



LUND
UNIVERSITY

Department of Political Science

STVA21
Tutor: Anders Uhlin

Discursive Democracy in and around the World Trade Organization

The Making of the Declaration on the TRIPS Agreement and
Public Health (Doha Declaration)

Peter Gottschalk

Abstract

Deliberative democratic theory has become prominent in international relations. This thesis applies Dryzek's theory of transnational discursive democracy in order to examine the role of global civil society in the promotion of discursive global governance in the context of the making of the Declaration on the TRIPS Agreement and Public Health (Doha Declaration) at the World Trade Organization's (WTO) Ministerial Conference in Doha. The debate on democratic deficit is briefly discussed followed by a more thorough discussion on discursive democracy. Some basic features of the WTO are examined. The Medicines case with focus on the actions of global civil society is described. The analysis of the Medicines case shows that global civil society may have contributed to the creation of a global public sphere, which in turn has changed the global politics of trade and intellectual property by making public health considerations legitimate. The thesis is concluded with some short observations on the issue of structure and agency, and a brief discussion on the issue of power.

Key words: deliberative (discursive) democracy, global governance, World Trade Organization, public health, global civil society.

Table of contents

1	Introduction.....	1
1.1	Problem and Purpose.....	1
1.2	Outline of the study	2
1.3	Material	2
2	Methodology	3
2.1	Theory and method.....	3
2.1.1	The debate on democracy in world politics	3
2.1.2	Deliberative democracy.....	4
2.2	Analytical framework.....	4
2.2.1	Single case study	4
2.2.2	Assessing process.....	5
2.2.3	Developing a framework for democracy assessment.....	6
3	Power and decision-making in the WTO.....	10
3.1	Power and decision-making in the WTO	10
3.2	The WTO Agreements, in particular the TRIPS Agreement	11
4	On the conditions for global deliberative democracy.....	12
4.1	The Medicines case	12
4.2	Deliberation or what?.....	15
5	Summary and conclusions.....	18
5.1	Summary	18
5.2	Conclusions	19
6	References.....	21

1 Introduction

The problem with a democratic deficit or a lack of democratic legitimacy in world politics has been hotly debated for the last ten years or so. At first, the problem discussed was whether international organizations can be democratic at all. Later, the discussions have focused on different conceptualisations of the concept of democracy and on the conditions for global democratic governance. In this paper, I am going to study an event that took place in one of the most debated international organisations, the World Trade Organization (WTO). The “event” at issue is the so called Medicines case which ended with the WTO Ministerial Declaration on the TRIPS Agreement and Public Health (Doha Declaration).

For several reasons, it might seem quite misplaced to talk about democracy in the WTO. The WTO is a notoriously undemocratic organization and it seems more appropriate to talk about global democratic governance. The WTO hardly has the image of a constructivist site for deliberation and learning.

1.1 Problem and Purpose

The *purpose* with this study is to explore and evaluate decision-making in and around the WTO from a democratic perspective. Decision-making will be understood in a broad way including deliberations leading up to decisions (this is an issue that will be discussed later).

The following problems are going to be addressed:

- *How can (global) decision-making (for example in an international organization) be made more democratic?*
- *To what extent has the process leading up to the Doha Declaration contributed to global democratization?*

In formulating the first problem, I have bracketed “global” and “in an international organization”. I will come back to this later, but a short comment here is appropriate. Although international organizations have formal rules for decision-making, reality shows that decision-making does not always follow formal rules, nor is it confined to single institutions. In the Medicines case several international organizations were involved although most of the “action” took place at or around the WTO. The international negotiations environment is thus made up of multiple arenas (institutions) in which issues are inter-linked across regimes (Drahos, 2003: 22), and is a description of international affairs that comes

close to what is usually called global governance (Dingwerth & Pattberg, 2006:187-189).

There are a few delimitations that are necessary to make. Although the relationship between political and judicial conflict resolution is interesting, I am not going to discuss that relationship here. Further, although democratization is about redistribution of power, the issue of power will not be central to this study.

Focus will be on the role of global civil society in promoting deliberative democracy.

Finally, there are several good reasons why the Medicines case is interesting to study but justification is still appropriate. One justification is that the Article 31*bis* Amendment is the first formal (legal) amendment to the TRIPS Agreement. The kind of normative change that is the focus of this thesis has been discussed in the context of international environmental regimes but not to my knowledge in the context of the trade regime. For example Brunnée and Toope have discussed a model that makes (deep) normative change possible with regard to ecosystem orientation of environmental law (Brunnée & Toope, 1997).

1.2 Outline of the study

In Chapter two theory and method is discussed. After a short introduction to deliberative democratic theory, an analytical framework for the assessment of deliberative democracy is developed. Chapter three mainly consists of a description of relevant features of the WTO. Chapter four provides a factual background to the Medicines case and also contains the main analytical part of the study. In the final chapter the results of the study are presented and discussed.

1.3 Material

For the most part, I will use academic articles to describe the processes in the Medicines case (Abbott, 2002, 2005; Abbott & Reichmann, 2007; Drahos, 2003; Sell, 2003; Sun, 2004; 't Hoen, 2002), but I will also use official WTO documents, government statements, statements and reports from NGO's, minutes of meetings, press releases, etc, which are all available on the WTO website. Further, *Bridges* (available at www.ictsd.org), a newsletter which provides daily reports from trade negotiations, will be referred to.

2 Methodology

An evaluation of decision-making in the WTO requires a normative standard to judge against. In order to assess the democratic legitimacy an empirical investigation (description) of power and decision-making in the WTO is required. However, such an approach is too broad and requires further limitations. This study will therefore focus on a particular decision-making process; the process leading up to the Declaration on the TRIPS Agreement and Public Health (Doha Declaration), which was adopted on 14 November 2001 at the WTO Ministerial Conference in Doha (in this text referred to as the Medicines case). At the same time the empirical domain broadens; global decision-making processes are not confined to single institutions.

2.1 Theory and method

This section will first provide an overview of the literature (debate) on democracy in world politics and then focus on deliberative democratic theory.

2.1.1 The debate on democracy in world politics

A major reason for the debate on democracy in world politics is the declining significance of the distinction between domestic and international politics in general, and one of the first more public debates on democracy beyond the nation state is the debate on a possible democratic deficit in the EU.

Several years ago Dahl asked the question whether international organizations can be democratic. His answer, resting on a domestic analogy, was basically no (Dahl, 1998: 114-117). Held, on the other hand, argued that we must re-think democracy at the global level and promoted a cosmopolitan democratic model (Held, 1995: 267-286; Archibugi, 2004). The cosmopolitan model builds upon government in the form of state-action, while deliberative democratic models emphasize informal deliberation in public spheres. A large part of the current debate is about democratic deficit in global governance, rather than on democratic deficit in (single) international organizations (Scholte, 2004; Steffek, 2003).

The particular debate on democracy in the WTO is lively and the literature is growing (Atik, 2001; Stein, 2001; Keohane & Nye, 2001; Weiler, 2000; Petersmann, 2001; Howse, 2003; Schaffer, 2003; Nanz & Steffek, 2004; Eckersly,

2007). The ‘Sutherland Report’ has addressed also the issue of democracy in terms of reformed decision-making and the role of global civil society (*The Future of WTO*; Wolfe, 2005).

2.1.2 Deliberative democracy

Deliberative democracy is a kind of democracy that is often contrasted against the liberal aggregative form of democracy (aggregation of preferences by voting). Deliberative democrats conceive of the democratic process as a transformative process, one that requires citizens’ participation (Farrelly, 2005: 200). Chambers has provided a useful review of deliberative democratic theory. She states that “[t]heorists of deliberative democracy are interested in such questions as: How does or might deliberation shape preferences, moderate self-interest, empower the marginalized, mediate difference, further integration and solidarity, enhance recognition, produce reasonable opinion and policy, and possibly lead to consensus?” (Chambers, 2003: 309).

Deliberative democratic theory can in turn be divided into two main streams of theoretical thought; one liberal (micro) and one discursive (macro). Liberal theorists concentrate on defining the ideal conditions of a deliberative procedure, while discursive theorists emphasize informal discursive forms of deliberation which take place in civil society. I will use Dryzek’s discursive ‘model’ of deliberative democracy, which I will discuss below.

2.2 Analytical framework

2.2.1 Single case study

This study is designed as a *single case study*; it is *structured* through its use of general theories on democracy, concepts, etc., and as such it is potentially comparative; it is *focused* in the sense that it is a case of the more general problem of democracy in international organizations and democratic global governance.

The WTO was certainly a central arena for deliberations in the Medicines case but not an exclusive one. Although several other institutions (organizations) were deeply involved in the Medicines case, in particular the World Health Organization (WHO) and the United Nations Sub-Commission on Human Rights, this study should still be regarded as a *single case study*. This is also why a global governance perspective seems appropriate. NGO’s like Médecins Sans Frontières (MSF) acted through different channels and used different strategies (Keck & Sikkink, 1998: 12-13).

Relationships between different international institutions and actors like the ones in the Medicines case are often discussed in terms of global governance (Dingwerth & Pattberg, 2006: 189-193). According to Rosenau, global governance “refers to the arrangements that prevail in the lacunae between regimes and, perhaps more importantly, to the principles, norms, rules, and procedures that come into play when two or more regimes overlap, conflict, or otherwise require arrangements that facilitate accommodation among the competing interests” (Rosenau, 1992: 9). The definition of the boundaries of institutions is a central part of these controversies (Lang, 2007: 525-530). Regime theory can provide us with theoretical perspectives to deal with these contexts. The most widely accepted definition of a regime is the liberal one adopted by Krasner: “*implicit or explicit principles, norms, rules, and decision-making procedures around which actor's expectations converge in a given area of international relations*” (Krasner, 1983: 2). International regimes are often described as “islands of order” in the international “ocean of disorder”. “International orders are broad framework arrangements governing the activities of all (or almost all) the members of international society over a wide range of specific issues”, whereas “international regimes, by contrast, are more specialized arrangements that pertain to well-defined activities, resources, or geographical areas and often involve only some subset of the members of international society” (Rosenau, 1992: 9). How an issue-area is constituted varies over time and between different actors. The content of the issues-area is defined by actor’s linking of single issues to complex issue-areas. A more pragmatic and pluralistic alternative to a liberal regime analysis as set out by Krasner is a Foucauldian one. “*An analysis based on Foucault's work treats regimes as loci of greater or lesser, but inevitable, tension in which actors struggle to define the regime and the space it orders.*” (Keeley, 1990: 98-99). The relationships and interactions both *within* and *between* regimes can be addressed through a Foucauldian regime analysis; “[r]egimes may overlap, spread, and compete. . . , and may merge with, absorb, or be absorbed by other regimes” (Keeley, 1990: 95) In fact, Keeley provides the seeds to a discursive version of international regime theory and to a discursive ‘interpretation’ of global governance.

In the conclusions I will return to my claim that this study is potentially comparative, e.g. that the results are generally valid.

2.2.2 Assessing process

I proceed from the constructivist understanding that democratic global governance is what states (and other global actors) make of it (Wendt, 1992; Dingwerth & Pattberg, 2006). This assumption is consistent with Dryzek’s statement that “[e]xperimentation with what democracy can mean is an essential part of democracy itself” (Dryzek, 1999: 48).

In essence, this is a case study of a particular decision-making process within an international organization. But as mentioned above it seems more appropriate to talk about global democratic governance. There are difficulties in separating

different processes from each other, both with regard to dispute resolution and law-making and to different functions performed by the processes (in particular problem solving and dispute resolution). I will return to the problem with delimitation later; how do we draw the boundaries of a decision? In this case it is very much a drafting process that is in focus.

2.2.3 Developing a framework for democracy assessment

An overview of possible models of democracy will be made, but it will be limited to deliberative democracy models which seems to be promising normative standards for this case. A normative deliberative democracy model will therefore be constructed as a kind of assessment framework. This normative democratic model would be similar to an ideal-typical model with potential for generating new problems (Hedlund, 2007: 17-24; Bäckstrand, 2006: 471-473). This kind of 'model-thinking' would however not fit a theory of discursive democracy such as Dryzek's very well (Dryzek, 2006: 158). Reconsideration may therefore be necessary. The analytical framework can in any case be characterized as a loop; an empirical investigation gives possibilities to adjust the normative theory with regard to new empirical insights. Such a method should have the potential to bring us closer to an understanding of the conditions for global deliberative democracy in the WTO, and a realization of those democratic values, point at necessary institutional improvements etc.

Developing a framework for democracy assessment requires a deeper discussion of democratic theory in order to identify possible normative standards (Hedlund, 2007: 31-54). Since democracy refers to both an ideal and an actuality it is important to keep them apart from each other (Dahl, 1998: 26-32). I ask "How can global decision-making (for example in an international organization) be made more democratic?" and then proceed from Dryzek's theory in setting up an analytical framework. This is consistent with his claim that transnational discursive democracy is not a model of democracy but rather a process of democratic governance (Dryzek, 2006: 158; Archibugi, 2004: 439-440).

At first, the challenge seems to be to identify, or rather to construct appropriate democracy norms and then 'operationalise' this normative deliberative democracy model (Stie, 2008: 2; Dingwerth, 2004). However, such a positivist stance might be more or less incompatible with the discursive stream of deliberative democratic theory. Stie has for example developed an analytical framework for empirical studies of democratic legitimacy in institutionalised decision-making settings, which she use in studying the EU's second pillar decision-making system (Stie, 2008: 4-11). Stie's model, however, belongs to a stream of thought that concentrate on defining the procedural conditions of a structured deliberative forum; her theory belongs to the micro stream of thought. The international negotiations environment is, as mentioned above, made up of multiple arenas in which issues are inter-linked across regimes. The stream of

thought more concerned with the messy, informal, unstructured deliberation which takes place in the public sphere seems more appropriate for our purposes.

Drawing on central questions exemplified by Chambers, we may require from any theory on deliberative democracy that it at least has the potential to shape preferences by deliberation; it is after all the central claim deliberative democratic theory makes. Further, it should have the capacity to moderate self-interest, empower the marginalized, mediate difference, further integration and solidarity, enhance recognition, produce reasonable opinion and policy, and possibly lead to consensus (Chambers, 2003: 309). Although the above requirements in theory should be the same for discursive democracy, the focus should be more on the shaping effect discourses have on deliberation rather than on deliberation itself. Empirical evidence showing that preferences have not been shaped by deliberation should not, however, make us conclude that a process cannot be labeled deliberative, unless we require that such shaping of preferences always affects outcomes (Stokes, 1998: 123-124). Deliberation defined as process need not have any impact on the outcome (Elster, 1998: 8-9).

I will use Dryzek's model of deliberative democracy as a normative standard. Dryzek's 'model' of deliberative, or rather discursive, democracy builds upon discursive sources of order already present in the international system. Discourses act as sources of order by co-ordinating the behaviour of individuals who subscribe to them. In his outline of a project for a transnational discursive democracy, Dryzek argues that the contestation of discourses should be central to a model of deliberative democracy. He states that transnational discursive democratization does not anticipate any well-defined model of democracy radically different from the status quo (Dryzek, 2006:160). He urges us to think constitutively about discourses (Dryzek, 1999:48); "[t]he essence of intelligent reflexive action in international politics is attention to the contextual restructuring that seemingly limited decisions can produce" (Dryzek, 2006: 126).

Dryzek states that the balance/interplay between discourses can be "brought under conscious, collective, and ultimately democratic control" (Dryzek, 2000:124); "[d]emocratic action in the international system is rooted in reflexive control over the prevailing balance of discourses".

Who deliberates is an important issue (Dryzek & Niemeyer, 2008), but discussions on the role of civil society in the WTO, has so far focused on dispute settlement (*amicus curiae*) (Eckersly, 2007). Since theorists of deliberative democracy emphasize deliberation in public spheres (Dryzek, 2000: 23) we should ask if and how global civil society contributes to and promotes the creation of a transnational public sphere (Bartelsson, 2006). The global public sphere is a site for the generation of public opinion, and the public sphere operates through contestation of discourses. Dryzek argues for "a reconceptualization of public opinion in terms of the outcome of contestation within the public sphere as transmitted to the state through a variety of means, notably rhetoric" (Dryzek, 2000:50).

Dryzek's idea of contestation of discourses must be seen in relation to the (mostly) Foucauldian concept of hegemonic discourses (2000:75, 2006:8, 2006: 22). This view would though be consistent with the later Foucault. At the same

time Dryzek states that “. . . it would be a mistake to see the contest in terms of one homogenous discourse fighting another” (Dryzek, 2000: 134). Perhaps he follows Foucault’s cautionary prescription that “*we must not imagine a world of discourse divided between accepted discourse and excluded discourse, or between the dominant discourse and the dominated one; but as a multiplicity of discursive elements that can come into play in various strategies*” (Foucault, 1979: 100). Later Foucault goes on saying that “[w]e must make allowance for the complex and unstable process whereby discourse can be both an instrument and an effect of power, but also a hindrance, a stumbling-block, a point of resistance and a starting point for an opposing strategy” (Foucault, 1979: 101).

Dryzek does not provide us with any substantive democratic norms. The theory is process oriented. Therefore the theory can be criticized for its lack of a normative force; any norm, even for example a racist norm, would be ‘democratic’ in case it was produced in accordance with the ‘democratic’ process. Bartelsson however suggests how the concept of global civil society brings normativity to the theory. Bartelsson suggests that the concept of global civil society must be understood in terms of its rhetorical function rather than primarily in terms of its theoretical meaning. We should ask what is *done* by means of it (Bartelsson, 2006: 372).

Dryzek is also criticised for lacking a critical edge. Although his theory, at least according to himself, is radical (Dryzek, 2006:23, 160) – it has its roots in post-structural thinking and is in many ways directed against liberal thinking – it is still too liberal. Discursive democracy is seen as a complement rather than an alternative mechanism (replacing voting) for making decisions. Deliberative democracy, the story goes, can produce consensus about “the common good”. Discursive democracy sees deliberation as ‘dispersed’ in society, for example in the public sphere, and co-exists with the ‘ordinary’ democratic system (Reinikainen & Reitberger, 2004: 278-279). But this form of discursive democracy also risks losing its critical edge and become uncontroversial. In this sense discursive democracy is very different from liberal democratic theory. Dryzek acknowledges and even gives conflict a productive role in some ways similar to Laclau and Mouffe’s agonistic democracy, or Norval’s aversive democracy (Norval, 2007: 45-53, 152-154). In my view, “contestation” fulfils a similar function in Dryzek’s theory.

Assessing process in terms of contending discourses requires a methodology which is different from the one used by for example Hedlund (Hedlund, 2007: 17-24; Milliken, 1999). For analytical purposes, we will have to identify and reconstruct discourses present in the Medicines case. The contest was essentially a clash between two discourses; the discourse on market liberalism (intellectual property is rooted in this discourse) and a human rights (health) discourse. Elements of other discourses can also be found in this contest; globalization and anti-corporate globalisation, etc. Further, we should ask whether the parties (states, corporations, NGOs) in the Medicines case argued constitutively. In formulating the second question, I draw from Sell and Prakash in their examination of the strategies of both business and NGO networks in framing issues in the Medicines case. Their question is: “[t]o what extent can persuasion and principled argument

be a potent asset for the weak to bring about desired change?" (Sell & Prakash, 2004: 143). The second question can thus be formulated as follows: *To what extent has the process leading up to the Doha Declaration contributed to global democratization?* In answering that question we should also consider the role of global civil society in the creation of a transnational public sphere.

3 Power and decision-making in the WTO

The failures at the Ministerial Conferences in Seattle in 1999 and in Cancún in 2003 have given rise to fierce criticism against the WTO, often articulated in terms of a “democratic deficit” or a lack of legitimacy (*Bridges Weekly*, January 2000; WTO Press release, 29 November 1999). Even though it is not clear where deliberation should take place; before or ‘in’ decision-making, deliberation must somehow relate to the process of decision-making.

3.1 Power and decision-making in the WTO

This part briefly describes the tasks and formal organisation of the WTO. It also provides an idea of how power is exercised in the WTO. I will just provide a brief overview of decision-making since it is rather the communicative “openness” than collective decision-making as such that I am interested in; the formation and transformation of actors’ preferences. The kind of power we are talking about is the Foucauldian kind or what Steven Lukes calls “the three-dimensional view of power” (Lukes, 1974: 21-25), or what Dryzek calls ‘disciplinary’ power (Dryzek, 2006: 162; see also Barnett & Duvall, 2005).

The seeds to an international trade organization were sown already at the Bretton Woods Conference in 1944. The World Bank and the IMF was created, but the Conference failed in establishing a trade organization. The GATT, however, entered into force and has served as the basis for eight rounds of multilateral trade negotiations. The early GATT negotiating rounds were primarily concerned with tariff reduction. Nowadays, non-tariff barriers dominate the trade agenda.

At the end of the Uruguay Round, the idea of creating a World Trade Organization emerged, and the WTO Agreement created the WTO as a new international organization. The legal structure of the WTO is laid down in the Marrakesh Agreement Establishing the World Trade Organization.

The general purpose of the WTO is to “facilitate the implementation, administration, and operation as well as to further the objectives” of the WTO Agreements. The WTO has four specific tasks: (1) to provide a forum for negotiations among members; (2) to administer the system of dispute settlement; (3) to administer the Trade Policy Review Mechanism; and (4) to cooperate as needed with the IMF and the World Bank.

WTO, and international organisations in general, have plenary organs but they are not (representative) democratic assemblies, although they are deliberative organs. The Ministerial Conference and the General Council are the two governing bodies of the WTO. Important decisions are thus taken by member states at the biannual Ministerial Conferences or at the level of ambassadors in the permanent General Council in Geneva.

WTO is often described as a ‘member-driven’ ‘negotiation machine’ (Wolfe, 2005: 634-637). The preferred method for decision-making is “consensus-based bargaining” (Ehlermann & Ehring, 2005; Steinberg, 2002; Buzan, 1981). In practice it means that a text is negotiated until no party objects to it any more. This method is “inherited” from GATT and has probably worked well. Even though WTO is different from GATT in several significant ways – the issues are nowadays more related to non-tariff barriers and matters of domestic jurisdiction – WTO retains important features of the ‘club model’ of international cooperation that characterized GATT (Nanz & Steffek, 2004: 325). The ‘club model’ includes the powerful players. The ‘green room’ consultations have become a synonym for non-transparent decision-making (Keohane & Nye, 2001: 2-8).

3.2 The WTO Agreements, in particular the TRIPS Agreement

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which came into effect on 1 January 1995, contains substantive provisions on the protection and enforcement of intellectual property rights such as patents and trademarks. It extends the legal obligations of the Paris, Berne and Rome Conventions to the entire WTO community.

The most important provision with regard to patents is Article 27 which requires member states to make patents available for any inventions in all fields of technology, including pharmaceutical product patents.

Article 30 allows member states to adopt certain exceptions to patent rights, and Article 31 of the TRIPS Agreement permits all WTO members to grant compulsory patent licenses; licenses to another producer to make the patented product without the authorization of the rights holder, and Article 31(f) provides that licenses should be issued “predominantly for the supply of the domestic market”. This can give rise to the so called the “Article 31(f) problem”; supplies to countries without pharmaceutical manufacturing capacity might be severely restricted.

A Council for Trade-Related Aspects of Intellectual Property Rights is established to monitor the operation of the TRIPS Agreement (the TRIPS Council).

4 On the conditions for global deliberative democracy

This chapter provides a brief, mainly chronological background to the Medicines case emphasizing main events. A reconstruction of the process leading up to the Doha Declaration and its aftermath will be made, and it will be judged against the normative framework developed above. This part is thus devoted to the second question: To what extent has the process leading up to the Doha Declaration contributed to global democratization? Some important episodes, most of them focusing on the role of global civil society, will be discussed.

4.1 The Medicines case

On 14 November 2001, the Ministers at the (WTO) Doha Conference adopted the Declaration on the TRIPS Agreement and Public Health (Doha declaration) by consensus (WT/MIN(01)/DEC/2). The decision was preceded by a heated debate, a debate that still goes on. Although it is difficult to set a starting point for the Medicines case, the relevant context cannot be extended too far. Historically, the impact of intellectual property rights on the health of poor people in developing countries has generated much controversy. Although the problem with expensive pharmaceuticals existed before the TRIPS Agreement (the launching of the Bangladesh National Drug Policy in 1982 is a good example; Thomas, 1987: 110), the rise in the incidence of HIV/AIDS has contributed to the current controversy. Seckinelgin for example claims that the global politics of health is changing, but that the change is coming from the politics of people rather than the high politics of global governance of health (Seckinelgin, 2002: 114). Another important event is the WHO's launching in 1981 of the 'Health for All' strategy. The WHO thereby contributed to the development of the right to health as it is enshrined in Article 12 of the Convention on Economic, Social and Cultural Rights which declares "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health". In fact, this was the rise of the global public health discourse on access to medicines.

Which then is the relevant context? Was it what happened before and not during the actual decision-making during the Ministerial Conference in Doha that matters from a theoretical point of view? Do we have to make a clear division between decision-making and non-decision-making, or perhaps rather preparations for decision-making? Howarth distinguishes between different kinds of decision-making; decisions taken *within* a structure and decisions taken *about* a

structure (Howarth, 2000: 122). Dryzek instead makes a distinction between *government* and *governance* (Dryzek 2000:132). Dryzek points out that “his” form of democracy is not institutionalized in formal organizations (Dryzek 2006: 154). The kind of transnational discursive democracy that he sketches lacks formalized connection to binding collective decisions (Dryzek, 2006:158).

An appropriate (analytical) starting point for the Medicines case is probably the first major NGO meeting on health care and TRIPS which was organized by Health Action International (HAI). The meeting took place in October 1996 in Bielefeld, Germany. At that meeting James Love, director for the Consumer Project on Technology (CPT), presented a paper (Love, 1996) which according to Ellen ´t Hoen of MSF “was a eyeopener for everyone who was there” (Sell, 2003: 147-148). After that HAI in many ways organized and lead the coalition of NGOs and developing countries (Drahos, 2003: 21-22). Another important event preceding the Doha Declaration is the work NGOs carried out in creating a revised drug strategy for the WHO World Health Assembly in January 1998. At the request of Zimbabwe’s minister of health, HAI produced a draft resolution for a WHO “Revised Drug Strategy” (Sell, 2003: 148).

An important part of the background to the Doha Declaration is a few disputes over pharmaceutical patents. The perhaps most talked-about dispute in this context is the South African Medicines Act Litigation. In order to promote the availability of affordable HIV/AIDS-related drugs via parallel imports and compulsory licensing under the TRIPS Agreement, the South African government introduced the Medicines and Related Substances Control Amendment Act in November 1997. In February 1998, 39 pharmaceutical companies challenged the constitutionality of the Act, including its compatibility with the TRIPS Agreement, before the Pretoria High Court. After considerable media attention and political pressure, the action was withdrawn from the court (Sun, 2004: 131-132; ´t Hoen, 2002: 30-32).

Another decisive dispute was US v. Brazil. In February 2001, the United States filed complaint before the WTO Dispute Settlement Body challenging the compatibility of Article 68 of Brazil’s Industrial Property Law with the TRIPS Agreement. Brazil and the United States reached an amicable settlement. Although Article 31 of the TRIPS Agreement permits a WTO member to pass a national law providing possibilities for compulsory licensing, Brazil and the United States had completely different views on how the provision should be interpreted (Sun, 2004: 132-133; ´t Hoen, 2002: 332-34).

A number of other events contributed to the realization of the Doha Declaration, in particular September 11, Antrax, SARS, but also a number of activities in other international organizations such as the UN Special session on HIV/AIDS which took place on 25-27 June 2001. Another example is the important role global civil society had in the genesis and adoption of the UN Sub-Commission for Human Rights Resolution 2000/7 on TRIPS and human rights (Weissbrodt & Schoff, 2003: 25-27). Moreover, the Sub-Commission’s Special Rapporteur Hunt’s report which emphasizes the Medicines case as a global health and/or human rights issue places the Medicines case in the context of global

economic relations and in particular emphasizes the place of human rights in those relations.

Several writers emphasize the decisive role for NGO's (global civil society) in the Medicines case and in world politics in general (Abbott, 2002: 478, 2005: 343; Sun, 2004: 130; 't Hoen, 2002: 34; Seckinelgin, 2002: 114). NGOs such as Médecins sans Frontière (MSF), Consumer Project on Technology (CPT), Oxfam, Third World Network (TWN), and Treatment Action Campaign (TAC) have played a decisive role in pursuing developing countries' interests in the WTO. The TRIPS Council's special session on intellectual property and access to medicines which took place on 20 June 2001 at the request of Zimbabwe's ambassador and the African group, is a good example of the interplay between NGO's and developing countries (Sell, 2003: 153). The Quaker UN office in Geneva provided support for developing country delegates. The special session was devoted to access to medicines issues and during the session a consensus emerged that the protection of public health should take precedence over TRIPS. At the session, the Brazilian delegation also highlighted its successful program of distributing HIV/AIDS medicines at low cost (Sell, 2003: 158; WTO Doc. IP/C/W/296).

On 19 and 20 September 2001, the TRIPS Council held its second special session on TRIPS and public health, which focused on objectives and principles, parallel imports and compulsory licensing. The African group presented a draft text for a ministerial declaration emphasizing that "nothing in the TRIPS Agreement shall prevent Members from taking measures to protect public health" ('t Hoen, 2002: 41). The African draft also emphasized the importance of TRIPS role in the protection and promotion of human rights (Sun, 2004: 135).

The Doha Declaration affirmed the TRIPS Agreement and the importance of intellectual property protection for the development of new medicines, but at the same time it excluded a number of important issues. One of those issues concerned the Article 31(f) problem; the ability of countries with little or no pharmaceutical manufacturing capacity to make effective use of TRIPS compulsory licensing decisions. Although the USA and EU was willing to accept most of the developing countries' demands at Doha, they did not accept developing countries' proposals to resolve the Article 31(f) problem (Abbott, 2005: 326). This issue was instead further negotiated under paragraph 6 of the Doha Declaration. Paragraph 6 instructs the TRIPS Council to resolve the issue by the end of 2002. This 'event' shows clearly that the issue area of international trade which we are mainly concerned with in this paper is dominated by the discourse of market liberalism; at the same time as the Medicines case concerned a few specialised (legal-technical) discourses it was situated within the broader framework; TRIPS "flexibilities" and the place of human rights (the right to health) in international economic relations. The dominant market discourse still seem to have shaped the deliberations but this time the outcome of the deliberations was balanced against contesting human rights discourses.

Nearly two years after the Doha Declaration was adopted, on 30 August 2003, the WTO General Council adopted the Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health

(WT/MIN(01)/17). The decision is meant to enable developing countries to import generic pharmaceuticals manufactured under compulsory licensing in case those countries lack manufacturing capacity: The decision established a mechanism for, among other things, notifications (Abbott, 2005; Atik & Lidgard, 2007).

The Article 31*bis* Amendment to the TRIPS Agreement was adopted by WTO members on 6 December 2005. The amendment is basically a transformation of the Decision on Implementation of Paragraph 6. The pending amendment (it has not yet entered into force) has, however, elicited considerable criticism from civil society. Some commentators consider the mechanism as too complicated, while others are more concerned that there is a risk that poor countries may be pressured into not making use of the mechanism (Abbott & Reichman, 2007: 922).

4.2 Deliberation or what?

Although commentators emphasize the decisive role for NGO's (global civil society) in the Medicines case they differ in their opinions on the particular significance of the Medicines case. Activists have claimed victory (*Bridges Weekly*, 15 November 2001). Others argue that the Doha Declaration only restates what is already in the TRIPS or that the Declaration is too complex to be workable (joint Oxfam-MSF press release, 30 August 2003, available at www.oxfam.org). Sell is of the opinion that the Medicines case has changed the politics of intellectual property, at least in the way that public health issues have become linked to trade and intellectual property (Sell, 2003: 162). What conclusions can we draw from the fact that the final text more closely resembles the developing countries' draft than the developed countries' positions (Sun, 2004: 145)? The post-Doha negotiations indicate that at least in the long term the preferences of the USA hardly had changed (Sun, 2004: 146). Does this mean that global civil society managed to act strategically rather than constitutively? No matter how we judge the outcome of the Medicines case, can we consider the process democratic even if it just (re)produced status quo? Notwithstanding that it is likely that the contributions from NGO's improved the quality of the decisions, we have not defined deliberation by its outcome but by features of the process (Stokes, 1998; Gambetta, 1998).

It seems plausible that global civil society did manage to create a global public sphere. But did global civil society reason constitutively? This addresses the question what should count as deliberation? Activists often use strategic action such as for example shaming instead of rhetoric's (Young, 2001: 670). While Habermas rejects strategic action as deliberation, Dryzek acknowledges both strategic and communicative action as possible in a deliberative setting. Activist's usually engages more in direct action than deliberation and therefore have an ambivalent relationship with deliberative democratic theory (Young, 2001: 670). In what ways did the discourses shape deliberation in the Medicines case? This question might be too far reaching to answer conclusively here, but some

comments are in place. A methodological problem is that many meetings (or other deliberative arenas) are not open to observation and often do not leave public record (Young, 2001: 677). It is thus difficult to study how deliberation works. Even though we are not interested in a micro analysis of how deliberation works, it is difficult also to distinguish between different forms of deliberation (discourses), and to examine and evaluate for example contestation of discourses. According to Abbott, MSF has been particularly successful in persuading at least part of the European Commission to “rethink close identification with the perspective of Glaxo-SmithKline” (Abbott, 2002: 478), but this observation does not say anything about the “constitutiveness” of the reasoning. Sell and Prakash gives an example from intellectual property of what I would call constitutive reasoning with ‘structural’, long-term effects; TRIPS is often described as a “coerced” agreement, at least by developing countries, and that the driving force behind the agreement was a transnational network of multinational corporations, a kind business community. Sell and Prakash examines how intellectual property as a form of property, comparable to tangible property, is presented as a self-evident truth. Sell and Prakash notes that the business network displayed impressive framing skills. Historically, intellectual property rights, in particular patents were considered “grants of privilege”. The success consists in re-framing “grants” as “property rights” in intellectual goods. By using the language of rights the US business community managed to get an acceptance for violators of intellectual property rights as “pirates”. “The piracy metaphor effectively changed a policy debate into an absolutist moral drama. Theft is simply wrong”. According to Sell and Prakash, this discourse had a clever pre-emptive quality; “there is no room for a policy discussion about the merits of piracy, nor any space for compromise in the direction of pirates” (Sell & Prakash, 2004: 173).

The Medicines case in light of global governance is also interesting. In my view, Keeley was far ahead of his time, not only as an early adopter of discourse analysis. He sets out not just a discursive (Foucauldian) version of international regime theory, but also a discursive version of global governance, i.e. the relations not just within but also between regimes. In the medicines case, Sell and Prakash (among others) claim that global civil society played a decisive role in the Medicines case. Although for example the WTO and the World Intellectual Property Organization (WIPO) has a formal cooperative agreement, NGO’s such as MSF acted as “joints” between different international organizations such as WTO and WHO (Sell & Prakash, 2004; compare Keck & Sikkink; the “boomerang effect” was developed to explain norm change in states; otherwise deliberative democratic theory and social constructivist norm studies seem to have lived separate lives). Keeley’s “Foucauldian interpretation” also captures the debate on the boundaries of the WTO; can we delimit democracy within the boundaries of the WTO? Activists have rather used different paths to influence institutions (Keck & Sikkink, 1998).

The medicines case might look like a fairly “closed” case in the sense that it revolves around the interpretation of a legal text (Article 31 of TRIPS). As such public international law provides well-established methods for the interpretation of that text, methods that should have been used if the case had been legally

settled by a panel. In a political setting such as the Ministerial Conference the parties (states) had more freedom to re-negotiate the meaning of the text. It is doubtful whether the political solution reached further than a legal would, but that is of no importance since the meaning of the text is sufficiently clarified. It is worth, however, to reflect briefly upon the possible effects of an amicus brief in the event of a panel proceeding (it is not difficult to guess what message an amicus brief from e.g. MSF would contain). But the case is also much wider in the sense that it concerns global health issues; but is it a “structural” decision? The Medicines case can be placed together with a number of other disputes and formal legal cases in the WTO which concerns “non-trade” issues. In fact, TRIPS itself has been invoked as a precedent with regard to the existence of non-trade issues in the WTO. Note that the most “trade related” issue perhaps was too trade related for the negotiators to be included in the agreement; regulation of exhaustion of rights which legally is the very essence of parallel trade remains within the national jurisdiction of the member states (Article 6 of TRIPS).

I believe the Medicines case is important as a “boundary” case (Lang, 2007). Such a discursive change can in the long run open up WTO more to other “non-trade” issues such as environment, human rights etc. Deliberative models of democracy can downplay the problem of boundaries (Dryzek, 1999:44). In other words, deliberation and communication can cope with fluid boundaries and the production of outcomes across boundaries (Dryzek, 1999:44).

The Medicines case is important as a contribution to the discourse on global democracy. Dryzek has pointed out that the environmental issue area has led all others in democratic innovation since the 1970’s (Dryzek, 1999:38) and he gives global civil society a central role in realizing transnational democracy (Dryzek, 2006: 123). Other scholars also claim that global civil society contributes to the creation transnational public spheres (Nanz & Steffek, 2004: 333-334; Scholte, 2004: 217222; Eckersley, 2007).

5 Summary and conclusions

I will now return to my claim that the results of this study are potentially comparative, i.e. that the results are, at least to some extent, generally valid. There is a risk that the Medicines case is an exceptional case; that global civil society seized a unique opportunity. I believe the results are to some extent generally valid, in particular to the extent that they refer to global democratic governance. The results are without doubt interesting outside the context of this particular case. But carefulness is recommended; the Medicines case could be an exceptional case.

5.1 Summary

The overall purpose with this study is to explore decision-making in and around the WTO from a democratic perspective. In order to do that two main questions have been considered. The *first* question – how can (global) decision-making (for example in an international organization) be made more democratic? – has been answered mainly by referring to Dryzek’s theory of transnational democratization. Most notably, this theory appears promising because it builds upon existing sources of order and is conceptualized as a process of democratization through these existing sources. The answer to the question then is that NGO’s, or rather global civil society’s, engagement with, and creation and promotion of a global public sphere in which a democratic control of discourses through contestation seems plausible. Dryzek’s theory, though workable, suffers from some deficits; it is difficult to see where he locates agency; and the issue of power seems ‘undertheorized’. These issues will be briefly discussed below in the conclusions. A straightforward answer to the *second* question – to what extent has the process leading up to the Doha Declaration contributed to global democratization? – is more difficult to provide but the general conclusion is that the Medicines case is an important contribution to the discourse on global democracy. Having in mind the definition of democracy as an experimental, unfinished, endless process (Archibugi, 2004: 440), this question has been dealt with by dividing it into several sub-questions (has global civil society contributed to the creation of a global public sphere?; has it achieved a structural long term decision and if so, was it done by constitutive reasoning rather than by ‘ordinary’ activist activities? etc.). There is no doubt that global civil society played a decisive role and there is definitely a global public sphere at least in the making, but a straight answer to the second is as we have seen difficult to give. Viewed as a short term decision taken within a structure, the Medicines case has clarified an

uncertain legal situation and contributed to the creation of a global public sphere. But viewed in the long term as a decision about a structure no certain conclusions can be drawn. Archibugi points out that when we see democracy as processes of democratization the way in which political systems are effectively assessed becomes decisive; “each and every democratic system can be evaluated more effectively on the basis of a scale relative to its own development, rather than through a simplistic democracy/non-democracy dichotomy.” It becomes necessary to take into account both the level of, and path to, democracy (Archibugi, 2004: 440). To make such an assessment though requires a deeper examination.

5.2 Conclusions

At first, the Medicines case looks like a typical case of “post-agreement bargaining” or “compliance bargaining” (Jönsson & Tallberg, 1998: 371-372), so why not use negotiations theory to study the Medicines case? One difference is that an outcome should reflect a value such as the outcome of a deliberation, not the relative negotiation power between the parties involved in bargaining. Abbott claims that “. . . economic and political power remains a key factor in determining the outcome of trade negotiations” (Abbott, 2005: 318), but he does not explain what kind of power he talks about. In fact, power is an issue that should receive more attention in this context (Barnett & Duvall, 2005). Another aspect of power is the possible expert influence of the WTO Secretariat (Barnett & Finnemore, 2004). According to Abbott “[t]he Secretariat [of the WTO], and particularly the Intellectual Property and Investment Division, has played a substantial and visible role in the TRIPS and medicines dialogue.” (Abbott, 2002: 477). The Secretariat for example formulates texts in the preparation for Doha. Abbott further states that the Secretariat is in a position to select actors and define agendas. This is of course an important observation with regard to the possibility for discursive democracy in the WTO.

Dryzek is somewhat vague when he speaks about democratic control of discourses and this is where agency enters the inquiry; to ask questions about the role of global civil society is indeed to ask questions about agency. Foucault speaks about discursive control already in *Orders of discourse*. The question is whether we can integrate Foucault’s concept of discursive control into Dryzek’s theory. Dryzek’s ‘relationship’ with Foucault seems ambivalent and it is not clear where Dryzek situates power. Can we draw from Foucault here as well? Dryzek’s theory, which at first seems quite radical, it is in essence fairly liberal. Although Dryzek acknowledges contestations, as compared to Habermas who “theorizes away” power, radical pluralists say there is no place for antagonism (*agonistic* democracy, or *aversive* Democracy; see Norval, 2007); I am not sure whether Dryzek’s *contestations* or *clashes* are the same thing.

As mentioned above, Dryzek is vague when it comes to agency. He mentions ‘discursive fields’ and “the ‘realist’ discourse of anarchy in international relations, which constructs actors only as states. . .” (Dryzek, 2000:76), but it is only in the linking with reflexive action that he touches issues of power. Theoretically, Sell is also concerned with structure and agency in her examination of the Medicines case. Her perspective is constructivist (Sell, 2003: 2-7) and she uses the concept “opposition” instead of “resistance” (Sell, 2003: 139; Sending & Neumann, 2006). Others have also tried to theorize resistance. For example Rajagopal has used Foucault to theorize resistance of transnational social movements in international relations (Rajagopal, 2003: 421-423). His attempt is similar to, but still different from deliberative democracy and global civil society, and most certainly more radical. But the Foucauldian influence is there in Dryzek’s theory too; “*where there is power, there is resistance*” (Foucault, 1979: 95).

6 References

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