

## NOTES

## EVOLUTION OF THE WTO DECISION-MAKING PROCESS

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The World Trade Organisation (WTO), like its predecessor the General Agreement on Tariffs and Trade (GATT), is a contractual body designed to seek negotiated solutions in pursuit of multilateral trade liberalisation. The WTO is described as a Members-driven organisation. In recent years, there seems to be a growing perception among critics that the WTO is unable to perform its role as a negotiating forum effectively. The failure of the Seattle Ministerial Conference in 1999 and the Cancun Ministerial Conference in 2003 has given rise to debates on institutional deficiencies in the WTO and the need for institutional reforms.

This paper will, however, focus narrowly on the mechanics of negotiations and decision-making, and examine how the decision-making process has evolved over the years, from the GATT to the WTO.<sup>1</sup> The paper discusses *inter alia*, basic issues of “transparency in decision-making”,<sup>2</sup> the “consensus rule in decision-making”, and how the WTO needs to find ways to address the institutional challenges posed by increases in the number and diversity of its members.

## I. INTRODUCTION

The decision-making process in the WTO remains largely unchanged from that of its GATT predecessor. The WTO decision-making process continues to be guided by four key principles: the consensus-rule, one member-one vote, member-driven character and the importance of informal processes.

The WTO consensus-rule requires that a decision be taken only if no member actively objects. Article IX of the *Agreement Establishing the World Trade Organisation* states that “the WTO shall continue the practice of decision-making by consensus followed by the GATT 1947”. Neither the GATT nor the WTO defines consensus explicitly. However, where a decision cannot be arrived at by consensus, Article IX.1 states that “at meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote”. Decisions of the Ministerial Conference and the General Council are taken by a majority of the votes cast. The exceptions to this simple majority rule are: (i) a decision to adopt an interpretation of an agreement would require a three-fourths majority; and (ii) a

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<sup>1</sup> Decision-making in the WTO Dispute Settlement Proceedings is not covered in this paper.

<sup>2</sup> “External transparency” regarding opening the WTO generally to the global public is not covered in this paper.

decision on a waiver of an obligation would also require a three-fourths majority. While in principle each WTO member has equal voting rights, voting rarely takes place in practice.

Since the GATT days, the process of consensus-building has relied on informal processes whereby issues are debated and compromise solutions thrashed out among smaller informal groupings before the issues were taken up in the open-ended plenary. The use of the "Green-Room" process and coalition of informal groups according to issues of common interests were key features in the mechanics of negotiations in the GATT and which have been carried over to the WTO. Whilst such informal processes had worked very well in the GATT, critics have argued that such a process of consensus-building no longer works in the WTO. In particular, they have questioned the lack of transparency and exclusivity in the negotiating process. Developing and least developed countries call for greater transparency and inclusiveness in the decision-making process. However with the larger and increasingly diverse WTO membership, efforts to balance efficiency with allowing the maximum participation of all WTO members in negotiations will present a challenge to reaching consensus.

## II. INFORMAL PROCESS

### A. *Green Room Process*

The use of the Green Room process, which started in the GATT Tokyo Round, intensified during the Uruguay Round and continues to be used in the post-Uruguay Round negotiations. This is intended to enhance the efficiency and effectiveness of negotiations by limiting the numbers of negotiators to those key and active players who could help move the negotiating process. It is argued that it will be impossible to conduct effective negotiations in an open-ended plenary session involving the total membership.

During the Uruguay Round, the GATT employed an informal Green Room system of meetings at critical stages of the negotiating process, in which a small group of about 20 countries were invited to thrash out particularly difficult or sensitive issues with the aim of working out compromise solutions in a smaller and intensive set-up.<sup>3</sup> The Green-Room process got its name because the room where the meeting took place (next to the GATT Director General's (D.G.'s) office) had walls that were painted green. Although the room is now no longer green, the name retains its popular usage. The Green Room process was managed by the GATT D.G. during the Uruguay Round and now by the WTO D.G. who determines who will be invited. Members are normally invited based on their active participation, intellectual contributions and the value they might add to the negotiating process. In recent years, regional representativeness is another criterion. Although the list of participating countries may vary depending on the issues, the list of typical participants included the "Quads" (United States (US), European Community (EC), Canada, Japan), Australia, New Zealand, Switzerland, Norway, one or two economies-in-transition (*e.g.*, Hungary), and a number of developing countries (Argentina, Brazil, Columbia, India, Egypt, Hong Kong, Mexico, Pakistan, Singapore), one or two other ASEAN countries (Malaysia, Indonesia or Thailand depending on the issue), and Uruguay. However, in the post-Uruguay Round negotiations, the list has expanded to 30-35 members, to include more developing and least developed countries such as Bangladesh, China, Chile, Costa Rica, Botswana, Kenya, South Africa, Zambia. Green Room consultations take place not only at the officials' level in the Geneva process, but also at the Ministerial Meetings.

The Green Room process had worked very well during the Uruguay Round. The GATT membership was much smaller then with about 80 Contracting Parties. In particular, the number of developing countries that played an active role during the Uruguay Round was

<sup>3</sup> Kent Jones, "Green Room Politics and the WTO's Crisis of Representation" (Conference Paper for the Centre for the Study of International Institutions Conference, Austria, November 2004).

relatively small. The process facilitated consensus-building whereby the outcome of the discussions in the Green Room were conveyed to the larger membership for final decision. The practice was that decisions were normally taken only after an issue had been discussed to the point at which an agreement had developed which all countries were ready to support, or at least not to oppose.<sup>4</sup> The GATT decision-making process worked because there were fewer countries actively engaged. Consensus-building engaged a small group of countries; the rest were relatively passive. And few countries were significantly affected by the results.<sup>5</sup>

However, the presence of 148 members in the WTO, with more active participants representing more diverse interests and objectives, has complicated the WTO decision-making process. Developing countries are demanding to be heard. They complain of being left out of the WTO decision-making. At Seattle, the African and Caribbean members were up in revolt and stated publicly that they would reject the outcome of these smaller sessions. Critics have argued that the Green Room process is inefficient, and have called for a better system that is more inclusive and transparent. Then European Union (EU) Trade Commissioner, Pascal Lamy, labelled WTO procedures “medieval” and has said the WTO needs to be “reviewed, refurbished, and possibly rebuilt”.<sup>6</sup> Even the US admits that “there is a need to change the rules of the WTO to give smaller countries more of a role with decisions...while ensuring that the WTO remains efficient in making decisions and able to overcome the differences in areas where consensus does not exist”.<sup>7</sup>

### B. *Other Informal Groupings*

The formation of informal alliances and coalitions among members to influence decision making, both inside and outside the Green Room, were central to the negotiating dynamics during the Uruguay Round as well as in the post-Uruguay Round era. It has been the practice in the GATT and in the early years of the WTO, where members have defended their national interests on an issue-by-issue basis and have avoided either general coalitions or a polarisation of debate along North-South lines. Cancun and the preparatory process in the run-up to Cancun saw an unprecedented manifestation of rhetoric and grouping, often along North-South lines.

Since the Uruguay Round, WTO Members have formed coalitions on specific issues such as the Cairns Group (agricultural exporting countries, both developed and developing), Friends of Non-Agricultural Market Access (developed and developing country grouping pushing for industrial tariffs negotiations) and the Colorado Group (developed and developing country Friends of Trade Facilitation). Pre-Singapore Ministerial, the US was able to convince the Quad to institute what was known as the Invisibles Group of capital-based senior officials comprising 15-20 key developed and developing country players in the WTO process. They would meet to discuss key issues, but not take decisions. (Singapore was active in the Invisibles Group). That group still meets outside of the WTO as “senior officials from capitals”.<sup>8</sup> There was also the “Friends of the New Round” (FOR) group that was started by Singapore to move the WTO process pre-Seattle. The core members were Australia, New Zealand, Hong Kong and Singapore. The Group discussed the tactics and strategy to be adopted, but not substantive issues. It provided a chorus of support at WTO meetings, and therefore swayed the mood. The 1998 Geneva Ministerial Conference was a crowning

<sup>4</sup> *Guide to the Uruguay Round Agreements* (The Hague: Kluwer Law International, 1999).

<sup>5</sup> Jeffrey J. Schott & Jayashree Watal, “Decision-Making in the WTO” (Policy Brief, Institute for International Economics, March 2000).

<sup>6</sup> Jim Kenworthy, “Reform of the WTO: Basic Issues & Concerns”, The Washington International Trade Association, Summer/Fall Issue, 2000.

<sup>7</sup> *Ibid.*

<sup>8</sup> Andrew Stoler, “The Current State of the WTO” (Workshop on the EU, US and the WTO, Stanford University, 2003).

success for the FOR Group. The Ministerial Declaration that emerged was based almost entirely on the text proposed by the FOR group. However, several months before Seattle, the FOR group fell apart because of differences over substance as each member had its own trade interests at heart. Nevertheless, the group had served its purpose. This was a normal occurrence in that each time the process reached the final stages of negotiations, each member would go on its own.

Pre-Cancun saw the emergence of new groupings of developing countries in the WTO who were setting their own developing country agenda. These groupings were very similar to those seen in the UN. The G20, for example, that included India, Brazil, South Africa, Mexico, Egypt and China, led the developing country opposition to the EU and US on agriculture at the Cancun Ministerial. The success of the G20 led to other special interest groups being established at Cancun such as the Indonesian-led Group of G33 on Special Products essential for their food security. The emergence of the G90 group of African, Caribbean and Pacific countries to oppose negotiations on the "Singapore issues" at Cancun was another demonstration of the need that these developing countries felt about making their voices heard collectively at the WTO. The G90 denounced the text produced by Derbez (Chair of the Ministerial), whether on cotton, the "Singapore issues" or the general lack of fairness posed by the text to the developing world. The group was particularly worried about the impact of certain erosion of their trade preferences in the EU market as a result of continual trade liberalisation at the multilateral level.<sup>9</sup>

Coalitions, whether geographically-based, politically-based or allied around common substantive interests, will exercise increasing influence on the WTO decision-making process.

### III. CONSENSUS PRINCIPLE

The WTO's practice of taking decisions by consensus is not an easy approach. With such a large and diverse membership, forming consensus is difficult and time-consuming. Today, a far larger proportion of members, particularly the developing countries, expect to be involved in negotiations. More active members, representing more diverse interests and objectives that have to be accommodated, have inevitably complicated the WTO's consensus decision-making process. It is difficult and cumbersome to negotiate among an increasingly varied membership. This has thus raised the question of whether modifications should be made to the consensus principle on which WTO decision-making is based, or whether, in those cases where voting in the WTO is foreseen, it should be used more readily in order to reduce blockages and improve efficiency.

However, given the implications of adopting alternative approaches to decision-making, most WTO members expect that consensus will remain the rule. It would be inconceivable that the WTO would resort to voting to break any impasse. Because of the "Most-Favoured-Nation" (M.F.N.) principle, WTO rules would have to be agreed to by consensus for them to be accepted universally and applied willingly. It would be difficult to envision a situation whereby a member would, with equanimity, extend benefits on an M.F.N. basis to an adversary that had voted against its interests in the negotiations.

### IV. DECISION MAKING: FROM THE SINGAPORE MINISTERIAL TO CUNCUN

During the 1996 Singapore Ministerial Conference, the implementation of the Uruguay Round Agreements was reviewed and proposals for trade issues to be addressed in the future were considered. The ministers in Singapore reaffirmed their commitment to complete the built-in agenda and also addressed several trade issues that were previously outside

<sup>9</sup> Pascal Lamy, "Is there Life after Cancun?" (Speech to the United Nations, 31 October 2003).

the scope of the trade negotiations. Among other things, they authorised the creation of working groups to study transparency in government procurement, investment and competition policy and agreed to continue ongoing analysis of trade and environment issues. The ministers in Singapore rejected attempts by the major developed countries to establish a working group on trade and labour, stating that this issue was best addressed by the International Labour Organisation.

The December 1996 Singapore Ministerial Declaration was based on a draft prepared in Geneva containing agreed text on all but the sensitive “new issues”. In Singapore, Green Room meetings were held comprising of ministers from 34 member countries. Blackhurst and Hartridge in a 2003 report described the reactions of those members who were excluded from the Green Room discussions:

At the late evening session devoted to getting consensus on the draft declaration, most of the other 90 or so WTO members with delegations in Singapore took the floor in turn, each making virtually identical interventions consisting of three points: first they thanked the thirty-four members in the Green Room process for their hard work; second that although they had some reservations on certain points, they could join the consensus in favour of the draft declaration; and third, that the way in which the draft declaration had been prepared was undemocratic, unfair and disgraceful, that they were no longer willing to accept a decision-making process that always presented them with *faits-accomplis*, and that they attached the highest priority to fundamentally revising the way important decisions are arrived at in the WTO.<sup>10</sup>

The 1999 Seattle Ministerial Conference failed to achieve its goal of initiating a new round of multilateral trade negotiations with a ministerial declaration. After four days of intensive talks, the conference was suspended on 3 December without agreement on a round, or issuing a ministerial declaration or any formal decision. In a brief statement at the end of the meeting, then United States Trade Representative (U.S.T.R.) Charlene Barshefsky, as Conference Chair, noted that the issues before WTO ministers were complex, and divergences too wide to be bridged rapidly. She stated that it was the collective judgement of those present that it would be best to take a time out, consult with one another, and find creative means to finish the job. She then announced that the ministers had agreed to suspend the work of the ministerial conference. In the interim, the Chair asked the WTO D.G. Mike Moore to consult with delegations in an effort to bridge differences, develop an improved decision-making process, and prepare for a successful conclusion of the ministerial conference.<sup>11</sup>

WTO negotiators faced inherent difficulties in their negotiation process, both in Geneva and Seattle. Negotiators were working from an unwieldy draft text that was transmitted to the Ministers in Seattle. The draft declaration was some 32 pages and contained nearly 400 bracketed items indicating disagreement among members. The draft was, in fact, an amalgamation of all proposals or position papers that members had submitted to the WTO General Council during the 15-month long pre-Seattle preparatory process. The approach that was adopted pre-Seattle was mainly open-ended General Council or Heads of Delegation Meetings where delegations repeated public positions with no attempts to negotiate compromise. The Geneva process had not provided an effective negotiating environment which could produce results, despite the intensity and long hours of work invested.

<sup>10</sup> Richard Blackhurst & David Hartridge (2003), “Improving the Capacity of WTO Institutions to Fulfill Their Mandate” (Paper presented to the conference “Challenges to the Legitimacy and Efficiency of the World Trading System: Democratic Governance and Competition Culture in the WTO”, Florence, 27-28 June 2003).

<sup>11</sup> Susan S. Westin, Associate Director, International Relations and Trade Issues, National Security and International Affairs Division, General Accounting Office, in her Testimony to the Committee on Finance, see pages D75-86 of The Congressional Records Daily Digest, 10 February 2000, 106<sup>th</sup> Congress, via Thomas, online: <<http://thomas.loc.gov/>> .

At Seattle, in an effort to give all WTO members the opportunity to take part in the negotiations, Chairman Barshefsky and D.G. Moore set up five large working groups on the major issues, including agriculture, market access, implementation, the “Singapore issues” (such as investment), and systemic issues (such as the structure of the WTO). The Working groups were open to all WTO members and convened on the second day of the conference. Working Group Chairs were selected from among the Trade Ministers in Seattle to facilitate consensus. The texts, reached by consensus by the various working groups, were then supposed to be brought together later in the week to produce a complete ministerial declaration.

However, some of the Working Groups were unable to achieve the necessary consensus. After two days of large working group meetings, Barshefsky convened the Green Room meeting, comprising some 30 ministers on the last day of the conference. The Green Room had only one day left to work out compromises across the range of unresolved issues, and then to gather the support of the rest of the delegations. The Green Room began with agriculture and worked until mid-afternoon on this issue without much success. There was thus little time left to discuss the other issues. Success was not to be had at the Seattle Ministerial.

The 2001 Doha Ministerial Conference succeeded in launching a new round—the Doha Development Agenda. Unlike Seattle, the mood at Doha was less acrimonious and confrontational because it had before it a draft text submitted by the Chairman of the General Council that had captured 80% of the consensus. There were therefore fewer areas of contention. The pre-Doha preparatory process in Geneva was a combination of open-ended Heads of Delegation/ General Council meetings, smaller working groups on specific issues and the Green Room process, the composition of which varied according to the issues under discussion. Whilst the Green Room process had a limited participation, transparency was assured in that the outcomes of the Green Room were brought to the bigger open-ended meetings for further debate and decision. Furthermore, the various working groups allowed for participation by the larger membership. Hence, the pre-Doha process provided an effective and conducive negotiating environment that resulted in a draft text that had only a minimum number of unresolved issues that required ministerial decision at Doha.

The approach at Doha followed a rather similar combination of informal groups on the major issues, the Green Room process and Heads of delegation meetings (both open-ended and limited participation). The Conference Chair, Youssef Hussain Kamal, Minister of Finance, Economy and Trade of Qatar, selected a team of very competent Trade Ministers who acted as facilitators and friends of the Chair to resolve outstanding issues.<sup>12</sup> The Facilitators organised consultations with different groupings of delegations and reported their deliberations to the open-ended sessions. The Conference proceedings were such that all Trade Ministers were given the opportunity at open-ended sessions to articulate their concerns and grievances. On the last day of the Conference, the Chairman decided to convene a Green Room meeting among 22 key ministers and went through the key issues, one by one, starting with investment, followed by agriculture, implementation and finally, the environment. The Green Room meeting was inevitable to facilitate trade-offs to arrive at the final deal.

The 2003 Cancun Ministerial Conference ended abruptly in failure just after lunch on 14 September following a four and a half-hour discussion in the Green Room (comprising 37 Ministers) on the “Singapore Issues”. The Conference Chair, Luis Ernesto Derbez, Foreign Minister of Mexico, decided that since there was no consensus to launch negotiations on even one of the “Singapore issues” (namely trade facilitation), there was little point in pushing on with other topics such as agriculture and industrial goods.

<sup>12</sup> Agriculture: George Yeo (Singapore), implementation: Pascal Couchepin (Switzerland), TRIPS/public health: Luis Derbez (Mexico), environment: Herald Munoz (Chile), WTO rules: Alec Erwin (South Africa), “Singapore Issues”: Pierre Pettigrew (Canada), other Issues: Mrs Tebelelo Seretse (Botswana), roving: Youssef Boutros Ghali (Egypt), Celso Lafer (Brazil) and Alec Erwin (South Africa).

The negotiating process, that had proved successful pre-Doha and at Doha, could not be repeated during the preparatory process in the run-up to Cancun and at Cancun. Like Seattle, the Geneva process pre-Cancun failed in not preparing a compromise solution on all the issues. Although the Conference Chair was helped by a select team of Trade Ministers, who acted as facilitators and friends of the chair for the outstanding issues,<sup>13</sup> the negotiating forum was established too late and four days were effectively wasted. However, the failure at Cancun was the result of several other factors, which will not be addressed in this paper.

## V. OUTLOOK

Since the failure at Seattle and Cancun, proposals to make the WTO decision-making process more inclusive and transparent have been put forward amongst others, by academics and developing country non-governmental organisations (N.G.Os). N.G.Os representing those developing countries that are outside of the Green Room system have called for its complete removal from the WTO decision-making process, to be replaced by a more “democratic” model.<sup>14</sup> Several other N.G.Os have proposed that “[m]eetings should all be official, with minutes taken down and circulated to all Members for amendments or confirmation”. The proposal further calls for more formal meetings of the General Council and the Trade Negotiations Committee (T.N.C.) “which should become the main-decision-making fora instead of the non-transparent informal meetings”.<sup>15</sup> This would effectively mean the adoption by the WTO of a United Nations (UN) structure where all negotiations are expected to be conducted in the plenary WTO General Council.

Schott and Watal have proposed a revised Green Room structure based on the executive board model of the International Monetary Fund (IMF) and the World Bank. Representation in the board would be based on a country’s relative weight in world trade volume, but in addition, there would be guaranteed seats for each geographical region of the WTO membership, with some form of rotating participation amongst the groups.<sup>16</sup>

The Consultative Board (appointed by WTO D.G. Supachai in June 2003 to examine the future challenges of the WTO) has recently released its report, which includes among others, proposals on decision-making in the WTO.<sup>17</sup> The report questions the merit of using the consensus decision-making approach for all decisions taken by the WTO members. It notes that consensus is increasingly difficult to achieve in the WTO because of the growing membership and the fact that the issues being dealt with are highly domestically sensitive, and hence difficult to garner consensus on. In this context, whilst the report endorses the continued use of consensus decision-making, it raises the possibility of alternative methods, such as voting being deployed for procedural decisions and recourse to plurilateral negotiations (such as the Codes negotiated in the Tokyo Round) where necessary so as to enable the willing to move forward. The report also recommends various other organisational changes to secure the political buy-in of WTO members and to improve the efficiency with which decisions are taken. These include annual (as opposed to the current biennial) WTO Ministerial Conferences and the establishment of a senior official’s consultative body with

<sup>13</sup> Agriculture: George Yeo (Singapore), non-agricultural market access: Hong Kong, “Singapore Issues”: Pierre Petergrew (Canada), development: Kenya and miscellaneous: Guyana.

<sup>14</sup> Third World Network, “Transparency, Participation and Legitimacy of the WTO”, March 1999. See online: <<http://www.redem.buap.mx/rm46.htm>>.

<sup>15</sup> Memorandum prepared by the Third World Network, Oxfam International, Public Services International, WWF International, the Centre for International Environmental Law, Focus on the Global South, the Institute for Agriculture and Trade Policy, the African Trade Network, the International Gender and Trade Network, the Tebtebba International Centre for Indigenous Peoples’ Rights, sent to WTO members and WTO Secretariat on the need to improve transparency and participation in the WTO, 13 July 2003.

<sup>16</sup> Schott & Watal, *supra* note 5, and Jones, *supra* note 3.

<sup>17</sup> Report of the Consultative Board chaired by Peter Sutherland, “Future of the WTO: Addressing institutional challenges in the new millennium”, January 2005. See online: <<http://www.eldis.org/static/DOC17321.htm>>.

limited membership and composed on a rotating basis. The body will have a broad agenda, but no executive powers.<sup>18</sup> The establishment of an official-level consultative body is not a new idea. It would effectively revive GATT's 1980s Consultative Group of 18, which achieved little and aroused unhappiness among those excluded.

This paper will not address the pros and cons of the various proposals that have been put forward by different constituencies. Whatever the approach pursued in future WTO negotiations, the key challenge is in achieving a balance between efficiency and allowing the maximum participation of all WTO members to achieve consensus in negotiations.

It should be acknowledged that since Seattle, much progress has been made to improve the transparency of the WTO decision-making process and participation of the larger WTO membership. Considerable progress has been made with respect to informal consultations and the Green Room process in recent years. Greater care has been taken to ensure that these informal meetings are balanced, representative and accountable.<sup>19</sup> It is important to make the distinction between the process of consensus-building in the small group meetings like the Green Room meetings and decision-making at the plenary level. It is a political reality that the Green Room process cannot be removed. Such meetings are necessary to forge the basis for wider consensus in negotiations. At the same time, it is necessary to provide the larger membership with the opportunity to comment and voice their concerns in the open-ended plenaries through the "report-back system". This would require a systematic iterative exchange between the Green Room process and the plenary whereby the outcomes of the Green Room discussions are reported back to the plenary for further debate and inputs by the larger membership. Such a process will facilitate consensus-building and allow for the final trade-offs in negotiations. There is no need for a major overhaul of the decision-making process of the WTO. What is needed is some fine-tuning, to build on the progress achieved so far, providing even greater transparency, representativeness and accountability in the WTO's decision-making process.

<sup>18</sup> Siva Somasundram, "Future of the WTO: Report by the Consultative Board to the WTO D.G.", March 2005. See online: <<http://www.minterellison.com/public/connect/Internet/Home/Legal+Insights/Articles/A++A+The+future+of+the+WTO>>.

<sup>19</sup> *Supra* note 17.