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Consensus and majority voting in the WTO

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Abstract: This article's subject is the implications that consensus/unanimity and majority voting might have for the World Trade Organization's (WTO) decision-making system. First it looks at some consequences that replacing the consensus rule with majority voting might have for the WTO, including justice concerns, legitimacy, homogeneity of WTO membership, and international enforcement. Second, it summarizes some solutions found in the European Union (EU) for coping with unanimity and majority rule, including constructive abstention, reallocation of contractual responsibilities, and the Luxembourg compromise. Finally, it considers some reform options for the WTO and offers some conclusions, namely expanding majority voting on certain areas only, redefining competences, multi-speed proposals (rethinking the single undertaking, constructive abstention, and the scheduling approach), redefining consensus, combining consensus and majority voting, and issuing interpretations.

1. Introduction

Before knowing what is right, one must know what is wrong.

John Kenneth Galbraith, *The Good Society*

Many authors have claimed that the WTO suffers from an imbalance between its efficient judicial and its ineffective political branches.[1] As a solution, some of them have suggested that the WTO's 'medieval'[2] political decision-making process should be streamlined.

In international organizations, non-judicial decision-making systems are based either on voting (be it one vote per member, be it weighted[3]), on

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1 Nettesheim (2003: 719–721), argues that this view is rooted in an erroneous application of the theory of separation of powers to the WTO. Pauwelyn (2005a: 2–34), offers an explanation as to why this so-called 'institutional paradox' has developed.

2 Pascal Lamy stated that the WTO was a medieval organization regarding its decision-making structures. See: Bridges Daily Update on the Fifth WTO Ministerial Conference, Issue 6, 'Cancun Collapse: Where There's No Will There's No Way', 15 September 2003, http://www.ictsd.org/ministerial/cancun/wto_daily/ben030915.htm (accessed 28 May 2008) and *The Guardian*, 'Brussels urges shakeup of "medieval" WTO', 16 September 2003, http://business.guardian.co.uk/story/0,,1042944,00.html#article_continue (accessed 13 October 2008).

3 This article will not differentiate between these types of voting because, as opposed to consensus and unanimity, they allow for a minority being outvoted. It is exactly this that is the relevant criterion for this text's discussion.

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consensus/unanimity, or on a combination thereof (Steinberg, 2002: 339). In the GATT/WTO, decisions have been taken mostly through consensus.[4] However, the consensus rule, it is sometimes argued, is cumbersome and annoying because 'the body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no member, present at the meeting when the decision is taken, formally objects to the proposed decision' (WTO Agreement, footnote 1). Therefore, some authors have argued that it should be dropped and (partially or completely) replaced by majority voting.[5] Majority voting is already part of WTO law,[6] yet expanding its scope[7] might empower the political branch of the WTO. This, in turn, would respond to the need for equalizing the efficiency of the WTO's political and dispute settlement systems.[8]

This paper firstly discusses the proposal of expanding majority voting and relinquishing the consensus rule in the WTO. Additionally, it takes a look at some aspects of EU decision making. Thirdly, I shall consider some reform options, and finally offer some conclusions.

In the WTO context, consensus means endorsement through non-objection, while unanimity involves explicit agreement expressed by voting. Put differently, abstention does not preclude the former, yet it does prevent the latter. It should be stressed that this article will not differentiate between these two kinds of decision making. This text will compare, on the one hand, decision-making processes based on universal approval, and, on the other hand, decision-making processes based on the approval of a majority. Therefore, unanimity and consensus as such are not an explicit focus, but rather what differentiates them from majority voting, namely that nobody can be outvoted.

4 On the consensus rule's history under the GATT as well as its scope under the WTO, see Jackson (1998: 176–177) and Ehlermann and Ehring (2005: 60–66). On the consensus rule itself, see Pauwelyn (2005a: 20–22, 43–45) and Sutherland *et al.* (2004: 61–68).

5 See, for example, Cottier and Takenoshita (2003). For a review of propositions to drop the consensus rule in order to unlock the WTO decision-making process, see Pauwelyn (2005a: 37–38).

6 The general rule in WTO law is that decisions are to be taken by consensus, but when consensus cannot be reached, the matter shall be decided by voting (Art. IX.1 and Art. X of the WTO Agreement). Consensus is also the rule in WTO dispute settlement (Art. 2.4 DSU), except for the negative consensus rule (Art. 6.1, 16.4, 17.14, 22.6, 22.7 DSU).

7 The scope of majority voting can be expanded either *de facto* by applying Art. IX.1 WTO Agreement so as to actually decide matters by voting when consensus cannot be reached, or *de iure* by amending that norm so that (some) decisions have to be taken by majority voting.

8 '[T]he term constitution defines – in the context of international organizations – an institutional setting in which decisions are not necessarily made by consensus' (Nettesheim, 2003: 718). That author strongly argues against using the term 'constitution' with this meaning (pp. 718–719). However, within this contested sense of 'constitution', one could say that the WTO judicial function has a stronger constitutional quality than the GATT's, since mandatory and binding dispute settlement was introduced as a part of the Uruguay Round Agreements. In the same vein, expanding majority voting in the WTO political decision-making process would mean enhancing the constitutional quality of the WTO political branch. For a comment on the term 'constitution' in the international and WTO context, see Krajewski (2001: 173–183).

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2. Consensus and majority voting in the WTO

Expanding the majority rule in the WTO would most probably increase the decision-making system's efficiency. This, in turn, might alleviate the imbalance that many authors have perceived between the WTO's 'consensus-plagued' (Cottier and Takenoshita, 2003: 173) political branch and its dispute resolution mechanisms. But what might be the consequences of such a development? This is this section's underlying question.

The WTO law's justice

Rousseau supported the view that after *l'état de nature* is left and *l'état civil* is reached, the *volonté général* is composed of the will of everybody. If a law is passed, it is fair, since the law is a form of expression of the *volonté général* (hence, everybody's will), and no-one can cause unfairness against himself.[9] In other words, because every member of Rousseau's ideal political community is involved in the process of approving a statute (that is, universal participation) and the bill is approved by everyone (put differently, unanimity and therefore every member has a right to veto), this regulation is just.[10]

However, outside Rousseau's ideal political community, universal participation and unanimity are not sufficient conditions for the rule's justice. Regarding Public International Law, for instance, if the treaty is meant to be applied to certain specific circumstances, the regulation's justice might not necessarily be guaranteed after these circumstances have changed (Vienna Convention on the Law of Treaties, Art. 62).[11] Additionally, a treaty cannot be deemed to be fair if one or more members agreed to it because of error, fraud, or coercion (Vienna Convention, Art. 46 to 52 and 69). Moreover, certain external limits do apply, such as *ius cogens* (Vienna Convention, Art. 53). However, this article will not dwell on these constraints firstly because to this author's knowledge the GATT/WTO treaties have so far not been challenged on these grounds, and secondly because should someone question a WTO treaty on these grounds, the matter would be resolved through recourse not to WTO law but to the Vienna Convention.

We might, however, slightly reformulate Rousseau's thoughts: for a rule to be just, it is a necessary condition that every member of the political unit would agree to the rule if he had the possibility to approve or reject it. In other words, it is a

9 Rousseau (1762, II, VI): '*il ne faut plus demander … si la loi peut être injuste, puisque nul n'est injuste envers lui-même*'.

10 Obviously enough, there are theories that emphasize other elements for guaranteeing a norm's justice. For example, Nettesheim (2004: 214–215) and Benz (2005: 265–267), apply Habermas' deliberative democracy perspective to the EU context, whereas Krajewski (2001: 172–173) and Beviglia Zampetti (2003: 122–124), do this to the WTO.

11 During the Uruguay Round, amendments were made easier by admitting majority voting as a general rule (compare Art. XXX GATT 1947 and Article X of the WTO Agreement), thus making the institution more resilient towards changes of circumstances.

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necessary condition that no-one's objections are ignored. Combining universal participation and unanimity is arguably the best way to guarantee that this necessary condition is fulfilled.[12]

National democracies do not always fulfill this necessary condition because normally they are indirect democracies that pass laws by majority voting. Therefore, it is especially important that organs and mechanisms for controlling a law's justice have been established, especially checks and balances, including an independent judiciary who can verify if a law meets the fairness criteria that are spelled out in the Constitution or anchored in human rights declarations. The EU democracy does not necessarily fulfill this condition either, and accordingly also includes checks and balances, the European Court of Justice being especially relevant in this respect. Conversely, if both criteria (universal participation and unanimity) are met, the aforementioned necessary condition for justice is fulfilled; consequently, checks and balances are somewhat less important and the resulting political and economical costs may not need to be incurred.[13]

Now I shall examine whether every WTO member is involved in the process of creating WTO law (that is, participation) and if everybody has agreed to the WTO law (approval), so as to guarantee that the aforementioned necessary condition is fulfilled (i.e. that no member's objections are ignored).

Participation

Putting into question the fact that every member participates in creating the WTO's law (formerly, the GATT's law) is nothing new. For example, in 1967 John H. Jackson (p. 143) stated that:

> when trade relations were primarily bilateral … no obligations could be imposed on a nation without its consent … It is submitted that the idea that no international trade obligations should be imposed on a nation without its consent no longer deserves unwavering recognition. Such idea was truly effective, if at all, for only a few large, powerful nations. For most countries, dependence on international trade is a fact of life and leaves them vulnerable to forces beyond their control including sometimes selfish and irresponsible actions of trading parties.

Especially developing countries and their advocates sometimes argue that the GATT/WTO law is not fair because only the powerful states negotiated the treaties' contents. This has been especially true since the introduction of the non-reciprocity principle between developing countries and their developed counterparts in Part IV of the GATT (see especially Art. XXXVI.8) back in 1966. At least since the 1970s authors have recognized that this non-reciprocity has had a perverse

12 There are obviously additional advantages of unanimity besides justice that are relevant at the international level. To name only a few, the unanimity rule is based on political equality among states. It hardly limits the State's sovereignty and thereby protects particular interests. Moreover, it is useful for gathering information about the interests of all participants (Steinberg, 2002: 360–365).

13 This discussion has been about a necessary condition for a norm's justice. The question about how justly other actors or courts will interpret and apply that regulation is outside the scope of this article.

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effect on developing countries:[14] because they do not offer concessions, less powerful countries have been regularly excluded from the so-called green room process.[15] Therefore, they do not participate in negotiations but are presented with a *fait accompli*. So, as some authors have put it, in the end non-reciprocity has condemned developing countries to being mere spectators during multilateral trade negotiations (Carreau and Juillard, 2005: 100, 225). To sum up, these elements certainly speak against assuming universal participation in the drafting process of GATT/WTO regulations.

However, negotiating a draft and approving it are two different stages. In the context of this article, the participation required for fulfilling the aforementioned necessary condition does not entail that every member plays a part in a bill's negotiation and drafting process, but that every member has the opportunity to vote for or against adopting the draft. Put differently, concerning this necessary condition it is irrelevant if an elite negotiated and drafted the text as long as every member can express his consent or dissent regarding the draft.

Regarding the GATT/WTO, the results of the green room negotiations are submitted to the whole membership's vote.[16] Also, states that become members through accession have to explicitly accept the previous rules. So in the end it can be safely said that every member participates in the treaty-creating process; certainly not every member plays a crucial role during the whole process, but every single member is included when it comes to approving the final draft and so making a treaty out of it.[17]

Regarding developing countries, of course their position could (and probably should) be strengthened during the negotiation phase. In this article the opinion is held that irrespective of their weak negotiating position while negotiating and drafting the GATT/WTO treaties, developing countries' participation in voting the final draft guarantees every member's involvement in the political decision-making process.

Approval

To begin with, it should be kept in mind that in this article unanimity and consensus are treated as substantially equivalent because of their shared characteristic of being decision-making procedures (e.g. for approving treaties) by which not even one member of the political unit disagrees with the content of the decision.

14 As examples of the 1970s, the 1980s, and the 1990s, see respectively Ibrahim (1978: 18–19), Balassa and Michalopoulos (1986: 8–11), Michalopoulos (1999: 25–26).

15 Blackhurst (2000) describes the 'concentric circles' model of WTO consultation and negotiating groups. See also Pedersen (2006: 128–129).

16 WTO members have recognized that not only open-ended informal consultations, but also consultations between individual members or groups of members contribute to the achievement of consensus, provided that (among other requisites) 'the outcome of such consultations [is] reported back to the full membership expeditiously for consideration' (WTO, 2000: para. 134).

17 Pedersen (2006) describes in detail the WTO's decision-making practice and concludes that members consider that current levels of participation and transparency are sufficient.

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As already mentioned, participation is not enough for fulfilling the necessary condition that no-one's objections are ignored, since additionally the treaties have to be approved by everyone. The question is whether every WTO member has approved WTO law.

The GATT 1947 was adopted by unanimity, but some decisions were taken by majority voting (Steinberg, 2002: 344). Over time, however, majority voting gradually fell into disuse. The Uruguay Round Agreements not only increased *de iure* the scope of consensus,[18] but were themselves approved by consensus.[19] Although the possibility of voting if consensus is not reached exists (Art. IX and X WTO Agreement), in practice almost no matter has been decided through voting (Pauwelyn, 2005a: 20–22, 26–28, 43–45; Steinberg, 2002: 343–345; Jackson, 1998: 176–177). The only relevant exception to consensus is the negative consensus rule in WTO dispute settlement (Art. 6.1, 16.4, 17.14, 22.6, 22.7 DSU). As a conclusion, the consensus rule that developed during the GATT years has been taken over by the WTO's political decision-making system. The WTO consensus-based decision-making system has been characterized in the following terms (Lafer, 1998: 3):

> The WTO consensus-based decision-making process – which finds its highest expression in the General Council – constitutes another confidence-building mechanism. Consensus is justified due to the fact that WTO's assets are not financial resources, but legal norms. In order to be effective, such norms must be accepted by all members. They cannot be imposed by the heteronomy represented by the power of some. They require the autonomy of a *pactum societatis*, resulting from the participation of all. The role of consensus, as a confidence-building measure, is intimately linked to the question of autonomy, that is, to the idea that to be free, to quote Rousseau, is to obey 'la loi qu'on s'est prescrite'. The value of consensus, in the perspective of action, is to diminish the fear of members to be bound by an undesired decision. Consensus thus contributes to the legal security of all WTO members as well as to the binding force of its norms.

In other words, in the WTO (as in the GATT) consensus guarantees that every member has approved WTO law and no one has opposed it.

However, mainly from the developing countries' perspective, it could be claimed that they did not really accept the deal. For example, perhaps the only possible course of action they arguably had was to (formally) approve the Uruguay Round Agreements because rejecting them would have meant enormous political and economical costs and isolation, as well as the loss of competitive opportunities.

Nonetheless, there are two main reasons for doubting the claim that developing countries have not really but only formally consented to GATT/WTO law.

18 Cf. Art. XXV.4, XXX.1 GATT and Art. IX.1, X WTO Agreement. See also Art. 2.4 DSU.

19 On the consensus rule in the GATT/WTO, see Jackson (1998: 176–177), Pauwelyn (2005a: 43–45), Steinberg (2002: 342–346).

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To begin with, states can be presumed to be rational actors. Justice is such a fundamental value when it comes to negotiating a treaty (or a contract) that no rational party will voluntarily sign an agreement that is unfair for him. Therefore, states might agree to bear costs or lose benefits, they might even for the common good's sake consent to a deal that on the whole is detrimental to them, as long as the bargain is perceived to be fair. This means that justice and unfairness should not be reduced to getting net benefits or bearing net costs and do not depend exclusively on these criteria. To put it from the powerful states' perspective, they might push for an asymmetrical deal, but the asymmetries cannot be too large for otherwise weak countries will not accept.[20] To sum up, GATT/WTO law has possibly been unfavorable for developing countries, but these states (as rational actors) almost certainly considered it fair. In the second place, if coercion was truly exerted, Articles 51, 52, and 69 of the Vienna Convention on the Law of Treaties should be invoked and the affected treaties declared void. The problem arises when the Vienna Convention is not invoked, but nevertheless coercion (political or economic) is asserted. Rhetorical accusations of coercion only discredit the system; they do not solve the problems.

In the end it can safely be assumed that every member has approved (at the least by not vetoing it) the contents of WTO law.[21]

Conclusion

Taking Jean-Jacques Rousseau's thoughts as a starting point, in this section I have argued that if a political system is based on direct democracy and makes decisions by unanimity, one of justice's necessary conditions (namely that no-one's objections are ignored) is fulfilled. This necessary condition is currently being met by the WTO's political decision-making system (as well as formerly by the GATT's).[22]

Adopting WTO law by majority voting would mean that this necessary condition for a rule's fairness could not be taken for granted. Hence, it is possible that some members would put into question the law's justice on these grounds. This in itself, some might claim, would not be bad, since it is something we know about and cope with in national political systems and in the EU, but there is an important difference. National democracies as well as the EU have developed organs and mechanisms for dealing with this pressure, normally through checks and balances that guarantee the revision of the regulation's fairness through appropriate structures and processes, be they judiciary, be they political.[23] The WTO, however,

20 This is described as 'filling the boat to the brim, but not overloading it' (Steinberg, 2002: 361). Therefore, 'powerful countries … fashion a package of asymmetric outcomes that they can be confident will be accepted by weaker countries' (p. 350). On how GATT/WTO negotiation outcomes might have been skewed in favor of powerful members in spite of a consensus requirement, see pp. 346–349.

21 On the question if WTO law is sufficiently supported by national democratic consent, see Howse (undated: pp. 4–12).

22 For comments about justice and the WTO as an institution, see Beviglia Zampetti (2003).

23 '[D]ecisions about rights against the majority are not issues that in fairness ought to be left to the majority' (Dworkin, 1977: 142).

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(still) does not possess either organs or mechanisms that are designed to perform this function. If majority voting were to be expanded, probably suitable organs to monitor the fulfillment of this necessary condition would have to be created or the existing organs would have to be empowered with the capacities for performing this task, and procedures to challenge the WTO law's fairness would have to be developed.[24] If these steps were not taken, the pressure exerted by claims of injustice might rise. Disobedience to unfair law could result, therefore undermining 'the very purpose of international organization of trading relationship', which is to 'increase the stability of international trading relations' (Jackson, 1967: 143). In a worst case scenario, it could even lead to a massive exodus from the WTO.

Moreover, introducing organs and processes to deal with this political pressure would mean costs, both political and economic. In addition to that, not only the creation but arguably also the running of these organs and processes would mean both economic and political costs. Furthermore, the threshold of still-tolerable injustice in WTO law would probably have to be defined, since it has been claimed that not every injustice should be significant enough for contesting the law's fairness (Radbruch, 1946: part III). As a consequence, would the WTO's overall efficiency increase?

To sum it up, expanding majority voting would mean a deep change in the WTO's political processes. On the one hand, it most probably would enhance its efficiency. On the other hand, it would also mean that one necessary condition of the WTO law's fairness, namely that no-one's objections are ignored, could not be assumed anymore. As a consequence, a tide of questioning the WTO law's fairness could rise which, if ignored, could severely damage the WTO. Therefore, creating organs and processes that adequately deal with this political pressure would arguably be necessary.

Maybe, in the end, introducing majority voting would be worth the effort. However, the main objective of this section is rather to express a cautionary note. When discussing the option of introducing majority voting into the WTO political decision-making process, the aforementioned risks should be kept in mind.

Decision-making and legitimacy in the WTO

In the EU, as in the WTO, a link exists between the decision-making process and legitimacy.[25] On the one hand, majority voting is more efficient than unanimity and thus might increase output legitimacy. On the other hand, as a general rule, consensus guarantees more input legitimacy than majority voting

24 These organs and processes would arguably have to be created in compliance with unanimity and direct democracy, for otherwise the system designed to control fairness would be open to critique about its own justice.

25 'Competence structure, decision-making process, and legitimacy are interdependent', Nettesheim (2004: 199). '[Input] legitimacy of WTO law can thus be determined procedurally by analysing the decision-making process in the WTO', Krajewski (2001: 169).

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(Steinberg, 2002: 360–361). That is one of the main reasons why some authors have strongly advocated maintaining the consensus rule:

> at this point in time, the WTO *needs* the high levels of voice, participation and contestation linked to the consensus principle. Consensus decision-making is arduous, messy and time-consuming. This is the price to pay, however, for a broadly supported and legitimate world trade system … the consensus rule must be maintained … The role consensus plays in the internal and external legitimacy of the world trade system largely compensates for the delay and *lourdeur* in WTO decision-making, as well as for the sometimes limited outcome in trade negotiations.[26]

Similar to the EU, a legitimacy crisis has been asserted regarding the WTO.[27] Whether this claim is true or not is not this article's topic, but it seems reasonable to assume that expanding majority voting in the WTO might cause or deepen problems regarding input legitimacy. Hence, regarding legitimacy, the question is whether the increase in output legitimacy due to a more efficient decision-making system would compensate for the reduction of input legitimacy. As long as that question is not answered, caution is to be commended concerning expanding majority voting.

Homogeneity in the WTO

EU scholars have discussed the importance of homogeneity as a prerequisite for the majority rule.[28] In this context, EU scholars focus mostly on population.

It is debatable if discussing homogeneity of the WTO members' population would make sense. On the one hand, 'for the public to be comfortable opening its markets to goods from other jurisdictions, they must believe that these other jurisdictions generally share their core values. And shared values define a community' (Esty, 2002: 15). On the other hand, it should be obvious that the WTO is not a political community comprised by citizens, but an institution aimed at inducing international cooperation among member states. However, homogeneity might play a role as a core of values shared not by citizens but by states (expressed through their representatives and negotiators).

26 Pauwelyn (2005a: 8, 39, 57). See also Pauwelyn (2005b: 337–340).

27 E.g. Howse (undated), Esty (2002), and Krajewski (2001, esp. pp. 175–177). Specifically on the WTO's dispute settlement legitimacy, see Weiler (2001).

28 For example, Callies (2005: 294), Gusy (1998: 279), Kielmansegg (1995: 234), Krajewski (2001: 171–172), Nettesheim (2005: 160–161), Scharpf (1997: 66), Schmidt (2006: 292), Weiler (1999: 83, 337).

Even though he uses 'majority' and 'consensus' differently than what is usual in the WTO context, Lijphart (1999: 32) concludes that majority democracies require relatively homogenous societies. Moreover, in plural societies (societies sharply divided into virtually separate subsocieties), 'the flexibility necessary for majoritarian democracy is likely to be absent. Under these conditions, majority rule is not only undemocratic but also dangerous, because minorities that are continually denied access to power will feel excluded and discriminated against and may lose their allegiance to the regime' (pp. 32–33). This author claims that 'the EU is clearly such a plural society' (p. 46).

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Is the WTO membership homogenous? On the basic level, it is not — simply because almost every country is represented in the WTO. However, unlike the EU or national democracies, the WTO regulates a rather specific area (international trade plus some related topics). Thus, on a second level, there would be homogeneity if member states had a common view on those subjects. That is how GATT was at its beginning, resting on 'an on-going basic consensus'.[29] 'GATT was, and was seen as, a highly technical, tariff-focused operation driven and inspired by an expert-consensus on embedded liberalism' – put differently, GATT was a Gentlemen's Club (Pauwelyn, 2005a: 15, 10).[30] This 'clublike atmosphere', combined with a 'weak legal-normative structure', allowed decisions to be made by majority voting (Pauwelyn, 2005a: 16–18). However (Pauwelyn, 2005a: 23, footnotes omitted):

> The 1960s marked the beginning of a gradual erosion of the clublike GATT, centered on an expert consensus on how to improve postwar trade relations. Deep substantive disagreements came into the open due to a stream of new and extremely diverse GATT members – in particular, the E.C., Japan, and newly independent, developing countries – and the emergence of novel trade problems for which the original GATT did not provide a blueprint – in particular, nontariff barriers. In this context, levels of contestation and politics rose naturally and consensus decision-making became a necessity if everyone was to be kept on board.

Thus, regarding the WTO, 'the relative homogeneity, which characterized the original founders of the GATT, has been replaced by a membership with very diverse developmental characteristics and ideological persuasions' (Pedersen, 2006: 104). Homogeneity exists neither between developed and developing countries, nor within each group. Thus, for example, European countries and the USA have different risk aversion levels and have different stances on what dangers the state should prevent — matters that have had consequences in the trade dispute on hormone-treated meat and in the discussions about international trade in transgenic food. Developing countries, for their part, form subclusters of states with diverse economic and political resources that translate into sometimes radically different views and needs concerning international trade. Lastly, there are transversal clusters, such as the Cairns Group, that congregate countries around specific international trade issues. This lack of homogeneity has caused some acrimonious discussions: on WTO law and environmental standards, the civil society's role in the WTO, and implementation of the Uruguay Round Agreements in connection with expanding the WTO in the Doha Round, to name only a few. Therefore, if WTO members do share a common ground at all, it is only in respect to the utmost basic elements of the international trade system. To sum up, 'if the

29 Jackson (1967: 137), who on p. 138 also calls it a 'continuing consensus'. See also Hudec (1970: 635).

30 On the GATT's 'club model', see also Esty (2002: 11).

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evidence of a European [state-driven] *demos* is questionable, the feasibility of a world-wide, WTO [state-driven] *demos* is even more elusive' (Pauwelyn, 2005a: 42). This, in turn, is an argument against expanding majority voting in the WTO.

International enforcement

Efficient decision-making depends not only on making decisions quickly, but also on application and (if required) enforcement (Lenaerts *et al*., 2005: 649). Here lies the shortcoming of the majority rule that is especially important in the international sphere, namely that 'an affirmative vote is often less important than wide consent' because to pass a disputed measure by voting 'is not very useful in agencies that must depend on governments for implementation of decisions and recommendations' (McIntyre, 1954: 491).[31] Therefore, 'the importance of the recommendation is not merely determined by weights of the votes that you can collect on an issue, but on the numbers of countries that are willing to accept the obligations'.[32] The occurrence of this negative aspect depends to a great extent on the degree of homogeneity between the actors and becomes less important the more supranational traits the organization has. On the contrary, under a unanimity rule, states that agree at the international level are normally thereby also signaling their willingness to implement the pact.

Conclusion

A cautionary note has been put forward in this section regarding an extension of the majority rule in the WTO. First, one of the necessary conditions for a rule's justice (that no-one's objections are disregarded) might not be fulfilled; hence, preventive and corrective structures for dealing with unfair law might be required. Second, the effects of an expanded majority rule on the WTO's legitimacy are somewhat uncertain. Third, WTO members might not be homogenous enough for a majority rule. Fourth, majority voting could negatively affect enforcement of WTO law. Hence, the WTO consensus rule should not be constrained.

3. Consensus and majority voting in the EU

The EU has developed ways to deal with the negative side-effects of unanimity and the majority rule. This section briefly reviews some of them, as they might be fruitful for the present discussion about the WTO.

How the EU copes with unanimity

It seems that EU members are not willing to lose their veto power and completely submit to the majority. For example, despite introducing reforms

31 On the EU context, see Lenaerts *et al*. (2005: 649–650).

32 United States, Congress (80th, 1st session), Senate, Committee on Finance, 'International Trade Organization. Hearings …', Washington, Government Printing Office (1947: 532–533), cited in McIntyre (1954: 490–491).

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on decision-making,[33] the Treaty of Lisbon retained unanimity in some key areas.

EU law and practice shows that majority voting is not the only way to streamline a political decision-making process based on unanimity. For instance, Article 23.1 EU allows for a so-called constructive abstention when a decision has to be taken by unanimity regarding the EU's Common Foreign and Security Policy. In a nutshell, constructive abstention consists of a formal declaration whereby a member state announces that it will abstain from voting, thus allowing a decision to be reached by unanimity. As a result, the abstaining member must accept the other members' decision and must avoid any action that conflicts with it. In return, the abstaining state does not have to apply the decision. Only up to one third of the weighted votes may abstain, otherwise a decision cannot be adopted. This guarantees that the bargain represents the will of the majority.[34]

A second option is not laid down in EU law, yet is grounded on the reasoning that whenever members have not agreed on a subject matter, they have not transferred to the EU the competence to regulate it. Put differently, if there is no unanimity on primary legislation, member states retain the power to independently regulate the area under discussion. The same logic can be applied the other way around, as at least one author has suggested (Scharpf, 1997: 83–84, 87–88). This approach is based on the fact that there are topics that fall within the EU's secondary legislation competence, yet over the years they have not been regulated by the EU, not because of a lack of interest, but because of a fundamental disagreement between members regarding these topics. Thus, Scharpf has recommended that the contractual allocation of responsibilities between member states and the EU be reexamined: areas where unanimity has not been reached and cannot realistically be expected to, due to fundamental conflicts of interests between members, should be taken from the EU and given back to member states. To refer a sphere to the EU without an underlying agreement only strains the EU and causes political frustration, because the worst scenario is when a member state cannot regulate a subject because of EU law restrictions, but the EU does not regulate it either due to lack of consensus. Accordingly, Scharpf claims that capacities should be protected and strengthened on the level at which a certain area can be regulated, be it by the member states or the EU. This would improve the legitimacy of decision making on both levels.

33 One of the 'three fundamental reasons for the Treaty [of Lisbon]' is to gain 'more efficiency in the decision-making process' by 'extend[ing] qualified majority voting', http://europa.eu/lisbon_treaty/faq/index_en.htm#top (accessed 13 October, 2008).

34 Except for the quorum requisite, for example Art. 6.2 of the Convention on the OECD contains a similar rule and the UN Security Council has developed an analogous practice (in spite of Art. 27.3 UN Charter).

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How the EU copes with majority voting

A way to deal with majority voting's downsides in the EU is enshrined in the Luxembourg compromise of 1966.[35] France had its will that in the Council of the European Union a member state might veto a decision (even when according to the treaties' text it should be made according to majority voting) if essential interests of that member could be harmed. This solution is reasonable from a democratic theory perspective because the more relevant the outvoted national interests are, the less the decision is legitimated (Scharpf, 1997: 67; Kielmansegg, 1995: 238–239). Yet the risks of abuse are quite obvious. They could be reduced to a certain extent for example by means of specifying in advance a catalogue of every member's essential interests or by requiring a reasoned justification for issuing a veto.

4. Options for WTO reform

Both unanimity and majority voting have advantages and drawbacks. One of this article's main purposes has been to express a cautionary note on expanding majority voting at the expense of consensus. In fact, WTO members themselves have expressed their support for the consensus rule.[36] However, not expanding majority voting does not automatically entail not reforming the WTO's political decision-making system at all. The WTO's consensus rule does not necessarily have to be kept as it is. Therefore, excluding the first proposition, forms of enhancing the WTO's political decision-making system without expanding majority voting, will be discussed against the canvas of EU law, practice, and academic debate. What we need to keep in mind is that a proposal may appear to be sound, yet when it comes down to actually reforming the WTO, one of the main questions will be whether member states consider it politically feasible.

Of the following propositions,[37] the first five would require amending the WTO treaties, while the last two have the critical advantage that they would not.

Differentiating between matters

If the WTO agreed on amending Art. IX WTO Agreement so as to require decisions to be taken by majority voting, maybe it would be useful to differentiate

35 Somewhat similar to this is the Ioannina compromise of 1994, which had lost its relevance due to the Treaty of Nice (2001) yet came back to life with the Treaty of Lisbon (2007).

36 'First, within the framework of the WTO Agreement it seemed that Members generally did not see the need for any major institutional reform which could alter the basic character of the WTO as a Member-driven organization and its decision-making process. There was also a strong commitment of the Members to reaffirm the existing practice of taking decisions by consensus' WTO (2000: para. 134). See for example also paras. 145, 150, 163; WTO (2002a, 2002b: para. 4), Pedersen (2006: 112, 127–128, 130).

37 There is no aim at originality in the following account of reform proposals on consensus as all of them (as well as other ones) have been discussed by EU and/or WTO scholars. The novelty of this catalog lies (I hope) in the approach and the background against which they are presented.

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between matters. It is more probable that member states would be willing to expand majority voting on decisions that do not affect the member's rights and obligations (e.g., administrative decisions such as appointing the WTO Director-General, procedural aspects) (Pauwelyn, 2005a: 45; Jackson, 2001: 74; Sutherland *et al.*, 2004: 64).[38] On the other extreme, amending the WTO treaties by a majority would almost certainly be rejected.

Redefining competences

In the EU context it has been suggested that areas that should be regulated through secondary legislation where unanimity has not been reached and cannot realistically be expected due to a fundamental conflict of interests between members, should be taken from the EU and given back to member states.

Even though there is no secondary legislation in the WTO, the concept might nonetheless be fruitful for the WTO. Perhaps questions about which members radically differ should arguably not be within the WTO's competence. A moderate consequence of this proposition is that the WTO's competences should not be expanded anytime soon. A radical consequence would be to reduce the WTO's competences (Esty, 2002: 13–14, 17–18). Although the radical option would quite probably end the current political deadlock, it is not realistic at the present. Yet maybe it should not be dismissed all too easily. After all, one could wonder if the 'bicycle theory'[39] is a fact, a theory, or just a rhetorical formula.

The single undertaking

Arguably the discussion about the imbalance between the WTO's political and judiciary branches would be for the most part irrelevant if the single undertaking had not been part of the backbone of the Uruguay Round Agreements. In a multi-speed WTO, on the one hand the political decision-making system would be more efficient. Those who wanted to could enter into plurilateral agreements. Members who disagreed could just step out of the reform train instead of vetoing the whole process. As a consequence, negotiations would be easier because only relatively like-minded countries would participate in a given agreement. Additionally, the number of participating members would most probably be reduced, thus facilitating negotiations. On the other hand, those members who accepted the new rules would do so by unanimity; thus, due to universal consent, the plurilateral agreements would meet the aforementioned necessary condition for justice. Also, the rule's legitimacy should be relatively uncontested – in respect of both those who accepted the rules and those who did not. For all these reasons, it is not really surprising that according to some authors 'the WTO should relinquish its

38 For example, the UN Security Council is governed by a similar rule (Art. 27.2 UN Charter).

39 According to the bicycle theory, 'a failure to move steadily forward toward freer trade condemns the world trading system to topple over and fall due to the accumulating pressures of protectionism' (Bacchus, 2003: 429–430). See also Balassa and Michalopoulos (1986: 3–4).

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obsession with the single-package idea' (Pauwelyn, 2005a: 61; see also Sutherland *et al.*, 2004: 65–66).

Nonetheless, requiring consensus for adopting plurilateral agreements (Art. X.9 WTO Agreement) constitutes this option's main hurdle. To overcome it, it would perhaps be advisable to add plurilateral agreements by a two-third majority, such as Art. X.1 WTO Agreement. The very nature of a multi-speed process that does not impose obligations on those who do not participate would prevent many of majority voting's disadvantages.[40]

If the single undertaking were abandoned, some limitations should arguably exist. Not only should plurilateral agreements have no effect on non-signatories (Art. II.3 WTO Agreement), but it also might be advisable to request a quorum so that there is a minimum number of members that have to sign them.

Should the multi-speed feature be expanded in the WTO? Should the results of the Doha Round be implemented as were the Tokyo Round codes or the Uruguay Round plurilateral agreements? There is one main risk to this proposition.[41] If it were not for the single undertaking, the so-called GATT *à la carte* might come back to life as a WTO *à la carte*. Such an absence of uniformity can be costly because the application of an agreement cannot be taken for granted, but the relevant information must be gathered and processed (e.g. if a country has subscribed the agreement). This 'pick and choose' trend was criticized during the GATT. The reason why it has escaped massive criticism in the WTO is most probably because the plurilateral agreements are of limited importance. However, what would happen if agreements that are essential to the WTO were consented to or expanded on a plurilateral basis?

To sum up, again a cautionary note should be kept in mind. Giving up the single-undertaking notion would probably not only bear significant benefits, but also costs and the risks of a pick and choose trend. Moreover, it seems improbable that the WTO membership would support such an innovation (Pedersen, 2006: 128).

Constructive abstention

The WTO being as it is, constructive abstention as understood in the EU context (see above) is not possible; it would be only if the single undertaking idea was

40 If a stable membership is sought, amendment of the plurilateral agreements should arguably still require consensus (Art. X.8 WTO Agreement). Majority voting could cause that – in respect to the outvoted minority – the costs originated by the plurilateral agreement rise. As a consequence, for the outvoted minority the costs of staying in and abiding by the new rule could become higher than the costs of withdrawing. The withdrawal costs are relatively low because it does not entail also withdrawing from the WTO nor from other plurilateral agreements. Because of these low exit costs, it arguably has to be avoided that law amendment causes high costs. This, in turn, is best guaranteed through law amendment by consensus.

41 An additional problem during GATT caused by the lack of a single undertaking was the free-riding phenomenon (especially since the Tokyo Round). This has mainly been solved by Art. II.3 WTO Agreement whereby plurilateral agreements are only binding for those members who have accepted them. In other words, the most favored nation treatment does not apply.

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relinquished. In fact, the idea of constructive abstention is extremely close to a multi-speed process. Hence, most of the commentaries offered on giving up the single undertaking are also valid for this proposal.

The scheduling approach

Also somewhat similar to the plurilateral agreements is the scheduling approach, whereby states that are willing to further liberalize, negotiate with other members and then put the resulting commitments in schedules (Jackson, 2001: 75; Sutherland *et al*., 2004: 66–67). This option's main risk is arguably a WTO *à la carte*, as in giving up the single understanding. Its main advantages are first that it does not break the consensus rule, and second that it has been used in the GATS.

Redefining consensus

Intuitively, it would seem that the solution with the best chances for political success might be not to expand majority voting in the WTO, but to keep consensus, albeit trying to tame the vetoing prerogative. Yet even these reforms might be difficult to introduce.

A tradition of majority voting without a majority rule

A so-called critical mass idea has been proposed: 'a practice where countries refrain from blocking consensus when a critical mass of countries support a proposed change' (Jackson, 2001: 74). What constitutes a 'critical mass' of countries is not defined. Yet, for this idea to make sense, the critical mass would obviously have to be at least a majority; indeed, it would arguably have to be a very wide majority.

In other words, this proposition means majority voting (requiring arguably a very high quorum) based on practice, without regulating it in a treaty. Herein lies its weakness; if members agree on such a practice, why not insert such a clause in the WTO Agreement? Moreover, traditions are usually vague and therefore arguably not the best way to strictly define a quorum – or, at least, when negotiating a treaty, you have to quarrel only once about the appropriate quorum, whereas, if it is a practice, there is the risk that the quorum will have to be discussed more than once. Lastly, why would countries (who are typically concerned about not losing power) abide by a practice when they are in the minority, if they do not know if their counterparts will always be willing to follow the practice? Would peer pressure suffice? To sum up, aren't those precisely the advantages of law over custom?

There are additional possible causes of conflict, such as setting up the quorum. On the one hand, the higher the quorum is (for example all states minus one), arguably the easier it will be accepted by WTO members. Yet, on the other hand, a high quorum would obviously be less useful in preventing negotiation deadlocks (but arguably even a very high quorum would be more efficient than consensus).

As a conclusion, the idea of a very high quorum that could not be opposed by a veto is definitely reasonable. Probably it would be best if implemented through a

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treaty amendment instead of constituting a practice. Yet again, the hurdle would be the states' willingness to introduce such a rule or practice.

Downsizing the amount of veto players

The inefficiency caused by unanimity rises with the quantity of players. Thus, a logical answer is to reduce the number of members that take part in negotiations and accordingly can issue a veto. This is essentially what the green room process is about. However, according to WTO law, negotiation results have to be adopted by the whole WTO membership, so this system is not immune to a veto. A way to build a sort of green room process without its disadvantages would thus be to use small representative groups to draft a proposal. Members, in turn, should refrain form vetoing these proposals.[42]

The main problem with reforming the WTO decision-making system along these lines relates to legitimacy, not only concerning the composition of the negotiating group, but also because 'in order to generate legitimate results, informal negotiations must be based on clear and transparent rules about how and when to use small group negotiations' (Krajewski, 2001: 169).

A veto catalogue

One possible way of minimizing the negative side-effects of the vetoing power is to restrict the use of a veto to a set of catalogued specific circumstances. The question is if that would be realistic. It seems that states issue a veto not only because they want to protect certain important interests, but also as a means for pressing everyone else to keep on negotiating. Furthermore, a veto (or the threat thereof) on one issue can be used to obtain benefits on another topic. In other words, the vetoing power is used not only to impede a detrimental deal, but also as a negotiating tool. Moreover, it would probably be hard for WTO members to agree on the catalogue.

Justifying the veto

Another possibility is to require a reasoned explanation for vetoing (Sutherland *et al.*, 2004: 64). Obviously enough, demanding reasons would not inhibit every abuse of the vetoing prerogative, but perhaps the most blatant. This effect could maybe be boosted by requiring that the justification be public. Yet once again, the question is if it is realistic to expect member states to agree to such a solution, which would reduce the usefulness of the veto prerogative as a negotiating tool.

Combining consensus and majority voting

According to Art. IX WTO Agreement, if consensus is not achieved, as a general rule the matter shall be resolved through majority voting. This option has virtually

42 A similar proposal relates to creating a 'steering group' (see Jackson, 2001: 75–76), somewhat analogous to the International Trade Organization's Executive Board (see McIntyre, 1954: 489–490). Also analogous would be not a member, but a coalition-driven decision-making structure (Pedersen, 2006: 128–129).

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not been used (Pauwelyn, 2005a: 20–22, 26–28, 43–45; Steinberg, 2002: 343–345; Jackson, 1998: 176–177). It has however been suggested that negotiations led under the threat of majority voting might make the consensus-based decision-making system operate 'in the shadow of a vote', thereby restricting the vetoing power and smoothing the process of reaching a consensus (Pauwelyn, 2005a: 44–45). The proposal of using the threat of a vote is especially appealing because the WTO's political efficiency might thereby be increased without reforming but applying existing law.

Yet some caution might be advisable. One might ask why WTO members up to now have not used this tool when faced with negotiation deadlocks. A possible answer lies in majority voting's disadvantages. Apparently, many WTO members simply do not want to make decisions by anything but consensus.[43]

In spite of that, if WTO members were to agree on making the decision-making system more efficient, this combination of consensus and majority voting would arguably be the best option.[44] This is especially true if majority voting is seldom used, but consensus is attained under the mere threat thereof.

Making use of interpretations

First of all, arguably one of the most simple ways of partially overcoming the WTO's political inefficiency might be by means of issuing interpretations which, according to Art. IX.2 WTO Agreement, can be adopted by a three-fourths majority vote.[45] It could be especially useful for correcting panel or Appellate Body interpretations that many members consider unacceptable (Pauwelyn, 2005a: 45), such as those on *amicus curiae* briefs (WTO, 2001).

Yet the fact that they are 'only' interpretations and not treaty amendments does not cancel out the majority rule's disadvantages. Moreover, up to now the immense majority of issues in the GATT/WTO have been decided by consensus. Thus, in practical terms, if matters were regularly decided through interpretations, it would certainly not mean expanding majority voting *de iure*, but it would mean doing so *de facto*. For these reasons, the cautionary notes expressed above about majority voting should be kept in mind regarding interpretations.

43 'WTO practice is to take decisions by consensus. This is not the easy approach: with such a large and diverse membership forming consensus is difficult and time-consuming. Given the implications of alternative approaches to decision-making processes we nevertheless expect that consensus will remain the rule' (WTO, 2002b: para. 4). See also WTO (2000: para. 134), WTO (2002a), Pedersen (2006: 112).

44 To reduce the negative side-effects of combining consensus and majority voting, a waiver could be granted for those countries who were outvoted (Art. IX.1, IX.3 and IX.4 WTO Agreement). This might ease some pressure exerted on the outvoted minority, but it is not a long-term solution, as waivers are limited in terms of time.

45 For an overview on interpretations, see Ehlermann and Ehring (2005: 58–60).

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5. Conclusions

Institutions have to evolve and adapt themselves to changing circumstances. Obviously, this is also true for the WTO. Thus, 'if the WTO fails to keep abreast of the changes in the world and to evolve as an institution, some of the major users of the institution … may begin to turn elsewhere to solve their problems' (Jackson, 2001: 71). Accordingly, ways to improve the WTO and its decision-making process should be sought.

This article first reviewed some pros and cons of expanding the scope of majority voting in the WTO political decision-making process (the WTO Agreement allows for making decisions by majority, but this possibility has so far seldom been used). As a cautionary note, I argued that the abolition of the consensus rule might unleash a tide questioning the justice of the rules adopted by majority. Additionally, the consensus rule has positive effects on input legitimacy that would be lost under majority rule. This article also argued that the WTO membership does not have the homogeneity that scholars have identified as one of the requisites for the majority rule. Lastly, a positive correlation seems to exist between consensus and the enforcement of international obligations.

Second, it dwelled upon some solutions developed in the EU for coping with the downsides of the unanimity rule as well as with majority voting, namely constructive abstention, reallocation of contractual responsibilities, and the Luxembourg compromise.

Third, I reviewed some options for reform to increase the WTO's decision-making efficiency, namely expanding majority voting only on specific issues, redefining competences, rethinking the single undertaking, introducing constructive abstention, expanding the scheduling approach, redefining consensus, combining consensus and majority voting, and issuing interpretations. While some may seem sound, member states would at present probably implement none of them. They seem to be reluctant to abandon the consensus rule as it is and thereby lose their veto privilege. Yet this may be not unwise after all.

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