectionist instruments, predicting the impact of WTO structures and policies on the instrument choice of actors is also burdensome.

9.3.5 Content of global governance

The choice of structures affects not only the quality but also the content of global governance policies. Design issues like voting rules, participation of NGOs, linkages between issue areas, and legal deference between institutions all leave their mark on content. Onuma (2003, 139), for instance, criticizes that law is “tacitly endorsing the present international order, which is state-centric, male-centric and West-centric, with a huge gap between the North and the South.”

Those who think that certain interests will be insufficiently heeded in global governance without structural changes aimed at the promotion of these interests should first attempt to make domestic politics more democratic, transparent, or otherwise committed to their values. Only if this proves insufficient, global governance structures should be modified with the promotion of substantive policies in mind – at the price of decreased effectiveness.

Such a content-driven stance on structure appears particularly justified concerning judicial delegation. Ample judicial delegation, combined with inefficient bargaining processes, tends to favor negative integration. In this case, actors pass mostly negative integration rules, which are easier to negotiate. These rules are then applied and extended by courts. Allocation of competencies at the actor level and limitations of judicial delegation may be a necessary response to this imbalance as long as bargaining is not sufficiently effective to agree on substantive positive integration.⁵²⁹

9.3.6 Transaction costs

Global governance involves transaction costs for negotiating, interpreting, monitoring, enforcing, and implementing agreements. Assessing the effects of structures on transaction costs requires difficult computations about the initial set-up costs of structures and the costs arising from continuous governing within these structures. Calculation is additionally complicated by the multitude of effects

⁵²⁹ Scharpf (1999) researches this problem in the European Union.

which every structural determinant exerts on various aspects of global governance. Costs incurred in one place may be more than offset by savings in other places.

The impact of judicial delegation on transaction costs, for instance, includes not only the establishment of a court but strongly depends on how judicial delegation impacts factors like the number, intensity, and shape of conflicts. Furthermore, complexity and uncertainty leave actors with the choice between inadequate rules, frequent renegotiations, and judicial delegation, which adapts rules and decisions to concrete circumstances, possibly including new information unavailable at the point of agreement. Investments into judicial delegation, thus, curb losses from inadequate policies and save bargaining costs.

This shows how hard it is to come by with a calculation of transaction costs which includes the initial set-up, as well as the governing within the structures and which takes the interdependence between different aspects and determinants of global governance into account. Therefore, I generally restrain the analysis to the workings of structures as the basis for future work that includes transaction costs. Generally, legalization is thought to increase transaction costs of negotiating an agreement in the first place and to lower the costs of running the agreement afterwards.⁵³⁰ Regionalization should reduce transaction costs as they rise with increasing numbers of actors.⁵³¹

Since effective global governance structures are characterized by their ability to solve the cooperation problems and since transaction costs arise mostly from efforts to overcome these problems, we can expect effective structures to display low transaction costs. Therefore, including transaction costs should necessitate only minor modifications in the proposed global governance structure.

9.3.7 Politically optimal scope of global governance

The present study considers the domestic political economy to the extent that it plays a role in the cooperation problems. Domestic audience costs influence the toughness of bargaining strategies and the power of threats; politicians consider domestic audience costs when they comply with or violate agreements. However, I do not disaggregate domestic politics in order to answer how global governance structures affect the scope of global governance which is optimal from a domestic political perspective.

Regionalization and legalization change the domestic political process, which engenders political positions for the international arena. Global governance structures that make actors more willing to extend scope enhance global welfare if scope that is politically optimal for governments falls short of socially optimal scope, which maximizes global welfare. This applies, in particular, if the domestic political process is biased in favor of protectionist forces.

In integrated regions, interests do not only have to be aggregated domestically but also intraregionally. This invokes, first, the question of how private agents are affected in their ability to exert political influence in favor of or against liberalization. The key to an answer is relative effects on collective action problems in lobbying, on scale economies in lobbying, as well as on interests and economic

⁵³⁰ See Abbott and Snidal (2000) and Kahler (2000).

⁵³¹ See Kahler (1992) and Oye (1986) on the relationship between numbers and transaction costs.

strength of agents in the domestic realm.⁵³² For instance, regionalization tends to weaken the strength of protectionist forces as import-competing industries are driven off the market. At the same time, regionalization lowers the interest of export industries in multilateral liberalization because the regional market already has an attractive size.

Secondly, the question arises of how the interests of nation states are combined to form a single regional voice in trade negotiations. Here it is important to see whether extreme positions are rather softened or come to determine the stance of the whole region.⁵³³ It also has to be discerned whether protectionist or free-trade interests are more likely to be dominant in intraregional interest aggregation.⁵³⁴

Legalization impacts politically optimal scope as well. Goldstein and Martin (2000), for instance, hold that increasing precision strengthens protectionist interests versus free-trade forces in trade negotiations. Both sides suffer from a collective action problem in mobilizing political pressure, exacerbated by the lack of information whose interests are at stake, and to which extent, in any given negotiation. Precision clarifies the distributional outcomes for the private agents and, thus, fosters political mobilization. As export interests are likely to be better organized for low levels of precision, increasing precision strengthens protectionists more than free-traders. Generalized claims on the effects of legalization on the domestic political economy are difficult, though, as these effects are highly sensitive to variations in domestic legal frameworks.⁵³⁵

No doubt, the impact on the politically optimal scope of global governance through political-economy channels is an important issue for the selection of global governance structures. Yet, this brief illustration indicates that the analysis is highly complex, with ambiguous answers, and with a focus different from that of this study. Therefore, separate analysis is preferable.

9.3.8 Political implementation of global governance structures

Whether recommended structures can be implemented politically can be answered from a unitary actor perspective or by disaggregating domestic politics. If we take actors as units of analysis and look at the international level, then effectiveness, legitimacy, and risk are the main drivers of political feasibility. Actors can be expected to implement structures that are effective and legitimate and involve low risk. The support global governance structures enjoy in the domestic realm depends partly on those factors that are relevant to unitary actors and partly on whether structures serve the interests of influential domestic groups.

The present study does not contemplate on these specific domestic aspects. Political feasibility from a unitary actor perspective is analyzed incompletely, in particular in two regards. First, I do not consider that certain types of positive and a large share of negative integration intensify regulatory competition between actors. This competition can have unwanted effects as it can induce a ‘race to the bottom’ or

⁵³² See *supra* note 63. See also Magee (2002).

⁵³³ Leigh-Phippard (1999) expects less outlier in multilateral negotiations through coalition formation.

⁵³⁴ Meunier (2000) expects intraregional coalition formation to produce more protectionist stances.

⁵³⁵ See Finnemore and Toope (2001).

at least apply downward pressure on standards and taxes imposed by autonomous governance, with adverse repercussions on domestic equity and legitimacy.⁵³⁶ On the other hand, regulatory competition creates benefits such as increased governance process efficiency. Accordingly, the influence of regulatory competition in governance on the effectiveness and legitimacy of autonomous governance is complex and unclear. In order to avoid an inextricably onerous discussion at the fringes of this study, I do not consider deviations of actual autonomous governance, arising under competition induced by global governance, from optimal autonomous governance without this competition.

The second neglected factor of political feasibility of recommended structures matters if global governance is perceived more broadly as a threat to national identity. Identity is strained if actors are under pressure to significantly adopt foreign cultural influences. Actors can also suffer from identity loss in the process of forming a collective identity as the boundaries between Self and Other blur away.⁵³⁷ Perceived threats to identity stand in a mutually reinforcing relationship with perceived risk. Deviations invoke the perception that sovereignty is threatened. The perception of threatened sovereignty, in turn, moves the discourse about risk towards a critical evaluation of global governance. Moreover, an analysis that focuses on political feasibility could pay attention to interesting interaction effects between legalization and regionalization. Asymmetrical power leads a strong country to prefer a low level of legalization.⁵³⁸ As treaties are as legalistic as the country with the least interest in legalization wishes (absent side-payments or coercion), regionalization will make legalization easier to attain if it works towards more symmetric powers.

Future work on the gap between socially and politically optimal structures is particularly important in the face of institutional path dependence. Institutional design traps can solidify, so that actors are stuck with inefficient institutions. Path dependence arises for two reasons. First, current institutional design affects future optimal design, both through the logic of consequences and the logic of appropriateness. Intertemporal effects are transmitted, for instance, through changes in the environment to which design responds, through development of specific assets and capabilities, and through institutional influence on ideational properties that serve to define objectives. Secondly, institutional design affects the process of institutional change.

In global governance, the peril that design traps cannot be surmounted is particularly real. Even if shocks infuse strong momentum to claims for institutional change, reformatory attempts are often stifled by opposition of leading states and domestic political constraints.⁵³⁹ Civil society may promote change. But as states partially loose control over the content of global governance to civil society, they hold on to their control over structure.⁵⁴⁰ Therefore, strategies for dynamic development of structures need to be developed that shun design traps throughout the tricky process of implementing a promising structure.

⁵³⁶ See Rodrik (2000).

⁵³⁷ See Wendt (1999, Ch. 7).

⁵³⁸ See McCall Smith (2000).

⁵³⁹ See Diehl, Ku and Zamora (2003).

⁵⁴⁰ See Diehl, Ku and Zamora (2003).

9.3.9 Implementation capacities

In the treatment of enforcement problems, I have considered implementation problems only indirectly as they intensify the need to distinguish between voluntary and involuntary defections, whereas I have excluded how global governance affects the capacity of actors to implement global governance policies.

Consideration of this issue holds two implications for the choice of structures. Evidently, global governance structures should be assessed by their contribution to implementation capacities. In this regard, we can expect regionalization to empower weak actors. Less obvious is a second repercussion. The stronger the role that international institutions adopt in implementation assistance is, the greater risk becomes. Poor actors become dependent on the skills and resources of international institutions, whereas rich actors need to cede resources to international institutions.

9.4 Actors of global governance

The present treatment of integrated regions and civil society, as well as the constitutive effects of international interaction that change actors' properties, need elaboration. Integrated regions should be modeled more carefully, interaction between states and civil society should be developed more extensively, effects from the international level on domestic institutions should be incorporated, and learning processes should be scrutinized in more detail.

9.4.1 Integrated regions

In Chapter 4 about ideational properties and learning, I have briefly argued that integrated regions should generally and in the long run be capable to agree on a joint position for international negotiations and are, thus, an effective approach to reducing the number of actors involved in global governance. A more in-depth analysis of regionalization with regard to global governance would allow modeling the behavior of integrated regions more accurately.

Many of the effects on integrated regions' behavior are political-economy effects; the necessity to consider such effects has already been noted above. In addition, regionalization changes how global governance affects actors from a unitary actor perspective. For instance, regionalization reduces uncertainty. Actors within an integrated region are heterogeneous to a certain degree and, as a consequence, differently affected by global governance. Actors who loose significantly can expect to be compensated by side-payments or favorable consideration of their thrusts in future regional negotiations. Furthermore, adversely affected actors feel less disadvantaged by global governance if they share a collective identity with other members of the integrated region that are favorably affected. Finally, unexpected, adverse effects become less threatening if members of integrated regions are able to use their regions as leverage in global governance to alter especially costly rules.

Researching how the intraregional effects of regionalization influence global governance will allow formulating additional criteria for benign regionalization. Intraregional voting mechanism, for instance, determine the behavior of integrated regions in international negotiations.⁵⁴¹ It may be

⁵⁴¹ See Meunier (2000).

possible to find operational and politically acceptable criteria for admitting integrated regions beyond the current requirements to cover substantially all the trade among members, not to raise the level of protectionism towards non-members, and to notify the regional agreement to the WTO.⁵⁴²

9.4.2 Civil society

Figure 8 gives an overview of the relationship between civil society, on the one hand, and nation states and integrated regions as actors of global governance, on the other. Numbers denote the arrows for easier reference with the text. Governance by government and governance with government are merged in this figure as I do not discern between these two concepts but assumes actor-based global governance with civil society involvement through diverse channels.

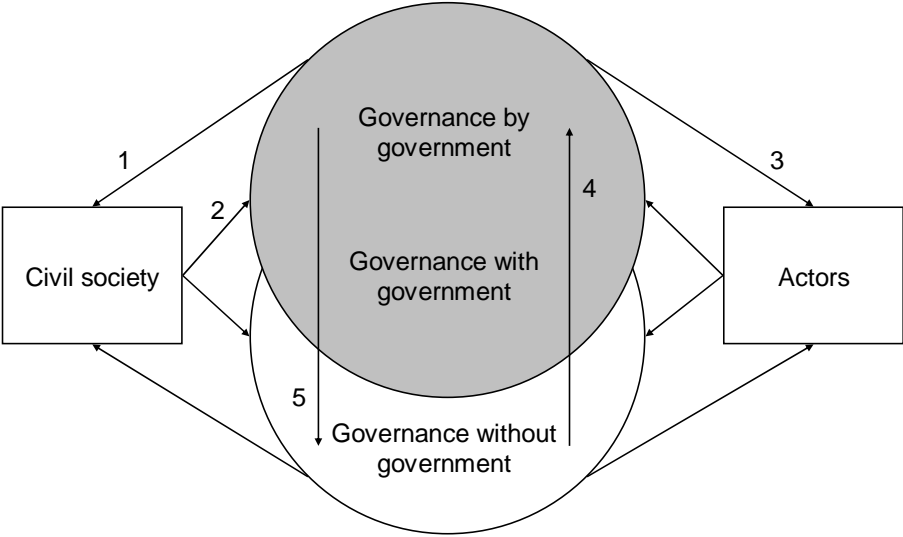


Figure 8: Civil society in global governance

Properties and roles of civil society should be more fully developed along several lines. The link between international institutions and the evolution of transnational civil society is omitted in the present study. Yet, international institutions give civil society access to the international stage and facilitate cooperation among national NGOs across borders (1).⁵⁴³ A further aspect that should be modeled in more detail is how civil society influences actor-based global governance. This would improve upon the arguments derived from civil society involvement in this study that affect governance directly (2) or indirectly, through civil society’s impact on learning (3). Moreover, proper treatment of civil society implies consideration of the effects of governance without government on actor-based global governance. In particular, self-regulation may lighten the burden which rests on actor-based governance (4). Finally, how actor-based global governance influences governance

⁵⁴² WTO Art. XXIV.

⁵⁴³ See Bohman (2002).

without government should be examined. For instance, judicial delegation may provide adjudication if dispute settlement under governance without government fails (5).

Legalization may provide several benefits in these regards. It may foster civil society engagement (1), provide an avenue to productively integrate civil society into state-dominated global governance (2 and 3), and develop interfaces with transnational governance (4 and 5).

9.4.3 Constitutive effects

Learning processes for those ideational properties which are considered in the present study need to be more comprehensively developed.⁵⁴⁴ International organizations are not only venues of communicative interaction, as pretended in the present study, but they are also agents of constructivist change.⁵⁴⁵ Even more importantly, the determinants of learning should be analyzed in detail for all ideational properties in the way this study has dissected legitimacy. To see the potential for such additional analysis, let us take, for instance, the influence of regionalization on collective identity formation. On the one hand, regionalization may serve as a ‘school’ for legalization where actors learn to live with an identity that is not based on nationality but on common values and shared objectives. On the other hand, we may worry that regional identities hamper the development of global identities if we look at the EU where larger countries have less supranational identities.⁵⁴⁶ By decreasing the number of actors, regionalization could furthermore enhance competitiveness to the detriment of collective identity formation.

In addition to better modeling processes of change for the considered ideational properties, further constitutive effects on actors need to be integrated that are absent in the present study. Most notably, global governance influences actors’ domestic political institutions.⁵⁴⁷ If global governance structures can be designed to promote legitimate autonomous governance, this will feed back positively into legitimacy and effectiveness of global governance.⁵⁴⁸ Furthermore, global governance structures affect the vertical allocation of power within states. Regionalization and advancing global economic integration strengthen sub-national, territorial actors, such as cities or local regions, in comparison with nation states.

⁵⁴⁴ See Cederman and Daase (2003) for a systematic review of the possibility to endogenize actors.

⁵⁴⁵ See Barnett and Finnemore (1999). Haas, Keohane and Levy (1994, 409) consider as the most important tasks which leaders of international institutions have to fulfill to “create and manipulate dynamic processes by which governments change conceptions of their interests; and to mobilize and coordinate complex policy networks involving governments, NGOs, subunits of governments, and industry groups, as well as a variety of international organizations having different priorities and political styles.”

⁵⁴⁶ See Hooghe (1999).

⁵⁴⁷ See Pevehouse (2002) on the influence of international institutions and particularly regional organizations on regime change towards liberal democracy. Zleptnig (2002) points to the influence of a procedural review of deliberative conditions in the domestic realm on domestic deliberations of trade issues.

⁵⁴⁸ Keohane and Nye (2001) emphasize the domestic democratic process as the prime source of legitimacy for international institutions. Mansfield, Milner and Rosendorff (2002) find that democratization furthers the conclusion of trade agreements.

9.5 Design of global governance

In this section, I review my definition of legalization, consider the possibility to add scope as a further endogenous determinant of global governance design, and point to direct effects of legalization, which have been omitted in the present analysis.

9.5.1 Legalization

The definition of legalization by the design of decision-making, judicial delegation, precision, exemptions, and punishment is limited in the number of endogenous determinants, which I consider, and in the characteristics that shape each determinant.

An additional determinant that sounds interesting in the future is executive delegation.⁵⁴⁹ I abstract from decision-making by the executive organs of the WTO because the Secretariat has little decision-making power today⁵⁵⁰ and – for reasons of delegation risk and of lacking legitimacy and enforcement capacity – its decision-making power is likely to increase only slowly.⁵⁵¹

Decision-making provides a good example for additional characteristics that could be incorporated to define the determinants of legalization more comprehensively. For instance, I do not account for the subtle difference whether consensus requires the explicit consent of all actors or whether a decision can be passed as long as no formal objection is filed. Neither do I integrate agenda setting rights and decision-making modes where voting power is weighted by population, economic strength, or financial contributions to international organizations.

Even more fine-grained distinction among possible institutional features would allow further promotion of deliberations. Frequent meetings, broad discussions that are not directly linked to bargaining, involvement of experts, powerful mandates for negotiators, and resource transfer to empower all actors to contribute meaningfully are candidates for pro-deliberative, institutional fine-tuning.⁵⁵²

⁵⁴⁹ In particular, delegating authority to a neutral agenda-setting body within the WTO can serve to reduce the number of policy proposals or endow few proposals with particular clout. See Scharpf (1999) and Pollack (1997) for the significance of agenda setting through the Commission in the EU.

⁵⁵⁰ See Raby (2001), Shaffer (2001) and Steinberg (2002). A light bureaucracy is also typical for other international institutions and even considered a characteristic for international regimes. See Young (1999a, Ch. 1).

⁵⁵¹ See Bronckers (1999).

⁵⁵² Schmalz-Bruns (2002) develops ideas how structures can create an ideal deliberative space in the EU. He suggests a parliament that regulates the access to and the process of deliberations *ex ante* and a court that controls access and process *ex post* in disputed cases.

9.5.2 Scope as endogenous determinant

In addition to more comprehensive modeling of legalization, scope could supplement legalization as an endogenous characteristic of international institutions.⁵⁵³ In combination with legalization, optimal scope is particularly interesting from a dynamic perspective.

Questions about the adequate speed of scope enlargement could be analyzed in a framework similar to the one developed in this study. Such a dynamic-scope study could include the following elements. Learning takes time. Scope extension increases heterogeneity and, thus, disagreement. Learning is most effective for intermediate degrees of disagreement. Too little scope can create tensions as unilateralism prevails and as linkages to non-regulated issues sabotage global governance effectiveness. With too much scope, risk becomes intolerable and legitimacy suffers as actors feel overly constrained by the WTO.

Moreover, the trade-off between precision of specific obligations, guidelines for substantive obligations, precision of structural provisions, and scope could be integrated into a static or dynamic model. For a given level of bargaining effectiveness, actors have to decide how to ‘spend’ their potential for agreement to clarify concrete obligations, to develop guidelines for obligations, to draft structural rules about governance processes, or to enlarge the scope of global governance.

9.5.3 Direct effects of legalization

The present study ignores those channels by which legalization directly influences the effectiveness of global governance, in addition to the indirect influence through the cooperation problems. Exemptions, for instance, directly lower the scope of global governance as actors evade obligations. Another example for direct effect is precision and judicial delegation which improve the determinacy of the contractual obligations. Since actors use their discretion in a self-serving way, which detracts from scope and predictable stability of global governance, precision and judicial delegation directly contribute to effectiveness. Abbott and Snidal (2000, 427) note on this issue, “One way legalization enhances credibility is by constraining self-serving auto-interpretation. Precision of individual commitments, coherence between individual commitments and broader legal principles, and accepted modes of legal discourse and argument all help limit such opportunistic behavior. Granting interpretive authority to courts or other legal institutions further constrains auto-interpretation.”

⁵⁵³ In my model, scope follows automatically from the precision and bargaining effectiveness implied in the choice of structure. However, it is possible to refine the model, so that endogenizing scope does not over-determine the model.

9.6 Conclusion

Above, I have mentioned several aspects concerning the objectives, the actors, and the design of global governance, which deserve further elaboration. At question is whether I have chosen the right degree of complexity and whether I have made the right choices with my assumptions for a given degree of complexity.

As to the latter, let me only stress the significance of one choice: making risk, which is often ignored or limited to a footnote, a central concern. This invigorates a power-conscious approach to global governance that adapts the spirit of the anxious realist worldview to an increasingly institutionalized world. The problem is no longer that rational actors refrain from cooperation because they fear violence outside institutions; instead, actors fear being subjugated by institutional power. This does not only reflect the risk-oriented perspective of realism, but certain realist assumptions about cooperation can be salvaged. For instance, the proposition espoused by Grieco (1988) that high exit costs aggravate cooperation holds true in the present account of risk, whereas liberal institutionalism sees only the positive effect of high exit costs in reducing enforcement problems. Generally, power needs to become more ingrained in mainstream analysis that aims to improve international institutions.

Whether the present specific framework is considered a successful engagement in interdisciplinary theorizing or not, the analysis should have revealed that analytical complexity is necessary. From my point of view, it is untenable to look at a narrow section of global governance, simplify it further, solve the artificially created problem with highly refined methods, and then draw strong conclusions. Such a procedure could be justified only if the objective is to produce input for more comprehensive analysis. Recall the special issue about *The Rational Design of International Institutions in International Organization* whose authors propose several conjectures by which rational designers are supposedly led. If legitimacy is influenced by institutional structure and if legitimacy is a central factor for effectiveness, then the effects of structure on legitimacy should be a main concern of rational designers. Yet, the special issue ignores legitimacy. This is an example of how theoretical monogamy undermines results.⁵⁵⁴

Even with an interdisciplinary toolbox that captures numerous causal mechanisms we can go seriously wrong if we delineate our field of research overly narrow. Interaction effects accumulate, in particular, in risk. The true costs of risk-aggravating legalization along one determinant can be only assessed in the context of other determinants in which legalization correspondingly has to be scaled back. Accordingly, the risk-reducing properties of regionalization can only be appreciated if the corresponding gains from more legalization are taken into account.

Furthermore, interaction effects have important ramifications for institutional reforms. If we optimize

⁵⁵⁴ The rationalist focus common in research is mirrored in the practice of the WTO. Esty (2002, 15) critically summarizes, “As the scope and depth of common values expands, so does the sense of community, which makes the public more willing to accept further economic integration ... what is lacking at the WTO is any recognition of the need for more politics – more dialogue and debate, and engagement with civil society – as a way of building the political foundations needed to support the economic structure that is being erected.”

single design aspects, we can tailor them to the existing institutional structure. In this case, they improve upon an inefficient design but may lead away from optimal design. Path dependency may lock-in such developments, so that the optimal design may become even harder to reach. Alternatively, if we design single determinants in accordance with the optimal design of the entire global governance structure, their incompatibility with the current structure may produce poor performance and frustrate further reforms.

Keeping interaction effects in mind is especially important for the interdisciplinary researcher who is tempted to scale down the field of study, in order to compensate for the increased complexity stemming from methodical and theoretical richness. Yet, global governance is a complex phenomenon – our theorizing has to reflect this complexity.

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