

Chapter 2

The Management of Global Trade: Purposes, Boundaries and Decision-Making

Many, but not all, of the controversies that afflict the multilateral trading system today are a product of some of the challenges facing the main organisation that guides its workings – the WTO. The predecessor of the WTO – the GATT – had served the multilateral system reasonably well over the nearly fifty years of its existence. But its success was due, at least partly, to the fact that it operated as a club, run largely by the Quad group (dominated by the bipolar relationship between the USA and the EU), where most developing country members sat on the margins, and also because the GATT’s mandate covered a much smaller set of issues. The considerably expanded and enforceable mandate of the WTO, on the other hand, remains contentious. In this Chapter, we revisit this debate and propose several recommendations for reform. We begin by recalling the potential contributions of multilateral institutions like the WTO and its predecessor the GATT and, in the section that follows, introduce the discussion on the boundaries of the WTO in an era of proliferating and potentially conflicting policy objectives. We then proceed, in Section 2.4, to analyse the implications of alternative approaches to decision-making in defining and giving effect to negotiating agendas in the WTO. Finally, Section 2.5 reviews aspects of the WTO’s enforcement functions under the dispute settlement system.

2.1 Multilateralism: the GATT and the WTO

The purpose and boundaries of the WTO cannot be understood without a discussion of the key role that multilateralism has played in fostering the global economy to date. The goal of this section is to recall the central features of multilateral economic institutions, the reasons why they were created, and the outcomes they seek to foster.

The multilateral trading system was established in the wake of the disastrous experiences of the Great Depression when

the then developed world splintered into competing currency and trade blocs, with the world’s major powers adopting ‘beggar thy neighbour’ policies of discriminatory protection and devaluation. These policies did nothing to remedy the economic problems associated with the depression, they caused terrible damage to international economic relations in general and international trade in particular, and exacerbated the rising hostilities that led to the outbreak of war, in 1939. The GATT was established as an institution to enable nations to cooperate with each other in international trade, to provide predictability, transparency, and stability in their trade relations with one another, and to offer a forum for rule-making and liberalisation. In this regard, the GATT and its successor, the WTO, have been successful, in ways that its originators did not predict.

And yet, multilateralism is a fragile institutional form, and the robustness of the multilateral trading system should not be taken for granted. Governments can pay lip service to the WTO, while focusing their priority attention and resources on the negotiation of PTAs. Few politicians or policymakers continue to appreciate the circumstances and conditions that gave rise to the multilateral trading system, and there is a widespread assumption that multilateralism and non-discrimination can easily co-exist with bilateralism, regionalism and discrimination. How many contemporary politicians connect their embrace of PTAs with faltering Doha negotiations? The multilateral trading system has survived ‘failed rounds’ in the past, for example the 1960-61 Dillon Round, largely due to strong leadership by the United States, which propelled the system forward regardless. This was, of course, a simpler proposition since the GATT was much more akin to a club than the present day WTO. These circumstances, prevailing in the first four decades after 1945, no longer exist. While the international economy has been buoyant, as it has been since the DDA was launched in

2001, many senior policymakers from leading jurisdictions seem not to be overly concerned about the weakening of the multilateral trading system. But it is also worth remembering that the largest powers have far less to fear about the consequences of a failing WTO than do other nations, given their greater bargaining power and larger internal markets.

It is also important to keep in mind that the fundamental purpose of many international institutions relates to pre-commitment – the notion that nation states are willing to separate rules of conduct from outcomes that are impossible to predict. In this way, institutions can dilute power-driven arrangements that embody *ex ante* certainties about the distribution of benefits arising from international exchange. This is what international institutions based on rules deliver and there are strong public goods characteristics here.⁷ But someone, or something, has to take responsibility for supplying and maintaining a public good. If coercion is not to be the basis of the international economic order, we must search for a critical mass of like-minded parties. This is a tough proposition presenting numerous collective action challenges.

The Warwick Commission is concerned that, at the present time, leading decision-makers in both the public and private sectors might be forgetting the principles that drove the multilateral endeavours for much of the second half of the 20th century – a dangerous and troubling development. Those principles relate to both the functions and objectives of multilateral institutions and the associated benefits, namely:

- Institutions lower transactions costs by the provision and sharing of information;
- Institutions facilitate the agreement of common rules and associated commitments;
- Institutions help make promises to adhere to those rules and commitments credible;
- Institutions reduce uncertainty and so promote predictability in state-to-state and commercial relations;

- Institutions enhance compliance with accepted norms;
- Institutions level the playing field ensuring that gains from trade are more evenly spread than might otherwise be the case.

Forgetting these lessons has implications for the successful functioning of the WTO as it was conceived in the closing stages of the 20th century. Now, we need a more complex and nuanced understanding of multilateral institutions. In the early 21st century, the traditional rule-makers, the USA and its junior partners in the post World War Two ‘grand institutional bargain’, must not forget the utility of institutions, but they must also recognise that the interests and concerns of new rule-makers and rule-takers warrant closer attention. Generally speaking, global geopolitics has changed and new actors, for example trans-national networks, and new processes of a trans-national regulatory nature, have emerged. Not surprisingly, then, expectations of the multilateral trading system have changed and this will likely have implications for the rule-making, transparency, deliberative, and enforcement functions of the WTO – indeed, the very boundaries of the WTO. The question arises as to what considerations should determine the WTO’s future boundaries and the purpose of the following sections is to offer some pointers in this regard.

2.2 Beyond Market Access? Deliberations over the Boundaries of the WTO

One of the matters that has divided WTO members is the question of which policy domains should be included in, and excluded from, the organisation’s mandate. In fact, this is a long-standing challenge. For instance, the Uruguay Round negotiations saw a deep divide between trading nations that wished to include the so-called “new issues” of services, Trade-Related Intellectual Property rights (TRIPS), and Trade-Related Investment Measures (TRIMS) under the GATT umbrella, and others who argued that the remit of the GATT should be restricted to tariffs on goods and related market access matters. Almost two decades later, the proximate cause of the collapse of the

Cancún Ministerial Conference, in 2003, was the controversy over the proposed inclusion of the four ‘Singapore issues.’⁸ Moreover, proposals have been advanced over the years to include labour and environmental issues more directly within the GATT/WTO system and these have received a mixed reception from some quarters of the WTO membership and from civil society and elsewhere. Must disputes over the WTO’s boundaries recur or can criteria be agreed to guide policymakers in the future?

Prior experience provides little guidance. By and large, in the past, the basis for expanding the agenda of the GATT and the WTO was to be found largely in the specific bargaining context of the time. Typically there was a case-by-case analysis of the policy domain at hand and the need to identify “win-win” situations through linkages and trade-offs played an important part. A good example of the latter was the last-minute inclusion of Paragraphs 31 to 33 in the DDA on trade and the environment.⁹ Moreover, each such decision necessitated debate. Many developing countries stated that they did not have sufficient expertise or resources to devote to the study of the potential consequences of both the future negotiation of new multilateral rules in certain policy domains and their implementation. Many industrialised countries contended that prior trade liberalisation revealed the need for the further elaboration of multilateral rules.

The debates over the boundaries of the WTO revealed a number of important considerations that have some bearing on future deliberations. As WTO Director-General, Pascal Lamy has noted:

‘The goal is not freer trade for trade’s sake. It is about better living standards for all countries – developing and developed alike. Because only with higher living standards, can we contribute to the eradication of poverty, better health care and education, a clean environment, a more stable, secure and peaceful world. This is our common objective. (Remarks to the Development Committee of the World Bank, Washington DC, September, 25, 2005).’

The difficulty arises in that reasonable people disagree on the goals to guide discussions over the boundaries of the WTO.

A second often contested consideration is the impact of trade and trade reform on the policy domain in question. Consider, for example, the relationship between trade and environment. Contrary to the fears of some critical activists, the relationship between trade and environment degradation is not necessarily negative. On the other hand, contrary to the claims of some doctrinaire free-traders, these relationships are not necessarily positive either. For example, liberalised trade may harm environmental quality by promoting economic growth that results in the unsustainable consumption of certain natural resources, or production of greater amounts of hazardous wastes or other pollutants. Conversely, trade disciplines can result in the reduction of, say, subsidies that encourage environmentally harmful farming or fishing practices.

Similarly, in issues of gender, trade liberalisation has in many instances been associated with rising employment and entrepreneurial opportunities for women. In other instances, trade liberalisation can exacerbate existing gender inequalities and thus worsen women’s economic and social status. Moreover, such varied results may occur in the same economy at the same time, for different groups of women. Thus, in virtually every one of the “trade and” areas, evidence available so far suggests that liberalised trade can generate complex and often contradictory effects. Much depends on the type of trade liberalisation undertaken, and the underlying economic, legal and social conditions within which it takes place.

A related reason why controversies over the mandate of the WTO have been so difficult to resolve is that the boundaries between trade-related matters and other policies or concerns are not easy to demarcate. Consider again, for example, the trade and environment nexus. To the extent that states have poor environmental regulations, the enhanced economic activity associated with liberalised trade is likely to cause additional environmental damage. From one perspective, the “problem” is not liberalised trade but rather poor domestic environmental policy, and the “solution” has little to do with trade policy. From this it follows that, if environmental harms

are properly priced, that is internalised by polluters through green taxes and so on, then there is little reason to think that increased trade and ensuing economic growth will cause undue environmental harm.

On the other hand and to the extent that it is difficult or impossible to internalise environmental externalities, increased economic activity may exacerbate environmental harms. And if the “problem” is that increased trade causes increased environmental degradation, is the “solution” to build environmental safeguards into trade rules? Some fear that this might lead governments deliberately to degrade their nation’s environment or refuse to strengthen their environmental policies so that domestic firms gain a cost advantage. This in turn raises the distinct concern as to what the appropriate policies are for a nation given its stage of development and whether trade policymakers and the WTO have the expertise to make that assessment.

Attempts may still be made to identify initiatives in which progress towards the objectives of trade policies, environmental policies, labour policies, gender policies, and other legitimate social objectives can or cannot be made together or to reinforce one another. Indeed, in many cases the WTO membership has sought to do just that.¹⁰ The question, however, is where the mandate of the WTO stops in a coherent system of international cooperation, and how other forms of governance at the domestic, regional, and multilateral levels fit in. The Commission has considered this matter at length and the following section describes our findings in this regard.

2.3 Agenda Formation and Decision-Making in the WTO

The simplest and clearest criteria on the purpose and boundaries of the WTO would ideally be based on the goals outlined in the Agreement Establishing the WTO. Unfortunately, as even a quick glance at the Agreement reveals, the objectives of ‘full employment’, ‘raising standards of living’, ‘expanding production of, and trade in, goods and services’, ‘sustainable development’ and ‘development’ among others are not

always consistent with each other. Nor does the Agreement give us a ranking of these objectives. When text fails to provide the solution, we must resort to underlying principles and consistent logic in its lieu.

It is perhaps useful to consider briefly some of the factors motivating WTO Members to seek an expanded WTO agenda. No exhaustive or analytically authoritative taxonomy can be developed where the underlying reasoning depends on the assignment of motive, but in thinking about motives one may be guided as to some of the prior questions that need asking about the desirability of expanding the WTO agenda in a particular direction. A first category of motivation may be to protect the existing bargain, particularly in relation to market access. This is the origin of the GATT national treatment provision, for example, which is designed to prevent governments from adding additional layers of protection against imports through internal measures once the terms of market access have been determined at the border. One could also characterise, for instance, the Tokyo Round Agreement on Technical Barriers to Trade or the Uruguay Round Agreement on Sanitary and Phytosanitary Measures in similar terms. The same logic applies to the current negotiations on trade facilitation, which build on three existing GATT Articles.

A key issue here, then, is to elaborate rules that form an intrinsic part of a contained structure of defined market access rights and obligations balanced against the pursuit of public policy objectives that transcend trading rights but should not unjustifiably undermine them. This is not always an easy balance to strike and views differ over the design of the trade-off and the degree of detail with which it should be specified in the trading rules. For example, in the case of the GATT Article XX right to prohibit the importation of products made with prison labour, governments felt no imperative to elaborate upon this public policy override to trade, in contrast to rules on, say, standards or import licensing.

A second motivation for seeking new rules on internal measures may be to redefine the conditions of competition in the market –

that is, to extend market opportunities for foreign products (goods or services) and/or suppliers. This was arguably the core logic for including trade in services under the umbrella of the WTO, and to some degree the TRIPS Agreement. Clearly, the above explanations for expanding the agenda – protecting acquired rights and pushing forward the frontiers of trade regulation – involve some overlap, since all disciplines on internal measures may be expected to influence the conditions of competition in some measure. These two categories do not exhaust all motivations for wanting to expand the WTO agenda. Governments might seek linkages between trade and non-trade issues, such as national security. This is arguably as close as one comes to a linkage that does not embody any competitiveness considerations.

We also need to distinguish the question of why the agenda for international cooperation in matters of international trade might be expanded from the question of forum selection. Doubtless some governments would prefer to deal with issues they regard as remote from the WTO's trade agenda under different instruments or in other fora. Several inter-governmental organisations exist with potentially overlapping agendas. Why, for example, should labour issues be addressed at the international level in one forum as opposed to another – the International Labour Organization (ILO) or the WTO – or intellectual property in the World Intellectual Property Right Organization (WIPO) or the WTO, or environment in the United Nations Environment Programme (UNEP) or the WTO? These questions have played prominently in past debates about international rules in their respective areas. No authoritative answer exists to these questions. Some have argued that proponents of agenda expansion have been attracted by the WTO as a forum because of its dispute settlement system and the possibility of using trade restrictions as an enforcement mechanism. Whether or not this is so, there surely are efficiency and scale considerations that should be brought to bear in thinking about the allocation of competence areas to international fora. Moreover, from a practical perspective, there is no doubt that different fora embody different cultures of cooperation.

This Report does not attempt to allocate specific areas of international cooperation to particular fora, recognising that political factors as well as technical considerations may influence these choices on a case-by-case basis. Instead, we explore, in relation to the WTO, possible approaches to deciding whether and under what conditions it might take up an issue for negotiation.

Another important point that has received less than adequate attention in debates about agenda formation is the distributional consequences from international cooperation in regulatory matters. Most standard economic analyses suggest that, save for particular circumstances associated with the terms of trade, all countries gain in some measure from reciprocal trade liberalisation. The negative distributional consequences in terms of reduced income for some occur within state jurisdictions – there are always winners and losers – and should be managed as a matter of domestic policy. But when it comes to internal measures and more or less explicit moves towards harmonised regulatory approaches, the distributional consequences of policy changes traverse jurisdictions. Different countries win and lose, and if governments are to agree voluntarily to cooperation in such areas in order to secure the global welfare gains implied by such cooperation, surely legitimacy will only be served and sustainability guaranteed if the distributional implications are rendered explicit and addressed. It should be noted, however that, at different points in time, changed circumstances in individual countries may convert them from net losers to net winners. The distributional consequences of international regulatory cooperation could be dealt with in different ways. The trade-offs could be embedded in the overall negotiating package itself, or through additional action outside the central bargain. Precise measurement is virtually impossible in such matters so, like reciprocity, technical precision inevitably gives way to a sense of justice and fairness.

Returning to our core issue, how should the WTO membership determine the scope of the negotiating agenda? Three main approaches to decision-making suggest themselves – consensus, voting, and a relaxation of the

single undertaking, or what we call critical mass. In considering each of these options briefly, we shall argue that the critical mass approach, appropriately defined and circumscribed, might be considered the preferred choice.

Consensus decision-making

The GATT/WTO has a long tradition of relying on consensus in decision-making. Notwithstanding the existence of voting provisions under the WTO Agreement and the GATT before it, governments have preferred to rely in virtually all instances upon consensus as the decision-making mode. In many ways, this has worked well, although the consensus-based approach has sometimes been criticised in terms of the procedural opacity involved in arriving at a decision. It has been argued that consensus can be a product of arm-twisting behind closed doors, reminding us that the former does not preclude the latter. This, however, should not be seen as an argument against consensus, but rather a problem of procedural transparency that can occur under any decision-making mode. In this sense, no approach to collective decision-making in and of itself guarantees that the interests of all parties will be taken into account.

Consensus-based decision-making can be cumbersome if the need for a consensus enables a single player or a few players to block outcomes and stifle progress. Preventing a decision from being taken may be entirely legitimate where vital interests are at stake, the more so if there is a shared perception among a significant group of countries that a particular outcome is undesirable. But equally, blocking may lack legitimacy where its aim is more to prevent others from moving an agenda forward than it is about avoiding a policy outcome perceived as harmful by those exercising a veto. In the history of GATT/WTO, there have undoubtedly been occasions where some parties have seen the action of others as less than fully legitimate in this regard.

Voting

The WTO voting system, like that of the GATT before it, is unweighted and grants one vote to each Member. The current procedures call for different levels of majority for a decision, depending on the matter at hand. The fact that voting is largely eschewed as a decision-making mode is attributable to at least two factors. First, the idea has always been counter-cultural in the trading system. Perhaps this is because governments have been reluctant to envisage arrangements whereby they can be overruled in respect of a decision that could significantly affect their vital interests. Second, with unweighted voting, in particular, countries responsible for a very large share of world trade could be outvoted by those with much smaller shares. Such a divorce of power from voting majorities would challenge the viability of the system, if not prove fatal.

One way of mitigating this difficulty would be to establish a weighted voting system. An idea along these lines discussed by the Warwick Commission was to create a voting arrangement embodying two thresholds. The first threshold would relate to country size, such that a decision could be carried by a certain percentage of global trade or global national income. The second threshold would require that a minimum number of countries voted in favour of a decision. This combination could protect the interests of large and small countries alike – any decision would have to command the support of a significant cross-section of national interests in order to be carried.

After much reflection, the Warwick Commission decided against recommending voting as a decision-making mode. One reason for this was the perception that governments would encounter great difficulty in agreeing upon the appropriate thresholds – a difficulty that would recur if different types of decisions required different thresholds. Secondly, the arrangement would formalise a *de facto* disenfranchisement of some countries every time a vote was taken. A final consideration was that the idea runs counter to the prevailing culture, and would be very unlikely to receive favourable consideration within the WTO.

The single undertaking and critical mass

The notion of a single undertaking has become prominent in the trade policy lexicon, as has the idea that there may be circumstances in which the single undertaking could be relaxed in relation to decision-making. In thinking about this possibility, it is helpful to consider briefly two different but not necessarily mutually exclusive meanings that attach to the concept of a single undertaking. One is the idea that in a negotiation, nothing is agreed until everything is agreed. The results of a round must go forward as a single package. In the DDA, for example, when Members agreed to give effect to the Decision on Transparency in relation to RTAs, this was done on a provisional basis as an exception to the single undertaking.

The second meaning relates to obligations rather than procedure. It is that all Members are obliged to subscribe to all the constituent parts of a negotiated package. An example of the use of this definition of a single undertaking is the manner in which the results of the Uruguay Round were agreed. Any Contracting Party of the GATT that wished to become a founding Member of the WTO, in 1995, had to accept the WTO Agreement in its entirety.¹¹ The Uruguay Round Single Undertaking implied a significant addition of obligations for many developing countries. Subsequently this proved contentious and gave rise to the implementation of S&DT mandates that were established in the years following the completion of the Uruguay Round.

The Uruguay Round Single Undertaking differed from the Tokyo Round deals, in which GATT Contracting Parties were given an opt-in/opt-out choice with respect to a range of non-tariff measure agreements negotiated at the time. It was in part this flexibility that the Uruguay Round Single Undertaking sought to eliminate.¹²

The Warwick Commission recommends that serious consideration be given to the re-introduction of the flexibility associated with what has come to be known as critical mass decision-making. Such a proposal, if implemented, would have the effect of unbundling in some measure the obligation-related single undertaking and introducing an

additional element of ‘variable geometry’. We do not believe that any voting system would be desirable in the context of critical mass decision-making. Rather, we see critical mass criteria emerging in the process of discussing and analysing proposals for new topics on the WTO agenda.

Before spelling out the conditions we would attach to this approach to decision-making, a question to consider is how much of a departure this represents from past practice. For this purpose, a distinction is required between negotiations involving market access and negotiations on rules. In the former case we have some recent and rather successful examples of negotiations based on critical mass, notably in sectors where advanced economies see themselves as net exporters; for example, the basic telecommunications, financial services and Information Technology Agreements of the second half of the 1990s. Moreover, the sectoral zero-for-zero negotiations contemplated in the ongoing Non-Agricultural Market Access (NAMA) discussions would seemingly rely on a critical mass criterion.¹³ The same can be said of the plurilateral negotiations currently taking place in the field of services.

So far, all negotiated outcomes relying on critical mass for their acceptance have been applied on a Most Favoured Nation (MFN) basis. The fundamental idea that agreements among less than the full membership should not undermine the rights of any parties, including the GATT Article I right to MFN, was originally captured in the language adopted in the Decision of 28 November 1979 (L/4905), which was formulated at the time the Tokyo Round Codes were adopted. Paragraph 3 of the Decision reads:

‘The CONTRACTING PARTIES [...] note that existing rights and benefits under the GATT of contracting parties not being parties to these agreements, including those derived from Article I, are not affected by these Agreements.’

The Warwick Commission is of the view that in the name of justice and fairness, the principle of non-discrimination should apply to all Members, regardless of whether they

participate in critical mass agreements. To the extent that benefits do not only accrue as a direct result of obligations, the idea is that non-signatories benefit from a non-discriminatory application by signatories of the provisions of an agreement as well as access to benefits arising from the agreement.

Thus, when it comes to variable geometry and rules negotiations, we have a clear precedent from the Tokyo Round Codes on standards, import licensing, anti-dumping, subsidies and countervailing measures and customs valuation.¹⁴ More recently, the agreed framework for regulation in the telecommunications sector was a critical mass agreement, whereby some Members making market access and national treatment commitments in telecommunication services did not subscribe to the regulatory framework. All this demonstrates that our proposals have precedents within the multilateral trading system. Some commentators have lamented the critical mass character of the Tokyo Round Codes, arguing that this amounted to the balkanisation of the trading system. The logic certainly influenced the formulation of the Uruguay Round Single Undertaking.

We argue that our proposals for a more flexible approach to decision-making are neither system-changing nor particularly radical. Precedent is on our side. Moreover, we consider that, by defining substantive and procedural requirements associated with a departure from the consensus rule, the proposed approach protects the integrity of the trading system as a whole and the legitimate interests of all WTO Members.

We are aware, however, that variable geometry and less-than-full consensus decision-making may combine to lessen the opportunities for trade-offs among negotiating interests, precisely of the kind that would be helpful in dealing with any adverse distributional consequences among parties that may arise from moves towards more harmonised approaches to non-border regulation. On the other hand, the determination of configurations in variable geometry scenarios involving critical mass can still provide a basis for bargaining – in other words, bargains might lie in actual configurations of critical mass agreements.

Moreover, adherence to the procedurally-oriented single undertaking requirement that everything must be agreed before anything is agreed also serves the purpose of holding together packages containing trade-offs. That was the precise thought which influenced the incorporation of the single undertaking principle in the Ministerial Declaration launching the Uruguay Round.¹⁵

A number of authors have sought to define the kind of criteria needed to protect the interests of all WTO Members in a world where the veto implicit in consensus gives way to critical mass decision-making. The Commission's enumeration of essential criteria draws partly on this work. Our criteria for what must be demonstrated and what procedures must be followed for a decision based on critical mass to be adopted are:

- That new rules are required to protect or refine the existing balance of rights and obligations under the WTO and/or that the extension of cooperation into new regulatory areas will impart a discernible positive global welfare benefit;
- That the disciplines be binding and justiciable so as to attain the objectives laid out in the first criterion above;
- That the rights acquired by the signatories to an agreement shall be extended to all Members on a non-discriminatory basis, with the obligations falling only on signatories;
- That Members shall consider any distributional consequences arising among Members from cooperation in new regulatory areas and shall consider means of addressing any such adverse consequences that they anticipate;
- Given the objectives at hand and the international cooperation sought, no other international forum provides an evidently better venue for pursuing the cooperation than the WTO;
- That the WTO membership would collectively undertake to provide any

necessary technical support, capacity-building and infrastructural needs in order to favour the participation of developing countries so wishing to participate in an agreement and derive tangible benefits from such participation;

- That all Members not forming part of the initial critical mass shall have the unchallengeable and unqualified right to join the accord at any time in the future on terms no more demanding than those undertaken by signatories to the accord in question.

In sum, based on the above considerations and criteria, we believe that serious thought should be given to critical mass as part of the decision-making procedures for delineating the WTO agenda. We believe these arrangements can protect the varied but legitimate interests of all Members of the WTO, render decision-making more supple and efficient, and reduce the risk that Members will find themselves obliged to accept legal commitments they do not consider to be in their national interest. In the Conclusion to this Report, we argue for a WTO Member-driven process of reflection on challenges and opportunities in the multilateral trading system. We believe that critical-mass decision-making would be an important element in any such deliberation.

2.4 Enforcing the Agreements

When the WTO was established in 1995, the new DSU was hailed as its jewel in the crown. Through the DSU, WTO members granted WTO panels compulsory jurisdiction over disputes arising out of the interpretation of WTO agreements; created the only standing AB in the international legal system; and authorised the possibility of virtually automatic economic sanctions against non-complying states. The WTO's dispute settlement system thus represents an unprecedented grant of legal authority to international tribunals to enforce international legal norms.

The DSU is the busiest and one of the most remarkable dispute settlement mechanisms in the history of international law. As of January 2007, Members had filed some 356 complaints. These complaints have given rise

to some 30,000 pages of dispute settlement reports, setting out a rich and sophisticated jurisprudence of WTO law. Most importantly, the DSU has produced notable successes. For example, during the early years of the WTO, the system addressed a number of highly controversial cases, including EC Bananas, Beef-Hormones, Japan-Film, Helms-Burton and Section 301 disputes. In the majority of these cases, the DSU played an important role in resolving – or at least defusing – highly charged and long-standing controversies. Over half of all disputes end prior to a panel ruling. Moreover, the vast majority of cases have been settled amicably – with the offending party taking the necessary remedial action. The DSU has been a major success. It represents a substantive advance on the previous GATT regime.

Many commentaries and analyses have been written on the DSU.¹⁶ Most of these analyses have been positive, concluding that while there is room for improvements in certain areas, the basic structure and approach has proven its worth and should not be tampered with. Among the issues that have been identified as warranting further attention, however, are the degree of appropriate “judicial activism” – also referred to as gap-filling – on the part of panels and the AB, the role of precedent in dispute settlement findings, compliance with panel and AB findings, sequencing between retaliatory action and multilateral process, remedies and damages, the role of the AB in relation to the possibility of remanding cases back to panels, access to proceedings for non-state actors through *amicus curiae* briefs, the desirable degree of confidentiality of dispute settlement proceedings, and better access for developing countries to the WTO's dispute settlement machinery. This is not an exhaustive list, nor is it the intention in this Report to examine all these questions.

This Report makes recommendations in only one area – that of improving access to dispute settlement for smaller and poorer members of the WTO. Access is not only about litigating effectively, but also about obtaining satisfaction when a panel or the AB finds in favour of a developing country litigant.

Many developing countries have made little or no use of WTO dispute settlement procedures, but some have been active. Overall, developing countries have been involved as complainants or respondents in slightly more than one-third of the cases brought before the WTO dispute settlement system. But these cases have involved very few countries, some of which are Argentina, Bangladesh, Brazil, Chile, India, Korea, Pakistan Mexico and Thailand. Several factors explain why the majority of developing countries may not have used the system to a greater degree.

- First, low participation is a reflection of the marginal role of many developing countries in world trade;
- Second, in the event that disputes arise, developing countries may be reluctant to bring them before the DSU for fear of reprisals by their trading partners. Even though the WTO is ostensibly a body of equals, power plays a key role in shaping its affairs;
- Third, the dispute settlement procedures are complex and many developing countries find them technically daunting, especially considering the human and financial resources required to use the trade system effectively;
- Fourth, the retaliatory capacity of most developing countries is limited. Even if a small developing country were to prevail in a WTO dispute against a large trading partner, in the absence of willing compliance by the responding party the threat of effective retaliatory action would ring hollow.

The first of these points reflects a reality that will change over time. As countries build a growing stake in world trade, they will be increasingly willing and able to participate in institutional aspects of the trading system, including dispute settlement. This goes to the heart of the development process itself.

Power relationships and dispute settlement

On the second point, regarding collateral coercion or retaliation when small countries

challenge large countries, one can but appeal to a shared perception among nations that their self-interest is served by a commitment to a rules-based system entailing pre-commitment, buttressed by transparency. In this context, the Commission proposes that a Dispute Settlement Ombudsman be established. The function of the Dispute Settlement Ombudsman is similar to that which is already contained in Article V of the Dispute Settlement Understanding On Good Offices, Conciliation and Mediation, which provides that the Director-General of the WTO, acting in an *ex-officio* capacity, might offer these services. The central difference in our proposal is that Members would acquire a right to the services of an ombudsman. Under the existing provisions, a request can be refused. Our proposal responds in part to the potential contribution of transparency in increasing the perceived legitimacy of dispute settlement proceedings, especially among countries of different size. When a developing country is considering bringing a dispute, the authorities would be entitled to the good offices of the ombudsman, whose primary role would be to offer mediation between the parties concerned at a stage prior to the formal request for consultations foreseen in WTO dispute settlement proceedings. This would offer an initial non-litigious avenue for settlement and would also serve to inform consultations in the next stage of the dispute settlement process should the informal mediation fail to deliver amicable settlement. The Commission believes that further reflection is called for in respect of this proposal.

The Commission urges panels and the AB to be more open to the submission and consideration of *amicus curiae* briefs by non-state actors, including civil society. Permitting non-state actors to participate in this way has the benefit of enriching the nature and quality of information that panellists have when considering disputes and of contributing to the transparency of dispute resolution processes. Such briefs may have a particular value in disputes that involve conflicts between economic and non-economic values.

We recognise that some fear the DSU could be overwhelmed by *amicus* submissions, although

that experience over the past decade suggests that this fear can be easily overstated. However, in the unlikely event that *amicus* briefs are submitted in numbers that adversely affect the dispute settlement process, the Dispute Settlement Board could explore mechanisms to limit the number of submissions. An additional contribution to transparency would be for DSU procedures, such as oral arguments, to be open to the public. This has already happened in a few disputes and is a trend that the Commission endorses, subject to exceptions such as the need to protect confidential business information.

Resource constraints and dispute settlement

As for the third point, concerning resource constraints in developing countries, there is no substitute for long-term investment in the acquisition of skills, along with an increasing capacity to find the financial resources necessary to conduct dispute settlement cases. Again, as countries become more engaged in trade, these constraints should diminish. That process can certainly be abetted through the provision of technical assistance. In addition, since 2001 the Advisory Centre on WTO Law has been providing advice to developing country Members on WTO rights and obligations, for instance in relation to specific disputes in which developing countries have been engaged.

Non-compliance and available remedies

The fourth issue concerns compliance and the scope for smaller countries to exercise their legal rights in the context of dispute settlement. A growing failure to comply would be seen as a systemic failure; without suggesting that this is a currently critical problem, it is clearly something that the system should guard against. To be specific, a problem only arises here if Members fail to act upon findings of panels or the AB. In formal terms, a party against whom a legal determination is made has an obligation to bring the offending measures into compliance. In the great majority of disputes, this is what has happened. But failing that, the offending Member may either offer compensatory measures or face retaliation from the complainant(s) in the dispute.

It is in relation to the possibility of retaliation that small countries may be at a particular disadvantage in unresolved disputes against large ones, and where WTO Members might therefore think about introducing alternative remedies. In considering this, however, the history of retaliation in the GATT and the WTO should be borne in mind. A careful reading of that history suggests that retaliation plays a limited role in prompting compliance with trade norms. During the GATT years, respondents could block the creation of a panel and the adoption of GATT reports. Although retaliation was a theoretical possibility, it was practically impossible, given the GATT's consensus requirements. Nevertheless, relatively few reports were blocked, the great majority of violation rulings were adopted, and the overwhelming majority of these findings led to substantial correction of GATT-inconsistent practices. The paradoxical contrast between the voluntary procedures and weak remedies and the obvious success of GATT dispute processes strongly suggests that retaliation plays only a limited role in inducing compliance.

WTO experience seems to confirm this, as compliance rates with WTO reports are roughly the same as with GATT reports, notwithstanding the fact that the WTO provides sanctions for non-compliance. Thus, GATT/WTO history suggests that compliance has much more to do with factors other than retaliation, including internal political dynamics in the respondent state, the perceived legitimacy of the rules and the dispute process, and reputation effects, than with the economic force of retaliatory sanctions.

Quite apart from what the history suggests, many find the imposition of trade sanctions against non-complying parties problematic. From the perspective of a system one of whose goals is to liberalise trade, authorising the imposition of trade restrictions is both counter intuitive and counterproductive. In most cases, it will increase the cost of imports and harm domestic consumers. Moreover, such sanctions carry no guarantee that larger states will be induced to modify WTO-inconsistent measures.

In these circumstances, the Commission proposes that WTO Members consider

accepting an obligation to provide cash compensation to aggrieved parties where compliance or trade-related compensation is not forthcoming. This idea, like most of the other recommendations by the Commission in regard to dispute settlement, has been mooted elsewhere, notably in the Sutherland Report.¹⁷ It would be for further consideration how far monetary compensation became a substitute for retaliation – that is, to what extent would this remedy be available generally. Clearly, this approach is not only less trade-distorting, it would also offer developing countries the possibility of neutralising what is otherwise a major asymmetry in the WTO's dispute settlement system.

A critical issue would be to set the cash compensation high enough to be effective, yet not so high as to encourage abuse. If compensation is set too low, the inducement for the losing party to a dispute settlement case to correct its offending trade practices would diminish. A related issue is whether rich countries would consider the required compensation so trivial where a small developing country was concerned as to provide an easy alternative to compliance or compensatory trade measures. This is the problem the Sutherland Report refers to as “buy out”. An additional consideration is that the payment of compensation is not self-executing. Unlike retaliation, the successful imposition of monetary fines requires an affirmative act by the defendant state. Finally, if cash compensation were considered as an inducement towards compliance and not a permanent, ongoing settlement arrangement, it is unclear whether this remedy would have the desired effect on state officials. Unlike private actors, governments are not necessarily deterred by compensation as politicians do not experience these costs directly because compensation is likely to be absorbed by politically weak constituents. One idea for dealing with the general problem that cash compensation could be considered a painless alternative in certain circumstances would be to provide for an escalating amount of compensation until an offending party complies or compensates through trade measures.

2.4 Conclusion

This Chapter has argued for the importance of the multilateral trade system and the role of the WTO in fostering international trade cooperation. To some extent, the WTO has been burdened by its own success and that of the GATT before it, and there is much pressure on it to expand its remit to include new issues. Thus, the Chapter has proposed a series of ways in which the boundaries of WTO activity could be better defined, its purpose sharpened, and its enforceability improved for all, rather than just a select group, of its Members. Reform along such lines is likely to improve the goals of efficiency, fairness and legitimacy in the WTO.

Several recommendations were made in this Chapter. Having weighed up the strengths and weaknesses of three different approaches to agenda-setting and decision-making – consensus, voting and variable geometry – the Commission recommends one form of the latter approach, namely that of critical mass decision-making, with three objectives in mind: freeing up the current blockages in the decision-making processes; ensuring that there is enough on the table to keep the major players engaged in the WTO now and into the future; and protecting the interests and needs of the smaller players. In this way, we have tried to balance the sometimes competing demands for efficiency, fairness, and legitimacy within the system in such a way as to keep the diverse membership of the WTO engaged.

In this Chapter, the Commission also proposed a number of ways in which both the transparency of, and compliance with, agreed multilateral trade rules can be enhanced. Transparency and compliance are, of course, worthy goals in and of themselves. But they also assume considerable political and practical importance. An organisation that is seen to be fair, and whose rules are respected, is likely to draw greater political support from leaders in developed and developing countries. A renewed sense of ownership of the organisation is precisely what the multilateral trading system needs in these difficult times.

CHAPTER 2: RECOMMENDATIONS

- 1 It is no surprise that decisions about the reach and content of WTO rules have been among the most contentious issues in the sixty-year history of the multilateral trading system. The negotiating and rule-making priorities established within the WTO are a crucial determinant of how well the institution serves the interests of its diverse constituents. A core challenge is to shape the agenda in a way that both respects the interests of the entire membership while at the same time securing the continued commitment of all parties. In pursuit of this balance, the Commission recommends that consideration be given to circumstances in which a critical mass approach to decision-making might apply. The key implication of this approach is that not all Members would necessarily be expected to make commitments in the policy area concerned. We are aware of the sensitivities inherent in this proposition and have taken care to spell out criteria that would need to be met in adopting such an approach. Among the criteria for considering a critical mass approach to defining the agenda are the need to identify a positive global welfare benefit, to protect the principle of non-discrimination, and to accommodate explicitly the income distributional aspects of rule-making.
- 2 As far as dispute settlement is concerned, the Report has focused on those aspects of reform that could improve access to the procedures for the smaller and weaker Members of the WTO. In this connection, the Commission recommends that Members be given a right to the services of a Dispute Settlement Ombudsman whose role would be to mediate between potential disputants upon the request of one party at a stage prior to launching a formal complaint. Such a procedure would allow recourse to the good offices of an independent party prior to any formal bilateral consultations.
- 3 The Commission is aware of recent improvements that have been made in enhancing the transparency and accessibility of dispute settlement proceedings and recommends that these initiatives be sustained and strengthened, particularly in relation to hearings that are made open to the public and in allowing the submission of *amicus curiae* briefs before panels and the AB.
- 4 One of the greatest successes of the WTO dispute settlement system, like that of the GATT before it, has been the high degree of compliant behaviour by Members in respect of findings. Nevertheless, where Members neither comply nor offer compensatory trade policy action, the option for aggrieved parties to take retaliatory measures is neither attractive when seen against the objectives of the WTO Agreement, nor feasible when small economies are pitted against large ones. In light of this, the Commission recommends that WTO Members consider accepting an obligation to provide cash compensation to aggrieved parties where compliance or trade-related compensation is not forthcoming.