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# **Report on Trade, Environment, and Transparency and Participation**

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## Preface

The Concerted Action on Trade and Environment (CAT&E) is designed to provide an opportunity for the large and growing community of European researchers working on trade and environment issues to meet regularly, to discuss research hypotheses and methods, to review results, and to develop new lines of co-operative research. CAT&E will launch a dialogue with policy makers at all levels. It aims to create a process that can document the progress of research and generate new research impulses in this area. It seeks to advance the resolution of current conflicts between trade and environment.

The information obtained in the course of the Concerted Action is annually summarised in state of the art reports and bibliographies in a fashion that is useful to both researchers and policy makers. These reports serve as an input to CAT&E's annual members' meetings and open conferences. To structure the reporting and discussions, the following themes have been identified initially (in random order; the theme of the present paper is underlined):

- ✓ Subsidies
- ✓ Government Procurement
- ✓ Investment
- ✓ TBT, SPS, and Labelling
- ✓ Trade and Development
- ✓ Trade, Environment and Human Rights
- ✓ Trade in Commodities
- ✓ Implementation Procedures
- ✓ Trade in Services
- ✓ Intellectual Property Rights
- ✓ Trade and Multilateral Environmental Agreements
- ✓ Dispute Settlement
- ✓ Transparency and Participation
- ✓ Sustainability Assessment of Trade Agreements
- ✓ European Trade Policy Development
- ✓ Trade and Agriculture
- ✓ Trade, Environment and Labour
- ✓ Trade, Environment and Public Health
- ✓ Science and Precaution
- ✓ Trade and Environment in the Architecture of International Governance.

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## 1. Introduction and scope of the paper

The World Trade Organisation (WTO) and other intergovernmental organisations confront a crisis of legitimacy that is partly rooted in their perceived secretiveness (Roberts, 2004). Complaints about the exclusivity and opaqueness of international trade negotiations are not new. The WTO's predecessor GATT, as well as numerous regional trade agreements have often been conducted and concluded without comprehensive stakeholder or direct public participation (Housman, 1994). The concerns voiced by Non-State Actors (NSAs), including NGOs and the Media, as well as developing country delegations, indicate that the WTO suffers from a legitimacy deficit because it fails to engage in democratic practices, be it of a representative or participatory nature. This could over time serve to undermine the validity of instruments used in the governing process, e.g., the dispute settlement mechanism (DSM), not to mention the commitment of the member states to implement difficult decisions.

This report offers a survey of the current discourse between actors on the issue of introducing more transparent and participatory practices into the WTO. It begins with a general definition of terms. This is followed by the identification of the most prevalent hypotheses put forth by the primary participants in the debate. In conclusion, future research agendas that build on existing methodologies and approaches will be suggested.

## 2. Definitions

**Openness** in trade policy-making consists of both transparency and participation, namely with regard to the **right of access to information** and **public participation in decision-making** processes (UNEP/IISD, 2000).

**Transparency** entails greater access to information as well as greater awareness on issues or policies. Operationally, this requires ensuring that the right to access --either to the general public or equal access of members within the organisation--and the right to information --through a broad dissemination of activities to the general public and stakeholders or disclosure rules-- are practised and respected. Within the context of the WTO, introducing more transparency also requires addressing standards and practices of actor participation. To the extent that NGOs play a crucial role in promoting issue awareness, not to mention framing the scope of various issues addressed within the WTO, respecting the right of public access and right to information could ultimately lead to changes in the participation structures of the organisation. The introduction of non-member observers is but one such example.

**Participation** can range from the relatively passive function of exchanging information, to providing consultation through working groups or meetings, to active involvement in analysis and agenda-setting. Internal participation is more than a procedural description and speaks of the organisation's governance structures and the formal control that actors have over their actions. An organisation's involvement of non-member stakeholders in its decision-making processes is often referred to as external participation (Hetty, Neligan, and Burall, 2003).

### 3. Identification of relevant research hypotheses

Within the ranks of about 148 members of the WTO, there is a persistent malaise related to the illegitimacy and inefficiency (fairness and inclusiveness) of the organisation's decision-making processes (Vaughan, 2003). According to a survey (Mason, 2004), the majority of respondents, especially environmental NGOs, favour further derestriction of WTO documents. It also shows that there is strong support for proposals related to greater NGO participation in existing WTO decision-making procedures, including participation in WTO regular meetings and observation of WTO dispute settlement hearings. From within and outside the WTO, there is wide spread criticism that it is an organisation which has promoted trade liberalisation at the expense of civil society, developing countries, and the environment.

Institutional reforms that **increase both internal and external transparency** in the WTO are often proposed as a critical first step in addressing the legitimacy gap. An underlying premise being that **more open and transparent practices should contribute to more effective participation in decision-making** (Bridges, 2002) (Brunnée & Toope, 2000). A second related premise is that **transparency and participation contribute to enhancing WTO's legitimacy as an international governing body**. In light of Agenda 21(1992) and the 1998 Aarhus Convention, NGOs are recognised as legitimate actors that are encouraged to participate in national and international decision-making. Nonetheless, there is less consensus on how best to promote their involvement. The discourse on transparency and participation is driven, in large part, by the differences in meaning assigned to the terms by different actors.

In the WTO context, actors are predominantly identified on the basis of membership (internal - external / national governments – NSAs) and the level of development and political identification (North - South / Developing Countries – Developed Countries). While these groupings are by no means fixed or homogenous (and positions on issues may vary within each group), the need to identify general trends and attributes has led to a simplification for conceptual purposes alone. For instance, NSAs include many aspects of civil society such as NGOs, public interest groups, the business community, and individuals. Given the limited scope of this report, two relevant actors will not be addressed in detail, other inter-governmental organisations<sup>1</sup> and parliamentarians (both of which fall outside the categorisation of internal-external as well as North-South).

Most studies that examine transparency issues in the WTO frame the issue in terms of principles of efficiency, equity, and legitimacy (Porter, 2001). A central role is played by the assumed relationship (either complimentary or conflictual) between the efficiency of trade regimes and equitable outcomes and processes (including a democratisation of the organisation by giving citizens increased access to and influence in the proceedings and decisions). It is important to recognise that the development of the debate over transparency and participation in the WTO is distinguished by two relevant factors: first, by the *a priori* assumptions of actors regarding the relationship between efficiency and equity of liberal

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<sup>1</sup> Participation of UNEP and secretariats of multilateral environmental agreements are dealt with in the CAT-E report on Trade and Multilateral Environmental Agreements by Markus Knigge (Ecologic).

trade regimes; and second, whether or not transparency and participation as part of institutional reforms should be linked, sequenced, or treated separately.

#### 4. Developing Countries

- ***Increasing internal participation fosters greater harmonisation of interests.***
- ***Increasing internal transparency and participation require a decrease in informal decision-making processes and a de-linking of trade issues.***

Considering the fact that developing countries represent the majority of WTO members under the consensus-based structure of the organisation, they are theoretically expected to exercise veto powers to block decisions. However, they can't actually exercise these powers, because more powerful states can still exact informal concessions by threatening retaliation on bilateral trade relations or on matters that are outside of the WTO mandate (Srinivasan, 2002) (The South Centre, 2002). In addition, developing countries face some difficulty in engaging proactively in decision-making, for they lack adequate financial and human resources required to participate in formal meetings, as well as keeping abreast of the informal meetings that are unpublished or unannounced. For example, only about one third of the 30 or so least-developed countries in the WTO have permanent offices in Geneva, and they cover all United Nations activities as well as the WTO, making it difficult to attend and thus participate. Contributions to mitigate the problem of the lack of capacity include financial and technical assistance (including training officials, organising seminars and workshops) through the framework of WTO. The active partnership of NGOs in developed countries with the states and civil society actors in the developing world might help deliver tangible benefits to those states (Mason, 2004). Introducing more formal and transparent processes within the organisation is also recommended. Recommendations that advocate limiting the number of meetings to no more than one or two at a time and publicising meetings in advance could provide developing country members with adequate time to prepare. De-linking issues would also have the same effect and, as we will see in the discussion on NGOs' increasing transparency, is often believed to result in negotiation processes that focus on fewer issues and avoid issue-bundling in negotiations (CAFOD, 2000).

In addition, it has been claimed that the existence of informal decision-making structures reduces the ability of all members to participate effectively. While officially all members can add to the agenda of the governing body, not all members have access to setting the agenda. The reason for this is the prevalence of private or reduced member meetings, such as the Green Room meetings, with attendance subject to invitation by the Director General and no prior public announcement. The events of the Singapore Ministerial Conference (1996), namely the addition of investment, competition, and government procurement to the agenda via a small informal group after there was no consensus reached in the General Council, is often cited as an example (Third World Network, 2002). The lack of internal transparency in agenda setting and related lack of participation in informal decision-making have formed the basis of demands for reform from the developing countries. (Woods and Narlikar, 2001) (Sharma, 2001)

- ***Increasing internal participation does not imply greater external transparency nor participation***

- ***Increasing external participation and transparency weakens national bargaining positions and favours developed countries.***

The developing countries' position on increasing external participation and transparency is a sensitive matter. Many would prefer to see internal participation and transparency addressed and existing substantive agreements implemented or revised to their benefit before the WTO takes on a broader mandate (Bronckers, 2001) (Steger, 2002). This position has meant that developing countries have had to position themselves against EU or US proposals that seek to increase (external) access to information, decision-making, and judicial processes.

Developing countries fear that increasing external participation to include NGOs will not be in their interests since northern NGOs are often better funded and staffed than LDC country missions, thus being in a better position to gain access to Quad country representatives i.e. US, Canada, the European Union, and Japan (Bridges, 2001).

In fact, many developing countries have strongly resisted the American proposals, including open hearings, a right to submit NGO briefs, and rapid releases of draft decisions. In 1998, Mexico expressed the view of several governments that premature disclosure of draft panel reports encouraged "external pressures of a non-legal kind....[from] certain vested interests". Furthermore, when the AB announced it would exercise its discretion to accept briefs from NGOs or individuals, many developing countries still protested strongly. In a special session of the General Council, Egypt complained that "the likely beneficiaries of such a decision were those individuals and NGOs who had the capacity in terms of resources and time (Roberts, 2004) (Centre for International Development at Harvard University, 2002) (Bridges, May 2002).

They claim that issues of external transparency and participation should be left to individual countries rather than to the WTO (Oxfam, 2000). More extremely, they argue that the WTO only has those capacities that the member governments attribute to it, so that NGOs can not demand the same opportunities for participation at the WTO level as they enjoy at the national level (Brandstetter, 2003) (Howse, 2002) (Porter, 2001). They also believe that by focusing on procedural reforms such as external transparency, the organisation could be distracted from substantive issues of significance to developing countries, i.e., agriculture (Oxfam, 2000).

## 5. Developed countries

- ***While increasing external participation contributes to increasing internal and external transparency, it reduces the efficacy of the regime.***

Developed countries, and especially the 'Quad Countries', espouse two positions that are at times seemingly contradictory. First, that increased external transparency and participation bolster WTO legitimacy in the eyes of domestic constituencies and NSAs generally. Second, that increasing internal transparency through increased participation would lead to reduced efficiency of the organisation (Porter, 2001).

On one hand, developed countries lead the drive to increase external transparency, especially since they are sensitive to domestic criticism of 'black box' decision making (Deutsche Presse Agentur, 2002). They support greater transparency, responding largely to domestic environmental constituencies (Mason, 2004). Perhaps, the impact on governmental

policy was most obvious in the United States. Concern that the WTO's perceived secretiveness would undermine voters' willingness to accept further liberalisation led the Clinton administration to make transparency in the dispute settlement mechanism a "priority issue" in the United States (Roberts, 2004). On the other hand, there is a widespread belief that limiting internal and external transparency contributes to greater internal efficiency. The importance allocated to respecting the confidentiality of subjects and parties under discussion is the most frequently cited example (CAFOD, 2000). An informal and restricted process is thought to promote linkages and log-rolling with the end result being increased co-operation of the parties and improved outcomes. One of the concerns surrounding proposals that increase external transparency is that trade issues could no longer be bundled. It is thought that once trade issues are separated, the probability of reaching a compromise might decrease and the costs of negotiation increase.

- ***Limiting participation promotes greater internal flexibility at lower institutional costs.***

Many developed countries support the current practice of informal and limited participation (as is characterised by mini-ministerials and Green Room meetings). Central to this argument is the belief that increased internal participation contributes to an increase in the number of parties and potentially the number of positions that must be considered over the course of negotiations (Howse, 2003)(CIEL, 2002). It is feared that this could generate sub-optimal outcomes vis-à-vis trade liberalisation measures. In addition, this would invariably lengthen the time required to negotiate and raise the actual costs of participating in WTO trade rounds. Also of concern is the possibility that this could lead to a decrease in compliance or implementation since initial commitments could be diminished, thereby reducing the need to create new committees and instead building flexibility within existing structures to adapt to changing priorities and issues (Ostry, 2002). Similarly, as the drive for participation increases, there are fears that the organisation becomes overly bureaucratic. This can slow decision-making to such an extent that any advantages gained by involving more people in the decision-making cycle are lost (Hetty, Neligan, and Burall, 2003)..

## 6. Non-State Actors

- ***Increasing external participation leads to increasing internal and external transparency thus contributing to the efficacy of the regime***
- ***Increasing external participation leads to potentially greater harmonisation of interests***

NSAs and NGOs in particular believe that increased external participation would lead to increased internal and external transparency as well as to greater harmonisation of interests. The sequence of reforms is important as it is only through comprehensive participation of civil society that the WTO can truly be a representative organisation. NSAs are perhaps the only group that do not assume that internal and external transparency and participation are incompatible in practice, and thus tend to downplay the tensions with developing country positions (CAFOD, 2000) (Esty, 2000).

A central hypothesis supporting the inclusion of NSAs in WTO decision-making procedures is that NGOs can improve the efficiency of the WTO by assuming information disseminating costs, promoting compliance with WTO rules, helping to educate the public about the WTO and trade, providing information and expertise, and by being the “connective tissue” that binds national decision makers to the public (Esty, 2000) (Brandstetter, 2003) (Bach and Stark, 2004). In the context of some regimes (i.e., environmental regimes), transparency and participation contribute to implementation (von Moltke, 2002). NGO’s have a legitimising function to the extent that they enhance representation, act as watchdogs, and introduce competing policy options. This in turn should improve the effectiveness and equity of the organisation (Loy, 2001)(European Parliament, 2001). The WTO, according to NGOs, should be reformed so that the same standards for transparency and participation that apply in domestic policy making can be applied to international negotiations (CAFOD, 2000).

The WTO has already taken some steps towards implementing Article V:2 of the WTO Marrakesh Agreement, which establishes that it is appropriate for the General Council to co-operate and consult with NGOs. Since 1994, the Secretariat has organised annual symposia with NGO representatives on trade and sustainable development issues. In 1996, the Secretariat commenced informal sessions with NGOs. The WTO has also responded to NGO demands for greater release of information concerning WTO policy making, especially in constructing an elaborate website. The reports of dispute panels are now made public as soon as they are adopted, although some important documentation continues to be restricted. Moreover, in 1996, the General Council took the important step of permitting NGOs to attend the WTO Ministerial Conference. At these Conferences, a practice has developed of providing NGOs the dubious privilege of attending several “plenary sessions” where delegations read set speeches, repeating generalities about their negotiating positions. However, the direct participation of NGOs in work or meetings has not been formalised, and the WTO is the only significant intergovernmental organisation without formal arrangement for NGOs (Bridges, 2001) (Tarasofsky & Pfahl, 2002) (Brandstetter, 2003). The WTO, it is claimed, must develop more formal accreditation, participation, and decision-making processes that relate to NGOs. While position papers, amicus briefs, and symposia are permitted, there are no formal avenues of interaction, and this leads to unbalanced representation and criticisms (Bridges, 2001) (Ecologic & FIELD, 2000) (Charnowitz 2001).

## 7. Survey of methodological approaches

The literature on transparency and participation in the WTO covers a relatively broad range of issues and policy debates. It is, however, still limited in the breadth of methodological approaches, with most studies employing issue framing, content analysis or comparative legal analysis (Charnovitz, 2002). There are two promising theoretically related approaches that are increasingly being employed to frame the issue of democratisation and efficiency within the organisation, and they may prove to yield much in the way of future research agendas: democratic legitimacy theory and agency theory.

Given the paucity of literature dedicated to establishing an analytical understanding of democracy and the WTO, it may well be necessary to revisit the range of conceptions of democracy and governance beyond the nation state. This could involve a re-examination of

representation in international organisations with a comparative analysis of the consensus principle in light of democratic theory. Also worthy of reconsideration is the type and nature of participatory and representative democratic practices, such as considering the possibility of enhancing the WTO's legislative functions (Charnovitz, 2000). Comparative studies of participatory models used in international organisations, with a focus on institutional structures that have balanced equity and efficiency, would also be in order. The experience with the Clean Development Mechanism and Article 12 of the Kyoto Agreement could be instructive given the high marks it has received with regards to openness.

Similarly, any discussion of participatory democratic practice should elaborate on the implications for civil society and institutional capacity, establishing working definitions for the WTO case. Possible accreditation schemes for stakeholders such as NGOs or MEA secretariats, confidentiality considerations, representation and participation of regions and sectors among non-State actors, amicus briefs (or alternatives to them, i.e., formalised procedures) would be a starting point. This area has the potential to build on the burgeoning body of work dedicated to addressing the role of public opinion and civil society in the dispute settlement process, in particular, the use of observers in the DSU and Appellate Body (Schneider, 2001) (Ullrich, 2000)(Waincymer, 2000) (Van der Borgh, 2000).

Agency theory, both in its qualitative philosophical form as well as more formal methods, is promising, particularly since it may provide insights into three critical elements driving the debate over democratic practices at the WTO: the role of rules and democratic consent, the substantive nature of WTO rules vis-à-vis democratic practices, and the set of values and behaviours of the current actors in the system (Howse, 2003). A starting point could be to consider flexible versus formal procedures, in other words: what contributes most to enhancing transparency and participation?

Once a better sense of actor positions and values has been ascertained, it would then be possible to conduct systematic analysis of strategic considerations, including some predictive work establishing potential coalitions and win-sets for co-operation between members as well as non-members. Cost-benefit analysis has been used to analyse the trade-offs faced in management and regulation at the WTO, especially between trade values and social values (Trachtman, 2002). However, future work that makes use of 'coalition bargaining' methods has the potential to capture the strategic dynamic of trade negotiations, agenda setting, and dispute resolutions. Expected-utility and game theoretical approaches could be useful in laying out counter-intuitive findings and unseen opportunities for co-operation between actors, particularly under conditions of uncertainty or asymmetric or imperfect information. This is an important distinction from the most common approaches currently used which assume that enhancing equity and promoting efficiency require complete information or a greater number of actors to reach co-operative outcomes.

Within the tradition of Public and Social Choice economics, there is an extensive body of work dedicated to comparative institutional analysis and, in particular, the role of decision-making in imperfect institutional settings. The new institutional economics approach to property rights with a focus on transaction costs is increasingly being employed to determine the optimal size of the organisation (Trachtman, 2002). This has for the most part been employed in order to examine decision-making in national settings, not multilateral

international organisations. Perhaps the time is ripe for a consideration of participation at the WTO under this framework.

## 8. Conclusions

At the heart of the debate on reforming the WTO are concerns over the politicisation of trade policy—both nationally and internationally, the appropriate form of democratic governance (participatory versus representative), and the legitimacy of WTO decision-making practices vis-à-vis civil society. Cutting the path from an opaque to translucent and ultimately transparent WTO, a critical question remains: transparent for whom and how?

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