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SYMPOSIUM ON QUEERING INTERNATIONAL LAW

CONSENSUS AND DIVERSITY IN THE WORLD TRADE ORGANIZATION: A QUEER PERSPECTIVE

*Claerwen O'Hara**

When the World Trade Organization (WTO) was established in 1995, it was seen as representative of a new era in international law, which claimed to be more functional and cooperative than the Cold War years.[1] Fast forward to 2022, most commentators proclaim that the WTO is in "crisis." For over two decades, its membership has struggled to reach decisions and, in 2019, the WTO was "dejudicialized"[2] by the United States blocking consensus on appointments to the Appellate Body. In seeking to understand what went wrong, some commentators have focused on the operation of the WTO's consensus procedure and, in particular, the way it can afford states a veto power. In this essay, I take a different approach by considering how the *discursive* effects of consensus decision making have played into some of the problems facing the WTO today. Inspired by Gibson-Graham's work on "queering the economy,"[3] I do so by unmooring queer theory from its base of gender and sexuality and applying queer insights to a discourse analysis of statements made in relation to the Uruguay Round of multilateral trade negotiations, which lasted from 1986 until 1993 and culminated in the agreement to establish the WTO. I show how the use of consensus decision making served to cultivate an intolerance of economic difference by giving rise to discourses of worldwide sameness and agreement. Finally, I consider what a queerer approach to trade-related decision making might look like.

The Uruguay Round Consensus

In modernity, origin stories have become crucial to mythmaking. As Peter Fitzpatrick writes, "an obsession with origins is perhaps the most obvious substitute for the mythically transcendent."[4] In the case of the WTO, an origin story was constructed around the fact that it came into being as a result of over 120 states reaching consensus during the Uruguay Round of trade negotiations. Indeed, in the WTO's early years, it became commonplace for its directors-general to emphasize the "consensus-based" nature of the new trade system, describing it as "a frame-

* *PhD Candidate and Teaching Fellow, Melbourne Law School.*

[1] On the new international imaginary launched at the end of the Cold War, see Matthew Craven, Sundhya Pahuja & Gerry Simpson, *Reading and Unreading a Historiography of Hiatus*, *in* INTERNATIONAL LAW AND THE COLD WAR (Matthew Craven, Sundhya Pahuja & Gerry Simpson eds., 2019).

[2] Richard Steinberg, *The Impending Dejudicialization of the WTO Dispute Settlement System?*, 112 ASIL PROC. 316 (2018).

[3] J. K. GIBSON-GRAHAM, THE END OF CAPITALISM (AS WE KNEW IT): A FEMINIST CRITIQUE OF POLITICAL ECONOMY (2d ed. 2006).

[4] PETER FITZPATRICK, THE MYTHOLOGY OF MODERN LAW 48 (1992).

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work of *consensus-based* trade rules which is now almost universal"[5] and "a system of *consensus-based* rules that could embrace all of the world's economies."[6]

The ability of so many states to arrive at such a far-reaching "consensus" does sound impressive. And, to some extent, it was. However, it did not mean that all parties affirmatively supported the bargain struck. Despite the terms "unanimity" and "consensus" sometimes being used interchangeably, these two decision-making methods are distinct. Unanimity requires an affirmative vote from all parties.[7] By contrast, under the framework of the General Agreement on Tariffs and Trade (1947) (GATT), and now the WTO, consensus is considered reached when no party formally objects to the proposed decision.[8] This means that the new trade system was "consensus-based" not because all the parties agreed, but because none of them *formally disagreed* with the proposed agreements.

This distinction between unanimity and consensus is far from inconsequential. By shifting the focus from agreement to lack of disagreement and dispensing with formal voting rules, consensus decision making in the GATT/WTO has tended to function as an informal system of weighted decision making.[9] In the absence of a formal vote, powerful states have more opportunity to use their market size or geopolitical power to influence the decision-making process. Furthermore, as the only way to prevent a decision from being adopted under this procedure is to block it—a move that can come with political and economic costs—it is difficult for lower-income states to maintain an objection to a proposed decision.[10] During the Uruguay Round, these effects were exacerbated through the use of small, exclusive gatherings known as "Green Room" meetings, as well as U.S. and European insistence on the "single undertaking"—a principle that required states to accept the proposed agreements on an all-or-nothing basis.[11] Consequently, the agreements that emerged were largely shaped by the interests of the Global North.[12]

Nevertheless, the power dynamics of the Uruguay Round began to disappear from view once the final consensus was proclaimed, giving rise to a sense of institutional pride. This was due, in large measure, to the murky nature of consensus decision making itself. As David Kennedy writes on consensus decision making as a process: "Because consensus produces no actual recorded vote . . . all that is seen is the institutional output."[13] As a result, "the institution seems to speak as a whole, losing the individuated voices of its members."[14]

Visions of Sameness

The notion that a procedure based around non-objection could replicate underlying power relations resonates with queer thinking. In the context of sex, for example, queer communities tend to favor establishing consent

[5] Renato Ruggiero, *Address to the Second Summit of the Americas* (Apr. 18, 1998).

[6] Renato Ruggiero, *From Vision to Reality: The Multilateral Trading System at Fifty*, Address to the Brookings Institution and the World Affairs Council Forum "The Global Trading System; a GATT 50th Anniversary Forum" (1998).

[7] Alex Ansong, *Democracy in the World Trade Organization: Are Some Members More Equal Than Others?*, 14 Int'l Org. L. Rev. 154, 157 (2017).

[8] Marrakesh Agreement Establishing the World Trade Organisation, Apr. 15, 1994, 1867 UNTS 154, n. 1.

[9] Asif Qureshi, The World Trade Organisation: Implementing International Trade Norms 6 (1996).

[10] Claerwen O'Hara, *Consensus Decision-Making and Democratic Discourse in the General Agreement on Tariffs and Trade 1947 and World Trade Organisation*, 9 Lond. Rev. Int'l L. 37, 42 (2021).

[11] Richard Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 Int'l Org. 339, 359–60 (2002).

[12] Donatella Alessandrini, Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission 132–57 (2010).

[13] David Kennedy, *The Move to Institutions*, 8 Cardozo L. Rev 841, 972 (1987).

[14] *Id.* at 972.

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through open and direct communication due to an awareness that "[s]ocial hierarchy (race, class, gender, ability, age etc.) . . . may result in different degrees of negotiating power."[15] Drawing on insights from queer theory, scholars have also pointed out that the use of consensus decision making in activist spaces can marginalize queer people because of how the requirement to "speak up" interacts with heteronormative power relations.[16]

But the main contribution that queer theory can make to the narrative of the Uruguay Round relates to the way the final consensus concealed the underlying power dynamics, making it appear as though all the participating states spoke as one. Queer theorists have long been skeptical of this kind of "lining up" of voices and the way it can foreclose difference. Eve Kosofsky Sedgwick even had a term for it: "Christmas effects."[17] This is because, for Sedgwick, in the 1990s, Christmas was a time in the United States when all institutions—religion, state, capital, ideology, domesticity—"line[d] up with each other" to speak with "one voice," creating a discursive monolith in which "everything mean[t] the same thing."[18] For Sedgwick, this was an alienating experience for those who did not fit the dominant narrative. Sedgwick used the idea of "Christmas effects" to reflect on the way the alignment of gender, sex, and sexuality under heteronormativity can erase diversity and contrasted this "lockstep of unanimity" with the "open mesh of possibilities" the term "queer" implies.[19]

The apparent "lining up" of over 120 states' voices in the form of the Uruguay Round consensus produced its own "Christmas effect," giving rise to visions of worldwide sameness and agreement. Reflecting on the Uruguay Round years in 1996, WTO Director-General Renato Ruggiero remarked that "[o]ne of the most notable changes on the world trading scene" had been "the death of the North-South divide."[20] On Ruggiero's account, this newfound unity was not the result of pressure or even compromise during the Uruguay Round, but rather "the embrace of market-opening and liberalization policies in countries at all levels of development."[21] Likewise, in 1998, Ruggiero asserted that "[t]he success of the WTO was the result . . . of a broadening international consensus about the value of trade liberalization."[22] When Mike Moore became director-general in 1999, he continued this narrative, claiming that the principle of "economic freedom" now found "a consensus of support from practically every part of the world."[23]

Moreover, to these institutional representatives, the reason the world was now united around free-market principles was because there was no other rational option. In 1994, GATT Director-General Peter Sutherland summarized the Uruguay Round consensus as follows: "Put simply, governments came to the conclusion that the notion of a new world order was not merely attractive but absolutely vital."[24] Similarly, in 1998, Ruggiero stated, "Why does this consensus [on trade liberalization] exist? Because the history of the latter half of this century has taught us that there is really no rational alternative."[25]

[15] Robin Bauer, *Queering Consent: Negotiating Critical Consent in Les-Bi-Trans-Queer BDSM Contexts*, 24 Sexualities 767 (2020).

[16] Eleanor Wilkinson, *The Emotions Least Relevant to Politics? Queering Autonomous Activism*, 2 Emotion, Space & Soc'y 36, 39 (2009).

[17] Eve Kosofsky Sedgwick, Tendencies 5 (1993).

[18] *Id.* at 5–6.

[19] *Id.* at 6–8.

[20] Renato Ruggiero, *The Road Ahead: International Trade Policy in the Era of the WTO*, Fourth Annual Sylvia Ostry Lecture (May 28, 1996).

[21] *Id.*

[22] Renato Ruggiero, *The Next 50 Years: Challenges and Opportunities For the Multilateral Trading System*, Address to the Friedrich-Ebert-Foundation (June 11, 1998).

[23] Mike Moore, *The WTO: The Challenge Ahead*, Address to The New Zealand Institute of International Affairs (July 1, 1999).

[24] Peter Sutherland, *Global Trade - The Next Challenge: Address to the World Economic Forum*, Address to World Economic Forum (Jan. 28, 1994).

[25] Ruggiero, *supra* note 22.

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Like Christmas or heteronormativity, the discourse of sameness produced by the Uruguay Round consensus worked to naturalize the WTO's system by making it appear to be "common sense." By reinforcing the idea that the world had settled on its most rational economic model, it also functioned to marginalize and even erase alternative economic ideas and ways of being, from the "socialist globalization"[26] envisaged by the Global South as part of the New International Economic Order in the 1970s, to indigenous economies that continue to exist across WTO member states today. In this regard, the discursive effects of the Uruguay Round consensus operated as a "straightening device,"[27] rereading the "rich and prolific disarray"[28] of economic possibilities into a singular narrative.

Dissenting in the Closet

The idea that the Uruguay Round consensus represented a worldwide ideological consensus was, of course, challenged. In the 1990s, there were anti-WTO protests in Geneva, Hyderabad, and Seattle.[29] Yet, WTO representatives dismissed these protests as a byproduct of the demise of ideological alternatives. As Director-General Moore put it in 1999, "In the absence of other 'isms' to vent frustration upon, globalism is the only 'ism' left."[30]

States in the Global South also voiced their discontent with the outcome of the Uruguay Round. In 1998, South African President Nelson Mandela told the WTO membership, "We must be frank in our assessment of the outcome of the Uruguay Round. . . . [I]t was mainly the preoccupations . . . of the advanced industrial economies that shaped the agreement."[31] Cuban President Fidel Castro was even more direct: "The United States obtained practically everything it wanted with the agreements leading to the establishment of the WTO. . . . The Third World countries have been losing everything."[32]

These sentiments translated into action when the new Doha Round of trade negotiations was launched in 2001. Determined not to be "bulldozed" during the consensus procedure again, states in the Global South formed organized coalitions in order to resist the proposals of the United States and European Union (EU) and push their own agenda.[33] In doing so, they hoped "to redeem the unbalanced deal that [they] had suffered as a result of the Uruguay Round."[34] However, the continued ability of the United States and EU to block decisions led to the negotiations descending into a prolonged North-South standoff. The Doha Round effectively collapsed in 2008 and has not since been resuscitated.

And yet, for a long time, even this sustained political dissensus did not displace the narrative that the WTO was based on a worldwide consensus. In 2010, Director-General Pascal Lamy still described the WTO as underpinned by "a simultaneous consensus on the virtues of opening up trade . . . [and] the existence of tested multilateral trade rules."[35] The continuation of this narrative again seems to stem from the nature of the WTO's consensus

[26] Johanna Bockman, *Socialist Globalization Against Capitalist Neocolonialism: The Economic Ideas Behind the New International Economic Order*, 6 Humanity J. 109 (2015).

[27] Sara Ahmed, Queer Phenomenology: Orientations, Objects, Others (2006). On "economic straightening," see Ilan Kapoor, *The Queer Third World*, 36 Third World Q. 1611, 1616 (2015).

[28] Gibson-Graham, *supra* note 3, at xxxix.

[29] Warwick Murray & John Overton, Geographies of Globalization 204 (2d ed. 2015).

[30] Moore, *supra* note 23.

[31] Nelson Mandela, *Geneva Ministerial* (1998).

[32] Fidel Castro, *Geneva Ministerial* (1998).

[33] Kristen Hopewell, Breaking the WTO: How Emerging Powers Disrupted the Neoliberal Project 77–104 (2016).

[34] Sungjoon Cho, *The Demise of Development in the Doha Round Negotiations*, 45 Tex. Int'l L.J. 573, 577 (2010).

[35] Pascal Lamy, *Crisis Is Opportunity to Restore Coherence in Global Economic Governance* (Dec. 8, 2010).

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procedure, in which only a *lack* of formal disagreement, and never disagreement itself, can produce an official decision. This works discursively to elevate moments of consensus, while simultaneously downplaying and concealing moments of dissent. Or, to put it in terms more familiar to queer theory, the WTO's consensus procedure helped to establish a "public/private divide,"[36] in which instances of (apparent) agreement were given full access to the public sphere and different and dissenting viewpoints were, like non-conformist sexualities, cast into the WTO's "closet."

Intolerance of Economic Difference

The persistence of the WTO's consensus narrative throughout these years of disagreement, albeit in a somewhat weakened state, has arguably contributed to some of the issues facing the institution today. In particular, it seems to have cultivated an intolerance of economic difference, which is now playing out in relation to China. When China joined the WTO in 2001, there was an expectation that it would move toward a free-market economy.[37] Instead, China developed its own economically successful model of state capitalism. Over time, China's economic heterodoxy became a source of distress to European and American trade policymakers, who felt China had reneged on an "implicit promise."[38] Under the Trump administration, the United States became increasingly vocal about its concerns, criticizing China's state-led economic approach for being "fundamentally incompatible with the open, market-based approach expressly envisioned and followed by other WTO Members."[39]

Eventually, U.S. discontent with China's "otherness" even appears to have played into its decision to paralyze the WTO's judicial branch in 2019 by blocking appointments to the Appellate Body. This was done partly because, in the United States' view, the Appellate Body had helped to protect China's economic system by interpreting WTO rules in a manner that "favore[d] non-market economies."[40] In this regard, the WTO's economic consensus narrative now appears to be creating instability within the institution itself.

A Queerer Approach

What, then, might a queerer approach to trade-related decision making look like? Consensus decision making is not necessarily incompatible with queer theory. This can be seen in the example of the Zapatistas, who are an anarcho-socialist Indigenous group located in Chiapas, Mexico. Like the WTO, the Zapatistas operate through consensus decision making.[41] But unlike the WTO, the participants enjoy a high level of economic and social equality, with the Zapatistas even "queering" their language by "blend[ing] the masculine and feminine spellings of Spanish pronouns . . . to be inclusive of everyone along differing gender and sexuality continuums."[42] Such inclusive and egalitarian practices likely go some way toward mitigating the silencing effect of consensus decision making on those who carry less power. The Zapatistas also resist arriving at a single ideological vision for the

[36] For a queer perspective on this divide, see MICHAEL WARNER, PUBLICS AND COUNTERPUBLICS (2005).

[37] Andrew Lang, *Heterodox Market Orders in the Global Trade System*, *in* WORLD TRADE AND INVESTMENT LAW REIMAGINED: A PROGRESSIVE AGENDA FOR AN INCLUSIVE GLOBALIZATION 73, 83 (Alvaro Santos, Chantal Thomas & David Trubek eds., 2019).

[38] *Id.* at 83.

[39] USTR, TRADE POLICY AGENDA OF THE PRESIDENT OF THE UNITED STATES 26 (2019).

[40] USTR, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION 9 (2020).

[41] ALEX KHASNABISH, ZAPATISTAS: REBELLION FROM THE GRASSROOTS TO THE GLOBAL 88 (2010).

[42] Levi Gahman, *Building "A World Where Many Worlds Fit, Indigenous Autonomy, Mutual Aid, and an (Anti-capitalist) Moral Economy of the (Rebel) Peasant," in* SUSTAINABLE FOOD FUTURES: MULTIDISCIPLINARY SOLUTIONS 112 (Jessica Duncan & Megan Bailey eds., 2017).

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world, instead advocating for "a world where many worlds fit"—a strategy noted for its resonances with queer theory.[43]

In the WTO, however, it is difficult to imagine the effective implementation of measures aimed at making consensus decision making more inclusive and accommodating of diversity. On the one hand, power relations between the members are so imbalanced that only major reforms to the global economic order could overcome the weighted effect of the WTO's consensus procedure. On the other hand, narratives of economic consensus are so embedded within the mythology of the institution that it seems unlikely to become a place for "multiple worlds" to thrive. This suggests that a queerer approach to trade-related decision making may not only require alternative decision-making practices to create space for different and dissenting viewpoints, such as voting or plurilateral agreements between smaller groups of states (or even non-state groups), but also a turn away from the WTO itself. To quote Michael Fakhri, perhaps what is needed is "the breaking of trade law into multiple institutional sites, embedding it within different contexts such as food security, public health, and transnational labor,"[44] to address those trade-related issues that require international cooperation without being subsumed within a single and unequal vision for the global economy.

[43] Jamie Heckert, *Intimacy with Strangers/Intimacy with Self, Queer Experiences of Social Research*, *in* QUEER METHODS AND METHODOLOGIES: INTERSECTING QUEER THEORIES AND SOCIAL SCIENCE RESEARCH 45 (Kath Browne & Catherine J. Nash eds., 2016).

[44] Michael Fakhri, *Life Without the WTO – Part I: Stop All this Crisis-Talk*, EJIL:*TALK!* (2019).

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