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## Reinvigorating debate on WTO reform: The contours of a functional and normative approach to analyzing the WTO system

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**Reinvigorating Debate on WTO Reform:**

**The Contours of a Functional and Normative Approach to Analyzing the WTO System**

Carolyn Deere-Birkbeck

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DEPARTMENT OF  
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AND  
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# *Global Economic Governance Programme*

Centre for International Studies | Department for Politics and International Relations



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Dr. Carolyn Deere-Birkbeck is a Senior Researcher at the Global Economic Governance Programme at the University of Oxford where she directs GEG's Global Trade Governance Project - a multi-year initiative to catalyze academic research and policy dialogue aimed at making the governance of the global trading system work for developing countries and sustainable development. She is also a Senior Research Associate at Oxford's Centre for International Studies and a Resident Scholar at the International Centre for Trade and Sustainable Development (ICTSD) in Geneva, Switzerland. Dr. Deere-Birkbeck is the founder and Chair of the Board of Directors of Intellectual Property Watch - the leading news service on international intellectual property policy debates - and a member of the Advisory Board of 3D -> Trade - Human Rights - Equitable Economy. In addition, she was a member of an International Commission, sponsored by the UK's Royal Society of Arts, which prepared the Adelphi Charter on Creativity, Innovation and Intellectual Property.

Before moving to Europe, Dr. Deere-Birkbeck served for four years as the Assistant Director of the Global Inclusion Programme at the Rockefeller Foundation in New York where she was responsible for grant-making on intellectual property, trade and sustainable development. In partnership with colleagues across the Foundation, she designed and coordinated the Foundation's initiative to Promote a Fairer Course for Intellectual Property Policy and launched the Bellagio Series on Development and Intellectual Property Policy. During this time, Dr. Deere-Birkbeck also co-founded the Funders Network on Trade and Globalization (FNTG) and served on its Steering Committee. Prior to moving to the Rockefeller Foundation, she worked in Washington, D.C. for the World Conservation Union (IUCN) and was the Manager of the Congressional Staff Forum on International Development at the Overseas Development Council (ODC). She has been a consultant to a range of non-governmental and international organisations, including UNDP's Office of the Human Development Report, the National Wildlife Federation, the Yale Centre for Environmental Law and Policy, the Open Society Institute and the South Centre.

Dr. Deere-Birkbeck is the author of *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (OUP, forthcoming, 2008), the co-author (with Elizabeth Havice) of *Fisheries, International Trade and Sustainable Development* (ICTSD, 2008), and the co-editor (with Dan Esty) of *Greening the Americas: NAFTA's Lessons for Hemispheric Trade* (MIT Press, 2002). She holds a DPhil in International Relations (University College, Oxford), an MA in International Relations (Johns Hopkins University School of Advanced International Studies) and a bachelors degree in political economy from the University of Sydney. She is of joint Australian and British nationality.

# Reinvigorating Debate on WTO Reform: The Contours of a Functional and Normative Approach to Analyzing the WTO System

Carolyn Deere-Birkbeck<sup>1</sup>

## I. Introduction

The debate on the institutional reform and governance of the WTO has now been underway for over fifteen years.<sup>2</sup> In 1999, only five years after the creation of the World Trade Organization (WTO), the collapse of the Seattle Ministerial Conference provoked intense demands for reform. By 2003, the failure of the Cancun WTO Ministerial again sparked debate on WTO reform. Two years later, when Pascal Lamy took over the reins as WTO Director-General, he proposed that WTO reform should be a key post-Doha priority.<sup>3</sup> In the context of a Doha Round of multilateral trade negotiations stumbling forward in fits and starts, the most prominent focus of discussions of WTO reform has been options for improving the process of the WTO negotiation process. Throughout the past ten years, however, there have also been a number of broader debates about the governance of the multilateral trading system and calls for institutional reform at the WTO. Most recently, the onset of global financial crisis in 2008 reignited more wide-

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<sup>1</sup> This chapter is the product of research supported by the Geneva International Academic Network (GIAN) and the Ford Foundation. The author would like to thank Arunabha Ghosh, Ricardo Meléndez-Ortiz, John Odell, Mayur Patel, Richard Steinberg, Robert Wolfe and Ngaire Woods for their feedback on the paper as well as the participants in a meeting of the Emerging Dynamic Global Economies (EDGE) Network Workshop on WTO Institutional Reform (13-15 March 2008).

<sup>2</sup> See generally Pitou van Dijck and Gerrit Faber (eds), *Challenges to the New World Trade Organization* (The Hague: Kluwer Law International, 1996); Anne Krueger (ed), *The WTO as an International Organization* (London: Chicago University Press, 1998); Carolyn Deere-Birkbeck and Ricardo Meléndez-Ortiz (eds), *Rebuilding Global Trade: Proposals for a Fairer, More Sustainable Future* (Geneva: GEG and ICTSD, 2009), <http://www.globaleconomicgovernance.org/wp-content/uploads/rebuilding-global-trade.pdf> (visited 14 April 2009).

<sup>3</sup> Pascal Lamy, 'Message from the Director General: A World Trade System for the Benefit of All,' [http://www.wto.org/english/thewto\\_e/dg\\_e/dg\\_e.htm](http://www.wto.org/english/thewto_e/dg_e/dg_e.htm) (visited 9 February 2009).

ranging interest in the role of the WTO in global economic management, prompting calls for the WTO to do more to sustain a global open trading system, and in particular to take greater leadership on issues of trade finance, aid for trade, and surveillance of protectionist measures.

In the face of existing and emerging global challenges, both critics and supporters of the WTO pose common questions. Is the WTO as we currently know it fit for its purpose? How can the WTO adapt to changing configurations of economic power in trade, while ensuring the weakest countries are properly and effectively represented? How can the WTO better respond to sustainable development concerns, ranging from poverty reduction, development, and food security, to sustainable fisheries and climate change? Is the WTO's current institutional guise appropriate or, are there reforms – incremental, fundamental, or both – that would better equip the WTO to reflect and address both contemporary needs and those likely to emerge in the future?

Amidst a growing body of scholarly literature and policy commentary on the governance and institutional reform of the WTO, this chapter proposes a distinctive approach. To set the context, Part II presents a brief overview of key themes in the existing literature, emphasizing the scope of debates on WTO reform. A full review and evaluation of the specific details of proposals offered through the course of these debates is beyond the scope of this chapter. This chapter does, however, highlight the differences among authors regarding what the WTO reform debate is and should be about, including with respect to the feasibility and desirability of a reform agenda. Part III proposes a new five-pronged approach to the question of WTO reform. It argues for: (i) analysing the WTO as a 'system'; (ii) disaggregating and analysing the governance of each of the



functions this system serves and should serve; (iii) acknowledging the informal nature and dynamism of many practices regarding the governance of these distinctive WTO functions; (iv) grounding reform proposals in clear normative principles and priorities, namely to respond to the needs of developing countries and advancing sustainable development; and (v) devoting greater attention to analysing the political strategies for achieving proposed reforms.

The chapter concludes with some preliminary observations on the reform priorities this approach reveals.<sup>4</sup> It provides indicative examples of how this approach to the WTO reform question yields the prospect of a more broad-ranging reform agenda than many existing studies and a reinvigorated dialogue on many now ‘tired’ reform themes.

## **II. Existing Literature on WTO Reform: The State of Debate**

The study of WTO governance concerns the set of processes, principles, norms, and institutions through which rules and practices for managing global trade are generating and implemented. The study of institutional reform of the WTO relates to a sub-set of these concerns – those specifically focused on the ‘institutional’ aspects of the WTO. Narrowly-speaking, these institutional aspects concern only the formal organizational aspects of the WTO. More broadly, reference to the institutional aspects of the WTO may also refer to the cultural habits, practices, rules, and procedures that govern how the work of the WTO is supervised, managed, and implemented. Depending on the topic at hand,

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<sup>4</sup> A comprehensive set of recommendations for reform based on this ‘systems’ approach and normative agenda—and their political feasibility—is available in Carolyn Deere-Birkbeck, ‘Making Global Trade Governance Work for Developing Countries: Proposals for WTO Reform’, Global Economic Governance Programme Working Paper, University College, Oxford (Forthcoming 2009).

authors writing on ‘WTO reform’ sometimes refer explicitly to institutional aspects of that reform. For some authors, a far wider set of issues fall under the WTO reform umbrella, including proposals for reform in respect of the principles and scope of the WTO’s agreements or the substance of particular aspects of WTO negotiations (such as those related to the Doha Round). For example, when some analysts write of WTO reform, their emphasis is on limiting the scope of the WTO negotiating agenda (i.e., to ensure it does not cover investment issues), or expanding its scope (i.e., to ensure it covers issues of high importance to developing countries, such as movement of labor, or the operationalization of principles, such as special and differential treatment). This chapter intentionally focuses tightly on the governance and ‘institutional’ agenda for WTO reform. That said, it is important to acknowledge that the issues are often entangled: some aspects of the Round negotiations are directly related to issues that arise in discussions of governance of the multilateral trading system (e.g., disciplines for regional trading agreements, principles of special and differential treatment, reform of the dispute settlement system).

The scope of the literature on WTO governance and institutional reform is vast. As noted above, the majority of attention has been on reform of the WTO’s negotiation process, as well as its dispute settlement process<sup>5</sup> and the appropriate relationship and balance between the two.<sup>6</sup> Additional recurring areas of interest include: (i) the internal

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<sup>5</sup> See, for example, William J. Davey, 'The WTO Dispute Settlement System: The First Ten Years', 8(1) *Journal of International Economic Law* 17 (2005); James C. Hecht, 'Operation of WTO Dispute Settlement Panels: Assessing Proposals For Reform', 31(3) *Law & Policy in International Business* 657 (2000).

<sup>6</sup> See e.g. John Barton, Judith Goldstein, Timothy Josling and Richard H. Steinberg, *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO* (Princeton: Princeton University Press, 2006); Amrita Narlikar, 'WTO Decision-Making and Developing Countries', *TRADE Series Working Paper*, South Centre (2001), at 42. Narlikar argues, for instance, that perhaps the ‘major and



governance and management of the WTO Secretariat, its ideal size and budget, as well as the role of the Director-General and the related selection process;<sup>7</sup> (ii) the intersection of WTO rules and other global norms on issues ranging from human rights and the environment to food safety and labor standards;<sup>8</sup> (iii) the WTO's relationship with civil society,<sup>9</sup> industry, and parliaments;<sup>10</sup> (iv) the appropriate role of the WTO in global

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unsustainable discrepancy' in the WTO is the coupling of an automatic and binding system of laws and surveillance with the informal, *ad hoc* practice of bargaining and negotiation.

<sup>7</sup> Richard Blackhurst, 'Reforming WTO Decision Making: Lessons from Singapore and Seattle', in Klaus Deutsch and Bernhard Speyer (eds), *The World Trade Organization Millennium Round* (London: Routledge, 2001) 295 – 310. And see Krueger, above n 4.

<sup>8</sup> See, for instance, José Alvarez, 'The WTO as Linkage Machine', 96(1) *The American Journal of International Law* 146 (2002); Robert Howse, 'From Politics to Technocracy-and Back Again: The Fate of the Multilateral Trading Regime', 96(1) *The American Journal of International Law* 94 (2002); Keith Maskus, 'Regulatory Standards in the WTO: Comparing Intellectual Property Rights with Competition Policy, Environmental Protection, and Core Labor Standards', 1(2) *World Trade Review* 135 (2002); Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, (Cambridge: Cambridge University Press, 2003) 556; Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?', 95(3) *The American Journal of International Law* 535 (2001); Ernst-Ulrich Petersmann, 'The Human Rights Approach advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is It Relevant for WTO Law and Policy?', 7(3) *Journal of International Economic Law* 605 (2004); Debra P. Steger, 'Afterword: The "trade and...." Conundrum- A Commentary', 96(1) *The American Journal of International Law* 135 (2002); Joel P. Trachtman, 'Institutional Linkage: Transcending "Trade and ...."', 96(1) *The American Journal of International Law* 77 (2002).

<sup>9</sup> On stakeholder engagement, see Steve Charnovitz, 'Non-Governmental Organizations and the Original Trade Regime', 5 *Journal of World Trade* 111 (1995); Steve Charnovitz, 'Triangulating the World Trade Organization', 96(1) *The American Journal of International Law* 28 (2002); Steve Charnovitz, 'Participation of Nongovernmental Organizations in the World Trade Organization', 17 *University of Pennsylvania Journal of International Economic Law* 331 (1996), at 332; Daniel Esty 'Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition or Exclusion', 1 *Journal of International Economic Law* 123 (1998); Robert Housman, 'Democratizing International Trade Decision-Making', 27 *Cornell International Law Journal* 699 (1994); Christophe Bellmann and Richard Gester, 'Accountability of the World Trade Organization', 30(6) *Journal of World Trade* 31 (1996); Lori Wallach and Michelle Sforza, *Whose Trade Organization? Corporate Globalization and the Erosion of Democracy - An Assessment of the World Trade Organization* (Washington D.C.: Public Citizen, 1999).

<sup>10</sup> On parliamentary matters, see Meinhard Hilf, 'How Can Parliamentary Participation in WTO Rule-Making and Democratic Control be Made More Effective in the WTO?', Presentation given at the University of Hamburg, 19 June 2003; G. Richard Shell, 'The Trade Stakeholders Model and Participation by Non-state Parties in the World Trade Organization', 17(1) *University of Pennsylvania Journal of International Economic Law* 359 (1996); Gregory C. Shaffer, 'Parliamentary Oversight of WTO Rule-Making: the Political and Normative Contexts', 7(3) *Journal of International Economic Law* 629 (2004). Shaffer also explores the conditions under which greater participation by parliamentarians might be possible. In a panel at the 2007 WTO Public Forum, Harlem Désir, the head of the European Parliament's Trade Committee and an active member of the inter-parliamentary union, emphasised the range of activities the IPU was already undertaking to enhance parliamentary engagement on WTO issues around the world, including informal consultations with the WTO Secretariat. Beyond the WTO, concerns about the

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economic governance and its relationship to other international organizations and agreements;<sup>11</sup> (v) the relationship between WTO agreements and the growing number of regional and bilateral trade arrangements; and (vi) the balance between the WTO's judicial and legislative functions.<sup>12</sup> The prominence of each of these areas of debate on governance and institutional reform has fluctuated over time. In the lead up to the election of the WTO's Director-General, for instance, debates about the appropriate powers of the Director-General and the election process re-surfaced. Similarly, debates on the 'Green Room' tend to intensify around the time of WTO Ministerial Conferences and mini-ministerial meetings.

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legitimacy and accountability of global governance have prompted a number of calls for great parliamentary participation in the governance of the global economy. See for instance, Richard Falk and Andrew Strauss, 'Toward Global Parliament', 80(1) *Foreign Affairs* 212 (2001).

<sup>11</sup> Rorden Wilkinson, 'Peripheralizing Labour: The ILO, WTO and the Completion of the Bretton Woods Project', in Jeffrey Harrod and Robert O'Brien (eds), *Globalized Unions? Theory and Strategies of Organized Labour in the Global Political Economy* (London: Routledge, 2002) 204-220. For the WTO's relationship with WIPO, see Paul Salmon, 'Cooperation Between WIPO and the WTO', 17 *St. John's Journal of Legal Commentary* 263 (2003); For the WTO's relationship with the Bretton Woods Institutions, see Richard Blackhurst, 'The WTO and the Global Economy', 20(5) *The World Economy* 527 (1997); Anne O. Krueger, and Sarath Rajapatirana 'The World Bank Policies Towards Trade and Trade Policy Reform', 22(6) *The World Economy* 717 (1999); Deborah Siegel, 'Legal aspects of the IMF/WTO relationship: The fund's articles of agreement and the WTO agreements', 96(3) *The American Journal of International Law*, 561 (2002); David Vines 'The WTO in Relation to the Fund and the Bank: Competencies, Agendas and Linkages', in Krueger (ed), above n 4, 59-96. The intersection of the WTO's agreements with public health policies has been reviewed in Carlos Correa (2000) 'Implementing National Public Health Policies in the Framework of the WTO Agreements', 34(5) *Journal of World Trade* 81 (2000); *Globalization and Access to Drugs: Perspectives on the WTO/TRIPS Agreement, Health Economics and Drugs* (Geneva: World Health Organization, 1998); WTO/WHO, *WTO Agreements and Public Health: A Joint Study by the WHO and WTO Secretariat*, (Geneva: WHO/World Trade Organization, 2002); John H. Jackson, 'Fragmentation or Unification Among International Institutions: The World Trade Organization', 31 *International Law and Politics* 823 (1999). The discussion of the appropriate role of the Bank and IMF has further evolved with the Aid for Trade discussion.

<sup>12</sup> Patrick Low, Miguel Rodriguez Mendoza and Barbara Kotschwar (eds), *Trade Rules in the Making: Multilateral and Regional Trade Arrangements* (Washington, D.C.: Brookings Institution Press, 1999); Jagdish Bhagwati, *Termites in the Trading System: How Preferential Trade Agreements Undermine Free Trade* (Oxford: Oxford University Press, 2008); Richard Baldwin and Patrick Low, *Multilateralizing Regionalism: Challenges for the Global Trading System* (Cambridge: Cambridge University Press, 2009).

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The debate on WTO reform has been punctuated by two major reports,<sup>13</sup> a series of formal submissions from WTO members, and a suite of proposals from academics and non-governmental organizations (NGOs) covering a diverse range of reform topics. In 1999, the failure of the Seattle Ministerial Conference prompted then Director-General Mike Moore to call on a group of eminent experts for advice about institutional reform, resulting in the 2005 *Sutherland Report on the Future of the WTO*. A variety of countries have submitted proposals on aspects of institutional reform, including Canada, Japan, the European Commission, the United Kingdom, and a number of developing countries, such as the Like-Minded Group (LMG) of fifteen developing countries (led by India).<sup>14</sup> After the 2003 collapse of the Cancun Ministerial Meeting, Pascal Lamy (at that time the European Union's Trade Commissioner) famously characterized the WTO as a 'medieval institution' and tabled a European Commission proposal for WTO reform. Then, in 2007, amidst concerns about the slow progress of the Doha Round and proliferating regional and bilateral trade agreements, the Warwick Commission, an independent commission of experts chaired by the former Canadian Minister for Trade and Foreign Affairs, published its report, *The Multilateral Trade Regime: Which Way Forward?*

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<sup>13</sup> See Consultative Board to the Director-General Supachai Panitchpakdi, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (Geneva: World Trade Organization, 2004) and The Warwick Commission, *The Multilateral Trade Regime: Which Way Forward? The Report of the First Warwick Commission* (Warwick: University of Warwick, 2007) 92. The Commission report proposed a number of institutional changes at the WTO, including increasing the size of the WTO Secretariat, expanding the powers of the Director-General, and revising the process for reaching new trade deals.

<sup>14</sup> See, for instance, WTO Doc T/GC/M91, General Council – Minutes of Meeting – Held in the Centre William Rappard on 26 January 2005; WT/MIN (03)/ST/58, Ministerial Conference - Fifth Session - Cancún, 10 - 14 September 2003 - Honduras - Statement by H.E. Mr Norman García, Secretary of State, Department of Industry and Commerce; WT/GC/W/477, General Council - Preparatory Process in Geneva and Negotiating Process at Ministerial Conferences - Communication from Australia; Canada; Hong Kong, China, New Zealand; Singapore; Switzerland; WT/MIN(01)/ST/110, Ministerial Conference - Fourth Session - Doha, 9 - 13 November 2001 - Republic of the Fiji Islands - Statement by H.E. Mr. Isikeli Maitaitoga, Ambassador, Permanent Representative to the WTO; WT/GC/M/57, General Council - Minutes of Meeting - Held in the Centre William Rappard, 17 and 19 July 2000.

To date, the vast majority of the scholarly literature on the governance and institutional reform of the WTO has emanated from developed countries and is dominated by the analytical perspective of lawyers and economists.<sup>15</sup> The involvement of political scientists and scholars of international relations on the reform agenda has been relatively scarce and recent.<sup>16</sup> Despite their long engagement on questions of trade and development in the multilateral trading system, input from developing country scholars on debates regarding WTO governance and specific proposals on institutional reform has been similarly tentative, general in nature, and recent compared to the intense engagement of developed country scholars on the topic.<sup>17</sup> The agenda, contours, and themes of the scholarly literature on institutional reform thus remain strongly defined by the preoccupations of developed country scholars, even where development-oriented in purpose.

Academic work on WTO reform is supplemented by a vast body of commentary by former WTO insiders (both from governments and the WTO Secretariat), NGOs, civil society groups, and industry associations, as well as governments and parliamentary

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<sup>15</sup> See e.g. Krueger above n 4; Sylvia Ostry, 'The World Trading System: In Dire Need of Reform?', Presentation given at the Canadians in Europe Conference hosted by the Centre for European Studies, Brussels in August 2002, [http://www.utoronto.ca/cis/ostry/docs\\_pdf/World\\_Trade\\_Reform.doc](http://www.utoronto.ca/cis/ostry/docs_pdf/World_Trade_Reform.doc) (visited 15 April 2009); Rorden Wilkinson, 'The Contours of Courtship: The WTO and Civil Society', R. Wilkinson and S. Hughes (eds), *Global Governance: Critical Perspectives*, edited by, (London: Routledge, 2000) 193-200; Patrick Macrory, Arthur Appleton, and Michael G. Plummer, *The World Trade Organization: Legal, Economic and Political Analysis* (New York: Springer Verlag, 2005) 3 vols. Bernard Hoekman and Petros Mavroidis, *The World Trade Organization: Law, Economics and Politics* (Abingdon: Routledge, 2007) 143.

<sup>16</sup> Ngaire Woods and Amrita Narlikar, 'Governance and the limits of accountability: the WTO, the IMF and the World Bank', 53(170) *International Social Science Journal* 569 (2001); Robert Wolfe, 'The World Trade Organisation', in Brian Hocking and Steven McGuire (eds), *Trade Politics: International, Domestic and Regional Perspectives* (London: Routledge, 1999) 207-222.

<sup>17</sup> Narlikar, above n 6; Amrita Narlikar, *International Trade and Developing Countries: Bargaining Coalitions in the GATT and WTO* (London: Routledge, 2003) 260; Amrita Narlikar, *The World Trade Organization: A Very Short Introduction* (Oxford: Oxford University Press, 2005) 168; South Centre, 'Institutional Governance and Decision-Making Processes in the WTO', Analytic Note, (Geneva: South Centre, 2003) 53.

bodies.<sup>18</sup> Here we find a more consistent interest in what developing countries may have to gain from improvements in the governance and institutional aspects of the WTO. Several intergovernmental organizations (IGOs) have also published documents that include reflections on the purpose and performance of the WTO system and proposals consistent with their respective mandates (e.g., labor, development, public health) and related stakeholder groups.<sup>19</sup>

In the remainder of this section, I highlight several cross-cutting themes of debate that illustrate these tensions. Across the spectrum of scholarly and policy analysts, most studies of WTO governance and institutional reform concur that a core purpose, if not *the* core purpose of the WTO, should be to protect a stable, multilateral, rules-based approach to international trade. For many of these analysts, the WTO's agreements represent the 'rule of law' in the realm of international trade: a global public good that warrants protection in its own right. Beyond that point of consensus (though still not universally shared), the scope of and prescriptions for reform vary as widely as do perspectives on the usefulness, goals, and mandate of the WTO.

The tensions that arise are amply illustrated in the literature on reform of WTO decision, rule-making and negotiating processes. For free trade advocates, this interest is spurred by concerns about the perceived inefficiency of the WTO system in achieving

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<sup>18</sup> Numerous proposals for WTO reform have also been made by NGOs such as Third World Network, Oxfam, ActionAid and the International Centre for Trade and Sustainable Development (ICTSD), among others. In November 2000, for instance, UK-based NGOs, including ActionAid, CAFOD, Christian Aid, Consumers International, FIELD, Oxfam, RSPB, and the World Development Movement, co-published a discussion paper on 'Recommendations for ways forward on institutional reform of the World Trade Organisation'.

<sup>19</sup> See, for instance, Andrew Cornford, 'Variable Geometry for the WTO: Concept and Precedents', UNCTAD Discussion Paper No. 171 (May 2004), [http://www.unctad.org/en/docs/osgdp20045\\_en.pdf](http://www.unctad.org/en/docs/osgdp20045_en.pdf) (visited 14 April 2009); UNCTAD, *Positive Agenda For Developing Countries: Issues For Future Trade Negotiations* (Geneva: United Nations, 2000), [www.unctad.org/en/docs/itcdtsb10\\_en.pdf](http://www.unctad.org/en/docs/itcdtsb10_en.pdf) (visited 14 April 2009).

agreements on trade liberalization. Those so concerned cite often the economic benefits of liberalization, as well as its contribution to peace and political stability, as justification for seeking more efficient ways to conclude new trade deals.<sup>20</sup> By contrast, critics counter that proposals for reforming the negotiating process that aim simply to achieve trade liberalization faster misunderstand the scope of the WTO's mandate. The WTO is now as much concerned with the regulation of world trade as its liberalization, and the task of negotiating global trade regulations presents different challenges than that of exchanging market access concessions<sup>21</sup> and their implementation of agreements may involve distinct political, institutional and budgetary considerations at the national level. Many who share this line of thinking emphasize that while trade liberalization may well be a purpose of the WTO, is it not *the* purpose of the multilateral trading system and should not be pursued as an end in itself. Rather, trade policy – and trade liberalization – should be shaped in light of public policy objectives, such as growth, employment and sustainable development, set out in WTO agreements. The appropriate speed and efficiency of negotiation processes able to reflect those goals may rightly vary.

Beyond negotiating processes, some scholars advocate fundamental, structural reforms of the WTO. This includes calls for constitutionalizing the WTO – that is, for constructing a constitution for the WTO – to bolster both the strength and legitimacy of

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<sup>20</sup> The notion that trade liberalization and associated trade rules would be important for peace was a central part of the motivation for creating the GATT system post-WWII. See A. Guinness, 'International Trade and the Making of Peace', 20(4) *International Affairs* 495 (1944); Herbert Feis, 'The Geneva Proposal for an International Trade Charter', 2(1) *International Organization* 39 (1948); Jacob Viner, 'Conflicts of Principle in Drafting a Trade Charter', 25(4) *Foreign Affairs* 612 (1947); C. Wilcox, 'The Promise of the World Trade Charter', 27(3) *Foreign Affairs* 486 (1949). In 2008, a statement by Pascal Lamy echoed the enduring commitment of many within the WTO system to the relevance of that ideal, stating that 'there are only advantages in returning to a time in history when the people wanted to create an international system which prevents the repeat of a traumatic situation such as the first world war which they came out of.' Cited in 'Socialist realism revealed at WTO,' *Tribune de Geneve*, 17 March. 2008.

<sup>21</sup> Dani Rodrik, *One Economics, Many Recipes* (Princeton University Press: Princeton, 2007).



the WTO's rules.<sup>22</sup> The varied proposals that fall under this heading are challenged by those concerned that constitutionalization would erode national sovereignty and risk over-emphasizing economic goals over broader public policy objectives. Some critics call instead for acknowledging the usefulness of and need for greater political contestation rather than more rules at the WTO, and for creating and maintaining spaces within the WTO where political debate can occur within the multilateral trading system.<sup>23</sup>

A further cross-cutting area of tension has been the debate on how to boost developing country participation in global trade and make the multilateral trade system more responsive to developing countries. Proposals on these issues extend back to the 1960s when Part IV of the General Agreement on Tariffs and Trade (GATT) was established (which, among other elements, introduced the notion of special and differential treatment for developing countries).<sup>24</sup> The scope of discussion on how to make the WTO work

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<sup>22</sup> See for instance, John O. McGinnis and Mark L. Movsesian, 'The World Trade Constitution', 114 Harvard Law Review 511 (2000), at 523-25; Ernst-Ulrich Petersmann, 'National Constitutions, Foreign Trade Policy, and European Community Law,' 3(1) European Journal of International Law 1 (1992); Christian Joerges & Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Publishers, 2006). For an evaluation of these debates, see Deborah Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford: Oxford University Press, 2005).

<sup>23</sup> Robert Howse and Kalypso Nicolaidis, (2001) 'Legitimacy and Global Governance: Why a Constitution for the WTO is a step too far?' in R. Porter, Pierre Sauvé, Arvind Subramaniam, and A. Zampetti (eds), *Equity, Efficiency and Legitimacy: The Multilateral System at the Millennium* (Washington, D.C.: Brookings Institution Press, 2001) 227-263; Steven Charnovitz, 'WTO Cosmopolitics', 34(2) Journal of International Law and Politics 299 (2003); John H. Dunning, 'The Future of the WTO: A Socio-relational Challenge', 7(3) Review of International Political Economy 475 (2002); Robert Howse and Kalypso Nicolaidis, (2003) 'Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?', 16(1) Governance 73 (2003); Manfred Elsig, 'The World Trade Organization's Legitimacy Crisis: What Does the Beast Look Like?', 41(1) Journal of World Trade 74 (2007); Joost Pauwelyn, 'The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO', 8(2) Journal of International Economic Law 329 (2005).

<sup>24</sup> Murray Gibbs, 'Special and Differential Treatment in the Context of Globalization', Proceedings of the G15 Symposium on Special and Differential Treatment in the WTO Agreements in New Delhi, India on 10 December 1998, [www.wto.org/english/tratop\\_e/devel\\_e/sem01\\_e/gibbs\\_e.doc](http://www.wto.org/english/tratop_e/devel_e/sem01_e/gibbs_e.doc) (visited 16 April 2009);



better for developing countries has subsequently greatly expanded, inspiring increased engagement from governments, NGOs, and scholars alike.<sup>25</sup> Here again though, more emphasis has been placed on the immediate and important question of what kinds of trade agreements would best benefit developing countries, rather than on the process of achieving better trade deals or ensuring that the governance of the multilateral system and its institutional features provide the greatest opportunities for developing country perspectives and needs to be addressed.

Importantly, the perspectives that development analysts bring to the reform discussion do not always fit neatly within the boundaries of the agendas defined earlier by developed country scholars. There are shared interests in questions of the reform of the WTO's dispute settlement system and in improving rule-making processes. But development-oriented analysts devote greater attention to matters such as understanding and empowering developing countries in the WTO rule-making process, the potential and pitfalls of coalitions among developing countries, and how to operationalize the principle of special and differential treatment (SDT). Developing countries and development advocates devote far more attention to the importance of improved trade-related capacity building and technical assistance as part of the institutional reform debate, though there has been surprisingly little attention to the details of how this significant activity should

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Sheila Page and Peter Kleen, *Special and Differential Treatment of Developing Countries in the World Trade Organization* (London: Overseas Development Institute, 2004).

<sup>25</sup> Faizel Ismail, *Mainstreaming Development in the WTO: Developing Countries in the Doha Round* (Geneva: FES Geneva and CUTS International, 2007); Joseph Stiglitz and Andrew Charlton, *Fair Trade For All: How Trade Can Promote Development* (Oxford: Oxford University Press, 2005); Rorden Wilkinson and James Scott, 'Developing country participation in the GATT: A Reassessment', 7(2) *World Trade Review* 473 (2008); Kevin Gallagher (ed), *Putting Development First: The Importance of Policy in the WTO and IFI's* (London: Zed Books, 2005) .

be provided and governed.<sup>26</sup> Developing country analysts and development-oriented analysts also devote greater attention than many developed country counterparts to the interaction between international organizations and regimes, and to the coherence of their work.<sup>27</sup> In particular, many development analysts are concerned with ensuring synergy between the work of the WTO, the International Monetary Fund, and the World Bank, as well as the overseas development assistance that bilateral government donors provide..<sup>28</sup> There is also a high degree of interest in how the interaction of different international regimes, most notably the trade and climate regimes, impacts developing countries.<sup>29</sup>

A further cross-cutting theme that attract the attention of WTO critics and supporters alike is that of improving the accountability and transparency of the WTO and expanding opportunities for public participation.<sup>30</sup> Reacting to the anti-globalization backlash against the WTO around the time of the 1999 Seattle Ministerial Conference, many scholars have also taken up questions about the legitimacy of the institution.<sup>31</sup> Some scholars propose ways to bolster the validity of the WTO, while others argue that only fundamental transformation of the purpose and processes of the WTO can boost its

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<sup>26</sup> Carolyn Deere-Birkbeck, Carolyn Deere-Birkbeck, 'Governing the WTO System: The Capacity-building Function', Global Economic Governance Programme Working Paper 2009/4, University College, Oxford (2009).

<sup>27</sup> Gary Sampson (ed) *The Role of the WTO and Global Governance* (Tokyo: United Nations University Press, 2001).

<sup>28</sup> Debapriya Bhattacharya, 'Creeping Trade and Phantom Aid: LDCs in the Global Context and Priorities for Reform of Global Governance', Geneva Lectures on Global Economic Governance (29 January 2008, updated February 2009), <http://www.globaleconomicgovernance.org/creeping-trade-and-phantom-aid-ldecs-in-the-global-context-and-priorities-for-reform-of-global-governance-geneva-lectures-on-global-economic-governance> (visited 16 April 2009).

<sup>29</sup> Birkbeck and Meléndez-Ortiz, above n 3.

<sup>30</sup> See Bellmann and Gester, above n 13; Wallach and Sforza, above n 13; Woods and Narlikar, above n 16, at 569.

<sup>31</sup> Daniel Esty, 'The World Trade Organization's Legitimacy Crisis', 1(1) *World Trade Review* 7 (2002); Elsig, 2005, above, n 23; Matthew Eagleton-Pierce, 'Uncovering Symbolic Power: Power Analysis, Southern Countries, and the World Trade Organisation', (Doctoral thesis on file with the University of Oxford, 2007).

legitimacy.<sup>32</sup> Further some scholars argue that the process of vigorous debate within civil society about the pros and cons of ‘constructive engagement’ with the WTO and the prospects for reform are in themselves a source of legitimacy for the institution.<sup>33</sup> The result of debates on accountability and legitimacy has been a suite of reform proposals – some more abstract and others very specific – that aim to embed principles of democratic process, inclusiveness, transparency, and representation in WTO decision-making. These in turn have provoked counter-proposals and rebuttals. Some developing countries, for instance, oppose calls for greater civil society participation in the WTO’s formal decision-making due to concerns this would offer greater advantages to better-resourced NGOs in developed country. Some analysts caution against proposals for a greater role for the private sector and/or civil society in WTO deliberations arguing that the trade-offs with efficiency may be too high and that problems of accountability and transparency should first receive attention at the national level, through enhanced and more participatory national trade policymaking processes.<sup>34</sup> Civil society organizations have also appealed for constraints on the influence of big business and multinational corporations in the WTO agenda-setting and negotiating process.<sup>35</sup> On the other hand, advocates of greater developing country participation in the trading system often argue

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<sup>32</sup> Some analysts also see accountability as an end in itself, appealing to international human rights norms in that respect. See the work of 3D->Trade-Human Rights-Equitable Economy at <http://www.3dthree.org>.

<sup>33</sup> On this point, some scholars argue that the legitimacy of international institutions is in part derived from conflicts with external agents of change such as social movements. See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).

<sup>34</sup> Robert Wolfe with Mark Halle (eds), *Process Matters: Sustainable Development and Domestic Trade Transparency* (Winnipeg: International Institute for Sustainable Development, 2007).

<sup>35</sup> Susan Sell, ‘Big Business and the New Trade Agreements: The Future of the WTO?’, in Richard Stubbs and G. Underhill (eds), *Political Economy and the Changing Global Order* (New York: Oxford University Press, 2000) 174-183; Susan Sell, *Private Power, Public Law: The Globalisation of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003); Dominic Eagleton, *Under the Influence: Exposing Undue Corporate Influence Over Policymaking at the World Trade Organization* (London: ActionAid, 2006)

that increased engagement of developing country business interests in national preparations for multilateral negotiations is a vital prerequisite for them to extract greater benefits from the multilateral trading system.<sup>36</sup>

To date, political analysis of the strategies for achieving proposed WTO reforms (and the constraints that frustrate the prospect of such reform efforts) have attracted far less attention than the proposals themselves.<sup>37</sup> This reflects a weakness more broadly in the literature on international regimes and organizations, which has offered greater attention to the emergence, formation, and design than to regime change or organizational change.<sup>38</sup> That said, some scholars and commentators do consider the politics of the WTO reform debate. Some critics question whether the WTO is in fact amenable to the kinds of fundamental institutional redesign advocated by other scholars. Skeptics of the prospects for reform of formal decision-making and negotiation processes at the WTO emphasize, for instance, that trade negotiations are necessarily informal and that prospects for restructuring them from the outside are extremely limited.<sup>39</sup> As an alternative, they propose processes of learning and gradual, incremental change as more likely vehicles for change, where players themselves devise more efficient strategies for

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<sup>36</sup> Sheila Page, *How Developing Countries Trade: The Institutional Constraints* (London: Routledge, 1994) 328.

<sup>37</sup> Jane Ford, 'A Social Theory of Trade Regime Change: GATT to WTO', 4(3) *International Studies Review* 115 (2002).

<sup>38</sup> See, for instance, Ernst B. Haas, *When Knowledge Is Power: Three Models of Change in International Organization* (Berkeley: University of California Press, 1990); Laurence R. Helfer, 'Understanding Change in International Organizations: Globalization and Innovation in the ILO', 59 *Vanderbilt Law Review* 649 (2006).

<sup>39</sup> For a leading proponent of this perspective, see Robert Wolfe, 'Can the Trading System Be Governed: Institutional Implications of the WTO's Suspended Animation,' in Alan S. Alexandroff (ed) *Can the World Be Governed? Possibilities for Effective Multilateralism* (Waterloo: Wilfrid Laurier University Press, 2008) 289-352; Robert Wolfe, 'Still Foggy after All These Years: Reform Proposals for the WTO,' in Alan Alexandroff (ed) *Trends in World Trade Policy: Essays in Honor of Sylvia Ostry* (Durham: Carolina Academic Press, 2007) 133-54; and Robert Wolfe, 'Decision-making and Transparency in the "medieval" WTO: Does the Sutherland Report Have the Right Prescription?' 8(3) *Journal of International Economic Law* 631 (2005).

deal making. There are also analysts that offer strategies for organizing among developing countries.<sup>40</sup> A compelling case has also been made that the recurring ‘crises’ of the multilateral trading system – and the reform debates these generate – are used to the advantage of its most powerful members.<sup>41</sup> More broadly, a number of anti- or alter-globalization critics of the WTO system raise fundamental questions about the accountability of the WTO and the status of national sovereignty in the face of powerful global institutions. They question not only the purpose but also the plausibility of many reform proposals, as well as the underlying economic model underpinning the WTO – one that they argue focuses too much on consumption, economic growth, and control of global economic activity by large corporations. They argue that transforming the global economic system, and the WTO included, to promote equity and environmental sustainability requires ‘bottom up’ democratization through the work and growing power of social movements, rather than ‘institutional tinkering’ from above.<sup>42</sup>

## II. A New Approach to WTO Governance and Institutional Reform

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<sup>40</sup> Peter Drahos, for instance, takes up the question of how developing countries can forge more effective coalitions, particularly in the context of forum-shifting by powerful players. See Peter Drahos, ‘When the Weak Bargain with the Strong: Negotiations in the World Trade Organization’, 8(1) *International Negotiation* 79 (2003). See also John Odell, *Negotiating Trade: Developing Countries in the WTO and NAFTA* (Cambridge; Cambridge University Press, 2006).

<sup>41</sup> Rorden Wilkinson, *The WTO: Crisis and the Governance of Global Trade* (Oxford: Routledge, 2006) 175.

<sup>42</sup> James E. Anderson, ‘Why Do Nations Trade (So Little)?’, 5(2) *Pacific Economic Review* 115 (2000); Mark Rupert, *Ideologies of Globalization: Contending Visions of a New World Order*, (London: Routledge, 2000) 208; Saskia Sassen, *Globalization and its Discontents* (New York: New Press, 1998); David Held and Mathias Koenig-Archibugi (eds), *Global Governance and Public Accountability*, (Oxford: Blackwells, 2005); Walden Bello, ‘Why Reform of the WTO is the Wrong Agenda’, (Focus on Trade 43, December 1999), [http://www.tni.org/detail\\_page.phtml?page=archives\\_bello\\_agenda](http://www.tni.org/detail_page.phtml?page=archives_bello_agenda) (visited 14 April 2009).

This section sets forth five elements of a new approach to the question of appropriate institutional reforms at the WTO that responds to the contemporary global challenges and the evolution of the WTO's functions and practices.

1. *A 'Systems' Approach*

In 1997, John Jackson described the WTO as a set of legal agreements, and an institutional framework to administer the implementation of these agreements, settle trade disputes, and provide a forum for ongoing negotiations.<sup>43</sup> In so doing, he reinforced the GATT tradition of seeing the WTO as a legal regime, albeit now with a more formalized institutional structure and stronger dispute settlement mechanism at its heart. Over the past fifteen years, however, there have also numerous scholarly efforts that characterize and analyze the WTO as an 'international organization'. While the WTO Secretariat may indeed be characterized and analyzed as an 'international organization', this approach has important constraints. In 2006, for instance, a debate on this subject emerged between staff at the WTO Secretariat and the One World Trust regarding the difficulties of applying the literature on the accountability of international organizations to the particular case of the WTO.<sup>44</sup> The Secretariat staff argued that the member-driven character of WTO decision-making and the legally binding nature of agreements *among* its *members* are characteristics that make it difficult to discern what exactly one is holding "the WTO" accountable for and what the WTO is in that context. The Secretariat's argument is that WTO members rather than the Secretariat are responsible

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<sup>43</sup> See John Jackson, *The Jurisprudence of GATT and the WTO*, (Cambridge: Cambridge University Press, 2000) 497; John Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2<sup>nd</sup> ed, (Cambridge: MIT Press, 1997) 453.

<sup>44</sup> The particular issue was the how the One World Trust's Global Accountability Project (GAP) Framework applied its framework to the WTO. For this case study, see One World Trust, *Global Accountability Profile: WTO* (London: One World Trust, 2006).

for the content of particular WTO agreements, and that this distinguishes the institution from large international bureaucracies such as the World Bank and IMF, which have a vast array of activities. This example illustrates the challenges of analyzing the WTO as an ‘organization’.

Day-to-day language provides a hint of how we might more usefully analyse the WTO. The WTO is frequently referred to co-terminously as the ‘multilateral trading system’. Rather than examine it as a legal regime, or as an ‘organization’, a promising alternative is to examine it as a system. What then would a systems approach involve? We know that the WTO is indeed a legal regime built upon contractual legal obligations between Members, but that it is more than a set of agreements.<sup>45</sup> The WTO is also clearly more than merely a negotiating forum. The WTO also comprises a Secretariat, which is a discrete international organization and bureaucracy with a budget and work program defined by member states,<sup>46</sup> which includes responsibilities ranging from the administration of agreements and meetings, to the provision of training and technical assistance. Importantly, however, the scope of activities and outcomes for which the WTO Secretariat is directly responsible is smaller than those that WTO members call on the multilateral trading system to deliver on.

A systems approach acknowledges the composite nature of the WTO and the variety of actors involved in delivering and conducting the various functions and services of the multilateral trading system. While WTO members conduct most of the formal

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<sup>45</sup> General introduction to the politics, law and economics of the WTO, see John Barton, Judith Goldstein, Tim Josling, and Richard Steinberg, *The Evolution of the Trade Regime: Politics, Law and the Economics of the GATT and the WTO* (Princeton: Princeton University Press, 2006).

<sup>46</sup> While most of the literature approaches the WTO system as a regime (see Barton et al., above n 33; Ford, above n 23), the first major volume on the WTO ‘as an international organization’ appeared in 1998 (see Krueger, above n 4).



business of the WTO, the Secretariat provides significant support and conducts important activities. The WTO Appellate Body is, for instance, a distinct but linked international organization with its own discrete budget and working practices. Further, the work of WTO system is animated by interactions among members (that conduct much of the day-to-day business of the system) and the actions of a host of international agencies, including but not limited to the WTO Secretariat, as well as non-government organizations (NGOs) (public and private interests), and experts/individuals. This fact is exemplified in the case of the training, technical assistance, and capacity-building function of the WTO system, where some of the work is funded and implemented directly through the Secretariat, but much is implemented through collaborative arrangements with other international organizations and bilateral donors, and also independently by these and non-government actors.<sup>47</sup>

A systems approach to WTO reform acknowledges the range of actors, in addition to the WTO Secretariat and WTO members, that ‘do the work’ of the system and explores how they interact to advance that work. This systems approach can then be applied to each of the particular functions the WTO systems serves.

## 2. *A Functional Approach*

In addition to its widely-discussed negotiation and dispute settlement functions, the WTO system serves a range of additional functions often neglected by scholarly literature, including: (i) monitoring and surveillance; (ii) research; (iii) capacity building, technical assistance, and training; (iv) regime maintenance; (v) interaction with other international organizations; and (vi) public outreach and information-sharing with a range

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<sup>47</sup> See Deere-Birkbeck, above n 26.

of non-state stakeholders. A functional approach prompts us to explore how to isolate the appropriate political processes for tackling the distinct functions of the multilateral trading system. The proper formats and processes for negotiation, policy dialogue, problem-solving, monitoring and information-exchange, and dispute settlement differ. These may involve various roles for the WTO Secretariat and for its Director-General.

For each of these functions, a series of governance questions can be asked, including about the process through which decisions are made and implemented.<sup>48</sup> How are priorities set and who is involved? Who controls budgetary resources? How is performance monitored, assessed, and evaluated? A ‘functional’ approach to studying the WTO that examines each of these independently, and the links between them, yields new insights into the challenges and priorities for reform.<sup>49</sup> First, it enables us to see the full range of areas in which governance reforms might generate benefits for sustainable development and developing countries. Second, it provides ‘oxygen’ to now stale debates on issues such as the appropriate degree of public ‘participation’ in WTO activities, the scale of the WTO Secretariat, and how effectively developing countries participate in and influence each of the functions of the system. Third, a functional approach extends the scope of reform literature to consider the full range of the WTO’s functions. The post-negotiation dimension of the multilateral trading system’s activities has a significant impact on members, especially developing countries. In particular, closer attention to

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<sup>48</sup> To date, analyses utilizing this functional approach have been completed on the WTO’s negotiation, dispute settlement, capacity-building, and monitoring functions. See [www.globaleconomicgovernance.org/trade](http://www.globaleconomicgovernance.org/trade).

<sup>49</sup> For the application of this functional approach to another international organization, see Carolyn Deere, ‘Reforming Governance to Advance the WIPO Development Agenda’, in Jeremy de Beer (ed), *Implementing WIPO's Development Agenda*, (Waterloo: Wilfred Laurier University Press/Centre for International Governance Innovation/International Development Research Centre, 2009) (forthcoming).

post-agreement bargaining is critical for properly understanding the experience of developing countries in the global trade system and the range of challenges to which proposals for WTO reform should respond. Power politics occur both within global trade talks and in the interpretation and implementation of any resulting agreements.<sup>50</sup> There is also a need for greater attention to negotiation processes that occur outside particular trade Rounds, such as negotiations-related to accessions, the built-in agenda of the Uruguay Round, and ongoing talks that occur in WTO committees. Each of these aspects involve intense political bargaining over timing, trade-offs, adjustments, and burden-sharing.

### 3. *Acknowledge Dynamism*

The study of WTO reform must begin with an up-to-date appreciation of how WTO decision-making occurs in practice across the WTO's functions and how this has changed over its first fifteen years. The practice of international trade decision-making now differs considerably to that of the early days of the system and indeed the prevailing practice at the launch of the Doha Round.<sup>51</sup> Whereas, for instance, proposals on WTO reform in the late 1990s focused on concerns about the exclusive nature of the 'Green Room' and called for formalization of the negotiating process to enhance representation and transparency, the process of negotiations has now evolved and proven far more

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<sup>50</sup> Carolyn Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*, Oxford: Oxford University Press, 2008).

<sup>51</sup> A 2005 study commissioned by the WTO Secretariat provides a factual account of the first decade of the inner workings of the WTO. See Peter Gallagher, *The First Ten Years of the WTO: 1995–2005* (Cambridge: Cambridge University Press, 2005). For more political accounts, see Aileen Kwa, *Power Politics in the WTO*, 2<sup>nd</sup> ed (Bangkok: Focus on the Global South, 2003), <http://www.focusweb.org/publications/Books/power-politics-in-the-WTO.pdf> (visited 15 April 2009); Manfred Elsig, 'The World Trade Organization's Bureaucrats: Runaway Agents or Masters' Servants?', NCCR Trade Regulation Working Paper 19 (March 2007), [www.nccr-trade.org/images/stories/publications/IP2/MElsig\\_NCCRWP\\_Agency.pdf](http://www.nccr-trade.org/images/stories/publications/IP2/MElsig_NCCRWP_Agency.pdf) (visited 4 April 2009).

dynamic than many commentators acknowledge. Power configurations are evolving, and there is constant improvisation with respect to strategies for reaching consensus and closing deals. One of the clearest examples is that in light of the expanding use of coalitions as tools for representation, the infamous Green Room attracts far less criticism than it had previously. That said, there are still important enduring complaints regarding the ability of most of the over 100 developing country WTO members to participate effectively in Green Room processes and WTO decision-making, particularly the poorest and weakest among them.<sup>52</sup>

There is also far greater involvement by non-state stakeholders across WTO activities than anticipated in much of the initial scholarship on reform. The participation of developing countries in the Dispute Settlement system has evolved as have its practices with regard to public access to proceedings. The WTO Secretariat's own work is implemented through a variety of formal and informal processes that are dynamic and have evolved over time, and recent analyses have demonstrated how the Secretariat itself may be an actor in its own right, including in WTO negotiations at given moments.<sup>53</sup> The WTO's practices and policies on internal transparency have improved considerably over time.<sup>54</sup> Much has also changed since the early, more abstract discussions of the links between trade and so-called 'non-trade' issues. The WTO system has already been called

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<sup>52</sup> Sonia Rolland, 'Developing Country Coalitions at the WTO: In Search of Legal Support', 48 *Harvard International Law Journal* 483 (2007); Mayur Patel, (2007) 'New Faces in the Green Room: Developing Country Coalitions and Decision-Making in the WTO', Global Economic Governance Programme Working Paper 2007/33, University College (September 2007).

<sup>53</sup> See Elsig, above n 52.

<sup>54</sup> Padideh Ala'i, 'From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance', 11(4) *Journal of International Economic Law* 779 (2008).

upon to respond to an array of global challenges that have taken its ambit far beyond the initial far tidier world of market access negotiations.

#### 4. *Grounding Analysis in Normative Purpose*

Reforming the WTO demands clarity as to the objectives and benchmarks against which proposals for institutional reform ought to be tested. Scholarly proposals on WTO reform too often lack a clear articulation of the goals and challenges that proposals seek to address or they focus only on a narrow objective. Proposals for reforms necessary to speed the process for reaching new WTO deals, for instance, neglect broader questions on how to ensure the multilateral trading system advances the ends for which it was established, which include improving economic welfare in all countries, poverty reduction, sustainable development, stability in global trade relations, and a guard against beggar-thy-neighbor trade policies. Yet proposals for WTO reforms are frequently advanced on the basis of ill-defined concerns about weak ‘efficiency’ or ‘performance’ without adequate specificity regarding what these concepts mean or the distributional impacts of proposed reforms. Too often scholars write of improving the performance, efficiency, or credibility of WTO, but it is unclear what they consider the broader normative purpose or benchmarks against which the WTO’s performance, efficiency, or credibility should be judged? A sharper focus on such substantive goals would spur recognition that the mandate and purpose of the multilateral trading system are deeply contested both by WTO members and its diverse stakeholders.

The focus of reform proposals ought not to be limited to helping sustain the WTO *per se*, but rather on whether reforms help foster progress toward a WTO system that better delivers on the goals set out in its preamble. If sustainable development and

improving the plight of developing countries should be, and indeed are, at the heart of political debates about the global trading regime, the discussion of institutional reform and WTO governance should also be motivated by and judged against its ability to address these challenges. Proposals for WTO reform thus need to address two critical political priorities: (1) how to bolster the relative power of developing countries in the system, and (2) how to ensure the system better responds to sustainable development priorities. The challenge for those concerned with WTO reform is to discern how and in what ways proposed reforms address these two inter-linked goals. Of course, not all commentators share the view that these goals should indeed be a core purpose of the system or of reform, and others may prioritize other aspects of the preamble (such as the calls for raising standards of living and ensuring full employment, or expanding the production of and trade in goods and services). There is however a clear political and legal rationale for a focus on sustainable development and developing country needs (recognizing that those of particular countries may vary widely) as a benchmark.

In legal terms, the preamble to the *Marrakesh Agreement Establishing the WTO* recognizes the importance of sustainable development, calling on governments to conduct their economic and social objectives in trade relations in a way that allows “for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.”<sup>55</sup> The WTO’s preamble also recognizes the particular needs of developing countries in the trading system include, *inter alia*, the

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<sup>55</sup> Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, in *Legal Instruments Embodying the Results of the Uruguay Round*, vol. 1 (1994) [hereinafter WTO Agreement].

objective of greater employment. Several of the WTO Agreements detail general principles and objectives that emphasize members' development and public policy objectives, as well as other national goals such as political security.<sup>56</sup> In 2001, WTO members reaffirmed normative objectives in the Doha Ministerial Declaration, stating their conviction that the open, multilateral trading system and sustainable development 'can and must be mutually supportive' (Para 6, Doha Ministerial Declaration) and making development the stated purpose of the Doha Round. In addition, the Doha Declaration on TRIPS and Public Health highlighted that trade policies should not stand in the way of efforts by countries to respond to public health priorities. Several WTO appellate body decisions have recognized the importance of non-trade considerations and agreements in their reports on trade disputes.<sup>57</sup>

Those who argue that the WTO ought not to be a 'development institution' or a sustainable development organization or indeed anything more than a forum for commercial bargaining, have already been overtaken by political reality. Issues of sustainable development and the concerns of developing countries feature prominently in a number of ongoing trade negotiations. The fact that trade deals are so difficult to reach is in part because governments cannot escape the need to address political issues regarding equity, social, and environment impacts. Many of the obstacles to the conclusion of new trade deals are linked to the real-world need for governments to respond to political demands and tension over development and sustainable development challenges. Negotiations are protracted precisely because the issues before states are

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<sup>56</sup> Carlos Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (Penang, Malaysia: Third World Network (TWN), 2000).

<sup>57</sup> For examples, see Nathalie Bernasconi-Osterwalder, Daniel Magraw, Maria Julia Oliva, Marcos Orellana and Elisabeth Tuerk, *Environment and Trade: A Guide to WTO Jurisprudence* (London: Earthscan, 2005).



complex, demand intensive processes of learning (about challenges, implications, and possible solutions), and require time-consuming efforts to build political support for potential deals in Geneva and amongst members.

The call for a more sustainable development and developing country-friendly WTO has moved far beyond early debates that pitted pro-development advocates against the WTO in general, or trade liberalization in particular.<sup>58</sup> Indeed, in the years since the WTO was established, the trade and sustainable development debate has evolved considerably<sup>59</sup> as advocates have explored different ways to ensure that the WTO's substantive rules and agreements, and the balance of concessions in the new Round, properly incorporate and address sustainable development considerations. On the other hand, skeptics argue that the prospect for achieving, implementing, and enforcing truly balanced rules will remain thwarted until fundamental institutional reforms are achieved that address the broad array of decision-making and governance processes at the WTO.

At the launch of the WTO, environmentalists expressed concern about the potential 'scale' effects of liberalized trade on the environment and warned that global trade rules may have a chilling effect on national environmental regulation and

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<sup>58</sup> John Audley, *Green Politics and Global Trade: NAFTA and the Future of Environmental Politics* (Washington, DC: Georgetown University Press, 1997); Marc Williams and Lucy Ford, 'The World Trade Organisation, Social Movements and Global Environmental Management', 8(1) *Environmental Politics* 268 (1999).

<sup>59</sup> Jagdish N. Bhagwati and T.N. Srinivasan 'Trade and Environment: Does Environmental Diversity Detract from the Case of Free Trade?' in Jagdish Bhagwati and Robert E. Hudec (eds), *Fair Trade and Harmonization: Prerequisites for Free Trade*, 2<sup>nd</sup> ed. (Cambridge: MIT Press, 1996) vol 1, 159-226; Halina Ward and Duncan Brack, *Trade, Investment and the Environment* (London: Earthscan, 1999); Graciela Chichilnisky, 'Sustainable Development and North-South trade', in Lakshman D. Guruswamy and Jeffrey A. McNeely, *Protection of Global Biodiversity: Converging Strategies* (Duke University Press, 1998) 101-117; Patrick Low, *International Trade and the Environment* (Washington, D.C.: World Bank, 2002); Gary Sampson, 'Is There a Need for Restructuring the Collaboration among the WTO and UN Agencies So as to Harness Their Complementarities?', 7(3) *Journal of International Economic Law* 717 (2004); Eric Neumayer, 'The WTO and the Environment: Its Past Record is Better than Critics Believe, but the Future Outlook is Bleak', 4(3) *Global Environmental Politics* 1 (2004).

undermine global environmental agreements.<sup>60</sup> There is now a more nuanced recognition that some trade rules and flows may help promote more environmentally-sustainable outcomes while others may drive or contribute to unsustainable production, distribution, and consumption practices.<sup>61</sup> While some argued that the prospect of greening the WTO was structurally limited,<sup>62</sup> others now acknowledge that the understanding of trade, environment, and sustainable development issues, has evolved considerably and that much progress has been made.<sup>63</sup> Indeed, there is now greater involvement of developing countries and experts in defining a ‘Southern Agenda for Trade and Environment’.<sup>64</sup> Some developing countries are now proponents of a sustainable development approach to trade policy formulation and to specific aspects of trade negotiations.<sup>65</sup> More generally, the scope of the sustainable development agenda at the WTO has broadened from issues such as eco-labelling requirements and addressing declining global fish stocks, to trade-related dimensions of the effort to stop climate change.<sup>66</sup>

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<sup>60</sup> Ken Conca, 'The WTO and the Undermining of Global Environmental Governance', 7(3) *Review of International Political Economy* 484 (2000).

<sup>61</sup> Adil Najam, Mark Halle, and Ricardo Meléndez-Ortiz, *Trade and Environment: A Resource Book* (Geneva: IISD/ICTSD, 2007); World Wildlife Federation (WWF), 'Reform of the WTO's Dispute Settlement Mechanism for Sustainable Development', WWF International Discussion Paper (July 1999), [http://powerswitch.panda.org/what\\_we\\_do/footprint/transforming\\_markets/news/?3758/Reform-of-the-WTOs-Dispute-Settlement-Mechanism-for-Sustainable-Development-Discussion](http://powerswitch.panda.org/what_we_do/footprint/transforming_markets/news/?3758/Reform-of-the-WTOs-Dispute-Settlement-Mechanism-for-Sustainable-Development-Discussion) (visited 14 April 2009).

<sup>62</sup> Erik Beukel, 'Greening the World Trade Organization Trading Regime? Towards a Structural Power Model', 4(2) *Journal of International Relations & Development* 138 (2001).

<sup>63</sup> Daniel Esty, 'Bridging the Trade-Environment Divide', 15(3) *Journal of Economic Perspectives* 113 (2001).

<sup>64</sup> Adil Najam, Mark Halle, Ricardo Meléndez-Ortiz, *Envisioning a Sustainable Development Agenda for Trade and Environment* (Geneva: IISD/ICTSD, 2007).

<sup>65</sup> Chile, for instance, has played a leading role in this respect. See Mario Matus and Eda Rossi, 'Trade and the Environment in the FTAA: A Chilean Perspective', in Carolyn Deere and Daniel Esty (eds), *Greening the Americas: NAFTA's Lessons for the Hemispheric Trade* (Cambridge: MIT Press, 2002) 259 and Carolyn Deere, 'Greening Trade in the Americas: An Agenda for Moving Beyond the North-South Impasse', *Journal of World Trade* 38(1) 137 (2004).

<sup>66</sup> Carolyn Deere, 'Fisheries Trade and Sustainable Development: Conflict or Compatibility?', 15 *The Ocean Yearbook*, 345, PG 102-220, (2002); Carolyn Deere and Elizabeth Havice, *Fisheries, Trade and Sustainable Development* (Geneva: International Centre for Trade and Sustainable Development, 2006); William M. Reichert, 'Note, Resolving the Trade and Environment Conflict: The WTO and NGO

The call to ground analysis in normative principles and priorities is also one for acknowledging the need to enable rather than suppress political contestation at the WTO. Here, several scholars have already called for bringing more politics into WTO negotiations and decision-making as a desirable outcome and for finding more spaces for political contestation to occur.<sup>67</sup> Similarly, the institutional reform agenda is not a technical, legalistic, or bureaucratic matter that it can be ‘solved’ without a thorough consideration of the political demands and concerns driving divergent perspectives and expectations about the end-goal(s) of the WTO. These will necessarily affect recommendations on the purposes and strategies for WTO reforms.

Debates that slow current WTO negotiations are not about *whether* sustainable development considerations should be taken into account, but rather *how* they can be taken into account. On the social front, negotiations on non-agricultural market access (NAMA) and services stall because members have competing national policy considerations to address in terms of poverty alleviation, the creation of good quality work,<sup>68</sup> risks to social cohesion from rapid adjustments, and their own ability to manage the economic and social adjustments. The deadlock on negotiations in agriculture is driven by fundamental concerns about livelihood, food security, and the fate of the

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Consultative Relations', 5 Minnesota Journal of Global Trade 219 (1996); Aaditya Mattoo and Arvind Subramanian 'From Doha to the Next Bretton Woods' 88(1) Foreign Affairs 15 (2009).

<sup>67</sup> Pauwelyn, above n 23; Kalypso Nicolaidis and Robert Howse, 'Democracy without Sovereignty: The Global Vocation of Political Ethics' in Tomer Broude and Yuval Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Oxford: Hart Publishing, 2008) 163-191; and Nicolaidis and Howse, above n 23.

<sup>68</sup> World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All* (Geneva, International Labor Organization, 2004); Annie Taylor and Caroline Thomas, *Global Trade and Global Social Issues* (London: Routledge, 1999); United Nations Development Programme (UNDP), *Making Global Trade Work for People* (New York: UNDP, 2003); and UNDP, *Human Development Report 2005 - International Cooperation at a Crossroads: Aid, Trade and Security in an Unequal World*, (New York: United Nations Development Program, 2005) 372.

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‘bottom billion’ people in the world in approximately fifty failing states that defy efforts to reduce poverty.<sup>69</sup>

Members have taken up environmental considerations in discussion of rules on fisheries subsidies and liberalization of trade in environmental goods and services, and there is mounting interest in the relationship between trade rules, the emerging climate regime, and biofuels. Across the range of trade-related environment issues, the challenge is to forge solutions that address social, development, and political considerations and constraints of both developed and developing countries.

The under-representation of developing countries in WTO decision-making and the inadequate response of the WTO system to the varied needs of developing countries remain central challenges in the daily work of the Doha negotiations. Concerns about asymmetric outcomes of the Uruguay Round and the negotiation process have fuelled a broad recognition of the need to improve the accountability and responsiveness of the WTO system to developing country priorities.<sup>70</sup> The addition in the Uruguay Round of a strong regulatory agenda to the WTO’s traditional liberalization focus generated significant technical and institutional challenges for developing countries.<sup>71</sup> Developed countries have too rarely fulfilled their promises to take development considerations into account in multilateral negotiations or to translate their commitments to providing

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<sup>69</sup> Paul Collier, *The Bottom Billion: Why the Poorest Countries are Failing and What Can be Done About It* (Oxford: Oxford University Press, 2007) 224.

<sup>70</sup> For historical reviews of the Uruguay Round, see John Croome, *Reshaping the World Trading System: A History of the Uruguay Round*, 2nd ed., (Geneva: World Trade Organization, 1999) 400; Terrance P. Stewart, Susan G. Markel, and Michael T. Kerwin, *The GATT Uruguay Round: A Negotiating History (1986-1992)* (Boston: Kluwer Law and Taxation Publishers, 2003) 342. For historical perspectives on the WTO, see Robert E. Hudec, *The GATT legal system and world trade diplomacy*, (New York: Praeger, 1975).

<sup>71</sup> Bhagirath Lal Das, *The WTO Agreements: Deficiencies, Imbalances and Required Changes*, (London: Zed Books/Third World Network, 1998) 128; Joseph Michael Finger and Philip Schuler, 'Implementation of Uruguay Round Commitments: The Development Challenge', 23(4) *World Economy* 511 (1999).

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technical assistance and promote technology transfer into meaningful outcomes.<sup>72</sup> The emphasis of WTO members and the Secretariat on Aid for Trade since 2005 reflects the recognition that capacity building to date has done little to empower developing countries to make effective use of the WTO system. Recognition of the political imperative for greater efforts that assist developing countries has permeated up to key policymakers, including several Directors-General of the WTO.<sup>73</sup> Core challenges for developing countries that remain inadequately addressed include tariff escalation, disciplines on agricultural subsidies, the failure to understand how these countries trade, and the asymmetric nature of accession negotiations for new developing country members.<sup>74</sup> In this context, developing countries have maintained their long-standing calls for special and differential treatment.<sup>75</sup> They have added a call for ‘policy space’ to enable them to balance trade liberalization with targeted measures to promote balanced growth, poverty reduction, and industrialization.<sup>76</sup> In the Doha Round, they make a forceful case for a

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<sup>72</sup> Hesham Youssef, *Special and Differential Treatment for Developing Countries in the WTO* (Geneva: South Centre, 1999).

<sup>73</sup> See Krueger, above n 4; Mike Moore, 'Efforts to Assist Poor Countries', 8(4) *Presidents & Prime Ministers* 30 (1999); Mike Moore, *A World Without Walls: Freedom, Development, Free Trade and Global Governance* (Cambridge: Cambridge University Press, 2003) 304; Zhen Kun Wang, *Africa's role in multilateral trade negotiations*, (Washington, D.C.: World Bank, 1997) 28.

<sup>74</sup> See Page above, n 37.

<sup>75</sup> Robert Hudec, *Developing Countries in the GATT Legal System* (Aldershot: Trade Policy Research Centre, 1987) 246; Diana Tussie and David Glover (eds), *The Developing Countries in World Trade: Policies and Bargaining Strategies* (Boulder: Lynne Rienner, 1993); Constantine Michalopoulos, *Developing Countries in the WTO* (Basingstoke: Palgrave, 2001) 294.

<sup>76</sup> See Das, above n 75; Bhagirath Lal Das, *The Doha Agenda: The New Negotiations on World Trade*, (London: Zed Books, 2003) 128. For historical reviews of debates on developing countries in the GATT, see GATT, 'Report of Committee on Trade and Development: Basic Instruments and Selected Documents', 1984-1985, 32nd Supplement #21, L/5913; Alice H. Amsden and Takashi Hikino, 'The Bark is Worse Than the Bite: New WTO Law and Late Industrialization', 570 *Annals of the American Academy of Political and Social Sciences* 104 (July 2000); Bela Balassa and Constantine Michalopoulos, 'Liberalizing trade between developed and developing countries', 20 *Journal of World Trade Law* 3 (1986); Charles Chukwuma Soludo, Osita Ogbu, and Ha-Joon Chang (eds), *The Politics of Trade and Industrial Policy in Africa: Forced Consensus?*, (Ottawa: Africa World Press/IDRC, 2004). On trade, developing countries, and industrialization, see Gallagher, above n 25; Yong-Shik Lee, *Reclaiming Development in the World*

more development-oriented Round and have articulated clear proposals for how this might be achieved.<sup>77</sup> In this endeavor they have been joined by legal scholars,<sup>78</sup> development economists,<sup>79</sup> and NGOs.<sup>80</sup> In sum, the WTO reform discussion takes place in the context of real-world economic, social, and environmental pressures and political debates over ongoing negotiations. They can not be isolated from them. The current financial crisis highlights how quickly the interests and priorities of states can shift, highlighting that processes for dialogue and debate within governance systems are especially important at times when global economic performance weakens.

### 5. Devising Political Strategy

A final aspect of the proposed approach to WTO reform concerns the politics of reform. First, the power politics that permeate the WTO system will surely also impact the political viability and direction of reform.<sup>81</sup> An important distinction among scholars is between those focused on devising an ‘ideal type’ of WTO and those focused on politically-achievable change in the short- and medium-term. On both counts, a recurring weakness is that of limited systematic consideration of the political prospects for reform and strategies for making proposed changes happen. There has been careful consideration

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*Trading System*, (Cambridge: Cambridge University Press, 2006) 208; Ha-Joon Chang, *Kicking Away the Ladder - Development Strategy in Historical Perspective*, (London: Anthem Press, 2002) 187.

<sup>77</sup> See Faizel Ismail, 'A Development Perspective on the WTO July 2004 General Council Decision', 8(2) *Journal of International Economic Law* 377 (2004). See also Ismail (2007), above n 25; and Dani Rodrik, 'Five Simple Principles for World Trade', *The American Prospect*, 17 January 2000.

<sup>78</sup> Joel P. Trachtman, 'Legal Aspects of a Poverty Agenda at the WTO: Trade Law and “Global Apartheid”', 6(3) *Journal of Intellectual Economic Law* 3 (2003).

<sup>79</sup> Bernard Hoekman, Constantine Michalopoulos, and L. Alan Winters, 'More Favorable and Differential Treatment of Developing Countries: Toward a New Approach in the World Trade Organization', World Bank Policy Research Working Paper No. 3107 (1 August 2003); Bernard Hoekman, *The Political Economy of the World Trading System: The WTO and Beyond*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 2001) 576; Andrew H. Charlton and Joseph E. Stiglitz, 'A Development-friendly Prioritisation of Doha Round Proposals', 28(3) *The World Economy* 293 (2005).

<sup>80</sup> Oxfam, *Africa and the Doha Round: Fighting to Keep Development Alive* (Oxford, Oxfam, 2005).

<sup>81</sup> See Kwa, above n 52; Fatoumata Jawara and Aileen Kwa, *Behind the Scenes at the WTO : The Real World of International Trade Negotiations*, (New York: Zed Books, 2003) 224.

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of the role of the United States in the GATT/WTO system and the prospects of US support for reforms, particularly in Congress.<sup>82</sup> Recent shifts in the balance of economic power among states in the negotiations, and particularly the rise of countries like India and China, call for a deeper assessment of the political prospects for reform proposals. More broadly, some scholars have noted the importance in general of sustaining political interest in the WTO as a dynamic and relevant international organization. Already, they note that the risk that a WTO with a weak legislative function will undermine the credibility and legitimacy of the strong adjudicative function embodied the dispute settlement mechanism.<sup>83</sup>

### **III. Conclusion: Political Challenges, Research Priorities and Proposals**

What should a better multilateral trading system look like? To answer this question this chapter has argued that scholars need to explore new ways of thinking about the purposes of reform and the way in which the WTO is analyzed. It has argued for analyzing the WTO as a system. This approach enables us to properly account for the range of actors that are involved in the work of the WTO. It also broadens the scope and richness of reform proposals and generates different recommendations than analysis that starts by describing the WTO as either an intergovernmental regime or international organization. Further, this chapter has called for attention to the range of functions that the multilateral trading system serves. Asking questions about the governance of

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<sup>82</sup> Gautam Sen, 'The United States and the GATT/WTO System,' in Rosemary Foot, in Neil MacFarlane and Michael Mastanduno (eds), in *US Hegemony and International Organisations* (Oxford: Oxford University Press, 2003) 115-138.

<sup>83</sup> Richard Steinberg and Judith Goldstein, 'Regulatory Shift: The Rise of Judicial Liberalization at the WTO,' in Walter Mattli and Ngaire Woods, *The Politics of Global Regulation* (Princeton University Press, 2009) 211-241.



particular WTO functions provides new insights into the challenges of reform and broadens the scope for debate about the system as a whole, not just its negotiation and dispute-settlement functions. This chapter has also argued that a clear point of view on the ends and goals of the trading system is a necessary prerequisite for intelligent discussion of WTO reforms, and makes the case that proposals for WTO reform should be grounded in the objectives of sustainable development and empowerment of developing countries in global trade governance. An important challenge – not addressed in detail in this chapter – concerns the kinds of indicators, benchmarks, or questions that can be used to measure how WTO reform proposals and governance (that is, the process by which decisions are made and implemented) contributes to, or constrains, progress in the area of sustainable development. Finally, this chapter has argued that reform proposals should acknowledge and allow the need for a permanent space or spaces for political contestation within the global governance or trade – as well as for greater attention to how reform proposals can be made attractive to WTO members.

To indicate where this analytical approach could lead, this chapter concludes with examples of some of its implications for the WTO reform debate in relation to four of the functions noted above: monitoring, negotiation, research, and capacity building.

A functional approach to the analysis of needs for WTO reform prompts greater attention to the WTO's monitoring function.<sup>84</sup> The recent financial crisis has already spurred interest in greater surveillance by the WTO Secretariat of protectionist measures

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<sup>84</sup> For a critical review of the effectiveness of WTO's monitoring and surveillance activities, see Arunabha Ghosh, 'Information Gaps, Information Systems, and the WTO's Trade Policy Review Mechanism', Global Economic Governance Programme Working Paper 2008/40, University College (2008). Also see proposals in articles by Robert Wolfe, Félix Pena and Arunabha Ghosh in Deere-Birkbeck and Meléndez-Ortiz, above n 4.

by member states. But, a careful examination of the monitoring function in light of the dual objectives of ensuring that it helps advance sustainable development and empower developing countries spurs a deeper and broader reform agenda. How could we reform the trade policy review (TPR) process to better serve as a tool to help governments integrate development considerations into trade decision-making? One option would be for the TPR process to include an assessment of the affects of trade rules in light of development objectives and an identification of national trade-related hurdles that impede their realization. The review process could also perform a stronger role as a catalyst for governments to organize appropriate capacity building. Specific reform proposals could include: making the Trade Policy Review process open to the public; involving national multi-stakeholder processes at the national level in the development of the national trade policy review reports; inviting recognized international experts as commentators in the Trade Policy Review meetings in Geneva; inviting commentaries from other national and international interested parties (for example, other IGOs, industry groups, NGOs, academics, etc); and integrating a new component into the Trade Policy Review process for least developed countries (LDCs) that evaluates the fulfilment by developed countries of their capacity building commitments to LDCs. The adoption of a ‘systems’ approach leads us to consider that the monitoring function need not, and perhaps cannot, be served by the WTO Secretariat alone. Instead, the performance of the WTO’s monitoring function might also be improved by engaging non-state actors through an independent monitoring mechanism.

The approach advocated in this chapter might also lead us to move beyond many of the existing proposals for enhancing the research function of the WTO. To date, there

have been several calls for greater research capacity within the WTO Secretariat. A development-oriented and systems approach would instead lead us to favor increased support for independent research and analytical capacity in developing countries at the national and/or regional level in universities, think tanks, and research centers, as well as in the regional/national headquarters of various UN agencies.<sup>85</sup> (Some initial steps in this direction are already being taken by the WTO Secretariat, albeit amidst calls to still boost the WTO's own research capacity.) In addition, a sustainable development perspective would prompt us to call on donors and national governments to support national research and analytical capacity that considers trade objectives in light of domestic development goals.

Regarding the WTO's negotiation function, a systems approach leads us to recognize the prominence of coalitions in the negotiations and to consider how there could be stronger financial support to the secretariats of developing country coalitions, drawing on lessons learned from successful experiences (such as those of the small and vulnerable economies coalition) regarding the effective internal management and operation of coalitions and improving their negotiating capacity.<sup>86</sup> Even the smallest countries with a limited interest in market-access issues at stake in specific WTO negotiations have a long-term interest in understanding and contributing to the development of institutional rules, which they also have obligations to implement and enforce at the national level. Support should thus be given to LDC WTO members to

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<sup>85</sup> Diana Tussie (ed), *The Politics of Trade: The Role of Research in Trade Policy and Negotiation* (Martinus Nijhoff, 2009).

<sup>86</sup> Mayur Patel, above n 53; Carolyn Deere-Birkbeck, Emily Jones and Ngaire Woods, *Manoeuvring at the Margins: Small States in International Trade Negotiations* (Oxford: Global Economic Governance Programme and London: Commonwealth Secretariat, forthcoming).

ensure they have permanent representation in Geneva. This can be accomplished either through mandatory contributions by members to the WTO's core general budget, or through a voluntary, supplementary contribution scheme. While such measures would not resolve all of the questions surrounding the best ways to structure and delineate the scope of WTO negotiations, without representation it is difficult to see how the smallest developing countries can hold the multilateral trading system as a whole accountable to them.

Attention to the specific functions of the WTO system also leads us to consider the engagement of developing countries in decision-making for the system's capacity building function. Improved capacity building will depend on developing country leadership to push for more effective aid, better articulate their needs, and extract greater value from existing resources. Effective Aid for Trade and capacity building demands that countries organize themselves and stakeholders in order to benefit from it, including through support for multi-stakeholder decision-making processes on trade policy, negotiating priorities, and implementation. On the governance front, the implication is that developing countries need a stronger role in the management of Aid for Trade. Significant steps have been made in this regard to improve the 'Integrated Framework' for capacity building to developing countries. However, a careful examination of the data on trade-related assistance and Aid for Trade reveals that the majority of assistance flows through bilateral agencies and a diverse range of multilateral agencies beyond those involved in the Integrated Framework.<sup>87</sup> Developed countries should shift their support from bilateral trade-capacity building initiatives, often driven by their own mercantilist

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<sup>87</sup> Deere-Birkbeck, above n 3.

priorities, to multilateral initiatives that offer great opportunities to delink assistance from developed country priorities. The focus of capacity building must be on establishing durable capacity in developing countries and regions rather than supporting a network of international trade consultants. Another shortcoming concerns limited attention to monitoring and evaluation of capacity building and Aid for Trade. This could be boosted through annual independent evaluations and/or peer-reviews of trade-related capacity building from the developing country perspective, which takes a sample of countries and reviews that provision of assistance against the priorities established through the ‘Enhanced Integrated Framework (EIF)’, or in other national development strategies (such as the World Bank’s Poverty Reduction Strategy Papers (PRSPs)). The point here would not simply to evaluate assistance on a project by project basis, but to seek metrics or benchmarks for discerning how well assistance helps countries implement trade policies, institutions, and initiatives that advance their development. Further, there should be greater monitoring and public disclosure of regarding the performance of each major donor. Proper acknowledgement of the range of actors and levels at which capacity building is needed takes one away from narrow WTO-centric views of the Secretariat’s work on training and TA, but rather sees it in context.

Finally, a functional approach to the question of WTO reform also breathes new life into an often sterile discussion on whether and how to boost ‘civil society participation’.<sup>88</sup> The functional approach highlights the ways in which civil society

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<sup>88</sup> Peter Van den Bossche, ‘NGO Involvement in the WTO: A Comparative Perspective’, 11(4) *Journal of International Economic Law* 717 (2008); Yves Bonzon, ‘Institutionalizing Public Participation in WTO Decision Making: Some Conceptual Hurdles and Avenues’, 11(4) *Journal of International Economic Law* 751 (2008); and Mark Halle, ‘Catching up with the Slowest: NGO Accreditation at the WTO’, 11(3) *Bridges Monthly* 20 (2007).

groups already do participate at different levels across the WTO's negotiation, research, capacity building, and monitoring functions, as well as the opportunities to enhance this further.



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