World Trade Review (2006), 5: 1, 103–131 Printed in the United Kingdom

From the trenches

This rubric is intended for occasional contributions from on-the-ground practitioners in Geneva and national capitals. Our hope is that this category will inspire other practitioners to submit notes and articles – typically in the range of 2,000 to 10,000 words – to the *World Trade Review*. As with all notes and articles submitted to the *World Trade Review*, manuscripts in this category will be reviewed by independent referees. However, the focus is intended to be practice oriented and at least one of the two referees will be a fellow practitioner.

© Peter Nørgaard Pedersen doi:10.1017/S1474745605002673

The WTO decision-making process and internal transparency

PETER NØRGAARD PEDERSEN*

Visiting WTO Fellow, Institute for International Business, Economics and Law (IIBE&L), The University of Adelaide

Introduction

Over the past few years the focus on the substantive agenda of the multilateral trading system has increasingly been matched, and sometimes even superseded, by the amount of attention accorded to institutional or systemic issues. Most prominent among these is the discussion of internal transparency and participation of all Members in the work and decision-making processes of the WTO.[1]

The spectacular collapses of the Seattle and Cancún Ministerial Conferences in 1999 and 2003 respectively, amid accusations of an undemocratic decision-making process, prone to both gridlock and brinkmanship, have provided ample

* Correspondence: Peter.Pedersen@wto.org

The author is a member of the WTO Secretariat. This paper was written while he was a Visiting WTO Fellow with the Institute for International Business, Economics and Law (IIBE&L) at The University of Adelaide. The author wishes to thank Ian Huxtable, Patrick Low, Evan Rogerson and Andrew Stoler for their valuable insights and helpful reactions to an earlier draft. He is also grateful to the editor and an anonymous referee for comments, which helped improve the paper. The opinions expressed in this paper are those of the author and do not represent the position of the WTO, its Members or the Secretariat. Any errors in this paper are those of the author.

1 Internal transparency and participation of Members refers to the Member-to-Member and Member-to-Secretariat working procedures and practices.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

evidence that the multilateral trading system is facing a serious institutional challenge. From a purely mechanical point of view, the recent focus on transparency in the decision-making process at the WTO is hardly surprising, given the numerical increase of the membership. The WTO of today, with its 148 Members, is a very different institution compared with the 23 original Contracting Parties of the GATT in 1948. The relative homogeneity, which characterized the original founders of the GATT, has been replaced by a membership with very diverse developmental characteristics and ideological persuasions. Importantly, Members that previously participated only sporadically in the work of the GATT are becoming increasingly assertive in defending their rights in the WTO.[2]

The debate regarding the legitimacy of the WTO, its decisions and its ideological foundation, has grown increasingly sophisticated over the past decade, with the initial focus on external transparency and public accountability having been replaced by scrutiny of the informal consultative processes that play a crucial role in the WTO. For an organization which takes its decisions on the basis of consensus and operates on the principle of one Member–one vote, this challenge to the legitimacy of the decision-making process by some of its own stakeholders is serious and has placed the issue of internal transparency and participation of all Members at the core of the WTO agenda.

Critics of the WTO have argued that small groups of countries effectively impose their will on the full membership and that, as a result, both the process of decision making and the decisions themselves lack legitimacy. The legitimacy of WTO rules crucially depends on the extent to which all Members feel they have participated in the process that produced these common and legally enforceable rules. Ownership of the process that leads to these rules is paramount for their recognition which, incidentally, is a much-utilized argument against voting in the WTO context. Some observers of the WTO believe that the first step towards reforming the organization's decision-making process, and thus the credibility of its decisions, would include the elimination of informal small group consultations. Proponents of this school of thought believe that a formalization of the WTO consultation processes will enhance transparency, improve decision making and therefore increase the legitimacy of its decisions.[3]

Others believe that the lack of a formal limited membership steering group, such as the Bretton Woods executive boards and the UN's Security Council, is a fundamental shortcoming of the WTO and a significant reason behind the near paralysis of the organization's legislative branch over the past few

2 Michalopoulos, Constantine, 'Developing Countries' Participation in the World Trade Organization', World Bank Policy Research Working Paper No. 1906, March 1998.

3 See for example Sharma, Shefali, 'WTO Decision-Making: A Broken Process', WTO Cancún Series Paper no. 4, Institute for Agriculture and Trade Policy, 2003. Jawara, F. and Kwa, A., *Behind the Scenes at the WTO: The Real World of International Trade Negotiations*, London and New York: Zed Books, 2003.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

years.[4] Proponents of this belief argue that the Green Room tradition in the GATT as well as the WTO simply has been an attempt to compensate for the absence of such a formal mechanism. They believe that if the WTO had a formal steering group which could discuss, debate and even negotiate, but not take decisions that bind the full membership, many of the issues and problems treated in this paper would disappear, or at least diminish considerably. However, while the GATT did for some time operate with an informal limited consultative group, it is difficult to see how a more formalized steering committee could be constituted. In the Bretton Woods organizations, membership of the boards is more or less limited to those holding the biggest shares of the institutions' capital resources. In the WTO, basing such membership on, for example, share of world trade would be problematic because it would exclude a large number of developing countries that have recently become very important players in the WTO. We shall return to both of these arguments later.

The issue of internal transparency and participation of all WTO Members, WTO jargon for the wide range of issues related to its internal decision-making processes, first surfaced at the WTO's Ministerial Conference in Singapore in December 1996. However, it was the collapse of the 1999 Seattle Conference that placed WTO decision-making procedures under close scrutiny and ensured that internal transparency received a separate platform under the auspices of the General Council. Subsequent ministerial conferences in Doha and Cancún saw a number of issues related to decision making and transparency surface again and accentuated the extent to which the profile and prominence of this systemic issue remain closely, although not exclusively, linked to the preparation and the conduct of Ministerial Conferences.

This essay begins with an outline of the origins of the issue of internal transparency and participation of Members in WTO decision making and the events that established this matter on the WTO agenda. It will discuss how the WTO and its Members have responded to this systemic challenge through dedicated discussions on internal transparency in the General Council. The second section will analyse how the conclusions reached during these discussions have influenced and improved the decisions-making processes at the WTO. The third section addresses a number of alternative suggestions on institutional reform of the WTO. The concluding section will take a closer look at current decision-making processes in the on-going Doha Round.

1. Origins of the issue of internal transparency and decision making

Although the GATT decision-making process encountered a number of problems throughout its almost 50 year existence, many of its practices were subsequently

4 Blackhurst, R. and Hartridge, D., 'Improving the Capacity of WTO Institutions to Fulfil Their Mandate', *Journal of International Economic Law* 7(3) 2004, 705–716.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

institutionalized in the WTO. Whereas the practice of decision making by consensus was not articulated anywhere in the GATT, Article IX of the WTO Charter states 'the WTO shall continue the practice of decision making by consensus followed under GATT 1947'.[5] Significantly, the footnote to this Article actually defines what consensus means. Articles IX and X specify when voting is possible.[6]

The GATT decision-making process relied heavily on informal consultations. Although the practice of the Director-General hosting Green Room meetings[7] among a few delegations had been initiated in the Tokyo Round, these informal consultations became both more frequent and involved more Contracting Parties throughout the Uruguay Round. In addition, numerous informal groups began meeting outside the GATT to discuss how to move the negotiations forward.[8] There was never any pretence that these groups would engage in actual decision making, but they did perform an important function in terms of gradually exposing ideas and proposals which would have died an instant death had they been aired in meetings among all the Contracting Parties. Such limited meetings also underscore the fact that then, as well as today, effective discussion, debate, and negotiation is impossible when the group exceeds 25–30 Members.

Informal consultations among a limited number of countries have continued in the WTO, but the practice has become increasingly controversial as a result of two factors in particular. First, with a few exceptions, agreements reached in the WTO impose obligations on all Members. The perception that the trade-offs and compromises discussed in the Green Room meetings will be imposed on other Members without their participation have made delegations outside the room wary of sanctioning the practice. Second, the demand for active participation in WTO decision-making processes has increased drastically among a large number of Members, particularly developing countries. Although small group consultations remain as common in the WTO as in the final years of the GATT, the practice is now under closer scrutiny than ever and has been at the heart of the criticism of a 'democratic deficit' and a 'legitimacy problem' at the WTO.[9]

It is important to make a clear distinction between the frequent small group consultations held by Chairpersons in the day-to-day work of the WTO and the

5 The Results of the Uruguay Round of Multilateral Trade Negotiations, The Legal Texts, page 11.

6 Where not otherwise specified, and where a consensus cannot be established, simple majority voting is sufficient. In addition, there are three different methods of voting: (i) amendments to general principles, e.g. MFN and national treatment, require unanimity; (ii) amendments to issues other than the general principles require a two-thirds majority, and (iii) interpretations of the provisions of the WTO agreements, including decisions on waivers, require a three-fourths majority vote.

7 The term Green Room takes it name from the original colour of the walls of the Director-General's meeting room at the WTO in Geneva.

8 These included a number of groups named after Geneva hotels where they had held their first meeting, e.g. the De la Paix Group and the Beau Rivage Group. Another group was the so-called Invisibles Group.

9 For an overview of the Green Room process see Jones, K., 'Green Room Politics and the WTO's Crisis of Representation', Conference Paper for the Centre for the Study of International Institutions, 2004.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

Green Room. The WTO membership will regularly request a Chairperson of a WTO body to consult on one or more specific issues and report back. Such consultations are encouraged and tolerated because they are recognized as necessary and because they have a better chance of producing results and generating momentum than deliberations among the full membership. The composition and size of small group consultations will vary depending on the specific issue,[10] but it is generally rather predictable. These consultations perform a facilitating or bridge-building role and there is never any pretence that they have some sort decision-making power. The Chairperson will generally announce the intention to hold such consultations and will report back, if not immediately, then at the end of a consultation cycle.

The Green Room, on the other hand, is generally linked to the final stages of a negotiating process, covers a broader agenda, and is therefore more controversial. Traditionally the Director-General has called and chaired such meetings which have provided an effective forum for a few delegations to discuss and negotiate informally. However, over the past four or five years, Green Room consultations among senior Geneva Permanent Representatives have repeatedly ended in grid-lock and failed to make the progress required for eventual ministerial decisions. Although the term Green Room remains part of the Geneva trade vocabulary, such consultations have declined in number and importance. The real Green Room meetings take place among Ministers and address a crosscutting agenda where most outstanding decisions are of a political nature.[11] Ministerial Green Rooms are generally slightly smaller than the comparable consultation among Geneva Permanent Representatives, although developing countries still make up a large majority.[12] The controversy and antagonism they have generated since the creation of the WTO stem from the perception that the outcomes of these meetings are presented as a *fait accompli* for the membership to accept. The fact that these consultations normally take place under intense time pressure adds to their controversial nature.

The vilification of the Green Room process also stems from criticism on the part of some WTO observers, many of whom have only a rudimentary insight into the role and composition of this process. Occasionally, even the participants of these consultations feel obliged to criticize the process for political reasons or out of solidarity with delegations that were not involved. At the same time, the ability of these Ministerial Green Rooms to deliver has been vastly exaggerated. As

10 Speculation abounds as to the selection of such small groups. In reality, it is fairly straightforward and involves a combination of the principal actors in WTO and countries with particular interest in the issue. Efforts to ensure geographical representation are also made.

11 The increasing number of mini ministerial meetings outside Geneva and the proliferation of meetings among senior capital-based officials reflect misgivings about the ability of the Geneva process to deliver results.

12 From 1999 to 2004 the percentage of developing countries in Ministerial Green Rooms was consistently above 70%.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

indicated previously, the failure of two out of three Ministerial Conferences since 1999 has underscored that a Green Room process offers no guarantee of success.

The 1996 Singapore Ministerial Conference

Early strains of the WTO decision-making process became apparent at the 1996 Singapore Ministerial Conference as the formal plenary sessions[13] were complemented by an informal consultative process among around 34 countries.[14] This exclusive group effectively provided the core-negotiating forum in which the draft ministerial declaration took shape. Although the existence of this group was highly controversial, the antagonism it generated was neither coherent nor rebellious enough to seriously jeopardize its operation. Nevertheless, at the final informal session on 12 December 1996, designed to reach the consensus required for adoption of the Singapore Ministerial Declaration, a large number of those countries which had not been involved in the small group consultations articulated their dissatisfaction with the manner in which the text had been prepared and indicated that they were no longer willing to accept this lack of inclusiveness and transparency. However, no Member opposed the final declaration and, although the Chairman of the conference made a specific reference to 'the need to improve the procedures to be applied at the next Ministerial Conference',[15] the issue was placed on the back burner.[16]

A number of factors help explain why the lack of transparency of the consultative process in Singapore did not result in the sort of protests seen at later WTO meetings. Above all, in 1996 developing country Members, many of whom had never participated in a GATT/WTO Ministerial Conference before, were poorly prepared substantively and logistically for the kind of intense around-the-clock activity which has come to characterize WTO conferences.[17] Lack of organization within individual delegations in turn made effective coordination with other developing countries difficult.[18] In addition, those developing countries which were involved in the core consultative process were spending most of their energy fighting a controversial agenda of a number of developed countries on labour, environment, and investment and had little time for coalition building among

13 These are on-the-record meetings of all WTO Members, observers and a handful of international intergovernmental organizations. The plenary sessions are not interactive and consist of five-minute statements by Ministers.

14 Determining the membership of this limited group is generally argued to be the prerogative of the Chairman of the Ministerial Conference in conjunction with the Director-General.

15 WT/MIN(96)/SR/9.

16 Although some delegations, and a considerable number of NGOs, made an initial attempt to keep the issue of internal transparency on the agenda, such efforts quickly lost momentum and no significant discussion of the issue took place during most of 1997.

17 The experience that many of these countries had gained from UN meetings did not prepare them well for the rhythm and intensity of WTO ministerial meetings.

18 Interestingly, a number of developing country NGOs identified the lack of coordination at Singapore as the principal obstacle to effective developing country participation.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

other delegations. Finally, the objective of the Singapore meeting was not to launch a new comprehensive round of trade negotiations and, as such, significant and controversial trade-offs were not envisaged.

Throughout 1997 and 1998 the issue of internal transparency did not appear on the WTO agenda. The fact that the 1998 Geneva Ministerial Conference was also being planned as the 50th Anniversary Commemoration of the multilateral trading system, and as such more of a ceremonial event, explains, to a large degree, why the preparatory process and the Ministerial Conference itself did not give rise to any debate on internal transparency and decision making.

Seattle Ministerial Conference

Much has been written about the comprehensive, complex, and divisive substantive agenda before the WTO membership prior to Seattle and the extent to which the 14-month preparatory process in Geneva was being severely hampered by the protracted struggle between Mike Moore of New Zealand and Supachai Panitchpakdi of Thailand for the post of Director-General. Between 1 May and 1 September the WTO was effectively without a head[19] and the burden of the entire preparatory process fell on the shoulders of the General Council Chairman who was alone in facing the considerable pressure from all Members to accommodate their specific concerns. The combination of a very broad and contentious substantive agenda, the strong ambition of some Members to launch a new negotiating round, an unusually divided membership, and a stuttering preparatory process left the WTO with an uphill battle before Seattle.[20]

The issue, which sparked off the procedural debate more than any other was the transfer of the ministerial text from the Geneva process to Ministers at Seattle. The weeks preceding the first draft of the declaration saw a series of smaller group consultations on both specific and more cross-cutting issues. The overall objective of these consultations was to make enough progress on the agenda and to narrow differences among Members so as provide Ministers with a manageable basis for making the political decisions that only they could make. Members had endorsed this approach in both 1996 and 1998.

When the General Council Chairman circulated his first draft of the ministerial declaration on 7 October 1999,[21] explicitly stating that he was submitting the document on his own responsibility and that the draft was only intended to advance the work of delegations, it created an outcry among a large number of delegations that felt severely short-changed by the lack of detail in the area of

19 A senior WTO Secretariat director was appointed Acting Director-General during this period, but his functions were limited to those of a caretaker.

20 For one of the most complete descriptions of the Seattle Conference, see Odell, John, 'The Seattle Impasse And Its Implications For The World Trade Organization', January 2001. Kennedy, Daniel and Southwick, James (eds.), *The Political Economy of International Trade Law*, Cambridge University Press, 2002.

21 Job (99)/5868.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

implementation. Such was the anger caused by the omission that, four days later, the Chairman felt compelled to issue an addendum to the first draft which listed virtually every specific implementation issue raised in the preparatory process.[22] What followed was quickly dubbed the 'Christmas Tree' approach as a large number of delegations submitted new proposals that they wanted to see reflected in a revised draft.

In many ways the second revision of the draft text on 19 October, with its 34 pages and scores of square brackets, foreshadowed the disarray that would characterize the Seattle Ministerial Conference. The reaction of many delegations to the Chairman's draft text showed that delegations remained deeply entrenched in their substantive positions. The length and nature of the preparatory process had created a sense of expectation among delegations to see their own specific language reflected in the Chairman's text, regardless of the degree of convergence among Members. The dissatisfaction of many delegations with the 19 October text further indicated a fundamental lack of confidence in the preparatory process, and it was becoming increasingly clear that delegations in Geneva had decided to leave further negotiations to their political masters, despite the fact that more than a month remained before the Ministerial Conference.

The final meeting of the preparatory process on 23 November reinforced the impression that, if anything, delegations in Geneva had taken the substance backwards.[23] After 53 formal and informal open-ended meetings and a total of 300 hours since September 1998 as well as 35 small group consultations over the final 30 days, the absence of a manageable product for presentations to ministers was perhaps the biggest failure of the Geneva preparatory process. Another casualty had been the role played by the Director-General. Whereas the preparatory processes for the Singapore and Geneva meetings had been led by an experienced Director-General, Mike Moore became involved too late and his mandate was too weak to allow for an effective leadership role. Finally, the preparatory process had also suffered from the lack of authority of the Chairman of the General Council.

The Seattle preparatory process had demonstrated that most developing countries were more actively engaged in the work of the WTO. The creation of the Like-Minded Group (LMG),[24] the enhanced coordination of a number of developing country groups, such as the African Group, the African, Caribbean and Pacific Group of States (ACP) Group and the Least Developed Country Group

22 Job (99)/5868/Add.1.

23 It is characteristic of the chaos of the Seattle preparatory process that the drafting phase began only eight weeks before the opening of the conference. The drafting phase resulting in the launch of the Uruguay Round in 1986 lasted four and a half months.

24 The informal Like-Minded Group was formed in 1999 to provide a platform for a common approach on implementation. Its composition has varied somewhat over time. The coordination of the Group is understood to be undertaken by Group members on rotation. In October 1999 the membership of the Group appeared to be Cuba, Dominican Republic, Egypt, El Salvador, Honduras, India, Indonesia, Malaysia, Nigeria, Pakistan, Sri Lanka, and Uganda. Subsequently, countries such as Jamaica, Kenya, Sri Lanka, Tanzania, and Zimbabwe were associated with the Group.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

(LDC), as well as their increased use of external analytical expertise,[25] were all important elements in explaining the growing assertiveness and confidence of developing countries in the run up to Seattle. The fact that the Seattle Ministerial Conference had been billed as the launch pad of a new round of trade negotiations, including on contentious issues such as investment and competition, clearly focused the developing countries in their approach to the preparatory process.

As ministers began arriving in Seattle it was clear that developing countries were expecting to carry over the momentum established in Geneva. Although it is beyond the scope of this paper to outline the substantive progress made at Seattle, it is clear that the outstanding differences were too numerous and profound to be solved in what was effectively three days.[26] The original five open-ended working groups, which had been established reluctantly by the Conference Chairperson, began work under their respective facilitators on the second day of the conference, but it quickly became clear that delegations were using these forums to repeat known positions rather than negotiate. The decision by the Chairperson to establish a working group on labour issues, despite the well-known and long-standing opposition by a large majority of WTO Members, was widely seen as a slap in the face of developing countries.[27] A large number of developing countries that were not included in the small group consultations by either the facilitators or the Conference Chairperson publicly denounced the process and, in an un-precedented move, signalled their readiness to veto any substantive outcome by the small group consultations on the basis of procedural objections.[28] This threat was, of course, never tested as a substantive outcome from consultative processes never materialized and a draft text never appeared. However, it did send a very strong message that a large number of developing countries would no longer accept watching the substantive agenda evolve from the sidelines. As the Seattle Ministerial Conference ended inconclusively on 3 December 1999, the issue at the forefront for a majority of WTO delegates was how to improve the internal transparency of, and participation in, the decision-making processes of the WTO.

The immediate aftermath of the Seattle meeting saw some attempts to allocate the blame for the collapse of the Seattle meeting, but eventually the focus turned towards understanding and addressing how the process had fallen short. Although a number of delegations argued that an extensive discussion of process would further delay progress on the substantive agenda, a majority of the membership

25 Including by a number of important developing country NGOs.

26 Schott, Jeffrey J. and Watal, Jayashree, 'Decision Making in the WTO', in Jeffrey J. Schott (ed.), *WTO After Seattle*, Washington DC: Institute for International Economics, June 2000.

27 This was one of several examples of the management style of the Chairperson at Seattle. The 2000 discussion of the role of the Chairperson at Ministerial Conferences was clearly inspired by the experience at Seattle in November–December 1999.

28 A number of such small group consultations became almost farcical as several countries gatecrashed the meetings. One such consultation on the issue of implementation, at one stage saw over 100 delegates in a room with a seating capacity of around 50.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

clearly felt that the Seattle experience had demonstrated a number of important systemic flaws in the WTO decision-making process and that the issue of internal transparency and effective participation of all Members warranted a dedicated track on the agenda of the General Council.

2. Internal transparency discussions in 2000 and 2002

In early 2000, and with the Seattle collapse still fresh, the Chairman of the General Council and the Director-General initiated an intensive series of open-ended consultations on how to improve internal transparency and the participation in WTO decision making. This process was initiated by an invitation to Members for specific suggestions on how to make the consultative processes in the WTO more transparent and inclusive. From the 20, mostly informal, non-papers received from individual or groups of delegations, it was clear that a large number of Members considered the issue of paramount importance to the functioning of the multilateral trading system.

In July the Chairman provided Members with a progress report[29] that summarized the main points articulated in the non-papers and during the informal discussions. The report emphasized the general recognition among delegations that significant improvements in the overall consultative processes following Seattle had taken place.[30] In his report, the Chairman also concluded that Members: (i) in general saw no need for radical reform of the WTO; (ii) firmly supported the fundamental principles of the multilateral trading system, including the practice of reaching decisions by consensus; and (iii) believed that informal consultations continued to be a useful tool, provided that certain principles regarding inclusiveness and transparency were applied. These principles included that: (i) Members should be advised in advance of such consultations; (ii) Members with an interest in the specific issue under consideration should be given the opportunity to make their views known; (iii) no assumption should be made that one Member represented any other Members, except where the Members concerned had agreed on such an arrangement; and (iv) the outcome of such consultations should be reported back to the full membership expeditiously for its consideration. The Chairman emphasized that, while such tangible progress on internal transparency was important, the full membership had a collective responsibility to keep this issue under close scrutiny. These general interim conclusions were supported by Members and were generally accepted to provide further useful guidance for the day-to-day work of the WTO.

29 Job (00)/6591.

30 The WTO decision-making process after Seattle was characterized by a very high level of sensitivity towards the need to ensure that all consultative processes were announced in advance and were followed up by reports back to the full membership.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

In addition to the generic discussion of transparency in decision making, the WTO membership also engaged in a focused exchange of views on issues relating to the preparation and organization of Ministerial Conferences. The Seattle experience and its potential impact on the process towards the next Ministerial Conference made this discussion particularly pertinent.[31] Although few delegations harboured expectations of concrete rule changes, the informal assessment of the Chairman regarding areas of convergence was widely acknowledged as accurately reflecting the ground covered by delegations during the debates.

The Chairman's assessment[32] pointed to a high degree of convergence of views on a number of issues: First, WTO Members generally seemed to agree that the main functions of Ministerial Conferences were to allow for political involvement in the ongoing work of the WTO. Second, the membership recognized the merit of having a maximum degree of flexibility in the process leading up to, and including, Ministerial Conferences. Any guidelines for the preparation and conduct of Ministerial Conference should be broad and flexible, taking into account the agenda of each Conference. Third, there was broad acknowledgement of the need to establish an efficient, Geneva-based preparatory process that would allow for solutions to be worked out in advance for most issues, particularly when decisions by Ministers were required. The creation of any negotiating structure and working groups at the Ministerial Conference, including the allocation of chairmanships for these, should ideally also be agreed during the preparatory process. Fourth, there was agreement among Members that the Chairman of the General Council, with the support of the Director-General and the Secretariat, should assume a central role in the preparatory process as well as during the Ministerial Conference, especially in the negotiation of any agreed outcome. A host country would normally provide the Chairperson of the Conference who would preside over the ministerial debate. Fifth, Members generally considered that the Marrakesh Agreement already provided the flexibility needed regarding the frequency of Ministerial Conferences. Sixth, Members reiterated that Ministerial Conferences should be held at the WTO Headquarters unless the Ministerial Conference or the General Council decided to accept an offer by a Member to host the meeting. Seventh, it remained clear that a strong, inclusive, and transparent process leading up to, and including, Ministerial Conferences, was fundamental in order to ensure a successful outcome. Furthermore, there was a common understanding that the working methods during the preparatory process, as well as during the Ministerial Conference, should build on the improvements of the

31 Of particular concern in the context of the organization of Ministerial Conferences was the fact that substantive discussions in Seattle began too late and eventually ran out of time. Instead of a five-day conference, Members in Seattle effectively had only three days. As seen later in both Doha and Cancún, the organization of Ministerial Conferences and the optimization of time for substantive discussions remain a serious problem. Another issue discussed by delegations related to the frequency of Ministerial meetings.

32 Job (00)/7891.rev1.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

consultative practices and the conclusions of the internal transparency discussions since early 2000.

The above points of convergence reflect what the market could bear in 2000. They clearly fell short of the kind of institutional reform that a number of delegations publicly had argued was necessary, but which would have been impossible to adopt by consensus. However, the articulation of these practices and guidelines was significant at the time, since the WTO was about to embark on another preparatory process for a Ministerial Conference. Equally important, the discussions on internal transparency and WTO decision making in 2000 had firmly established this systemic issue at the core of the WTO agenda and as such would provide important input and guidance for the approach taken to the preparatory process for the 2001 Ministerial Conference in Doha and beyond.

In early 2002, following the Doha Conference, the intensive consultations towards establishing the Trade Negotiations Committee brought the internal transparency discussion back into the mainstream of the WTO agenda. During these consultations it became clear that events prior to and during the Doha Conference had prompted several delegations to prepare more formal submissions to advance the discussion on internal transparency and participation of Members. The principles and practices section in the Chairman's statement, which was endorsed by Members at the first meeting of the TNC on 1 February,[33] not only recalled the conclusions on internal transparency from 2000, but also went further in articulating the role and obligations of chairpersons in ensuring inclusiveness and fair representation of different positions.[34]

In response to submissions by Bulgaria,[35] India *et al.*,[36] and Australia *et al.*,[37] the General Council Chairman initiated consultations in the autumn of 2002. Although the submissions and the discussions to a large extent repeated many of the points of the 2000 debate, they also sought to build on the practices that subsequently had developed. Following the first open-ended informal consultation, Members agreed that the Chairman should undertake further consultations on this issue in a smaller group and report back with appropriate recommendations.[38] The basis of these discussions was a draft paper prepared by the Chairman

33 TN/C/1. See also TN/C/M/1. Rules for selecting officers and some broad references to their role are outlined in WT/L/510.

34 The Chairman's consultative process, which led to these principles and practices, confirmed the Director-General in an ex-officio capacity as TNC Chairman and established the negotiating structure under the TNC. This process was conducted in small groups or with individual delegations. During the month of January the Chairman met with 98 delegations.

35 WT/GC/W/422, Bulgaria, 13 November 2000 (re-submitted).

36 WT/GC/W/471, Cuba, Dominican Republic, Egypt, Honduras, India, Indonesia, Jamaica, Kenya, Malaysia, Mauritius, Pakistan, Sri Lanka, Tanzania, Uganda, and Zimbabwe (hereafter LMG), 24 April 2002.

37 WT/GC/W/477, Australia, Canada, Hong Kong, China, Korea, Mexico, New Zealand, Singapore, Switzerland, 28 June 2002 (Chile was added to the list of co-sponsors on 16 July 2002).

38 There is, of course, a certain irony in the decision to have the Chairman hold consultations on transparency among a small and exclusive group of countries.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

which sought to capture a number of elements where the transparency debate had moved forward and where some convergence was appearing. The small group consultations on internal transparency were useful and underlined the importance of open-ended informal meetings supported by smaller consultations. Significantly, there was general agreement that small group consultations continued to be an important tool towards building a broader consensus. However, key differences as to the need for the adoption of specific rules or procedures to guide the informal consultative processes in the end prevented the endorsement of the Chairman's conclusions.[39] The failure to obtain an endorsement of the revised statement[40] was a disappointment but also reflected that some delegations did not feel comfortable endorsing a statement that fell short of the specific procedures and rules they believed were required for the preparatory process and for Ministerial Conferences. Although the 2002 process on internal transparency added little of substance to the points of convergence established in 2000, it did confirm the centrality of the issue to the overall functioning of the WTO system.

Another important lesson from the 2002 internal transparency discussions was the increasing recognition among delegations that the behavioural impact of a core set of principles and practices *vis-à-vis* the consultative process can be significant. Although the proposals on internal transparency in 2002 were both more formal and in some cases pushed for specific changes to the WTO Rules of Procedure, there was general recognition that any formal change would most likely be at the lowest common denominator and considerably inferior to the changes seen as a result of improved practices.

As we shall see in the following section, the practices and principles for consultative processes that were originally outlined in 2000 would have a significant impact on the preparation for, and conduct of, Ministerial Conferences.

3. New practices in the WTO decision-making process

As preparations for Doha began on 8 March 2001, it was clear that all WTO Members wanted to ensure that the lessons learned from Seattle would not be forgotten and in launching the process the General Council Chairman made a specific reference to the work undertaken on internal transparency. A similar emphasis on the need to keep the practices and principles that underpinned the consultative processes under close scrutiny was articulated by the Chairman throughout the Cancún preparatory process.

39 Although 'endorsement' is semantically stronger than 'taking note' it carries no legal weight in the WTO. The decision to seek an endorsement was a mistake, since it forced some delegations to reiterate points of divergence rather than convergence.

40 Job (02)/197.rev1.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

The Doha Ministerial Conference

The principal feature of the Doha preparatory process was informal open-ended General Council or Heads-of-Delegation (HODs) meetings,[41] supplemented by other smaller-scale consultations.[42] This approach was pursued in recognition of the inefficiency of the formalized preparatory process before Seattle and was not opposed by any delegation. The Chairman also consulted bilaterally and plurilaterally throughout the process[43] but adhered rigorously to the practice of announcing his intention to hold such consultations and of reporting back to the full membership on the outcome of these consultations.[44] Throughout the preparatory process and until a few weeks before the Ministerial Conference, there was widespread appreciation among delegations for the efforts by the Chairman and the Director-General to ensure transparency and inclusiveness. However, as with the pre-Seattle process, issues related to the transfer of the draft text to Ministers shifted the discussions from substance to procedure. Following the second draft, the Chairman and the Director-General decided, amid some controversy, to forward the draft to the Chairman of the Doha Conference and to Ministers.[45] The letter from the General Council Chairman and the Director-General to Ministers clearly stated that the draft declaration was 'under their responsibility', did not enjoy consensus, and that some Members favoured the inclusion of several square brackets to indicate the areas where disagreement remained. They also expressed their belief that the Geneva process had taken the document as far as was possible and that it was only a basis for further work among Ministers.[46] Despite criticism by some delegations it was informally acknowledged that the Geneva process would not bridge the remaining differences.

Compared with Seattle, the conference in Doha kicked off with an unprecedented effort to provide delegates with an overview of activities. Hence, at

41 The HODs format has traditionally been used to conduct informal discussions among the Permanent Representatives (most often Ambassadors) of Members. HODs are open to all Members. Normally delegations are requested to limit their attendance to the Permanent Representative plus one delegate, which is the number of seats allocated to each delegation at HODs meetings. This rule is, however, not enforced rigidly and some delegations often find room along the walls of the meeting rooms. No written record is produced for informal meetings, although the WTO Secretariat produces informal summaries for the WTO non-resident Members.

42 In the Doha preparatory process, some 50 open-ended consultations or meetings were held (179 hours in total). This does not include the open-ended meetings on implementation (13 open-ended consultations/meetings, 61 hours total).

43 In a two-week period in early September 2001, the Chairman saw over 60 delegations.

44 All Members welcomed this system of reporting back to open-ended meetings as an important new feature of internal transparency, despite the fact that it had already been used in the pre-Seattle process. Nevertheless, the automaticity of this was a significant and positive trait.

45 A small number of delegations argued that a further (third) revision of the draft was needed.

46 This belief was based on the lack of progress in consultations in Geneva and the overall political nature of a number of the decisions required. There was also a growing sense that the Geneva representatives did not have the political mandates required for some decisions.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

the first HODs meeting early on Saturday 10 November the Chairman of the Conference, Minister Kamal of Qatar, informed Members of the scenario envisaged for the informal process, including the Ministers who would act as Friends of the Chair on different issues. Although these Friends would consult in a variety of formats, a daily reporting mechanism was established to ensure that information would be fed back to the full membership at regular intervals. This mechanism was intended to mirror the Geneva preparatory process, which, despite some late criticism by a handful of Members, had stood up to scrutiny and was generally applauded by delegations. In addition, delegations were assured that two one-hour slots each day would be 'meeting-free' so as to allow groups to coordinate among themselves. This latter initiative was an innovation in the context of the Ministerial Conference and was a direct response to a request by some Members and Group coordinators.

An informal HODs meeting the following day received fairly substantial reports by the Friends of the Chair on their activities so far and of their intentions regarding the future process. These Friends emphasized their availability if delegations wished to see them, and, in response to specific requests, provided practical guidance on how to go about soliciting such meetings. Although these initial steps to ensure some transparency may seem modest, there was widespread recognition among Members that they nevertheless represented very significant improvements over previous conferences in terms of transparency and inclusiveness.[47]

Beyond a much-improved preparatory process and a more predictable consultative environment at the Ministerial Conference, there are a number of reasons why procedural wrangling at Doha took a back seat. The widespread feeling among Members that a second consecutive failure to launch a comprehensive negotiating round would do serious damage to the WTO as well as the geo-political situation following the events of 11 September 2001 have often been mentioned as factors. It is clear that to a vast majority of WTO Members the Doha Conference represented a rescue mission for a Negotiating Round with development issues at the core. In addition, the largest trading nations, developing as well as developed, came to Doha with enough flexibility and determination to make a deal happen.

Such was the pressure for a successful Ministerial Conference that the infamous Green Room among a group of 22 Ministers continued for nine hours on Tuesday 13 November without any information to the rest of the membership.[48] The controversial decision to extend the conference by 24 hours was made by the Chairman and on 14 November the WTO obtained the result a majority of

47 Privately, some NGOs also welcomed these initiatives as it provided them with additional predictability for interacting with delegations.

48 Although several trade officials from countries not invited to the meeting were waiting around elsewhere in the conference centre, most had gone to their respective hotels.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

Members had been seeking. The final HODs meeting to pave the way for the formal adoption of the Ministerial Declaration and the launch of the Doha Round did hear some complaints about the lack of inclusiveness which had characterized the end game, but there was no appetite among delegations to see a procedural issue derail the substantive outcome.

Much has been written about the negotiations at Doha and about the pressure exerted on delegations to sign the final declaration. However, this criticism overlooks the significant improvements, explicitly acknowledged by WTO delegations, to the decision-making process that had characterized the Doha preparatory process and the conference itself. It could be argued that the 13 November Green Room did not represent a systemic failure in the context of GATT–WTO history of decision making, insofar as it replicated a long-standing and high-risk tradition of brinkmanship in trade negotiations. Nevertheless, the end game of the Doha Conference did illustrate that a number of systemic problems regarding the decision-making process remained unresolved. However, they also demonstrated that a large number of WTO Members were willing to accept an imperfect process in order to secure a substantive outcome. At Doha, the significance of the substantive outcome was simply too great for anyone to open another negotiating front on procedural issues.

The Cancún Ministerial Conference

The issue of internal transparency did not feature prominently in 2003 as preparations got under way for the Ministerial Conference scheduled to mark the halfway mark in the Doha Round. One important factor in explaining this was the absence of a formal announcement of the preparatory process for the Cancún conference. The decision not to create a separate track for the preparatory process was fuelled principally by the desire to avoid lengthy procedural discussions on such a process and to focus on the substantive mandates facing Members at the Fifth Ministerial Conference. A procedural discussion would inevitably have attempted to pin down specific dates for stocktaking exercises in advance of the conference, and, given that the WTO had already missed several important deadlines in 2002, it was felt that substantive and technical work should drive the process and not vice-versa. Another reason for adopting this approach was to play down the Cancún meeting as a scheduled stocktaking exercise.[49] Like the preparatory process for Doha, informal HODs meetings constituted the backbone of the substantive work in the lead up to Cancún – supported by a multi-level consultative process. Significantly, the full membership backed this informal

49 It can be argued that Cancún was more than just a stocktaking exercise, as some delegations looked to the conference to push for negotiations on the four so-called Singapore Issues (relationship between trade and investment, interaction between trade and competition policy, transparency in government procurement, and trade facilitation) and on the extension of protection of geographical indications to products other than wine and spirits.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

approach. The letter from the Chairman and the Director-General that transmitted the draft declaration to the Chairman of the Ministerial Conference was sent on 31 August and broadly followed the model used previously. Invariably, this led some delegations as well as a number of NGOs to question the legitimacy of the process and the integrity of the Chairman and the Director-General, but these complaints did not reflect the sentiments of the overwhelming majority of Members. Interestingly, many of those who called for another revision also signalled their unwillingness to compromise any further.

From the point of view of transparency and inclusiveness, the 2003 preparatory process and the Cancún meeting itself represented a series of significant improvements. The participation of the Conference Chairperson in the July General Council meeting was an unprecedented sign of commitment to ensuring continuity with the Geneva process, including the practices on transparency in consultations. Similarly, the Chairman's outline of the formal and informal tracks at the conference and the decision to announce his roster of facilitators prior to the Ministerial Conference were significant improvements in terms of transparency.[50] At the inaugural informal HODs meeting in Cancún the Conference Chairperson provided delegations with a more detailed and practical overview of the informal process, including the subjects on which the five facilitators would assist him. These new initiatives went a great deal further than what had been done at previous meetings and combined with the preservation of the meeting-free slots reserved for coordination and consultation among or within delegations initiated at Doha, provided clear examples of how many transparency practices had become embedded in the organization of Ministerial Conferences.

Ironically, this adherence to transparency effectively delayed the process of more focused and result-oriented consultations at Cancún. By the time the open-ended consultative processes were drawing to an end and a more consolidated consultative group of 36 delegations met, the conference was already in its last day. This, incidentally, may represent the most significant mistake of the Cancún Ministerial Conference. The failure to begin a consolidated end game consultative process late on 13 September resulted in a decisive loss of momentum. When the group assembled in the morning of 14 September, it never managed to establish the atmosphere that had proved decisive to clinching a deal at Doha. This loss of momentum was compounded by the inability of individual players to negotiate and make decisions within a given mandate in the vacuum of the end game consultations. The effectiveness of the end game depends on such flexibility. The Cancún end game, on the contrary, was severely hampered by the absence of clear mandates for a number of Ministers who coordinated the efforts of larger constituencies, but who did not appear to have a negotiating mandate to go with it. This was particularly problematic because the dynamics of the Cancún end game, to a large extent, were dictated by a number of late but substantial concessions,

50 WT/MIN(03)/8. Minister Derbez selected these Friends/Facilitators.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

which required some groups to revisit their mandates in a short space of time. When genuine negotiations finally began to happen, the turn-around time for some delegations and groups was too long and irritation over the brinkmanship and late concessions by some Members was mounting.

The preparatory work for Cancún raised a number of important questions with respect to the Geneva process and its ability to deliver on substance. From a procedural point of view, it appeared that the overwhelming majority of delegations agreed that the informal nature of the Geneva preparatory process provided the most suitable format for a preparatory process. However, the foremost failure of the Geneva preparatory process was that it never reached a point where the full range of potential concessions and trade-offs were understood and factored into the negotiating strategies of all Members. The inevitable result in Cancún, not unlike Seattle, was that Ministers were asked to solve a large number of technical issues rather than address a few overall political decisions.

From a decision-making and process point of view, the collapse of Cancún was particularly disconcerting. The transparency and procedural predictability of the preparatory process and ministerial conference had arguably been superior to anything previously seen in the context of a WTO negotiation, but the numerous open-ended consultations at Cancún never saw delegations engage in direct negotiations. In some respects the failure of the Cancún meeting highlighted the organizational conundrum of WTO Ministerial Conferences. Although open-ended meetings allow for a high degree of transparency, nobody is under the illusion that they will actually narrow substantial differences and serve as drafting sessions. The long hours spent in HODs meetings in Cancún were utilized by delegations to repeat well-known positions and did not provide any specific guidance as to possible compromises. The absence of a mechanism which could have fed possible compromise texts that were known to enjoy considerable backing and which could have focused discussions ensured that the HODs meetings went around in circles. In this regard it is significant that most delegations in Cancún probably would have been comfortable with a small group process, which at least could have indicated possible trade-offs and forced delegations to review their positions and bottom lines. However, by the time this process got under way, it was too late. There is little doubt that the process and organizational experience of the Cancún meeting will provide useful input for the Hong Kong Ministerial Meeting.

One final observation concerning the preparatory process and the Cancún Ministerial Conference itself relates to the unprecedented level of coordination seen among groups such as the ACP Group, African Group, LDC Group, and G90. The coordinators of these groups appeared to operate more efficiently than previously – at the Geneva level and ministerial level. The creation and rise to prominence of the G20 in response to a US–EU framework agreement in agriculture and the decline of the Cairns Group were other significant features of 2003.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

Post-Cancún – August 2004

As in the immediate aftermath of Seattle, the weeks following Cancún were characterized by criticism of the inadequacies of the decision-making process and of the delegations that had proved unable or unwilling to make the necessary compromises in the final hours of the conference. However, the mutual recriminations subsided as Members agreed to focus on those substantive issues which were considered to be fundamental to unlocking the broader agenda.[51] The work for the remainder of 2003 was organized as a single-track consultative process, characterized by a focus on four issues, i.e. agriculture, non-agricultural market access, cotton, and Singapore Issues.[52] As a result, during this period the TNC and its subsidiary negotiating bodies remained suspended. Importantly, substance drove the consultative process conducted by the Chairman, which included 42 meetings with groups, three open-ended HODs meetings and two formal General Council meetings. In addition, the Chairman held countless bilateral meetings and even engaged in shuttle diplomacy to a number of ministerial gatherings and capitals. The post-Cancún process placed great emphasis on transparency, but it is equally clear that Members were looking to the Chairman for the leadership required to bring the WTO agenda back on track and in that process were unwilling to engage in procedural wrangling. The post-Cancún process also confirmed the growing importance of different groups and their coordinators within the WTO framework and among trade ministers.

In February 2004 the new General Council Chairman embarked on a comprehensive consultative process which, over a period of six months, would encompass 11 informal HODs, 54 meetings with smaller groups, and 81 bilateral meetings in addition to the two formal meetings of the General Council. In late April he provided the first comprehensive overview of his consultations and previewed future activities. It was quickly established that the process and the substantive focus of the immediate post-Cancún process still provided the best basis for making progress and that delegations were in broad agreement that a target date of end July was an appropriate aim. As had become customary, the Chairman's statement outlining the future process was circulated in the interest of transparency.[53]

One of the most salient characteristics of the process was also the extent to which external ministerial gatherings provided constant, albeit not always clear, input to the Geneva negotiations. In addition to mini-ministerial meetings in Davos and Paris, high-level meetings of the African Union, LDCs, ACP, and the G90 all contributed to the Geneva process.[54] Furthermore, a number of key players

51 Since the focus of the substantive agenda had been decided at the General Council level, the General Council Chairman rather than the Director-General chaired the consultative process.

52 Trade and Investment, Trade and Competition Policy, Trade Facilitation, and Transparency in Government Procurement.

53 The circulation of such statements is of great importance to WTO's non-resident Members in particular.

54 Meetings of the G8 and UNCTAD also provided strong input during this period.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

engaged in unprecedented shuttle diplomacy. In early June, the Chairman presented delegations with a list of ideas for elements to be included in this outcome[55] and previewed the organization of the further process, including issues related to transparency. At no point during this process did Members complain about lack of transparency or exclusion. While this was probably due to the comprehensive nature of the Chairman's consultations, the group coordinators worked hard to keep their constituencies informed.[56]

In general, the process leading up to the circulation of the first draft of the July Package on 16 July,[57] and the revision on 30 July,[58] was as transparent and inclusive as could reasonably be envisaged. A series of small group consultations would be followed by an informal open-ended HODs meeting, where the Chairman, the Deputy-Director General, who was acting as a facilitator on Trade Facilitation, and the individual negotiating Chairs would report on substance and process. Consultations among delegations were also taking place around the clock outside the WTO. Despite the fact that the July General Council meeting was never billed as a ministerial event, a number of Ministers and senior officials arrived in Geneva to provide the final push for a successful outcome. In many respects the entire approach and commitment to avoiding another failure resembled the 'rescue mission' of 2001 that had launched the Doha Round.

The July 2004 end game reinforced a number of lessons learned from previous preparatory processes and from Ministerial Conferences. It confirmed the efficiency and value of small group consultations when there is enough political will and determination among the delegations involved. However, the July end game also emphasized that this political will has to be prevalent among those delegations that are not present in the Green Room. The final Green Room on 30 July was no secret and everybody knew where it was taking place, what the agenda was and who was present. In fact, a significant number of delegations had installed themselves just outside the area where the consultation was taking place and received periodic briefings from 'insiders'. With this scenario, however, July also showed that, despite the progress made in improving decision making and transparency, the basic nature and brinkmanship of the end game had not changed.

Towards Hong Kong 2005

The General Council Decision of 1 August 2004 injected new life into the Doha Round and, in a sense, provided the negotiating Chairpersons with a new mandate

55 Job (04)/69.

56 From March to July the Chairman met four times with the ACP coordinator and once with the ACP group; eight times with the African coordinator and four times with the African Group; four times with the LDC coordinator and twice with the LDC group, twice with the ASEAN coordinator and once with this group as a whole.

57 Job(04)/96.

58 Job(04)/96/rev1.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

to push for substantive progress in the negotiating groups. With a specific deadline for the completion of the Doha Round negotiations no longer looming,[59] there was general agreement among delegations in Geneva to let the technical work of the individual negotiating groups drive the WTO agenda. In this context it is no surprise that the post-August 2004 process has largely been driven by developments in the agriculture negotiations. As usual in the WTO, tangible progress in agriculture is widely seen as necessary to unlock the overall Doha agenda in general and in non-agricultural market access (NAMA) and services in particular.

The organization of the work in the agriculture negotiations has been illustrative of how the focus on substance and technical details has dictated the work in Geneva since August 2004 and the extent to which there has been very little appetite for procedural wrangling among delegations. The consultative approach adopted by the Agriculture Chairman has involved a three-stage process of which Stage One has been a first reading of an issue in the 1 August agriculture framework in so-called open-ended informal special sessions. Stage Two has seen more technical discussions of the issues raised in the first reading, and, although these meetings have taken place in a smaller room, they remain open to all interested delegations. Stage Three of the process has involved smaller group consultations on highly complex and technical issues. The agenda for each of these meetings has generally been clearly communicated by the Chairman in advance and the results or conclusions from these deliberations are resubmitted to all participants for their consideration.

The above process has not given rise to complaints and has been reproduced in other negotiating groups as a practical approach for generating momentum. Members have granted Chairpersons considerable freedom to consult selectively and they have in turn been meticulous in both announcing meetings and in reporting back to the full membership on any substantial developments.[60] This practice is hardly new in the WTO, but the trust upon which it rests represents a significant positive development in the decision-making processes of the organization. Since March 2005, a string of so-called informal mini-ministerial meetings among some 30–35 countries have taken place in Davos, Mombasa, Paris, and Dalian. Similarly, several meetings among senior capital-based officials from a limited number of countries have taken place in and around Geneva. All of these meetings have focused on how to move the Doha Round forward.

In the past, mini-ministerial meetings, especially prior to Seattle and Cancún, have often generated fierce criticism from those who were not invited. There is little doubt that the increasing frequency of mini-ministerial meetings can be seen

59 The August Decision did not set a new deadline for the Doha Round.

60 For an excellent analysis of options available to a Chairman of a WTO committee, see Odell, J. S., 'Chairing a WTO Negotiation', in Ernst-Ulrich Petersmann (ed.), *Reforming the World Trading System Legitimacy, Efficiency and Democratic Governance*, 2005, Oxford University Press.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

as a direct response to the gridlock that has characterized the Geneva process over the past few years. As mentioned previously, the latter stages of the Uruguay Round offered plenty of evidence of in-house process difficulties, leading to consultations outside the GATT framework. These informal mini-ministerial meetings generally bring together some 25–40 Ministers from a cross-section of WTO Members. Normally the Director-General and the General Council Chairman are invited, but it would be unthinkable, and potentially very damaging to their credibility, if either of them ever hosted a meeting of a select group of countries. The controversy surrounding the decision of the Director-General of the World Intellectual Property Organization (WIPO) to invite a select group of countries to Casablanca to adopt an action plan on global patent harmonization is very illustrative of why the head of a multilateral organization cannot take the lead in any endeavour that does not involve all stakeholders.[61]

Similarly, although mini-ministerial meetings will discuss matters on the WTO agenda, and even see bilateral negotiations between participants, there is never any pretence that the meeting can somehow feed results directly into the Geneva process as *faits accomplis* for adoption. However, sometimes these gatherings can result in the political push necessary to move the Geneva process into a higher gear. While the term 'mini-ministerial' has traditionally been associated with meetings on the sidelines of other international gatherings, such as the OECD Ministerial Meeting[62] and the World Economic Forum, this is changing. Over the past few years an increasing number of developing country Members of the WTO, including Kenya and China, have hosted such meetings, thereby effectively dispelling the notion that these meetings remain 'rich country' gatherings. Nevertheless, the track record of mini-ministerial meetings providing constructive input into the Geneva process and generating negotiating momentum is rather patchy. But these meetings can provide direction and impetus for the Geneva negotiators. The relative absence of criticism of the mini-ministerial meetings held throughout 2005 is certainly a change compared with the post-Seattle period. This is all the more remarkable since at least one of these meetings generated a direct substantial input to the agriculture negotiations in Geneva.

The preparatory process for the Ministerial Conference in Hong Kong effectively began in August 2004 with the General Council Decision providing guidance on a number of issues. However, although the revival of the Doha Round appeared to have generated a common sense of purpose among delegations to

61 The meeting, held in mid-February 2005, and its outcome was strongly rejected by a number of developing countries that had not been invited. This outcry effectively discredited the initiative. See http://www.ictsd.org/weekly/05-02-23/story5.htm.

62 WTO mini-ministerials at the sidelines of the OECD are normally hosted by an OECD member (other than an EU member State). In fact, OECD countries make up a very small number of the total participants and normally developing countries represent more than 50%. The Swiss have traditionally hosted mini-ministerial meetings at the WEF in Davos.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

focus on making substantive progress in Geneva, tangible substantive progress in important areas such as agriculture and non-agricultural products has been disappointing. The original ambition to produce so-called 'first approximations' of modalities in these two areas by the end of July 2005 did not materialize and the absence of progress in these key areas has, in turn, slowed progress on the wider Doha negotiating agenda.

Interestingly, the situation in September 2005, three months before the Hong Kong Ministerial Conference in several ways resembled September 1999 before Seattle, i.e. a heavy and grid-locked substantive agenda and a change of leadership at the top of the WTO. Although process discussions and procedural issues relating to the WTO decision making did not feature to any significant degree in the first nine months of 2005, experience has shown that, as the Ministerial Conference looms and pressure on delegations for substantive concessions mounts, the temptation to open a new negotiating front on procedural issues becomes very real. The final three months of the preparatory process in Geneva remains crucial to the eventual outcome, as this is where the draft ministerial declaration will be produced. In this context, the transfer of the draft text to ministers will, as with previous conferences, be a key moment. However, the fact that in May 2005 WTO Members managed to select a new Director-General without a divisive and prolonged procedural squabble is certainly a significant achievement and should ensure that the final stages of the preparatory process can focus on the substantive negotiating agenda and a result in Hong Kong.

4. Alternative suggestions for reforming decision-making at the WTO

As with the 'in-house' debate on internal transparency, the Seattle debacle sharpened the focus of external observers on this issue. Initial reactions by several observers suggested that the failure of Seattle was a direct result of an undemocratic and un-transparent decision-making process designed to marginalize the less powerful Members of the WTO. Some concluded that the WTO decision-making process was in dire need of a dramatic overhaul. Although the entire Seattle process exposed a number of institutional problems, such conclusions fail to acknowledge that even a perfect process would have been unable to bridge the substantive differences among Members in 1999.

The dedicated discussions on internal transparency among WTO Members in 2000 and 2002 featured very few of the proposals and solutions provided by WTO observers on how to improve WTO's decision-making processes. Below a number of the external proposals for reform of the WTO's decision-making process will be analysed.

Elimination of Green Room type consultations

Over the past two years a number of NGOs have argued that the practice of Green Room meetings has undermined the legitimacy of WTO decisions and that a more

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

democratic model should be adopted.[63] Such a model would rely almost exclusively on open-ended formal meetings for negotiation among WTO Members and would restrict smaller group meetings by Chairpersons, unless explicitly approved by the full membership. While such an approach could theoretically improve transparency, there are a number of problems associated with this model. First, the pre-Seattle experience clearly illustrated that a formal process does not provide an appropriate forum for negotiations. Second, formalizing a preparatory process is unlikely to enhance transparency for those delegations that do not have representation in Geneva, as the formal records, also known as 'Minutes', from a full-day meeting on average take around two weeks to process and translate into the WTO's three working languages. Third, and perhaps most importantly, an increasingly unwieldy and formal process will inevitably lead a number of delegations to take the consultative process outside the framework of the organization. Unlike in-house consultations, these processes will operate with no transparency or reporting obligation. Finally, formalizing the WTO decision-making process would be contrary to the very real concern of many delegations, that the general proliferation of meetings is hampering their efforts to participate effectively.

During the discussion on transparency in 2000 and 2002 some delegations did call for more open-ended meetings at which Chairpersons could report back and this practice is now solidly embedded in the WTO decision-making practices. The debate on transparency among the WTO membership has clearly illustrated that delegations do not believe that fundamental reform to the decision-making processes is necessary.

WTO steering committee/executive board

The idea to establish a steering committee or an executive board with a rotating membership has some historical precedent in the so-called 'Consultative Group of 18' of the GATT.[64] This may, to some extent, explain why this idea continues to receive considerable attention by some WTO pundits.[65] The fundamental idea behind these proposals is that such a body would provide a more transparent and predictable consultative mechanism compared with *ad hoc* Green Rooms. The proponents of such a mechanism all emphasize that it would not take decisions that bind the full membership, but would rather make recommendations based on thorough consultations.

63 Third World Network *et al.*, 'Memorandum on the need to improve internal transparency and participation in the WTO', July 2003. Sharma, 'WTO Decision-Making', Jawara and Kwa, *Behind the Scenes at the WTO*.

64 Blackhurst and Hartridge, 'Improving the capacity of WTO institutions to fulfil their mandate', 705–716.

65 Schott and Watal, 'Decision Making in the WTO'.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

In October 2003, the European Commission circulated a reflection paper to the 133 Committee on WTO Organizational Improvements, which called for the creation of an advisory group to prepare negotiating options.[66]

An executive board with a pre-determined membership could perhaps add an element of predictability to the consultative process. It has been argued that the creation of such a group would reduce the risk of bigger players abandoning the multilateral approach on certain issues in favour of a bilateral or plurilateral negotiation outside the WTO. However, although the creation of such a mechanism appears to have significant benefits in theory, it is almost certain that questions such as the criteria for representation and the status of the discussions in the body would make its establishment very difficult. The principal opposition to a steering committee or an executive board would most likely come from a sub-set of countries which historically have been able to get into any Green Room they are interested in, but which would struggle to gain their own seat on such a board. This group might include countries such as Argentina, Australia, Canada, Chile, Colombia, Hong Kong (China), Korea, Mexico, Norway, New Zealand, South Africa, and Thailand. These countries have a long tradition as strong supporters of the multilateral trading system along with the EU, US, and Japan.

It is therefore no surprise that the creation of such a mechanism has not been raised in any detail among Members during discussions on internal transparency. In addition, the past few years have seen a much more assertive membership insisting on the WTO being 'member-driven', and it is difficult to see how anything that could be seen to encroach on this notion could be successful. Significantly, the idea of a consultative board would appear to address the issue of efficiency rather than transparency.

Regional representation

The idea of organizing the decision-making process of the WTO around regional representation has often been linked with the creation of a consultative board and the formalization of a consultative forum. This idea has failed to generate any interest among those countries which would be encouraged to organize themselves along regional lines. Despite the proliferation of regional trade agreements regional coordination in the WTO remains a very marginal activity. The notion of regional representation has not been raised in the context of the transparency discussions at the WTO. An important reason why the idea of regional representation is unlikely to flourish is simply that negotiating interests in the WTO do not always coincide with the geographic location of countries.

Weighted voting

The introduction of a variant of weighted voting along the lines of the IMF and the World Bank or even the EU would certainly provide for a more predictable and

66 European Commission, 'Reflection paper on WTO organizational improvements', Note to 133 Committee, October 2003.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

stable balance between participation and efficiency. However, this idea would fundamentally undermine the rule and practice of decision making by consensus, break with the principle of equality among states, and exacerbate what many countries see as existing asymmetries. It would also seem very unlikely that developing countries would sacrifice their surge in importance at the WTO to a system of weighted voting, e.g. based on share of world trade, which would reduce their influence. Finally, a system of weighted voting would certainly not be the answer to criticism regarding the legitimacy of WTO decisions. It should be recalled that one of the first intermediary conclusions of the consultations on internal transparency in 2000 was that Members did not see the need for any fundamental change to the consensus rule and the issue has not featured in any detail since.

Flexible integration/plurilateral approach

The idea of returning to the more flexible integration or 'a la carte' approach of the 1970s gained some currency among a limited group of Members recently in the context of the Singapore issues. It was argued that those countries that had the interest and the capacity to move ahead with negotiations should be allowed to do so. The WTO has been down this road before with some success[67] and a recent report by the Consultative Board to the Director-General endorses the idea of 'variable geometry', i.e. allowing some Members to take on more extensive obligations than others.[68]

However, given the strong opposition to any plurilateral negotiations on the Singapore Issues, it seems unlikely that this approach could generate support in the WTO.[69] Developing countries in particular are adamant that they do not wish to see a 'two-tier' WTO. Nevertheless, considering the difficulty of launching comprehensive trade rounds, the possibility of small groups of interested countries seeking a plurilateral deal outside the multilateral framework may not be that far-fetched. The proliferation of Free Trade Agreements over the past few years would suggest that plurilaterism may have a role to play.

Enhancing coalition building – concentric circles model

The basic idea behind the concentric circles model is to work towards a situation where existing coalitions among Members play important roles in building consensus on difficult issues.[70] The work of such groups would support and complement

67 The Tokyo Round resulted in nine agreements to which only some of GATT's Contracting Parties subscribed. Of these only two remain in force, i.e. on government procurement and civil aircraft. In addition, in 1996 a large number of WTO Members signed on to the Information Technology Agreement.

68 Both before and after Cancún the EC Commission often argued in favour of allowing a 'coalition of the willing' to move ahead with negotiations on the Singapore Issues.

69 Consensus is required in order for a plurilateral negotiation to take place within the WTO.

70 Blackhurst, R., 'Reforming WTO Decision-Making: Lessons from Singapore and Seattle', in *The World Trade Organization Millennium Round: Freer Trade in the Twenty-First Century*, London: Routledge, 2001.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

the small group consultations and their coordinators would be closely involved in these. The weakness of this model is its focus on achieving internal agreement in such groups rather than conciliation with groups of opposing views. Viability of this model relies heavily on the extent to which group coordinators are able to 'win' a mandate to represent and, above all, speak for their constituencies. The concentric circles model in many ways reflects what has been happening over the past years in the WTO. The growing influence of such groups as the African Group, the LDC Group, and the ACP in Geneva, and at the ministerial level over the past few years, has been an important feature of the decision-making process in the WTO. Similarly, the emergence of a number of informal coalitions around specific issues or platforms, e.g. the LMG (implementation), the G20 (agriculture), and Friends of The Round[71] would suggest that such groups have a role to play.

The above has shown that there is no shortage of ideas and models for improving the decision-making processes at the WTO. However, it is noteworthy that most of the ideas and suggestions for change articulated by observers of the WTO have only rarely featured in the discussions among Members on the issue of internal transparency. At the recent off-the-record discussion of the report by the Consultative Board to the Director-General,[72] Members appeared to reject some of the recommendations on WTO decision making, including a modification of the consensus principle. Indeed, most observers tend to ignore the significance that WTO Members attach to the notion of a 'Member-driven' organization. In this context it is also significant that WTO observers have rarely bothered to analyse the incremental but nevertheless significant improvements to WTO decision making and internal transparency since 2000.

5. Conclusion

Over the past decade issues related to internal transparency and the decision-making processes of the WTO have emerged as the foremost institutional challenge facing the multilateral trading system. This paper has attempted to provide an overview of the origins of these issues, the manner in which the WTO membership have responded to this challenge, and the practices which now characterize the conduct of the consultative processes.

The WTO decision-making process remains imperfect and will most certainly require further improvements in the future. However, with internal transparency and decision making now important systemic issues in their own right, there is little doubt that they will continue to be scrutinized by the membership as well as by observers of the WTO.

71 A group of ten developing and five developed countries.

72 Consultative Board to the Director-General Supachai Panitchpakdi, 'The Future of The WTO', WTO, 2005.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

Contrary to what many observers of the WTO decision-making process argue, WTO Members have spent considerable time and effort on this issue. Much of the criticism of the decision-making process in the WTO is either dismissive of the progress made, or simply chooses to ignore the fact that the membership has engaged substantively to improve the transparency of the multilateral trading system. Discussions on internal transparency in 2000 and 2002 reaffirmed that Members did not believe the fundamental principle of consensus decision making should be changed, but that the informal decision-making processes, particularly in the context of Ministerial Conferences, were in need of reform. The current practices, and the guidelines within which consultations take place at the WTO, are the direct result of what a large number of Members believed was wrong with the decision-making processes. Although these practices have little legal status, their behavioural impact on the way the WTO operates is considerable. There is enough evidence in the day-to-day work of Chairpersons and the Director-General in the WTO to demonstrate adherence to a culture of increased transparency and participation.

The way in which Members have approached the issue of internal transparency contains a number of parallels to how they have dealt with the challenge of opening up the WTO to greater public scrutiny. The approach to improving the external transparency and the relationship with NGOs over the past decade reflects a similar preference on the part of the WTO membership for improved practices and guidelines, rather than specific institutional amendments. The practices for dealing with civil society groups, developed and refined over the past decade, but with no legal foundation, have become so embedded in the operation of the multilateral trading system that it would be unthinkable that they could be rescinded. Similarly, insistence on specific and formal rules for consultative processes in the WTO would not only result in a lowest common denominator outcome, but would also undermine the moral authority embodied in the current practices and guidelines. It may be argued that what is in place is the least bad of the workable alternatives.

Experience at the WTO shows that the legitimacy of the decision-making process requires that there is an adequate degree of open-ended and inclusive activity to balance other more restrictive consultative processes. Critics of the WTO often appear to single out the decision-making processes of the organization as uniquely exclusive in comparison with other international institutions. This is disingenuous. All international intergovernmental organizations face challenges when it comes to finding the right balance between efficiency and inclusiveness.

Small group consultations by Chairpersons and Green Rooms will continue to play important roles in the overall WTO process, since, on balance, they offer important forums for making progress. WTO Members in general recognize this. However, their legitimacy hinges on the ability to ensure an adequate degree of transparency and inclusiveness, as well as a guarantee that such mechanisms are understood to be coalition building and not decision-making forums. It is also

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press

clear that any attempt to short circuit or deviate from the guidelines and practices on transparency will continue to require some general acceptance among WTO Members. Past experience has shown that in some cases, and faced with a high-stake substantive agenda, the WTO membership appears willing to accept such a temporary deviation. However, muddling through and experiencing negotiating collapses on a regular basis is unsustainable for the multilateral trading system and the legitimacy of its decisions. In this respect it will be crucially important that the progress made so far on internal transparency and the decision-making processes in the WTO is bolstered by further improvements. Some of these will be relatively straightforward, e.g. previewing organizational features of Ministerial Conferences sufficiently ahead of time and ensuring consistent adherence to the consultative practices of the Geneva process. Other issues, such as the transfer of a workable draft text to Ministers prior to the Ministerial Conference, will be more difficult. Of course, a certain degree of flexibility will always be required, but provided certain practices are maintained such flexibility will most likely also be granted.

As the WTO moves towards its Sixth Ministerial Conference in Hong Kong in December 2005 and beyond, issues related to transparency and decision making will remain important. Whether these issues become a separate negotiating item on the WTO agenda will, in part, be determined by the extent to which all delegations feel sufficient ownership of the process and the substantive outcome. This places a significant responsibility on the shoulders of the various Chairpersons and the Director-General, but it also depends on the willingness of all Members, including the large groups which have come to play important roles in the WTO, to take and accept leadership responsibility in the context of the multilateral trading system.

https://doi.org/10.1017/S1474745605002673 Published online by Cambridge University Press