

# WTO constitutional problems: dispute settlement and decision making

by John H Jackson

The controversy surrounding the World Trade Organisation's Ministerial Conference in Seattle at the end of last year focused public attention on the workings of the WTO. The author looks at the background and history of the WTO, as well as procedures for dispute settlement among nations, in an article written before the events at Seattle.

On January 1, 1995, a new international economic organisation came into being, resulting from the lengthy, extensive and complex Uruguay Round trade negotiation in the context of the General Agreement on Tariffs and Trade (GATT). The Uruguay Round Agreement of the GATT/WTO has been described as 'the most important event in recent economic history.' In addition, the World Trade Organisation (WTO) is described as the 'central international economic institution',<sup>1</sup> and nations are becoming increasingly engaged with the detailed processes of the WTO, especially its dispute settlement procedure. However, the WTO Agreement, including all of its elaborate annexes, is probably fully understood by no nation which has accepted it, including some of the richest and most powerful trading nations that are members.<sup>2</sup>

This article looks at the first three years' experience under the new organisation and its 'constitution'. At this point in time, appraisals of the launch and early experience of the WTO are almost uniformly optimistic and approving. The new organisation has had a successful launch, it has engaged in a number of different activities (not all of which have individually been successful), and it has put into practice a quite remarkable set of new procedures for dispute settlement among nations concerning trade matters.

Therefore, it is worthwhile to try to draw some conclusions about this early experience and what it might portend for the future. This is the purpose of this article which intends, furthermore, to put forward some generalisations or tentative hypotheses about the meaning and potential of these early years of experience. The article will do this in four parts. First, it will provide a brief overview of the history, background, and 'landscape' of the new organisation. It illustrates the continuity from its predecessor, the GATT, and some of the major problems of the GATT and how the Uruguay Round negotiators approached those problems in developing the new organisation and the extraordinarily extensive treaty of the Uruguay Round.

The second part examines the jurisprudence of the new organisation during the early years up to March 1998. A brief overview of the dispute settlement cases will be presented, along with some indications of the potential meaning of those cases and some hypotheses about the directions of the new Appellate Body. The third part of this article discusses some of the emerging constitutional problems, particularly questions about allocation of power within the organisation, and between the organisation and the member states. Particular attention will be given to the potential ability or inability of the organisation to cope with some of the many problems of 'globalisation' which are emerging. Finally, this article will suggest some possible solutions or partial solutions to some problems, and draw some conclusions and prognoses.

## I. OVERVIEW OF THE HISTORY, BACKGROUND AND 'LANDSCAPE' OF THE WTO

Looking back over the 1946–94 history of the GATT allows one to reflect on how surprising it was that this relatively feeble institution with many 'birth defects' managed to play such a significant role for almost five decades. It certainly was far more successful than could have been fairly predicted in the late 1940s.

World economic developments pushed The GATT to a central role during the past few decades. The growing economic interdependence of the world has been increasingly commented upon. Events that occur halfway around the world have a powerful influence on the other side of the globe. Armed conflict and social unrest in the Middle East affect the farmers in Iowa and France and the auto workers in Michigan and Germany. Interest rate decisions in Washington have a profound influence on the external debt of many countries of the world which, in turn, affects their ability to purchase goods made in industrial countries and their ability to provide economic advancement to their citizenry. Environmental problems have

obvious cross-border effects. More and more frequently, government leaders find their freedom of action circumscribed because of the impact of external economic factors on their national economies.

One of the interesting and certainly more controversial aspects of the GATT as an institution was its dispute-settlement mechanism. This mechanism was unique. It was also flawed, due in part to the troubled beginnings of the GATT. Yet these procedures worked better than expected, and some could argue that in fact they worked better than those of the World Court and many other international dispute procedures. A number of interesting policy questions are raised by the experience of the procedure, not least of which is the question about what should be the fundamental objective of the system – to solve the instant dispute (by conciliation, obfuscation, power threats, or otherwise), or to promote certain longer-term systemic goals such as predictability and stability of interpretations of treaty text.

Even though some argued that GATT Dispute Settlement was merely a facilitation of negotiations designed to reach a settlement, the original intention was for GATT to be placed in the institutional setting of the International Trade Organisation (ITO). The draft ITO Charter called for a rigorous dispute-settlement procedure which contemplated effective use of arbitration (not always mandatory, however) and even appeal to the World Court in some circumstances.<sup>3</sup> Clair Wilcox, Vice-Chairman of the US Delegation to the Havana Conference, regards the possibility of suspending trade concessions under this procedure as:

*‘... a method of restoring a balance of benefits and obligations that, for any reason, may have been disturbed. It is nowhere described as a penalty to be imposed on members who may violate their obligations or as a sanction to insure that these obligations will be observed. But even though it is not so regarded, it will operate in fact as a sanction and a penalty.’*

He further notes the procedure for obtaining a World Court opinion on the law involved in a dispute, and says, ‘A basis is thus provided for the development of a body of international law to govern trade relationships.’

When one reflects on the almost fifty years of pre-WTO history of the GATT dispute settlement process, some generalisations seem both apparent and quite remarkable. With very meagre treaty language as a start, plus divergent alternative views about the policy goals of the system, the GATT, like so many human institutions, to some extent took on a life of its own. Both as to the dispute procedures (a shift from working parties to panels), and as to the substantive focus of the system (a shift from general ambiguous ideas about ‘nullification or impairment,’ to more analytical or ‘legalistic’ approaches to interpret rules of treaty obligation, the GATT panel procedure evolved toward more rule orientation.

The GATT dispute settlement process became admired enough that various trade policy interests sought to bring their subjects under it. This was one of the motivations which led both the intellectual property interests and the services trade interests to urge those subjects to be included in the Uruguay Round. The Uruguay Round results, of course, apply the new Dispute Settlement Understanding (DSU) procedures to those subjects.

## II. THE JURISPRUDENCE OF THE WTO EARLY YEARS

### *II.1 The first years of the new WTO dispute settlement procedures*

The WTO Secretariat listings of 30 March 1998 show that 120 cases have been brought under the new procedures. This is a remarkable increase, about threefold, over the rate of cases under the GATT. This number of cases may give various indications. First, it represents a great deal of confidence by the nation-state members of the WTO in the new procedure. Second, members are perhaps testing the new procedure and trying it out by bringing cases. Third, perhaps the new texts of the Uruguay Round Agreements have sufficient ambiguity (fairly typical at the beginning of practice under a treaty text) that they engender more cases. And, finally, perhaps it is a combination of all these factors.

One of the more optimistic indicia of the figures is the relatively large number of settlements that are apparently occurring. This could be an indication that the procedures are enhancing and inducing settlements, and that these settlements are consistent with the ‘rule orientation’ principles of the procedures. Governments start a procedure, and then as the procedure advances more becomes known about the case. At some point, the jurisprudence will suggest to the participants the likely outcome of the case and this will induce settlement, consistent with the rules as interpreted in prior cases. Thus the jurisprudence assists the governments in coming to agreement about their case, consistent with the rules themselves.

Another optimistic indication is the general spirit of compliance with the result of the dispute settlement procedures. Even the major powers have all indicated that they will comply with the mandates of the Dispute Settlement reports when they are finalised and formally adopted (which is virtually automatic). Naturally, grumbings and complaints, particularly by special interests within societies, about the rulings of the panels and the Appellate Body are expected to exist. Nevertheless, the author has attended meetings where officials from the major participating members in the WTO have all indicated that their governments intend to comply with the results of holdings against their governments. So far, there seems to be no exception to this spirit of compliance, although the question of what is appropriate ‘compliance’ is controversial from time to time.

Another interesting facet of the cases brought so far is the much higher amount of participation by developing countries. These countries have brought a number of the cases themselves, even against some of the big industrial countries (with rather satisfying wins). In addition, for virtually the first time in GATT/WTO history, developing countries have even brought cases against other developing countries.

### *II.2 Some tentative generalisations about the developing jurisprudence*

The addition of the right to appeal to an Appellate Body made up of a permanent cadre (a roster of seven, sitting in divisions of three), in conjunction with the automaticity of approval of panel reports, has already had a very profound impact on the world trading system as embodied in the GATT and WTO.<sup>4</sup> Some of

these impacts will be the focus of the next sub-section. For this sub-section, however, it is of considerable interest to examine the characteristics and general approaches of the nine or ten reports made available by the Appellate Body divisions.

First, the Appellate Body has made it reasonably clear that general international law is relevant and applies in the case of the WTO and its treaty annexes, including the GATT. In the past there has been some question about this, with certain parties arguing that the GATT was a 'separate regime,' in some way insulated from the general body of international law. The Appellate Body has made it quite clear that this is not the case; it has made reference to general international law principles, particularly as embodied in the Vienna Convention on the Law of Treaties, which the Appellate Body calls upon for principles of treaty interpretation.

The Appellate Body also has produced reports which, while not entirely free of possible error, have been very carefully crafted. These reports give the strong impression of opinions that judicial institutions in many legal systems follow. The Appellate Body reasoning has been quite thorough, and generally careful (especially considering the very short time limits within which they have to operate). It has also been quite independent and impartial, for it is difficult to detect nationality influence on the Appellate Body. There is no indication of particular authorship of any part of an Appellate Body report and no provision for dissenting opinions. Thus, an Appellate Body report is only attributed generally to the three members of the roster which sat in the division. This makes the Appellate Body work more 'juridical,' or, put differently, 'legalistic' in tenor than before in the GATT, and indeed more so than in many, if not most, international tribunals.

The second characteristic that seems to be emerging from the jurisprudence with the Appellate Body is a more deferential attitude towards national government decisions (or, in other words, more deference to national 'sovereignty'), than sometimes has been the case for the first-level panels or the panels under GATT. In some sense, therefore, the Appellate Body has been exercising more 'judicial restraint' and has been more hesitant to develop new ideas of interpreting the treaty language than sometimes has been the case in the first-level panels themselves. Although there is no clear explanation for this attitude of the Appellate Body, this may be attributed, nevertheless, to the fact that the Appellate Body roster contains relatively few GATT specialists. The Appellate Body, which generally is considered to have outstanding members, has members that are more 'generalist' than one would typically find on the first-level panels or in the GATT panels in previous years. This could be a very good omen, because the care and appropriate deference to national decisions may be a significant factor in the long-run general acceptance of the work of the WTO Dispute Settlement Body (DSB) among a great variety and large number of nations of the world.

### *II.3 The role of the WTO dispute settlement system in the New World trading framework*

As mentioned in the previous sub-section, the dispute settlement system under the new procedures is having a profound impact on the world trade system. In particular, diplomats find themselves in new territory. Rather than

operating in what is thoroughly a 'negotiating atmosphere', diplomats find themselves acting as lawyers, or relying on lawyers, much more heavily than before, and much more heavily than some of them would like. The dispute settlement procedure itself becomes part of the negotiating tactics for various Dispute Settlement attempts. To this end, reference is frequently made in the media to 'nation A' arguing against 'nation B's' measures, and 'threatening to bring a case in the WTO' if it does not get the matter resolved. The negotiations concerning potential and threatened US action against Japanese automobile imports is a case in point, where the option to bring the case in the WTO apparently worked in a way that was deemed by the Japanese appropriately favourable to their negotiation (negotiating) position. In another case, Costa Rica, small as it is, brought a case against the giant of the north – the US – concerning import quotas in the US against the importation of cotton underwear and some other textile products. Costa Rica won the case, both at the first level and on appeal – an outcome that is quite an eye-opener.

One interesting set of developments that has been evolving, first of all under the GATT and now under the WTO, is the participation of private attorneys who are retained by governments involved in the WTO dispute settlement process. Small governments, in particular, often do not have in-house expertise that is adequate to handle some of the complex cases (or even some of the simple cases) which are finding their way into the WTO dispute settlement arena. Such states are put at a substantial disadvantage against large entities like the US or the European Community which have such in-house expertise. These smaller states consequently have in some circumstances been eager to retain the services of private attorneys, usually Europeans or Americans. But there has been some objection made, most often by the US, to the practice. During the course of the last year, developments seem to have moved very substantially in the direction of permitting this practice of governments retaining private attorneys, with certain limitations. Although this represents a commendable move, it will nevertheless necessitate a certain amount of careful thinking about the role and relationship of the private attorneys vis-à-vis their government clients, and vis-à-vis the WTO system. It will be wise for the DSB or other appropriate bodies to develop certain standards and ethical rules, perhaps including conflict-of-interest rules as well as confidentiality rules, which would generally be recommended to governments as part of the contract they use to retain attorneys. If this matter receives appropriate attention, it will facilitate the evolution of the appropriate practices and documents in this respect.

## *II. EMERGING CONSTITUTIONAL PROBLEMS OF THE WTO*

Almost every human institution has to face the task of how to evolve and change in the face of conditions and circumstances not originally considered when the institution was set up. This is most certainly true in respect to the original GATT, and now in the case of the WTO. With the fast-paced change of a globalising economy, the WTO will necessarily have to cope with new factors, new policies, and new subject matters. If it fails to do that, it will sooner or later, faster or more gradually, be 'marginalised.' This could be very detrimental to the broader multilateral approach to international economic relations,

pushing nations to solve their problems through regional arrangements, bilateral arrangements, and even unilateral actions. Although these forms other than multilateral can have an appropriate role and also can be constructive innovators for the world trading system, they also run considerable additional risks of ignoring key components of, and the diversity of, societies and societal policies that exist in the world. In other words, they run a high risk of generating significant disputes and rancour among nations, which can inhibit or debilitate the advantages of co-operation otherwise hoped for under the multilateral system.

In addition, in the case of human institutions and particularly treaty negotiations involving over 130 participating nations or entities, gaps and considerable ambiguities in many places in the treaty language are inevitable. These shortcomings are beginning to emerge in the discussions and dispute settlement proceedings of the WTO. They seem to be particularly significant in the context of the new issue texts, namely GATS for services and TRIPS for intellectual property. However, even concerning the traditional GATT text itself, there are ongoing ambiguity problems that are calling for new approaches. For example, an evolution in thinking about the obligations of Article III (national treatment) as affected and perhaps embellished by other texts in the context of GATT in Annex IA, such as the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Technical Barriers to Trade, etc., is currently witnessed. Along the same lines, a number of other newer subjects have been suggested for allocation to co-operative mechanisms in the WTO context. These include questions about competition policy, investment rules, human rights issues, environment in trade, labour standards issues, sanctions (unilateral or otherwise) to enforce some of these policies, and also questions of threat to peace and arms control. The inventory of potential new issues does not stop there.

The crucial question remains, however, how will the WTO solve or attempt to solve some of these issues? The First Ministerial, held at Singapore in 1996, faced some of these questions. Many conclude that the results of that meeting were not terribly innovative in relation to ways to cope with new issues. Obviously, the ministers felt both the legal constraints of the WTO 'charter,' and political as well as economic constraints of attitudes of constituents in a number of different societies. The issues needing resolution could be broadly grouped into two categories: (1) substantively new issues (such as some of those discussed or listed above), but also (2) a number of procedural or arguably interstitial issues for the organisation. It is clear, for example, that a variety of the procedures of the dispute settlement process (particularly its relation to the text of the Dispute Settlement Understanding), as well as other procedures regarding decision-making, waivers, new accessions, are being scrutinised and various suggestions for improvement are being put on the table. With respect to dispute settlement, most are aware that the treaty text itself calls for a review during the calendar year 1998, now ensuing.

In considering and dealing with the above-named issues in the current WTO institutional framework, it has to be recognised at the outset that there is a delicate interplay between the dispute settlement process on the one hand, and the possibilities or difficulties of negotiating new treaty texts or making decisions by the organisation that are authorised by the Uruguay Round treaty text, on the other hand. In this context, the possibilities of

negotiating new text or making decisions pursuant to explicit authority of the WTO 'charter' are clearly quite constrained. In the last months of the Uruguay Round negotiations, the diplomatic representatives at the negotiation felt it was important to build in a number of 'checks and balances' in the WTO charter, to constrain decision making by the international institution which would be too 'intrusive on sovereignty'. Thus, the decision-making clauses of Article IX and the amending clauses of Article X established a number of limitations on what the membership of the WTO can do. The amending procedures are probably at least as difficult as those that existed under the GATT.<sup>5</sup> Under the GATT, it was perceived by the time of the Tokyo Round in the 1970s that amendments were virtually impossible, so the Contracting Parties developed the technique of 'side agreements'. The theory of the WTO was to avoid this 'GATT à la carte' approach and pursue a 'single agreement' approach. Attitudes toward that continue to exist.

Apart from formal amendments, one can look at the powers concerning decisions, waivers and formal interpretations. Substantial constraints do exist, however, in each of these avenues. Decision-making (at least as a fallback from attempts to achieve consensus) is generally ruled by a majority-vote system. However, there is language in the WTO charter (Article IX, paragraph 3), as well as the long practice under the GATT, that suggests that decisions cannot be used to impose new obligations on members. Waivers were sometimes used in the GATT as ways to innovate and adjust to new circumstances. This process, however, fell into disrepute and caused the negotiators to develop Uruguay Round texts that quite constrained the use of waivers. In particular, such a constraint concerned duration of waivers subjecting them, thereby, to explicit revocation authorities. The GATT had no formal provision regarding 'interpretation', and thus the GATT panels probably enjoyed greater scope for setting forth interpretations that would ultimately become embedded in the GATT practice and even subsequently negotiated treaty language. However, the WTO addresses this issue of formal interpretations directly, imposing a very stringent voting requirement of three-fourths of the total membership. Since it is often observed that a quarter of the WTO membership is not present at key meetings, one can see that the formal interpretation process is not an easy one to achieve.

Given these various constraints, it would be understandable if there was a temptation to try to use the dispute settlement process and the general conclusions of the panel reports regarding interpretation of many of the treaty clauses which have ambiguity or gaps. However, the Dispute Settlement Understanding itself in Article 3, paragraph 2, limits proceeding in this direction, by saying 'Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.' As suggested in Part II above, the emerging attitudes of the Appellate Body reports seem to reinforce a policy of considerable deference to national government decision making, possibly as a matter of 'judicial restraint' ideas such as that quoted from the DSU Article 3, and otherwise expressed by various countries that fear too much intrusion on 'sovereignty' (whatever that means). The provision of an explicit power of 'formal interpretation' with a supermajority requirement in the WTO charter also arguably constrains the scope into which the dispute settlement system can push the idea of its report rulings and recommendations becoming 'definitive'.

In short, there are indications that the dispute settlement system cannot and should not carry much of the weight of formulating new rules either by way of filling gaps in the existing agreements, or by setting forth norms which carry the organisation into totally new territory, such as competition policy or labour standards. In addition, as noted above, there are many procedural questions. Some of the procedures under the Dispute Settlement Understanding are now being questioned. Various suggestions are coming forward, and some lists of proposals for change exceed 60 or 80 items or suggestions. Many of these suggestions are reasonable 'fine tuning,' without dramatic consequence to the system. But even the fine-tuning can be difficult to achieve given some of the constraints on decision-making. One of the geniuses of the GATT and its history was its ability to evolve partly through trial and error and practice. Indeed the dispute settlement under GATT evolved over four decades quite dramatically – with such concepts as 'prima facie nullification', or the use of 'panels' instead of 'working parties', becoming gradually embedded in the process – and under the Tokyo Round understanding on dispute settlement became 'definitive' by consensus action of the contracting parties.

But the language of the DSU (as well as the WTO 'charter') seems to greatly constrain some of this approach compared to the GATT. DSU Article 2, paragraph 4, states 'Where the rules and procedures of this understanding provide for the DSB to take a decision, it shall do so by consensus.' The definition of consensus is then supplied in a footnote, and although not identical with 'unanimity', provides that an objecting member can block consensus. Likewise, the WTO 'charter' itself provides a consensus requirement for amendments to Annexes 2 and 3 of the WTO<sup>6</sup>. Thus the opportunity to evolve by experiment and trial and effort, plus practice over time, seems considerably more constrained under the WTO than was the case under the very loose and ambiguous language of the GATT, with its minimalist institutional language.

Thus, we have a potential for a stalemate, or potential for inability to cope with some of the problems that will be facing and are already facing the new WTO institution. This requires exploring a possible solution in this respect. This is the focus of the following and final part of this article.

#### **IV. EXPLORING POSSIBLE SOLUTIONS AND DEVELOPING CONCLUSIONS AND PROGNOSSES FOR THE FUTURE**

In order to avoid the potential stalemate problem referred to in the previous section, various possible solutions could be developed. For instance, the WTO can develop somewhat better opportunities for explicit amendments, using the two-thirds (and three-fourths in substance cases) power of amendment in the WTO charter. By the same token, some of the decisions that are possible by the WTO membership at its ministerial meeting or various council meetings can 'creep up on' some of the issues and decide them in a way so that certain small steps of reform can be taken. These decisions will become part of the 'practice under the agreement' referred to in the Vienna Convention on the Law of Treaties. A third avenue can stem from the dispute settlement details and potential changes in procedures. In this respect, it may be possible to work within the 'consensus rule' to make some changes in Annex 2 (the DSU). It at least appears

that this does not require national government member treaty text amendments, and thus avoids some of the elaborate procedures of national government ratification of treaties, etc.

The question of such consensus relates to at least two different kinds of decisions: changes in the text of the DSU; and decisions by the DSB which could involve incidental or interstitial and ancillary procedural rules, assuming that they are not inconsistent with treaty provisions of the DSU. Intuitively, the consensus rule apparently applies in this context. There may be a few situations where basic, small and relatively unimportant decisions can be made as a matter of practice of the administration of the dispute settlement system, such as decisions about how to interpret time deadlines, or the form of complaints that should be filed, or the development of a relatively uniform set of procedural rules about activities of panels and panel members, translations, documentation, etc. Even then there is at least some likelihood that an objecting member could force an issue to go to the DSB and that member could dare block consensus.

With respect to larger 'new subjects' for WTO additions, subjects as significant, for example, as rules on investment, or competition policy, or even environmental rules, it appears that matters will be somewhat more difficult even than the procedural changes. If amendment of the agreements is not feasible, one could look at the WTO Annex 4 'plurilateral' agreements which are optional, and thus in the drafting process do not necessarily need to be subject to 'consensus'. However, to add a negotiated plurilateral agreement to Annex 4 of the WTO does require the so-called 'full consensus'. Thus once again, that could be blocked, and clearly that blocking opportunity will translate back into the negotiating process about what can be negotiated to be placed in such a new potential plurilateral agreement.

Accordingly, it may be that the critical development for the WTO is to address 'consensus' procedures and thus give attention to the meaning and practice of consensus. In this context, it might be feasible to develop certain practices about consensus that would lead member nations of the WTO to 'self restrain' themselves from blocking a consensus in certain circumstances and under certain conditions. In other words, the General Council, or the DSB (General Council acting with different hats) might develop a series of criteria about consensus concerning certain kinds of decisions, which would strongly suggest to Member States that if these criteria are fulfilled, they would normally refrain from blocking the consensus. This approach could be compared to the practice in the European Community history and jurisprudence of the 'Luxembourg Compromise', where it has been understood that governments would refrain from exercising their potential vote against a measure in certain circumstances, unless the measure involves something of 'vital interest' to the nation members involved. While not pursuing the analogy too far, one might see something similar develop in the context of the WTO.

However, it is prudent at this point to consider what some of the conditions or circumstances might be to encourage nations to refrain from blocking a consensus on some of the more purely procedural reforms that might be desired, either in amending the DSU or in decisions of the DSB. The following might be considered:

- Firstly, the major criterion is that a proposed measure must be consistent with the fundamental principles of the WTO, including MFN, and perhaps some of the substantive requirements of treaty texts such as national treatment, or restraints on border measures. Normally, procedural changes ought not to be directed to challenge those particular rules anyway.
- In addition, the requirement of a supermajority threshold, such as 70 per cent of the members present, is recommended.
- And last but not least, it may be helpful in this context that the consideration of any new procedural measure should first be examined in depth by a special expert group appointed by the DSB or the WTO membership. This group would consist of considerable expertise on legal procedures and it would be recognised as impartial and not prone to be pushing one reform or another for particular advantage of the nation concerned. To this end, it may be useful that the members of the expert group should be, like panels, working and discussing in their own right and judgment and not on instruction of governments. Indeed, such an expert group might draw upon individuals who are not part of the diplomatic missions at Geneva, and in some cases not even government employees. The expert group could prepare certain recommendations or evaluate proposals that have otherwise been made, and then send them to the DSB, or to the WTO General Council, with a recommendation of adoption. Then if the other criteria mentioned above were fulfilled, again members would be strongly encouraged to refrain from blocking consensus, partly with the notion that in the future they may be supporting some other measures which likewise would benefit from restraint in using consensus-blocking techniques.

Turning to more substantial reforms which might be developed through plurilateral agreements as candidates for Annex 4, one might also develop a set of criteria which would be used to persuade nation members to refrain from exercising consensus-blocking techniques. For example, criteria for a new plurilateral agreement that would benefit from such a developing practice over time (informal and not part of the treaty) could include the following:

- The proposed agreement would not be inconsistent with any of the existing other rules of the WTO and its Annexes, especially Annex 1 (GATT, GATS, and TRIPS). Thus, MFN would be fulfilled where otherwise required by the rules of Annex 1. Other measures already embodied in the treaties would likewise be a requirement of consistency for the new treaty agreement. It has to be emphasised, however, that the new plurilateral agreement proposal would sometimes contain measures that would call for rules applying to those accepting the new protocol that differ from the other WTO rules. This should not, nevertheless, have any detrimental impact on the non-members of the new protocol.
- The protocol or plurilateral agreement proposal should have among its proponents a 'substantial' number of members of the WTO. Substantial in this context should be interpreted in a way that makes it relatively clear that bilateral agreements would not be good candidates. Probably, the proposed protocol should include between ten and twenty WTO members, or alternatively the minimum number would be left ambiguous, as long as it was not just a few members. It could also be noted that smaller groups of members can enter into

regional trading arrangements, provided that these are not inconsistent with the other rules of the WTO, particularly including Article XXIV of GATT.

- The proposed plurilateral agreement should be open to accession by any WTO member. Possibly this ability to accede to the plurilateral agreement should be unconditional. That would mean that the proposal for a plurilateral agreement would have within its text all the measures to be required, leaving nothing further to be negotiated for accession. There might be some exception for a 'scheduling' type apparatus analogous to GATT tariff schedules or GATS service schedules.
- It could be required that a majority vote of the Council would approve the addition of the plurilateral proposal to Annex 4. This majority vote could be something of a supermajority, such as two-thirds. Other formulas for the vote could be envisaged.
- Since bringing a new plurilateral agreement under the WTO 'umbrella' by adding it to Annex 4 might have some financial implications for the costs of Secretariat and other assistance in enhancing and carrying out the plurilateral agreement, an additional principle to avoid consensus-blocking could be that the financial costs of the additional activity created by the proposed plurilateral agreement would be carried entirely by the members who have acceded to the plurilateral agreement, under a special budget item in the WTO financial system.

Possibly with some approach like this to providing some constraint on the techniques of developing consensus, the risk of the consensus requirement creating stalemate and inability to evolve and cope with new problems in the global economy could be minimised. These criteria could be developed through resolutions of the General Council or the DSB, in the form of 'recommendations to members', and might provide the relatively informal practice which nevertheless could be effective over time. If such practice was reasonably successful, it might achieve some of the best of several divergent policies, namely allowing measures to go forward short of unanimity or total consensus, but at the same time protecting in some sort of ultimate and 'vital sense' the right and power of every member of the WTO to object in only those very few cases where it felt it was [so] strongly important to its vital national interest that it would not refrain from blocking the consensus. Clearly this must develop as a sort of 'gentlemen's agreement' over time, and the practice of this procedure in its formative period, which may take several years, would be extraordinarily important.

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<sup>1</sup> Leonard Bierman, Donald R Fraser and James W Koari, 'The General Agreement on Tariffs and Trade from a Market Perspective', 17 U Pa J Int'l Econ L, 845 (1996).

<sup>2</sup> Based on interviews with WTO officials and Uruguay Round negotiations.

<sup>3</sup> See the Charter of the International Trade Organisation (ITO), Chap. VII, Articles 92-97, UN Final Act and Related Documents, UN Conference on Trade and Employment, held in Havana, Cuba, from

21 November 1947 to 24 March 1948, Interim Commission for the International Trade Organisation, Lake Success, New York, April 1948. UN Doc E/Conf 2/78. See also Clair Wilcox, 'A Charter for World Trade' 159, 305-308 (1949).

- <sup>4</sup> The GATT continues as a treaty, although the WTO has taken over the organisational functions of what used to be the GATT.
- <sup>5</sup> Largely copied from the GATT, with the possible exception of certain non-substantive procedural amendments.
- <sup>6</sup> It will be recalled that Annex 2 is the DSU and the Dispute Settlement procedures.

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