

CHAPTER VII

A results-oriented institution - decision-making and variable geometry

A. CONSENSUS

269. The World Trade Organization is in large measure a negotiating machine.⁴³ Like the GATT before it, the WTO was designed to seek negotiated solutions to the challenges of global trade. The efficient conduct of negotiations and the pursuit of multilateral consensus as a means of closing off the bargaining and the making of decisions are the WTO's only means of fulfilling its mandate. The organization has no money with which to secure objectives, unlike the World Bank and the International Monetary Fund. While trade is an important factor in achieving development aims, the WTO is not a development agency. It relies instead on technical assistance and capacity building aid to achieve results among its poorer Members. Other institutions are expected to fulfil that role; the WTO is in the business of negotiating conditions of market access and supportive trade rules that provide opportunities for its membership to take commercial advantage of the global economy.

270. In recent years, the WTO has sometimes given the impression of being unable to negotiate effectively. As public and political interest has increasingly focused on the institution, it has not always appeared able to deliver on the stated ambitions of its Member governments. Still less has it been able to respond to the multiplicity of demands on which special interest groups have campaigned. This has led to frustration, at best, and extreme, sometimes violent protest, at worst.

271. The extent to which the WTO can or should seek to meet the demands of all its critics is covered in other chapters. Here, we look at the mechanics of negotiations and decision-making to establish whether structures and procedures are optimal, including whether the consensus rule should be modified.

B. NEGOTIATING ADVANCES ARE NATURALLY SPORADIC

272. It ought to be stressed at the outset that periods of modest achievement by the world trade body are not unusual. Since 1947, the GATT and the WTO have moved forward in fits and starts - notably through eight completed trade rounds. In the early years, these rounds were largely about tariff reductions among a small group of countries: they could be conducted and concluded relatively quickly. Since the 1960s, however, there has been a single, increasingly broad, multilateral trade round concluded once every 12 or 13 years. In between, work has concentrated on the settlement of disputes and accessions. Clearly, Members have needed time to digest and implement the results of each round. Negotiating fatigue is a real phenomenon. Moreover, the political impetus necessary to launch and drive forward a new negotiation deflates naturally as other issues predominate and economic fortunes encourage or discourage trade liberalization initiatives.

273. Arguably, the WTO has done well since the conclusion of the Uruguay Round and the establishment of the new institution in 1995. After all, in the late 1990s it secured major deals covering telecommunications and financial services. In 2001, it tied up the most complex accession negotiation ever, that of China. There have been many other successful accession negotiations conducted also. Furthermore it has resolved more trade disputes in eight years than the GATT managed in almost 50 years. And, against many odds, it launched the Doha Development Agenda.⁴⁴

274. Yet, what progress there has been, was hard won. Movement in the Doha negotiations has been painfully difficult and has raised questions about the process itself. However, it would be wrong to jump to conclusions about the need for structural and procedural change. There are many potential explanations for the

⁴³ The functions of the WTO as laid out in Article III of the Marrakesh Agreement Establishing the WTO include: facilitating implementation, administration and operation of the Multilateral and Plurilateral Trade Agreements; administering the Dispute Settlement Understanding; administering the Trade Policy Review Mechanism and cooperating, as appropriate, with the IMF and World Bank to achieve greater coherence in global policy-making.

⁴⁴ The Doha Development Agenda Round of negotiations was launched at the Fourth WTO Ministerial Conference in Doha, Qatar, in 2001.

sometimes troubling absence of substantive negotiating advances in recent years. First, participation is broader and more intense. There are many more Member governments involved (almost 150 compared to the 86 at the start of the Uruguay Round), so consensus is bound to be more elusive. More important than sheer numbers of Members, the impact of much-enhanced training and technical assistance programmes means there are now many more effective negotiators with the capacity to make a mark. Additionally, Members still lacking negotiating capacity have access to externally funded consultancy services which also seek energetically to have a visible impact on the negotiating process.

275. An area of explanation lies in the scope and sensitivity of negotiations. Many of the easy issues have been tackled; tariff barriers, for instance, have been reduced in developed countries to the point where those that remain at high levels are also the most politically sensitive. As a consequence, further opening of market access in many areas of goods and services is a hard sell for governments. Even though many developing countries start from much higher levels of protection, their governments face no less difficulty in exposing domestic industry to external competition. More generally, and leaving market access to one side, the issues dealt with by the WTO - although clearly trade-related - increasingly touch on sensitive aspects of domestic policy-making and crucial choices among welfare objectives. Agricultural support policies and the application of intellectual property rights are obvious examples.

276. The results of WTO negotiations bite more deeply into national competitiveness than ever before. In an increasingly open global economy, those who seek to compete - for markets or for investment - all have much to gain from major multilateral trade deals. The balance between "gains" and "concessions" is acutely defined: ambitions can be very high, defensive

postures exceedingly rigid. Furthermore there is too frequently a political bias in domestic assessments of national competitiveness that leads in counterproductive directions. The recent controversy over outsourcing of services jobs is an obvious example

277. There are currently no opt-out options available to WTO Members where new rules and agreements are being negotiated. Prior to the Uruguay Round, there were few obligations imposed on developing countries and, as a result of the Tokyo Round especially, a number of important plurilateral agreements to which membership was wholly voluntary. The Uruguay Round changed all that, with a "single undertaking" to which all WTO Members would be required to subscribe - albeit with differing implementation periods. That change, welcome in itself, now weighs heavily on developing country governments and has clearly coloured their attitudes towards the Doha Round. Simply acquiescing in decisions promoted by the major players is no longer cost free.

278. Finally, while business and consumers continue, rightly, to be the key stakeholders in multilateral trade negotiations, governments must increasingly take account of others. The impact of development, environmental, labour and other interests in the past decade has been significant. Governments must decide for themselves how to respond in terms of WTO negotiations. However, in many cases the impact of other stakeholders has led to ambivalence in governments about their fundamental support for the multilateral trading system and the negotiating positions they adopt. In short, trade negotiations have long ceased to be the almost exclusive domain of technocrats; they are now, increasingly, high level concerns for political leaders.

279. Few of these changes are likely to go away. To a large extent the WTO must learn to live with them. Its Members can look at

possible methods of driving negotiations and they can consider how to facilitate decision-making, but they cannot ride roughshod over the rights of individual Members. Nor can anyone pretend that governments will cease to make very political, as well as commercial, judgments on when and how to move in negotiations. The WTO, like the GATT, is a remarkable instrument of multilateralism. Because it is so, it must remain for sovereign governments to decide, at every point, their national interests and to demand that those interests are fully reflected in everything the WTO decides. That may be frustrating when particular Members wish to move ahead and others prefer to hold back. We look at some alternative approaches in the following paragraphs. But it should be observed that almost no WTO Member is ever single-mindedly on the side of creating new obligations and further opening markets. It is, to say the least, a little disingenuous to complain about lack of liberalizing zeal in the WTO membership one day and to insist on a sovereign right to maintain some sensitive corner of protection the next. Ambition and humility are often good bedfellows.

C. SHOULD THE CONSENSUS PRINCIPLE BE QUESTIONED?

280. Certainly, the most dramatic solution to the troublesome system of decision-making in the WTO would be to look again at the consensus rule. Voting is provided for in the Marrakesh Agreement with specific majorities required for certain specific situations. However, the practice of decision-making by consensus in the WTO has been, so far, to the exclusion of voting. Consensus was also the norm in the GATT, although voting was used, for instance in the case of new accessions and for waivers.

281. Establishing a consensus means reaching a point where no WTO Member is actively opposing a decision. Put another way, it means that any Member, no matter how insignificant

in global trade terms, can have a veto on any decision of the institution. That is the WTO's way of ensuring that the poorest and weakest cannot be overridden by the rich and powerful. It has been a cornerstone of the trading system over more than five decades; it is the procedural equivalent of the most-favoured-nation principle that ensures the weakest trading nations receive, unconditionally, the best conditions of market access offered in the WTO by the strongest. Thus, the big and powerful countries must spend time to persuade even small and less developed countries of the merits of a proposal. The smaller, less developed countries are better able to have leverage, which requires that they be listened to.

282. There is a larger sense of legitimacy for proposals adopted by the consensus approach, since it requires that no Member object to a proposal. But it should be noticed that the definition of consensus favours Members that can afford to be present at all meetings, since absence - or abstention - does not itself defeat a consensus.

283. On the other hand, there are also disadvantages to the consensus system of decision-making. As the number of Members grows larger and larger (now 148, perhaps going to 170 or more), it becomes harder and harder to implement needed measures that require decisions, even when there is a vast majority of the Members that desire a measure. The consensus requirement can result in the majority's will being blocked by even one country. If the measure involved a fundamental change, such difficulty would probably be worthwhile, as adding a measure of "constitutional stability" to the organization. But often there are non-fundamental measures at stake, some of which are just fine-tuning to keep the rules abreast of changing economic and other circumstances.

284. When the decision-making process becomes wholly inefficient and “treaty rigidity” sets in, there is much temptation to take situations to another procedure, one which has a proven ability to at least come to a reasoned decision. This other procedure in the context of the WTO is, of course, the dispute settlement system. Thus, a relative paralysis or deep inability to move forward, can actually cause issues that ought to be decided by a diplomatic or “legislative rule-making” process, to instead be referred to the juridical system, perhaps in situations that are inappropriate for a juridical system. Likewise, consensus blockage leads WTO Members to “take their business elsewhere” by establishing agreements or institutions separately from the WTO, or to utilize other techniques of “variable geometry”.

285. Sometimes observers say consensus decision-making is not a problem since they do not observe many situations of a consensus being blocked. However, even without the blocking occurring, the fact that consensus is known to be the only pathway open in some situations leads Members to refrain from even making the attempt to achieve movement in the organization. Further, almost all potential decisions are prepared informally in advance and usually do not move to a formal proposition in a decision-making body if they are not ripe for consensus.

286. So the question has been put forward by a number of different Members and observers of the WTO as to what the organization should do about its “consensus problem.” Clearly, voting is rarely, if ever, a wise alternative, even though the WTO treaty text provides for voting as a fallback (Article IX), or in some cases, as the method of decision. As stated above, the WTO practice so far has been quite consistent, even in those cases, to use consensus. Furthermore, the voting structure in the WTO can be manifestly unfair, given the existence of some large blocs of votes being available to some parties.

287. There are other practical objections to departing from consensus. Where, for instance, negotiations take place within a broad agenda covered by a single undertaking - as in the Doha Development Agenda - breaking the consensus practice would deny tactical advantages and leverage to those excluded. Some Members seek to block progress on potential agreements extending the reach of the trading system because they lack the means to implement new commitments. It must be incumbent on the membership collectively to ensure appropriate provisions and transition periods as well as adequate capacity-building support for implementation. Denying such a Member its right of veto would not be an acceptable response.

288. In the light of these conflicting policy goals, the Consultative Board has two recommendations. **First, it recommends that the WTO Members give serious further study to the problems associated with achieving consensus in light of possible distinctions that could be made for certain types of decisions, such as purely procedural issues.**

289. **As a second recommendation in this context, the Consultative Board urges the WTO Members to cause the General Council to adopt a Declaration that a Member considering blocking a measure which otherwise has very broad consensus support shall only block such consensus if it declares in writing, with reasons included, that the matter is one of vital national interest to it.**

290. Ultimately nobody can be excluded from any decision as things stand; nor should they. The fact must be faced that some issues dear to some participants will not always be progressed quickly - sometimes not at all. That may be frustrating, but multilateralism was never easy. There are, however, systemic and procedural options that might provide the means to lighten the burden of securing progress in the WTO.

It is important that the institution looks carefully at these and other possibilities. Indeed, as the process of globalization proceeds, the WTO is becoming a unique laboratory for multilateral negotiations. Thus, these issues should be considered in a very broad perspective.

D. VARIABLE GEOMETRY - LETTING THE WILLING MOVE FORWARD

291. One set of possibilities focuses on variable geometry in WTO commitments. In other words, some Members may choose to take on more or less obligations - obligations that may, or may not, be enforceable through the dispute settlement mechanism. A second area worthy of consideration - that is not mutually exclusive to the first - relates to more sophisticated management and consultative processes.

292. "Variable geometry" is a term to denote that obligations differ for different Members of the organization. To a great extent, the GATT and the WTO have always had certain elements of variable geometry. Tariff, service and government procurement schedules are examples, based on negotiating principles tailored for those subjects. The WTO Agreement provides for a few "plurilateral" (meaning optional, not binding on all) agreements in Annex 4. However, the consensus rule makes it difficult to add new agreements to that Annex. Special and differential treatment is a form of variable geometry to give special recognition for developing country needs. Regional or other GATT Article XXIV agreements are another example. (See related discussion in Chapter II.)

293. There are advantages to some amount of variation in obligations to avoid the "one size fits all" problems, and to provide opportunities for experimentation, innovation, and measures that have policy value, but which cannot be achieved in the context of so many Members. However, clearly there are other downsides.

294. A major effort was made in the Uruguay Round to move away from further splintering the multilateral trading system through the kind of limited membership agreements (plurilateral agreements) reached in the earlier Tokyo Round. In whatever form, re-establishing two or more classes of membership in the WTO is not always an optimal solution to the challenges of extending the scope of the institution, nor to deepening the commitments to liberalization of its Members. To some extent, the WTO serves to encourage and nudge its Members - particularly where governments face entrenched domestic or private sector opposition - towards development-friendly, market-based policy options. That said, for the reasons above, the alternatives to universal commitments must at least be reviewed.

295. The Tokyo Round generated nine agreements to which only limited numbers of GATT contracting parties ever subscribed. In the main, it was developed countries that signed on to these "codes". They covered largely non-tariff measures including technical barriers to trade, anti-dumping measures, subsidies and countervailing measures, government procurement, import licensing, customs valuation and so on. The Uruguay Round resulted in all WTO Members being required to take on all obligations under most of the WTO agreements. These included updated versions of the Tokyo Round codes. Varied and sometimes very lengthy timeframes were provided for developing countries to implement. Even so, many poorer countries found difficulty in so doing, notably with respect to the customs valuation agreement.

296. In practice, only two Tokyo Round plurilateral agreements remain operational in the WTO: those covering government procurement and trade in civil aircraft. The former is subscribed to by only around one-fifth of the membership, the latter much less. However, some 63 WTO Members are now participants in the Information Technology Agreement (ITA)

added in 1996. Taking the plurilateral route again would permit willing groups of Members to take commitments on specific dossiers where no agreement of meaningful substance is likely on a universal basis. All WTO Members might be enabled to participate in negotiations and subsequently decide whether or not to sign and implement.

297. Certainly the plurilateral approach would enable sets of WTO Members wishing to negotiate more ambitious commitments to do so. Groups might negotiate across a broad agenda or on single topics. What about the remaining Members? One proposal would permit them to participate in the negotiations of a plurilateral agreement but to retain the freedom to opt out of a result they found unpalatable. Another approach would be to exclude them from the negotiations but provide an opportunity for them to opt in at a later stage.

298. Clearly, this is a divisive approach that would enshrine a multiclass membership structure. It could take the multilateral trading system backwards rather than forwards. Those choosing not to participate might quickly be left far behind or feel marginalized. And they might play no part in the design of commitments they may ultimately desire - or have no alternative but - to sign on to. Thus, the rules under which any such negotiations take place in the future should be clear in advance and appropriate to the institution. Clearly, they should not permit small groups of Members to bring into the WTO issues which are strongly and consistently opposed by substantial sections of the rest of the membership.

299. One advantage of such an approach, however, might be to dissuade the most powerful Members of the WTO from taking alternative routes in securing - or avoiding - trade liberalization with their trading partners. In particular it might diminish the attraction of regional and bilateral trade arrangements, especially those

that fail to come close to the requirements laid down in the WTO.

300. The Consultative Board therefore advises that possible plurilateral approaches to WTO negotiations should be re-examined - outside the context of the Doha Round. There should be particularly sensitive attention to the problems outlined above. If there is political acceptance of the principle it is suggested that an experts group be established initially to consider and to advise on the technical and legal implications.

E. THE “GATS SCHEDULING” APPROACH

301. The General Agreement on Trade in Services (GATS) established a new approach to the taking of trade commitments at the multilateral level. Essentially it allows each WTO Member to decide its own pace for offering market access and national treatment for specific services sectors and activities. Commitments are built from the bottom up; they are made and “scheduled” in a manner and at a speed which squares with development and other national policy priorities. Thus, while all Members would sign an agreement based on such an approach, there would be a high degree of voluntarism in concrete commitments made. Naturally, trading partners would be free to seek to improve the level of each other’s commitments through negotiation.

302. Scheduling cannot be practical in all areas. It is hard to apply, for instance, in the rule-making areas such as anti-dumping and subsidies. There are other drawbacks. In particular, the multiplicity of individual national commitments can be a complication for traders and investors that are active on a global scale. That said, any enforceable and predictable commitment made in the WTO might be seen as preferable to no commitment and constantly changing market or regulatory conditions. Moreover, as in the GATS, some provisions in

such an agreement might be generally applicable - for instance, most-favoured-nation treatment and transparency.

303. It will also be argued that the “bottom up” scheduling approach is too lacking in ambition and, therefore, commercial impact. There are alternative mechanisms: the most obvious is a “top down” approach where everything is covered by all disciplines except where specific policies and activities are identified and scheduled. That, however, moves us back to a more onerous set of obligations which may be difficult to assess and implement for poorer countries.

304. In certain circumstances, a GATS approach would be an appropriate alternative - in developing new disciplines - to a plurilateral negotiation. We therefore advise that these two concepts be further explored together.

F. TAILORING THE COMMITMENTS OF THE WTO'S POOREST MEMBERS

305. The recent concern about market access negotiations and extending the reach of the WTO into new areas has tended to focus on the capacity of least-developed countries to secure benefits from their membership and to take on new commitments. The experience of some of those countries in implementing Uruguay Round agreements - albeit with long transition periods and, often, lower levels of commitment - demonstrates the validity of some aspects of such concern. Since at least some additional implementation burdens of any new WTO obligations agreed in the Doha Round will fall heavily on least-developed Members, is there an approach that would focus specifically on them?

306. Much of the broader response, naturally, will take the shape of reinforced technical assistance efforts and capacity building aimed specifically at meeting new obligations. There

is a strong case to be made that least-developed countries should have a contractual entitlement to capacity building support to implement new commitments in the WTO. It is not good enough for advanced Members merely to express their political intent to provide support - it should be part and parcel of new agreements.

307. It is also assumed that long transition periods and, where appropriate, lower levels of obligation will continue to be provided for the WTO's poorest Members. Should more radical approaches be considered?

308. One such approach is to recognize that the least-developed countries are, unfortunately, insignificant in terms of world trade (even collectively) and to offer them the broad benefits of WTO membership while requiring of them none of the obligations. In any event, those WTO Members that provide trade benefits to LDCs currently do so while demanding little or nothing in exchange. Part IV of the GATT and the Enabling Clause establish the principal of non-reciprocity in trade negotiations under the WTO and in the provision of preferences, as we have discussed extensively in Chapter II.

309. However, going so far as to remove all obligations from all least-developed countries would be a mistake. Membership of the WTO is recognition by governments that more open and investment-friendly domestic markets create trade and generate development. Of more practical importance is that WTO membership is intended to place on governments - all governments - pressure to move them towards, not away from, competitive trade regimes.

310. It is evident that a good many least-developed country governments seek actively to harness the disciplines of the WTO to secure internal reform and to integrate into the global trading economy. Clearly, nations that wish to maintain very high levels of across-the-board

market protection and stultifying or corrupt regulatory regimes, and that have no intention of using WTO obligations to pursue development-oriented domestic reform, are going to reap minimal benefits from their membership. But if such nations exist, they are a very small minority. Most, at some point, if not today, will make constructive and creative use of their membership. Removing even minimal obligations will not hasten the day that policy changes are made to promote development and secure integration into the global economy. Such a move would also deny what little negotiating leverage least-developed countries currently wield in WTO negotiations.

311. The Consultative Board advises that wherever possible new agreements reached in the WTO, in future, should contain provisions for a contractual right, including the necessary funding arrangements, for least-developed countries to receive appropriate and adequate technical assistance and capacity building aid as they implement new obligations.