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Betrachtungen zur Aussenwirtschaftspolitik

International Economic Relations: Notes & Comments

Various Approaches for Institutional Reforms within the WTO

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1 Introduction

With Cancún two out of five WTO Ministerials have now failed. The outcome of the Doha conference – at first celebrated as a success – is now also called into serious question. The WTO does not seem able to achieve any substantial political progress. There is therefore a need for an institutional reform of the WTO.¹ The question then arises as to whether it will be possible at all to reform the WTO – this would also require a political process which must be decided according to the current rules. Not everything desirable in theory is therefore also achievable in practice.

Which reforms are we talking about? The various reform approaches can be roughly divided into three categories. One focuses on the decision-making process.² WTO decisions are largely made by consensus. Seattle and Cancún had shown how difficult it can be to reach a consensus among the more than 140 members. Compared to the GATT, today's situation is more complex because the WTO's economic impact is much greater and its political power is more explosive due to new WTO agreements and their enforceable rules. WTO proponents were therefore most concerned about the possibility that the success of the organization might harbor the potential for its own demise, since WTO's attractiveness has led to a significant increase in the number of members. While the GATT had 23 contracting parties when it was founded in 1947, the WTO presently has 148 members and 27 applicants are waiting in the wings to join.

* The views expressed in this paper are those of the author and should not be ascribed to the organization he is working with.

1 The debate on an institutional reform of the WTO was most lively in the aftermaths of Seattle. Besides academics also business and NGOs engaged in this discussion; see OXFAM (2000) and UNICE (2001). The failure of Cancún revived this debate. It prompted EU trade commissioner PASCAL LAMY to call the WTO a "medieval" organization. At the end of 2003 the EUROPEAN COMMISSION came up with a discussion paper on institutional reforms of the WTO; see EUROPEAN COMMISSION (2003a). The objective of a moderate institutional reform has subsequently become part of the EU's post Cancun strategy; see EUROPEAN COMMISSION (2003b) p. 10–11.

2 For an overview on this question see SCHOTT and WATAL (2000).

Obviously, finding a consensus becomes more difficult with every new member. This can be seen right now as the WTO is challenged to get new agreements on international investment and competition policy issues off the ground within the context of the Doha round of negotiations. WTO critics, however, maintain that the failures of the Seattle and Cancún conferences were rooted not in the rules governing decision-making processes but in the misalignment of industrialized and developing countries' interests.³ In their minds, the most important question was that of providing an institutional basis so that a broad participation of developing countries in decision-making procedures can be accomplished.⁴

The second category of reform proposals concerns questions relating to the WTO's democratic legitimization. The statement that the WTO, as all international organizations, suffers from a "lack of democracy" is based on the realization that, due to the dispute settlement mechanism, WTO rules can interfere greatly with a country's national sovereignty. A brief look at dispute settlement procedures makes clear that the WTO deals with issues affecting domains of national laws, for instance, health policy or tax legislation. In view of the far-reaching implications of WTO rules, should national parliaments not be more closely integrated into the organization's work? Does the public not have a right to more extensive information, and should interested parties not be participating in the organization's deliberations on an ongoing basis?⁵

A third category, often neglected in political debates, relates to the WTO's management and Secretariat.⁶ Improving the practical work procedures and management can have a catalytic effect on the organization as a whole and is also not very controversial politically. This means the improvements stand a relatively good chance of being successful.

It is the objective of this paper to make a contribution to formulating a reform agenda which is politically realistic as well as efficient, that is, which stands a chance of achieving the greatest amount of progress through politically feasible steps.⁷

3 See OXFAM, Cancun talks collapse as poor countries stand firm, Press Release of 14 September 2003, Internet: http://www.oxfam.org/eng/pr030910_cancun_wreck.htm (downloaded January 10, 2004).

4 See OXFAM (2000).

5 See for a discussion on the alleged legitimacy crisis of the WTO: ESTY (2002) and HENDERSON (2002).

6 See RUDISCH (2002) p. 19–22.

7 This objective does not rule out that it may be worthwhile to think about much more fundamental reforms which could be realized in the long run. For instance, BRONCKERS proposes to officially broaden the WTO's mandate and to develop it into a World Economic Organization; see BRONCKERS (2001).

2 Decision-Making

2.1 Rules Governing Decision-Making Processes

Rules governing decision-making processes are a key issue for any international organization since these rules determine an organization's ability to make decisions and how power is distributed. Decision-making rules must largely be evaluated by considering the size and heterogeneity of the membership. Within the EU, for instance, decision-making rules are a constant and burning issue. Which questions are determined by which rules? In view of the imminent EU enlargement from 15 to (at first) 25 members, many voices rightly call for a reform of decision-making processes. It is said that the EU will only be able to exist as a functioning organization if more decisions will be made by majority votes.

In the case of the WTO, there is a striking asymmetry between the ability to make legal decisions when WTO rules are violated and the ability to amend existing rules or create new ones. In other words, the judicative branch of the WTO has much authority to act, whereas the legislative branch functions only clumsily. While the dispute settlement mechanism provides that Panel and Appellate Body determinations of rule violations and the authorization of countermeasures can only be averted on the basis of consensual decisions by all member states, a positive consensus is necessary for amending these rules. But the boundary between making and administering rules is fluid since decisions coming out of the dispute settlement process result in legal interpretations of the rules, which can have important political repercussions.⁸

The question of how environmental protection should best be treated within the WTO framework illustrates this problem. On several occasions, this politically significant issue has been decided by dispute settlement procedures. But, at the present time, WTO members would hardly be able to agree on a common interpretation. A related issue is the question of democratic legitimization. A parliament approves the text of an agreement and must then sit back and wait until important legal terms are defined only during a dispute settlement process. The situation is aggravated by the fact that, in order to gloss over political differences, vague terms

8 In the light of effective WTO dispute settlement MARCO BRONCKERS makes the case for improving WTO rule making; see BRONCKERS (1999). ERNST-ULRICH PETERSMANN proposes a constitutional reform of the WTO with a view to strengthen the consideration of human rights. See PETERSMANN (2000) and PETERSMANN (2003).

are frequently chosen intentionally in international negotiations so as to leave room for many different interpretations. In many international organizations this does not have any serious consequences because the institutions do not have any judicial bodies that would interpret and enforce negotiated texts on a case-by-case basis. In contrast, WTO member countries can be confronted with rules that they would have never agreed to from a policy point of view. It should not come as a surprise that this leads to misalignments. Since only a minority of WTO observers consider weakening of the dispute settlement mechanism a reasonable solution to overcome the asymmetry between the legislative and judicial branch, the only viable alternative is to strengthen the decision-making capacity on the political side.⁹ The WTO is also in permanent competition with regional free trade agreements which threaten to result in more and more fragmentation of world trade. A standstill on the legislative front would mean a step backwards.

The consensus principle of the WTO must be seen against this background.¹⁰ Many observers think that the agreement on the Ministerial Declaration of Doha was bordering on the miraculous. Others opine that the compromises found in Doha are nothing more than empty words and that members' interpretations of the core issues of the Declaration are greatly diverging. The Singapore topics (investment, competition, trade facilitation, and public procurement), for example, or the term negotiating "modalities" to be agreed upon during the fifth ministerial conference, clearly demonstrate this point. While the EU takes "modalities" to mean the scope of the negotiations including negotiating objectives, India, for example, also incorporates the question of "whether negotiations should take place at all". These fundamentally diverging views led to one of the major controversies in Cancún, maybe even caused the failure of the conference.

Ultimately, the Doha consensus was possible only because the reality of different interpretations was accepted and there was much political pressure to avoid another Seattle at all costs in view of the terrorist attacks of September 11, 2001. At the end of the day, all WTO members were keenly aware of the necessity for the WTO and the international community of

9 In contrast, the ongoing development of the dispute settlement mechanism, taking place outside of the Single Undertaking, is aimed at strengthening procedural processes. In light of the rule making of the judicial system and the lack of democratic legitimacy CLAUDE BARFIELD argues that WTO dispute settlement should give more room for diplomatic solutions; see BARFIELD (2001).

10 For more details on the consensus principle see RUDISCH (2002) p. 23.

nations to demonstrate their capacity to act. Has the consensus principle reached its limits and is it therefore urgently necessary to formulate different voting procedures so that the WTO will continue to be able to function in the future? Did Cancún prove that without exceptional international pressure consensus on matters of substance can hardly be achieved?

The transition from consensus principle to majority decisions improves the decision-making ability. Decision theory, however, shows that with a transition to majority decisions an important advantage is lost. The benefit of unanimous decisions lies in the fact that every decision has some advantage for every member.¹¹ But, in practice, individual decisions often make for winners and losers; therefore the WTO needs to negotiate issues by embedding them into a larger context.¹² It is argued that a positive overall package can only be put together when a sufficiently large number of results have been bundled together. This is the decisive incentive for engaging in comprehensive negotiations; in other words, it is the only chance to even reach a consensus in the decisions-making process. Up until now, comprehensive negotiations were considered a convincing alternative to majority decisions.

The example of the EU demonstrates how politically sensitive it is to decide without the consensus principle when it comes to the really important issues, even in the relatively homogeneous European legal context. It is difficult to imagine that anyone in the EU would be in favor of majority decisions in questions such as enlargement or amendments to the EU Treaty. This would represent too much interference in countries' national sovereignty. It is easy to see how much more problematic the majority principle would be for an organization that unites so many members with different political, economic and cultural values and, at the same time, touches vital national interests. A transition from the consensus principle to majority decisions would thus be anything but a mere technical change. On the contrary, it would go to the very essence of the WTO. The organization's legitimacy is based on two important elements: on the one hand,

11 A property which is called Pareto efficiency in economic theory applies only if there is sufficient transparency and if it is possible to evaluate the impact of decisions in a rational manner. Only well-informed, rationally acting governments (i.e. utilizing all the information available) will make decisions that actually lead to Pareto optimal results.

12 Here, the question is justified which economic theory premises should be used as a basis. Should the mercantilist approach of trade diplomats be used which always views market access as a concession for which something should be given in return, or should modern foreign trade theory be the overarching approach which holds that market access also benefits the country granting such access.

the voluntary nature of membership, with members being free to leave the organization if they wish to do so and, on the other hand, the right of every member to veto decisions. The more an organization moves away from the consensus principle, the easier it becomes to make decisions. Simultaneously, the risk of making decisions at the expense of individual members increases greatly. The latter would have to weigh the pros and cons of staying in and of leaving the organization. But in the case of the WTO, the consequences of leaving the WTO regime would be so dramatic that disadvantaged members' ability to live with any problems must be considered as rather high. Therefore, the general implementation of majority decisions across the board is unthinkable from a political standpoint. Differentiated voting procedures, however, might be possible, especially since the WTO Statutes already provide for them (see *Table 1*).

Table 1 Decision-Making Rules in the WTO

Type of decision	Rule	Legal basis
Decisions	Preferably consensus, but simple majority possible	Article IX.1
Access of new members	Two-thirds majority	Article XII
Budget	Two-thirds majority	Article VII
Interpretation of agreements	Three-quarters majority	Article IX.2
Waivers	Three-quarters majority	Article IX.3
Amendments	Two-thirds majority (with exceptions)	Article X.1 in combination with X.3 (exceptions: X.2, X.5, X.6)
Integrating a plurilateral agreement	Consensus	Article X.9
Cancelling a plurilateral agreement	Decision of the members to the agreement	Article X.9

Source: Agreement Establishing the World Trade Organization

The available possibilities have not been utilized in practice; the consensus principle has also been applied in situations in which it was not even required. This shows that the consensus principle is not just a simple rule but rather an expression of a consensus-oriented culture that dominates the WTO. Turning away from the consensus principle would therefore be a break with the traditions fostered within the WTO. It is safe to assume that the organization would not risk such a venture in the absence of a great degree of pressure to implement changes. Whether the failed Ministerial Conference of Cancún will prompt such a move remains to be seen.

In this context, it is also important to mention that the EU alone holds 15 votes. If EU candidate countries are added as well as those states that are closely linked to the EU through development cooperation based on the Cotonou Agreement, the total comes to about 100 countries. If majority rule were to be applied, the EU and its partners alone would be in a position to bring about decisions they deem to be in their interest (e.g., bring about waivers and amend agreements).

Majority decisions would thus not be a panacea but cause new problems.¹³ What good would a committee chair be if the person was installed against the will of certain member countries? Would it not be possible to block these bodies and render them useless? And who would want to make the decision on what constitutes an interpretation of, or an amendment to, an agreement? Using the term “modalities” as an example makes clear how politically explosive a simple definition can be. The practice of not applying majority decisions, even if allowed by the WTO Statutes, is certainly justified.

2.2 A Two-Speed WTO

Another option to streamline decision-making within the WTO would be to limit the process to a small group of members instead of negotiating and concluding new agreements with all WTO members as a matter of principle.¹⁴ This option was much debated within the EU in the context of sought-after agreements on international investment and competition rules. Could a “two-tiered” WTO – similar to the EU concept (e.g., Monetary Union, Schengen) – contribute to the development of the WTO regime?¹⁵ Even though one of the successes of the Uruguay Round was the negotiation of a multilaterally satisfying package of rules, it would certainly not be a paradigm shift to press for more plurilateral agreements in the future. This approach lends itself especially to those areas in which accession to an international agreement presumably will result in more benefits than costs, a concept that applies especially to the “new issues” of competition and investment. Generally, the multilateral approach is cer-

13 The pros and cons of the consensus principle are also discussed by RUDISCH (2002) p. 23–25.

14 After Cancún, plurilateral agreements have become an option openly discussed by the EU; see EUROPEAN COMMISSION (2003b) p. 10–11.

15 JACKSON questions the Mantra of the “single undertaking” and argues that there might be subjects that would require a different time line or a different composition of participants; see JACKSON (2001) p. 72). Also GARCIA BERCERO discusses this option; see GARCIA BERCERO (2000) p. 109. See also the “concentric circle” model described by BLACKHURST (1998) p. 49–50.

tainly the best solution. But after Cancún, one must ask whether the “one size fits all” approach is really realistic. Is it always necessary from an economic point of view that small Pacific islands create competition authorities and adapt to multilateral investment rules? Also, the traditional trade policy approach of exchanging concessions (a principle based on mercantilist assumptions which, from an economic theory perspective, is hardly tenable) is totally misleading when it comes to these new topics. The latter focus essentially on central elements of good governance. Countries want to create favorable conditions for foreign investors. Competition policy is an indispensable element of a well-functioning market economy. The modernization of customs procedures does not have any disadvantages, and more transparency in public procurement may be an important step in the fight against corruption. It is far-fetched to define such agreements as hostile to the interests of developing countries. Implementing these agreements costs money. But if these costs are shouldered by the industrialized countries within economic cooperation projects or via “capacity-building” structures, an increasing number of countries will probably participate in plurilateral agreements, once positive experiences with the new rules become well-publicized. There is no “free rider” problem that would hinder such a process.

Proponents of these agreements can count on the fact that the advantages of being a member will be clearly demonstrated in practice, thus gradually enlarging the membership of plurilateral arrangements. One of the downsides of plurilateral agreements certainly is that the relatively small – and homogeneous – group of negotiating members will reach results that are too demanding, i.e., too costly in the long term for those on the outside. It would therefore be important to integrate the concerns of non-negotiating WTO members into initial discussions among the small group. Otherwise, the risk that plurilateral agreements will not be enlarged is rather high. Since, in the end, all WTO members must agree to the integration of a plurilateral agreement into the set of WTO agreements (Article X.9 of the WTO Agreement), the negotiating members must not veer too much off course. On the other hand, non-participating members have also only limited veto power because it is always possible to conclude plurilateral agreements outside of the WTO regime, e. g. under the umbrella of the OECD. If the agreement remains under the WTO umbrella, non-participating members would enjoy greater transparency and the opportunity to join the negotiating parties at any time.

2.3 Decision-making bodies

For some time now, it has been debated whether the WTO should institute a governing body, similar to the UN Security Council or the ILO Governing Body which would support the finding of consensus solutions, or should even have a special decision-making authority.¹⁶ Such a governing body would not be totally new in the trade policy arena. A Consultative Group of 18 already existed from 1975 to 1988 within the GATT.¹⁷ The fact that this group was abandoned demonstrates that the advantages of such a system were not particularly compelling, at least not at that time.¹⁸

After Seattle, one of the main criticisms of the WTO decision-making process was that *de facto* only relatively few members actively participate in negotiating compromises and that many members are excluded from this process. The catchword of this debate was “Greenroom” diplomacy.¹⁹ An examination of current WTO decision-making practices shows that, in most cases, decisions are not made in plenary sessions with all members participating but only among a relatively small and selected group. Not all WTO members participate in the various committee meetings since, on the one hand, smaller countries do not have sufficient human resources as well as technical capabilities and, on the other hand, not all issues are relevant or are considered to be relevant for all WTO members. Furthermore, for division of labor and efficiency reasons, spokespersons emerge for certain issues; they represent a whole group of like-minded WTO members and follow the discussions on a continuing basis. As a general rule, alliances are flexible. But sometimes they are forged for the long haul.

Undoubtedly, the best-known of these alliances of interests is the Cairns Group which focuses on free access to agricultural markets, with Australia acting as the group’s spokesperson and organizer. With regard to the re-

16 This proposition is discussed by RUDISCH (2002) p. 8–15. RICHARD BLACKHURST points out that at the Singapore Ministerial Conference consensus on the declaration has been achieved by means of a group of 44 members which discussed, debated, and eventually reached consensus. This consensus among the 44—although fiercely criticized by the left outs—was finally adopted by all members; see BLACKHURST (1998) p. 49.

17 See GARCIA BERCERO (2000), p. 108 and NARLIKAR (2001) p. 16–17.

18 JEFFREY SCHOTT and JAYASHREE WATAL propose to set up a small informal WTO steering committee as a facilitator to forge consensus; see SCHOTT and WATAL (2000).

19 Greenroom is the name of one of the Director-General’s conference rooms. In the past, it had been used for informal discussions among small groups of members in advance of upcoming decisions. Participants were always invited by the Director-General. The term “Greenroom” diplomacy denotes the preliminary discussion of upcoming decisions and the exclusion of some members from the decision-making process.

gions represented, the state of development, and size of the participating countries, the Cairns Group is extremely heterogeneous. Nevertheless, its common position on agricultural policies has turned out to be very stable. One might assume that such a long-standing cooperation leads to a relationship of trust among the group members, thus promoting broader-based cooperation. But when the members of the Cairns Group were asked if they could imagine a coordinated approach to issues other than agriculture, this assumption would be quickly refuted. In spite of the long-standing alliance, the number of issues on which the group is united in its views has not increased. Trade policy alliances are formed on the basis of tangible interests. It is therefore difficult to imagine that a representative WTO steering body, elected for a finite period of time, would be able to unite the many different WTO issues and interests of members.

In this context it should also be mentioned that since the beginning of the Doha negotiations, individual WTO members have started to spontaneously convene so-called “mini ministerials” to evaluate the overall political climate. Attended by the most important representatives of diverse interest groups, the debates focus on approaches to overcoming the most serious conflicts, without these discussions being binding for the work of the WTO. With such flexible consensus-forging strategies, the question arises how much “added value” a formal steering body might have. Such a body would never be able to represent the many different interests of the organization’s members. Conflicts of interest between representatives and interested parties would be foreseeable and would limit the maneuvering room of the steering body.

2.4 Ministerial Conferences

Ministerial Conferences are the political culmination of the WTO. Here, the WTO’s political capacity to act must be demonstrated. Seattle and Cancún have exposed ostensible shortcomings in the preparation and procedures of ministerials.²⁰ Now, practical consequences must be drawn.

First of all it is important to draw up a political agenda which fits to the format of a ministerial conference. On the one hand, ministerials are a suitable means for reaching difficult political compromises and achieving

20 For a detailed chronology of Seattle see ODELL (2001). ODELL’s expectation that the WTO has to face continued stalemate now turns out to be pertinent.

the necessary trade-offs between various areas of negotiation. The presence of the political decision-makers, the pressure to move as a result of the time restriction faced by ministers, and the fact that decisions have to be made simultaneously make ministerials so effective and provide a great opportunity for the consensus-finding process. On the other hand, ministerials should not be burdened with too many controversial topics. If the complexity of the topics awaiting decision increases, politicians could become more inclined to say “no” as they will feel excessive demands are being made on them and will want to avoid making any mistakes which could prove difficult to reverse. Therefore, if the agenda is overloaded, especially developing countries with limited trade policy capacities could easily get the impression that they were being outmanoeuvred. One has to bear in mind that despite the various measures for capacity-building many developing countries have limited ability to recognize the implications of the various WTO issues and to analyse the impact on their own economy. One can rightly maintain that Cancún has suffered substantially as a result of the great number of issues awaiting decision.

The ministerial draft declaration submitted by the Chairman of the General Council can be helpful. It provides a clear structure for the issues awaiting decision and for the topics on which agreement has already been reached in Geneva. However, it is characteristic of the state of the WTO that the WTO Director-General – who would in fact be predestined to present such an impartial draft – is not expected to do so.

It is understandable that for diplomatic reasons the Trade or Foreign Minister of the host country is offered the Chair of the Ministerial Conference. However, there should also be an explicit regulation that such important decisions as breaking off or extending the conference should not be possible as a solitary decision by the Chairman but should only be made in agreement with the WTO Director-General, the Chairman of the General Council, and the Vice-Chairmen of the Ministerial Conference. An unexpected end to a ministerial conference should no longer be possible.

The most important WTO members should also consider whether, in the future, they would perhaps like to lend well-timed momentum to ministerials by way of unilateral offers. Cancún has shown how unproductive and dangerous it is to delay for days the start of the actual negotiations – during which offers are made and compromises are reached. The tactic of making decisions at the last moment and insisting on maximum demands

as long as possible can easily lead to a polemic atmosphere which can get out of control and make consensus-finding impossible. In addition, it has become clear that spurious compromises made under time pressure at the last minute have no politically sustainable basis on which one could build or advance negotiations.

3 Democratic Legitimization and Integration of Stakeholders

Making an institution more democratic can be an important goal in and of itself. The question of whether the WTO suffers from a lack of democratic structures and whether this gap can be filled by organizational changes is therefore justified. But the decision-making process might also suffer from insufficient public information or integration of interested groups. Within the OECD, the failed negotiations on a multilateral investment agreement (MAI) are a good example.²¹ Many observers think that the public became aware of the negotiating process much too late. The criticized lack of transparency and legitimacy must be understood against this background. Waves of protests and innumerable rumors regarding contents and possible implications of a potential MAI spread quickly, rendering an objective debate impossible. A public information deficit and disregard for the concept of integrating the public's representatives can thus have negative consequences for the decision-making process.

The WTO is a forum for governments. These negotiate agreements – usually on behalf of the legislative branch – which then must be ratified on a national basis. Ratification is a decision that either adopts or rejects an agreement as a whole. While the amendment of individual sections of an agreement is possible in theory, it is so complicated in practice that it is usually not an option.²² The question of who ratifies agreements and from whom the ratifying parties' legitimacy is derived is beyond the WTO's control and – in view of the organization's intergovernmental character – can never be under its jurisdiction. If one were to question the legitimacy of the governments represented in the WTO, the organization would fold like a deck of cards.

21 See BÖHMER (1998).

22 If parliament, on the other hand, reserves the right to amend agreements, a government's "negotiating power" is diminished because negotiating partners must assume that a government's commitments ultimately might not stand firm due to a parliament's power to withhold consent. If negotiations proceed on the basis of rational calculations, this uncertainty must be taken into account when binding counter-proposals are offered.

Democratic legitimacy increases as governments and the people's representatives coordinate their views continuously. In this manner, the legislative branch can influence ongoing negotiations and possible compromises to a certain extent. The U.S. Congress and national parliaments in the EU can be considered two extremes when it comes to the coordination process. While Congress has its own independent specialized bodies that follow trade policy issues with great interest, national EU parliaments (responsible for ratifying agreements) usually only concern themselves with trade issues when ratification is imminent. Because of the bridging function of the EU Council, democratic legitimization within the EU is rather indirect and members of parliament have only little influence. This could be changed only if the European Parliament were to be integrated into this process (at present, the Parliament does not even have a trade policy committee, only an informal working group). But this does not appear to be on the horizon for the near future because the Treaty of Nice did not strengthen the Parliament's trade policy competence, in spite of the fact that the EU's trade policy jurisdiction is growing. It is therefore correct to say that democratic legitimization in the area of trade policy is insufficient. But this is less the fault of the WTO than of the decision-making mechanisms of its members. As long as a great number of WTO member governments lack democratic legitimization, parliamentary assemblies will not be able to accomplish substantively more democracy within the organization either. Conversely, the WTO regime becomes more democratic as the internal structures of members become more democratic. To use WTO terminology, a bottom-up strategy is needed.

A WTO consultative parliamentary assembly might enhance transparency and enable parliamentarians to be more targeted when exerting influence on their governments.²³ The most important advantage would thus be more feedback for the respective capitals. But it remains questionable whether this would ultimately facilitate consensual decision-making within the organization. It is true that greater transparency would refute the accusation that the WTO engages in secret negotiations along the lines of the OECD-MAI process. But since members of parliament feel the need to make a mark for themselves in the eyes of their voters, they are interested in portraying their views to the public in the best possible light; and since they are unable to assess the enforceability of their demands as long as negotiators are still at work, democratic legitimization might get a boost, but possibly at the expense of finding a consensus. Regular parlia-

23 See RUDISCH (2002) p. 15–17.

mentary assemblies would also entail considerable administrative expenditure and be a burden for the WTO processes that are already impaired by staffing shortages. For these reasons, small-scale solutions should be considered. It might be feasible, for instance, to invite delegations of parliamentarians to Geneva more frequently. The WTO Secretariat as well as chairpersons of working groups and committees could supply them with information on topical issues. Closer cooperation with the Interparliamentary Union might also be envisaged.

Should not the experience of those actively engaged in world trade, who know about the problems and opportunities of international trade, be integrated to a greater extent into the work of the WTO? A closer look at the technical issues such as trade facilitation makes it clear how significant practical experience can be. Within international organizations, there are certainly precedents for officially accredited advisory bodies made up of business representatives. Analogous to the OECD Business and Industry Advisory Committee (BIAC) or the EU Economic and Social Committee, business organizations or companies could be heard within such an advisory structure. But in view of the public and political debate about the WTO's role, it would be difficult to give companies official observer status and, at the same time, exclude trade unions and other non-governmental organizations. The establishment of advisory bodies would, of course, entail additional administrative expenditures. Even though the know-how of companies could be an important touchstone for the practicability of trade policy decisions, it remains unclear if such bodies would indeed facilitate finding a consensus on various issues. Two scenarios are possible: for one, advisory bodies might have a catalytic effect. If, for example, business leaders were to approve a potential international investment agreement, it might be easier to convince WTO members of the advantages of an agreement. The composition of such a group would be decisive. It would have to be as representative as possible of the WTO membership. The advisory body would then act as the mouthpiece for the companies located in WTO member countries. On the other hand, there already exists a worldwide business organization, namely the International Chamber of Commerce, which already plays or could play this role. The added value of an advisory body provided for in the WTO Statutes would mainly be that the lines of communication could be greatly intensified. The evaluation of such a body would be incomplete without mentioning the possibility that it could contribute to politicizing the work of the WTO. Some NGO representatives accuse the WTO regularly of being influenced – if not controlled – by “transnational corporations”. This allega-

tion would quickly be leveled against an advisory body composed of business representatives. On balance, it appears that, at the present time, business leaders should live with the fact that they have less of a presence in the WTO, which is of such great importance for them, than in the OECD or the EU. Ultimately, it is up to business to strengthen ongoing efforts *vis-à-vis* the WTO through a stronger presence at the organization's headquarters. This certainly does not require amending the WTO Statutes.²⁴

One of the core criticisms leveled against the WTO after Seattle was the lack of transparency. This applies to both internal transparency, i.e., the flow of information to WTO members, as well as external transparency, namely the information flow to the public. The demand for transparency has become an ever-growing component of the WTO debate. After all, who can find fault with transparency?

What is the actual situation with regard to external transparency?²⁵ The public has access to almost all important WTO documents via the WTO website and specialized information services. Nevertheless, there is no total transparency, i.e., persons not accredited with the WTO cannot get observer status and are not admitted to meetings. Thus, WTO representatives are afforded a certain private space to exchange views and positions and to smooth the path towards compromise while the public is – largely – excluded. This sphere of confidentiality is absolutely indispensable since the hammering out of compromises cannot be done in public. Trade diplomats are called upon to explore compromises that are, by necessity, outside the scope of the official positions of their capitals. This flexibility should not be limited by disclosing the content of discussions to the public. If the deliberations of individual WTO bodies would be made available to the public, important discussions would increasingly take place outside of formal groups. This would only give the appearance of enhanced transparency but would in reality lead to negotiation mechanisms that are more obscure than at present. In the meantime, the WTO seems to have struck a sustainable balance between a certain amount of necessary insulation on the one hand and transparent information to the public on the other hand. Important positions are always made public, while specific verbal statements and the course of debates are kept confidential.

24 SYLVIA OSTRY discusses whether NGOs should enjoy more formal participation in the WTO; see OSTRY (2000).

25 After Seattle a lack of external transparency has been criticized by NGOs (see OXFAM 2000), business (see UNICE 2001) and officials (GARCIA BERCERO 2000) alike.

With regard to internal transparency, one must differentiate between availability of information for representatives of member states and capacity to process information. The latter comprises aspects such as the size of the staff and their level of education as prerequisites for selecting, evaluating and processing information and integrating it into individual positions and initiatives. In the end, staffing and capacity aspects also determine whether it is possible to gain early access to information. Internal transparency therefore depends largely on progress in the field of capacity-building. After Seattle, educational opportunities were greatly expanded, thus improving the prerequisites for trade policy capacities. But, in the end, it is decisive that the flow of information between Geneva and the various capitals is working smoothly and that suitable structures are created among relevant ministries and agencies that enable governments to participate in WTO processes in a meaningful way. Unfortunately, disputes over areas of responsibility and insufficient flow of information often hinder an effective representation of trade policy interests. These structural problems cannot be overcome by providing individual officials with technical expertise through capacity-building. Of what use is the best training of trade diplomats if counterparts at home are not able to provide precise analyses and instructions? Development policy activities of WTO members must pay more attention to these problems, and WTO capacity-building must be made available for suitable projects. Only a coordinated approach will ultimately result in sustainable results. To overstate the case: no trade diplomat will ever get into personal trouble by saying “no”; what is risky is saying “yes” once too often. Many observers are of the opinion that this is one of the reasons why many developing countries are criticizing the Doha Round or reject it altogether. But it is safe to assume that well-informed countries with targeted trade policies will utilize the opportunities provided by the Doha negotiations to constructively advance the process as a whole. This points to an often neglected correlation between capacity-building and decision-making.²⁶

4 Role of the Secretariat

The Director-General can play an important role when it comes to finding a consensus among members. His influence depends largely on his

26 UWE SCHMIDT demonstrated that, next to the expertise in Geneva, the organizational prerequisites in the various capitals are very important. This broad approach includes the flow of information, areas of responsibility as well as coordination efforts and provides advice for systematic capacity-building; see SCHMIDT (2002).

technical knowledge, experience and personality and less on how this position is defined in the WTO Statutes. No observer will argue with the fact that a separation of the terms of office is more than unfortunate. A repeat of the wrangling that surrounded the successor to RENATO RUGGIERO must be avoided at all costs. This touches on more than the issue of familiarizing oneself with the job and necessary continuity; it is also a question of confidence in a candidate. A candidate who gets into office without the full confidence of all members lacks the capacity to exert his influence informally, which is of preeminent importance in this position. If some of the members view the Director-General with suspicion, the office holder is limited to the few responsibilities stipulated in the Statutes and unable to utilize opportunities that can be an important attribute of the office beyond the formalities. Against this background, the recently instituted more transparent procedure for nominating the Director-General is a step in the right direction.²⁷ While these procedures are apt to avoid conflicts about the design of the nomination procedure, finding a consensus requires much more than that. First and foremost, members must be prepared to look beyond their own interests. The six-year term of office, as currently stipulated, is definitely a minimum.

Even greater friction has regularly been stirred up – and has hampered the work of the organization – when a new Director-General nominated new Deputy Directors-General. To provide a greater degree of continuity on the leadership level, the provision to stagger the terms of office of the Directors-General, as stipulated in the procedural rules for nominating the Director-General, is a welcomed change. These provisions must now be implemented in practice.

One fundamental reform of the WTO's governing structure, namely the creation of a directorate, would contribute to making the organization less political and providing greater continuity on the leadership level. Such a body, which might consist of approximately five members, would elect a chairperson from its midst who would have the responsibilities of the present Director-General. The various portfolios would then be allocated to the other members of the directorate. All members would act as

27 WTO Doc. No. WT/L/509 ("Procedures for the Appointment of Directors-General") emphasizes the goal of reaching consensus among WTO members. The nomination process is to start nine months prior to the expiration of the Director-General's term and be concluded by a decision of the General Council at the latest three months before the term expires. In addition to the required qualifications, the procedure also defines a consultation process, and facilitators are provided. The term of office is set to four years, with the possibility of being re-elected for one more term.

deputies to the Director-General. It would be important that individual directorate members would be nominated for staggered terms.

At present, there is an increasing discrepancy between the number of tasks confronting the Secretariat and the human and financial resources available for its work.²⁸ The Secretariat has about 550 employees (including language services and the various administrative departments).²⁹ During the last few years, the capacity of the Secretariat has not kept pace with the growing number of members, increasing public information demands, advisory responsibilities, and the growing list of WTO issues (e.g., the Singapore issues). Bottlenecks in the work of the Secretariat are becoming more and more obvious. Furthermore, suitable salary increases did not make up for the growing workload of WTO employees. On the contrary, wages have been below average compared to other UN organizations, which explains why the WTO Secretariat started a go-slow strike action at the end of 2002. There is an urgent need to adjust human and financial resources to changed conditions. This would have a positive effect on the organization as a whole.³⁰

The WTO has abandoned a practice that was in place during the GATT and the Uruguay Round, namely that the Secretariat could also conduct technical meetings. Many WTO meetings deal with difficult legal issues. Problems have been the availability of chairpersons, their briefing, and the efficiency of meetings. Giving the Secretariat more responsibilities would ease the burden on a practical level and would also help to depoliticize the work of the WTO. Since the results of such meetings are always submitted to other WTO bodies, representatives of the member states would still evaluate the work of the working groups.

5 Conclusion

The foregoing discussion shows that more flexible voting and rule-making principles represent an opportunity for the WTO to increase its ability to act. Implementation of the differentiated voting procedures laid down in the WTO Agreement and greater reliance on plurilateral agreements

28 The resources of the WTO Secretariat are discussed by BLACKHURST (1998) p. 38–44.

29 For comparison purposes, the International Telecommunications Union has 790 employees, the International Labor Organization 1,900 in its Geneva headquarters alone.

30 See also BLACKHURST (1998) p. 48. He advocates for increased resources of the WTO Secretariat and for more resources member countries devote to the WTO (permanent delegates in Geneva and backup support in capitals).

would be a break in WTO practice. Without considerable pressure, there will be no turning away from the culture of consensus and the principle of multilateral action.

A much less drastic option for increasing the efficiency of the WTO is to strengthen the WTO Secretariat both at the top and across the board. Enhancing the human resources and the capacity of the Secretariat would have a catalytic effect on the work of the WTO as a whole. Practical improvements to the preparation and procedure of ministerial conferences could also be made relatively easily. Cancún has shown that it is important for ministerial conferences to set politically realistic objectives and to take up the phase of genuine negotiation as swiftly as possible.

The democratic legitimization of the WTO can only be assured by way of a bottom-up strategy, i.e., the democratization of country-internal processes (through democratization in the narrower sense or through improved coordination processes with members of parliament). While the direct integration of civil society and business into the work of the WTO appears to be interesting to the representatives involved in such efforts, affording these groups an official status and observer rights would probably not bring the organization closer to the goal of facilitating consensual decision-making. This does not mean, however, that civil society and business should not be better integrated on an informal level, for instance through a regular exchanges of views with the Director-General.³¹

Plurilateral agreements lend themselves to the so-called “new issues”. They would not be totally new to the WTO. Existing rules would not have to be changed to allow such agreements. Greater use of plurilateral negotiations would increase the flexibility of the WTO considerably and would be appropriate considering the nature of new topics, since the issues at hand would bring benefits to the signatories in terms of good governance. They could therefore not be misconstrued as concessions (provided that the costs of implementation would be paid through development policy instruments).

On the whole, institutional possibilities to further develop the WTO should not be overestimated. They are anything but panacea. They can only accompany other processes. The WTO will only be able to regain its

31 WTO Director-General SUPACHAI has created a Business Advisory Group, a civil society group, and a group in which scientists are also represented, all are to support the Director-General in his work.

ability to act efficiently if members have the political will to strengthen the multilateral system. Only the willingness to compromise and flexibility in the political realm can accomplish substantial progress.

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