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WTO Decision-Making for the Future

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ABSTRACT

Decision making in the WTO has become ever more difficult as the number of members increases and the range of issues tackled broadens. This paper looks at reasons why aspects of decision-making might be changed and discusses a number of potential pitfalls that change would have to avoid, such as a dilution of commitments and fragmentation of the multilateral trading system. It then takes a detailed look at the notion of 'critical mass' decision-making. It argues for this approach under certain conditions, as it would: i) allow for the emergence of a more progressive and responsive WTO agenda; ii) blunt the diversion of trade cooperation initiatives to RTAs; iii) allow more efficient differentiation in the levels of rights and obligations among a community of highly diverse economies; and iv) promote greater efficiency in multilaterally-based negotiations on trade rules, and perhaps, sectoral market access agreements.

Keywords: GATT/WTO; negotiations; decision-making

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1. INTRODUCTION

As GATT/WTO membership increased over the years, from 23 in 1948 to 153 in 2009, so too did the diversity and complexity of issues that must be dealt with in trade relations. Greater variance among WTO members in terms of interests and priorities have made negotiations harder to manage and slower to complete. Many observers have pointed to what they see as sclerotic tendencies within the institution, provoking a search for new ways of doing business in relation both to procedures and the disposition of substantive rights and obligations among Members.[2] Bilateral and plurilateral regional arrangements may also be seen in part as an attempt to address these difficulties.

Consideration of decision-making within GATT/WTO has been a key element in the search for solutions. In the growing literature on this topic, a distinction has emerged between the "internal" and "external" aspects of decision-making procedures.[3] The external component is primarily concerned with the role accorded non-state actors. The internal element, which is th subject of this paper, deals with the manner in which WTO signatories themselves go about making decisions. Decision-making involves both procedural and substantive aspects. The procedural deal with a range of organizational matters, such as the role of different bodies in the process, the mix of formal and informal meetings, representation in informal meetings, transparency provisions, the conditions of access of individual members to the process, and more generally, the degree of representativeness and "voice" afforded by chosen procedures.[4]

It is not difficult to see how procedural arrangements for taking decisions feed into substantives outcomes. The concern of this paper, however, is with substantive aspects of decision-making arrangements in the WTO and it considers consensus, vetoes, votes and critical mass approaches to taking decisions. The core concern is with how the design of decision-making options influences the capacity of the WTO to manage diversity among its membership.

The paper argues that the nature of decision-making arrangements is crucial to the management of a regime that has to balance rights and obligations among nations with differing needs and priorities – a challenge that has beset the GATT/WTO trading system since its inception. The effectiveness of chosen decision-making modalities in terms of institutional robustness will be heavily influenced by the institutional "bells and whistles", or accompanying processes and procedures that shape the overall decision-making environment.

[2] Among the many writings on this, three major reports have been written – the Leutwiler Report (GATT, 1987), the Sutherland Report (2004) and the Warwick Commission (2007)

[3] The discussion is often couched in terms of internal and external transparency. Transparency is a crucial and element of the governance concerns relevant to the functioning of institutions, and is closely related to decision-making. For a recent treatment of transparency, see Wolfe and Collins-Williams (2009).

[4] Examples of this literature include Wolfe (2007), Jones (2007), Pedersen (2006), and the Sutherland Report (2004).

1.1. Why change the decision rules in the WTO?

The standard decision-making modality of the WTO is consensus.[5] Vested interests, inertia and conservative risk preferences often militate against change and impart a strong preference for the *status quo.* This makes experimentation more difficult, calls for convincing arguments about why change is needed and requires a higher degree of certainty that changes will be effective (Elsig, 2009). These are challenges facing any attempt to modify the WTO's decision rules. Why then, might one argue for modifications to the consensus rule?

Three main considerations suggest themselves. One relates to efficiency and the notion that the veto implicit in consensus decision-making imparts a bias towards lowest-common-denominator outcomes. Progress, when made, comes at a slow pace. The history of how the European Communities started to move away from exclusive reliance on unanimity in the Council from the 1987 Single European Act onwards is instructive of how pressures for progress clashed with a cumbersome decision-making culture. The GATT/WTO also has some experience in this domain which will be discussed below.

Second, one of the most severe recurring problems facing the GATT/WTO throughout its history has been the manner in which decisions are made on the content and form of the negotiating agenda. The system has to accommodate diverse interests, which makes it impossible for the institution to remain relevant to the needs of its membership without modifying and expanding its agenda from time to time. Yet agenda formulation, particularly in the rules area, has proven an intractable and divisive issue down the years (Jansen and Low, 2009).[6] In the eyes of some, many of these differences over the reach and content of GATT/WTO rules were never resolved to the satisfaction of all parties, and in certain instances may have been disposed of with a certain degree of coercive persuasion. The consensus rule did not make this decision-making process any easier.

A third reason for revisiting the consensus rule is that its relaxation could contribute to a more supple and effective accommodation of differentiated rights and obligations within the system, better aligned to the varied needs and priorities of Members and bestowed with a greater sense of fairness and legitimacy. Much of the rest of this paper will be devoted to developing a framework for "critical mass" decision-making (defined below). Critical mass decision-making requires a relaxation of the consensus rule, suitably embedded in a series of checks and balances that could make for a more vibrant and flexible multilateral trading system. A related argument is that the outcome of critical mass decision-making may be part of an answer from the WTO to a growing fragmentation of regulatory regimes under preferential trade agreements.

A clarification of the "single undertaking" concept. Before elaborating on the case for varying the WTO's decision rules, however, it is useful to clarify a particular concept that is

[5] A consensus rule is quite similar to unanimity, except that consensus in the WTO can be reached provided no objections are raised to a decision. Unanimity would require that all parties explicitly agree to the decision. Some of the theoretical discussion of decision-making in this paper assumes that we can talk of unanimity as if it were consensus. This does not undermine relevant meanings.

[6] In the Tokyo Round (1973-79) some governments wanted to develop better disciplines on a range of non-tariff trade measures and others did not. In the Uruguay Round much difficult discussion took place over the incorporation of trade in services, trade-related intellectual property rights, and investment. In the Doha Round, difficulties emerged over the possible inclusion of competition, investment, trade facilitation and transparency in government procurement as part of the negotiations.

closely linked to consensus decision-making – that of the "single undertaking". This clarification is needed because the notion of a single taking has been appropriated to serve two different meanings and has added confusion to the debate about different approaches to decision-making. The single undertaking first appeared in the lexicon of GATT/WTO-speak at the beginning of the Uruguay Round in 1986. The idea was to prevent parties from "cherry-picking" results or "harvesting" early outcomes from the negotiations unless all parties agreed. By keeping the whole agenda joined up, to be settled at the end, negotiators believed they were maximizing trade-off opportunities and no-one would be denied negotiating leverage. The same provision is contained in the Doha mandate.

After it became clear that the Uruguay Round was going to give birth to the WTO, the single undertaking took on a new meaning. It changed from merely being a mechanism to guarantee a unanimous decision about any possible early harvest, and became the gateway for WTO membership. Under this version of the single undertaking, no WTO Contracting Party could become a founding Member of the WTO without accepting the entire Uruguay Round package, including trade in services, trade-related intellectual property rights, and various new or elaborated non-tariff measure agreements. The single undertaking now became a requirement to assume obligations across the board, on pain of foregoing WTO membership. The emphasis placed on this modality for the birth of a new institution was perhaps a reflection of the determination of some parties to exorcise the approach in the Tokyo Round that made adherence to certain non-trade measure agreements voluntary (see below). It became increasingly clear, particularly in the light of the "implementation" agenda,[7] that some governments regarded this adapted version of the single undertaking as coercive. They were convinced the circumstances surrounding the closure of the Uruguay Round had pressed them into undesirable and quite possibly welfare-diminishing obligations.

On the other hand, some suggest that the success of certain developing countries in resisting the inclusion of competition, investment and transparency in government procurement in the Doha Round was attributable to the single undertaking. The logic is not clear. Power relationships have changed in the WTO since the Uruguay Round and this has affected agenda-related decisions. This outcome had nothing to do with the single undertaking in either of its guises. The single undertaking is perhaps best viewed as a procedural rule in negotiations designed to prevent a sub-set of nations from acting to the detriment of the full membership. Such action would in any event be impossible with the consensus decision rule. The notion of the single undertaking need be considered no further in this note.

1.1.1. Organization of the paper

The rest of the paper is organized in three more sections. Section 2 will review the underlying characteristics of alternative decision-making options in the WTO. Section 3 will discuss aspects of an appropriate institutional setting for critical mass decision-making, focusing especially on some norms and procedures that may be considered essential to the preservation of equity within the system, while at the same time securing more flexible pathways for a strengthened multilateral trading system. Section 4 concludes.

[7] The implementation emerged in the aftermath of the Uruguay Round and sought to revisit a wide range of WTO provisions, particularly with a view to making them more "development-friendly."

2. DECISION-MAKING OPTIONS

The original GATT has nothing to say about consensus. Instead, it sets out voting rules varying with circumstance from consensus to a two-thirds majority. As GATT membership multiplied there was increasing resort to consensus as the *de facto* decision rule in practically all matters. Rarely in recent years has voting been resorted to (Pauwelyn, 2005).

Article IX of the WTO Agreement spells out detailed decision-making rules. The starting point is adherence to the "practice" of consensus decision-making, with a possibility of voting on the basis of one vote per Member in cases of disagreement, with a simple majority carrying the day unless otherwise specified. Interpretations of provisions, amendments of provisions or waivers require super-majorities of two-thirds or three-quarters of Members, depending on the case at hand, and in the absence of consensus.

The practice of consensus in the GATT/WTO has always been taken to mean that no party objects rather than that all parties must agree. This abstention option would often be applied by default, because a party was absent from a meeting or generally non-participatory, although in some cases parties might abstain while expressing a measure of disagreement.

Consensus as 'shadow' weighted voting. In practice one might interpret consensus decision-making as a hidden system of weighted voting as the reality is that larger countries find it easier to influence voting outcomes than smaller ones. It would be more costly for smaller countries to challenge an outcome popular with large countries than vice-versa. Similarly, blocking a consensus with a veto is much more difficult for less powerful countries. Large countries have been willing to accept a one-country one-vote arrangement on the assumption that voting would not be used and that the veto would only be applied with great moderation.

With opacity and pragmatism, then, parties to the GATT and WTO arguably found a broadly acceptable decision-making equilibrium over the years that responded to underlying power relationships. It would be naive to assume that outcomes were always considered fair and welcome. Moreover, with the rise of new powers, the equilibrium has been placed under greater strain. The manifestation of the strain is the growing difficulty of reaching decisions and closing negotiations. The equilibrium is increasingly one of inaction. The WTO has been slowing down as an instrument of trade policy change and cooperation, leaving space that must partly explain the explosion of regionalism.

2.1. Formal voting as an option

Would voting offer a better way to advance multilateral cooperation on trade than consensus? There is a large multi-disciplinary literature on voting and how it affects policy outcomes. This is of limited concern here because as explained below, a formalized system of voting is a long way off as a practical tool for decision-making in the WTO.

Buchanan and Tulloch (1962) have argued that unanimity is the best decision rule for articulating social choice. Under majority voting (50 per cent threshold) a majority may vote for outcomes that impose costs on the minority, and unanimity is the only rule that ensures Pareto improving outcomes. A super majority (threshold in excess of 50 per cent) is a second best option, superior to majority voting because it better protects minorities from having costs

imposed upon them. McGann (2002) has challenged this conclusion, arguing that a majority is better than a super majority because it is an inherently less stable arrangement.

We need to distinguish between two situations under majority (or super majority) voting. First, the Buchanan and Tulloch scenario is one in which aggregate welfare falls as a consequence of a policy decision, but the majority gains at the expense of the minority. In a second scenario, a policy change could increase aggregate welfare and therefore be Pareto improving, but the minority may be worse off from the policy change. The solution to the first problem is unanimity, but in the second case unanimity would be a bad solution because the losing minority would block the globally welfare-improving outcome. The distributional problem under the second scenario is amenable to solution if a decision rule is imposed that requires the winners from a policy change to compensate the losers – a move that would still leave the winners better off. In effect, a unanimity rule with frictionless side payments would always ensure a Pareto optimal outcome in the second scenario.

The prospects of voting in the WTO. It is difficult to imagine a situation in which WTO Members would be willing to submit to voting arrangements on any policy measures which they perceived to have real resource implications. Moreover, assuming one-country one-vote would be unacceptable to larger countries – a prior decision would be required on the allocation of votes. A second decision would be needed to establish thresholds in terms of voting thresholds.

A literature has developed on how the approach to qualified majority voting emerged in the European Communities. The EU experience is not an example of what might happen in the WTO, but it is illustrative of tensions between various notions of political equity, equality and democracy that underlie decision-making preferences. In an analysis of the Nice Treaty, Baldwin et al. (2001) show how different voting structures can carry important efficiency implications, fundamentally influencing the prospects for progress and cooperation in integration. The literature also suggests that certain conditions have to be present before voting can even be contemplated. A minimum degree of convergence is required as to the objectives and desirability of particular integration policies. The number of parties involved also seems to be a key determinant of success. It is difficult, to say the least, to see adequate cohesion and commonality of purpose for arrangements comparable to those of the EU to be given serious consideration in the WTO. This judgment is widely, but not unanimously, shared in the literature (Tijmes-Lhl, 2009; Jones, 2007; Warwick Commission, 2007; Pauwelyn, 2005; Sutherland Report, 2004).

2.2 Critical mass decision-making as an option

A critical mass may be said to exist when a sufficient number of parties that do not represent the entire membership agree upon a common course of cooperative action to be taken under the auspices of the WTO. Examples of agreements struck in this way include those on telecommunications and financial services in the immediate post-Uruguay Round period, and the Information Technology Agreement (ITA), which was negotiated following the first WTO Ministerial Meeting in 1996. These agreements embody the feature that benefits accruing from them apply on a non-discriminatory basis to signatories and non-signatories alike.

Apart from critical mass arrangements, it should be noted that other modalities exist in the WTO context for differentiating rights and obligations among WTO Members. Note, however, that these are not decision-making modalities that compete with a critical mass approach, but rather arrangements that have a bearing on the content and balance of legal rights and obligations comparable, in this context, to a critical mass decision-making outcome. They can be divided into three categories and are different from the critical mass model discussed here in important ways. First, there are the special and differential treatment provisions for developing countries in areas both of (preferential) market access and rules. Second, there are plurilateral agreements, notably the Agreement on Government Procurement and the Agreement on Trade in Civil Aircraft. These agreements are among a sub-set of Members who establish a set of rights and obligations with respect to one another. Third parties are excluded from both rights and obligations and therefore these agreements discriminate against non-signatories. Third, there are voluntary agreements such as the Code of Good Practice for the Preparation, Adoption and Application of Standards, which is annexed to the Agreement on Technical Barriers to Trade.

The earliest appearance of a critical mass approach was in the Tokyo Round (1973-79), when agreements were negotiated on non-tariff measures, including technical barriers to trade, customs valuation, import licensing, anti-dumping, and subsidies and countervailing measures. The MFN rights of GATT contracting parties were protected by a decision stating 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."[8] The critical mass character of these agreements was eliminated by the Single Undertaking in the Uruguay Round.

In considering areas in which critical mass decision-making could be an option, it is useful to distinguish between market access negotiations and negotiations about trading rules. In the case of negotiations on trade opening measures – that is, reductions in tariffs and non-tariff barriers to trade in goods, or market access and national treatment barriers to trade in services – it is arguable that elements of critical mass are already embedded both in the negotiations and their results. No two Members have the same market access obligations. The baseline for market access negotiations is the individual tariff schedules of each Member, initially set at the time of accession and modified on the basis of negotiations in subsequent rounds. Members have participated more or less intensively in these negotiating rounds, largely as a function of their development status.

The critical mass negotiations that have taken place since the creation of the WTO have for the most part involved market access, such as in the ITA, telecommunications and financial services negotiations.[9] The fact that these were sectoral negotiations is what made a critical mass threshold – that is, the determination of the minimum necessary level of participation – such an important point of focus. Future sectoral market access negotiations could well involve a similar approach, but for the present purposes we are more interested in critical mass negotiations involving the establishment of new or modified rules.

[8] Decision of 28 November 1979 (L/4905).

[9] Only the telecommunications critical mass negotiations involved a rules aspect, with the inclusion of regulatory principles in the additional commitments column in the GATS schedules of participating Members.

As noted above, among the reasons for considering an additional element of flexibility in decision-making were: i) the slow, and some would argue continually slowing, pace at which the WTO is able to make decisions, perhaps in part because of inertia induced by the presence of veto power that can be hard to challenge[10]; ii) persistent difficulties encountered in defining agendas for negotiation; and iii) the idea that decisions taken among sub-sets of Members could facilitate the adoption of a forward-moving agenda, which under the right circumstances would not compromise the integrity and coherence of the multilateral trading system. Finally, it might also be argued that an increasingly lumbering pace of decision-making has induced governments to seek alternative venues for cooperation.

More supple decision rules at the multilateral level, less encumbered by transactions costs associated with large numbers, and less at the mercy of highly varied interests and priorities among Members, could contribute to disentangling the growing web of overlapping regional agreements. These are among the reasons put forward in some writings for considering critical mass decision-making.[11] Nonetheless, a critical mass approach may carry risks of fragmentation, erosion of the integration process, and inconsistency. One way to think of enhanced cooperation and critical mass is in terms of functional rather than geographical distinctions.[12] This allows the maintenance of a common base with area-specific variations responding to particular situations. The next section discusses in more detail a range of institutional and procedural safeguards against these risks.

3. INSTITUTIONAL AND PROCEDURAL ISSUES FOR CRITICAL MASS DECISION-MAKING

This Section spells out some of the more detailed issues that would arise in an exploration of the feasibility of critical mass decision-making in the WTO. The discussion is divided into seven sections.

3.1. Proposing a critical mass approach

If it was understood that in principle critical mass agreements were not ruled out as a means of advancing the WTO's negotiating agenda, one of the first considerations would be how these were to be proposed. First, presumably a prior understanding would be necessary that such arrangements required the support of a sufficient number of Members to warrant further consideration. Second, proposers would be expected to justify their desire to resort to a critical mass mode. Third, abstracting from market access sectorals, rules-related critical mass proposals might be about enhanced obligations in existing areas of WTO law – just as the Tokyo Round non-tariff measure accords (except for government procurement) were in the GATT context. In this case, no difficulty would arise in regard to the WTO basis upon

[10] Notwithstanding the argument that the unanimity rule bears characteristics of hidden weighted majority voting.

[11] Aspects of these and other arguments advocated or simply presented for considering critical mass decision-making (referred to in some literature as relaxing the single undertaking) as a possible decision-making mode may be found in the Sutherland Report (2004), VanGrasstek and Sauvé (2006), the Warwick Commission (2007), and Cottier (2009).

[12] The idea of emphasizing functional over geographical distinctions has also been developed in discussions on the appropriate design of special and differential treatment provisions, with a view to avoiding the binary nature of the WTO "graduation" debate and to direct attention to the more analytical aspects of why economies need special and differential treatment (Stevens, C. 2002; Keck and Low, 2004).

which such arrangements would build. If a critical mass proposal covered new territory beyond the current WTO remit, extra caution would be required to ensure that this did not undermine systemic integrity and the underlying inclusiveness of the multilateral trading system. Finally, no body exists in the WTO that can be compared to the EU Commission, since the Secretariat is not vested with comparable authority. This means that the role of standing WTO bodies as a mediating influence would need to be accorded importance, and well designed.

Critical mass, Pareto, and distributional issues

We have seen from the voting literature and standard welfare analysis that two situations can arise where a critical mass decision process could impose negative welfare outcomes on a sub-set of the membership. The first involves an agreement that is not Pareto-improving but which boosts the welfare of one group at the expense of another. The second type of agreement is welfare-improving globally such that the benefitting group could compensate a losing group and still be better off, but the necessary transfers are not made. The first type of agreement has strong beggar-thy-neighbour characteristics and should be disallowed altogether. The second type of agreement would be desirable but may require some imaginative supplementary action to ensure that no sub-group loses out from a critical-mass action. Compensatory mechanisms could take different forms, including trade-offs among negotiating subjects. Managing both types of arrangement would require careful analysis and an open discussion.

Defining the critical mass: the role of the "market"

Apart from the possibility of a ground rule about a certain minimum level of membership engagement required to embark on a critical mass initiative, an obvious question is who decides that a critical mass has been attained. The simplest answer, in the absence of the kinds of calculations required for working out voting thresholds, is that the critical mass defines itself. A critical mass exists when those prepared to go ahead with an agreement consider the agreement has sufficient support and commitment among the membership. Given the view, strongly embedded in the GATT/WTO manner of doing business, that free riding is the dominant unconstrained mode of behaviour in situations of potential international cooperation, it would be expected that potential participants in a critical mass agreement would be very attentive to the question of who else was participating.

Non-discrimination, free riding and contractual stability

The starting point of a critical mass agreement is that not all parties will participate. There would be something odd about a situation in which the WTO embraced the possibility of critical mass agreements and then set them up to discriminate against non-signatories. In a purely practical sense, it is also questionable whether the WTO membership today would brook discriminatory critical mass agreements along the lines of plurilateral arrangements such as the Agreement on Government Procurement.

When the critical mass has defined itself (as above) those left outside it are presumably considered too small in the market to undermine the agreement. In this sense, the outsiders cannot meaningfully be considered free-riders. This brings us to the conclusion that the economist's "small country" assumption should apply here. A free-rider is only a party whose non-participation in an agreement can destabilize that agreement. The rest should be left

alone. A conclusion from this line of reasoning would seem to be that there is no justification for refusing to apply the MFN rule in respect of all the benefits accruing from a critical mass agreement – to signatories and non-signatories alike. In many cases this may be irrelevant if countries external to the agreement are not in a position economically speaking to benefit from the commitments of others under the agreement. If anything, this merely reinforces the case for a MFN default.

A consideration of some importance is what happens if today's small countries become tomorrow's free-riders. A concern often expressed about an MFN approach to critical mass is precisely this – dynamic developing economies will face no pressure to make commitments down the road if they can enjoy the benefits of the commitments of others in a non-reciprocal manner, even though they have become free-riders in the eyes of the members of a critical mass agreement. This point should not be taken lightly. However, at least two considerations suggest that it can be over-played. First, the "market" may work here as well, in the sense that a party that earns the reputation for free-riding may well pay a price in other ways – there is much that is fungible when it comes to international cooperation. Second, if an agreement is welfare-enhancing, it is probably reasonable to assume that the benefits accrue both from one's own actions and those of others. This would provide an incentive to assume commitments. An empirical test of these propositions might be to look at how far emerging economies desist from taking advantage of special and differential treatment provisions as they grow and develop.

To the extent that this dynamic aspect of the free-riding concern remains a problem, several potential institutional fixes suggest themselves. A review mechanism could be established, for example, that would provide a context for a multilateral consideration of the case for expanding membership of a critical mass agreement. Some indicative quantitative criteria could be developed to assess readiness for participation, which could be fed into discussions. Engagement incentives might also entail a certain degree of exclusiveness in administrative and procedural arrangements surrounding the agreement.

Another issue that would need to be resolved is whether there was an expectation of eventual convergence around critical mass agreements, such that all WTO Members would be expected eventually to subscribe to the obligations of such agreements. The alternative would be to leave the matter open. From a systemic perspective, there would seem to be a case for assuming eventual convergence. If this were so, it would be factored into the way a multilateral review process would operate.

Negotiating critical mass agreements and participation

Another concern about the dynamic between potential insiders and outsiders in a critical mass context is that there is room for spoiling or gaming behaviour by parties that have no intention of participating in such an agreement. Such behaviour should be relatively easy to detect and discount, but the concern is legitimate. However, it would be difficult to justify the empowerment of the self-appointed critical mass as gatekeeper with respect to which parties may engage in deliberations about a potential critical mass agreement. Perhaps at some stage in the negotiations indications of commitment could be elicited from all potential parties. Another consideration is that some parties not regarded as crucial to the critical mass may believe that they will derive welfare benefits from participation, and this opportunity should surely not be denied.

Although the argument here is for open-endedness in the deliberative and perhaps the negotiating phase, it would obviously be the case that decisions taken under a critical mass agreement would be the exclusive domain of signatories to that agreement. A final point here is that a critical mass agreement should be open to accession by other parties at any time, without a need for the additional negotiation of an entry ticket.

Managing critical mass agreements: maintaining multilateral accountability

The somewhat obvious point to be made here is that for critical mass agreements to remain part of a multilateral structure they will need to be held to the standards that applied at their inception. This means that multilateral reporting and review arrangements would be part of the package.

Decision points requiring consensus

Three decision points seem to arise in respect to the question as to when consensus decision-making should apply to critical mass initiatives. The first is at the launch of a proposal, the second is during the actual negotiation of the substance of an agreement and the third is upon adoption of results. No institution like the EU Commission exists to decide when a critical mass proposal should and should not be permitted to go forward. This argues for some other approach and raises the question whether a consensus decision should be required before critical mass negotiations are undertaken. Legitimacy considerations and systemic coherence may argue for a shared decision at the entry point. If a critical mass proposal is serious and broadly supported, it will be difficult to block without sound reason.

This is a difficult issue, however, and it may be argued that consensus decision-making should only kick in at the point where results are adopted. If entering into a critical mass negotiation is not subject to veto at the outset, there should be a general prior agreement on the ground rules for conducting critical mass negotiations – and these would be commitments on which Members could be challenged through multilateral due process.

There does not seem to be any justification for requiring that substantive negotiation of critical mass agreements be subject to a consensus decision-making process. This would be cumbersome, inefficient and costly. The consensus requirement would better be left to the time when the results of a negotiation are adopted and an agreement is to enter into force. This would be an indispensable accompaniment of keeping a critical mass agreement within the ambit of the multilateral system. It would be understood, or perhaps required, that the adoption stage would not be a time to pick at the details of a negotiated agreement. Indeed, this could be an occasion to follow the example of US legislation on the all-or-nothing adoption of international trade agreements, or the EU's requirement that the Parliament can only vote to sack an entire Commission and not individual Commissioners. In sum, then, of the three decision points, the conclusion here is that consensus might or might not be required at the entry point, would not be required at the negotiation stage, and would be required at the adoption stage.

4. Conclusions

This paper has taken a fairly detailed look at the case for critical mass decision-making as an element of the WTO's overall decision rules. It has argued in favour of such an approach as: i) a means of advancing a progressive and responsive WTO agenda; ii) a way of blunting the demand for regional fixes to issues that are best addressed globally; iii) a vehicle for more efficient differentiation in the levels of rights and obligations among a community of highly diverse economies; and iv) as a mechanism for promoting greater efficiency at lower cost in multilaterally-based negotiations on trade rules, and perhaps, sectoral market access agreements. The paper has paid some attention to the risk of fragmentation and dilution of the multilateral basis for trade cooperation arising from the adoption of a critical mass approach, and has discussed a range of institutional and procedural safeguards against this risk.

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