Who is accountable at the World Trade Organization?

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The World Trade Organization (WTO) is widely seen as an important entity in global governance. In modern democratic thinking, such sites of significant public authority ought to be accountable, but a burgeoning literature on accountability in global governance has not reached consensus on what such a claim might mean in practice. Transparency is a fundamental norm of the WTO, and foundational for accountability, yet accountability as such is not mentioned in WTO agreements, and explicit consideration of accountability is rare in the voluminous WTO reform literature. The first step is uncovering who might be accountable at WTO.

The response to the global financial crisis that began in 2008 illustrated a familiar accountability paradox. On the one hand, governments are accountable to their citizens to mitigate the effects of any economic shock using whatever means are thought necessary, regardless of whether the measures would be deemed “protectionist”. On the other hand, consistent with multilateral principles, they ought not to pass the burden of adjustment on to other governments. The Leaders of the G20 largest economies ought also to be accountable for their commitments to resist protectionism (Wolfe, 2011). Here is the paradox: transnational forces can weaken accountability to the extent that they constrain the ability of a state to respond to the wishes of its own populace (Sperling, 2009), yet domestic processes cannot be determinative of the outcome of multilateral negotiations (Scharpf, 2000). Helping states mediate these conflicting domestic and international pressures is a traditional role for international organizations, but if the international organization is itself a site of public authority, ought not it to be accountable? International organizations are traditionally thought to derive their legitimacy in two ways, from the consent of participating governments, and from effectiveness in meeting their objectives. Scholars and civil society organizations now argue that international organizations must also be as accountable as governments (Koenig-Archibugi, 2004; Scholte, 2011). But international organizations are practically immune to electoral politics, and how can citizens participate effectively in decisions that affect them when the decision may also affect hundreds of millions of people far away?

This paper has a limited ambit. It takes the importance of asking about accountability for granted, and looks only at the WTO. The immediate objective is to ask who might be accountable at WTO, which requires considering what sort of entity WTO is, in the next section, and then applying an analytic framework developed by Jerry Mashaw to uncover the various possible accountability mechanisms, in the subsequent section. Seen in this analytic framework, WTO has numerous “accountability regimes”, which creates a polycentric problem because the regimes overlap and conflict, not least because each matters to a different set of stakeholders. The paper concludes by suggesting that WTO might face an accountability trilemma: efforts to enhance one aspect of accountability might undermine others.  

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1 [citations to the accountability literature here and elsewhere incomplete]

2 (For a recent survey, see Hoekman, 2011; see also Deere-Birkbeck and Monagle, 2009; For one early examination of WTO accountability in comparative perspective, see Woods and Narlikar, 2001).

3 In subsequent stages of this project we will look for empirical evidence testing the various accountability mechanism identified, and we will investigate the role of civil society organizations in
What sort of entity is the WTO?

To ask about accountability in international organizations implies an assumption that what happens there is in some way consequential. Realists in the international relations literature would not ask about the accountability of the WTO because they see all international organizations as epiphenomenal. Other scholars might not bother because the power and interests of the largest states determine whatever happens in Geneva. But is the WTO a forum to hold governments accountable for their interventions in the market, or an unaccountable constraint on their sovereignty? Should WTO be understood as a policy making body with a powerful court for enforcement, or is it analogous to a domestic administrative agency?

Notions of accountability are rooted either in democratic theory, or in Anglo-American administrative law. The analytic task for this paper would be simplified, because administrative law concepts would apply, if we see WTO as being like an administrative agency. I think we can, though the domestic coherence between the agencies of the administrative state is not replicated in global governance with its indirect authority and splintered discretion.

I claim that WTO is a forum, not an actor, one whose practices arise in social interaction (Wolfe, 2005). The formal constitutional language used by lawyers seems discordant with the WTO (Dunoff, 2009), but the absence of a canonical text does not mean that the regime has no constitutive basis. The notion of the WTO and its negotiation rounds as a Single Undertaking is a constitutive metaphor that implies both a definition of the legitimate actors and of the process they use to arrive at collective decisions (Wolfe, 2009). The Single Undertaking shapes collective life in the trading system whether Members are contemplating new negotiations, concluding an agreement, or interpreting the results. Distinguishing between making rules, administering rules and enforcing rules in administrative law, or in political terms between bargaining, monitoring and enforcing, is analytically convenient, but how states do one determines the others. The same people using the same techniques negotiate agreements; bring disputes; raise complaints in committees; and tacitly modify the rules by their practices or acquiescence to matters raised (or not raised) in transparency procedures. Their understanding of the regime, and of their own place in it, is equally seamless.

The foundation of the WTO is not power, but the Single Undertaking, all the way down. Some scholars suggest instead that the Single Undertaking rests on the rock of power (Steinberg, 2002, 342-3). It may be that the EU and the U.S. dominated GATT/WTO decision making in the Kennedy, Tokyo and Uruguay Rounds, despite a consensus rule based on sovereign equality, but the rich countries have not been able to dominate the agenda of the Doha Round, and if they want an outcome (an open question), they have not been able to force one. The growing salience ensuring WTO accountability. The analytic framework will also be applied to a comparison of WTO and multilateral environmental agreements.

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4 Institutions all the way down has to be qualified in the same ways as “ideas all the way down,” but the Single Undertaking does shape power and interest. See (Wendt, 1999, 371).
of the Single Undertaking limits everybody’s power, whether compulsory power based on material resources, or institutional power, based for example on the ability to deny consensus (Barnett and Duvall, 2005, 14-5). Powerful states cannot easily dismiss the concerns of any Member, especially Members allied with others in clubs. The Single Undertaking is part of how the WTO ensures that all Members have a voice and a veto in the evolution of the WTO acquis, thereby flattening, or at least diminishing hierarchies, and creating the possibility of mutual accountability based on diffuse reciprocity. The Single Undertaking does not eliminate power as a factor at the WTO, but it does limit the possibility for its abuse.5

The WTO as a forum is not a legislature with policy responsibilities. The WTO Agreement itself and its covered agreements are entirely procedural. Administrative law concerns can be seen most obviously in Article X of the General Agreement on Tariffs and Trade (GATT) on “Publication and Administration of Trade Regulations”.6 The covered trade agreements largely concern standards to be applied to trade policy, but do not in themselves make policy. In the trading system, attention to such horizontal accountability would place more importance on the committees, rather than the dispute settlement system. WTO Committees meet to discuss whether the rules work, and to discuss the interpretation of existing rules. Here we find the growth of new understandings that will eventually be codified. Here is where we find whether the WTO operates in a transparent and accountable manner, and whether Members hold themselves to account for their mutual obligations.

Consider the example of the Agreement on Sanitary and Phyto-sanitary Measures (SPS). Its objective, as stated in its preamble, is that “no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health, subject to the requirement that these measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade” (WTO, 1998). This language is an attempt to specify how the non-discrimination principles of the GATT (Articles I and III) and the general exceptions for domestic public policy (Article XX) should apply in this domain. It is not easy to tell the difference, however, between a necessary measure, and protectionism. The WTO has no capacity, or authority, to get involved in the substance of social regulation aimed directly at the actions of individuals and firms, but the administration of these regulations is its domain.

The agreement seeks to resolve the tension between necessity and protectionism, or justifiable and arbitrary measures, in three ways. The first is by encouraging Members to rely on hitherto underutilized international standards because those standards have already passed international

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5 It follows that the canonical view of international economic law, seeing the WTO as the ‘trade constitution’ establishing the basis for a ‘rule-oriented’ diplomacy in the face of the stipulated alternative, ‘power-oriented’ diplomacy, is over-simplified (Jackson, 1997).

6 Some scholars attribute this text to the US Administrative Procedures Act of 1946, whose language it replicates. But the GATT provisions are traditional. Transparency and independent judicial review had been part of English administrative law since the seventeenth century. By the middle of the nineteenth century, English administrative law had all the features familiar to us today, including independent agencies, regulation-making, and sunset clauses (Arthurs, 1979; Arthurs, 1985).
Food safety is a domain with many sites of normative authority, including the Organisation for Economic Co-operation and Development (OECD), the Codex Alimentarius Commission, the World Organization for Animal Health (known as the OIE for Office International des Epizooties) and the International Plant Protection Convention. The idea is not to make the norms and standards of other international organizations “enforceable” obligations—it is simply to recognize and validate other sites of normative authority. Since such standards will not always be appropriate, however, the second device is a procedural requirement that any national deviation from an international standard should be based on a scientific risk assessment. This device is subject to the dispute settlement system, which has been a source of most of the controversy around the agreement.

A preoccupation with adjudication in domestic administrative law means that relatively less attention is devoted to non-judicial institutions of accountability, to other institutions that focus on how governance is exercised, such as a Freedom of Information and Privacy Commissioner, or an Auditor-General (Macdonald, 2004). The third device used under the SPS Agreement, therefore, is regulatory transparency (Wolfe, 2003). “Transparency” here is a device for managing administrative discretion. It refers not only to Members keeping each other informed about their sanitary and phyto-sanitary measures, but also to ensuring that other Members are able to query whether a given SPS measure is the most appropriate solution to a problem. In the WTO, that means both first generation transparency, or “right to know” procedures, like notification of new trade policy measures, and second generation monitoring and surveillance, a network process where Members hold each other to account (Collins-Williams and Wolfe, 2010).

In sum, the WTO is like an administrative agency. The rules and practices of the WTO are initially a form of administrative law, which means they could be assessed in light of what academics call Global Administrative Law, defined as “the mechanisms, principles, practices, and supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring that they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make (Kingsbury, Krisch and Stewart, 2005, 17).” In the next section I develop an analytic framework that can help to illuminate the variety of accountability regimes that might be said to operate at or in the WTO.

**Six questions to ask about any accountability regime**

Accountability is a political project. Attention to its methods matters, but the prior questions are about the purpose to be served and the particular accountability regime chosen (Mashaw, 2005, 16). In liberal states the fundamental accountability relationship is between the people as principals and government officials as their agents. Mashaw argues (2005, 17) that in any accountability relationship we should be able to specify the answers to six important questions: *Who* is liable or accountable *to whom; what* they are liable to be called to account for; *through what processes* accountability is to be assured; *by what standards* the putatively accountable behavior is to be judged; and, *what the potential effects* are of finding that those standards have been breached. These basic features, *who, to whom, about what, through what processes, by what standards and with what effects,*
describe what I will call an “accountability regime.”

Mashaw shows (2005, Figure 2 and passim) that answering the six questions will differ for domestic accountability regimes associated with public governance; those that police the marketplace; and those that inhabit the non-governmental, non-market, social realm. Answers will also differ depending on the device an accountability regime uses. For example, public governance accountability regimes include political regimes that operate through electoral processes; administrative regimes that operate through hierarchical control of subordinates; and legal regimes that operate through the authoritative application of law to facts. The accountability regimes generated by social networks will be more horizontal, using internally generated norms and sanctions. In the public governance realm, there is significant role differentiation, and accountability obligations tend to flow in only one direction. Elected officials owe an obligation of political accountability to citizens, for example, but not vice versa.

It is not news that scaling up from domestic accountability regimes to global governance is not obvious. Citizens cannot vote on the WTO or its rules, but governments can refuse to notify new polices or to implement their obligations, and they can discipline their own negotiators. No external entity can subject the WTO to judicial review, unlike agreements notified to the United Nations where performance is reviewable by the International Court of Justice. So how do we construct ideal-type “accountability regimes” that might apply to the WTO?

Table 1 [about here] shows the sorts of issues that might attach to these questions at WTO. Both agents and principals are ambiguous, depending on how one understands the purpose of accountability, and other ambiguities abound. Are Members accountable for meeting the abstract objectives of the Preamble to the WTO Agreement, or for the specific obligations of the covered agreements? Do delegates represent all principals, or is participation possible? Is the usual accountability concern with constraints on abuse of power salient, or is it more important that Members keep their promises (Najam and Halle, 2010)? Perhaps the hardest question is about the effects on actor behavior, since the usual notion in the literature is that accountability must include some sanction or possibility of redress. In short, is accountability a good thing in itself, or instrumental?

Accountability can be both a vertical and a horizontal principle. Table 2 [about here] illustrates a hierarchical view of WTO accountability, showing how our understanding of accountability changes as we focus on different relationships involved with the WTO. The first two rows are substantive; the other two are what Mashaw call administrative accountability. In this table, we see that citizens can hold Ministers accountable for the substance of policy through voting. Governments at home can mostly hold actors at WTO accountable on what are essentially procedural grounds, but the principals can substitute their judgment for that of their agents, or remove the agent. The top and the bottom of the table also differ between seeing the WTO as an agency in itself and as a site for the elaboration of the trade regime. In the latter, what Williams (2011) might call an intergovernmental model, accountability relationships are mostly horizontal. As in networks, reciprocity and mutual appraisal dominate.

When we turn to consider the apparent purposes of the WTO, the picture becomes more complex, illustrating the wisdom of Mashaw’s conclusion (2005, 34) that
beliefs about how administrative decisions should be made, and how they should be made accountable, are parasitic on beliefs about the purposes of programs. And because programmatic purposes are contestable, and accountability regimes have strengths and weaknesses, abstract normative specification of the goodness of one or another accountability regime verges on the useless.

Differing understandings of the substantive role of the WTO affect judgments about the appropriate accountability regime. On the one hand, the WTO is the locus for Members holding each other to account for the actions of their national authorities. On the other hand, Members collectively can be accountable for their management of the trading system, perhaps, Scholte (2011) says, to the people affected by its actions. Accountability runs in many directions to and from capitals. Table 3 [about here] is an attempt to show other accountability regimes centred on the WTO.

International relations scholars see international organizations contributing to international order and stability. When the GATT was created after the Second World War, the promotion of trade was seen as essential for peace, but so was leaving the new welfare states scope to develop. Postwar multilateralism was based, therefore, on the compromise of embedded liberalism (Ruggie, 1982). But the trading system was also designed to serve the needs of commercial policy, which would lead to a different understanding of accountability. Developing countries, especially LDCs, and critics of the WTO think it ought to serve the needs of social justice. Concerns then include the often-cumbersome western administrative procedures required by the rules, and inappropriate demands, for example with respect to intellectual property rights. Many academics and civil society organizations assert that Western countries have gained disproportionately from international trade and in some sense “owe” something to developing countries. 7 In such an accountability regime the intended effects are related both to the outcome (development-enhancing trade) and to process (greater formal and informal participation by developing countries) both of which require non-reciprocity.

Finally, the preamble of the WTO agreement places all its objectives in the context of “allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and enhance the environment….” WTO may be “Member-driven”, but individuals seeking sustainable development are concerned about issues that transcend the interests of specific states, issues that are not necessarily an immediate concern and that may be potentially trade inhibiting. This notion of accountability creates a tension between the positive benefit of the WTO for foreign or commercial policy purposes and the lack of a voice for other living things and future generations. Negotiations based on the sum of Members’ self-interest and the arguably narrow mandate of the WTO along with its closed participation and consensus decision-making may foster lowest common denominator policy making.

Each of these accountability regimes engages different stakeholders, often with incommensurable understandings of appropriate action and of the desired effect on the actors they presume to be accountable.

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7 [citations]
The accountability trilemma

Accountability regimes do not commend themselves on their technical merits but because of the purposes they serve. Are delegates in Geneva accountable to their principals at home? Are participants in small group meetings in Geneva accountable to the Members they purport to represent? Civil society organizations, business groups, trade unions and other relevant stakeholders seek to influence the ongoing discussions at the WTO, based on their own aims and interests. At the same time, concerns are often expressed about the ability of all Members to participate in the WTO, and the ability of individuals affected by the WTO to even know what is going on. Does the enhancement of any one of these forms of accountability constrain the pursuit of the others? Multiple accountability relationships can mean that attempts to make an organization accountable can end in them being ignored, or destroying that which it is they seek to make accountable (Black, 2008, 157). Mashaw (2005, 13) suggests that virtually all law and all political institutions face a trilemma of demands for efficacy, responsiveness, and coherence. Put in slightly expanded terms, citizens want administrative action, indeed all public action, to be functionally successful in managing or solving social and economic problems, responsive to the will of the people, and faithful to basic normative commitments that make up the society’s vision of adherence to the rule of law. But in Teubner’s view […] almost any reinforcement of an institution’s capacity to satisfy one of these demands will have deleterious effects on its capacity to satisfy at least one of the others.

The WTO faces such an accountability trilemma. Consider only the widely accepted values of transparency and participation for now. The WTO is much more transparent than when it began, but further transparency might hurt the WTO if it encourages posturing by negotiators and politicians. If constituents perceive a negotiation as purely distributive, they will be critical of a negotiator who pursues the possibility of an integrative outcome. Thompson (1998, 159) suggests that, given the natural desire to save face, “[n]egotiators who are accountable to constituents are more likely to maintain a tough bargaining stance, make fewer concessions, and hold out for more favorable agreements compared to those who are not accountable.” The transparency that accountable governance demands undermines the privacy essential for negotiations (Stasavage, 2004) and might undermine liberalization, or force protection into less transparent forms (Kono, 2006).

Too much transparency might also undermine accountability. In the case of the SPS committee discussed above, while questions ought to be asked about accountability within this process, in itself the SPS committee contributes to the transparency and accountability of national administration of sanitary and phyto-sanitary regulations (Lang and Scott, 2009). If instead we think that the substance of domestic regulations is determined in SPS meetings, we would worry more about whether the public a) knows what is going on and b) can be heard—perhaps through

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8 For analysis of how well WTO is doing, see (Steffek, forthcoming; Williams, 2011).
civil society organizations. The same thing can be said of the similar process under the Agreement on Technical Barriers to Trade (Howse, 2003, 13). When TBT appears to overturn democratically arrived at domestic regulations, it seems unaccountable. But if the real aim is improving the domestic regulatory process, which can be good for democracy, then the procedures promoted by the WTO can be appropriate in a given context, although the necessary accommodations to domestic legal systems and administrative practices are not necessarily feasible or desirable in all countries.

Just as transparency can be harmful, so can accountability, if agents face demands from the wrong principals, or if principals monitor the wrong things. Accountability might also be harmful if principals make demands of agents that are beyond the scope of the WTO. It is one thing to hold Members of the WTO accountable for their specific commitments; it is something else to hold WTO accountable for what it ought to have done in terms of its apparent general aspirations. We must recognize the danger in imagining international organizations being accountable for their contribution to the effectiveness, efficiency and legitimacy of global governance if our own understanding of these things goes beyond the implicit and explicit obligations that Members have undertaken, and the tasks that they have assigned to an international organization. We face a risk of conflating accountability for doing the right thing (e.g. open inclusive negotiations) with achieving the right thing (e.g. a trading system that would be supportive of sustainable development, or some other goal). Knowing who is accountable at WTO therefore depends on knowing why you are asking the question.
Table 1 Issues attached to the six questions at WTO

<table>
<thead>
<tr>
<th>Who (agents)</th>
<th>To whom (principals)</th>
<th>About what</th>
<th>Through what process</th>
<th>Criteria/ standard of assessment</th>
<th>With what effects on agents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Members (officials, ministers, delegates) or Secretariat?</td>
<td>Members, stakeholders or citizens?</td>
<td>Mandate or commitments?</td>
<td>Delegation or participation?</td>
<td>Effectiveness, keeping promises, or abuse of power?</td>
<td>Good in itself or instrumental?</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Outcomes or actions?</td>
<td>Ex ante justification or ex post transparency?</td>
<td>Procedural rules or substantive?</td>
<td></td>
</tr>
</tbody>
</table>

9 The questions and the organization of the Tables are based on (Mashaw, 2005, Figure 2).
<table>
<thead>
<tr>
<th>Who</th>
<th>To whom</th>
<th>About what</th>
<th>Through what process</th>
<th>Criteria/ standard of assessment</th>
<th>With what effects on agents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ministers</td>
<td>Citizens</td>
<td>Policy choice</td>
<td>Voting</td>
<td>Ideology or political preference aggregation</td>
<td>Approval or removal</td>
</tr>
<tr>
<td>Ambassadors</td>
<td>Politicians, Senior officials</td>
<td>Implementation, legality, Consistency of commitments with the country’s interests</td>
<td>Oversight, monitoring</td>
<td>Instrumental rationality</td>
<td>Substitute action</td>
</tr>
<tr>
<td>Director-General</td>
<td>Ambassadors and delegates</td>
<td>Use of funds, Appointment of staff and dispute settlement panelists Reporting</td>
<td>Hierarchical managerial oversight</td>
<td>Conformance with written norms and procedural justice</td>
<td>Affirmation or injunction</td>
</tr>
<tr>
<td>Secretariat, dispute settlement panelists, others</td>
<td>Director-General</td>
<td>Conformity to norms of behavior</td>
<td>Hierarchical managerial oversight</td>
<td>Legal rules?</td>
<td>Substitution of alternative decisions; removal from office</td>
</tr>
</tbody>
</table>
Table 3 Accountability regimes based on substantive purposes\textsuperscript{10}

<table>
<thead>
<tr>
<th>Foreign policy (Intergovernmental)</th>
<th>Who</th>
<th>To whom</th>
<th>About what</th>
<th>Through what process</th>
<th>Criteria/standard of assessment</th>
<th>With what effects on agents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Members</td>
<td>Members; citizens</td>
<td>Multilateralism; reduce the possibility of interstate conflict; overcome international externalities and spillovers; inclusive procedures.</td>
<td>Single Undertaking as constitutive metaphor requires consensus, reciprocal obligation, nondiscrimination, and transparency. Collective appraisal</td>
<td>Collective norms, consensual understanding Compromise of embedded liberalism</td>
<td>Withdrawal of esteem; exclusion</td>
<td></td>
</tr>
<tr>
<td>Commercial policy</td>
<td>Members</td>
<td>Governments; Economic actors; citizens</td>
<td>Mutual obligations</td>
<td>Transparency and surveillance; third party adjudication</td>
<td>Diffuse reciprocity Economic values; collective or individual welfare</td>
<td>Mutual adjustment</td>
</tr>
<tr>
<td>Social Justice (Supranational?)</td>
<td>Developed countries; WTO as an entity;</td>
<td>Polycentric: Developing countries, LDCs, civil society; citizens anywhere affected by WTO</td>
<td>Social and procedural values (fairness, equality and legality) Continuity/security values (social cohesion, safety)</td>
<td>Monitoring by civil society organizations?</td>
<td>Non-reciprocity</td>
<td>Praise or blame?</td>
</tr>
<tr>
<td>Sustainable development (Cosmopolitan?)</td>
<td>Trading system; WTO as an entity; Members</td>
<td>Polycentric: Citizens and civil society organizations concerned about the planet</td>
<td>Development that meets the needs of the present without compromising the ability of future generations to meet their own needs</td>
<td>Horizontal coherence between the WTO and other international organizations</td>
<td>Non-reciprocity; social, economic or environmental impacts that may transcend countries and generations</td>
<td>Policy that takes account of other living things and future generations</td>
</tr>
</tbody>
</table>

\textsuperscript{10} [cite sources]
References

Arthurs, Harry W., (1979) 'Rethinking Administrative Law: A Slightly Dicey Business,' Os


