

WTO 決策制訂的改革：華威委員會 報告與關鍵多數決策制訂模式

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中文摘要

多邊貿易體系正面臨嚴峻的挑戰。由於主要會員對農業補貼（subsidies）與保護主義等長期存在的問題堅持己見而陷入僵局，杜哈回合（Doha round）協商因而迄今已癱瘓七年餘。試圖就架構達成包裹協議以結束此一回合的努力在 2008 年 7 月的日內瓦部長級會議幾近成功，且儘管世界領袖們在 2008 年 11 月二十國集團（G20）與亞太經濟合作會議（APEC）高峰會上一再規勸，但在次月就證明各會員國仍缺乏政治意志去達成協議。甚至連全球金融海嘯後保護主義再度興起的威脅加劇的刺激下各國領袖仍未能縮短他們的歧見。事實上，多邊貿易自由化絕非易事，而現今更是難上加難，尤其是目前議程中有不少問題在很多國家是內政上極為敏感的課題。但是有些困擾當前杜哈發展回合協商的問題卻是內在的問題。有鑑於此，世界貿易組織（WTO）邀請八位著名的貿易專家針對此一多邊貿易體系內部的問題進

行診斷，因而有 2005 年 1 月的蘇瑟蘭報告（Sutherland Report : The Future of the WTO: Addressing institutional challenges in the new millennium），探討 WTO 成立 10 年以來面臨的種種制度面問題。2007 年 12 月 WTO 又發表第二份報告，即華威委員會報告（Warwick Commission Report : Multilateral Trade Regime: Which Way Forward?）*多邊貿易體制：該往何處去*，內容為評估 21 世紀早期全球貿易體系治理，並提供貿易體系與 WTO 改革的政策建議。

本文主旨在就華威委員會報告做一概觀性剖析，尤其是該報告建議 WTO 會員國應考慮「關鍵多數決策制訂模式」（critical mass decision-making）作為比現行要求所有的協定適用會員全體的決策制訂模式更具彈性的另類模式。聚焦於關鍵多數的提議絕非意味著華威委員會報告的其他建議比較不重要，事實上，該報告就如同先前的蘇瑟蘭報告一樣花了相當多頁數討論令人傷腦筋的區域貿易協定及這些協定對全球貿易主義的負面衝擊。而所不同的是，華威委員會報告將焦點置於全球貿易治理體系的未來。

‘Reforming the WTO’s Approach to Decision-making: The Warwick Commission Report and Critical Mass Decision-Making’

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Key words : WTO, Warwick Commission Report, Decision-making

Introduction

The multilateral trade system is facing immense challenges. The Doha Round of negotiations has limped along for seven years, with the major players deadlocked over the perennial issue of agriculture subsidies and protectionism. Efforts to reach an agreement on a framework package to conclude the round came agonisingly close to success during the July 2008 ministerial meeting in Geneva, but despite the exhortations of world leaders at the G20 and APEC summit meetings in

¹ This paper presents an overview and discussion of some of the findings and recommendations of the Warwick Commission, of which the author was a member. Sections 1 and 2 of this paper represent the findings of the Warwick Commission, and Section 3 is based on my personal views which should not be attributed to the Warwick Commission. An earlier version of this paper was presented at the 7th Annual International Academic Conference on the WTO and China, held at Shanghai University on 25-6 October 2008.

November 2008, there proved to be insufficient political will to reach an agreement the following month, in December 2008. Not even the threat of resurgent protectionism in the wake of the global financial crisis was sufficient to prod leaders into bridging their differences for the sake of locking in much of the unilateral liberalisation which has been achieved in the past decade.²

To be sure, the last successful round of multilateral trade negotiations, the Uruguay Round (1986-1994), failed to meet many of its key deadlines, and was declared to be near death on more than one occasion. Multilateral trade liberalisation has never been easy, and it is even more difficult now that much of the 'low hanging fruit' has been plucked and the remaining issues on the table have a high degree of domestic political sensitivity in many countries. But some of the problems that are plaguing the current Doha 'Development' Round of negotiations are intrinsic to the specific circumstances and context of the round itself. Arguably, its launch was premature, having been hastened by the desire of world leaders to demonstrate solidarity in the wake of the September 11 terrorist attacks in 2001. Its 'development' agenda remains unclear and is both contested and politicised in ways that have often been unhelpful to advancing the negotiations. Moreover, it is evident that regional trade agreements (that is, preferential

² For a discussion on the potential for a resurgence of protectionism and what governments might do to stem this, see the contributions in Richard Baldwin and Simon Evenett (eds), *What world leaders must do to halt the spread of protectionism*, A VoxEU.org Publication, London: Centre for Economic Policy Research 2008, and available at <http://www.voxeu.org/index.php?q=node/2651>.

trade agreements (PTAs) between two or more countries), which are relatively easy and quick to negotiate, have become a politically attractive alternative to many governments. Many believe that the proliferation of PTA negotiations are ‘sucking the oxygen’ out of the Doha Round.

But there are also deeper pressures and strains within the multilateral trade system, and these have been the subject of recent inquiries and reports. The first of these was a report by eight eminent trade experts (‘the Sutherland Report’), which was commissioned by the then World Trade Organization (WTO) Director General, Supachai Panitchpakdi, following the breakdown of the Doha negotiations in Cancún in 2003.³ The Sutherland Report identified a number of challenges to the WTO including the erosion of its central norm of non-discrimination as a result of the proliferation of regional trade agreements, and the growing difficulties in advancing negotiations and decision-making within the WTO. The Sutherland Report was followed three years later by the Warwick Commission, which was an independent inquiry that launched its report at the WTO headquarters in Geneva in December 2007.⁴ Like the Sutherland Report,

³ Peter Sutherland, Jagish Bhagwati, Kwesi Botchwey, Niall FitzGerald, Koichi Hamada, John H. Jackson, Celso Lafer, Thierry de Montbrial, *The Future of the WTO: Addressing Institutional Challenges in the new millennium*, Report by the Consultative Board to the Director-General Supachai Panitchpakdi, Geneva: World Trade Organization 2004.

⁴ The Warwick Commission, *The Multilateral Trade Regime: Which Way Forward?* The Report of the First Warwick Commission, Coventry: The University of Warwick, 2007. The report is available at <www2.warwick.ac.uk/research/warwickcommission/report/>.

the Warwick Commission Report took its investigation beyond the problems that have plagued the Doha Round and instead looked to the future of the system of global trade governance. And like the Sutherland Report, it also identified as key challenges for the multilateral trade system reconciling the parallel universes of regional and multilateral trade agreements, and the need to find ways of overcoming blockages in decision-making.

The purpose of this article is to provide an overview of the Warwick Commission Report and, in particular, its recommendation that the WTO membership give consideration to 'critical mass decision-making', an alternative approach to decision-making that is more flexible than the current approach which requires that all Agreements to apply to all Members. Focusing on the critical mass proposal is in no way meant to suggest that other recommendations in the Warwick Commission Report are any less important. Indeed, the Warwick Commission Report, like the Sutherland Report before it, devoted considerable discussion to the vexing question of regional trade agreements and their potential to undermine a more global approach to trade relations. However, there is already a large and rich literature that explores these issues from a variety of political, economic and institutional perspectives, as well as a growing literature on proposals for how to reconcile the 'parallel universes' of multilateral and regional trade agreements.⁵ By contrast, the

⁵ See for instance the recent literature on proposals for multilateralising regionalism, including Richard Baldwin and Patrick Low, editors, *Multilateralizing Regionalism*, Cambridge: Cambridge University Press, 2009; Richard Baldwin, 'Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade', *The World Economy*,

proposals for critical mass decision-making are more recent and embryonic, and have been prompted by the manifest difficulties in decision-making and negotiating within the WTO since its inception in 1995.

The paper proceeds in three parts. Part one provides a brief overview of the Warwick Commission’s principal findings. Part two focuses in more detail on the Commission’s recommendation in relation to critical mass decision-making. Part three part takes the discussion beyond the Warwick Commission’s specific recommendations, and explores some of the major criticisms of the critical mass idea. This article concludes that, on balance, a critical mass approach could make decision-making in the WTO more flexible and efficient, thus helping to ensure that multilateral trade rules remain adaptable, responsive and relevant to its membership.

1. The Warwick Commission Report

The Warwick Commission was an independent initiative of the University of Warwick. Chaired by former Canadian Trade Minister, the Honourable Pierre S. Pettigrew, its seventeen members were drawn from six continents (North America, South America, Africa, Western Europe, Asia and Australia), and included trade economists, political scientists, a trade lawyer, a philosopher and trade policy practitioners from both the private and public sectors. Notwithstanding this diversity, the Commissioners shared a common commitment to the

importance of the multilateral trade system and the importance of multilateral rules to promote global public goods. The Commissioners met four times through 2007 and produced their report in December of that year.⁶

The Warwick Commission Report identified five central challenges facing the world trading system and the dilemmas they pose for policymakers.⁷ Firstly, the Commission noted a paradox between the continued liberalisation and internationalisation of the economies of the major OECD countries on the one hand and an attendant marked reduction in popular support for open markets in significant sections of the populations of these countries on the other. Concern about stagnant wages, job losses, growing income inequality and environmental degradation are now central to the political debate in most rich countries, and some sections of the community see trade as part of the problem rather than part of the solution. Ironically, this development is occurring at the same time as support for economic liberalisation is growing in many of the larger and faster-growing developing countries.

The second challenge identified by the Warwick Commission is the increasingly multipolar nature of the global trade system. In the past, the GATT system was very much a 'rich man's club', with deal-making dominated by the 'Quad' (the United States, the European Union, Japan and Canada). However, the emergence of Brazil,

⁶ For further information on the Warwick Commission, its composition and its activities see <www2.warwick.ac.uk/research/warwickcommission/>.

⁷ The following section draws heavily on the Introductory chapter to the Warwick Commission Report, especially pp 8-11.

India and China (which joined the WTO in the 2001) as key players in the global economy has seen a significant readjustment of power relations within the WTO, and the international trade system more widely. This transformation demonstrates the ongoing adaptability of the WTO -- especially compared to the other institutions such as the International Monetary Fund and the G7/8 which remain dominated by rich countries in North America and western Europe and, for this reason, are increasingly anachronistic. But unlike the old Quad, the new grouping of key decision-makers is not a club of ‘like-minded’ countries. This appears to be making it more difficult to find common ground and shared priorities in the Doha Round. It is not just becoming more difficult to reach agreement, but the processes themselves have become more complex with the growing size and diversity of the membership. Indeed, WTO members have shown a marked propensity to engage in coalitional activity for the purpose of asserting their commercial objectives, thus adding greater complexity to both agenda formation and negotiation.

In this context, policy makers need to think about how to ensure the sustained participation of all major groups of WTO Members in its activities. With these realities in mind, the Warwick Commission identified the need to ensure that the fast-growing, large emerging markets take up leadership roles in the global trading system while at the same time ensuring that the originally dominant economic actors, the US and the EU, do not disengage. Importantly, it is also crucial to ensure that the smallest and poorest WTO Members continued to retain a

valued stake in the system. The report concluded that tackling these potentially competing imperatives will require a new *modus operandi* across the spectrum of negotiations, content, and form of WTO agreements.

The third distinct challenge facing policymakers is the need to reconcile the sometimes competing objectives of the WTO. Accompanying their growing weight in the WTO, developing countries have rightly demanded that certain matters of particular importance to them be addressed. At the same time, many WTO Members want multilateral trade rules to continue to evolve, in order to keep up with fast-moving commercial developments in the world economy. Moreover, there are calls by some for the WTO's agenda to be expanded to include issues such as the environment and human rights. This tension between 'unfinished business' and new agendas has often led to conflict within the WTO; indeed, the very boundaries of the WTO agenda are contested, as was evident in the bitter debate over the so-called Singapore issues.⁸ This raises important questions about the remit of the WTO, about how decisions should be made about its boundaries, and about its future role in economic regulation in an increasingly integrated global economy.

⁸ At the Singapore WTO Ministerial in 1996, the EU pushed for the inclusion of trade facilitation, trade and investment, and trade and competition on the negotiating agenda for the next round, while the US pushed also for the inclusion of transparency in government procurement. Due to strong opposition from a large group of developing countries, of the four 'Singapore issues', only trade facilitation remained on the Doha agenda.

A fourth challenge concerns issues of justice and fairness. Criticisms of decision-making processes in the WTO by civil society organisations and many developing country governments came to a head at the Seattle Ministerial meeting in 1999. Since then, the WTO has instituted several substantial reforms, especially in relation to improving internal transparency, thus putting the WTO well ahead of many other international organizations in this regard. Nevertheless, problems persist. The Warwick Commission identified the need for the WTO to continue its efforts to build a more just multilateral trade system. In particular, WTO Members need to balance the potentially competing demands of efficiency, fairness, and legitimacy within the system in such a way as to keep the diverse membership of the WTO engaged. Moreover, the WTO faces a significant challenge in establishing a balance of rights and obligations among its Members which is perceived as legitimate, sufficiently flexible, and also in addressing the trade-related development needs and priorities of individual members.

The fifth and final challenge identified by the Warwick Commission relates to the challenge posed by preferential trade agreements, which are inherently discriminatory and thus at odds with the WTO’s fundamental norms of non-discrimination. Governments around the world are turning to other vehicles for trade reform, most notably bilateral and regional trade agreements which establish preferential trade relationships among their signatories. To be sure, frustration with the slow pace of multilateral trade negotiations and the WTO’s cumbersome approach to decision-making is not the only spur towards preferential

trade agreements, but research shows that these alternative vehicles for reciprocal trade liberalisation have important consequences for the multilateral trading system. Reconciling these approaches to trade reform is a significant challenge for the WTO and its membership.

2. The Warwick Commission Recommendations on Critical Mass Agreements

Chapter Two of the Warwick Commission Report examined the challenges of boundary determination, agenda-setting and decision-making in the WTO. It began by noting the value of the GATT/WTO system, especially for its unique provision of multilateral trade rules. To be sure, the WTO is not unique in supplying trade liberalisation, as this can be achieved by governments acting unilaterally or negotiating bilaterally or in groups through preferential trade agreements. However, the WTO is unique in the way its norms, rules and processes provide predictability, transparency and stability, and mitigate the asymmetries of power in international trade relations; in its deliberative functions; and in its role as a forum for rule-making on a near universal basis. However, the Commission also noted that multilateralism is a fragile institutional form and that decision-making within the WTO is becoming more difficult than ever before in the history of the multilateral trade system since the end of the Second World War.

Putting aside the difficulties that have dogged the Doha Round market access negotiations, the Warwick Commission Report noted that one area that has divided

WTO members relates to the question of what policy domains should be included in the organization’s mandate. Over the years, the GATT proved capable of evolving with the times; indeed one might argue that a major reason for its success was its ability to foster responsive, adaptive and flexible multilateral rule-making: the amendment of Article XVI on the use export subsidies in agriculture in 1955, the first Anti-Dumping Code negotiated during the Kennedy Round, the Tokyo Round plurilateral codes on non-tariff measures⁹, and the dramatic expansion of the negotiating agenda in the Uruguay Round to include areas such as trade in services, investment, and intellectual property rights are all examples of this adaptability. However, since the end of the Uruguay Round, it has been manifestly difficult to get proposals for new rules negotiations onto the agenda, as was evident at WTO Ministerial Meetings in 1996, 1998, 1999 and 2003. Even the ‘something for everyone’ Doha Round agenda of 2001 was subsequently chiselled down to a handful of issues in 2004.

Unfortunately, there is no rule book that defines the criteria by which new issue areas might be added to the WTO agenda. Looking to the past provides few hints as in

⁹ These were The Agreement on Bovine Meat, The Agreement on Civil Aircraft, The International Dairy Agreement, the Agreement on Government Procurement, the Agreement on the Implementation of Article VI (The Anti-Dumping Code), the Agreement on the Implementation of Article VII (the Customs Valuation Code), the Agreement on Interpretation and Application of Articles VI, XVI, and XXII (the Subsidies Code), the Agreement on Import Licensing Procedures and the Agreement on Technical Barriers.

each case a decision to extend rules was taken in the context of a specific negotiating context with explicit or implied trade-offs involved. Nor does the Agreement that establishes the WTO provide useful criteria, as the institution's major objectives are broad, potentially in conflict with one another, and with no objective or set of objectives taking priority. While some academics, government and non-government organisations have sought to argue for the inclusion of particular issues on the grounds that they are 'trade-related', the Warwick Commission came to the view that this was too imprecise a basis on which to base such claims. However, the lack of any clear way forward presents a major problem for the future of multilateralism: should the WTO membership be unable to agree on the scope of organization's negotiating agenda – in effect, its borders and remit – then we can expect to see governments increasingly inclined to turn their backs on the difficult process of cooperating collectively through the multilateral trade system.

Thus the Warwick Commission was especially interested in considering how approaches to decision-making in the WTO might be reconsidered. At the forefront of our thinking was the thorny issue of how to free up current blockages in decision-making; how to ensure that there is enough on the table to keep the major players engaged in the WTO (instead of forum-shifting now and into the future); and how to protect the interests and needs of the smallest and weakest members of the multilateral trade system. In discussing alternative approaches to decision-making, the Warwick Commission Report began by acknowledging that the WTO has done much to

address criticisms about exclusivity and lack of transparency in its decision-making processes – problems that were a legacy of the GATT where only a minority of the membership participated in a meaningful way in deliberations and negotiations. Thus we have seen over the last ten years, measures taken by the WTO Secretariat and membership to enhance participatory decision-making as well as the increasingly important role of coalitions in decision-making process.¹⁰

But our report went on to argue that the WTO’s current decision-making processes were cumbersome and were an impediment to progress: in particular, we suggested that the principles of consensus and the Single Undertaking have become an obstacle to agenda formation. Before elaborating this, it is important to clarify the different meanings of the term ‘Single Undertaking’. In its earliest usage, adopted at the beginning of the Uruguay Round negotiations, the single undertaking referred the negotiating process and it meant that nothing was agreed until everything was agreed and that the results would go forward in a single package. This principle remains operative in the Doha Round. A second meaning of the Single Undertaking is a more legally-oriented understanding which relates to obligations rather than process: it is the requirement that all Members subscribe to all parts of a negotiated package, with no choices for opting in or out. This second understanding of the Single Undertaking, which came into effect at the end of the

¹⁰ For a discussion see the World Trade Organisation, *World Trade Report 2007, Six Decades of Multilateral Trade Cooperation: What have we learnt?* Geneva: WTO Publications, 2007, pp 322-32.

Uruguay Round and which was incorporated in the Marrakesh Agreement that established the WTO, entailed a significant and ultimately contentious set of new obligations for many developing countries.¹¹

The Warwick Commission noted that the principle of consensus decision-making, which has been operative within the multilateral trade system since the origins of the GATT, was important for ensuring that issues could not go ahead when a group of countries genuinely believed an outcome was undesirable or not in their interests. But consensus can be problematic if it allows a Member or small group of members to block progress on an issue. Such behaviour would not necessarily manifest itself as active blocking by some Members but simply their refraining from making an attempt to move an idea forward¹², though we have also seen recent examples of active blocking as well. The Report also noted that the Single Undertaking, which emerged late in the Uruguay Round and which imposed obligations on all Members as a condition of their entry into the WTO, has made many countries more resistant to the inclusion of new issues in the WTO agenda, regardless of their intrinsic merit.

In thinking about how to address these problems, there have been two divergent schools of thought among the community of trade policy scholars and practitioners.

¹¹ For a discussion of these different shades of meaning, see Craig Van Grassek and Pierre Sauvé, 'The Consistency of WTO Rules: Can the Single Undertaking be Squared with Variable Geometry?', *Journal of International Economic Law* 9 (4), pp 837-64.

¹² The Sutherland Report, p 64.

One school has argued for significant organizational reform within the WTO, either through the establishment of a formal Executive or management structure that would have responsibility for initiating and driving ideas forward, or through the introduction of voting system, similar to those that exist in some other international organisations. The Warwick Commission did give active consideration to the idea of a voting system and we discussed a number of possible approaches, but in the end we dismissed this idea for several reasons -- not least of which is the fact that the WTO membership has shown little enthusiasm for this idea in the past.

In thinking about ways to make decision-making less cumbersome and more efficient, another school of thought has mooted a less radical approach, one which is informed by earlier practices in the GATT rather than being lifted from the practice of other international organizations. This less radical approach calls for the re-introduction of the flexibility which characterised decision-making prior to the Uruguay Round, in the form of critical mass decision-making, which would allow *groups* of Members to put new ideas into the mix; propose, advance, and develop initiatives; and negotiate new rules. After considerable deliberation, the Warwick Commission came down in favour of recommending that the WTO members give serious consideration to circumstances in which a critical mass approach to decision-making might be desirable.

What would a critical mass agreement look like? How might it be used?

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Proposals for the re-introduction of variable geometry into the multilateral trade system have been around for a few years now.¹³ Various authors have suggested criteria for when and why a particular issue area should be considered for critical mass negotiation in the WTO and for how the interests and rights of all WTO members, and not just those in the critical mass agreement, could be protected.

Following on from these debates, The Warwick Commission proposed a comprehensive set of criteria for critical mass decision-making, and recommended that decisions made by critical mass had to demonstrate the following:

1. That new rules are required to protect or refine the existing balance of rights and obligations under the

¹³ Variable geometry refers to the practice where negotiations on particular issues result in agreements that are not binding on all parties to the negotiation. On different proposals for the introduction of variable geometry or critical mass decision-making in the WTO, see for instance the Sutherland Report (2004), Andrew Cornford, 'Variable Geometry for the WTO: Concept and Precedents', UNCTAD Discussion Papers No. 171, May 2004, available at www.unctad.org/en/docs/osgdp20045_en.pdf and accessed on 22 December 2008; Robert Lawrence, 'Rulemaking amidst Growing Diversity: A Club-of-Clubs Approach to WTO Reform and New Issue Selection', *Journal of International Economic Law* 9 (4), November 2006, pp 823-35, Craig Van Grassek and Pierre Sauvé, 'The Consistency of WTO Rules: Can the Single Undertaking be Squared with Variable Geometry?', *Journal of International Economic Law* 9 (4), pp 837-64; and Peter Lloyd, 'The Variable Geometry Approach to International Economic Negotiations', paper presented at the conference on Alternative Frameworks for Agricultural Trade Negotiations, Institute for International Trade, University of Adelaide, 11-12 December 2008.

- WTO and/or that the extension of cooperation into new regulatory areas will impart a discernible positive global welfare benefit;
2. That the disciplines be binding and justiciable so as to attain the objectives laid out in the first criterion above;
 3. 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;
 4. That Members shall consider any distributions consequences arising among Members from cooperation in new regulatory areas and shall consider means of addressing any such adverse consequences that they anticipate;
 5. Given the objectives at hand and the international cooperation sought, no other international forum provides an evidently better venue for pursuing cooperation than the WTO;
 6. 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; and
 7. That all Members not forming part of the initial critical mass shall have the unchallengeable and unqualified right to join the accord any time in the future on terms no more demanding than those

undertaken by the signatories to the accord in question.¹⁴

These recommendations were aimed at striking a better balance between the goals of inclusiveness and efficiency in decision-making at the WTO. In particular, the Warwick Commission was concerned to find a middle ground between the need to enable groups of Members to develop new rules on the one hand while on the other hand reducing the possibility that some members will find themselves required to accept legal commitments which they believe, for whatever reason, are not in their interest. The Warwick Commission criteria for critical mass decision-making are necessarily demanding, in large part in an attempt to address some of the criticisms that have been made of the critical mass idea, both in principle and in practice.

It is important to note that critical mass agreements have been previously used within the WTO, prior to the beginning of the Doha Round. The Information Technology Agreement (ITA), which covers computers, telecommunications equipment, semiconductors, semiconductor manufacturing equipment, software and scientific instruments, was negotiated with the proviso that it would only come into force when a critical mass of countries – representing 90 per cent of world trade in those goods – had signed on to the agreement. At the time of its negotiation, only 29 WTO members signed on, and it was not until after the 1996 Singapore Ministerial

¹⁴ The Warwick Commission Report, pp 31-2.

meeting of the WTO, when eleven more countries signed on, that the critical mass requirement was achieved. At the time of writing, the ITA has 43 signatories (counting the EU as a single member) and it covers 97 per cent of world trade. Significantly, the ITA is applied on a most-favoured-nation (MFN) basis, and does not discriminate against those WTO members that are not signatories to the agreement. In a recent paper on the ITA, Iana Dreyer and Brian Hindley argue that the absence of tariffs on these key information and communication technology products together with the MFN provisions of the ITA agreement have enabled many developing countries and transition economies to enter into global production networks.¹⁵

Critical mass decision-making also occurred in the immediate aftermath of the Uruguay Round when governments agreed to continue negotiations on Financial Services and Basic Telecommunications, areas where agreement had eluded negotiators during the round itself. Like the ITA, the results of these two agreements were applied on an MFN basis.

3. Criticisms of a Critical Mass Approach to Decision-Making

In debates on the desirability of critical mass decision-making in the WTO, four principle criticisms have

¹⁵ Iana Dreyer and Brian Hindley, *Trade in Information Technology Goods: Adapting the ITA to 21st Century Technological Change*, ECIPE (European Centre for International Political Economy) Working Paper No. 6/2008. Available at <http://www.ecipe.org/trade-in-information-technology-goods-adapting-the-itata-to-21st-century-technological-change>

emerged. First are concerns that encouraging sub-sets of Members to work together to make agreements will create a 'two-class' system within the WTO. Second is the concern that critical mass decision-making might erode the cross-linkages between different negotiating issues, linkages which have been vital in the framing of trade-offs in order to reach final outcomes. Third is the concern that a move to critical mass agreements could undermine the WTO's consensus approach to decision-making. The fourth and final concern is the fear that a move to critical mass decision-making could encourage free rider behaviour. The final section of this article tackles each of these criticisms in turn.

The first of these criticisms relates to concerns about the development of a WTO with two classes or tiers.¹⁶ Indeed, some recent proponents of critical mass decision-making have suggested that the 30 WTO or so members that account for more than 80 per cent of world trade would routinely form the basis of critical mass agreements, thus reinforcing the notion of a two tier WTO emerging if such an approach were adopted. However, this view is a misunderstanding of the critical mass idea, which in no way is advocating a return to the days of the GATT where the real decision-making was done by the United States and Europe and 'consensus support' was subsequently extracted from the rest of the Contracting Parties. This is because the groups of countries that form a critical mass on any particular issue will, by definition, be self-selecting

¹⁶ For criticisms of the critical mass idea, see Robert Wolfe, *Can the Trading System Be Governed? Institutional Implications of the WTO's Suspended Animation?* CIGI Working Paper No. 30, September 2007, pp 21-4.

because they have an interest liberalisation or rule-making in that particular area. Thus critical mass agreements are likely to have different mixes of members, depending on the issue at hand. This is not suggestive of a two-tiered WTO, nor even a multi-tiered one, as the concept of tiers implies hierarchy. Multi-dimensional might be a better word.

Another common argument against critical mass negotiations relates to the concern that the cross-issue linkages that have been important in advancing multilateral negotiations might be lost. For instance, during the Uruguay Round there was said to be an implicit dynamic at work whereby the ‘concessions’ made by major developed countries in areas where they did not hold a competitive advantage (e.g. agriculture, textiles and clothing) would be compensated by the ‘concessions’ made by developing countries in areas such as services and intellectual property.

There are a number of difficulties with this argument in relation to where it stands as an objection to critical mass decision-making. Firstly, these cross-linkages are said to be an important negotiating dynamic in the Doha Round: developing countries will get better access to rich country markets for agriculture and semi-industrial products and in return rich countries get better access to all for services and high tech exports. While this may be true in theory, it is manifestly not working in practice as the Members are looking for balance within every issue and sector that is being negotiated. Moreover, the presence and proliferation of PTAs are clearly taking away many

dimensions of these the linkages. For instance, the ability of individual countries to negotiate preferentially improved market access in specific sectors through PTAs appears to be detracting from efforts to secure similar improvements multilaterally.

In defence of critical mass decision-making, one might envisage a situation whereby critical mass agreements might in and of themselves be self-balancing. Alternatively, one might envisage a number of critical mass agreements being negotiated simultaneously in a full-scale or even 'mini-round', with implicit linkages among these different critical mass negotiations. So the cross-linkages that are often part of securing outcomes need not necessarily be lost in the context of any wholesale move to critical mass decision-making.

Another criticism of critical mass decision-making is that it removes the 'veto' power that individual Members currently have by dint of the GATT/WTO's long tradition of consensus decision-making. However, the critical mass approach does not necessarily preclude consensus decision-making; rather it relaxes the Single Undertaking that requires all Members to accept the obligations of new agreements. Consensus might be preserved through a requirement that a decision to negotiate or to adopt results on a critical mass basis be agreed to by all Members, while understanding the critical mass agreements themselves were voluntary and not binding on those Members who chose not to become signatories. However, this might not be necessary if there were demanding requirements about the form and substance of critical

mass negotiations that were aimed at protecting the interests of non-participants, along the lines of those elaborated by the Warwick Commission.

Another common criticism of critical mass agreements is that they could allow for free-riding, whereby WTO members that are not signatories to the agreements will nonetheless enjoy their benefits as a result of the agreements being applied on an MFN basis. However, in relation to agreements that liberalise market access, this should not be a concern as the very notion of a ‘critical mass’ is that the participants account for sufficient Members with a major interest in or share of world trade in the particular area of negotiation, such that those Members who are not a party to the agreement do not have the market power to destabilise the agreement.

Conclusion

There is no shortage of explanations of the recent difficulties in decision-making in the WTO: lack of leadership by the major powers; the clash of interests and values that comes from having a more diverse membership; the challenge posed by larger numbers which makes it more difficult to identify common interests and increases the cost of organisation; and more generally, the climate of mistrust that is said to exist within the WTO. The problem with such diagnoses is that they are rarely accompanied with forward-looking proposals for resolving these problems. By contrast, proposals for critical mass decision-making represent a concrete and practicable response to addressing some of the problems that

currently plague the WTO. Critical mass agreements, provided that they are well designed and are applied on an MFN basis, would enable groups of countries to move agendas forward in a way that was not detrimental to the interests of non-participants. In that way, critical mass agreements could protect the interests and rights of all members of the WTO while enabling the system to move forward at a faster rate than current processes allow. This may also help the multilateral trade system to keep up with the rapid proliferation of PTAs by enabling groups of countries with common interests to move forward inside of the WTO, rather than having to go outside of it.