

Preparing For Structural Reform in the WTO

Thomas Cottier

World Trade Institute, Berne

September 26, 2006

I. Structure-Substance Pairing

Negotiations at the WTO are mainly driven by domestic constituencies and governments. They define outcomes. The structure of the organisation is instrumental to this goal, and does not in itself decide on outcomes. Nevertheless, the structure and operation of the WTO is not without impact. The ways by which decisions are prepared and made do affect outcomes and results. This is common to all law, domestic and international law. Process and substance are inextricably intertwined. We call this substance-structure pairing. Effective global governance requires open attitudes towards multilateralism, shared perceptions on objectives, but also clear structures on all layers of government, local, national, regional and global. It is equally true for the WTO.

While international trade regulation is almost exclusively treaty-based, the process in the WTO often deviates from written rules and is mainly shaped by custom and diplomatic practices developed under GATT 1947. Except for dispute settlement, it is not clearly framed in institutional terms. Difficulties to achieve agreement and to make progress among the currently 149 Members of the WTO are partly due to these practices. Except for the General Council and the Ministerial Conference, no body is mandated and authorised to address procedural issues in a comprehensive manner, coming forward with new ideas and informed proposals.

The WTO was established as an international organisation in 1995. An umbrella agreement was added and the role of the Director-General (DG) and Secretariat defined. The main structural change was undertaken in dispute settlement. The principle of consensus-minus-one (or reversed consensus) was realised in this branch of the organisation. Other than that, the GATT system persisted: negotiations in rounds based upon consensus diplomacy and largely informal negotiating structures to be defined for each round. A much larger portfolio, dealing way beyond border measures with complex domestic policy issues (service regulation, domestic support, intellectual property standards and government procurement) has remained unaccompanied by suitable structures of negotiations, commensurate with the complexities of the subject matter at hand. In between negotiating round and during rounds, legal developments are achieved mainly due to incremental clarification in dispute settlement, on a case-by-case basis. A substantial body of case law emerged and established WTO as an emerging field of international law. Progress in dispute settlement, however, created an imbalance with the political process. It needs to be addressed and remedied.

Overall, the WTO suffers from complex clashes of interests and of a lack of attention to procedural issues. Both produced the current stalemate of the Doha Development Agenda. It

results in an increasing shift to preferential agreements and further erosion of multilateralism. A debate on structural reform therefore is essential with a view to reinforce the multilateral trading system and to establish a proper balance with unilateral, bilateral and regional trade policy and regulation. This discussion paper suggests establishing appropriate committee structures within the WTO, dealing with institutional and procedural matters.

II. Issues for Debate

Many structural issues are not dealt with under current working structures in a coherent manner, or not at all. Negotiators are informed and driven by national agendas, seeking to enhance or limit market access according to prevailing domestic interests. Too little attention is paid to underlying structural and horizontal issues. We recall the following issues randomly:

- *The structure and process of decision-making in the WTO:* is consensus based diplomacy the best way to proceed? What are viable alternatives? Is it possible to contemplate a system of weighted voting, taking into account shares of world trade, openness of markets and size of population? How to deal with blocking powers? Should they be retained, or should the system be aligned to consensus-minus-one as it is established in dispute settlement? How to render negotiation processes transparent and open to all those interested to participate?
- *The balance of negotiations and dispute settlement:* How to bring about effective means of legislative response which does not depend on trade rounds and thus very long periods of time? How to make better use of the possibility of interpretative statements by Members?
- *The role of the Secretariat in negotiations and dispute settlement:* How to bring about more transparency on the influence and role of the Secretariat in the process of negotiations and dispute settlement? What should be done in order to enhance and develop the Secretariat into a warden of multilateral disciplines? Could the DG obtain powers to submit motions of his or her own? Should the Secretariat be represented by its own counsel in dispute settlement?
- *The virtues and disadvantages of trade rounds v. incremental work and progress:* How to bring about a proper mix of trade rounds and a process of continuous treaty-making in its many regulatory fields? Do we need criteria for secondary legislation which could be enacted on the basis of existing treaties?
- *Single undertaking or variable geometry:* What are the criteria by which basic decisions should be made on package deals or plurilateral agreements? What are long-term implications of variable geometry for developing countries?
- *Alternative options to Special and Differential Treatment:* How to replace current and ineffective models of S&D? In depth thought is required on alternative approaches. How could graduation be defined? Is it possible to bring about progressive regulation, commensurate with levels of development of competitiveness within a particular uniform set of rules? How could economic indicators be employed to this effect?

- *The legal relationship of WTO law and other international agreements:* Efforts to clarify this relationship failed in specialised committees, since the matter is one of horizontal importance and impact. Who is the proper body to deal with it beyond dispute settlement?
- *The relationship of WTO and other international organisations:* Given the interdependence of subject matter, the relationship needs clarification beyond observer status. What should be the proper role in negotiations and in dispute settlement of other organisations?
- *The relationship of WTO to civil society and business (Non-governmental organisations):* How to shape operational relations with NGOs in the process of negotiations and dispute settlement? To what extent can they assist in enhancing legitimacy of WTO rules and acceptance around the world?
- *The role of Academia:* What, in particular, should be the relationship of WTO to the academic community? How can its work be better integrated in the process? What can the WTO do to foster academic training in the field, still largely lacking around the world?
- *The relationship of WTO to national parliaments:* What can be done to foster inclusiveness of democratic legislators in the process, thus enhancing information, awareness and understanding of the multilateral system?
- *The legal relationship of WTO Agreements and preferential trade agreements:* How to strike a proper legal balance between multilateralism and preferential trade? How to develop hierarchies of rules and enhance enforcement of multilateral disciplines in the field?
- *The relationship of WTO law and domestic law; the role of WTO law in domestic courts and proceedings:* should this issue be entirely left to domestic constitutional law or should it be part of WTO disciplines and thus of multilateralism? How can we translate direct effect and thus effectiveness in terms of market access concessions?
- *The structure and operation of WTO in the field of technical assistance and capacity building:* What are the structural implications of enhanced technical cooperation in aid for trade? Should the WTO develop regional offices? How to cooperate with other international and regional organisations? How to cooperate with universities in the regions?

The report of the Consultative Board (“The Future of the WTO”, Geneva 2004) made a number of structural recommendations. They entail in particular:

- Limited role for other international organisations; restricted observer status.
- Defining clear objectives for dialog with civil society organisations and the public at large.
- Review of dispute settlement reports by independent group of experts.

- Enhanced technical assistance with a view to strengthen implementation and rule-orientation of national trade policies.
- Luxembourg-type compromise on consensus: blocking consensus should be limited to declared national interests, in writing and with reasons stated.
- Review of plurilateral approach as opposed to single undertakings, enhanced recourse to scheduling.
- Ministerial Conferences to take place on an annual basis.
- Creation of a consultative body of senior officials from capital to meet on a quarterly or biannual basis with the DG, with limited membership and partly on a rotating basis.
- Clarification of the key role of the DG in negotiations.

Most of the issues addressed above profoundly affect power relations. They are not of a technical nature. Yet, this cannot constitute a reason to leave them aside and unattended. They should be exposed to a robust and informed debate. Science-based research should be encouraged to support reasoned deliberation.

III. Creating Fora for Debate and Negotiations

There is currently no official forum within the WTO (except for the Secretariat) mandated to prepare and discuss these controversial horizontal matters in a comprehensive and systemic manner. Partly, issues are dealt with in specialised committees. For example, the Committee on Trade and Environment dealt with the relationship of WTO law and MEAs; a problem, however, which equally exists in other areas of law, for example in the field of trade and investment, trade and human rights, or trade and culture. For example, a Negotiating Group deals with reform of the dispute settlement system, but cannot sufficiently address the relationship to, and the interconnection, with the process of negotiations. Special and Differential Treatment is dealt with in the Committee on Trade and Development, but affects all areas and Committees of the WTO alike. Pledges for technical cooperation are made by Members, but remain outside discussions as to how the WTO should be structured to effectively employ these funds. There is no committee dealing in a comprehensive manner with relations with other international organisations. The Committee on Budget, Finance and Administration is limited to financial issues and does not assess the overall operation and functioning of the WTO.

The International Law Associations, in its 2006 Report, (to be published: <http://www.ila-hq.org>) recommends establishing a legal or institutional committee in the WTO which would be mandated to deal with structural and horizontal issues of the type indicated above. It is necessary to create structures which allow a comprehensive discussion of proposals relating to the improvement of the functioning of the WTO. During the Uruguay Round, such a Committee existed (FOGs), but was not continued under the new Organisation. This is a serious shortcoming and partly explains difficulties encountered in the process of negotiations. FOGs was not appropriate and sufficient to discuss innovation, and it is not a

coincidence that it was not continued upon the conclusion of the Round. More than that is needed.

It is suggested to design to a two-tier structure. A first tier would operate as a think tank, a forum of expertise, information-exchange and non-hierarchical deliberation between government and academia. A second tier would be entailed to negotiate and prepare political decisions in the field. It is important to distinguish these functions and define their relationship.

A. Consultative Committee

A body should be designed and mandated to develop conceptual ideas and proposals on horizontal systemic issues such as indicated in the extensive list above. Over the last decade, a true and international academic community dealing with institutional and structural issues of global governance, the role of international organisations and constitutionalisation of international law has emerged. Problems are discussed from a detached point of view and not interest driven in the same way as governmental processes. Scholarly findings and discussions, however, often remain academic. They do not reach policy makers. There is not a sufficient linkage between these discussions, the WTO and Members. Results of academic work and conferences do not find their way into negotiations in other than accidental ways. It is submitted that this community could strongly support the thinking on structural issues and should be included in the process. This can only be successful if academics closely work with senior government officials and representatives of the WTO Secretariat from the very beginning.

1. The Consultative Committee should be structured in a manner so as to allow discussion and proposals made both from capitals as well as from academia. It would be beneficial to create a body composed of constitutional international lawyers, political scientists, economists and representatives of governments dealing with systemic issues of international governance in capitals or Geneva based missions. The Committee could consist of a core group and work with flexible membership and working groups, depending on the subject matter dealt with. A special interface mechanism (e.g. exchange forum) with national parliaments and non-governmental actors should also be an important design feature of such a Committee.
2. The mixed think tank would operate under a broad mandate. Ideally, it would decide upon the initiatives to be taken. Alternatively, more restrictive mandates would need to entail a decision-making process. Different models are possible, ranging from mandates by the Ministerial Conference, the General Council to those granting powers to the DG.
3. It should be discussed to whom the Committee reports. Again, different options could be considered and should be explored. The Committee could report to the DG who would obtain the right to make proposals of his own to the General Council and the Ministerial Conference on institutional matters relating to the functioning of the Organisation. The idea expressed in the Report of the Consultative Group to create a senior official's consultative body could be linked to this idea as proposals by the mixed institutional Committee could be submitted to this group for discussion. The DG would be entitled to process suitable proposals into diplomatic channels and the bodies of the WTO.

4. The Committee could also take up matters submitted to it by WTO Committees and NGs for advice and recommendation.
5. The work of the Committee also is made available to Members which, of course, retain the right to take matters up and develop initiatives of their own, based upon the work of the Consultative Committee.

B. Negotiating Group or Standing Committee

Members and the DG alike should be entitled to introduce recommendations of the Consultative Committee into the negotiating process. To this effect, a NG or Standing Committee on institutional matters should be created. It could be combined with the Committee negotiating dispute settlement, assuming responsibility for all structural, horizontal and procedural matters. It would also be responsible for securing coherence between different draft treaty texts.

This body is purely governmental and fully integrated into the regular decision-making process of the WTO. It would assume the responsibility to prepare treaty texts and decisions relating to horizontal structural issues. Matters pertaining to special committees would remain with these bodies, but mutual interaction and consultation should be assured.

IV. Conclusion

It is hoped that the paper may stimulate discussion on a proper structure-substance pairing in the WTO. Different avenues are possible, and other models than briefly sketched here are conceivable. The need for it can hardly be disputed. The multilateral system no longer can afford to leave horizontal issues aside due to a lack of appropriate fora for debate and decision-making.

Members with a keen systemic interest and a stake in the future of the WTO should support this effort and launch appropriate initiatives.

For a start, the DG should be encouraged to form a study group which would submit suggestions how to proceed and explore options to create an appropriate architecture capable to deal in detail with horizontal issues.
