

# The World Trade Organization at work: Performance in a member-driven milieu

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**Abstract** This article discusses performance in the context of the World Trade Organization (WTO). Applying the framework by Gutner and Thompson and inspired by principal-agent theory, it is argued that existing studies have under-specified the institutional milieu that affects performance. The WTO represents a member-driven organization where Members are part of the international organization (IO) (e.g., through rule-making) and at the same time act outside the IO (e.g., through implementation). Thus, a narrow reading of the IO (focusing on the civil servants and the Director-General and his staff) will not suffice to understand IO performance in the WTO context. Selected evidence is presented to illustrate aspects of the WTO's inner-working and the institutional milieu of performance. In addition, the article discusses a number of performance parameters, including the relationship between Secretariat autonomy and performance, the role of information, and the mechanisms of performance aggregation. The article ends by cautioning against quick fixes to the system to improve performance.

**Keywords** World Trade Organization · Principal-agent theory · Delegation · Performance · Negotiations · International civil servants

**JEL Classification** D23 · D73 · D78 · F13 · F55 · F59

## 1 Introduction

The recent history of trade negotiations within the World Trade Organization (WTO) is full of anecdotal evidence of some sort of underperformance. The negotiation machinery has achieved little since a number of sector services agreements were concluded in 1997.<sup>1</sup> In the current trade round (called the Doha Development

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<sup>1</sup>These include the 4th protocol on basic telecommunication and 5th protocol on financial services.

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Agenda), the WTO has stumbled from one missed deadline to the next. Not surprisingly, when organizations fail to deliver aspired outputs, explanations abound as to who is responsible for the meager results. The negotiation platform is probably the most prominent location to study performance in the context of the WTO; however, in order to assess overall performance of the Geneva-based organization, the article suggests taking a closer look at the overall institutional setting and the key tasks the organization carries out.

I argue that existing studies underspecify the institutional milieu that affects performance.<sup>2</sup> In particular, the WTO functions as a member-driven organization where Members are part of the international organization (IO) (e.g., through rule-making) and at the same time act outside the IO (e.g., through implementation). In addition, a variety of actors outside the WTO can significantly impact its performance. In the context of implementation, national civil servants, business communities, political parties, and non-governmental groups will interpret, apply or contest rules emanating from the WTO in various ways. Thus, a narrow reading of the IO (focusing on the civil servants and the Director-General (DG)) will not suffice to understand WTO performance.

This article provides a conceptual framework for how to approach the WTO's performance. In light of the research strategies stipulated by Gutner and Thompson (2010) in this issue, this article suggests a four step approach to analyzing WTO performance: *first*, a diagnosis of the objectives and tasks (*the baseline*); *second*, a description of the delegated means (mandate, budgets, personnel, discretion) to those who shall carry out a certain task with a special emphasis on the institutional constraints (*the institutional milieu*); *third*, an evaluation of the underlying material or social drivers (*sources of performance*); and *fourth*, a judgment of how well tasks are carried out and how all outputs add up (*task-specific and aggregation effects*). This article focuses in particular on steps 1 and 2 and discusses aggregation effects.

The article is structured as follows: First, a short review of the literature on WTO performance is presented. This is followed by a discussion on performance objectives. Third, a principal-agent (PA) framework is used as an analytical tool to highlight the different institutional relationships within the WTO. Selected evidence is presented to illustrate aspects of the WTO's inner-workings and the institutional milieu of performance. Fourth, a number of performance parameters are discussed, including the relationship between Secretariat autonomy and performance, the role of information, and the mechanisms of performance aggregation. The article ends with a brief discussion on the implications of the analysis for current reform debates.

## 2 Current Literature

Studies related to the role of the WTO in global trade cooperation have hitherto been dominated by what could be called grand bargains analysis, impact studies and research on the functioning of the dispute settlement system. Performance has been part of these various strands and research programs, albeit in implicit ways. Below, a brief overview illustrates the variety of approaches and how they relate to the performance metrics (Gutner and Thompson 2010).

<sup>2</sup> Milieu is understood here predominantly within a rationalist perspective.

First, grand bargains analysis refers to studies addressing the core business of the WTO: improvement of market access and non-discriminatory treatment of exporters and their products. Much emphasis has been placed on factors that explain outcomes in subsequent trade rounds, including “go-it-alone power,” market forces, negotiation strategies, coalition activities or ideational power (e.g., Gruber 2000; Steinberg 2002; Ostry 2002; Narlikar 2003). Trade rounds have been drivers for regulatory adjustments and have affected the competitiveness of various economic sectors leading to changes in relative welfare.<sup>3</sup> Thus, this work can be situated towards the outcome-side of the performance continuum. In this context, it is largely undisputed that the last round (the Uruguay Round) brought substantial liberalization in many markets, broadened the coverage of issues and added more stringent rules.<sup>4</sup> Other work on negotiations focuses on explaining particular events, such as sector agreements, the terms of accession for new Members, Ministerial conferences, and negotiations on specific issues.<sup>5</sup> These selected outputs can be situated around the middle of the performance metrics.

Second, impact studies have been carried out at various levels. On the macro-level, the recent debate on the effects of GATT/WTO membership on trade flows stands out (Rose 2004; Goldstein et al. 2007). Andrew Rose (2004) has stirred the waters of the trade community through a number of quantitative studies that question the conventional wisdom that GATT/WTO membership increases trade volumes in a statistically significant way. Goldstein et al. (2007) show that there are measurable effects of the GATT/WTO system on trade flows, when the analysis controls for *institutional standing* of non-members (rights and obligations similar to contracting parties) and their *institutional embeddedness* through auxiliary commercial arrangements (e.g., preference schemes). This literature addresses outcome-based concerns about performance. At the micro-level there are many case studies that explore the effects of WTO obligations on the domestic level (e.g., intellectual property rights, reduction of tariff or non-tariff barriers). This work can be placed around the intermediate outputs of the metrics’ continuum.

Third, most of the literature on the WTO and how it performs has focused on dispute settlement. This work has looked at the effects of an increasingly legalized system on dispute initiation and dispute resolution. Particular attention has been devoted to the alleged existence of a structural bias against developing countries’ participation. Overall evidence is mixed, while controlling for trade flows as a proxy for expected disputes, some scholars find evidence of lack of legal resources while others suggest power asymmetry as the key factor for explaining the number of actual cases launched (Busch and Reinhardt 2002; Guzman and Simmons 2005; Kim 2008; Bown 2009; Sattler and Bernauer 2010). In addition, some work has focused

<sup>3</sup> It is important to stress that trade rounds produced unequal welfare effects across and within countries. In addition, the focus on the cooperation problems has shifted over time from negative integration (e.g., tariff reductions, tackling protectionism in agricultural markets, offsetting unilateralism) to positive integration (e.g., compatible technical regulations, the protection of intellectual property rights, stronger dispute settlement).

<sup>4</sup> There have been many critical studies focusing on welfare transfer from the South to the North resulting from the Uruguay Round, e.g., Finger and Nogués (2002).

<sup>5</sup> Examples include case studies on the negotiations that brought about a public health related opt-out from the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), e.g., Drezner (2007).

on the dynamic effects of a legalized system on the (future) willingness of actors to engage in additional liberalization (Goldstein and Martin 2000). The work on dispute settlement ranges along the performance metrics. Studies that look at legal capacity of actors and effects of existing processes of dispute settlement are situated around the process side of the performance metrics; other more systematic work that addresses behavior and overall compliance tackles performance towards the right hand side of the performance spectrum (from intermediate to macro outputs).<sup>6</sup>

The ways that the institutional milieu impacts performance is underspecified in the current literature. This article attempts to contribute to the closing of this gap.

### 3 The WTO: What is to Be Performed?

While theoretical explanations from institutional economics and international relations can be helpful in understanding the role of IOs in economic cooperation, they do not offer easy guidance on how to develop performance indicators.<sup>7</sup> Establishing a baseline to assess the WTO is difficult (Elsig 2007a). Various impeding elements discussed by Gutner and Thompson (2010) coincide; in particular, an important “eye of the beholder” problem and the existence of broad and ambiguous objectives stand out. There are diverging views as to how negotiations should address the concerns of the parties involved. There is also disagreement over whether and to what degree the WTO should address non-trade concerns.

In order to approach the “baseline” for performance assessment, I start with a brief look at the treaty texts (in particular the preamble of the General Agreement on Tariffs and Trade (GATT)/WTO treaties). If we contrast the preamble of the 1947 GATT treaty with that of the agreement that led to the creation of the WTO in 1994, we observe some stable expectations as to trade being an important instrument to help raise standards of living, ensure full employment and increase real incomes (macro performance).<sup>8</sup> If we compare the preamble texts at these two points in time, we notice two new concerns: addressing sustainable development and paying special attention to developing countries.<sup>9</sup> Some of the macro goals are measurable, such as employment and income levels. Yet, it is far from obvious how to isolate the effects produced by WTO membership from the other factors explaining these outcomes.<sup>10</sup> Other goals, such as

<sup>6</sup> Some recent work on capacity constraints combines process and output measures; see for instance Busch et al. (2008).

<sup>7</sup> For an overview on economic, international relations and legal explanations for the need of a multilateral trade institution, see World Trade Report (World Trade Organization 2007).

<sup>8</sup> *Recognizing* that their relations (...) should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand (...) and expanding the production and exchange of goods; *being desirous of contributing* to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce ([www.wto.org](http://www.wto.org)).

<sup>9</sup> *Recognizing* further that there is a need (...) to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade (...) ([www.wto.org](http://www.wto.org)).

<sup>10</sup> Many studies also suggest that trade liberalization has occurred mainly in unilateral terms or in the regional context, but less through the WTO (World Bank 2005).

sustainable development, will make performance assessment an even more contentious exercise due to obvious limits to conceptualizing and measuring “sustainability.” In a nutshell, the preamble’s objectives are too ambitious and ambiguous to be used as a baseline (a problem found in other IOs’ core treaty texts as well).

Another set of potential performance baselines could be derived from WTO guiding “principles, norms, rules and decision-making procedures around which actors’ expectations converge” (Krasner 1983: 2; Ruggie 1982). These tools (e.g., the most-favoured nation (MFN) clause) contribute towards achieving the above macro objectives. MFN has been an important norm in the successive rounds of trade negotiations to lower tariffs.<sup>11</sup> Another example is the “national treatment” norm which has become more important in recent years as trade obstacles are increasingly found behind the border.<sup>12</sup> In addition, the key organizing rule for negotiations is the reduction of barriers to trade in a reciprocal way as noted explicitly in the preamble texts. More recently (and often in opposition to reciprocity and MFN), we have witnessed the re-emergence of a “special and differential treatment” norm. This norm affects expectations related to finding flexible solutions in light of different stages of development. Yet, the regime’s norms and rules are not attractive performance indicators. They are not easily operationalized (e.g., special treatment) or suffer from important legally agreed exceptions (e.g., Art XXIV allowing for regional and bilateral trade agreements violating the MFN norm).

Objectives that might be better suited for addressing the “baseline” are goals that seem within reach of the organization and relate to what Gutner and Thompson (2010) call “intermediate goals.” These objectives (while not explicitly listed in the treaties) include dispute solving (avoiding trade wars), fending off unilateralism, assuring a level playing field, providing export opportunities, and addressing non-trade concerns. Whereas WTO Members might generally agree on the intermediate goals, they attach different importance to the above issues. A small vulnerable economy might not be too concerned with dispute settlement, as it is usually not “taken to court” and acting as plaintiff is not a credible option for a variety of economic and political reasons (Bown and Hoekman 2008). Such a country is more likely to concentrate its efforts on level playing field issues, such as technical assistance and capacity building or on changing particular rules to reap more benefits from the trading system. A more competitive industrialized country might attach more importance to the question of fending off unilateralism, illustrated by the position adopted by Japan during the Uruguay Round negotiations when aggressive US trade measures were a major concern. Thus, Japan opted for constraining unilateral trade measures. This was done by pushing for more stringent rules, a stronger dispute settlement system and the agreement by the US (and the entire membership) to stay within agreed processes and rules and to abstain from unilateralism.<sup>13</sup> Finally,

<sup>11</sup> The MFN norm calls for non-discrimination between one’s trading partners. Various MFN exceptions exist, e.g., the enabling clause for a special treatment of developing countries, Art XXIV on regionalism, the long-used practice of providing “waivers” for “temporal” non-compliance, etc.

<sup>12</sup> The national treatment norm stipulates that foreign produced goods cannot be discriminated against once they have entered the country (for example, an excise tax applicable only to imported goods would be illegal).

<sup>13</sup> A key concern for Japan during the Uruguay Round in the area of the dispute settlement system was to tame US unilateralism, Interview with a former Japanese trade negotiator, 21 May 2010.

general consensus breaks down when shared “intermediate goals” are tested in contexts where negotiators face strong opposition from domestic interest groups. Trade policy is generally very difficult to isolate from broader domestic politics. Against the background of diverging interests and conflicting preferences, the so-called “eye of the beholder” problem is most acute.

Additional factors complicate the search for baselines. Following the creation of the WTO, a redesigned dispute settlement system with stronger enforcement mechanisms to induce compliance with rulings (e.g., quasi automatic adoption of reports written by the panels and the Appellate Body (AB), potential recourse to sanctions by the complainant party in case of non-compliance) led actors in the late 1990s to consider channeling many trade-related issues away from particular organizations dealing with these (e.g., intellectual property rights, environmental standards) to the newly created institution. As a result, the tasks have mushroomed and the regulatory trading system continues to expand.<sup>14</sup> Finally, negotiators often agree on imprecise treaty texts or leave issues unsettled to move the process forward and to overcome deadlocks. Yet, “strategic ambiguity” in relation to obligations leads to different interpretations and expectations by parties. The above factors make performance assessment a tricky exercise.

Given the disagreement over the exact baseline for performance measurement, I suggest putting the focus on the four domains in which the WTO offers concrete services. These are 1) a negotiation platform; 2) a forum to settle disputes; 3) regime management-related tasks (implementation and reviewing national trade policies); and 4) technical assistance and training activities. Below, I attempt to unpack the organization and focus on the institutional milieu that affects process and output performance. Such an institutional snapshot provides us with a more realistic appreciation as to the internal conditions that affect performance of the organization.

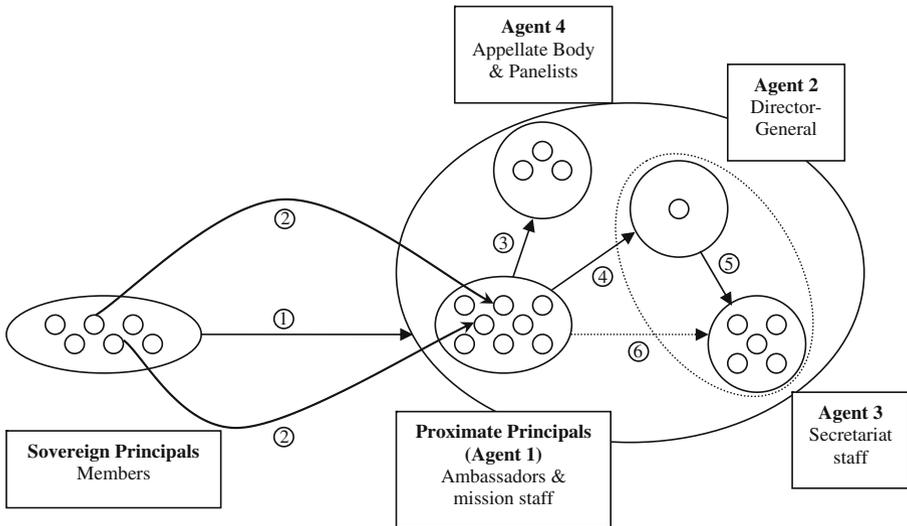
## 4 Principal-Agent Relationships in the WTO

### 4.1 Complex Agency: Various Actor Constellations

I suggest looking at the WTO through the prism of a set of conceptual tools that developed within the PA literature. PA helps locate actors, depict hierarchical relationships within a political system, and trace evolving principal and agent costs (Nielson and Tierney 2003; Gutner 2005; Hawkins et al. 2006; Thompson 2006; Elsig 2007b, 2010). Such an approach maps responsibilities allocated in the system and addresses the issue of who is managing performance. Unpacking the WTO’s institutional milieu helps capture the role of various actors that are jointly (in symbiosis or in conflict) engaged in WTO activities. Figure 1 sketches key PA relationships (PARs) in the WTO.

In a member-driven organization, such as the WTO, the role of the proximate principal (PP) (the ambassadors based in Geneva) is important for understanding the

<sup>14</sup> The WTO has moved towards addressing non-tariff barriers, trade-related concerns (e.g., investment, competition) and non-trade concerns (e.g., human rights, environment, and development).



**Fig. 1** Sovereign principals and complex agency (adopted and expanded from Elsig 2010); the arrows represent delegation from a principal to an agent

evolving politics. The PPs not only transmit and filter interests from national constituencies (individual principals), they also act as a police patrol on behalf of the collective principals (the collective decision-making forum of ministers), and possess some discretion to delegate (and control) tasks to the DG and Secretariat officials. In addition, by running the negotiations, the PPs need also to be conceptualized as part of an IO (Elsig 2010). Such a conceptualization calls for some caution in analytically separating internal and external sources of performance (Gutner and Thompson 2010). I suggest focusing on the PP as an actor at the interface between internal and external. Below, I map important PARs and highlight contractual relations within a “complex agency.”<sup>15</sup>

In PAR①, the sovereign principals are represented by the ministers who usually meet every 2 years in Ministerial negotiations. Ministers convene to decide on addressing deadlocks in negotiations or to settle on issues of institutional design. The ministers are the prime body to accept the outcomes of negotiations (pre-cooked by the PPs and negotiated in small circles) and are asked to address the most contentious issues, usually done through horse-trading during Ministerial Conferences.<sup>16</sup> In the most recent (concluded) constitutional reform negotiations (the Uruguay Round), Ministers accepted a grand reform of the dispute settlement system creating a two-step litigation procedure. On top of the existing GATT panel structure, an additional judicial body was designed to allow parties to appeal panel decisions. Moreover, while the decision-making rules remained formally untouched, the WTO Members abstained from clearly defining the roles of the DG and the Secretariat staff and delegated this task to the PPs for a later stage (Elsig 2010).

<sup>15</sup> I focus on formal PARs, where the principals can delegate, control and sanction based on a “contract.”

<sup>16</sup> Between Ministerial Conferences more restricted circles where only a handful of ministers may participate are used in an attempt to unblock negotiations.

PAR② depicts the relationship between ministries in country capitals and their representatives in the Geneva missions to the WTO.<sup>17</sup> These representatives (the PPs) act as a collective group in a number of Committees that manage the organization. The most important day-to-day decision-making body where ambassadors meet is the General Council. Another key Committee is the Dispute Settlement Body (DSB) that oversees the work of the dispute settlement institutions and engages in ongoing reflections on reform. All bodies are chaired by ambassadors for the duration of 1 year and it has become accepted practice that the chair person of the DSB is quasi automatically selected by the Members to chair the General Council.<sup>18</sup> There exist different types of delegation and control mechanisms managing individual capital-mission relations. One of the most stringent oversight control system exists in the US case. The US Congress (and its Committees dealing with trade issues) closely watches the actions of its individual PP (the USTR Geneva office). The Congress is “assisted” by domestic interest groups that follow trade policy closely (a type of “fire-alarm” tool as a complement to other control mechanisms). In many developing country cases, the control from the capital is far less stringent and creates greater autonomy for the ambassadors (Elsig 2010).

PAR③ illustrates the two-step litigation process, with variance in delegation and agent logics in the panel and the appeal stages. In the first stage, a group of three panelists who are mandated to rule on a case are chosen on an ad hoc basis by the WTO Members. These panelists are screened before appointment.<sup>19</sup> Re-appointment depends largely on how panelists have “performed” in the past.<sup>20</sup> In the second stage (the appeal institution) members are appointed for a term of 4 years, renewable once.<sup>21</sup> AB decisions are not likely to be overturned given high thresholds for re-interpretation or non-acceptance by Members, increasing the autonomy for AB members.<sup>22</sup> However, as ex post control is limited, principals invest some time in selecting candidates (ex ante screening). Interviews with actors involved in the selection procedures confirm an intensification of screening activities over time (Elsig and Pollack 2010).

PARs 4–6 depict the politics within the WTO in a narrow reading of agency. The WTO agreement is vague on the formal rules governing these relations.<sup>23</sup> PAR④

<sup>17</sup> In 2009, 20 Members of the WTO lacked direct representation through a Geneva-based ambassador.

<sup>18</sup> Interview with a former ambassador and Chair of the General Council and the DSB, 17 June 2010.

<sup>19</sup> In case of conflict over appointing panelists, the DG holds a special right to force selection.

<sup>20</sup> Re-appointment of a panelist is influenced by external factors (the disputing parties accept the expert) and by internal factors (the panelist is perceived as a team player and is not acting too “autonomously”), see also Shoyer (2003), and Davey (2003).

<sup>21</sup> Other authors attribute a trustee position to the AB (e.g., Alter 2008); see also Grant and Keohane (2005).

<sup>22</sup> As AB members are subject to a re-appointment procedure there exists after 4 years an ex post control tool for Members.

<sup>23</sup> The 1994 Agreement Establishing the WTO (Article VI) reads: 1. There shall be a Secretariat of the WTO (...) headed by a Director-General; 2. The Ministerial Conference shall appoint the Director-General and adopt regulations setting out the powers, duties, conditions of service and term of office of the Director-General; 3. The Director-General shall appoint the members of the staff of the Secretariat and determine their duties and conditions of service in accordance with regulations adopted by the Ministerial Conference; 4. The responsibilities of the Director-General and of the staff of the Secretariat shall be exclusively international in character. In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the WTO (...).

describes the relationship between the PPs and the DG. The DG is appointed for 4 years (one re-appointment is possible), but the treaties are incomplete as to the exact rights and obligations.<sup>24</sup> This leaves substantial discretion to the PPs individually and as a collective principal to manage their relations with the DG (Elsig 2010). PAR⑤ defines the relationship between the DG and the Secretariat staff. The DG is expected to run the Secretariat and is also accountable vis-à-vis the WTO Members for its activities. The DG appoints Directors and oversees the work of the Secretariat. Finally, PAR⑥ focuses on the link between PPs and the Secretariat. This does not represent a formal PAR as PPs have no rights in appointing Secretariat officials and cannot sanction the civil servants directly.<sup>25</sup> Yet, the treaties request civil servants to work closely with the Members of the organization. In particular, they are asked to assist the PPs. Given a strong PP dominance in negotiations, these non-contractual relations are important in understanding overall performance.

## 4.2 The Institutional Milieu and WTO Tasks

The institutional milieu differs across WTO functions (negotiations, dispute settlement, regime management, or technical assistance and capacity building). For each task the WTO carries out, we need to focus on the pivotal actors and their autonomy and preferences. Below, I look through the lens of the agent in a narrow sense (the Secretariat). The Secretariat for this purpose is defined as comprising the DG and the Secretariat staff. I briefly assess the Secretariat's autonomy (and its potential for influence) across functions.<sup>26</sup> Table 1 provides an overview of key tasks carried out by the DG/Secretariat staff across organizational activities. In addition, other key actors are listed and their role is given a value between 1 and 3 (from weak and intermediate influence to strong influence).

In the realm of negotiations, the key actors are the PPs.<sup>27</sup> They table proposals and chair the negotiation committees. WTO staff from different Secretariat Divisions assists the various chairs and the Members of the organization (if asked to do so). A special role is played by the DG who acts as facilitator and can use some influence through the position as the Chair of the Trade Negotiation Committee (TNC) (see Odell 2005).<sup>28</sup> In this capacity, the DG convenes meetings with heads of delegations, holds informal gatherings and participates as observer in small group negotiations, de facto representing the entire membership. The DG also runs the Ministerial Meeting jointly with the representative of the host governments. Empirical evidence suggests that the role of the DG and the WTO staff in negotiations is limited and has somewhat decreased over time (Winham 1986; Elsig 2010).

<sup>24</sup> See procedures to appoint the DG, Doc WT/L/509, 20 January 2003, <http://docsonline.wto.org/DDFDocuments/t/WT/L/509.doc>.

<sup>25</sup> It is not unusual for PPs to try to pressure the DG to appoint specific candidates, interview with a former DG, 8 November 2007.

<sup>26</sup> The focus is on the Secretariat as it is involved in the four areas defined.

<sup>27</sup> On the role of the Secretariat in negotiations, see Elsig (2010).

<sup>28</sup> Yet, the TNC operates under the authority of the General Council (the most important Committee composed of PPs).

**Table 1** The role of the Secretariat in various areas

Issue area	Secretariat task	Influence of Secretariat	Influence of other key actors
Negotiations	Assistance	DG (2) Staff (1)	Proximate Principals (2–3) Members (1–3)
Dispute settlement (two stages)	Panel/AB Consultancy and Drafting	Stage 1: DG (1) Staff (2) Stage 2: Appellate Body Secretariat (2)	Stage 1: Panelists (2) Stage 2: Appellate Body (3) Members (1–3) Other groups (1–2)
Regime management I (e.g., Implementation)	Compiling Information and Reporting	Staff (1) DG (1)	Members' Ministries (3)
Regime management II (e.g., Trade Policy Review)	Analysis and Reporting	Staff (2) DG (1)	Members' Ministries (1–2)
Technical assistance & capacity building	Advice & Training	Staff (2) DG (1)	Other groups (3)

1 indicates weak influence, 2 intermediate influence, 3 strong influence

The influence of the Secretariat in dispute settlement is more pronounced, yet difficult to measure. Two players stand out: the Legal Division staff (including regular staff) advising panelists, and a specialized legal office assisting the AB (AB Secretariat).<sup>29</sup> Little is known about the WTO staffers who assist panels and the AB. Some authors have argued that these legal officers have substantial influence. Joseph Weiler posits in relation to panels that the drafting of reports is dominated by the Secretariat. The style of the reports “often shades the truth in that the legal deliberation will often have taken place between legal secretary and other members of the Secretariat and not, in any meaningful sense within the Panel” (2001: 197). The Secretariat dominates the process as in most cases it benefits from legal expertise (information asymmetry) and it can devote more time to working for the panels than the panelists themselves. “De facto, inevitably and importantly, they are the repository of institutional memory, of horizontal and temporal coherence, of long term hermeneutic strategy” (2001: 205).<sup>30</sup> In addition, in panel proceedings, the legal division influences the choice of panelists and it is hardly conceivable that the Secretariat suggests panelists with whom working relations are strained. Key characteristics to be selected seem to be availability, solid knowledge of the issues involved, perceived neutrality and past record of constructive engagement.<sup>31</sup> Even

<sup>29</sup> While the AB members are selected by the Members, the AB Secretariat is selected by the DG (in consultation with the AB members), e-mail exchange with an AB member, 3 July 2010.

<sup>30</sup> Weiler continues: “Like in Freud’s dream theory certain things just have to come out. The views of the Secretariat as to the proper outcome of a dispute will, thus, come out and more invidiously will be consciously and subconsciously pushed upon the Panel” (2001: 205).

<sup>31</sup> The DG is increasingly involved in the selection process, as parties do not accept proposed panelists.

less is known about the “assistance” of the AB Secretariat working with AB members. Yet, there is general consensus that the influence of various legal advisors to panels (and to the AB) has not decreased as the system has become more legalized (and potentially more constraining).<sup>32</sup>

A large part of the daily work of the Secretariat involves regime management functions (Thompson and Snidal 2005). These include administrating implementation-related WTO commitments and the surveillance of national trade policies (Trade Policy Review Mechanism (TPRM)). Implementation of the agreements is the daily business of various Committees, where the Secretariat assists the chairs.<sup>33</sup> One aspect of implementation is the obligation of the WTO Members to notify a defined number of trade policy measures (e.g., new regulations or preferential trade agreements). The Secretariat compiles these types of information and makes them available. The Secretariat's autonomy is larger in designing and running the TPRM than in the other regime management activities described above. This type of peer-pressure exercise informs the entire membership (and beyond) on good and bad practices in national trade policy. It increases overall transparency. It was not until 1977 that the Secretariat started reporting on a regular basis (Blackhurst 1998: 42). During the Uruguay Round negotiations, contracting parties were in favor of a more institutionalized process, but disagreed on the degree of autonomy to be granted to the Secretariat. Some were of the view that the Secretariat should confine itself to listing information without making any judgment, leaving the final assessment to the countries under review. In addition, they pushed to prohibit the Secretariat from visiting capitals for data collection purposes (Croome 1995). While these positions did not prevail, other control mechanisms were installed, such as the obligation to submit two reports, one by the Secretariat and one by the country under assessment. Over time, the Secretariat has increased its autonomy by designing and managing the assessment process and by enlarging the scope of topics under review. At the same time, the countries' own reports have never attained the importance expected by the principals. They have shrunk in size and relevance over time.<sup>34</sup>

Finally, technical assistance and training activities have increased in importance since the end of the 1990s.<sup>35</sup> While many Members often mention that the WTO is not a development institution, the external funds for this mandate have substantially increased (on the origins see Blackhurst 1998). The main goals are to get developing countries (and especially LDCs) accustomed to the rules of the system and to assist

<sup>32</sup> Members have substantial influence as they take the decision to launch a case and in most cases attempt to find a solution prior to the start of litigation. In addition, for many WTO Members the role of the private sector is pivotal for litigation (see Shaffer 2003).

<sup>33</sup> See Footer (2006) for an overview of different Committees.

<sup>34</sup> Interview with senior WTO official, 31 January 2007.

<sup>35</sup> However, the WTO is only one player among many in providing trade-related technical assistance and capacity building. A growing number of intergovernmental organizations (e.g., South Centre, Commonwealth Secretariat) and non-governmental organizations offer their services to developing countries. In addition, the WTO joins forces and collaborates in capacity building with other organizations. The WTO participates in various inter-agency efforts, including Aid for Trade, the Enhanced Integrated Framework, and Trade Facilitation. The WTO often plays an “orchestrating” role in this area; see Abbott and Snidal (2010).

them in participating in negotiations. Whereas a number of Members attempt to influence the use of funds for specific activities (e.g., earmarking), the Secretariat still has sufficient wiggle-room in responding to demand.<sup>36</sup>

## 5 WTO Performance in a Member-Driven Environment

PA frameworks are helpful in highlighting various actor constellations within a political system and in conceptually preparing the ground for exploring the material and social drivers of the various principals and agents, their strategic use of resources, and the agent and principal costs that develop. Below, I focus on three specific questions related to analyzing WTO performance: 1) is there a relationship between agent autonomy and performance? 2) what is the role of information in various fields of WTO activity? and 3) how do different process and output performance measures contribute to overall performance?

### 5.1 Autonomy of the Secretariat and Performance

The above discussion suggests that there is substantial variance as to the Secretariat's autonomy across activities. The more we move towards the upper half of the "pyramid of performance" (see Figure 2 in Gutner and Thompson 2010), the less autonomy and thus influence can be attributed to the Secretariat (the agent in a narrow sense). Put differently, we could also understand the degree of autonomy or influence of the IO agent as a function of politicization of various delegated tasks. In the area of negotiations—which has the greatest potential to contribute to improving performance from the macro perspective—the member-driven nature of the system is most evident. Thus, the sources of good or bad performance need to be investigated on the principal side and the interests and ideas of the Secretariat are of secondary importance. It is hard to find any evidence of the Secretariat contributing to good or bad performance in negotiations due to the lack of its influence (Elsig 2010). Towards the bottom of the performance pyramid (e.g., technical assistance, trade policy review), the Secretariat plays a more prominent role and needs to be closely analyzed as an actor in determining good or bad performance. Based on existing evaluations of WTO-provided training and technical assistance, little concern over bad performance can be detected on this micro-level function (see below). Yet, there exists a general research gap on the micro-level functions of the WTO.

A related question is whether more autonomy or influence of the Secretariat leads to better or worse performance. This question is harder to tackle and calls for other research strategies. These could include the carrying out of a counterfactual analysis, a comparison across IOs with similar tasks (e.g., on dispute settlement or reporting), or an in-depth study on how tasks have been carried out over time given varying degrees of autonomy and changing institutional milieus.<sup>37</sup> If we focus on tasks

<sup>36</sup> Interview with senior WTO official, 31 January 2007.

<sup>37</sup> As tasks within the WTO are situated alongside the performance metrics continuum (see Figure 1 in Gutner and Thompson 2010), it is difficult to compare the performance across activities.

located at the lower part of the performance pyramid, there is widespread consensus among the membership that the Secretariat is doing a good job. The reporting on Members' trade policies has gained in quality, not least because Members have stopped micro-managing this activity since the second half of the 1990s.<sup>38</sup> The Division handling trade policy reviews has not only increased its autonomy incrementally, its workload has also been affected by growing membership and output requirements stipulated in the WTO treaties. By contrast, if we turn our attention to the negotiation platform, which can be situated in the upper part of the performance pyramid, we observe a weak role of the Secretariat and little output in the last 15 years. This calls for a counterfactual analysis as to the effects of increasing the role of a supranational actor (the DG, the Secretariat, or chairs) given existing decision-making procedures (see Elsig and Cottier 2011). Some initial attempts in counterfactual analysis show that increasing the Secretariat's role might not suffice to remedy the situation, as a number of structural factors have changed since the conclusion of the Uruguay Round negotiations and affect today's prospects of cooperation within the multilateral trading system (Elsig and Cottier 2011).

## 5.2 Performance Assessment and the Role of Information

What we learn from business studies is that information on process or output is a key factor for performance assessment (see also Weaver 2010). In short, organizations need information to manage performance. Yet, the concept of information does not transfer easily from the world of business to IOs. I posit that performance assessments through evaluations are least contentious when they focus on process-based performance metrics, yet as we move up towards outcome-based performance, evaluations become highly politicized. Below, I discuss the relationship between information, evaluation and performance in the four mandated areas.

In regards to technical assistance and training activities, evaluations of project-related tasks are frequently carried out internally and externally. An internal methodology to monitor and evaluate the technical assistance programs was put into place in 2002 with the launch of a Technical Cooperation Audit.<sup>39</sup> In addition, a consortium of non-governmental organizations was mandated in 2005 to conduct a first review of WTO-provided training and technical assistance.<sup>40</sup> The report gave overall a positive assessment. Suggestions and recommendations did not address highly politicized issues and were largely targeted at increasing the quality of teaching, enhancing co-operation with other agencies, and outsourcing some tasks to non-governmental groups.<sup>41</sup>

<sup>38</sup> Interview with senior WTO official, 29 January 2007.

<sup>39</sup> Notice to the staff on the Evaluation Methodology for Monitoring and Evaluating the Technical Assistance Activities (Office(02)40).

<sup>40</sup> The mandate (terms of reference: TOR) focused on assessing the WTO's comparative advantage vis-à-vis other agencies, the relevance for participants, the efficiency and management of the overall training and technical assistance, Strategic Review of WTO-provided Training and Technical Assistance (TRTA), WT/COMTD/W/152 and WT/COMTD/W/153.

<sup>41</sup> The suggestion to outsource is not surprising given the interests of the organizations which evaluators represented.

In the domain of implementation and regime management, information features prominently. In order for implementation-related Committees to perform well, the output depends on the quality of information submitted to the organization by the parties themselves. More active information gathering by the Secretariat in order to increase transparency of national trade policies is done through the TPRM. This area lends itself more easily to internal and external performance assessment, yet no initiatives have thus far materialized.

Whereas increased information and transparency is generally accepted in regime management and technical assistance, this is less clear-cut when the analysis turns to negotiations and litigation.<sup>42</sup> In the area of negotiations, the system has become more transparent, not least due to the growing voices of developing countries following the failed Ministerial in Seattle. A set of incremental changes to address *internal* transparency were implemented to encourage participation of the weaker actors within the organization. In addition, *external* transparency of the organization's work has increased over time. Yet, a lower degree of information and transparency also serve strategic interests as actors attempt to gain from the existence of information asymmetries. Negotiating parties may wish not to reveal their positions and use "private" information as a bargaining chip.<sup>43</sup> A related controversial question is whether more transparency increases or decreases performance. As Stasavage (2004) has argued, increased transparency throughout the negotiation process and public knowledge of country positions can lead to poor performance. More transparency increases audience costs at home and pushes negotiators to engage in posturing, to follow defensive negotiation strategies and to offer fewer concessions.<sup>44</sup> It is not surprising that calls for internal evaluation of negotiation processes are seldom heard.<sup>45</sup> And, the few noteworthy efforts of trade diplomats to engage in reform discussions focus on incremental changes related to improving existing processes (Ismail 2009).

The relationship among information, evaluation and performance in the context of dispute settlement has received little attention from the international relations community. International trade lawyers have dominated the scholarly debate on this question (e.g., Van den Bossche and Alexovicova 2005). Lawyers' discourse on information has focused on participation and procedural issues, such as the role of third parties, the information a party to a conflict is asked to submit to the panels and to the AB, or the treatment of confidential business information (see Weiss 2007: 1580–2). Some experts suggest that a too high a degree of confidentiality is detrimental for a legal system and in order to enhance legitimacy (and greater public support), the process needs less secrecy (Sutherland et al. 2004). In this respect, the Sutherland Report has advocated opening the legal hearings to the public; this

<sup>42</sup> "Evaluations" of these activities quickly turn political and are mainly done by insiders of the system (e.g., negotiations among Members to change decision-making rules, reforming dispute settlement).

<sup>43</sup> The Secretariat is closely watched by the PPs to make sure that it doesn't engage in simulation exercises on expected effects of regulatory changes on trade flows and national welfare. Simulations are mainly carried out by Members and the results are usually not shared among contracting parties.

<sup>44</sup> There exists a related argument on the effects of increased legalization and de facto greater transparency in the WTO. This in turn empowers import-competing groups and reduces Members' ambitions to engage in further liberalization through the WTO (Goldstein and Martin 2000).

<sup>45</sup> A recent evaluation that also included an assessment of decision-making processes was mandated by former DG Supachai Panitchpakdi (Sutherland et al. 2004). Yet, PPs did not pay much attention to the report.

“would be consistent with the standard practice of many international and national tribunals” (Davey 2005: 326). While many developing countries have been reluctant to do so, there is an emerging practice of allowing more public access to hearings (Ehring 2008). In terms of evaluation, the DSU is de facto undergoing an internal assessment by the PPs following the traditional practice of trade diplomacy. In parallel to the current Doha Round negotiations, WTO Members are reviewing the functioning of the DSU.

### 5.3 Aggregating Performance: Trickle Up, Canceling Out or Second Best?

A final question raised by Gutner and Thompson (2010) is whether process performance will automatically translate into outcome performance leading to a sort of trickle up effect. In relation to aggregation, I suggest some caution as to assuming a linear relationship between various performance outputs (see also Lipson 2010). Within the organization, there are some clear limits for agent activities defined by the member-driven character of the organization and the nature of its tasks. In areas of technical assistance and capacity building (e.g., satisfaction of users) and implementation (providing up-to-date and correct information to the Members), the work of the Secretariat can contribute to overall success and good performance of the organization. One can assume a trickle up effect from implementation and technical assistance towards positive aggregate performance.<sup>46</sup> Yet, the overall contribution to explaining macro performance appears limited.

The aggregation of performance is less clear-cut in relation to the middle and upper half of the performance pyramid. Important trade-offs exist. While legal agents in the dispute settlement system (e.g., AB members, panelists or the legal division) might aspire to clarify principles, engage in doctrine building, opt for an active interpretation of ambiguous wording, or setting a precedent, they are also concerned with principals' preferences.<sup>47</sup> The latter applies to the acceptance of legal decisions, but also speaks to the risk of negative consequences in the area of negotiations. This negotiation-litigation tension has characterized the WTO system in recent years and has weighed heavily on performance. An alleged imbalance between rule-making and litigation has been lamented (Cottier and Takenoshita 2003). Thus, given the constraints imposed by the member-driven nature of the organization, some agents might be willing to settle for a second-best solution. In this sense, those called upon to act as “judge” in a given trade conflict might opt to “freeze” the dispute or attempt to de-escalate it. In particular in relation to panel reports, it is not unusual to see balanced reports that uphold legal claims for both litigating parties (see Horn and Mavroidis 2008). Such a strategic underperformance

<sup>46</sup> A special problem in WTO-sponsored workshops and training activities relates to job fluctuations among participants. A significant number of workshop participants leave government or move within governmental departments following their training. This affects the overall impact of technical assistance related to trade policy.

<sup>47</sup> While it may seem counterintuitive, some AB members feel unease because their decisions cannot easily be overturned by member states due to existing high thresholds for re-interpreting AB recommendations or for creating new rules and obligations following consensual decision-making procedure. This situation places enormous responsibility on their shoulders (see Pollack 2007: 7).

might be intended not to offend key Members within the system. This is another example of principal costs that have been overlooked in the literature.

In conclusion, effective aggregation (or trickling up) in the context of the WTO is hampered by the institutional milieu that allows subtle forms of interference by Members. Therefore, agents opt to “work-to-the-rule” as a result of principals’ direct and indirect influence over their work. Thus rather than focusing on internal and bureaucratic obstacles to overall performance, we should pay more attention to external preferences that are imported into the system through the Members’ Geneva-based representatives (PPs).

## 6 Conclusions

One of the implicit findings from the above analysis is the difficulty of turning to self-assessments or third party evaluations in the WTO context. The lack of evaluations further suggests that the type of work that the WTO carries out could explain some of the systemic reluctance to engage in performance assessment. In comparison with many other IOs in the fields of development assistance, financial stability (see Weaver 2010), disease prevention, or peace-keeping operations (see Lipson 2010), measuring the WTO’s services is even more tricky. The WTO does not deliver easily measurable products and it is not in the business of providing substantial financial transfers to achieve defined goals. The WTO is part of those organizations that are engaged in regulatory standard setting with important distributional effects and that offer platforms of dispute settlement. These types of activities, as this article has shown, lack easily available performance measures and thus pose an acute “eye of the beholder” problem. In the context of the WTO, the difficulty for finding acceptable performance indicators increases as we move from the process side to the output side.

This article has tried to unpack the WTO and to emphasize the complex agency milieu that affects the performance of the organization. In doing so, the article addresses an expectation gap as to what the system in its current design is able to perform. The performance in the area of negotiations has been modest at best when judging the outcome over the past 15 years. In addition, recent studies on the WTO have provided us with evidence that the role of the Secretariat has decreased over time, and that the mantra of the “member-driven” organization has become even more dominant (Sutherland et al. 2004, Elsig 2010). Member dominance in combination with decision-making procedures based on consensus and relying on the “single undertaking” approach has led to deadlock in negotiations.<sup>48</sup> Finally, WTO Members have come to realize that the business of making rules (positive integration) is much more difficult than the classical reciprocal game of lowering tariffs (negative integration) (Fearon 1998). As a result, voices within the membership have increased that consider the current system for making decisions inadequate

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<sup>48</sup> The single undertaking principle means that nothing is agreed until everything is agreed. This approach ties together a diverse set of negotiation issues, excludes early harvest of agreed negotiation outcomes, and makes a final (package) agreement only possible if it is acceptable to all Members.

to tackle upcoming challenges. Getting more help from the Secretariat is one option that could be explored in this context.

Yet, a cautionary note is in order. Delegating power to agents within the organization (in particular in the field of negotiations) will not prove sufficient to overcome the current deadlock. Delegation has to go hand in hand with a broader effort to redesign the system (e.g., on decision-making, voting procedures, moving away from the single undertaking) (for a detailed discussion, see Elsig and Cottier 2011). The overall paradox of reform, however, is that Members have first to agree to delegate power; a difficult issue in light of the existing consensual processes of decision-making and reluctance by Members socialized in a member-driven environment to give up some of their prerogatives as principals.

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