

A hearing in the WTO for all members

Guidelines for improving
the Hong Kong WTO negotiating process

Policy Briefing

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TROCAIRE

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Introduction

In just ten years, the World Trade Organisation (WTO) has doubled its membership. Four fifths of its members are developing countries. This enlargement has created new challenges in terms of co-ordination and negotiation. With decision making based on a consensus system, so each member has equal decision making power, the WTO is held to be the most democratic of all the international institutions with a global mandate. The Seattle Ministerial (1999) however, revealed how even such a democratic system is vulnerable to manipulation by an elite group of powerful members.

Developing countries, who had made serious preparations for Seattle, and unlike previous Ministerials, had presented a large number of their own proposals, found that their initiatives were not treated seriously by developed countries and that the organisation and conduct of the Ministerial reinforced their exclusion. There is general consensus that issues of content, process and organisation also played a key part in the failure of the Fifth Ministerial in Cancun.

Out of concern for what another failed Ministerial would mean for the multilateral trading system and the advancement of developing countries interests, Trocaire seeks to advance in this paper, discussion points on institutional arrangements which demonstrate learning from previous failures and increase the likelihood of a Sixth Ministerial in Hong Kong, which does respect the principle of decision making through consensus. This paper encourages action in the short term. It addresses issues of transparency, participation and accountability in the context of Ministerial preparations and conduct only. Highly contentious and technical institutional issues, which would increase divisiveness, such as the overhaul of dispute settlement, the single undertaking or the consensus principle are not our immediate concern. These internal issues together with external transparency are core elements in need of serious attention in the longer term debate on institutional reform.

This paper, we believe is a pragmatic intervention on what can be done in 2005 to improve Members, particularly developing countries, confidence in the Sixth Ministerial preparatory phase and the actual processes during the December negotiations. It is a component part of Trocaire's work on global governance, which seeks to ensure that the principles of stakeholder participation, democracy, accountability, ownership and legitimacy inform decision making within the WTO. Set in the context of the Vatican's statement on ethical guidelines for international trade issued in September 2003, the paper advances the concept of the WTO as a 'family of nations'.¹ This collective is by nature a

¹ Holy See's note to Ministerial Conference of World Trade Organisation published in L'Osservatore Romano, September 10, 2003

community based on mutual trust, mutual support and sincere respect. In such a community the strong do not dominate.

The paper is divided into three sections, the first, considers how exclusionary processes undermine consensus decision making. The second part identifies how office holders, the Secretariat and Ministerial functionaries are perceived as being subservient to vested interests. This section considers the need to establish legitimacy with all stakeholders, not just an elite few, particularly civil society organisations and the final third section outlines discussion points and our ideas on how to restore representativeness and inclusiveness into Ministerials.

1. Inclusive 'Consensus'

Whether they are called 'Green Rooms', informals, small group meetings, consultations, mini-Ministerials, non-inclusive meetings characterise WTO negotiations. They are also a much criticised aspect of the negotiation process. Non-inclusive meetings consist of a group of countries coming together to further discuss the negotiations, attempting to reach a common position, which is then taken back to all Members, usually in the form of an unbracketed chairperson's text. It is largely the same group of countries attending these meetings. These forums are criticised for bypassing established mechanisms for decision making and are considered by the majority of excluded members to constitute a parallel decision making authority.

These meetings have been a regular source of discontent amongst delegates at the WTO, whose concerns are echoed by civil society organisations.² They are seen as undemocratic, non-transparent, and a violation of the so-called consensus principle. The Seattle Ministerial collapsed in disagreement because of the non-transparent process, a process which was synonymous with the so called 'Green Room'. Whilst some efforts were made to reform the WTO process in the wake of Seattle, Green Room methodology did not disappear. To the contrary, they have become more established and integrated into the negotiation process. The July Framework agreed by 'the five interested parties' represents a further concentration of elitist decision making³. In circumstances where decisions are increasingly made outside the WTO's highest authority, the Ministerial Conference will be in danger of becoming a mere showcase, where all the members simply meet to exchange pleasantries once every two years.

Trocaire believes sacrificing inclusiveness for expediency subverts the very foundations upon which WTO governance is based. It is clearly undemocratic

² 'Time ripe for WTO transparency, inclusiveness, orderly procedures?' by Chakravarthi Raghavan, South-North Development Monitor (SUNS), 9 August 2004

³ The 'five interested parties' comprises the US, EU, Brazil, India and Australia

and untransparent, fuelling resentment and suspicion among the excluded. Instead of fostering a spirit of co-operation and collective responsibility it plants the seeds of non co-operation and discord.

Hitherto, small group meetings are not representative, nor are they democratic or transparent. Mini-Ministerials, for example, consist usually of between 20 and 30 invitees. 33 WTO member states were in Mombasa in early March. The status of these meetings, the criteria for participation and a record of what happened are as clear as mud. Typically however, we know that the most economically powerful countries attend, e.g. the US and the EU. Some developing countries also attend, notably those considered significant because they are too troublesome to ignore, or because they lead coalitions in the WTO, e.g. Brazil.

Beyond who attends, small group meetings are undemocratic because pressure is exerted on the less influential countries. Positions arrived at in the different developing country groupings of the WTO are picked apart and the country nominated as spokesperson is pressurised to change its mind. In this sense, exclusionary type meetings are seen as a means of achieving in private what can't be achieved through the collective. In this context, much of the crucial discussions in Cancun and Doha around the vexed subject of Singapore Issues took place in small meetings, with the EU exerting disproportionate influence on outcomes.⁴

Furthermore, there is a lack of transparency around the issue of small group meetings. It is often unclear who organised them, and whether they count as a WTO meeting or not. For example, the mini-Ministerials prior to Cancun were not officially WTO meetings, but in some instances the Chair of the General Council was present, as well as the Director General (DG). What is the status of the recent meeting held on the fringes of the Davos Forum, what was discussed there and what were the conclusions? What is the status of the other mini-Ministerials scheduled/unscheduled into the months before Hong Kong? Indeed, what is the status of Hong Kong, of the Ministerial itself, if Ministers and their negotiators, commit far greater time and resources to unofficial rather than official meetings of the WTO?

And then the conduct of exclusionary meetings at Ministerials themselves. In their defense officials argue that given the range of issues, their varying importance to different members and the limited time available for negotiation it is naïve to have universal representation at all meetings. However, true this may be it is equally unrealistic to persist with a model that has so demonstrably failed. These meetings are closed, and for non participants it is difficult or impossible to determine accurately what happened without a formal record. All there may be is a chairperson's bracket free text or proposal as with the treatment of the Singapore Issues at the penultimate Green Room in Cancun. This makes it difficult for those not in attendance, to determine how positions

⁴ 'Singapore Issues' also referred to as 'New Issues' refers to Investment, Competition, Trade Facilitation and Transparency in Government Procurement

were changed, what incentives were offered, and what pressure countries were put under in order to explain their position.

Balancing organisational efficiency with inclusiveness is an ongoing challenge within the WTO. A number of Members and international trade experts have considered options such as an Advisory Group or the establishment of a Consultative type Body. Such mechanisms are intended to advance the preparation of negotiating options and try to narrow differences, they would not undercut existing WTO rights and obligations nor the rule of decision making by consensus. Such mechanisms would be constituted by a specific number of members, representative of the whole membership⁵. This idea is seen by some members as in effect creating an executive board dominated by major countries.⁶

Developing countries have demonstrated greater capacity to organise into cohesive groups, often round a common issue, the West and Central African (WCA) cotton group of countries or the G-33 demonstrated this in Cancun. One of the greatest problems for developing countries, which they cited amongst their objections to including the Singapore Issues in this trade round, is their lack of capacity to effectively engage in negotiations. The July Framework remains an intimidating but more focussed agenda. Given the inevitability of small group meetings how can developing countries interests be best represented? Trocaire believes the absence of a mechanism or forum for taking the discussion on how the membership of a Consultative Body or other representational ideas forward is a weakness. Members should allocate responsibility to a working group mandated to invite members to submit responses on the various Advisory/Consultative Group/Body options already tabled, to table additional proposals and to present an unprejudiced report and strategy for moving forward. Accordingly, the working group, would address issues of membership, rationale for type of membership (permanent/rotational), internal structures, mandates and operational codes paying particular attention to achieving optimum representation and transparency for developing countries.

In the few months that remain before the Sixth Ministerial it would be impossible to establish such a working group, develop proposals, feedback to all members and facilitate agreement amongst members on the best structure for ensuring optimum participation and transparency into the future. However, by agreeing to the establishment of such a working group the membership which was rightly critical of internal processes after Cancun would know they had not lost sight of advancing fundamental institutional issues. Meanwhile, members should agree some simple procedural improvements which ensure draft texts for Hong Kong are prepared and agreed by the Members. Members should further clarify the status of Mini-Ministerials and ensure where applicable that a complete record of such meetings exists.

⁵ European Commission note for the 133 Committee on WTO Organisational Improvements, October 2003. Report by the Consultative Board to the Director General on The Future of the WTO, 2004

⁶ Trade:Guarded Response to Sutherland Report from WTO Members by Martin Khor in Seatini Bulletin, Vol.8, No.2

2. Vested interests among Officeholders?

While the WTO is a membership organisation, it is the responsibility of appointed officeholders and the Secretariat to service the delegate bodies, present the institution, deliver technical assistance and facilitate negotiations. With under 600 people in the Secretariat, the WTO's staff is relatively small compared to other international institutions. In the Consultative Board report on the future of the WTO, acknowledgement is made of the erosion in mutual confidence between delegates and staff. Cited are the employees dissatisfaction with their conditions of service and tensions arising from their sole role of support rather than initiative or institutional defence. The report, however, does not provide case study evidence of how the Secretariat may be utilised to do the bidding of specific members rather than fulfilling its duty in ensuring the system functions so as to deliver the agreed mandate.

In Cancun, treatment of the WCA proposals for cotton reform became the litmus test of the WTO members ability to deliver a 'development agenda'. At the final AU/LDC/ACP meeting, Benin highlighted how the non transparent process worked against the WCA group. Following publication of the revised draft Ministerial text on the penultimate day of the Ministerial, the WCA group met with the DG to discuss the shape of a more ambitious text on cotton. To the group's surprise, they were informed soon afterwards by the Secretariat that an alternative text had been presented by another group of countries and this text would be the basis of negotiations. Such practice leaves the Secretariat's duty of absolute neutrality open to question.

The most senior office in the Secretariat, is that of the DG, yet the role of the office-holder is not defined in the Marrakesh Agreement. Setting out the powers, duties, conditions of service, term of office have never been fully developed. The frustration with the manner in which the Cancun Ministerial concluded, provoked considerable discussion on the potential role of the DG. However, since the July Framework was agreed, attention to institutional reform has evaporated and the appointment of a new DG presents members with an opportunity to, spell out the office holder's responsibilities.

Is the DG only the head of the Secretariat? Is the DG not also required to bring leadership to the multilateral trade system? While the DG chairs the Trade Negotiations Committee, should the office holder not also have the right to chair other committees and councils, including the General Council? Dr. Supachai's decision to engage directly with the cotton issue in Cancun, ensured all members addressed the issue. His exhortations to members to implement trade measures which would benefit the worst affected tsunami countries demonstrate the capacity of a DG to act as an 'honest broker'. A role which allows the DG put

forward proposals and compromises to all the members would distance the WTO from the Machiavellian solutions of the most powerful.

If the role of the DG has not yet been spelled out, it is little surprise that other important but lesser roles and temporary positions are even more problematic. Again, post Cancun, the role of the General Council Chair, the Conference Chair, and facilitators came under sharp scrutiny. At successive Ministerials, it has become practice that the Chairman of the General Council produced a text at the eleventh hour, 'on his own responsibility' and without brackets, so that opposing positions were not reflected. These texts were the General Council chair's version of how a compromise might look and largely catered to the approval of the most powerful members of the WTO. Their release close to the opening of the Ministerials, prescribed discussions on content in capitals and in Geneva amongst delegates.

The conduct of Ministerial Chairpersons perpetuated this discrimination against the interests of smaller countries. The Conference Chairperson's executive decision to appoint friends of the chair to expedite progress in negotiations had been widely criticised, most recently in the Consultative Board's report. Facilitators of conference working groups cannot be impartial if they have a known vested interest in the outcome while suspicions are further heightened by the lack of clarity around their mandate. While this approach appeared to work in Doha, it added to the power keg in Cancun, failing to achieve the necessary progress and leading the Conference Chair to unilaterally call the Ministerial to an abrupt end. No delegation were happy with this outcome, yet decisions on the sequencing of negotiations at Ministerials and the decision on how Ministerials should end seems to remain in the sole hands of the Conference Chair. With only a few months to Hong Kong, Members could act to mitigate some of the more obvious potential threats by instigating some minimal reforms vis the role of officeholders. The role of the Conference chair should be agreed by the Members in Geneva as should Conference facilitators, who should also be appointed by the Members.

The interest of Members to address internal institutional reform measures has dissipated since the Cancun post mortems. The issues, however, remain unresolved and threaten to complicate what is by its very nature a difficult negotiations process. Opportunities to raise institutional issues are increasingly few between now and the Sixth Ministerial. The WTO Public Symposium did include discussion on institutional issues among various stakeholders, including civil society organisations. Though providing a useful forum for the exchange of ideas the Public Symposium is but a once a year event delinked from decision making processes. The public, civil society do have a role to play in world trade policy and a more systematic recognition of this is overdue. Trocaire has advocated over the past number of years for greater participatory rights for civil society actors. These actors include NGOs, labour unions and other associations, who should be accorded observer status along the lines of that institutionalised in the accreditation practice of other international organisations, like the UN Economic and Social Council (ECOSOC). Such organisations could

be accorded the right to present written and oral opinions. Thus, the many recommendations made by civil society organisations on the need to improve internal transparency and participation in the WTO, might have received a more fuller hearing than has been the case to date.⁷

3. Guidelines for democratising the negotiating process

Trocaire aims to promote the political debate and the formulation of policy proposals to improve the WTO negotiating process in the context of the preparations and conduct of the Sixth WTO Ministerial in Hong-Kong.

- Further exclusive meetings will take place in 2005. Further mini-Ministerials are planned. On the basis that excluded Members would benefit from knowing what is going on at these meetings, their formal status should be established on a transitional basis. Clarity should be established vis country participation and responsibility allocated for production of comprehensive minutes of these meetings.
- Building a WTO which is truly democratic is the Members responsibility. They can boost their belief that such a body is within reach prior to Hong Kong by putting in place a working group, mandated to invite members to submit responses on the various Advisory/Consultative Group/Body options already tabled, to table additional proposals and to present an unprejudiced report and strategy for moving forward.
- 'Green Rooms' are not decision making forums, there must be an operative General Committee or Assembly at Hong Kong that functions as the decision making forum throughout the Conference.
- As the Marrakesh Agreement requires the 'powers and duties' of Director General's office to be precisely known, the appointment of the new DG presents an obvious opportunity for fully clarifying the role. In particular, the capacity the office holder has to act as an 'honest broker' should be reflected in the job's terms of reference.
- The divergence of views among Members in the preparatory processes and at Ministerials must be reflected in official negotiating texts. The preparation of draft texts is the responsibility of the Members, they cannot derogate this duty and leave it to an individual such as the General Council Chair to prepare texts on his/her own responsibility. Members must agree terms of reference indicating who and how draft negotiating texts are to be prepared and presented.

⁷ Interagency Memorandum on the Need to Improve Internal Transparency and Participation in the WTO, 2003

- The practice of appointing facilitators, friends of the chair by Conference Chairs, must also be addressed. These appointments cannot be made at Ministerial meetings by the Conference Chair alone. A process for identifying positions and candidates needs to be agreed by the Members. Among the guiding criteria should be that the individuals chosen should be allocated to negotiating issues in which they have no national interest. A clear terms of reference for the Conference Chair should also be developed which set down clear guidelines for how the officeholder should deal with eventualities such as the extension or premature ending of Ministerial meetings.
- A clear and transparent system should be developed for participation of civil society, perhaps akin to the consultative status enjoyed in relation to ECOSOC at the UN.

