Still foggy after all these years: Reform proposals for the WTO

Robert Wolfe
Associate Professor
School of Policy Studies
Queen’s University
Kingston, Ontario
J7L 3N6
(613) 533-6689 fax 533-2135
wolfer@post.queensu.ca

This paper was prepared for Alexandroff, Alan S. and Raj Bhala, eds, Trends in World Trade Policy: Essays in Honor of Sylvia Ostry (Durham, NC: Carolina Academic Press). I am grateful for the insights of the WTO officials and national delegates who patiently answered my questions in confidential interviews conducted in June and July 2004.
After the collapse of the WTO’s Cancún Ministerial Conference in September 2003, many people thought that the difficulty of new negotiations might be symptomatic of deep structural problems, or at least that the institution was in desperate need of reform. Does the explanation of the WTO’s difficulties lie in the substantive policy challenges associated with globalization, or in a mismatch between institutional tasks and capabilities? Is the greater participation of developing countries slowing things down? Justice demands the genuine inclusion of all Members, but no organization of close to 150 participants will ever move quickly, or give an equal voice to all. The trillions of dollars in annual trade in goods and services associated with globalization take place within the dense institutional structure of the global trading system, but is the institutional basis of this system centred on the WTO sustainable?

Sylvia Ostry has had longer experience than most with these issues—as a practitioner she had a lead role in establishing and pushing forward the Uruguay Round Negotiating Group on the Functioning of the GATT System (Ostry, 1997, p. 192), and institutional matters have remained a constant theme in her research and commentary (Ostry, 1987; 1992; 1998; 2001). The WTO is a much more substantial institution than the GATT, and its procedures are more sophisticated than they were at the outset but, Ostry has argued, it is now clear that it was a mistake to create an organization with a strong dispute settlement system, weak legislative capacity, and no executive committee to provide leadership. The work of the FOGS group, she would argue, remains unfinished.

I divide the questions about WTO reform into three groups for analysis. The first deals with how substance and procedure are related in the structure of negotiations and agreements: can the institution cope with the substance of its agenda? Should the Single Undertaking be dropped, allowing for variable geometry, or a two tier system, perhaps with less reciprocal bargaining? Second, are procedural inadequacies of the WTO in Geneva or at Ministerials a problem? Is the consensus rule a good thing? Is the problem personalities or procedure? Should the Green Room and other informal processes be curtailed? Can Ministerials be better organized? Third, is developing country capacity a constraint on new negotiations or the implementation of new obligations? I will conclude by sketching the policy implications for reform, although unlike the ambitious proposals of many analysts, my suggestions will not be revolutionary. I think that institutions evolve through practice, not grand designs (Wolfe, 2004c), and that trade negotiations are a long slow process of learning, not a straightforward set of bargains—the WTO is therefore always “crossing the river by feeling the stones” (Wolfe, 2004a).

1. Can the WTO cope with the substance of its agenda?

Is the slow pace of WTO negotiations due to inability to agree on the substance of the agenda under current procedures? If it is, does the Single Undertaking make sense any more? At the end of the Uruguay Round, all of the agreements, including all of the revised agreements from the Tokyo Round, were included in the WTO Agreement, which countries could accept or reject only in its entirety, making the WTO explicitly a “Single Undertaking”. This device may
have been introduced at the outset of the Uruguay Round to keep negotiations on services
derailed to those on goods, contra the wishes of Brazil and India, but it served in the end to
keep agriculture harnessed to everything else, contra the wishes of the EU and Japan. Since
Members could never reach agreement sequentially, the Single Undertaking was essential. Now
the device increases the hesitation of developing countries about new negotiations because they
lack the resources to analyze all the issues in real time, yet they are expected to sign all the
results. They recall that a small reference to intellectual property in the Punta del Este
Declaration that launched the Uruguay Round ended in them having to swallow the huge TRIPs
agreement at Marrakech. This multilateral principle may make easy issues take longer, but it
may also force an earlier resolution to tough issues, and it avoids the fragmentation of the trading
system observed after the Tokyo Round. The Single Undertaking only works as a forcing
mechanism, however, because of the implicit corollary: nothing is agreed until everybody agrees.

Is it now impossible for the WTO both to enhance the apparatus of global governance
and to become more universal and inclusive? All Members want to avoid fragmentation as
bilateral trade negotiations and regional deals proliferate, and all Members want to benefit from
globalization while preserving domestic autonomy. By the time the Doha negotiations conclude,
however, the WTO may have more than 170 Members, ranging from giant economies run on
divergent principles, like the USA, the EU and China; through middle-sized but rich countries
like Canada and South Korea; to small poor ones like Uganda and Peru. If the round’s ambitions
are fulfilled, the WTO legal system will be even more complex than it is now. Will it make sense
to have common rights and obligations applicable to such a large and diverse membership? Some
officials argue that a single set of rules is impossible. Is it better to have some formal recognition
that a Member’s capacity to take on rules is linked to its stage of development? Or would it be
better to have a formally unitary set of obligations with opt-outs and “variable geometry”? Perhaps
some rules could be “soft”, meaning subject only to surveillance rather than “hard”,
meaning codified rules subject to the dispute settlement system? The question of which countries
and which issues are in or out arises because of the Single Undertaking. This procedural device
has substantive implications.

While the Single Undertaking does not require everybody to be active on all issues, it
does mean that the “Doha Development Agenda” is not a disconnected series of negotiations but
an integrated “round”. In a September 2003 “think piece” on the implications of Cancún, the
European Commission mused about the possibility of restructuring into a WTO I (multilateral)
and a WTO II ( plurilateral) (EU, 2003). The distinction would allow say trade facilitation to
become part of the Doha negotiations under the Single Undertaking while allowing work to
continue on the other Singapore Issues towards possible agreements among those who are
willing. I think that plurilateral deals are not much use if they exclude the problem countries—as
the current government procurement agreement does, for example. Like regional deals, they
work best with issues that have few world externalities: a bilateral solution to the Canada-USA
softwood lumber dispute would have few commercial implications for other countries but a
change to the underlying trade remedy law that created the dispute would have such an impact on
others that agreement would only be possible in the WTO. The Singapore issues in particular are
ones where the world externalities are bigger than benefits available to any minilateral grouping,
which would be true of most behind-the-border issues. Domestic regulation as a trade issue has
an inherently MFN character: once the legal framework is changed, it is changed for everyone.
Plurilateral deals have little to offer: a round is the only way to create a package large enough for all participants to see themselves in it, one in which negotiators can see all the trade-offs between issues and countries—indeed in which negotiators can see the tradeoffs between import-competing and export interests within a given economy.

The last point is quite important. It is hard to influence the protectionist forces in another country directly—a producer who wants to block imports has little reason to negotiate with foreigners. In the standard political economy arguments, therefore, the supply of protection is determined in domestic politics in bargaining between producer demand and political supply (Magee, Brock and Young, 1989). This picture is incomplete, however, because exporters are also participants in domestic politics, and they are interested in the market access that foreigners have to offer (Sherman, 2002). Modeling domestic politics as a contest helps make sense of reciprocal bargaining in trade negotiations. Reducing one’s own tariffs may be the best economic policy, but reciprocal bargaining allows foreigners to influence domestic politics, creating an incentive for exporters to trump protectionists. Progress in the Doha round, therefore, might require developing country concessions on services, agriculture and Non-Agricultural Market Access (NAMA) designed to get American business to explain to Congress why agriculture subsidies have to be reduced—Senators hear their constituents more clearly than they ever hear foreigners, no matter how valid their claims.

Some analysts wonder nevertheless if there are limits to the reciprocal bargaining norm, given the changing issues on the table. I am dubious, despite the provisions for “less than full reciprocity” in the NAMA section of the Doha declaration (WT/MIN(01)/DEC/W/1). When it seems that bargaining is difficult for an issue new to the system, it could be because the issue is not ripe for bargaining, not that the reciprocity norm is the culprit. I think that bargaining requires known interests, whereas negotiating is a process of learning, of constituting the elements out of which a bargain can be constructed. Market conditions obviously have a major influence on determining issues, actors and strategies in international negotiations (Odell, 2000: Chapter 3). If “traded services” are negligible, states would not create the General Agreement on Trade in Services (GATS); countries that are not large traders of such services may have little interest in such negotiations; countries that have complementary export interests may be allies in a negotiation; and so on. But negotiations also create the idea that “services” are something that can be traded and thus a subject for bargaining. The problem is not reciprocal bargaining, therefore, but that sometimes negotiators have not yet created the conditions under which bargaining can be fruitful.

Other analysts worry that the value of reciprocal bargaining has been diminished by resistance to the kind of cross-issue linkages required by the Single Undertaking, and by the large numbers of small, poor countries who seek exemption from having to offer reciprocity. Many of the poorest countries have no interest in market access negotiations because they benefit from schemes like the General System of Preferences (GSP) or the US African Growth and Opportunities Act (AGOA). Acceptance of these derogations from non-discrimination has been used to buy acquiescence to new negotiations, but attempts to preserve preferences make the Doha round more difficult: the ACP waiver at Doha has proved to be a poisoned chalice.1

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1 EU agreements with the African, Caribbean and Pacific (ACP) states are derogations from WTO norms because they are preferential; the entire Membership must therefore agree to waive the application of
Smaller countries are at a disadvantage anyway, these analysts note, because the practice of negotiating market access bilaterally among “principal suppliers” and then extending the results to all participants through the “most favored nation” principle (MFN) limits the interest of Members with large markets in negotiations with small market Members. Deals negotiated with “principal suppliers” benefit small Members, who can act as free riders, but MFN also hurts them by limiting their ability to negotiate on subjects of greatest interest to them.

My argument for the reciprocity norm, however, goes beyond political economy explanations. If WTO is a central component of global governance, then there are no grounds for saying that its normative framework only applies to some states, or that only some states must or can be full participants. The basic structure of rules should apply to all. If developing countries exempt themselves from active engagement, they will not be playing their part in the continual evolution of the trading system. Discussion will then centre on how a developing country can accommodate itself to the system, rather than on whether the WTO rules make sense for all countries. The EU proposal of May 2004 to give the most vulnerable countries the “round for free” is like issuing non-voting shares in the enterprise, a corporate governance practice now in disrepute.

That said, the WTO has always had a variable geometry. The trading system depends on both equal obligations to ensure openness and differential application to accommodate national public administration. The WTO has many examples of this kind of embedded liberalism compromise between free trade abroad and the welfare state at home (Ruggie, 1982)—in the Agriculture Agreement, for one example, tariffication and the rules on domestic support allow policy difference; for another example, the GATS is inherently a variable geometry system because “specific commitments” are scheduled from the bottom up, and the Basic Telecommunications agreement’s “Reference Paper” contains principles whose implementation differs from country to country. The WTO is a multi-tiered organization. Under a common set of principles, the details can differ for each member. It should be possible in the current negotiations, therefore, to design a trade facilitation principle that does not merely ask developing countries to replicate the administrative law systems of developed states.

Does is matter whether developing countries are fully engaged? Put differently, what difference does WTO make? Andrew Rose thinks that membership does not make much difference (Rose, 2002). China and Vietnam have had extraordinary growth in trade, yet they were not formally bound by the law of the trading system, nor were others bound to apply it to them. Many countries are developing internationally-oriented telecommunications regulatory systems without seeing the need to list the Reference Paper in their GATS schedules. Such arguments notwithstanding, Subramanian and Wei conclude that the GATT/WTO has done a splendid job of promoting trade wherever it was designed to do so and correspondingly failed to promote trade where the design of rules militated against it. The WTO has served to increase industrial country imports substantially, possibly by about 68 percent. But it has done a less good job of increasing the imports of developing countries because developing countries were WTO rules. Agreement to a waiver for the latest ACP deal was a key objective for this large group of poor states at the Doha ministerial, so the waiver was used to buy their acquiescence to other parts of the declaration. Now they are hesitant about market access negotiations that might erode those preferences.
essentially exempted from the system (Subramanian and Wei, 2003). There may be legitimate debate about whether and how WTO as an organization can contribute to development, but there should be little debate on whether participation in the trading system is good for development. And surely there should be no debate about whether rich countries ought to be concerned about development. The Single Undertaking should not be abandoned, and developing countries should not be pushed aside in the interest of moving more quickly.

2. Are procedural inadequacies of the WTO in Geneva or at Ministerials a problem?

The narrative about ministerial failures always begins with procedural problems in the conduct of the meeting. Pascal Lamy, the EU trade commissioner, left Cancún moaning, not for the first time, about WTO’s “medieval” procedures. When people complain about WTO procedure, they usually mean that the procedures are so untransparent that nobody knows what is going on. Or they mean that developing countries cannot possibly attend every relevant meeting. Or that with so many meetings and so many groups to be consulted, nothing gets done. I leave questions of legitimacy aside in this chapter to ask whether WTO procedures aid in finding a consensus. I consider five aspects of the problem: consensus, informality, small groups, ministerial engagement, and trust.

Consensus

All WTO decisions are taken by consensus, an essential diplomatic practice given that virtually all WTO agreements form part of a Single Undertaking that Members must accept or reject in its entirety. Many commentators regret the absence of “legislative” capacity at the WTO, or the apparently ad hoc nature of its processes, especially in light of the supposed strength of the dispute settlement system. I take a differing view. On the one hand, if by “legislative” the hope is for a standing body that could take decisions by majority (weighted) vote, then the analysis is misplaced. It would be pointless to have a vote that would create obligations that sovereign states will not implement. A contractual body like the WTO will never take decisions on that basis, despite the fact that Article IX of the Treaty does allow for decisions by voting.\textsuperscript{2} (The ability to protect sovereignty by denying consensus gives a valued veto to large as well as small Members.) On the other hand, I argue elsewhere (Wolfe, 2004c) that misplaced emphasis on the dispute settlement system obscures other important aspects of the WTO’s institutional architecture. The evolution and interpretation of WTO rules depends on diplomatic negotiation not majority vote or court dictate, which is why the search for consensus remains the central decision-making problem. One result of the Single Undertaking and the consensus rule is variable geometry, in the sense of allowing countries to accept common principles with flexible

\textsuperscript{2} The IMF and the World Bank do not vote much either, perhaps because of the weighted voting rule (Sureda, 2003, p. 572). On how any voting formula can become out-dated, see (Kelkar, Yadav and Chaudhry, 2004).
implementation. Another is the need to design rules that are not one-size-fits-all. Since this
design process is not simple, it places great stress on informal procedures.3

Informality

The task of knowing where the consensus is to be found usually falls on the Chairman of
the relevant WTO body, who is always an official of a Member country. The real business of
learning what matters most to particular Members takes place not in meetings of close to 150
people, but “in the corridors,” meaning all of the occasions, social and otherwise, in and out of
Geneva, when participants have opportunities to talk to each other. Chairs draw from a rich
menu of informal techniques for building consensus, from open-ended consultations with all
Members to one-on-one “confessionals” between the chair and ambassadors. These techniques
are common in most international organizations. Some informal meetings follow established
rules of procedure, but others do not (for a discussion, see Lydon, 1998). Informal meetings of
duly constituted bodies can be announced in advance with a firm agenda, as when the WTO
General Council meets as Heads of Delegation, but other meetings may never be announced.
Some meetings are open to the public, press, and civil society organizations, and some are open
only to a select group of members of the international organization. Some can be private and
unofficial meetings of a regular body that follow many of its normal procedural rules, but with
no written record; others can be ad hoc and unscripted. In the WTO, where the term is in
common usage, “informal” means at a minimum that the meeting is unofficial, or “off the
record”, unlike formal meetings, when all Members may attend, and minutes are taken. Formal
meetings are held only for the record, since much of the work of finding a consensus has already
been done informally. Most formal meetings of officials in Geneva are now mirrored by a larger
number of informal meetings. The 400 formal, official, meetings of WTO bodies in 2001, for
example, were easily exceeded by the 500 informal meetings of which the secretariat was aware
(WTO, 2002b). Indeed many delegates complain that the effort to improve transparency has
succeeded too well, since they now have to attend too many meetings. The General Agreement
to Talk and Talk has become the World Talk Organization, but that is not a bad thing.

Many of informal meetings are held to coordinate the position of coalitions. Developing
countries in particular are now part of many formal and informal groupings with over-lapping
membership. (The origins and success of developing country coalitions during the Uruguay
Round and early years of the WTO are analyzed in Narlikar, 2003.) The effectiveness of these
groups was obvious in Cancún, at least in playing a blocking role—the disparate basis of the
geographic and sectoral coalitions made it easier to oppose than propose. Their coordination in
Cancún was also aided by the personal relationships built up in Geneva, and no doubt at many
ministerial meetings. One study of this informal coordination concludes that efforts to formalize
the system would be a mistake—informality and flexibility serve developing countries well
(Bernal, et al., 2004, p. 27).

3 Indeed the late Ernst Haas argued that international organizations that respond to structural change by
learning (rather than merely adaptation) manage to transcend controversy with compromise found not
though voting but by “consensus” (Haas, 1990, p. 90).
Talking off the record, often in private, is essential. After three days of informal meetings of the agriculture negotiating group at the end of June 2004, the chair provided an informal assessment to a formal session. Sources report that he said he was treading a delicate balance between the need to be transparent and to include everyone in the negotiations, and the need to let difficult ideas develop before exposing them more widely. “A newly planted, delicate flower could wilt and die if it is exposed to too much sunlight,” he said. The more intense the divergent opinion, the more compromise must be explored in private. One delegate told me that as a chair of a negotiating group, he depended on informal meetings because delegates would give real answers to his questions when their views were not on the record. In short, as the EU stressed in its contribution to the 2000 debate on internal transparency, WTO decisions should be made in accordance with the provisions of Article IX of the treaty, but “informal consultations” are an essential part of developing consensus (WTO, 2000a). While some of these consultations are open-ended, many are limited.

Small group meetings

When the numbers of active participants in multilateral trade negotiations increased dramatically in the 1980s, experience confirmed the well-understood proposition that the legitimacy of involving large numbers of participants comes at the expense of the efficiency associated with small numbers (Kahler, 1993). One part of the solution to the consensus puzzle, therefore, is the old technique of holding meetings in smaller groups. One former GATT official called it the “expanding-and-shrinking-concentric-circle-approach,” in which issues may be broached in a plenary, but smaller groups meeting in private do most of the work (Patterson, 1986). During the Kennedy Round of the 1960s, GATT Contracting Parties developed a number of informal negotiating devices. One was the practice of negotiating market access bilaterally among “principal suppliers” and then extending the results to all participants through the “most favored nation” principle (MFN). Given the large difference in economic weights of participants, some major deals began life in small meetings of the most significant participants—the so-called “bridge club” of the USA, the EEC, the United Kingdom, Japan, and Canada. Even then, delegates from smaller Contracting Parties felt excluded (Winham, 1986). Trade rules and domestic policies began to come to the fore in the Tokyo Round, but the decision making structure was still “pyramidal” (Winham, 1992), with the largest players still negotiating agreements among themselves, then discussing the results with others. This “minilateral” process conserves negotiating energy, but makes it impossible for smaller countries to influence the results. Not surprisingly, therefore, most developing countries did not sign the minilateral “codes” that came out of the Tokyo Round. (On the Tokyo Round agreements, see Winham, 1986.)

The other familiar manifestation of the “concentric circles” approach was the gradual emergence of “Green Room” meetings. (This term at WTO for small group meetings comes from Arthur Dunkel’s time as Director-General when he would call a meeting of the most-interested parties to a negotiation in his board room, known from its color as the Green Room. (Blackhurst and Hartridge, 2004, p. 713)) The Director-General still convenes Green Room meetings of ambassadors in advance of major meetings of the Doha round Trade Negotiations Committee (TNC) or the General Council to explore where consensus might be found on thorny issues in a negotiation. At the 1988 Montreal ministerial, contentious issues were first discussed
by small groups of officials, continuing the Geneva Green Rooms, and then by similar limited
groups of ministers (Croome, 1995). The inner circle only became controversial after the first
WTO ministerial in Singapore, when a Green Room of 34 countries left all the other ministers
loudly wondering why they had come. Contrite promises to ensure it would never happen again
led to no changes (Blackhurst, 2001; see also Blackhurst, 1998; Blackhurst and Hartridge, 2004).
The anger erupted at Seattle in 1999, where the conflict inside the hall was much more serious
for the health of the WTO than anything that happened in the streets (Curtis and Wolfe, 2000). A
lengthy debate on internal transparency led to new procedural understandings (see the chair's
report in WTO, 2000b), but developing countries were still unhappy with how the Doha
ministerial was subsequently prepared and conducted when the final compromises were again
hammered out in a Green Room.

The concentric circles tactic worked best when developing countries were content not to
be bound by or to play a role in the trading system, when Members did not see the need to be at
every meeting on every issue. The policy move behind the border, the Single Undertaking (under
which every country is potentially bound by every new rule), and the automaticity of the dispute
settlement system, mean developing countries, and indeed all small countries, demand genuine
participation in the evolution of the system. It is not merely the small numbers that makes the
Green Room work, however, it is that it engages everyone who can make a difference to the
process. Involving more people increases the costs associated with larger numbers, without
bringing in more ideas, or enlarging the group of key supporters. When every Member with an
interest was able to be in the room, the system worked, but when an effective meeting cannot be
organized without excluding a Member that wants to participate, then the concentric circles
model starts to erode (Blackhurst, 2001). The secretariat now worries that the Green Room at
ministerials remains useful for consultations, but not for shaping a deal.

One persistent response to the institutional weaknesses of the trading system has been an
attempt to regularize a small group forum. The ITO would have had an elaborate institutional
structure, including an Executive Board designed to be representative of the Members of “chief
economic importance” based on shares of international trade (Hart, 1995). A similar body was
also envisaged in the 1955 draft “Organization for Trade Cooperation,” an unsuccessful attempt
to remedy the GATT’s institutional defects (Jackson, 1990). A senior officials group was
created, however, in 1975 during the Tokyo Round as the Consultative Group of Eighteen,
known as CG-18.4 CG-18 was a fertile source of new trade policy ideas in the Tokyo Round, and
in the early stage of preparing for the Uruguay Round (Blackhurst and Hartridge, 2004), but
during the 1980s it gradually fell into disuse. Some thought a group of 22 (as it was by 1987) too
large to be effective or too small to be representative. In the 1980s, the group of eminent experts
who provided some of the ideas that informed the preparations for the Uruguay Round
recommended the creation of a Ministerial body whose limited membership would be based on a
constituency system (GATT, 1985). Developing countries wary of the “Security Council
syndrome” resisted proposals to create a successor group to CG-18, whether of officials or of
Ministers. The American proposal of a Management Board, made before the WTO idea emerged

4 CG-18 was established July 11, 1975 (GATT, BISD 22S/15); made permanent November 22, 1979
(GATT, BISD 26S/289); and has been in suspense since 1988 (GATT, BISD 35S/293). The last meeting
was held 21-22 September 1987.
in 1990, was seen as especially “hegemonic” by some developing countries (Croome, 1995, pp. 156, 274; see also Stewart, 1993). Nevertheless, many observers of the new organization thought that some such group would be needed (Ostry, 1998; 2002; Jackson, 1990; Jackson, 1995; Schott and Watal, 2000; Blackhurst, 2001; Wolfe, 1996; Blackhurst and Hartridge, 2004). European and Canadian officials have often returned to the idea of creating such a group at least at the level of capital-based senior officials, if not of Ministers (WTO, 2000a; Lamy, 2004; Canada, 2000). Sylvia Ostry has suggested that it could be a policy forum, if not a management body, with a link to greatly strengthened secretariat research capacity, or linkages to research institutions and NGOs (Ostry, forthcoming; for a similar proposal of a high-level policy advisory group, see Hoekman, Michalopoulos and Winter, 2004, p. 500). Despite the many proposals such a group has not been created.\footnote{Formal small groups are no panacea. The UN had the Security Council from the start, and from the start that body has had elaborate informal practices (Smith, 2004). Given its inflexible rules, the Security Council has adapted to change not through new formal structures but through new informal practices, notably in who is consulted (Hurd, 1997). By the early 1990s, the most important work was done in meetings of the P5 (the five permanent members), and their “informals” or “informal consultations” with the rotating non-permanent members became the real place where business was done. Non-members of the Council were excluded, even when they might be expected to provide concrete support with implementing Council decisions (Malone, 2000, p. 30).}

**Political engagement**

In the absence of formal ministerial engagement in Geneva, small group informal mechanisms have proliferated. I describe this process more fully in another paper (Wolfe, 2004b). In brief, ministers have informal discussions of WTO and other trade matters on the margins of meetings called for other purposes, and many of the regional groups and sectoral coalitions active in Geneva now have ministerial meetings designed to shape a common position in advance of a WTO Ministerial Conference or to provide instructions for their officials in ongoing negotiations. The most interesting innovation is meetings held to provide leadership for the WTO, a set that includes informal meetings of ministers or senior capital-based officials where participation rather than being sectoral or regional is meant to be somehow representative of the full WTO Membership. These meetings have come to be called “mini-ministerials”, perhaps because in function and in their scaled down Membership they mirror the formal Ministerial Conference, although they also resemble the current Green Room meetings of ambassadors in Geneva. Since Cancún, “micro-ministerials” have also emerged—meetings of a handful of ministers representing differing regions and interests in the negotiations.

Some critics think that involving ministers was a mistake, but I think that they have to be involved. Ministers must defend tough WTO decisions at home, and they contribute to making tough decisions in Geneva. Their ability to contribute, however, requires learning about the issues, and the positions of trading partners, which can best be done in informal meetings with colleagues from their own and other regions. It follows, therefore, that informal ministerial meetings can be valuable. The group system is one way to coordinate the views of large numbers of Members, but as sticking points emerge in the WTO, it can be helpful to have cross-regional meetings—that is, meetings of ministers who are “like-minded” only with respect to the need to
find a compromise. If Members will not agree to set up some sort of successor to CG-18, and there is no chance that they will, then something like the mini-ministerials will be a useful way to obtain political guidance on a small number of tough issues.

Informal ministerial engagement is clearly easier for some Members than others, but the attendant difficulties of participation for developing countries are ones of overall administrative capacity. Indeed the capacity problem may actually be alleviated by fostering even more informal off-the-record occasions where ministers and senior officials can learn from each other without having to adopt public positions. Since informality is rife, the real issue is transparency and inclusion, not more rigid rules. Some developing countries do not agree.

Trust

In April 2002 The “Like-Minded Group” (LMG) of developing countries made a set of proposals (WT/GC/W/471) for ensuring that both the preparatory process and the conduct of the Ministerial Conferences would be “transparent, inclusive and predictable.” There is a well-established argument that “predictability” is improved by removing decisions from administrative or political whim, that “rules” are better than “discretion”. In this case, the LMG may imagine that precise written rules will determine how the WTO does business, but despite precise rules on “consensus” in Article IX of the Treaty, India, a member of the LMG, was able to insist at Doha that negotiations on the Singapore issues must be based on “explicit consensus”, a phrase that has no logical or juridical meaning at WTO. Civil society critics may not agree (Jawara and Kwa, 2003), but flexibility serves all members. The procedures serve nobody, however, if they generate mistrust, especially if some Members feel excluded from information and participation.

The LMG proposal appears to correlate transparency both with open-ended meetings where everyone can participate, and with decisions being taken by bodies formally representative of all Members. This procedural logic of explicit inclusion is common in situations of low trust, or ones where participants are individually bound by the results. Given that the Single Undertaking commits all Members to the results, binding decisions can only be taken in formal WTO bodies where all Members are present, but such bodies cannot do the real work, as previously discussed. The alternative model for committee structure is based on a logic of implicit inclusion through consultation. The implicit LMG model imagines that all committees should simply be a small-scale replica of the principal deliberative body sitting as a Committee of the Whole. The latter model imagines that committees can be composed of delegates of the deliberative body. Here trust is expressed through the sensitivity of the processes by which opinions are canvassed and the openness with which Reports are written and discussed at the principal deliberative body.

Few people complain about not being consulted on a decision with which they agree, and everyone is critical when a few people in a closed room try to impose their views on everyone else. Giving all small developing countries a real voice in all WTO decisions is impossible. Ensuring that they understand those decisions, that they were engaged in the preliminary discussions and that new rules do not impose conditions they cannot meet, is essential. The WTO

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6 I owe this distinction to Rod Macdonald. For one theoretical approach, see (Black, et al., 1998)
is pushing on a string if it supplies rules for which there is no effective demand, which is a particular problem when a new WTO obligation requires action not by the trade minister but by other ministers who do not see the domestic value of the international rule. Even putting a new law on the books will not help if it is incongruent with the informal practices and mutual expectations of actors in the trading system. (I elaborate this view of the nature of law in Wolfe, 2004c.) It is in this sense that negotiators discover WTO rules by listening to economic actors and citizens—domestic consultations are an essential part of trade negotiations. That is, developed countries should not insist on new rules that will be hard for developing countries to implement—it is essential to find rules that all can use (Wolfe, 2003). Substantive legitimacy matters more in the end than formal proceduralism. (On the similar distinction between input and output legitimacy, see Scharpf, 2000.)

The challenge is acute on issues that cause sharp divergences between large numbers of Members. They cannot all be in the room during the search for consensus, yet they must all understand what is going on. Some developing countries and their sympathizers who are critical of small group consultations think that "no consultations by the chair should be held without adequate advance notice being given to the entire membership, and all members should be informed of, and entitled to attend, all such meetings (Jawara and Kwa, 2003, p. 283)." Yet for all the reasons discussed above, consultations often have to be small and private. It is easier when the chair of a negotiating group enjoys broad support, and when every Member trusts at least one of the people in the room to represent their views accurately, and to report on what happened. If Members suspect that an attempt is underway to isolate or split certain groups, then trust evaporates and the process stalls. It can also be essential, as one delegate told me, to create opportunities for those most directly involved to hear the views of everyone else, and to find a way to ensure that all those views are on the record, even if not in the negotiating text. The process, another delegate told me, should be like a conveyor belt, with a constant flow of information. Small group consultations and "confessionals" are occasions for the chair of a body, or the Director-General, to transmit as well as receive information. The coordinator of an developing country coalition present at a Green Room meeting must report back so that nobody will be surprised when the action resumes in public—and the chair of the meeting should not be surprised by the positions Members then adopt. A group coordinator must be both a faithful reporter of discussions inside the room, and the authoritative voice of the group: when s/he signals the possibility of compromise, other participants will know that it is genuine.

In June 2002, a group of developed countries responded to the LMG proposals with comments (WT/GC/W/477) aimed at keeping WTO procedures flexible, while recognizing that the only consensus that matters is the one that concludes the negotiations, and the Single Undertaking means that such a consensus will depend on whether everybody agrees that the overall result is balanced. After a number of informal meetings, the chair of the General Council, then Sergio Marchi of Canada, tried to move the discussion forward with a series of proposals in December 2002 (WTO, 2002a), picking up ideas first articulated in the 2000 debate, on how to ensure that small group consultations “contribute to the achievement of a durable consensus….” The proposals were not formally accepted.

7 Note that I am not using the term “accountability”, which mostly arises in a principal/agent framework (Keohane and Nye, 2003).
Many observers would prefer more formal and explicit processes in the WTO, but the loose informality of the Green Room, or of the recent “mini-ministerials”, is endemic in collective life. Informal meetings are inevitable: small groups of the people with the most experience or the most at stake, will always work together on understanding issues and finding a compromise. The challenge is to make the process of aggregating the work of these groups more transparent.

3. Is developing country capacity a constraint?

Analysis of procedural difficulties in ministerials often has a capacity dimension, expressed with more or less delicacy. The WTO diplomatic model is based on the implicit assumption that each Member has a substantial trade policy bureaucracy at home able to analyze its country’s interests both in its own and in export markets, and the capacity to advance its positions with sufficient numbers of sophisticated English-speaking representatives in Geneva. Many developing countries do not fit this model. Many of the developing country proposals for procedural reform, and much of the sympathetic civil society analysis (Jawara and Kwa, 2003) aims at making life easier for small missions. The problems of participation are part of an explanation of developing country resistance to an expanded negotiating agenda—they can only extend their limited expertise and resources to a finite number of topics and meetings. The legitimacy of the WTO is therefore under constant challenge from Members who cannot follow developments closely.

The problems of participation in the informal processes of Geneva are an order of magnitude greater during the brief period of a ministerial, with as many as seven formally constituted small group meetings (Friends of the Chair or facilitators) taking place at the same time, along with many more meetings of constantly shifting coalitions. (The excellent chronology of meetings in Cancun in Kaukab, Vina and Yu III, 2004 illustrates the problem.) Groupings of African countries, of Least-Developed Countries (LDCs), and of African, Caribbean and Pacific (ACP) states played a complicated and volatile role in Doha and Cancún. Many observers worried that they did not really understand or agree with the draft declaration on either occasion. In Doha they were pushed towards acquiescence by the ACP waiver. In Cancún they were pushed towards rejection by the Americans’ hypocritical mishandling of the West African cotton initiative. If developing countries are going to be active, they have to push for an acceptable outcome, not just block things they do not like, which will require a significant increase in their collective ability to negotiate in real time. Africans began to coordinate regionally at ministerial level in the late 1990s, but they could do much more to pool their resources—and they could do more to increase the resources they themselves devote to multilateral trade policy at home and in Geneva, though more technical assistance from large countries would help (Blackhurst, Lyakurwa and Oyejide, 2000).

The need for “capacity building” appears throughout the Doha declaration, as do promises of Trade Related Technical Assistance or TRTA, based on a strong consensus that many developing countries, but especially the poorest, cannot take advantage of the opportunities offered by the trading system without help. But if WTO “law” arises in human interaction, as I
argue elsewhere (Wolfe, 2004c), then top-down WTO-centred TRTA will be futile. Negotiating
capacity may correlate with economic capacity generally—a country that is not engaged with the
world may not be able to negotiate in the WTO. Trade policy officials cannot make up their
“interests”—they need to hear from their citizens and their firms who are engaged in trade as
importers, exporters, producers and consumers. Developing countries often lack the industry
associations common in the advanced economies, which does not help. What problems do
economic actors encounter? What new opportunities do they wish to pursue? Where are the rules
as codified in the WTO discordant with their daily practices in the trading system? Only with this
information can officials begin to think about how to participate in the Request and Offer process
in GATS, or analyze negotiating proposals on the table in Geneva.

Real capacity building will require more donor commitment (OECD, 2001), and a
country-centred approach (as opposed to a WTO-centric approach) that puts capacity building in
the context of a country’s overall development strategy. Technical assistance in understanding
the existing texts will always be welcome, as will be suggestions on how to implement current
obligations, many of which developing countries may not have understood when they signed the
Final Act of the Uruguay Round. Assistance in participating in new negotiations, however, will
not help much if countries have not undertaken the prior steps.

Developing countries want inclusive procedures that provide written information for all
Members, with sufficient time for them to formulate a position, and they then want an
opportunity to participate in the decision (see, for example, WTO, 2001). These democratic
principles are well-accepted at WTO, but nobody would argue that practice matches aspiration.
Some of the developing country proposals for improvement, however, tend to try to solve the
concrete manifestations of the problem evident at the previous ministerial. The proposals from a
group of African countries before Cancún (WTO, 2003) came too late and in the wrong form to
make a difference. Even efforts to make WTO procedures more formal and explicit can only
succeed through hard work in the informal processes where real decisions are made. The
inherent difficulties facing small delegations are not susceptible to a procedural fix.

4. Practical Implications

It will be obvious by now that I am not a revolutionary. I do not advocate blowing up the
WTO, nor do I think that it needs stronger legislative capacity. Some reform suggestions query

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8 (For an excellent analysis of the programs that exist with recommendations for improvement along
these lines, see Deere, 2004; see also Hoekman, Michalopoulos and Winter, 2004; and Prowse, 2002; The
problems of the 36 Members and observers without a resident delegation in Geneva are an order of
magnitude more serious, and are not addressed here. For a study of their needs, see Weekes, Thompson
and Wang, 2001.)

9 In this I am consistent with the advice of Haas, whose first maxim for designers of international
organizations was to avoid fundamental constitutional revision in favour of the “self-designing”
organization where states, secretariat and NGOs can allow their practices to evolve as circumstances
change (Haas, 1990, p. 201).
the Single Undertaking, but I think that it is an essential multilateral characteristic of the WTO.

A round is the only way to create a package large enough for all participants to see themselves in it, one in which negotiators can see all the trade-offs between issues and countries—indeed in which negotiators can see the tradeoffs between import-competing and export interests within a given economy. It follows that the consensus rule is essential, and that the core agenda should be kept focused on what it must have, not on what some countries might like to see. Some reform suggestions would have the WTO agenda become much broader; others would have it be narrower and more focused. The argument against broadening is similar to the one against seeing the WTO as a “development” organization, though usually advanced by different people. The WTO, it is said, should concentrate on commercial policy, and nothing else. The argument has merit, and yet if the WTO is to focus on the way commercial transactions transmit the externalities of domestic policy decisions across borders, it requires a pretty broad agenda. If the mandate of the organization was more limited, would it still be interesting to the largest traders? And if it ceased being interesting to them, would it be interesting to anybody else? Reciprocal bargaining still matters. Developing countries have to be able to manipulate rich country politics, offering concessions on services, agriculture and NAMA designed to get business to explain to politicians why agriculture subsidies have to be reduced. The agenda agreed to in Doha was too broad, but at the time of writing, the July 2004 framework agreement seems to have created a more focused agenda that will allow the trading system to respond to the commercial aspirations of the largest traders and the development needs of the smallest.

While everyone should be an active participant in negotiations, it is vital to recognize the implicit variable geometry of successful WTO agreements by avoiding one-size-fits-all proposals. The WTO is not helped by the blanket use of the term “developing country”, as if China and Uganda should be thought of in the same way with respect to their ability to participate in negotiations or to undertake new obligations. If some developing countries are at a disadvantage, then the question is how far the WTO should be expected to go to change its procedures to accommodate its weakest Members, those whose share of world trade is inconsequential. Differentiation might be unpalatable for some developing countries, but it could be a way to make the developing country position on special safeguards for agriculture more palatable to developed countries, and it might help unblock Special and Differential treatment issues generally. If it did that, then Doha could claim to be a development round. The WTO rules provide sufficient flexibility to allow the system to evolve along with a changing world economy without leaving the large number of small players behind.

Institutional weakness is not on the Doha agenda, yet—the creation of the WTO itself emerged late in the Uruguay Round when participants realized that the existing structures could not support all the new agreements likely to be included in the Final Act. Late in the Doha round, Members may again see the need for institutional reform. What should they consider? The key for all Members is transparency in both dimensions: knowing what is going on, and being able

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The current Director-General has appointed a former Director-General, Peter Sutherland, to lead a consultation group of outside experts with a mandate to make suggestions on institutional reform. This chapter was completed before the group reported. My focus is on the WTO as a forum for negotiations, but other institutional reform issues merit attention, like the dispute settlement system, relations with civil society organizations, and coherence with other international organizations and regional bodies.
to influence the outcome. Both forms of transparency have different implications for what is known in WTO-speak as internal and external transparency. I consider only internal transparency here, where the issues are whether the WTO is able to provide a forum for all Members to understand the intentions of all other Members, and where all Members have a voice.

Many reform proposals would make the WTO more transparent by making it more rigid and predictable. The effort is doomed. Informality is endemic in collective life. No organization of close to 150 Members can find consensus on sensitive matters like agricultural reform if all discussions must be held in public, in large groups, with written records. Informality, however, requires a good deal of trust. Measures to increase trust among Members should be at the heart of an institutional reform agenda. The Marchi proposals of December 2002 still look sensible, especially for the conduct of informal meetings (WTO, 2002a). He noted that in order to ensure that small group consultations “contribute to the achievement of a durable consensus” it is important that
- Members are advised in advance of such consultations;
- Members with an interest in the specific issue under consideration should be given the opportunity to make their views known;
- No assumption should be made that one Member represents any other Members except where the Members concerned have agreed on such an arrangement;
- The outcome of such consultations is reported back to the full membership expeditiously for its consideration.

Informal consultations in WTO are likely to remain informal—nobody in Geneva sees any prospect of reaching agreement on a formal Executive Committee of ministers or senior officials. The problem of ensuring that the WTO meets its broad objectives remains, however. Some body should have a systematic overview both of WTO operations and of developments in the trading system. Mini-ministerials and other types of informal political engagement may have to fill the gap. Changing the timing of ministerials might also be worth considering.

Some critics think that involving ministers at all was a mistake, others that having a ministerial every two years is too often (Kaukab, Vina and Yu III, 2004). That position is not sustainable when issues go behind the border and when ministers even in developing countries can come under intense pressure from their public over WTO issues. The general demands for and practices of public participation in leading countries, north and south, now make it impossible to restrict negotiations to a professional core. Ministers are ultimately responsible at home for the formal decisions of the WTO, so they have to be engaged, even if the issues are technically complex. If ministers do not understand the agreement in Geneva, they will not understand it when they have to defend it in front of national legislators and civil society.

If ministers must be engaged, it might be better for them to meet every year—an annual ministerial has long been the practice for the IMF and the World Bank. The whole purpose on those annual occasions is what goes on outside the room. A ministerial every year would involve

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11 One delegate told me about the pressures a developing country minister faced at home in the summer of 2003 when civil society was getting faster reports from Geneva than the minister about the progress of negotiations on access to essential medicines. The absence of effective machinery to keep people informed, and to interpret what was going on, limited that country’s ability to be an effective participant.
ministers more fully in the work of the WTO, which would make them and thus the organization more accountable. It might also lower the pressure to produce “results” for every Ministerial Conference, which might lead to a healthy reconsideration of the agenda. The difficulty, of course, is that there might be many years when political decisions were not needed. And it is already the case, as one developing country delegate told me, that Members do not understand how to deal at ministerials with the countries other than the 25 or 30 who dominate world trade. The rest are not central to the outcome, yet they need to participate, to get some sense that their issues are understood. Each minister has an ego, and a press corps eager to hear how about their personal contribution to the outcome of the meeting. Ministerial Conferences might be more effective if every minister felt busy, and if each one understood that they too have something to lose from system failure, even in the short term.

The LMG paper argued for holding ministerials in Geneva. The proposal might be sensible, given the existing infrastructure, including the availability of experts, which might help the smaller delegations participate in real time. The idea was considered at the inception of the WTO, but it seems to have fallen by the wayside, not least because the Swiss authorities have informally made clear they do not want the security and cost implications of hosting.

Individuals make a difference in negotiations, especially in the chair (Hampson, 2004; Tallberg, 2004; Odell, 2004). The job of chairing the Ministerial Conference is now such a delicate task that more care must be given to the selection. The host’s choice served Members well in Doha, but not in Seattle or Cancún. The EU has argued for a clear delineation between the role of the host country and that of the Director-General. The role of the host country of the Ministerial Conference should be limited to chairing the plenary session, while informal processes should be handled by the Director-General, assisted by his deputies (WTO, 2000a). An alternative would be to have the General Council select the chair of open-ended Heads of Delegation meetings, and of the all-important Green Room. Facilitators can make a difference to the functioning of the ministerial. The LMG paper and the EU (Lamy, 2004) sensibly suggest selecting facilitators sooner, and by consensus.

The role of the Director-General matters, but should s/he be the head of the secretariat, a spokesman for trade liberalization, or a leader trying to shape the evolution of the system? The three year terms agreed as part of the compromise to allow both Moore and Supachai to have a term was a grave error, given the need for continuity and experience. Members have now agreed on a new selection procedure, with a six year renewable term. In recent years, the role of the chair of the General Council has increased—giving the Director-General some right of initiative on the agenda might redress the balance.

The chairs of WTO meetings are often criticized for submitting a chairman’s text “on their own responsibility”, yet providing a clean text as a focal point is a well-established technique of successful negotiators. The WTO is not analogous to the UN, often seen as a place to register positions; it should be seen as a place to reach agreements on the rules for a global economy. The former leads to the misguided demand that all views be reflected in the negotiating texts, whatever the priority attached to them; the latter requires that negotiating texts only reflect ideas that have some chance of commanding consensus. The risk in including all views was obvious in Seattle, when Members whose views made it into the draft text did not
want to give up something they thought was already “won”, and could not be seen to back down. Despite the protestations of developing countries and many NGOs (Kaukab, Vina and Yu III, 2004), there is no virtue in a text that reflects all the views expressed in the preparatory process. Ministers with limited time and technical knowledge can only be asked to resolve a small number of political problems in a negotiation—and if the chair gets it wrong in guessing at the zone of consensus, developing countries have proved more than capable of blocking agreement. Moreover, it is not wise to attempt to codify good judgment—the chair should not be tied down by Lilliputian rules of what s/he can or cannot do. The timing and membership of Green Rooms at ministerials should not be formalized. Management of the meeting should be left to a carefully selected chair advised by the facilitators, the chair of the General Council, and an experienced Director-General who in turn is supported by an actively engaged secretariat. Everybody should arrive expecting that the debate may have to be extended if reaching consensus seems possible.

Finally, the events of July 2004 illustrate the evolutionary capacity of the WTO. After a great many informal meetings of various groupings of ministers to consider how to repair the damage to the Doha Round caused by the Cancún collapse in September 2003, a consensus gradually emerged in the spring of 2004 that a full-blown Ministerial Conference was not needed. Rather, a decision of the General Council at its regular mid-year meeting would provide sufficient authority for a new framework for the negotiations. This late July meeting was a regular meeting, yet ministers from 25 countries, and a great many more capital-based senior officials, attended where normally Members would have been represented by their ambassadors. During the week ministers met in a variety of large and small groups, including a Green Room at the end, before the General Council convened for the record. (For a detailed account, see Wolfe, 2004b.) It is perhaps not surprising that the presence of the leading ministers was necessary, since Members were trying to agree on what was not agreed at a Ministerial Conference. Without political engagement in the preparations, and then in the final bargaining in Geneva, it might not have been possible to reach agreement. The process was an ad hoc adaptation to exceptional circumstances, which is actually normal in the WTO.

The reform agenda outlined above, therefore, may not be as ambitious as was the idea of creating the WTO itself in the late stages of the Uruguay Round, but annual Ministerial Conferences with some procedural improvements in running the meeting and more clarity in the roles of the officers might go a long way to increasing the transparency of the organization, which might in turn lead to more trust among its Members. Procedural improvements by themselves will not solve intractable policy disagreements on major issues, nor by themselves make it any easier to penetrate the Geneva fog, but they will make a difference.
References


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