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The case for creating a Working Party on the Functioning of the WTO

by

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# The case for creating a Working Party on the Functioning of the WTO

Peter N. Pedersen<sup>1</sup>

## ABSTRACT

Since the conclusion of the Uruguay Round in 1994 and the creation of the WTO in 1995, the functioning of the multilateral trading system has been the focus of a considerable number of articles, proposals and debates. With the exception of a few important initiatives on transparency and decision-making, most contributions on the functioning of the WTO have been made by external observers of the WTO. However, over the past two years, an increasing number of Members have showed interest in systemic and institutional issues. This interest has to a large extent been generated by a concern about the role of the multilateral trading system in the overall international economic environment, particularly in light of the current global financial crisis. At the same time, the WTO as an institution is under considerable pressure following more than a decade of efforts to conclude the Doha Round of trade negotiations. This paper explores the possibility of establishing a Working Party on the Functioning of the WTO as a separate, deliberative process in the WTO. It seeks to outline the advantages of creating an informal forum or space for discussion among WTO Members and argues that many WTO Members appear to be ready for a broad discussion of institutional and systemic challenges facing the multilateral trading system.

**Keywords:** GATT/WTO; functioning of the WTO, institutional reform, systemic reform.

**JEL Classifications:** F1, F5, F13

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## 1. Introduction

A key element of organizational theory is that change or institutional reform - whether private, public, domestic or international - should not be conducted for the sake of change alone. At the same time most practitioners of organizational and performance management theory would agree that it is healthy for any organization to continuously look towards ways to improve its functioning.

Since the conclusion of the Uruguay Round in 1994 and the creation of the WTO in 1995, the functioning of the multilateral trading system has been the focus of a considerable number of articles, proposals and debates<sup>2</sup>. With the exception of a few important initiatives in areas such as transparency and decision-making, the bulk of the contributions on the functioning of the WTO have been external. This is not to say that the WTO membership have not taken on issues which have a direct impact on the functioning of the organization, but the broader themes of institutional and systemic reform have received less attention among Members than among outside observers of the WTO.

This paper is based on the premise that many WTO Members are ready for a broad discussion of institutional and systemic challenges facing the multilateral trading system. Such an exchange of views would benefit from a separate process or space within the WTO which would provide a degree of flexibility that the regular institutional framework does not offer.

There have been a number of reasons for the lack of appetite for a comprehensive debate about the functioning of the multilateral trading system among WTO Members. First, during the first few years of operation of the WTO Members did not see the need to engage in a general discussion on reform of a trading system which was still in its infancy and in the process of establishing a track record of operation. Second, until very recently many Members viewed references to the functioning of the WTO as subtle attempts to derail or slow down discussions on WTO's substantive agenda. Third, since the 50<sup>th</sup> Anniversary of the GATT/WTO in 1998 the focus on launching and subsequently on concluding the 8<sup>th</sup> Round of multilateral negotiations has inadvertently, but effectively assigned discussions on broader institutional and systemic issues to academic and other civil society fora.

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<sup>2</sup> See the excellent historical overview in "Strengthening Multilateralism: A mapping of proposals on WTO reform and global trade governance", Carolyn Deere-Birkbeck and Catherine Monagle, ICTSD and Global Economic Governance Programme, November 2009. See also WTO, "Report of the Consultative Board to the Director-General Supachai Panitchpakdi on the Future of the WTO: Addressing Institutional Challenges in the New Millennium" (WTO, Geneva 2004), and the Warwick Commission, "The Multilateral Trade Regime: Which Way Forward?" (2007, University of Warwick). Other contributions include Debra Steger, "The future of the WTO: The case for institutional reform", *Journal of International Economic Law* 12(4), 803-833, 2009 and Peter Pedersen, "The WTO Decision-making Process and Internal Transparency", *World Trade Review* 5 (1), 103-131, 2006.

In his foreword to the WTO World Trade Report 2007, Director-General Pascal Lamy made a direct reference to the need for the organization to address a "missing middle" of issues which fall outside the legislative and litigation areas of work of the WTO<sup>3</sup>. Similarly, in his statement to the General Council in April 2009 as part of the appointment process of the Director-General, Mr Lamy emphasized the need to strengthen the WTO system beyond the immediate focus of the Doha Round negotiations<sup>4</sup>. As EU trade commissioner, Mr Lamy on several occasions raised institutional concerns, particularly with respect to the preparation and conduct of ministerial conferences<sup>5</sup>. These concerns were specific and did not have the broader scope that his 2007 and 2009 interventions would seem to suggest. The notion of the "missing middle" can also be found in the conclusions of the Warwick Commission report which calls for a reflection exercise that should go beyond the issues already being discussed within the multilateral trading system<sup>6</sup>.

If the membership is now be willing to engage more directly on systemic and institutional issues, this may be attributable in particular to two somewhat interrelated factors. First, the 2008 outbreak of the worst global economic crisis since the 1930s precipitated a discussion of the organization's role in global economic governance in general and in the monitoring of trade policies, including the introduction of new protectionist measures, in particular. Second, the stalemate in the Doha Round after a decade of negotiations, including several high-profile mini-ministerial failures, as well as the long overdue requirement to hold a ministerial conference, sparked discussions at the end of 2008 and in early 2009 about the need to convene Ministers to provide guidance and vision for the future of the multilateral trading system.

Discussions in the WTO in 2009 and more recently in the context of the preparatory process for the 8<sup>th</sup> Ministerial Conference in 2011 have seen delegations refer to systemic issues, institutional issues, and the strengthening of the system.

At this point an initial clarification with respect to terminology is in order. The overall nomenclature utilized by delegations in the WTO so far is less radical than that of external observers. Whereas the outside debate has often focused on the need for "reform" of the WTO, concepts such as "strengthening", "streamlining" and "improving" would seem to capture the desire expressed by some

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<sup>3</sup> World Trade Report 2007, WTO.

<sup>4</sup> 29 April 2009, Director-General Lamy speech to the General Council "Strengthening the WTO as the global trade body".

<sup>5</sup> EU Trade Commissioner Pascal Lamy, press conference 2 December 1999 and address to the European Parliament Kangaroo Group on 27 January 2004.

<sup>6</sup> Warwick Commission, op. cit.

delegations to "review the functioning" of the system more adequately. Similarly, at this early juncture of the discussions the concepts of "systemic" and "institutional" appear to be interchangeable.

## **2. Negotiating Group on the Functioning of the GATT System (FOGS)**

On 20 September 1986, following a week of intensive negotiations at Punta del Este, Uruguay, Ministers of the GATT Contracting Parties adopted a declaration that set out the aims and procedures of the forthcoming round of multilateral trade negotiations. Tucked away in section F of Part I of the ministerial declaration was a mandate to establish a negotiating group on the Functioning of the GATT System (FOGS).

A first look at the group's three-part mandate reveals much about the issues which many Contracting Parties saw as fundamental to the effective functioning of the GATT. The negotiating objective in the FOGS, as spelt out in the Punta del Este mandate, was to "develop understandings and arrangements:

- To enhance surveillance in GATT to enable regular monitoring of trade policies and practices of Contracting Parties and their impact on functioning of the multilateral trading system,
- To improve the overall effectiveness and decision-making of the GATT as an institution, including, inter alia, through involvement of Ministers, and
- To increase the contribution of GATT to achieving greater coherence in global economic policy-making through strengthening its relationship with other international organisations responsible for monetary and financial matters."

It is interesting to note the similarities between the FOGS Negotiating Group's mandate and the issues which have been mentioned in the context of the recent global financial crisis, i.e. monitoring of protectionist measures and international economic governance issues. Discussions in the FOGS Group show that the 1980s debt crisis loomed large on the minds of negotiators when the FOGS mandate was designed. At the same time, sensitivities about possible linkages in terms of policy conditionality among the Bretton Woods organizations were also at the centre of many contributions by developing countries to the FOGS Group.

Specific outcomes of the FOGS Group included the Trade Policy Review Mechanism and the WTO's Coherence Mandate with the IMF and the World Bank. The group also spent a considerable amount

of time on decision-making, including on the need, format and frequency of ministerial involvement as well as the possibility of institutionalizing a ministerial steering group along the lines of the Consultative Group of 18 which was widely considered to have lost relevance at the time<sup>7</sup>.

The FOGS Group discussions also covered issues related to internal transparency, the participation of delegations, and the role of the WTO Secretariat and its Director-General. Finally, from 1989 onwards several governments began entertaining the idea of providing the GATT and the expected outcome of the Uruguay Round with a more appropriate institutional foundation.

The above brief historical account is relevant to the current context precisely because of the institutional and systemic flavour of the mandate and discussions of the FOGS Group. Despite the heavy substantive agenda of the Uruguay Round, negotiators were resolved to address institutional and systemic issues of central importance to the multilateral trading system.

Although the parallels to the current context are important - both in terms of the challenges facing the WTO's substantive agenda and in terms of the external economic environment - the differences are at least as important. Above all, the very high profile of the WTO compared to the relatively anonymous GATT means that public scrutiny of the organization is of a magnitude never experienced pre-1995. This in turn means that on institutional and systemic matters related to the multilateral trading system, the past 15 years have produced an impressive range of literature which was not available to negotiators in the FOGS Group.

### **3. Systemic and Institutional Issues in the WTO**

In the following section we shall briefly attempt to contextualize the emergence of systemic and institutional considerations among the WTO membership since 2008.

Current WTO working structures and mandates do not easily allow for the inclusion of a number of issues which could be labelled systemic or institutional. Of course, over the past decade or so various working groups and committees have been established, but these were issue-specific rather than institutional, systemic or even structural. Some of these groups were subsequently abandoned, either because their *raison d'être* disappeared or because their presence within the multilateral trading system was considered politically unsustainable.

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<sup>7</sup> For a comprehensive discussion of the CG18, see Richard Blackhurst and David Hartridge, "Improving the capacity of WTO Institutions to fulfil their mandate", (2004) 7 JIEL 705.

Even before the launch of the Doha Round in 2001 the principal focus of the multilateral trading system had been on negotiations and the Round. This is not to say that the WTO membership had been unable to address issues with significant systemic ramifications. For example, the comprehensive processes on transparency and decision-making practices in 2000 and 2002 represent significant and highly successful forays into the institutional setup of the multilateral trading system by the membership. However, these processes were *ad-hoc* and mostly the result of specific procedural incidents or failures in the context of ministerial meetings. By default, the General Council oversaw these deliberations.

Despite the obligation to hold a ministerial conference at least every two years, the WTO did not convene a full ministerial gathering between December 2005 and November 2009. At the General Council meeting in December 2008 and subsequently in February 2009 a growing number of delegations made reference to the need to fulfil the Rules of Procedure agreed for sessions of the Ministerial Conference, adopted by the General Council in January 1995. These, following on Article IV of the Marrakesh Agreement Establishing the WTO, provide that "[r]egular sessions of the Ministerial Conference shall be held at least once every two years."<sup>8</sup> On 30 April 2009 Uruguay circulated a document calling for the 7<sup>th</sup> Session of the Ministerial Conference to be convened arguing that "[T]here would be no justification for continuing to postpone the regular convocation of the topmost body of the WTO, particularly in the current world economic and trade environment, which requires international cooperation, direct political involvement at the multilateral level, and strong and credible institutions." Finally, at the General Council meeting on 26-27 May 2009 the membership adopted the decision to hold a regular ministerial conference from 30 November to 2 December 2009<sup>9</sup>.

The May 2009 General Council interventions on the issue of the 7<sup>th</sup> Ministerial Conference arguably constitutes the most comprehensive, albeit preliminary, exchange of views on broad institutional issues in which Members have engaged since the creation of the WTO. Agreement among Members at that meeting to hold a "regular" ministerial<sup>10</sup> gathering which would address issues and challenges in relation to the functioning of the multilateral trading system could be interpreted as an effort to deliberate on the "missing middle" in the WTO.

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<sup>8</sup> WT/GC/M/117 and WT/GC/M/118.

<sup>9</sup> WT/GC/W/599

<sup>10</sup> The concept of a "regular" ministerial does not exist anywhere in the Marrakesh Agreement. However, it is a good illustration of the sensitivity among the membership when it came to ministerial meetings being exclusively focused on the DDA. Similarly, the manner in which a series of unsuccessful mini-ministerial gatherings had replaced full-scale Ministerial Conferences was also a source of some resentment with a large number of Members.

A recurring theme in the 2008 and 2009 discussions in the General Council was the WTO's role in the global economic environment in general and in relation to the financial crisis in particular. A side effect of these discussions was the initiation in January 2009 of monitoring reports by the WTO Director-General on trade measures taken by all WTO Members and Observer Governments. In response to the G-20 Leaders' specific request, the Director-General submits a regular monitoring report on G-20 trade and investment measures (jointly prepared with the OECD and UNCTAD). The WTO Secretariat has also helped occasionally other groupings, such as APEC, in monitoring trade-related developments.

Some six weeks ahead of the 2009 Ministerial Conference, India submitted a formal communication on behalf of several delegations calling for the "strengthening of the WTO" through the establishment of a deliberative process under the General Council to review the organization's functioning, efficiency and transparency and to consider possible improvements. A total of 22 co-sponsors had signed up to the proposal by the end of October<sup>11</sup>. The proposal by India *et al.* is relatively general and therefore captures the overall thrust of a large number of the comments and interventions made by other Members on institutional issues throughout 2009. As noted, the proposal gathered both wide and diverse support and clearly included some of the ideas which had been making the rounds among delegations. Nevertheless, consultations towards finding agreement to actually place the proposal in front of Ministers at the Geneva conference did not conclude successfully and the proposal did not make it to the Ministerial Conference.

India also submitted a set of five proposals in July 2009 calling for the Ministerial Conference to look at very specific ideas to improve notifications, the operation of WTO committees, the engagement with Regional Trade Agreements, market access for LDCs and international standards<sup>12</sup>. These proposals did not feature at the ministerial meeting, partly because India submitted the proposal to the General Council and indicated that their introduction was to stimulate further discussion at that level. The proposals were of a fairly detailed technical nature which generally does not suit ministerial discussions. Nevertheless, it would seem reasonable to argue that these proposals do indeed touch upon some of the institutional issues, for example a cross-cutting discussion of notifications or the WTO's relationship to RTAs, which would be better served by a process dealing with systemic issues, rather than in the current WTO committee framework.

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<sup>11</sup> WT/MIN(09)/W/1 + add. 1, 2, 3.

<sup>12</sup> WT/GC/W/605



The early stages of consultations by the General Council Chairman in preparation for the 8<sup>th</sup> Ministerial Conference in December 2011 have also seen a number of general references to systemic and institutional issues although, at the time of writing, there is still little clarity among delegations as to what proponents more specifically have in mind. However, what is clear from consultations and discussions among delegations so far is that they see the December conference as an opportunity for them as the owners and stakeholders of the system to address and explore issues with wider institutional implications for the system. This may very well include a ministerial exchange of views on the Doha Round, but there is a noticeable appetite to address fundamental questions about the role and functioning of the multilateral trading system. It would seem reasonable to expect some of the ideas from the 2009 discussions surface again in the context of the 2011 Ministerial Conference.

#### **4. Establishing a Process on Institutional Issues in the WTO**

Before addressing the specific issues which might find a home in a dedicated process where Members could discuss wide-ranging issues related to the functioning of the WTO it is useful to contemplate the nature and potential advantages of such a forum.

As previously mentioned, the General Council has on occasion been used to dealing with issues in "special sessions". However, its regular agenda is already complex and given its status as the WTO's top political body outside ministerial sessions the procedures and rules that underpin its operation are observed with particular rigour. Having the General Council take on a host of institutional issues would seem an inefficient use of this body and would almost inevitably ensure that these discussions would be loaded with a degree of counterproductive formality. This, however, does not mean that the General Council would have no oversight of a process on institutional and systemic issues and we shall return to this below.

There is currently no official forum within the WTO which provides a natural home for the broad mix of institutional and sometimes cross-cutting issues which are of interest to the WTO membership. At the same time, it seems that what the India *et al.* proposal refers to as a "deliberative process" may not be strictly limited to issues of a systemic character, but could indeed be the home or "track" for a significantly broader set of topics that currently do not have a logical home in the WTO web of councils, committees and working groups. In some ways it makes sense to think of such a process as

an incubator or brainstorming forum for issues which cannot yet muster the required consensus to be formally catapulted onto the WTO agenda<sup>13</sup>.

The informality of such a process could provide a degree of flexibility which formal WTO bodies do not have. To some extent, the use of working groups in the WTO could serve as an example and even copying this terminology might have certain advantages as it accentuates informality, exploratory debate and non-negotiation. In providing such groups with a more flexible and informal operating mandate it should also be clear that the normal procedural constraints of regular WTO bodies do not apply. For example, the groups should be allowed to invite outside experts and organizations to contribute to the discussions and there would be no procedural constraints with respect to the agenda or issues to be discussed by the groups.

Second, establishing an informal process outside the formal procedural rigidity of the regular WTO bodies would help de-politicize many issues. The absence of specific decisions and formal outcomes from such a process could be levied as a criticism, but it would be hard to argue that a complete stalemate, such as that on inter-governmental organization observer status in WTO bodies, is preferable. Precisely because the informal nature of the process it might be possible for some delegations to approach issues with more pragmatism.

Third, an informal process would have to be proponent-driven -- i.e. by WTO Members -- and it would be understood that the establishment of a subsidiary working group could not be blocked. Perhaps some numerical threshold for the introduction of groups could be considered. Clearly, for a WTO based on rigid rules and with an ailing negotiating agenda which has tested mutual trust among delegations to an unprecedented extent, such an approach would entail a leap of faith. However, without less dogmatic *modus operandi*, a deliberative track on systemic and institutional issues would add little, if any value to the WTO system overall. Finally, given the relatively informal process of creating a subsidiary working group, it could also be assumed that terminating a group that has run its course or generated little interest would be less controversial for the proponent(s). Nevertheless, it should be up the proponent(s) to terminate a group.

Fourth, the deliberative track or process would not make decisions, nor would it affect the rights and obligations of WTO Members. Traditionalists would gain comfort from the fact that the process

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<sup>13</sup> The so-called “Invisibles Group” from 1995 to 1999 served as informal brainstorming fora among a smaller group of countries and included the WTO Director-General. A “Friends of the System” group continues to meet informally to discuss a wide range of WTO related issues. However, as with the CG18, the Invisibles Group was perceived to lack the transparency and accountability which is associated with a discussion among WTO Members within the framework of the organization.

would report once or twice a year to the General Council and could, at a maximum, provide specific recommendations on issues. Although some may argue that this could render an informal process irrelevant, nothing could be further from the truth. Providing Members with a forum for serious, creative and outside-the-box thinking on trade-related issues that would otherwise not be addressed by the WTO membership is preferable to having no forum at all. The annual public symposia organized by the WTO Secretariat are useful exercises for transparency and consultation with civil society, but there is considerable evidence over the past 15 years that Members prefer to own and control the WTO agenda-setting. By firmly establishing that the deliberations in this process could lead to recommendations rather than decisions, the issue of participation for smaller delegations and non-resident Members would seem to be partly addressed. Nevertheless, it might be worthwhile emphasizing that these Members could choose to accredit specific experts to take part in the discussions they consider of interest.

Fifth, one option could be to establish an overall Working Party on the Functioning of the WTO with subsidiary working groups making up the substantive remit. There would be considerable institutional, political and practical logic in having the Chair of the General Council and the Director-General co-chair the Working Party. The chairmanship of the subsidiary bodies would be for the proponents of a particular topic to organize. The subsidiary groups would have complete autonomy in terms of frequency of meetings and reporting to the overall Working Party. The Working Party on the Functioning of the WTO could meet twice a year with the objective of establishing how to present a report and possible recommendations to the General Council.

## **5. Working Party on the Functioning of the WTO - The Issues**

Given the Member-driven nature of the process proposed here, any consideration of issues that might be taken up is illustrative only. Some of the issues listed below may already receive adequate attention in existing committees. However, the existence of a committee does not, on its own, disqualify a discussion of a particular issue under a Working Party on the Functioning of the WTO. This is particularly the case when the discussion of an issue might warrant a different approach compared to that taken in existing committees.

- **Multilateralism and the role of the WTO:** Although the multilateral trading system has survived failed negotiations before, multilateralism as an institutional form is currently going through a difficult time. The delegations that called for the convening of the 7<sup>th</sup> ministerial conference in 2009 did so in part because they believed that there was a need for trade

Ministers to meet and discuss the challenges facing the WTO in an economic and geopolitical context which had changed radically since the WTO was founded. However, rather than having an *impromptu* and *ad hoc* discussion every two years, a working group which more systematically prepared issues for a ministerial exchange of views might be worthwhile considering.

- **Regional trade agreements:** There are currently over three hundred PTAs in operation globally and dozens more are under negotiation. The four-fold increase of PTAs since 1990 is one of the foremost institutional challenges facing the WTO today<sup>14</sup>. Nevertheless, the existing structure of the Committee on Regional Trade Agreements may not be the right place for a wide-ranging systemic, perhaps even philosophical, discussion of this issue. At the core of this argument is that while policymakers generally have expressed solid support for the multilateral trading system, they simultaneously have diverted considerable resources and attention to the pursuit of preferential trade agreements (PTA). There is a growing sense among many Members that the WTO needs to address this relationship in an open and dynamic fashion, including with the involvement of business.
- **The relationship of the WTO with other international organisations:** The issue of observer status has been blocked in the General Council for over a decade. What essentially began as a political problem unrelated to the activities of the multilateral trading system has a very negative systemic effect on the WTO. For example, the WTO has been unable to provide even its Bretton Woods coherence partners with observer status in negotiating bodies, including the Trade Negotiations Committee. The deadlock on this issue seems particularly incongruous in an international economic environment which requires improved governance and coordination. Members might also want to consider how to update the WTO coherence mandate in light of the financial crisis and the state of the DDA negotiations.
- **The structure and process of decision-making in the WTO:** Considerable progress has been made on the transparency and inclusiveness side of this issue over the past decade. None of the improvements made are legally enforceable, but the practices that have evolved are solidly embedded into the fabric of the multilateral trading system. On the other hand, fundamental questions remain with respect to consensus-based decision-making which arguably has played an important role in the decade long Doha Round stalemate. While the

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<sup>14</sup> See the World Trade Report 2011 for an extensive study of the relationship between the WTO and preferential trade agreements.

idea of introducing some method of weighted voting appears to be impossible from a political, practical and cultural point of view, the notion of "critical mass" decision-making might be worthwhile exploring. A variable geometry approach to negotiations and agreements is not new to the WTO and with the right procedural and substantive protection such an approach might be seen to offer enough protection for all WTO Members.

- **Alternative options to Special and Differential Treatment:** In-depth thought is required on alternative approaches on how to improve some of the current models of S&D. The DDA negotiations have clearly demonstrated that S&D is not a one-size-fits-all concept and that different countries often require different solutions. If a subsidiary working group on S&D were able to avoid a theoretical and ideological discussion and instead focus on practical solutions that actually work everybody would stand to benefit.
- **The relationship between the WTO and civil society, business and academia:** Art. V 2 of the Marrakech Agreement and the 1996 Guidelines<sup>15</sup> remain the foundations upon which the Secretariat pursues its relationships with these entities. Many practices are now fundamentally ingrained in the way the organization relates to civil society. Nevertheless, as part and parcel of the transparency, legitimacy and accountability discussion, this file will continue to evolve. A prominent issue in this context is the submission of Amicus Curae briefs to dispute panels and the Appellate Body by civil society organizations. Hence, there may be wider systemic issues within this particular area that Members may wish to address.
- **The relationship of WTO with national parliaments and the IPU:** The WTO's relationship with national parliaments and with the Inter Parliamentary Union has intensified steadily over the past decade or so. WTO Members differ in their views both in terms of the significance of the relationship and the substantive parameters surrounding it. Several outside observers have called for a more formalized relationship with national parliaments, including the creation of a parliamentary oversight body at the WTO. A debate on this issue could clarify positions among Members, and foster a better understanding of key issues for parliamentarians.

**Climate change and the WTO:** The joint WTO-UNEP study on climate change in many ways underlined how difficult it is to find the appropriate body to discuss climate change in the WTO. The CTE as well as the CTE Special Session mandates are deliberately rigid and would therefore not easily accommodate a discussion on the issue. An inability of WTO

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<sup>15</sup> WT/L/162.

Members to have an informal, and informed, exchange of views on trade and climate change would be a carbon copy of the failure of the WTO to participate actively in the trade and environment debate in the second half of the 1990s. In addition, given that border adjustment measures are likely to have their day in WTO dispute settlement over the next few years, it would make sense to foster a forum where trade policy makers might take the sting out of that confrontation.

- **21<sup>st</sup> Century Issues:** This term has gained some momentum in the General Council Chair's consultations on the 2011 Ministerial Conference and covers a wide range of issues, including some that have a history in the WTO. Many of these issues have existing committees or working groups in the WTO, for example a host of issues related to food security, food standards and some environmental issues. Others, like climate change, energy, and exchange rates do not. The latter category also includes issues such as investment and competition which may be coming back as a result of the financial crisis and international economic governance issues.
- **Dispute Settlement Understanding:** The negotiations on the DSU would clearly seem to be the rightful home of any initiative to reform this prominent feature of the multilateral trading system. Nevertheless, comments by delegations in the context of the preparations for the 8<sup>th</sup> Ministerial Conference seem to suggest that many believe the DSU negotiations have become so intertwined with the DDA Single Undertaking as to make it almost impossible to have a constructive discussion on even relatively minor practical improvements to the DSU. From an institutional point of view, particularly given the comprehensive and tangible body of jurisprudence since 1995, it would seem a reasonable use of Members' time to have a discussion of a number of fairly straightforward and practical improvements to the system that would not necessarily require negotiation. A subsidiary group on dispute settlement would also be an interesting place to have an exchange of views on the relationship between WTO law and other international legal agreements.

As previously noted, the above list of issues is non-exhaustive. It is intended as an initial outline of a number of institutional and systemic issues which do not necessarily fit into existing structures of the WTO and would benefit from a different and perhaps more informal forum of discussion among Members. It is not intended to duplicate existing structures or discussions in the WTO, but a Working Party on the Functioning of the WTO and its subsidiary groups could offer an outlet for discussions among Members that are not currently taking place in the WTO.

## **6. Conclusion**

This paper has explored the possibility of establishing a Working Party on the Functioning of the WTO as a separate, deliberative process in the WTO. It has sought to outline the advantages of creating such an informal forum or space for discussion among WTO Members, including allowing for procedural flexibility which the regular institutional framework does not offer. We have also addressed some possible practical features of such a process.

Over the past two years, including in the context of the preparatory processes for the 2009 and 2011 Ministerial Conferences, an increasing number of Members have showed interest in systemic and institutional issues. This interest has to a large extent been stoked by a general concern about the role of the multilateral trading system in the overall international economic environment, particularly in light of the current global financial crisis. At the same time, the WTO as an institution is under considerable pressure following more than a decade of efforts to conclude the Doha Round of trade negotiations.

Many WTO Members appear to be ready for a broad discussion of institutional and systemic challenges facing the WTO. So far the terminology applied by Members, e.g. "strengthening", "streamlining" and "improving" the multilateral trading system demonstrates pragmatism, realism and caution. As with previous processes on transparency and decision-making, the WTO membership seems to believe that what is needed are practical solutions to the functioning of the WTO, rather than fundamental institutional reform.