Functioning of the WTO
Mapping the Challenges and asking the Hard Questions

Background Paper
ICTSD-WTI Expert Group Meeting,
E-15 Initiative
Geneva, 28 February-1 March 2013

Manfred Elsig, World Trade Institute, University of Bern
Jappe Eckhardt, World Trade Institute, University of Bern
Maura Iliuteanu, World Trade Institute, University of Bern¹

Not for citation – first draft

¹ Manfred Elsig is Associate Professor in International Relations, Jappe Eckhardt is a Post-Doctoral Fellow, and Maura Iliuteanu is a Research Assistant at the World Trade Institute. We wish to thank Christophe Bellmann for valuable comments.
1. INTRODUCTION

The World Trade Organization (WTO) is a relatively young organization. Created at the end of the Uruguay Round negotiations, it became operational in 1995. The work of the WTO can be divided into three functional areas. First, the institution acts as a platform for trade negotiations; second, it administrates the regime (which includes implementation of commitments, providing training, technical assistance and disseminating information based on research activities); third, it offers a dispute settlement mechanism. Of the three functions, the first had been the most important; however, over time the other functions have gained in importance and, most recently, dispute settlement has become the prime focus for action. Scholars have talked in this context of an emerging asymmetry between rule making and rule interpretation that threatens the overall balance of the organization.

Given that the organization has been in existence for a rather short time, in its current form, it is surprising that academia and many trade experts have devoted so much effort to analysing its work and putting forward numerous suggestions on how to improve processes and outcomes. The reason for this significant level of attention is that the multilateral system, with the WTO at its centre, matters for nations and their citizens. The WTO had become the poster child of global economic governance. However, perceptions of its role and impact have changed over time. While in the late 1990s, the public perception was heavily influenced by an alleged pro-free trade discourse, illustrated by the street protests in Seattle at the WTO’s third Ministerial Meeting in 1999, the past ten years, characterized by a stalled trade round, have led to concerns about the overall health of the system due to lack of performance (Elsig 2010). While in the late 1990s, protesters gathered in front of the WTO “headquarters” to voice discontent, today the organization risks becoming marginalised in providing regulatory solutions, as trade negotiations have moved from the multilateral level to regional, plurilateral and bilateral level fora.

This background paper takes stock of WTO governance, with a particular focus on how the WTO provides new or updated rules to address the trade challenges of the twenty-first century. Section 2 describes the current context and discusses a number of key parameters that have changed in recent years and that directly impact on how the WTO does business. Section 3 picks out three areas (the negotiation function, the behind-the-scenes work of Committees, and the interaction between the private sector and the WTO). It reviews the literature, presents key debates and puts forward a set of questions for discussion. Section 4 concludes.
2. SETTING THE CONTEXT: CHALLENGES TO MULTILATERALISM IN GLOBAL TRADE REGULATION

The Role of the WTO

What is the role of the multilateral trading system with an international economic organization at its centre? There are various responses to this question. The dominant economic theory suggests that institutions assist in lowering barriers to trade by addressing the temptation of important trading nations to free-ride (Bagwell and Staiger 2002). States have an incentive to cheat and economic institutions such as the WTO help bring mutual gains for the participating actors. The international law literature sees the purpose of the WTO as providing predictability and fostering the rule of law, at times providing for constitution-like protection of rights (WTO 2007). The mainstream view in international relations is of an organization that helps address free-riding, provides transparency and by doing so increases compliance (and therefore stability of trade relations) (Keohane 1984). One key feature is that it helps constrain the misuse of power (Grant and Keohane 2005). Among the WTO membership, the expectations also vary greatly. At one extreme there is the notion that the WTO should mainly function as a forum for international cooperation to deal with the conflicting mercantilist interests of its members. In which case, the main objective of the system is simply to avoid or resolve conflicts and the best way to do it is by reducing gradually obstacles to trade. At the other extreme, some view the system as an institution that should go beyond the mere arbitration of commercial interests and actually contribute through its rules and disciplines to the advancement of public policy objectives (e.g. development, poverty reduction, sustainability, fairness, etc…). Whatever perspective one takes on the purpose, and therefore the legitimacy of the system (see Elsig 2007), on balance, voices of support trump critical voices as they relate to the need for the multilateral system.

---

2 Realists suggest that powerful states dominate design and outcome of trade organizations to suit their own interests (e.g., Gruber 2000).
Changing parameters for trade negotiations

In the following, we discuss a number of challenges which the WTO system faces. Some are general trends that impact many international economic organizations, while other developments are WTO-specific. Below we list six important parameters that have changed in the past 20 years.

First, the system has moved from a club model to a multi-stakeholder model for governing trade relations (picture 1). The world trading system was characterised until the 1990s as a club in which trade diplomats met behind closed doors to hammer out solutions to gradually lower barriers to trade. In the 1990s, the organization started to attract the interest of a variety of actors. The creation of the WTO led to a deepening of trade concessions and provided WTO Members with a highly legalized dispute settlement system to support implementation. As a result of this move towards market integration and legalization, many new actors brought their issues and concerns, sometimes only remotely linked to trade, to the WTO. Since the late 1990s, the WTO has undergone an adjustment process in reacting to this increasing scale of public attention. Incrementally, the organization has become more transparent and has worked on its inclusiveness (in particular with internal stakeholders). While it became clear that the old way of doing business would not work in the twenty-first century, the opening up of internal politics to the wider public also has significant costs for the organization (see also Stasavage 2004), as internal discussions are more easily leaked and negotiators’ room for manoeuvre curtailed. Finding the right balance between allowing WTO negotiators some wiggle room and providing a flux of information on the negotiations has proven difficult.

Picture 1: Cartoon by Ingram Pinn portraying the paradigm shift during the WTO Ministerial Meeting in Seattle, 1999.
Second, the General Agreement on Tariffs and Trade (GATT) system created in 1947 was dominated by the US and embedded within a strong liberal consensus among experts (Ikenberry 2006, Ruggie 1982). The GATT system was often characterized as having been set up and managed by a benign hegemon. However, during the last successful trade round, the leadership became more broadly shared. The European Union (EU), represented by the European Commission, started to become more assertive in trade negotiations, while the QUAD group (which included in addition to the transatlantic partners, Japan and Canada) served as an important informal platform for agreeing on major issues enabling the round to move forward. Today “the balance of power” has shifted towards emerging markets. This shift is predicted to further increase when focusing on trade and gross domestic product (GDP) data (see figure 1). We have clearly moved from a bipolar trade world in the 1980s to a multipolar trade world today. In particular China, Brazil and India play an important role in the system, acting on their own or as part of coalitions (Narlikar 2011). The impasse of the Doha Round is not so much a result of transatlantic disagreement as a situation in which highly industrialized countries and large developing countries have disagreed over the exact degree of market access and protection of vulnerable sectors of the economy (e.g. the US–India stand-off over a special safeguard mechanism in the agricultural sector). The inner core of countries trying to advance the negotiation agenda informally has grown to about seven or eight countries (US, EU, Japan, Canada, China, India, Brazil, and Australia). The number of concentric circles of decisions-making have further increased.

![Figure 1: World Bank simulations](image)

3 For a game-theoretical discussion of the negotiation deadlock, see Elsig and Dupont (2012b).
Third, the new preferential trade agreement landscape offers a challenge to the organization. Many countries have turned their attention towards this type of negotiation venue, driven largely by exporter discrimination concerns (Dür 2007, Manger 2009, Elsig and Dupont 2012a). As a consequence, if countries improve selected market access through small group deals, the appetite for negotiating ambitious multilateral solutions might well decrease. In particular, initiatives such as the Trans-Pacific-Partnership Agreement (TPP) and the idea of launching an EU–US free trade zone show new potential sources of discrimination on the horizon. This will most likely lead to additional dynamics among states to remedy potential disadvantages emanating from these agreements. We may not see many new preferential trade agreements in the years to come, but we may see efforts to update existing ones. Whatever, the complementarity to the multilateral trading system, potential substitution effects, or emerging discrimination, this “new regionalism” will require a different response from the WTO than what we currently witness under existing procedures.

Fourth, the WTO is faced with the legacy of the grand bargain (market access for developing countries vs. services/intellectual property rights for developed countries) of the Uruguay Round described by Sylvia Ostry (2002). For many developing countries, the effects on trade

Figure 2: PTAs over time (Agreements by year, and cumulative number), from Dür et al. 2013.
flows (and the lack thereof) have led to the perception of an asymmetric deal where many countries cannot reap the benefits resulting from the original bargain. In addition, many low-income developing countries still struggle to implement their WTO obligations. This phenomenon has further increased the expectation held by a large group of developing countries that the Doha Round will need to deliver on development. These expectations meet demands by industrialized countries to improve market access in developing countries. Therefore, it is difficult for the WTO to deliver, given the stark differences in countries’ expectations of the round. This unfolding expectation-capacity gap looms large in the current environment of negotiations. The growing demands by developing countries also translate into more voice and participation (at least in the formal meetings) by an increasing group of engaged state representatives from the South. Figure 3 shows how the number of GATT/WTO Members from both developing and developed countries has increased over time. In addition to the growth of overall numbers, the average size of WTO missions has also increased, which leads to more active participation in the system (Elsig 2011).

**Figure 3: Number of GATT/WTO Members, from Elsig and Cottier 2011.**

Fifth, we witness important changes in the way goods production and services provisions are organized across borders. The increasing reliance on production networks and outsourcing leads to a growing importance of the existing behind-the-border rules. This creates new
challenges in the negotiation process. While in the early days of multilateral trade liberalization, progress in negotiations occurred within a framework of reciprocal lowering of trade barriers, such as tariffs (a so-called form of negative integration), we have now moved towards addressing barriers that exist behind the border. These obstacles range from non-tariff barriers to specific investment clauses, different intellectual property rights regimes and diverging competition norms (WTO 2011). The unfolding challenge consists of finding the optimal degree of positive integration (in agreeing standards that are acceptable to all parties involved). This type of situation resembles a more difficult type of cooperation problem (Aggarwal and Dupont 2008). Figure 4 illustrates such non-tariff barriers for the EU and the US. It may prove difficult to find one-size-fits-all norms for the various measures related to domestic regulation that affect trade.

![Figure 4: Non-tariff measures facing US and EU exporters, 2009](source: Martinez et al. (2009)).

Sixth, we deal with a somewhat unintended consequence of legalization. The enforcement mechanism of the WTO (“the jewel in the crown”) has led to dynamics that potentially hinder progress in trade negotiations. Under the shadow of a strong dispute settlement system, where concessions can actually be enforced, parties are reluctant to commit to future deals, and this has important distributional consequences as domestic interest groups grow more vigilant.
(Goldstein and Martin 2000). In addition, the long shadow of cooperation (Fearon 1998), leads to even more value-claiming negotiation tactics that hinder quick progress in negotiations. The international relations literature has been quite sceptical about the legalization leap that occurred during the Uruguay Round and also some Members of the Appellate Body voice discomfort about having the power to rule while no legislative response is easily available for WTO Members (Ehlermann 2003).

3. ADRESSING GOVERNANCE ISSUES

There have been many contributions on the role of the WTO; most prominently two expert groups have assessed the WTO: the so-called Sutherland Group (WTO 2004) and The Warwick Commission (2007). In addition, there are numerous contributions by experts and scholars that focus on issues related to governance (for example Deere-Birkbeck and Monagle 2009, Steger 2009, Cottier and Elsig 2011, Narlikar et al. 2012, Meléndez-Ortiz et al. 2012).

In the following, we focus on three areas where the E-15 initiative aims to stimulate discussion with a view to making a contribution. We provide a short overview of key issues, address how the WTO a system has been reacting to challenges and put forward some ideas in the form of questions to be further pursued and fleshed out.

The negotiation function of the WTO

For a long time, it was conventional wisdom that the negotiation function is the most important activity of the WTO within its mandate. Now that we are twelve years into the Doha Round, this statement regrettably needs some qualification. In any event, the WTO has produced few outcomes based on negotiations since the late 1990s when it concluded the Information Technology Agreement, the Basic Telecom Agreement, and the Financial Services Agreements, which were mainly characterized by a “critical mass” approach. In addition, a part of the membership negotiated and concluded a plurilateral, club-like agreement on public procurement. These outcomes resulted from Uruguay Round left-overs that were successfully tackled. The Doha Round, however, which started in 2001, has been deadlocked in recent years.
What has changed?
The first question is whether the negotiation process in the Doha Round differs from that of the Uruguay Round? What can be observed is that there is more participation, particularly by developing countries. The information asymmetry between different contracting parties is also less significant, expertise is more widely spread among the membership and the formal small group meetings allow for broader participation reflecting the interests of additional parties. There seems to be greater inclusiveness, yet, not surprisingly, many deals continue to be discussed in informal small group meetings, mostly gathering outside the WTO premises. Small group outcomes are still pivotal for success, but are not sufficient for progress to be made. Before agreement in the core group can be multilateralized in the Geneva process, opportunities need to be provided for input from the membership at large. Judging from the evolving processes, one could argue that the system has incrementally adjusted (without rule changes) to demands for more participation. Also, there has been less criticism about lack of inclusiveness than in the past.

While many outside experts have lamented the slow progress in negotiations, there has been little debate about this within the system. The Ministerial Conference in 2009 was set up partially to review WTO governance issues; however, only a few countries made formal submissions and those that were presented remained largely general in nature and did not lead to much engagement and discussion in the Ministerial gatherings.

Is the decision-making triangle incompatible?
The set-up and rules for negotiations have come under criticism about the lack of progress. While many of the challenges described in section 2 might to a large extent explain the lack of movement in the negotiations, the institutional setting has also come under more scrutiny in academia and among practitioners and has been pinpointed as an additional factor that inhibits progress.

Elsig and Cottier (2011) picture the current system as relying on three pillars: the single-undertaking, consensus-decision making and the member-driven character (see figure 5). They argue that this triangle has become incompatible. Using a counterfactual argument, they investigate the effects of loosening one of the three pillars. They investigate what the effects of this might be for three different scenarios. In scenario one, the WTO gives up a strict reading of the single undertaking and moves towards a system that allows for forms of variable geometry. Of the proposals that have been put forward, the critical mass initiative has received most attention. Other proposals included the possibility to allow for early harvest or
moving towards a legislative system where issues would be taken up as they arise. Scenario two would foresee a system in which the consensus principle would be weakened by moving towards qualified majorities in selected negotiation areas. While key decisions could still be taken by consensus, other lower-level (or secondary) decisions could be negotiated under the shadow of some form of voting (e.g. Cottier 2010). Finally, the third scenario assumes that a big obstacle to tabling concessions rests on sovereignty concerns embodied in the member-driven character of the organization. This reluctance to delegate keeps the autonomy of chairs in the negotiations (who are recruited among the membership) limited. In addition, member dominance keeps the WTO Secretariat (as a potential representative of a public good) on the sidelines in the negotiation process. Are there ways to empower some actors to address the problem of lack of incentives for individual members to table concessions and move from value claiming to value creating negotiation strategies (see also Odell 2009)?

![Figure 5: The incompatible triangle, adapted from Elsig and Cottier 2011.](image)

**Reform proposals?**

So far most energy has gone into the discussion on experimenting with ways to abandon the single undertaking approach. The critical mass approach has been advocated by a number of experts (e.g. Warwick Commission 2007). The key question centres around finding the right balance for those who want to move forward in their attempt to liberalize without creating negative effects on those not participating. This idea has already been described in the Sutherland Report (WTO 2004: 38):
“[T]here should be a re-examination of the principle of plurilateral approaches to WTO negotiations. This should pay particularly sensitive attention to the problems that those not choosing to participate might face. Further, the approach should not permit small groups of members to bring into the WTO issues which are strongly and consistently opposed by substantial sections of the rest of the membership.”

- So the first question is about the design of variable geometry. What is the difference between plurilaterals and critical-mass approaches and how do these differ from sector approaches that are de-linked from the WTO proper (e.g. the new negotiations on an international services agreement)? Which approach is most suitable for what type of regulatory issue and how should processes be designed (see also Hoekman 2012 as to the role of MFN)?

However many other ideas that have received less attention could be worth exploring, including the following:

- The WTO has a well-trained corps of trade experts. The Sutherland Report (WTO 2004) has already suggested that the WTO “needs a convincing and persistent voice of its own” and it sees the Secretariat as an actor to actively promote WTO principles. In more detail: how could the Secretariat’s expertise and institutional memory be used more efficiently? Might the Secretariat be mandated more often to independently prepare reports and papers on behalf of WTO Members? In the negotiation process, how can the Secretariat, as the guardian of the treaties, be given a more prominent role, such as by chairing sub-groups that are asked to prepare draft texts?

- A key role in the negotiations is held by the Chairs of the various negotiating Committees. WTO Ambassadors are usually selected to chair a group. The question is how the Chairs can be further empowered by the WTO Membership to more actively engage in searching for solutions and suggesting, in a personal capacity, policy options to be pursued. Is the support by the WTO Secretariat sufficient or should more assistance be institutionalized? Could each Chair be supported by deputy chairs and be allocated more resources?

- Is it necessary that all decisions are taken by consensus? Could we envisage moving towards a system that would allow some form of qualified voting for a well-defined
spectrum of decisions (Cottier and Takenoshita 2003)? The Sutherland Report (WTO 2004) has already suggested studying the problems “associated with achieving consensus”. As a first step, it suggests that if Members hold out against a ‘broad consensus’, they need to certify that they do so only to protect a ‘vital national interest’. What might be other mechanisms to constrain the use of veto powers?

- Is there a way to re-launch the idea of either geographical or functional groups or of allocating more resources to these groups? Should the Membership move towards a system of formal recognition of coalitions (Narlikar 2011)? Could there be an advisory council composed of representatives of the regions and established groups within the WTO which would provide input into the negotiations?

- How can we get more buy-in to the decision-making procedures by the Trade Ministries based in the capitals? Can more formalized (or informal) processes be created and specific roles assigned to Trade Ministers? If lack of leadership is an often cited obstacle to progress, could it be envisaged that leaders be brought into the process more actively? The Sutherland Report has already proposed to set up five-yearly summit meetings, annual Ministerial meetings and quarterly meetings of high-level officials. Is this feasible and what would be some of the advantages and disadvantages of an increase in interaction?

- How can we further empower developing countries’ participation while allowing for certain groups to move forward more quickly? Can we envisage a type of graduation system (e.g. Cottier 2006) where obligations kick in after the countries’ competitive industries have reached a certain threshold? Put differently, could the discussion move away from country-related development indicators to industry-specific progress?

**The Role of Committees: Information Exchange and “Norm” Elaboration**

In the shadow of the stalled negotiations, a second large area of WTO activity occurs within numerous WTO Committees. While the mandates of the regular or special Committees might differ, they all operate towards managing the regime. They do so by exchanging information, collecting data, overseeing notification processes where WTO Members inform each other about national developments, and in particular by assisting in implementing the WTO
obligations which parties entered into. In addition, these interactions might often lead to an exchange of views on best practices and eventually to the elaboration of new norms. An interesting question is how the work of regular Committees has been impacted by the stalled round and to what degree various Committees could be used as platforms to re-energize the interest in certain areas of trade regulation. What are the possible ways to strengthen the work of the regular WTO committees enabling them to escape a business-as-usual approach?

Important in all Committees is the focus on increasing transparency about states’ trade policy measures. While some Committees are actively overseeing classical notification requirements about planned regulatory reforms (e.g. the TBT for technical standards and the SPS Committee on sanitary and phytosanitary measures), the Committees also allow for discussion and reflection. This latter function is important in Committees; however, the mandates are not always clear as to the degree to which discussion should lead to more deliberation and eventually to the elaboration of new shared norms. The question arises whether and how regular committees could initiate a discussion on pressing challenges which are not really addressed in the negotiations (e.g. climate change and trade, exchange rate, high and volatile food prices, etc). While the focus of the regular committees is on compliance, what would be needed to use existing institutional venues to go beyond this role and offer a more deliberative function?

Regime management in the background: Gap in research

What is puzzling is the lack of research into the functioning of WTO Committees. Very few attempts have been made to systematically study these Committees. Lang and Scott (2009) emphasize the potential of Committee work to create shared knowledge which could lead to the elaboration of new shared norms. Most contributions focus on the Trade Policy Review Committee and suggest a widening of its mandate (e.g. Chaisse and Matsushita 2013, see also Abu-Ghazaleh 2013), to bring in more stakeholders (Hoekman 2012), to be tougher on the WTO Members (e.g. Keesing 1998, Zahrnt 2009) or to discuss the reports in the countries concerned (Zahrnt 2009). Another Committee that has received attention is the Regional Trade Agreements (RTA) Committee. Given the importance of the growing numbers of

---

4 For an overview of the Committee structure, see Appendix 1.
5 For a sceptical view, see Steinberg 2009.
PTAs, the Membership has given this Committee new tasks, most notably the development of a transparency mechanism in 2006. Bridges wrote on 5 July 2006:\textsuperscript{6}

The draft decision sets out a series of notification requirements for Members that are signatories to RTAs. They will be required to provide the WTO with detailed information on the signing and implementation of deals, covering, for example, the pact’s scope, rules of origin requirements and specific tariff concessions. Individual RTA members will have to provide import data for each other as well as the rest of the world.

In addition, the Secretariat was asked to prepare “factual presentations (containing no ‘value judgments’)” on each agreement. Finally the new mechanisms also called for formal meetings to discuss these agreements. Notwithstanding progress in the work of the Committee (and a re-evaluation), it remains to be seen to what extent the increasing transparency about the PTAs leads to real questioning of the WTO compatibility of some of the agreements.

\textit{Reform Proposals?}

Some of the work which involves Committees has undergone assessment; however, few of these assessments have been conducted by external actors (e.g., review of the technical assistance and capacity building programmes of the WTO).\textsuperscript{7} In the area of the Trade Policy Review Mechanism (TPRM), we have witnessed a number of procedural adjustments (see also Laird and Valdes 2012). In the run-up to the 2009 Ministerial Conference, some proposals were put on the table to strengthen the work of WTO Committees. In particular, India suggested a number of discussion points.\textsuperscript{8} These covered a variety of issues such as the need to enhance the WTO trade information system, most prominently the Trade Policy Review Body (TPRB) process. But it also suggested that the Secretariat “may make factual presentations on developments in various members on their disciplines covered by a committee”. Moreover, India suggested inviting outside experts to present their views and advocated a stronger mandate for monitoring developments in preferential trade agreements and for developing non-binding best practice guidelines for negotiating new agreements. Finally, it suggested the establishment of an “omnibus legal system” that would address all forms of preferential market access for LDCs in a coherent way.

\textsuperscript{7} Strategic Review of WTO-provided Training and Technical Assistance (TRTA), WT/COMTD/W/152 and WT/COMTD/W/153.
\textsuperscript{8} WT/GC/W/605, 2 July 2009.
However, besides the TPRM Committee and the RTA Committee, we know very little about the functioning of many of the other Committees (for a list, see appendix) and the potential and prospects for reform. Given that this area of hidden WTO governance has not received great attention, we propose a set of questions for debate:

- Information and transparency are important features of the WTO regime. How can the work of Committees be improved towards making the most out of the information collected?
- Committees also serve the important role of exchanging information about best practices. How can the level of quality in these Committees be improved, e.g. by bringing in experts from capitals? What can be done to allow for “learning” in an environment that is buffered from the actual negotiations?
- What needs to be done to make interaction in the Committees more oriented towards the goal of finding consensus in norm interpretation and building an understanding of the need to elaborate new norms? How can the set-up and support be improved?
- Related to above point regarding new norms, how can regular Committees also serve more as forum to address new issues/challenges related to their respective topics?
- Should there be an external assessment of the WTO Committees’ work in order to pinpoint strengths and weaknesses and allow for a more informed discussion? What can be done in specific Committees in terms of mandates and procedures?

The WTO and the Private Sector: the business dimension of trade

During the past decade, the willingness of private sector actors to invest time and resources in multilateral trade negotiations seems to have eroded. This increasing ambivalence towards multilateral trade reforms is due to a combination of complacency (i.e. taking the free flow of goods and services for granted), discontent with the slow pace of WTO discussions in general and the standstill of the Doha round in particular, and a growing feeling that the WTO does not effectively responds to todays’ business concerns, like the operations of global supply chains and increasing importance of electronic commerce. As a result, private actors have
been actively pushing national policy makers to explore venues other than the WTO to fulfill their trade policy needs. Especially notable in this regard is the shift in lobbying efforts from multilateral trade deals to bilateral agreements (Davis 2009, Drezner 2006), as the latter take much less time to negotiate and are usually shaped in such a way that they include more of the issues regarded important by the business community.

If the WTO wants to reverse this trend of private actors partly turning their back on multilateralism, it seems vital for the WTO to engage much more than it does at present with large and small businesses in both developed and developing countries. This is important for several reasons. For one, private actors’ involvement and support could play a crucial role in re-energizing the Doha Round. Second, a more active involvement of private actors could make the WTO more effective and strengthen its legitimacy. After all, by taking on board the input of businesses, the WTO would involve one of the groups which are most influenced by decisions on global trade rules. Third, it can help to promote an understanding of the core principles of the WTO if private actors have the feeling that their interests and concerns are taken into account. Fourth, it would enable the WTO to tap the expertise and knowledge of private actors. By engaging more with private actors, the WTO has the opportunity to enrich the nature and the quality of the information it receives at all stages of WTO decision making and in all functions the WTO serves.

The best way to ensure a more active involvement of private actors with the WTO is to set up a system which enables the WTO and the private sector to interact much more systematically and in a more structured manner than is currently the case.

The present state of private sector involvement

Before we turn to our discussion about what can be improved in terms of the interaction between the WTO and private actors, it is important to note that the WTO and its Members seem to acknowledge that transparency and some degree of active engagement with business, and civil society more broadly are in the interests of the organization. The WTO has included a section on the relations with societal interests in its charter. Article V:2 of the Marrakesh Agreement states that the General Council is authorized to “make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.” In other words, the WTO and the Members have acknowledged, ever since the very beginning, that the participation of private actors is perfectly in line with the inter-governmental character of the WTO (WTO 2004). However,
the current engagement is essentially based on a series of ad hoc mechanisms and practices but the system has no permanent formal mechanisms.

Since the adoption of the Marrakesh agreement (and the establishment of the WTO in 1995) the WTO and its Members have taken several initiatives to encourage a greater level of engagement from private actors (WTO 2004, Deere-Birkbeck 2012). In 1996, for instance, the General Council adopted guidelines which were aimed at, among other things, enhancing transparency and developing communication with private actors and other non-state actors. What is more, over the years the WTO has organized an increasing number of outreach events in which it engages with private actors, such as briefings for non-state actors on WTO council and committee meetings, plenary sessions of ministerial conferences and symposia on specific issues, which private actors and other non-state actors can attend, and the annual public forum, which the WTO has been hosting since 2001 (between 2001 and 2005 it was called the public symposium).

Another sign that the WTO is reaching out to non-state actors is that, as a result of the decision by the General Council in 2002 to derestrict documents, many official documents are now made accessible to non-state actors at the same time as they become available to Members. This means that WTO negotiations can now be followed through first-hand sources by private actors; this makes the WTO negotiations much more transparent than before. At the same time, online outreach has improved as well and the number of online forums to which private actors and other non-state actors are invited has increased steadily. Finally, the topic of transparency and private actor involvement is also increasingly discussed during official meetings, such as ministerial conferences. To illustrate this point, in 2005 the WTO Ministerial Declaration (Hong Kong) included the following statement (quoted in Deere-Birkbeck and Monagle 2009):

[....] We invite the Director-General to reinforce the partnerships and coordination with other agencies and regional bodies in the design and implementation of technical assistance programmes, so that all dimensions of trade-related capacity building are addressed, in a manner coherent with the programmes of other providers. In particular, we encourage all Members to cooperate with the International Trade Centre, which complements WTO work by providing a platform for business to interact with trade negotiators, and practical advice for small and medium sized enterprises (SMEs) to benefit from the multilateral trading system.
Apart from these initiatives taken by the WTO to increase transparency and invite private actors to public events, the business community is also involved in WTO affairs and decision making through other (more informal) channels. That is, firms and business groups may try to influence WTO decision making by lobbying decision makers at the national and international level. Although most scholars have focused on political mobilization and influence of firms on national and regional trade policy making (most notably in the EU and the US) an increasing body of literature also looks at lobbying in the context of the WTO. Some scholars have looked, for instance, at the role of private actors during WTO trade rounds, like the current Doha Round (e.g. Poletti 2012), while others have focused on the involvement and influence of firms in WTO litigation and adjudication (Davis 2012, Shaffer 2003, 2006). All these studies show that industry lobbying within the WTO takes place on a large scale and that private actors, under certain circumstances, influence WTO decision making.

Despite the efforts by the WTO to engage with private actors and the fact that industry lobbying is widespread in WTO affairs, the multilateral trading system still lacks, in the words of Deere-Birkbeck (2012: 123), “adequate routine mechanisms and processes for the constructive engagement of stakeholders, whether from unions, nongovernmental organizations, academia, or the business sector, in ways that feed into decision-making processes to ensure trade rules respond to public concerns and expectations.”

If one wants to put in place such routine mechanisms and processes for engaging private actors in WTO affairs, one of the key questions is who, within the WTO, should be responsible for developing and maintaining relations with private actors? Is this the responsibility of the WTO itself – and if so, should it be done by the Secretariat or the External Relations Division – or should the Member governments shoulder most of the responsibility for establishing and retaining contacts with private actors? For Bhagwati (2001) the answer to this question is straightforward: the Members are responsible. He sees no rationale for giving non-state actors a role in WTO decision making independent of governments. In the Sutherland report (WTO 2004) we find a somewhat more nuanced answer to the question of who bears the responsibility of engaging non-state actors in multilateral trade policy matters. Although it is suggested that the primary responsibility rests with the Members, it is acknowledged that the WTO itself also has a role to play when it comes to relations with societal interests. However, it is up to the membership to develop clear objectives for the WTO Secretariat’s (i.e. not the External Relations Division’s) relations with non-state actors.
Reform proposals?

Even though private actors are involved in WTO affairs in many ways, there is no WTO agreement or any document stating the exact rights and responsibilities of societal interests in its dealings with the WTO. By comparison, many other intergovernmental organizations have elaborated formal mechanisms to deal with non-governmental organizations (e.g. formal accreditation mechanisms, often backed by financial resources). This lack of clarity has spurred debates among policy-makers (inside and outside the WTO), academics and others about how exactly societal interests could and should be engaged in the work of the WTO and who should take the lead in this process. So far this debate has not led to any concrete steps towards a more active and formalized involvement of private actors in WTO affairs. The following questions could be further reflected upon:

- The WTO system serves various functions (e.g., negotiation, capacity-building, problem-solving, monitoring, research and information-exchange, and dispute settlement) and each of these functions “may demand different roles for the WTO Secretariat, its Director-General, coalitions of WTO Members, and non-state stakeholders, whether from business, academia, or civil society” (Deere-Birkbeck, 2009). This leads to the question of which decision-making processes and functions of the WTO private actors should become involved in. In the literature one can find various proposals regarding the exact role private actors should play within the WTO system. Most of these proposals focus on mechanisms for receiving input from business groups. Steger and Shpilkovskaya (2009), for instance, suggest allowing non-state actors (like private actors) to be observers during (committee) meetings. Others suggest involving businesses in the WTO’s research work (Ostry, 2002) or consulting the business community during the election of a new Director-General (DG) (Deere-Birkbeck, 2009). Still others see a role for private actors in dispute settlement, for instance by opening up the dispute settlement system to submissions and consideration of amicus curiae briefs by non-state actors (Warwick Commission 2007) or giving firms the standing to bring trader-state cases to the dispute settlement system (Hufbauer and Scott 2012).

- There are also more far-reaching proposals which centre around the creation of permanent arrangements for private actors to become involved in WTO decision
making. Abu-Ghazaleh (2013), for instance, suggests establishing a Private Sector Advisory Committee, made up of CEO’s and senior business leaders, which could work with the DG and the secretariat and could advise Members on specific issues. Stoler (2012) is even more specific and proposes the creation of a “Working Party on Coherent Approaches to 21st Century Issues.” In this working party, in which participation by relevant international business groups should be facilitated, questions regarding WTO-Plus trade agreement provisions in the WTO could be discussed.

Another issue raised in this regard is whether private actors should also be more directly involved in the trade negotiation rounds. Of course Members can already decide who to pick for their negotiating team and they have the freedom to include people from the business community (Bhagwati 2001). In addition, governments can inform and consult business groups of their own choosing before, during and after the negotiations. Should the WTO go a step further by allowing private actors to take part in negotiations independent of governments or add parallel (negotiation) tracks in order to give business the chance to become more involved? Before such arrangements are implemented, questions regarding confidentiality and the limits of transparency should be answered first. It is also important to look at the logistical challenges and the likelihood of reaching agreements if, in addition to Members, large numbers of private actors were also to take part in WTO negotiations.

Another issue often mentioned in discussions on the role of private actors in the WTO, is the financial and administrative burden this puts on the WTO. Other international organizations which have developed extensive contact with private actors and other societal interests (e.g. the World Bank) made large amounts of financial and human resources available to set up these arrangements. The WTO has a tight budget and few people for its outreach work, which is a constraint on the extent and forms of engagement WTO can undertake with private actors (WTO 2004). A pertinent question is whether the financial means as well as the human resources available for the WTO’s dealings with private actors should be increased?

Another issue that could be explored is which private actors should be involved. Should this be only an umbrella organization or also individual firms? And on the basis of what criteria and by whom should this selection, if at all, be made?
Finally, it is worth exploring the question whether private actors should be treated differently than other societal interests (e.g. NGOs).

4. CONCLUDING REMARKS

This background paper presented some of the key challenges for governing the WTO system and has focused in particular on the negotiation function of the organization, the role of the Committees and the interaction between the WTO system and the private sector. It is meant as a document to be used to take stock and to launch debates about reform in these three areas.

References


Appendix 1: WTO Councils, Committees and Working Groups

General Structure
The daily work of the WTO falls within the province of the General Council. This body is composed of representatives of all Members: albeit under different terms, it also meets as the Dispute Settlement Body and the Trade Policy Review Body, and carries out the diverse functions and tasks assigned to it under the Marrakesh Agreement and the Dispute Settlement Understanding (for the Dispute Settlement Body).

At the level below the General Council, and operating under its guidance, there are three more Councils, each responsible for a general area of trade: the Council for Trade in Goods, the Council for Trade in Services and the Council for Trade for Trade-Related Aspects of Intellectual Property Rights. These Councils perform the tasks the General Council and their associated agreements entrusted them with. Each body is entitled to establish its own rules of procedure, subject solely to the approval of the General Council.

Further down the institutional chain, are the subsidiary bodies that each of the aforementioned Councils has the right to establish. In their turn, the subsidiary bodies are entitled to formulate their own rules of procedure, subject to the direct approval of their higher-in-rank Councils.

List of Committees

- Committee on Trade and Environment
- Committee on Trade and Development (Subcommittee on Least-Developed Countries)
- Committee on Regional Trade Agreements
- Committee on Balance of Payments Restrictions
- Committee on Budget, Finance and Administration
- Reporting directly to the General Council
  - Committee on Market Access
  - Committee on Agriculture
  - Committee on Sanitary and Phytosanitary Measures
  - Committee on Technical Barriers to Trade
  - Committee on Subsidies and Countervailing Measures
  - Committee on Anti-Dumping Practices
Committee on Customs Valuation
Committee on Rules of Origin
Committee on Import Licensing
Committee on Trade-Related Investment Measures
Committee on Safeguards
  ▪ Reporting directly to the Council for Trade in Goods, and to the General Council
Committee on Trade in Financial Services
Committee on Specific Commitments
  ▪ Reporting directly to the Council for Trade in Services, and to the General Council
Information Technology Agreement Committee
  ▪ Informs the General Council or Goods Council of its activities
Committee on Trade in Civil Aircraft
Government Procurement Committee
  ▪ Informs the General Council of its activities

Working Groups

In addition to Councils and Committees, the work of the WTO also takes place in temporary subsidiary bodies named working groups.

Working Group on the Relationship between Trade and Investment;
Working Group on the Interaction between Trade and Competition Policy;
Working Group on Transparency in Government Procurement;
Working Parties on Accession;
Working Party on Preshipment Inspection;
Working Group on Trade, Debt and Finance; and
Working Group on Trade and the Transfer of Technology.

Source: http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_02_e.htm