

Governing the World Trade Organization

Past, present and beyond Doha
World Trade Forum

Edited by Thomas Cottier and Manfred Elsig



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GOVERNING THE WORLD TRADE ORGANIZATION

Like many other international organisations, the World Trade Organization stands at a crossroads. There is an obvious imbalance between the organisation's dispute settlement arm and its negotiation platform. While its current rules, supported by a strong dispute settlement system, have provided some buffering against the negative effects of the financial crises, its negotiation machinery has not produced any substantial outcomes since the late 1990s. It has become obvious that the old way of doing business does not work any more and fresh ideas about governing the organisation are needed. Based on rigorous scholarship, this volume of essays offers critical readings on the functioning of the system and provides policy-relevant ideas that go beyond incremental redesign but avoid the trap of romantic scenarios.

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Edited by
THOMAS COTTIER
and
MANFRED ELSIG

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CONTENTS

<i>List of figures</i>	page	vii
<i>List of tables</i>		viii
<i>Notes on contributors</i>		ix
<i>Preface</i>	xv	
<i>List of abbreviations</i>		xvii
1. Introduction	1	
THOMAS COTTIER AND MANFRED ELSIG		
PART I: Setting the stage 11		
2. The origins and back to the future: a conversation with Ambassador Julio Lacarte Muró	13	
3. After globalisation? WTO reform and the new global political economy	20	
TONY MCGREW		
PART II: Boundaries 47		
4. Internal measures in the multilateral trading system: where are the borders of the WTO agenda?	49	
MARION JANSEN		
5. Legitimising global economic governance through transnational parliamentarisation: how far have we come? How much further must we go?	82	
MARKUS KRAJEWSKI		
PART III: Emerging and established powers 109		
6. Adapting to new power balances: institutional reform in the WTO	111	
AMRITA NARLIKAR		

7. Delegation chains, agenda control and political mobilisation:
how the EU Commission tries to affect domestic mobilisation
on the DDA 129
BART KERREMANS
PART IV: **Weaker actors** 155
 8. Developing countries and monitoring WTO commitments
in response to the global economic crisis 157
CHAD P. BOWN
 9. Exploring the limits of institutional coherence in trade
and development 188
KENT JONES
PART V: **The consensus principle** 215
 10. The WTO as a 'living instrument': the contribution of consensus
decision-making and informality to institutional norms and
practices 217
MARY E. FOOTER
 11. Crisis situations and consensus seeking: adaptive decision-
making in the FAO and applying its lessons to the reform of the
WTO 241
ROBERT KISSACK
PART VI: **Quo vadis?** 263
 12. A post-Montesquieu analysis of the WTO 265
STEVE CHARNOVITZ
 13. Reforming the WTO: the decision-making triangle
revisited 289
MANFRED ELSIG AND THOMAS COTTIER
 14. Barriers to WTO reform: intellectual narrowness and the
production of path-dependent thinking 313
RORDEN WILKINSON
- Index* 337

FIGURES

Figure 7.1	The compromise triangle in the DDA	<i>page</i> 131
Figure 7.2	The delegation chain in the EU	135
Figure 7.3	Agenda setting and mobilised interests in the delegation chain	138
Figure 8.1	New trade remedies and the global economic crisis, 2007–2009	174
Figure 8.2	WTO disputes, 1995–2008	176
Figure 9.1	Institutional sketch of the WTO	192
Figure 9.2	The challenge of harnessing coherence for trade liberalisation	209
Figure 13.1	The incompatible triangle	291
Figure 13.2	Missions' scaling up	294
Figure 13.3	Membership of developing countries	295
Figure 13.4	The new pentagon of decision-making	305

TABLES

- Table 4.1 Internal measures in the WTO and other
multilateral platforms *page 72*
- Table 8.1 Timeline of major new monitoring initiatives
in the WTO system in 2009 *167*
- Table 8.2 Relative importance of various types of new crisis-era trade measures
according to the Global Trade Alert *178*
- Table 8.3 Example application of GTA-provided information: Brazil's bilateral
imports (US\$) of industrial fatty alcohols, 2003–2009 *181*
- Table 9.1 Global institutional comparative advantage profile: trade-related
issues *199*

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PREFACE

The World Trade Forum series was established in 1997 with the aim of addressing some of the most pertinent questions facing the global trading system. Who would have thought at that time that the Forum would one day turn to the question of how the World Trade Organization (WTO) is governed, as a result of lack of progress in multilateral trade negotiations and a profound imbalance between the political and judicial branch of the Organization? After nine years of Doha Round negotiations and with major regulatory challenges ahead, we thought that the time was ripe to take stock and to consider the challenges and prospects of governing the WTO. The thirteenth World Trade Forum was held on 25 and 26 September 2009 at the World Trade Institute of the University of Bern and was entitled 'Making Decisions at the World Trade Organization: Past, Present and Beyond Doha'. The aim was to reflect on the past, to look critically at the current governance challenges and spearhead different paths the WTO could take in the future. For this purpose we invited scholars and experts on international economic organisations to participate. The conference offered a unique platform to exchange ideas and test them with practitioners representing international organisations, official WTO delegations and non-governmental organisations. This participatory mixture served to bridge the existing divide between trade diplomacy and academia. It pushed for cross-fertilisation among various disciplines, most importantly law, economics and international relations. While theoretical proposals might not always be able to jump the high hurdle of the Geneva reality test, we attempted to lay some groundwork for further reflection, debate and eventual action in the not so distant future. We hope the book will appeal to a wide readership that is ready to engage with various complementary, competing and overlapping assessments of the current system and to join in sketching future paths for the WTO to take.

It should be noted in this respect that the picture on the book cover does not convey a negative message of the Gordian knot, but a more positive analogy of ropes that can be untied, serving the climber,

providing safety and inspiring confidence. An understanding of how the ropes were intertwined in the first place is necessary in order to push and pull the coloured ropes in the correct sequence, and finally, to untie them in a collaborative effort. Once untied, the ropes can be used again, in the hands of experienced and team-oriented coalitions, supporting the shared climb to the summit.

This volume would not have been possible without the contributions of a number of outstanding people. Particular thanks go to the participants of the conference for their stimulating presentations and engaging debates. We would like to express our gratitude in particular to Tom Bernes, Steffen Grammling, Michael Hahn, Jennifer Hillman, Faizel Ismail, Andrew Lang, Bessma Momani, Marion Panizzon, Victor do Prado and Debra Steger. We would like to express our heartfelt appreciation to the authors involved in this book for their stimulating contributions and for their willingness to stick to the deadlines imposed. We believe that joint efforts of this kind yield promising results. Indeed, an interdisciplinary effort combining theoretical and practical experience and perspectives is required when climbing in order to reach the summit and to gain a view into new valleys and territories.

We are equally very grateful for the continued support received from the Ecoscientia Foundation without which this World Trade Forum could not have been staged. We thank Susan Kaplan for reviewing the manuscripts and for her support in preparing the publication. She was ably supported in this endeavour by Mariella Delahaye and Sarah Woodall. We wish to thank Margrit Vetter and Gaby Hofer for taking care of housekeeping matters and for lending us their unique organisational skills. Finally, we wish to thank Finola O'Sullivan of Cambridge University Press for her continued support and commitment to the project and the World Trade Forum series and to the two anonymous reviewers for their assessment and valuable suggestions.

*Thomas Cottier &
Manfred Elsig*

ABBREVIATIONS

AB	Appellate Body
ADB	Asian Development Bank
BICs	Brazil, India and China
BRIC	Brazil, Russia, India and China
CAP	Common Agricultural Policy
CSO	civil society organisation
CVD	countervailing duty
DDA	Doha Development Agenda
D-G	Director-General (of the WTO)
DG	Directorate-General
DSB	Dispute Settlement Body
DSU	(WTO) Dispute Settlement Understanding
EP	European Parliament
FAO	Food and Agriculture Organization (of the United Nations)
FDI	foreign direct investment
G90	Group of 90 (developing countries)
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GM	General Motors
GPA	Agreement on Government Procurement
GTA	Global Trade Alert
IDB	Inter-American Development Bank
IEE	Independent External Evaluation
IF	Integrated Framework
ILO	International Labour Organization
IMF	International Monetary Fund
IO	international organisation
IPA	Immediate Plan of Action
IPU	Inter-Parliamentary Union
ISNT	informal single negotiating text (in quoted material)
ITC	International Trade Centre
ITO	International Trade Organization
IUCN	International Union for the Conservation of Nature
LDCs	least-developed countries
MEA	multilateral environmental agreement

MFN	most-favoured nation
NAFTA	North American Free Trade Agreement
NAMA	non-agricultural market access
NGO	non-governmental organisation
NIEO	New International Economic Order
OECD	Organisation for Economic Co-operation and Development
PCWTO	Parliamentary Conference on the WTO
PNoWB	Parliamentary Network on the World Bank
PSE	private sector enterprise
PSP	Principal Supplier Principle
PTA	preferential trade agreement
SCM	Subsidies and Countervailing Measures
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TRIMs	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCLOS	UN Conference on the Law of the Sea
UNCTAD	UN Conference on Trade and Development
UNDP	United Nations Development Programme
USTR	US Trade Representative
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WP	Working Party
WTO	World Trade Organization

Introduction

THOMAS COTTIER AND MANFRED ELSIG

Constitutional paralysis paved the way for financial ruin, for military impotence, and for foreign invasion. If taxes could not be raised, the Republic's Army could not be maintained, and the Republic's enemy could do as they pleased.

(Davies 2001)

The World Trade Organization (WTO) stands at a crossroads, a situation it shares with many other international organisations (IOs) established after the Second World War. While challenges from globalisation are creating opportunities and the need for enhanced multilateral cooperation, IOs have largely remained on the sidelines, staying with structures shaped for a different and past period. The responses to the most recent financial, fiscal and economic crises and the failure to reach more than a shaky political accord at the 2010 Copenhagen Summit on Climate Change illustrate two facts: the absence of leadership and the preference for unilateral, bilateral or plurilateral approaches, and the lack of an appropriate international architecture able to deal with a highly complex international agenda. Nation states continue to cling to an outdated model of Westphalian sovereignty which translates into limited delegation to and within IOs of global reach. The exact diagnosis of shortcomings and crises varies from one IO to another. In the case of the WTO – formally created in 1995 but strongly building upon the experience and diplomatic *modus operandi* of the 1947 General Agreement on Tariffs and Trade (GATT) – an obvious imbalance between the organisation's modern dispute settlement arm and its traditional negotiation platform emerged (Cottier and Takenoshita 2003). While the WTO's existing rules, backed by the strong dispute settlement system, have provided some buffering against the negative effects of the financial crises (e.g., countries' incentives to turn to protectionism), its negotiation machinery has not produced any substantial outcomes since the late 1990s. It has become obvious that

the old way of doing business does not work properly any more in a multi-polar world and that demand for fresh ideas about governing the organisation is growing (e.g., Steger 2010). This becomes all the more evident when we turn to future regulatory issues which transcend the traditional call for market access and liberalisation.

This book is about governing the most important multilateral institution at the heart of the global trading system. We understand governance as a term of political science capturing the substance and structure, as well as the processes of political systems. While lawyers increasingly tend to structure the argument of governance in terms of constitutional theory in international law (e.g., Klabbers, Peters and Ulfstein 2009), we use the term governance as defined by James Rosenau to mean 'the maintenance of collective order, the achievement of collective goals, and the collective processes of rule through which order and goals are sought' (2000: 175). We posit that governance malaise develops from difficulties in defining processes, working within existing structures, or disagreement on the collective goals. We also submit that constructive criticism of how institutions are governed is necessary and important if they are to continue to play an important role. Absence of criticism (lack of voice) would be a sign of states taking the exit option (Hirschman 1970).

In the case of the WTO, however, the amount, tone and origins of criticism directed at the organisation are noteworthy. Even the innermost circle of actors (the Geneva-based trade diplomats) must have come to realise that the WTO has a serious 'governance' problem. The first notable efforts towards addressing governance deficiencies started in early 2000 after the infamous third WTO Ministerial Conference held in Seattle in December 1999. Back in Geneva, many contracting parties and a significant number of civil society groups called for a rethink of decision-making. Therefore, in the run-up to the Ministerial Conference in Doha in 2001, some incremental changes were agreed upon to allow greater access for weaker states during the negotiations (to address concerns of inclusiveness). In addition, we witnessed attempts to increase overall transparency (and decrease secrecy) to address concerns of information asymmetry voiced by many developing countries. Yet, the launching of a new round masked the continuing difficulties in making deals at the WTO. After successfully negotiating a formula to address the thorny issue of the protection of intellectual property rights and public health, some participants were even enthusiastic about the ability of the existing governance toolkit to manage the Doha Round.

Whereas it remains disputed in the literature whether 9/11 provided the necessary conditions for agreeing on a mandate or whether changes in negotiations behaviour account for the Doha Declaration (Blustein 2009, Odell 2009); what remains undisputed is that agreement on the Doha Declaration was influenced by concessions towards developing countries. These concessions came in the form of publicly suggesting that the key concern was to strengthen the developmental aspects of the WTO. This rebranding exercise (from a market access endeavour to a development round) raised expectations which would be hard to meet. Since the beginning of the round, little progress has been made in relation to the agenda outlined and many deadlock situations have been encountered, at times paralysing the organisation.

The original WTO treaties foresaw that the organisation would meet at least every two years at the Ministerial level. Given the small progress in the Doha Round and the reluctance to bring Ministers together without the prospect of some success, there had been no Ministerial gathering in 2007.¹ In late 2009, the WTO Members finally agreed to hold a Ministerial meeting. In response to the evolving consensus that another failed Ministerial was to be avoided, the meeting was intended to address governance issues.² This was an attempt to allow Ministers to meet outside the typical bargaining atmosphere (which is usually what happens at Ministerials). While progress by tabling bold new initiatives was not expected in a formal setting (Ministers read out their prepared speeches), it marked the start of a period of reflection on reform of the institution.

It has become evident that while the present round will be completed (or abandoned) on the basis of current procedures, future tasks can no longer be successfully addressed without institutional reform. Beyond classical trade issues, future challenges include additional liberalisation of behind-the-border measures, complex negotiations on trade policy responses to climate change mitigation and adaptation, and finding

¹ When Ministers met it was within the setting of so-called mini-Ministerials among leading economies; these were convened to attempt to unblock issues.

² To quote from the WTO website: 'In his report to the General Council on 17 November 2009, D-G Pascal Lamy said that while the upcoming WTO Ministerial Conference would not be a negotiating session, it would be "a platform for ministers to review the functioning of this house", including the Doha Round, and an occasion "to send a number of strong signals to the world with respect to the entire WTO waterfront of issues - from monitoring and surveillance to disputes, accessions, Aid for Trade, technical assistance and international governance.'" www.wto.org/english/thewto_e/minist_e/min09_e/min09_e.htm, accessed on 12 June 2010.

regulatory answers to long-term effects of the financial and fiscal crises, including the absence of sufficient financial regulation in international law. Given this changing environment and the demand for fresh ideas on adapting the WTO governance model, this edited volume is aimed at contributing to the evolving debates on the future of this key multilateral institution in regulating the world economy.

This volume is the result of the 2009 World Trade Forum held at the World Trade Institute of the University of Bern in September 2009. The Forum brought together scholars and practitioners who have been writing on WTO law, economics and international relations as well as colleagues focusing on other global economic multilaterals. The Forum allowed for critical discussions across disciplinary boundaries and political convictions, pushing contributors to sharpen their arguments in terms of theoretical frames, conceptualisation, empirical assessment and policy prescriptions. The book offers more than one diagnosis of governance crises and consequently suggests various paths towards reform (Elsig 2007).

This is not the first book on reform (and will not be the last). However, it offers a number of new aspects: first, by contrasting and complementing various traditions for studying WTO governance, the book goes beyond a mono-disciplinary approach. We posit that the blurring of disciplinary borders will shed some new light on the challenges the WTO faces. Second, a number of the chapters offer explicit comparative perspectives. Lessons learned across IOs are intended to enrich the often myopic view of the WTO, treating the WTO in a *sui generis* fashion. Third, the book addresses change over time. It goes beyond a 'snapshot' analysis of current problems and provides for a longer term view of the functioning of the system. Fourth, the contributions rely on critical and constructive analyses.

The book also provides for a variety of readings on how the WTO does business and contributors work with different and competing expectations as to what the WTO is mandated to perform. Therefore, this edited volume does not put forward a uniform set of proposals. While readers will find plurality of voices on reform, they will recognise that contributors to this volume are united in advocating that the WTO cannot continue to renegotiate old rules and create new rules in a business-as-usual scenario. They provide policy-relevant ideas that go beyond incremental redesign but avoid the trap of (overtly) romantic scenarios for changing the dominant governance models of the organisation.

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