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The Way Forward for the WTO: Reforming the Decision-Making Process

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ABSTRACT

The World Trade Organization is in a state of flux. This stems largely from the Doha Round impasse and the failure of the main protagonists to reach agreement. However, it is also the effect of a changing global political economy. With the rise of the emerging economies, decisions reached before at the World Trade Organization are not so easy to make anymore. Following the global economic crisis, the US finds itself in a sustained economic slump and, amid domestic crises, unable to lead the multilateral trading system as it has always done. With no credible successor in sight, the Doha Round remains in limbo and, with it, the multilateral trading system. The new world order, however imprecise, renders the current decision-making system obsolete. The number of protagonists has increased and the issues have become more complicated. It has grown increasingly difficult to reach decisions at the World Trade Organization, particularly with respect to the negotiating rounds. Even the Uruguay Round took nearly a decade to complete, which suggests a stagnant and outdated decision-making system in serious need of a revamp. The increasing popularity of regional and bilateral trading agreements, and with these the continued erosion of the rules underpinning the multilateral trading system, is indicative of the World Trade Organization members' frustrations with the latter. Nonetheless, through its functions the World Trade Organization makes a significant contribution to global peace, security and development – and failure of the system is not desirable. Changes cannot be implemented in the midst of a negotiating round, albeit at an impasse. However, post-Doha, a review of the decision-making system should be prioritised in order to ensure an efficient and, hopefully, a more transparent and inclusive decision-making mechanism.

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ABBREVIATIONS AND ACRONYMS

CG18	Consultative Group of Eighteen
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IMF	International Monetary Fund
LDC	least-developed country
MFN	most-favoured nation
PTA	Preferential Trade Agreement
QUAD	US, EU, Japan and Canada
SDT	special and differential treatment
TBT	Technical Barriers to Trade
TRIPS	Trade Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
UNSC	United Nations Security Council
WEF	World Economic Forum
WTO	World Trade Organization

INTRODUCTION

Confidence in the multilateral trading system is at an all-time low. The Doha Round impasse continues to erode the assurance that the World Trade Organization (WTO) is able and capable of carrying out its core mandate of regulating international trade. Current commentary is defined by pessimism and fatalism.¹ Key to the apparent failure of the Doha Development Agenda is the failure of the decision-making process at the WTO. However, this would seem to be an unfair verdict on an institution that has, by and large, been the most successful of all international institutions so far. In addition, the system is the only one in the world in which all countries, big and small, have the same power and authority – although this might be said to exist in theory only, especially as the consensus has historically found its seat with the QUAD countries (US, EU, Japan and Canada). That said though, the WTO has managed to give the smaller countries some measure of representation in the institution, and a certain degree of say in issues and processes.

The Doha Round impasse signals a crisis in the WTO and the need for broad institutional reforms. Hoekman identifies three dimensions of the calls for institutional reform at the WTO: the rulemaking and decision-making processes; the management of day-to-day activities; and the enforcement of negotiated commitments and rules.² The paper focuses only on the rule-making and decision-making processes, especially as they are key to the institutional reform in the other dimensions. Decision-making is a huge issue because it is linked intrinsically to the legitimacy of the institution. In the words of Cottier:³

Decision making processes serve and facilitate the attainment of legitimate outcomes commensurate with the substantive goals of the organisation [...] The authority and legitimacy of the institution relies, in other words, on appropriate substance-structure pairings. With the evolution of substance, structures and procedures equally need to change, adapt and evolve.

The quotation aptly sums up the current problem with the WTO. There is a growing misalignment between decision-making processes and the substantive content of the WTO. That the Doha Round is a ‘development’ round is one example. This needs to be remedied and should be made a priority once the Doha Round is concluded, although such a conclusion would be unlikely, given the likelihood that there cannot be another negotiating round again under the same archaic decision-making mechanisms.

The paper explores the principles of consensus as well as the Single Undertaking in the WTO, and investigates whether these principles are still applicable in today’s WTO. This involves an analysis of how these principles are applied; the effects on the broader membership of the WTO; a comparison of the decision-making mechanisms applied during the General Agreement on Tariffs and Trade (GATT) years; and an interrogation of the various options that have been put forward either as alternatives to the two principles or options for improving the principles.

The paper begins with an overview of the current challenges facing the WTO, and how these relate to the shortcomings or otherwise of the current decision-making system in the WTO. It follows with an analysis of the decision-making processes as espoused in both the consensus and the Single Undertaking principles. The paper explores the various options

put forward over the years as possible solutions to the challenge of decision-making in the WTO. Finally, it concludes with a few recommendations on the best possible ways of tackling the question of institutional reform in the WTO from a decision-making perspective.

THE EVOLUTION OF DECISION-MAKING: FROM GATT TO THE CHALLENGES OF THE WTO

Comparisons are often made between the WTO and its predecessor, GATT. The consensus is that GATT was generally successful, both in its decision- and rule-making processes and with trade liberalisation. It is important to identify the differences between the two institutions and to determine why the WTO has not been as successful as GATT. However, although the prevailing view of GATT may be that of a successful institution from a decision-making perspective, there may be a romanticism attached to this, which could be motivated partly by the frustrations being experienced with the WTO.

As a starting point, GATT's active membership consisted of willing liberalisers with only three dominant players: the US, the EU and Japan.⁴ This willingness was based on an understanding of the need for trade liberalisation, and the key to this was reciprocity and the understanding that countries had to reduce their own tariffs if they were to obtain tariff concessions from other countries.⁵ This facilitated the calibration of the political economy forces in each of the countries towards further trade liberalisation.⁶ Also, each of the dominant economies in the GATT system was too large to free-ride on the tariff reductions made by the other countries, and hence reciprocity in the negotiations was easier to achieve.⁷ That there was only one sector for the negotiation of liberalisation, namely manufactures, of course helped to make negotiations even easier. In the discourse on agricultural trade, it is often cited how the agricultural sector was a sacred cow under GATT. Nonetheless, the restriction of the scope of negotiations to manufactures meant that, because the dominant players in the system were all major manufactures with the capacity to export to each other, liberalisation was an opportunity to achieve economies of scale in the sector and to raise efficiency.⁸ Similarly, the benefits of liberalisation in the sector were even across the board.

Continuous trade liberalisation was achieved through trade negotiation rounds, the process of which has been carried over to the WTO, albeit being more difficult to achieve agreement now. Under GATT, provision was made for rules to ensure that states did not renege on their tariff liberalisation commitments.⁹ Of particular importance was the principle of 'binding' tariffs and ensuring that previously negotiated concessions could not be renegotiated; and making provision for other states to retaliate in the event that a state elected to go back on its commitments.¹⁰ It is important to stress, however, that despite the rules put in place to ensure consistency with commitments made, GATT was not necessarily a strictly rules-based institution. It was driven more by the economic and political desire, particularly after the Second World War, to preserve the negotiated tariff concessions.

Pauwelyn describes GATT as having been more of a gentleman's club than a legal regime:¹¹

Its objective was to settle trade problems, not to create or clarify trade law. Flexibility to adapt to economic and political realities prevailed over the predictability of the rule of law. The GATT club was inspired and run by what became known as “embedded liberalism,” that is, a common belief among the technocratic elites of the original twenty-three GATT contracting parties – after all, a limited set of like-minded, capitalist countries – that trade liberalisation increases welfare and requires international coordination and discipline, albeit with sufficient room left for domestic politics to redistribute income and sustain the safety nets of the welfare state at home.

Developing countries were always part of GATT from its inception, and their number grew consistently over the years. Their interest in the running of GATT was, however, lessened through the instrument of special and differential treatment (SDT). This enabled developing countries to apply protectionist trade strategies, such as the use of import substitution to promote industrialisation; export subsidies to promote exports; and the use of trade controls for balance of payment purposes.¹² The SDT was also a response to the prevailing development orthodoxy among developing countries at the time, where the import-substitution industrialisation model was being actively pursued.¹³ The developed countries were willing to acquiesce to this in order to secure allies against the spread of communism.¹⁴ Hence, developing countries did not participate in the negotiations and did not have to liberalise their own domestic tariffs but, owing to the most-favoured nation (MFN) principle, could afford to free-ride on liberalisation commitments made by the bigger countries. This effectively consolidated the role of the QUAD within GATT as the decision-makers, and enabled them to make deals and decisions among themselves through bilateral agreements and closed meetings. Baldwin describes this as the ‘don't obey, don't object’ system, in which developing countries were content to have the developed countries make all the decisions provided they were allowed to protect their economies through the SDT tool.¹⁵ It is clear that the system was designed to work loosely, and it seemed to work rather well. In fact, in the case of the US and many other governments, GATT was only provisionally applied for the forty-seven years it was in existence, without having been actually ratified, but countries were still unable to backtrack from their liberalisation commitments because of the threat of retaliatory action. Thus GATT actually operated without any constitutional or institutional foundation.¹⁶ Such a set-up would not have prevailed if a relatively benign hegemon, ie the US, did not wish it to be so.

As the GATT system developed and gained many more country members over the years, it became a de facto world trade organisation, albeit fragmented by the many ‘codes’ that countries were negotiating among themselves.¹⁷ Whereas the first five negotiating rounds under GATT had focused solely on reducing tariffs, the sixth round, which was the Kennedy Round, ventured into anti-dumping issues and the seventh round, the Tokyo Round, ventured more extensively into non-tariff issues. At the Tokyo Round, several plurilateral ‘codes’ were negotiated, covering such issues as subsidies and countervailing measures; technical barriers to trade; import licensing procedures; government procurement; customs valuation; anti-dumping; bovine meat; international dairy; and trade in civil aircraft.¹⁸ Agreements were also negotiated on SDT, balance of payments,

safeguards and dispute settlement.¹⁹ Consequently, GATT, in its initial formulation as a 'gentlemen's agreement', could not cope with the growing complexity of international trading relations.²⁰ The institutional flaws of GATT became exposed, which include the following.²¹

- The 'provisional' application of GATT.
- The inadequate amending provisions of the GATT treaty, where unanimity was required for some clauses and two-thirds majority for others and, even then, the amendments would not apply to countries that refused to accept them.
- The relationship of these 'codes' to the GATT treaty itself was also contested.
- The relationship of the GATT treaty to domestic law in some countries was unclear.
- Issues of accession and opt-out clauses in which some contracting parties could opt out of a GATT relationship with other parties.

It became clear that the world trading system was in need of a more formal and institutionalised, rules-based body; and that transformation of GATT was inevitable if the system was to work more effectively and avoid unending disputes. This was glaringly evident in the Uruguay Round, which has been recorded as the most ambitious and comprehensive of all negotiating rounds. The round adopted new agreements such as the General Agreement on Trade in Services (GATS), Trade Related Aspects of Intellectual Property Rights (TRIPS), Sanitary and Phytosanitary Standards, and Technical Barriers to Trade (TBT). Some of these agreements, such as the TBT Agreement (previously known as the 'Standards' Code in the Tokyo Round) were improvements from the Tokyo Round 'codes'. Dispute settlement was streamlined and plurilateral agreements transformed into multilateral agreements applicable to all members. Most importantly, the Uruguay Round saw the transformation of the then multi-speed GATT system into the WTO as it is known today, a formal legal entity that administers the rules-based multilateral trading system based on the principles of reciprocity and non-discrimination.

CHALLENGES FACING THE WTO

Largely because of the current emphasis on development concerns in the WTO, it has become easy to generalise about the challenges facing the WTO and to simply classify these as a developed versus developing country divide. This would be a simplistic approach, especially given the conflicting interests within these groups. At a broader level, however, most of the issues do have developed versus developing country dimensions, if not foundations. Baldwin identifies four general developments in the global trading system, which have made it increasingly difficult for decisions to be reached at the WTO.²²

- The increased technical complexity and disruptive domestic economic effects of the issues being negotiated.
- The shift in relative bargaining power among the negotiating participants in favour of the developing countries.
- The proliferation of bilateral and regional free trade agreements in contrast to multilateral agreements.

- The increased emphasis on achieving ‘fairness’ rather than reciprocity in trade liberalisation.

Broadened agenda with domestic regulatory implications

Cottier emphasises Baldwin’s first point by stressing that the progressive reduction of tariffs over the years, both multilaterally and unilaterally, has seen the emphasis of regulatory work become more biased towards issues related to domestic regulation and ensuring a conducive environment for investment.²³ He opines:²⁴

Non-tariff barriers addressed in the agreements on Technical Barriers to Trade and on Phyto and Phytosanitary Measures, standards on intellectual property in the TRIPS Agreement, domestic support in the Agreement on Agriculture, disciplines on subsidies in the Agreement on Subsidies and Countervailing Duties, domestic regulation in GATS, and government procurement all essentially serve as a benchmark for domestic law operating within the jurisdiction of Members. Much of the work in GATT since the Tokyo Round and in the Uruguay Round has been of a legislative, law-making, prescriptive nature. Future negotiations are likely to see the realm of rule-making reinforced. Clear distinctions between negative integration (prescribing limits to national sovereignty) and positive integration (prescribing what Members are obliged to do) have been blurred. But the latter is increasing. The challenges of climate change, work on various linkage issues beyond the environment, in particular human rights, the linkage to investment protection, intellectual property and the regulation of services, in particular financial services, will further enhance complex rule-making negotiations. These negotiations will need to take into account elements pertaining to different fields, combining goods, services and intellectual property alike.

The quotation is highlighted by the controversy surrounding the Singapore issues.²⁵ Developing countries were at the forefront of the campaign against the inclusion of the Singapore issues in the WTO agenda, protesting the intrusion into the domestic policy space. Another prominent issue is that of trade and climate change. Trade and competitiveness concerns feature heavily in the climate change negotiations, particularly regarding ‘carbon-leakage’, where developed countries worry that implementation of carbon-reduction measures may result in the relocation of their production companies to developing countries with less stringent carbon-control measures in place. The use of trade-policy remedies and measures in the fight against climate change is being mooted in many countries; and such trade barriers as cross-border tax-adjustment measures, private standards (production-process methods) and labelling are being considered by some developed countries. This poses a real threat to the countries at the receiving end of these policies, and highlights the ongoing question of whether the WTO should also venture into this area in terms of rule-making or rather leave it for the UN Framework Convention on Climate Change to address.

On a different subject and with particular reference to the effects of the global financial crisis, Draper alludes to the tensions generated by the impact of exchange-rate management on trade.²⁶ Although the issue of exchange-rate regimes and financial deleveraging belongs squarely within the realm of the International Monetary Fund (IMF), there are still significant impacts on the global trading system.²⁷ The question, again, is

whether the WTO would want to expand into that arena as well. After all, the example of investment and intellectual property shows that the WTO is not averse to broadening its regulatory reach.

However, there are problems inherent to the expansion of the WTO's reach on trade-related issues, particularly as they are not tariffs. It is difficult to assess reciprocity in the negotiations, since there is no simple measure of comparison across countries. Domestic stakeholders may be affected adversely, as illustrated by the government procurement code that the US signed up to in the Tokyo Round, which threatened minority groups in the US because they could no longer receive preferential treatment when bidding for government contracts.²⁸

Political activation of developing countries

The shift in relative bargaining power among the negotiating participants in favour of the developing countries is also related to developments in the global political discourse and the global political economy. From a purely WTO perspective, part of the challenge stems from the Single Undertaking adopted at the Uruguay Round, which required that countries participate in all agreements. This is in sharp contrast to GATT, which either exempted some countries from the tariff reduction negotiations through SDT²⁹ or granted some countries the luxury of selecting which agreements to sign up to in the Kennedy and Tokyo Rounds. Following the Uruguay Round, developing countries became more active in decision-making at the WTO. The distribution of political and economic power stills plays an integral role in shaping the agenda of trade negotiations,³⁰ and the political activation of the developing countries has upset the apple cart of decision-making in the WTO.

Developing countries have learnt to organise and galvanise each other into interest-based coalitions, mainly based on defensive interests and designed to gain better access to developed countries.³¹ This is an obvious consequence of the size of their markets and is also in line with the history of SDT in the world trading system. Nonetheless, through coalition building, developing countries have made themselves very relevant to decision-making in the WTO. The experience of Seattle and Cancun further illustrates the political power that developing countries have managed to accrue for themselves. In Cancun, leading developing countries refused to negotiate the Singapore issues in the absence of balanced concessions from the developed countries, especially on the issue of agricultural trade.³² No longer can the QUAD set the agenda or make decisions at the exclusion of developing countries, which is where part of the challenge with decision-making in today's WTO stems from. China's accession to the WTO in 2001 signalled a permanent change in the power dynamics of the WTO.³³

China is one of the new trade powers that has risen in recent years, and, together with Brazil and India among others, is referred to aptly as an 'emerging economy'.³⁴ These countries have experienced sustained growth over the years and have even managed to emerge from the recent global economic crisis with only minor bruises compared with the major developed countries, which have experienced a sustained economic slump to date. These countries have given rise to the multipolar world that is currently being experienced. The recent accession of Russia to the WTO is expected to facilitate another shift in the power dynamics at the WTO. Russia is part of the BRICS group of countries,

together with Brazil, China, India and South Africa. With all the BRICS in the WTO, it is expected that the QUAD will face its toughest challenge yet, and, from experience, the decision-making process will be made more difficult. India and Brazil have already set the precedent by establishing themselves as ‘process drivers in multilateral negotiations’.³⁵ However, a strong BRICS presence and coalition in the WTO is yet to be seen and experienced. This points to a fundamental shortcoming of the political and economic power that developing countries have managed to accumulate: incoherent positions and conflicting interests. Just as GATT was able to function effectively because of the same vested interests of the QUAD, despite their divergent economic interests, the emerging powers pose a challenge to the QUAD leadership and have a crippling effect on the WTO because of the heterogeneous nature of their interests, and indeed across developing countries as a whole.³⁶

Another view of the developing country dimension is that the trade liberalisation agenda is now mostly about developing countries. There are three components to this: ‘OECD liberalization vis-à-vis developing countries; developing country liberalization vis-à-vis the OECD; and intra-developing country liberalization. To service these processes, developing countries must thus be central to the negotiating organisation.’³⁷ This partly explains the developed country enthusiasm for the negotiation of non-tariff measures, although there is still a case to be made for trade liberalisation in developed countries as well.³⁸ This has facilitated inter-sectoral negotiations, whereby in exchange for granting enhanced developing country access to their markets, developed countries want access for services, the defence of intellectual property rights, and security for their investments in developing countries.³⁹

Regionalism versus multilateralism

The issue of whether bilateral and regional trade agreements are building blocks or stumbling blocks of the multilateral trading system has been discussed ad nauseam. However, it is still pertinent in the discourse on the apparent failure of decision-making in the WTO. Bilateral and regional trade agreements are sanctioned by article XXIV of GATT and exist as one of the exceptions to the MFN principle. The challenge to the multilateral trading system lies in the multiplicity of these regional trade agreements undermining the multilateral trading system in the following manner.

- Regional trade agreements create vested interests that make it more difficult to attain meaningful multilateral liberalisation. For instance, many developing countries have been hesitant in agreeing to ambitious multilateral tariff reductions in the Doha Round for fear of preference erosion, as the tariff reductions cut into their preferences under the Generalised System of Preferences⁴⁰ or Preferential Trade Agreements (PTAs).⁴¹
- Regional trade agreements focus more on the regulatory issues in goods and services trade and, because of the unreserved autonomy of the parties to such PTAs, this undermines transparency and predictability in international trading relations.⁴²
- PTAs also have the negative trend of including non-trade objectives, particularly when it comes to PTAs based on the preferential treatment of developing countries and when developing countries do not have to make reciprocal concessions in market access.⁴³

The main worry is that these demands could be used to force the inclusion of such non-trade objectives into the WTO, especially as countries would be implementing them at PTA level anyway.⁴⁴

In essence, there are two main concerns when it comes to the challenge of bilateral and regional trade agreements. The first is that developed countries may resort to these agreements in order to obtain concessions from weaker countries on issues that they would otherwise not be able to introduce within the multilateral framework. The second concern is that the emerging economies are not showing much leadership in terms of multilateral trade liberalisation but are proving to be champions of regional trade agreements.⁴⁵ In general, the proliferation of these trade agreements is also seen as an indication of the WTO members' fatigue with the system, especially as it fails to conclude the Doha Round. As a result, there is an increasing trend towards the idea of 'multilateralising regionalism',⁴⁶ even though implementation of the idea might prove to be as complex as the task of concluding the Doha Round.

'Fairness' in trade liberalisation

This challenge has been in existence from the early days of GATT and is intrinsically tied to the principle of SDT for developing and least-developed countries (LDCs). It is drawn mainly from the development concerns of developing countries and LDCs, an issue that has become more topical with the Doha Development Agenda, particularly as the round was meant to address the development concerns of developing countries and equal benefits of trade liberalisation for all member countries of the WTO. Developing countries realised soon after the formation of GATT that unfettered trade liberalisation was not conducive to their development, and perpetuated the trade patterns where they remained commodity suppliers and imported value-added products. This gave rise to requests for changes in the international trading system in four main areas: the creation of trade preferences for developing countries; non-reciprocal or less than full reciprocity in trade relations between developed and developing countries; flexibility for developing countries in the application of trade rules; and the stabilisation of commodity markets.⁴⁷ It led to the formation of SDT, a principle that was designed to address the perceived conflict between trade liberalisation and socio-economic development.⁴⁸

Currently the WTO has more than 155 SDT provisions under its fold, which form the 'development' element of the WTO.⁴⁹ However, one of the major complaints by developing countries has been that SDT as it currently exists in the WTO is ineffectual. This is evident in the language employed in the provisions and the lack of effective sanctions for failure to adhere to the provisions. The language does not direct any action and merely encourages the granting of preferences by developed countries to developing ones.⁵⁰ These best-endeavour clauses that accompany most of the provisions cannot be challenged legally at the WTO's Dispute Settlement Body. Prior to the Uruguay Round, SDT had two principal components: 'protection of developing country markets and access to developed country markets'.⁵¹ Post-Uruguay, the adoption of the Single Undertaking, which involves developing members acceding to all GATT/WTO agreements, necessitated the addition of a third element; that of 'delayed implementation' of the agreements to which the developing countries had bound themselves. This was as a result of the capacity

problems that developing countries would face in trying to implement the agreements. It must be noted here that under GATT, SDT was more about exemptions from GATT provisions and non-reciprocity. However, post-Uruguay SDT was more closely identified with implementation-related assistance, and most commonly manifested itself through longer implementation periods of WTO agreements for developing countries and LDCs. Nevertheless, such SDTs have been identified largely as having been ineffectual, and part of the Doha Round mentality was to redress this situation.

To ensure that developing countries benefit from the increased opportunities and obtain welfare gains from the multilateral trading system, paragraph 2 of the Doha Ministerial Declaration makes reference to enhanced market access; balanced rules; and well-targeted, sustainably financed technical assistance and capacity-building programmes as being critical. Paragraph 50 of the declaration also provides that all negotiations under the Doha Round shall take account of the SDT principles embodied in part IV of GATT, the Enabling Clause and all other relevant WTO provisions. The declaration also provides that the members reaffirm that the provisions for SDT are an integral part of WTO agreements. Most importantly, 'all special and differential treatment provisions shall be reviewed *with a view to strengthening them and making them more precise, effective and operational* [author's own emphasis].'⁵² Drawing from this, it is clear that any resolution of the Doha Round will need to involve some development element, and developing countries insist on this. The outcomes of this round are supposed to reflect the development aspirations of developing countries and serve as a vehicle to attain economic growth and development. However indiscriminately and often the word 'development' is used, there exists no standard definition. Where developing countries complain that agreements and provisions go against their development interests, this is not explained. 'It is yet to be determined how development principles can be applied effectively in the WTO, in line with countries' varied definitions of development, and in a manner that would best satisfy all members' expectations'.⁵³

THE LEGISLATIVE FRAMEWORK FOR DECISION-MAKING IN THE WTO

Decision-making in the WTO comprises the rules on decision-making itself and the process by which these rules are negotiated.⁵⁴ The rules on decision-making were established with the formation of the WTO; it is the process by which these rules are negotiated that has stalled and which is the subject of this paper. As the rules on how decisions or even rules⁵⁵ are made have an impact on the process of rule-making, they require a brief discussion.

As a basic point of departure, decision-making in the WTO is dominated by the practice of consensus, which follows on from the practice of GATT. Article IX:1 provides that: 'The WTO shall continue the practice of decision-making by consensus followed under GATT 1947'. A simple majority shall constitute a quorum for the consensus decision to be made.⁵⁶ However, the same provision goes on to say that 'except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be arrived at by voting.' Under the same article, authoritative interpretations⁵⁷ of the WTO agreement require a three-quarters vote, with the additional requirement that

there be a recommendation by the respective councils where the interpretation relates to GATT, multilateral agreements on trade in goods, the GATS and the TRIPS Agreement.⁵⁸ Such interpretations are binding and may also affect the rights and obligation of WTO members.⁵⁹ The Rules of Procedure have more detailed provisions on how the voting should be conducted. Thus consensus is the primary method and voting the secondary method, to be resorted to in the event of the failure of consensus.⁶⁰ Only once in the history of the WTO has voting been resorted to, with Ecuador's accession in 1995; otherwise, all decisions have been arrived at through consensus.⁶¹

In certain instances as well, the majority vote does not apply and all decisions have to be made by consensus. This includes the decisions made by the Dispute Settlement Body,⁶² waivers in respect of the extension of transition periods for the implementation of WTO agreements,⁶³ and decisions on the addition of new plurilateral agreements to annex 4 of the WTO Agreement.⁶⁴ The amendment of the WTO Agreement has its own unique set of procedures. Where, in general, international law does not require the consent of all parties to a treaty in order to pass an amendment, with the obvious requirement that parties which are not party to the amendment are not bound by it, article X of the WTO Agreement provides for a more onerous process.⁶⁵ Article X:1 reads as follows:⁶⁶

Any member of the WTO may initiate a proposal to amend the provisions of this agreement or the Multilateral Trade Agreements in Annex 1 by submitting such proposal to the Ministerial Conference. The Councils listed in paragraph 5 of Article IV may also submit to the Ministerial Conference proposals to amend the provisions of the corresponding Multilateral Trade Agreements in Annex 1, the functioning of which they oversee. Unless the Ministerial Conference decides on a longer period, for a period of 90 days after the proposal has been tabled formally at the Ministerial Conference any decision by the Ministerial Conference to submit the proposed amendment to the members for acceptance shall be taken by consensus. [...] If consensus is reached, the Ministerial Conference shall forthwith submit the proposed amendment to the Members for acceptance. Except as provided in paragraphs 2, 5 and 6, the provisions of paragraph 3 shall apply to the proposed amendment, unless the Ministerial Conference decides by a three-fourths majority that the provisions of paragraph 4 shall apply.

Two-thirds of the members must agree to the proposal for it to be adopted and become effective. The amendment is effective for all members, but only if it does not modify members' substantive rights and obligations. In the instance in which the amendment does intrude on members' substantive rights and obligations and such members have not accepted the amendment, the Ministerial Conference may decide by a three-quarters majority that such members withdraw from the WTO or remain a member with the consent of the Ministerial Conference.⁶⁷

However, when it comes to amendments of the cornerstone principles of the trading system – such as the most-favoured treatment principle,⁶⁸ binding of tariffs,⁶⁹ and articles IX and X of the WTO Agreement (the legislative framework governing decision-making) – then unanimous consent is required.⁷⁰ This means that every member of the WTO has to assent to whatever changes or amendments are being proposed in relation to these provisions.

Table 1: Decision-making in the WTO

Decision-making rule	Type of issue
Unanimity	Amendments concerning general principles such as non-discrimination.
Three-quarters majority	Interpretation of the provisions of the WTO and waivers of WTO disciplines for members.
Two-thirds majority	Amendments to the WTO relating to issues other than general principles; accession.
Consensus	Where not otherwise specified.

Source: Hoekman B & M Kostecki, *The Political Economy of the World Trading System: The WTO and Beyond*. Oxford: Oxford University Press, 2001.

Articles II and III of the WTO Agreement make provisions for decisions such as new rules, amendments and new agreements to be negotiated at any time WTO members so wish. However, the WTO has adopted and carried on with the GATT culture of multilateral trade rounds, although they are broader than the GATT rounds, which were, for the most part, concentrated on tariffs. Despite the above framework, the key decision-making mechanism employed by the WTO is that of consensus and, as noted, voting has been used only once in the history of the WTO, and even then it was in the case of an accession. Hence, discussion on the efficacy of WTO decision-making is mostly in the context of negotiation rounds. Tied to the negotiating rounds and decision-making is the Single Undertaking principle that was adopted in the Uruguay Round.

The Single Undertaking

The Single Undertaking is taken to mean that 'virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately.'⁷¹ With the establishment of the WTO, the Single Undertaking also meant that countries wanting to become members of the WTO had to accept the entire agreement package in the Uruguay Round as well as the associated obligations without exception.⁷² The idea behind the Single Undertaking is to enable trade-offs through issue linkages and to facilitate negotiating leverage where it might otherwise not exist.⁷³ Issue linkages facilitate trade negotiations through ensuring that countries can offer concessions on their defensive interests in exchange for reciprocal concessions from negotiating partners on their offensive interests, thus keeping the enthusiasm for trade negotiations and trade liberalisation going.⁷⁴ Without the Single Undertaking, trade issues would be negotiated in silos; and countries with only defensive interests would have no motivation to negotiate. With issue linkages, there is always the guarantee, at least in theory, of getting concessions on offensive interests in other areas, thereby enabling negotiations.

Speaking specifically to the Uruguay Round and the success of the Single Undertaking, one analyst pronounced as follows:⁷⁵

This unprecedentedly comprehensive round strategy did, in the end, work despite many misgivings throughout the negotiations that it was too ambitious and complicated. There

was a weakening of the draft agreement for some issues, particularly in the final phase of the negotiations, but this was to be expected. [...] In contrast, it is doubtful that such politically sensitive issues as agriculture, textiles and intellectual property rights, to name only a few, could have been negotiated with comparable result on an individual basis.

Most developing countries would, however, argue against the success of the Uruguay Round and the Single Undertaking. For them, the Single Undertaking forced them to sign up to agreements in areas in which they had no capacity to implement their obligations. This was done under promise of technical assistance, capacity building and other adjustment tools to enable them to implement these agreements, but developing countries are not satisfied with the level of assistance given so far. The Single Undertaking fell short of recognising that there was no parity among the countries signing up to the Uruguay Round agreements.⁷⁶ Some have described the Single Undertaking for developing countries as having been a choice between a loss of all market access or market access with onerous obligations – and there was only one choice there.⁷⁷ Baldwin is of the opinion that negotiations on intellectual property rights, antidumping and countervailing duty rules, trade in services and foreign direct investment have only served to demonstrate how the complex technical nature of the negotiations makes for uninformed decision-making in many small countries and LDCs.⁷⁸ It only makes sense therefore that developing countries would regret signing up to some of the Uruguay Round agreements.

What this means for decision-making, and drawing from the experience of developing countries in the Uruguay Round, is that the Single Undertaking makes it impossible to reach agreement because countries are at different levels of economic development and, concomitantly, have differing implementation capacities. With the concerns around the implementation of SDT post-Uruguay Round, true to the adage of ‘once bitten, twice shy’, it will be difficult to get developing countries to sign up to the Doha Round until they are satisfied that the development mandate has been executed sufficiently. Some of the countries are still struggling, nearly two decades after the Uruguay Round, to implement some of the agreements. This calls for a revision of the Single Undertaking, which will otherwise pose a threat to decision-making and progress in the WTO. For instance, paragraph 47 of the Doha Ministerial Declaration provides that:⁷⁹

the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking. *However, agreements reached at an early stage may be implemented on a provisional or definitive basis.* [author’s own emphasis]

This provision allows for an early harvest⁸⁰ in the negotiations but this requires unanimous consent and such consent has so far been absent.⁸¹ A good example would be the issue of an early harvest for LDCs that was punted in the run-up to the eighth WTO Ministerial Conference in Geneva in 2011. However, despite the apparent support of the idea by all member states, this did not materialise. With the Doha Round still being negotiated as part of a Single Undertaking, LDCs lose out along with all other countries. The world still sits and waits for a resolution to the Doha impasse. The Single Undertaking is therefore intrinsically linked to the Consensus Principle because the issue linkages and the bundling of agreements require the participation of all parties.⁸²

The Consensus Principle

In practice, consensus is deemed to exist if no member present at the time the decision is made formally objects to the decision.⁸³ Consensus at the WTO therefore does not imply unanimity among the parties. It does not matter that some members might not be present or have chosen to abstain from the decision-making. As discussed, the consensus practice follows the GATT practice, which involves negotiations and consultations to ensure agreement before voting.⁸⁴ This slows down the process of decision-making as efforts are made to bring dissenting countries on board.⁸⁵ The Consensus Principle means that any country in the WTO is capable of blocking decisions by merely registering its dissent and has been used on occasion where a country's interests would be adversely affected by such a decision. This poses a problem. In order to prevent a veto, the decisions usually arrived at are of the 'lowest common denominator', designed to ensure acquiescence by all.⁸⁶ The system ensures the maintenance of the status quo, as potentially unpopular decisions would never be floated. This means that the WTO is incapable of delivering on demands for rule-making and also runs the risk of potential crisis and paralysis, with the WTO losing relevance on important trade issues.⁸⁷ Nonetheless, consensus is also the leveller, at least in theory, although this ignores the various pressures that smaller countries may be subjected to and the possibility of their being unable to sustain a veto.⁸⁸ In addition:⁸⁹

A necessary condition for consensus to have the purported benefits is that there is informed participation. In practice, small countries confront serious information and resource constraints that impede effective participation. This can have costs, both in an opportunity forgone sense, and in a direct sense if countries agree (or do not object) to initiatives that have adverse consequences for them.

In essence therefore, capacity to sustain a veto is linked directly to economic status, and share and importance in world trade, and is thus sometimes likened to weighted voting.⁹⁰ Weighted voting as used in other multilateral institutions relies heavily on such thresholds as economic status, with voting shares allocated in accordance with a country's wealth.

Although voting is provided for under article IX of the WTO Agreement, in the event of a failure of consensus, it is not considered a real option for political economy reasons. A good example of the failure of a one-country, one-vote system is the United Nations Conference on Trade and Development (UNCTAD).⁹¹ Since its formation, UNCTAD has operated on the equal vote system. However, probably owing to the roots of its formation as a response to developing country concerns in GATT, most of the decisions taken are biased in favour of developing countries and seek to create obligations for developed countries towards developing countries. Needless to say, most of these decisions, if not all, have never been implemented and are simply ignored by developed countries.

There are advantages to decision-making by consensus.⁹²

- A decision based on consensus will enjoy broad support and implementation is secured owing to the co-operation of both the powerful stakeholders as well as the minorities.
- Consensus is the best of all the other decision-making options and processes as developed countries fear being outvoted while developing countries fear being presented with *faits accomplis*.⁹³

Developing countries have become increasingly active in the WTO, both as a result of the Single Undertaking principle, which broadened the domestic reach of the WTO, as well as the binding of tariffs. This has led to decision-making by consensus becoming a very contentious issue, particularly since the Seattle Ministerial meeting, when developed countries were trying to get the Singapore issues onto the negotiating agenda. It could be said that the system of decision-making by consensus only worked in the pre-Uruguay Round years. Post-Uruguay, the institutional challenges to the WTO have made it even more difficult to achieve consensus, particularly because the decision-making process used to be exclusive. Previously, consultations and negotiations towards consensus were always aimed at the major powers, as it was their veto that was really a concern, and any decision made to the exclusion of the major powers was a non-starter. Presently, a continuation of the current system poses a threat to the legitimacy and relevance of the WTO. It is important to note that the problem lies not in the instrument of consensus in decision-making, but rather in the process of reaching consensus, which has evolved beyond recognition over the years.

Whereas informal consultations have proved very effective in steering the organisation to a decision in the past, they have now become a source of controversy for two particular reasons. These are the Single Undertaking, which makes agreements binding on all members; and the growth in the number of active participants, particularly of developing countries, and their demand for active participation in the decision-making process.⁹⁴ Continuing with the same practices in informal consultations creates a 'democratic deficit'.⁹⁵ The one particular informal consultation process that has come under considerable criticism over the years is the 'Green Room' consultations. Green Room consultations are part of a consultative process that was developed in the Tokyo and Uruguay Rounds, in which the 'principals' in the negotiations would negotiate issues until reaching a compromise.⁹⁶ Formerly, the QUAD was always represented in the Green Room process. Now, however, the system accommodates the likes of India, Brazil, China, South Africa, Australia and various representatives of such groupings as the LDCs. Nevertheless, the process is still not inclusive of all members.

The Green Room consultations are traditionally a mechanism designed to reduce the number of active participants in the WTO deliberations, thus creating scope for progress and for decisions to be reached.⁹⁷ The rise of the emerging economies has made the Green Room consultations more representative of developing countries as they are now part of such consultations. However, the geo-political shift in the world has increased demands for increased representation of developing countries beyond the 'emerging economies' and other selected smaller countries.

There have been some changes to the Green Room processes post-Seattle that are worth mentioning, as well as some associated problems.⁹⁸ Members are now informed of all scheduled informal meetings as well as the list of invited countries, and uninvited countries with a national interest in the matter also have the option of taking part. Minutes of some of the informal meetings are circulated to non-attendees. It is always emphasised that these informal meetings are merely for building consensus and are not for decision-making. Certainly there has been a concerted effort to remove the stigma of Green Room meetings as exclusive, informal, small-group meetings. However, three problems still remain with these particular improvements and the Green Room operations. Firstly, many developing countries are still not able to attend the meetings owing to a lack of resources

and limited representation in the WTO. Informal meetings tend to be ad hoc, thus leaving little time for preparation and resource allocation. Despite the protestations about the role of these informal meetings, their results are often presented to the rest of the WTO membership only in the final stages of the discussions. This limits the right of developing countries to object, as it does not give them enough time to study the provisions and the introduction of the findings of these meetings at such a late stage, which makes it difficult for the developing countries to enter a formal objection.

Secondly, these meetings also allow the Chairperson or Director General, whatever the case may be, to be broker, mediator and facilitator of the negotiations. The Chair decides on the agenda, the countries to invite and the frequency of the meetings; and these decisions have an impact on the inclusion or exclusion of the uninvited countries and their interests.⁹⁹ It would help if some of these positions were held by people from developing countries but, although efforts are being made to ensure equal representation of both developed and developing countries in WTO leadership positions, the balance is currently skewed and LDCs are often excluded owing to resource implications anyway.¹⁰⁰

Finally, the traditional ‘club like’ nature of these informal meetings has resulted in plenty of informal protocols of interaction and a certain culture that is exclusionary in its effect on developing countries, which makes the Green Room process even more inaccessible. Also, as opposed to official interactions, there are no official support services, such as translation, which makes it difficult for non-English-speaking developing countries and LDCs to participate effectively.¹⁰¹

Proposals and options for reform

The proposals for reform can also be understood within the context of the current four main tenets of decision-making in the WTO:¹⁰²

- The WTO is a one-member one-vote organisation thereby allowing equal status to all members irrespective of their trade shares or economic size.
- The WTO is a member-driven organisation.
- Consensus based decision making is the de-facto norm in the WTO.
- The WTO relies on an elaborate network of informal processes to get to a consensus.

These tenets are the basic framework for decision-making in the WTO, and it is highly unlikely that countries would favour a radical departure from these principles. Many reform proposals for the WTO have been proposed by various academics and NGOs. This paper focuses on only three of these, namely decisions through voting or weighted voting; decisions through a WTO executive committee; and critical mass approach or plurilaterals.

It is interesting to note that developing countries in particular are very keen on the retention of consensus in decision-making, despite its current inefficiencies and marginalising effect, because they believe this to be their only means of ensuring that their voices are heard. This is mostly a practical consideration and is based on the understanding that the voting system would never work in the context of the WTO. Consensus ‘allows a politically viable negotiating process of give and take to emerge.’¹⁰³ Consensus is also regarded by developing countries as an assurance against decisions that

are disadvantageous to their interests.¹⁰⁴ As such, they are in favour of options that look at strengthening the consensus rule, such as those suggested by the Sutherland Report. The Sutherland Report recommended that any member considering blocking a measure should declare in writing, with reasons included, that the matter is one of vital interest to the member. Ismail supports this approach and emphasises that it will help to prevent major powers from blocking decisions for non-trade related reasons.¹⁰⁵ However, it is unclear how this approach would help with the various other problems associated with consensus decision-making. It certainly does not stop smaller countries from refraining from blocking a measure because of aid and other considerations they get from developed countries. Nonetheless, in all practical terms, as the example of UNCTAD shows, the current system of consensus would be favourable to voting if any progress is to be made. If the current system of consensus is dropped in favour of voting, it is likely that all decisions would be in favour of developing countries, as they form the majority in the WTO and, without the support of the superpowers, the system would be rendered redundant.

Voting and weighted voting

Voting is provided for in the legislative framework as a fall-back option. However, as discussed it has only been used once in the WTO's history. Developing countries, despite being in the majority and thus able to use the voting system as a means of getting their way, have never requested the initiation of voting procedures to arrive at a decision. The provision for voting under the legislative framework alone should limit the risk of consensus, leading to a paralysis of decision-making. Countries are reluctant to employ their right to veto decisions and thereby prevent consensus from being secured, owing to the threat of isolation and a potential crisis. Thus voting as a decision-making mechanism in the WTO really only just exists on paper.¹⁰⁶

It goes without saying that if voting were to ever become a real possibility, developed countries would reject a one-country, one-vote system. Decisions would need to be made on both the allocation of votes as well as on the thresholds to be used. These decisions would need to take into consideration political equity, equality and democracy.¹⁰⁷ The system would somehow have to be fair and responsive to the needs of all countries while ensuring that no country is marginalised.

This raises the possibility of weighted voting. Seeing as 'sovereign power does not sufficiently respond to existing power relations', and this is certainly true of the WTO, voting rights would thus need to be constructed in such a way that members' relative importance in world trade has to be reflected in their voting rights.¹⁰⁸ This is the voting system that is applied in the Bretton Woods Institutions.¹⁰⁹ Voting rights can be allocated using trade shares, gross domestic product, dependence upon foreign trade and population size.¹¹⁰ What this means is that given the current global political and economic dynamics, there will exist some kind of 'G20' within the WTO, making decisions on behalf of the entire membership. Weighted voting could serve to cement the kind of marginalisation in the decision-making processes in the WTO experienced by some developing countries outside the 'emerging economies' of, inter alia, China, India, Brazil and South Africa. Weighted voting would thus not be supported by all developing countries. The voting option, however, is dismissed in most WTO quarters owing to an inherent aversion of it. Experience of the IMF and the World Bank shows that developing countries are

disgruntled with the allocation of voting rights in those systems. Given the shifts in the global political economy, weighted voting should be considered with caution. Low opines that ‘a formalized system of voting is a long way off as a practical tool for decision-making in the WTO.’¹¹¹

A WTO Executive Committee

As a member-driven organisation, the WTO does not have a formal executive committee like the IMF or the World Bank. The issue of a decision-making executive committee is as volatile as the issue of weighted voting, especially as developing countries are raising their displeasure with the constitution of this executive council and their representation in the Bretton Woods Institutions. It is hard to imagine the developing countries accepting such an arrangement in the reform option of the WTO. Nonetheless, it is one of the most commonly discussed options. In his discussion of reform proposals for the WTO, Hoekman speaks of two proposed models for an executive committee: one structured the same way as the IMF or World Bank executive committees; and another structured to ‘identify compromise positions in negotiations, suggest solutions when WTO Councils fail to achieve consensus, engage in strategic thinking and help to set priorities to further the mandate of the organisation’, while the membership still continues to use consensus for decision-making.¹¹²

Regarding the first model, Cottier contends it would be possible to establish such an executive committee. Membership would be based on considerations of size, geography and level of development; and would operate on a rotating basis with membership fixed for a number of years. The major powers would obtain automatic membership, of course, and the executive committee would ‘ensure that all pertinent interests and regions have a voice in decision making’.¹¹³ The second model is supported by Ehlermann and Ehring, who state that such a committee could facilitate decision-making in the WTO at a less formal level.¹¹⁴ This is critical, as developing countries are likely to be wary of a formalised institution, particularly because although they would have to be represented, developed countries would most likely all get a seat in such a committee. However, if the executive committee were to be comprised of a smaller group of countries, this would make bullying tactics much easier. In an era of bilateral and regional agreements, representative countries would most likely find themselves putting their own interests first should these ever come into conflict with regional interests.

The formation of an executive committee has found favour among some WTO members, notably the European Commission, which in 2003 circulated a reflection paper calling for the creation of an ‘advisory group’ that would assist the WTO with negotiating options.¹¹⁵ This would not be a new concept for the WTO, as GATT had, for some time, a ‘Consultative Group of Eighteen’ (CG18), which was established in 1975 on a temporary basis and then made permanent in 1979.¹¹⁶ Membership to the CG18 was based on economic weight and regional representation, with the rest of the membership participating as observers, as alternates or by invitation. The group only met a few times and was suspended in 1989, which does not lend much credence to the idea of an executive committee or, in its adaptive form, an advisory group.

The Sutherland Report recommends the creation of a ‘consultative body’ without executive or negotiating powers to provide both political guidance to the negotiators

and a political economic context to trade negotiations. This body would have a limited membership of about 30, with the major trading powers having a permanent seat and the rest of the seats being rotated. A combination of meeting frequency and participation would allow for inclusivity of the process.¹¹⁷ However, given the debates around the reform of the United Nations Security Council (UNSC), having a replica of the UNSC at the WTO would not be such a good idea. There are currently calls for the revision of the composition of the five permanent members (China, France, Russia, UK, US) of the UNSC, particularly in light of their veto power. UNSC permanent membership is based on the post-Second World War political power dynamics in the world. These dynamics have changed drastically over the years and some countries in the UNSC no longer have the same political and economic clout. This also applies to the regional representation in the UNSC, especially considering the lack of African representation in the permanent membership. One would expect the QUAD to form part of such a ‘consultative body’, but the QUAD as it was originally constituted is no longer a big factor in the WTO. Having a permanent seat does not allow for such shifts in countries’ political and economic weight and, as other powerful stakeholders emerge, the QUAD could be left out of the core of the decision-making system.

Ultimately, the failure of the idea of an executive committee, even in the diluted form in which it existed, with no decision-making powers, makes it easier to dismiss this reform proposal. It is unlikely that countries will buy into it anytime soon. Four reasons have been put forward as to why the establishment of such a body would not be approved by members.¹¹⁸

- The nature of WTO legislation, i.e. its binding nature and its intrusive potential, means that few countries would be willing to accept recommendations of a consensus of an advisory inter-state body, especially if the issue under discussion is one in which substantial differences exist;
- A permanent/semi-permanent body may have worked partially when the mandate of GATT was restricted to goods, but today interests of countries differ significantly across issue areas that are covered by the WTO. It seems simplistic to expect that many countries would find their interests adequately represented according to regional groupings in each issue area;
- Even members that gain a place on such a board might not have the resources or the will to negotiate in all the different areas that a permanent body would demand;
- Creation of an advisory board would formalise the exclusion of a large number of members from process consultations.

Plurilaterals

Most commentary has dwelled on plurilaterals as being the most practical approach to reforming the WTO decision-making system. The WTO makes provision for plurilateral agreements in Annex 4, but the consensus requirement makes it difficult to add any new agreements to the annex. Plurilaterals are agreements that are limited to only those countries that have signed up to the agreements. The rights and obligations under those agreements are only accruable to that specific set of members (the rights accruing from the agreement can, however, be extended to non-members) and are not binding on the broad

WTO membership. This is as opposed to multilateral agreements, which are binding on all members.

In considering why the WTO should consider the alternative of plurilateral agreements, Draper contends that certain factors imply a convergence towards reduced ambition in the WTO negotiations, as evidenced by the Doha impasse. These include the structural adjustment of the global economic and political geography; the growing disillusion with unilateral economic liberalisation mainly due to the global economic crisis; as well as the vacation of the leadership role of the US in the WTO.¹¹⁹ As such, if this impasse remains unresolved then the WTO may lose its relevance as major trading powers bypass it because of its lack of effectiveness.¹²⁰ In the absence of consensus in the Doha negotiations, plurilateral agreements may actually be the next best solution to save the WTO from redundancy.

As discussed, the WTO has a history with the plurilaterals approach as the predecessor to the Single Undertaking system. Plurilaterals have also been celebrated as the variable geometry approach and would assist with moving trade liberalisation forward and preventing developing countries from undertaking onerous obligations that they struggle to implement under the Single Undertaking.¹²¹ Also, considering that the current system of consensus has been likened to weighted voting and, because the decisions lie within a small minority of countries with the majority share in world trade, the system does not deviate much from operating like a WTO executive committee. For the same reasons that the consensus decision is in a quandary, the weighted voting and executive committee systems would not work in the WTO context.

The Warwick Commission also proposes that the WTO consider the use of ‘critical mass’¹²² decision-making in light of the paralysis of decision-making currently being experienced.¹²³ Tariff liberalisation is still very relevant; indeed one of the most contentious issues currently in the Doha Round is tariff reduction in the Non-Agricultural Market Access negotiations and in the sectoral negotiations. However, the Warwick Commission identifies the plurilaterals approach as being the most promising approach to improve decision-making for new topics in the WTO.¹²⁴ These are agreements that will apply primarily among the signatories rather than among the wider membership of the WTO. The biggest fear, which probably motivated the developing countries’ dissension against plurilaterals, is that agreements will be negotiated on exactly the same issues that developing countries are trying to keep out of the negotiating table, eg the Singapore issues. This is a valid concern, however, in reality, trade liberalisation is a constant thread that runs through the WTO. Although there are still some sectors that are massively protected in some countries, with all the multilateral and unilateral liberalisation since the GATT days, countries are experiencing a liberalisation fatigue. Two or three decades down the line, the debate will no longer be about tariff liberalisation but rather about the new generation issues.

Also, if the plurilaterals are allowed to go ahead, there is the fear that the bar might be set too high for developing countries to reach and then, in the same fashion as with the Tokyo Codes, these plurilateral agreements are then multilateralised. These are concerns that should be taken into consideration as the plurilateral approach to decision-making is being crafted.

A few recommendations have been made on the criteria and procedures to be adopted with regard to plurilaterals should members decide to adopt this approach. The Warwick

Commission although it makes reference to a variable geometry approach to ‘critical mass’ agreements, has made the following recommendations.¹²⁵

- The existing rights and obligations under the current system need to be protected and the expansion into new regulatory areas through plurilaterals should be of such nature to provide a positive global welfare benefit;
- The disciplines should be binding and justiciable;
- The MFN principle should be applied to such agreements but the obligations should only fall on the signatories;
- There should be means of addressing any adverse distributional benefits arising from such plurilateral agreements for any affected countries;
- There should be provision for technical support, capacity building and infrastructure support for developing countries wishing to participate in such agreements;
- Members that are not part of the agreement from the onset should have the ‘unchallengeable and unqualified right’ to join the agreement at any time and on terms no more onerous than the initial signatories.

Additional recommendations from the World Economic Forum (WEF) include that:¹²⁶

- Membership must be voluntary;
- The subject of the plurilateral is a core trade related issue;
- The issue under negotiation should enjoy substantial support from the WTO’s membership; and,
- The ‘subsidiarity’ principle should apply in order to minimise the intrusion of ‘club rules’ on national autonomy.

The question of whether to extend the preferences flowing from the plurilateral agreements to non-signatories as recommended by the Warwick Commission could be regarded as a bit controversial as it might promote free-riders. However, the WEF recommends that the issues considered for plurilateral agreement should generally enjoy support from the WTO. In other words, rather than have the entire WTO membership sign up to an agreement on a certain trade issue and then apply SDT to smaller developing countries and LDCs, these countries will be exempted completely from signing up to these agreements for lack of capacity. Another way of protecting the non-signatories is to make sure that all the members participate in the negotiation of these agreements to ensure that countries do not later sign up to obligations that they had no say in creating. Of course, this is based on the countries negotiating in good faith. The understanding that developing countries and LDCs do not have to sign up at the initial stage should encourage negotiations aimed at ensuring sound agreements that cater for the interests of both developed and developing countries, especially as they will be negotiating with the understanding that at some point, when they have capacity, they will sign up. This is where the recommendation by the Warwick Commission as well as by the WEF on technical support comes in. In that particular regard, ways of strengthening the Aid for Trade initiative should be looked at.

With regard to developed country agendas being the subject of these plurilaterals, given the rise of developing country influence in the WTO and the changes in global

economics, maybe it is time that developing countries became more proactive in the WTO rather than reactive. They could launch their own plurilateral negotiations, which could work to serve the issue linkages that the system currently gets through the Single Undertaking.

Who will reform the WTO?

Of course, in order for any reform of the decision-making system in the WTO to take place, there needs to be unanimous agreement from all the WTO members. Members are currently divided on the issue of reform in the WTO but – just as all contentious decisions have been made in the WTO because there was strong leadership – leadership in the WTO is also central to the key reform necessary for the institution to progress from Doha and some of the other challenges it faces.

Although the US and the EU remain indispensable to any reform process, it is imperative that the emerging economies be brought into the fold as well. These countries – Brazil, India, China and now Russia – and to a significant extent South Africa as well, will play a pivotal role in bringing other developing countries to the table and in convincing them that reform of the decision-making mechanism and particularly moving to the plurilateral system is critical to the future relevance of the WTO. Speaking in the context of a Doha resolution, Draper and Dube identify a new group in the WTO that is representative of the power dynamics and the changed global political landscape, which could be key in pushing for change – the ‘G11’.¹²⁷ This group would constitute the US, the EU, Canada, Australia, Japan, Brazil, China, India, Argentina, South Africa and Mauritius. This is the same group that could potentially reform the WTO once it resolves the Doha Round, if they can realise and harness their power. The composition of this group could change easily, however, with some countries falling off and others joining.

CONCLUSION

The WTO was created following the realisation that GATT could not support the new structure and agreements that were being decided in the Uruguay Round. The change from GATT to the WTO was necessitated by institutional challenges brought about by an expanded WTO agenda and the Single Undertaking. It is important to recognise that once again, the WTO finds itself at a juncture in which a change to its decision-making mechanisms is necessary, as the current system is not sustainable. The failure of Doha, and in this case, non-resolution of the impasse for years on end, will have the same effect as a failed round, and will prevent the institution from going forward and any new discussions from taking place. Developing countries will certainly not allow any new discussions to take place in the wake of a failure to realise the ‘development’ round. The WTO therefore finds itself in a crisis of both relevance, and, if it lacks relevance, of legitimacy – and this needs to be resolved. The institution needs to prove that it is capable of responding to global changes and challenges, at both a political economy and an agenda level.

ENDNOTES

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- 11 Pauwelyn J, *op. cit.*
- 12 Michalopoulos C, 'The Role of Special and Differential Treatment for Developing Countries in GATT and the World Trade Organisation', 2000 World Bank Policy Research Working Paper, 2388 3, <http://siteresources.worldbank.org/INTARD/825826-1111405593654/20432097/TradeanddevelopmentintheGATTandWTO.pdf>.
- 13 Draper P & N Khumalo, *Smoke and Mirrors? Sub-Saharan Africa's Negotiating Position in the Doha Development Agenda through the Prism of Special and Differential Treatment*, Trade Policy Briefing, 2. Johannesburg: SAIIA (South African Institute of International Affairs), 2003.
- 14 *Ibid.*
- 15 Baldwin R, 2010b, *op. cit.*
- 16 Pauwelyn J, *op. cit.*
- 17 Hoekman BM & MM Kosteci, *The Political Economy of the World Trading System: The WTO and Beyond*. New York: Oxford University Press, 2nd edition, 2001.
- 18 Lester S *et al.*, *World Trade Law: Text, Materials and Commentary*. United Kingdom: Hart Publishing, 2008.
- 19 *Ibid.*
- 20 Lester S *et al.*, *op. cit.*
- 21 Jackson JH, 'GATT and the future of international trade institutions', *Brooklyn Journal of International Law*, 8, 11, 1992, as referenced in Lester S *et al.*, *World Trade Law: Text, Materials*

- and Commentary*. United Kingdom: Hart Publishing, 2008.
- 22 Baldwin RE, 'Failure of the WTO Ministerial Conference at Cancun: Reasons and remedies', 29, 2006, *The World Economy*, <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9701.2006.00815.x/pdf>. Although the classification of the challenges that have made decision-making in the WTO more difficult is agreed with, the corresponding interpretation of the challenges is not necessarily the same across all four identified challenges.
- 23 Cottier T, *op. cit.*
- 24 *Ibid.*
- 25 Singapore issues are the four issues prioritised at the Singapore Ministerial in 1996, namely trade facilitation, investment, competition policy, and transparency in government procurement. The latter three were rejected for negotiation by developing countries at the 2003 Cancun Ministerial. Trade facilitation was included in the mooted Doha package.
- 26 Draper P, *Whither the Multilateral Trading System? Implications for (South) Africa*, Occasional Paper, 6. Johannesburg: SAIIA, 2010.
- 27 *Ibid.*
- 28 Baldwin RE, *op. cit.* The issue on government procurement resonates with the South African government's reservations when it comes to the plurilateral agreement on Government Procurement in the WTO. The assertion is that such an agreement would have a negative affect on the government's black economic empowerment programme that is designed to help in transforming the economy, which is biased in favour of the minority as a result of a historical legacy.
- 29 Although, these countries could have taken part in the negotiations if they had wanted to but they opted not to negotiate due to the prevailing import-substitution industrialisation development model orthodoxy.
- 30 Baldwin RE, *op. cit.*
- 31 Baldwin R, 2010b, *op. cit.*
- 32 Baldwin RE, *op. cit.*
- 33 Cottier T, *op. cit.*
- 34 Currently, however, there is debate about the exact status of these countries, with some critics arguing that the term 'emerging' is a misnomer as these countries have already 'emerged'.
- 35 The Warwick Commission, *The Multilateral Trade Regime: Which Way Forward? The Report of the First Warwick Commission*. Coventry: The University of Warwick, 2007.
- 36 For instance, China's trade growth poses a threat to other developing countries with its cheap industrial exports and this makes their interests at the WTO contradictory. In agriculture, the interests of food-exporting developing countries, such as Brazil and Argentina, are inimical to those of net food-importing developing countries; and their positions on agricultural trade are diametrically opposed. See Baldwin R, 2010b, *op. cit.*
- 37 Collier P, *op. cit.*
- 38 It must be noted that although there has been an increased and overwhelming foray into non-tariff regulatory issues, trade liberalisation still remains the core of the WTO agenda. Indeed, some of the key issues in the Doha Round, whose resolution might facilitate the resolution of the entire round, revolve around the conventional issues of tariff liberalisation and market access: non-agriculture market access negotiations (NAMA), agricultural trade negotiations, negotiations on trade remedies, Aid for Trade, SDT and Graduation and the General System of Preferences (GSP), to mention but a few, see Cottier T, *op. cit.* This core focus on tariff reductions and market access despite observations of a liberalisation fatigue in the WTO,

which might also be attributed to the slow pace of the Doha Round although there are other, more fundamental reasons.

- 39 Collier P, *op. cit.*
- 40 This is a product of the United Nations Conference on Trade and Development (UNCTAD), which adopted the GSP in 1965, allowing developed countries to grant trade preferences to developing countries of their choice. This deviated from the allowances of GATT article I, which only recognised and allowed trade preferences accruing from a past colonial relationship between a developed country and a developing country. In order to effectuate the GSP, it was granted a waiver in respect of article I by GATT contracting parties. See Dube M, *The WTO Non-Agricultural Market Access (NAMA) Negotiations and Developing Countries: In Pursuit of the 'Development Agenda'*. LLM Thesis, University of Pretoria, 2010, http://www.chr.up.ac.za/images/files/research/idlu/dissertations/2010/memory_dube.pdf.
- 41 Sutherland P *et al.*, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*. Report by the Consultative Board to the Director-General Supachai Panitchpakdi. Geneva: World Trade Organisation, 2004, http://www.ipu.org/splz-e/wto-symp05/future_WTO.pdf.
- 42 *Ibid.*
- 43 Under its Africa Growth and Opportunity Act, which paves way for a preferential trading scheme in favour of African countries, the US makes demands of sub-Saharan countries that include the establishment of a market-based economy; the rule of law and political pluralism; economic policies to reduce poverty; a system to combat corruption and bribery; protection of workers' rights; and elimination of barriers to trade and investment. See Garay LJ & R Cornejo, 'Rules of origin and trade preferences' in Hoekman B *et al.* (eds), *Development, Trade and the WTO: A Handbook*. Washington: The World Bank, 2002.
- 44 *Ibid.*
- 45 Baldwin R, 2010b, *op. cit.*
- 46 Baldwin R & P Thornton, *Multilateralising Regionalism. Ideas for a WTO Action Plan on Regionalism*. London: Centre for Economic Policy Research, 2008; Baldwin R & P Low, *Multilateralizing Regionalism. Challenges for the Global Trading System*, New York: Cambridge University Press, 2009.
- 47 Michalapoulos C, *op. cit.*
- 48 Lichtenbaum P, "Special Treatment" versus "Equal Participation": Striking a balance in the Doha negotiations', *American University International Law Review*, 17, 2002, pp. 1004–1032, <http://www.wcl.american.edu/journal/ilr/17/lichtenbaum.pdf>.
- 49 International Centre for Trade and Sustainable Development & International Institute for Sustainable Development, 'Special and Differential Treatment', Doha Round Briefing Series, 1, 13, 2003, http://www.wto.org/english/forums_e/ngo_e/iisd_specdiff_treatment_e.pdf.
- 50 Lichtenbaum P, *op. cit.*
- 51 *Ibid.*
- 52 Paragraph 50 of Doha Ministerial Declaration. WT/MIN(01)/DEC/1 20 November 2001. Ministerial declaration, adopted on 14 November 2001, http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.
- 53 Dube M, *op. cit.*
- 54 Steger DP & N Shpilkovskaya, 'Internal management of the WTO: Room for improvement', in DP Steger (ed.), *Redesigning the World Trade Organisation for the Twenty-First Century*. Ottawa: Centre for International Governance Innovation, 2009.

- 55 Ehlermann and Ehring state that: ‘One needs to distinguish between rule making and decision making, as these exercises are different in nature from a constitutional point of view. The formal rules of the WTO reflect this distinction, even though it largely disappears in the organisation’s practice.’ See Ehlermann CD & L Ehring, ‘Decision-making in the World Trade Organisation: Is the consensus practice of the World Trade Organisation adequate for making, revising and implementing rules on international trade?’, *Journal of International Economic Law*, 51, 2005, pp. 51–75, <http://jiel.oxfordjournals.org/content/8/1/51.full.pdf+html>. This paper, however, takes the position that the lines are blurred. Both decision-making and rule-making face the same constraints, especially given that even decisions relating to rule-making or amendments are difficult to reach consensus over, and hence rules cannot be made or amended. The two are thus interchangeable, although the standard reference for this paper is ‘decision-making’.
- 56 Rule 16 of the Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council. See Steger D & N Shpilkovskaya, *op. cit.*
- 57 This is as distinct from the interpretations performed by panels and Appellate Bodies when clarifying WTO rules and as defined in article 3.9 of the Dispute Settlement Understanding. See Ehlermann CD & L Ehring, *op. cit.*
- 58 Ehlermann CD & L Ehring, *ibid.*; Steger D & N Shpilkovskaya, *op. cit.*
- 59 Lester S *et al.*, *op. cit.*
- 60 Article IX:2 of the WTO Agreement. Steger D & N Shpilkovskaya, *op. cit.*
- 61 *Ibid.*
- 62 Article IX:1, footnote 3 of the WTO Agreement and article 2 (4) of the Dispute Settlement Understanding.
- 63 Article IX:3, footnote 4 of the WTO Agreement.
- 64 *Ibid.*
- 65 Ehlermann CD & L Ehring, *op. cit.*; Steger D & N Shpilkovskaya, *op. cit.*
- 66 Article X: 1 of the WTO Agreement.
- 67 Article X of the WTO Agreement.
- 68 Article I of GATT 1994.
- 69 Article II of GATT 1994.
- 70 Article X2 of the WTO Agreement.
- 71 WTO, ‘How the negotiations are organized’, http://www.wto.org/english/tratop_e/dda_e/work_organ_e.htm.
- 72 Of course, there were provisions made for developing countries through longer transition periods and promises of technical assistance and other implementation-related assistance.
- 73 Low P, ‘WTO decision making for the future’, Staff Working Paper, ERSD-2011-05. Geneva: WTO, 2011, http://www.wto.org/english/res_e/reser_e/ersd201105_e.pdf; MacMillan E, ‘Doha decision making: Implications of the Consensus and Single Undertaking Principles for developing countries’, *Commonwealth Trade Hot Topics*, 71, 2010, <http://www.thecommonwealth.org/files/221610/FileName/THT71DohaDecision-Making.pdf>.
- 74 MacMillan E, *ibid.*
- 75 Preeg EH, *Traders in a Brave New World, the Uruguay Round and the Future of the International Trading System*. Chicago: University of Chicago Press, 1995; as quoted in Levy PI, Do We Need an Undertaker for the Single Undertaking? Considering the Angles of Variable Geometry, Yale University, Paper prepared for the CEPR/ECARES/World Bank Conference on The World Trading System Post-Seattle: Institutional Design, Governance and Ownership, Brussels, 14–15 July 2000.

- 76 Oxfam, *Institutional Reform of the WTO*, Oxfam GB Discussion Paper. Oxford: Oxfam, 2000, <http://policy-practice.oxfam.org.uk/publications/institutional-reform-of-the-wto-112433>.
- 77 Hudec R, 'GATT and the Developing Countries', *Columbia Business Law Review*, 1, 1992, pp. 67–77.
- 78 Baldwin R, 2010b, *op. cit.*
- 79 Paragraph 47 of Doha Ministerial Declaration. WT/MIN(01)/DEC/1 20 November 2001. Ministerial declaration, adopted on 14 November 2001, http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.
- 80 Normally, during WTO negotiations nothing is agreed until everything is agreed. However, an 'early harvest' allows for issues that have been agreed on by all members to start being implemented even while negotiations are still ongoing on other issues.
- 81 MacMillan E, *op. cit.*
- 82 *Ibid.*
- 83 Lester S *et al.*, *op. cit.*
- 84 Hoekman B & MM Kostecki, *op. cit.*
- 85 Lester S *et al.*, *op. cit.*
- 86 *Ibid.*
- 87 Ehlermann CD & L Ehring, *op. cit.*
- 88 Khumalo N, Looking beyond the Doha Round. Reforming the WTO Negotiating Process, Policy Briefing, 4. Johannesburg: SAIIA, 2009.
- 89 Hoekman B, *op. cit.*
- 90 Khumalo N, *op. cit.*; Low P, *op. cit.*
- 91 Khumalo N, *ibid.*
- 92 Ehlermann CD & L Ehring, *op. cit.*
- 93 *Ibid.*
- 94 Pedersen PN, 'WTO decision-making process and internal transparency', *World Trade Review*, 5, 2006, in S Lester *et al.*, *op. cit.*
- 95 *Ibid.*
- 96 Hoekman BM & MM Kostecki, *op. cit.*
- 97 Khumalo N, *op. cit.*
- 98 This section draws extensively from Narlikar A, WTO Decision Making and Developing Countries, Trade-Related Agenda, Development and Equity Working Paper, 11. Geneva: South Centre, 2001.
- 99 To illustrate, efforts by the WTO Director General, Pascal Lamy, to conduct informal meetings with the G7 during the July 2008 Ministerials failed to both discuss or resolve issues of interest to developing countries, such as the cotton issue, the banana negotiations, duty-free quota-free access for LDCs and the country-specific issues in the NAMA negotiations. All these issues were not on the agenda despite their relevance in the negotiations, because none of the countries that Lamy conducted the informal meetings with concerned with those particular issues. See Ismail F, *Reforming the WTO: Developing Countries in the Doha Round*. Jaipur: CUTS International, 2009).
- 100 They have to have a presence in Geneva in order to be considered and if they are in arrears with their membership fees for more than a year then they are not eligible to hold office.
- 101 Narlikar A, *op. cit.*
- 102 *Ibid.*
- 103 *Ibid.*

- 104 Hoekman B, *op. cit.*
- 105 Ismail F, *op. cit.*
- 106 Ehlermann CD & L Ehring, *op. cit.*
- 107 Low P, *op. cit.*
- 108 Cottier T, *op. cit.*
- 109 The Bretton Woods Institutions are the World Bank and the IMF
- 110 Cottier T, *op. cit.*
- 111 Low P, *op. cit.*
- 112 Hoekman B, *op. cit.*
- 113 Cottier T, *op. cit.*
- 114 Ehlermann CD & L Ehring, *op. cit.*
- 115 Lester S *et al.*, *op. cit.*
- 116 Narlikar A, *op. cit.*
- 117 Sutherland P *et al.*, *op. cit.*
- 118 Narlikar A, *op. cit.*
- 119 Draper P, *op. cit.*
- 120 *Ibid.*
- 121 MacMillan E, *op. cit.*
- 122 'Critical mass decision making would be a situation in which a subset of governments could decide that they wished to pursue a particular negotiation. The presumption would be that they wouldn't have to involve all the membership in the negotiation, nor implicate them in the results of the negotiation.' Low P in interview with R Vaitilingam, 'World Trade Organization decision-making for the future', 20 November 2009, <http://voxeu.org/index.php?q=node/4240>.
- 123 The Warwick Commission, *op. cit.*
- 124 *Ibid.*
- 125 Plurilaterals are essentially about the 'critical mass' being able to move forward on certain issues in which the rest of the membership is unable or unwilling to proceed with liberalisation.
- 126 Draper P, *op. cit.*
- 127 Draper P & M Dube, *Dreaming out Loud: Implications of a Doha End-Game for South Africa*, Occasional Paper, 100. Johannesburg: SAIIA, 2011.







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