Geneva Trade and Development Forum – Governance Group

Towards a Two-tier System in WTO Decision-Making

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I. The Changing Substance and Context of WTO Law

The days are long gone when the goals of GATT 1947 and the World Trade Organization – in light of extensive post World War II tariff-based protectionism – essentially focused on reducing border protection and enhancing market access for goods traded.

Firstly, with the progressive reduction of tariffs and the ban on quantitative restrictions on agriculture, the emphasis of regulatory work has shifted to areas pertaining to domestic regulation and securing fair conditions for investment in many fields. Non-tariff barriers addressed in the agreements on Technical Barriers to Trade and on Phyto- and Phytosanitary Measures, standards on intellectual property in the TRIPS Agreement, domestic support in the Agreement on Agriculture, disciplines on subsidies in the Agreement on Subsidies and Countervailing Duties, domestic regulation in GATS, and government procurement all essentially serve as a benchmark for domestic law operating within the jurisdiction of Members. Much of the work in GATT since the Tokyo Round and in the Uruguay Round has been of a legislative, law-making, prescriptive nature. Future negotiations are likely to see the realm of rule-making reinforced.

Secondly, the advent of binding dispute settlement has changed the relationship of rule-making and adjudication. While panel and results could be blocked under GATT 1947, Members are today bound by DSU decisions, and subject to majority ruling. No longer is there a power of veto in dispute settlement. At the same time, decisions taken by dispute settlement are difficult to review in succeeding legislation. Albeit the instruments of authentic interpretation and of revision of treaty provisions formally exist, the tradition of working and negotiating in trade rounds extending on average to a decade practically exclude the possibility of legislative response. In fact, the Appellate Body has the last word on interpreting the agreements within the WTO. In turn, this creates an imbalance between law-making and adjudication, placing a heavy responsibility on the case law in developing WTO law.

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[1] This note draws upon Thomas Cottier, A Two-Tier Approach to WTO Decision-Making, in: Debra Steger (ed), Redesigning the World Trade Organization for the Twenty-first Century, CIGI, Ottawa: Wilfried Laurier University Press 2010 pp 43-66.

Thirdly, leadership has changed. The core of the Uruguay Round agreement was agreed by the US and the EC and eventually multilateralized. Others played an important, but not decisive role, at the time. This was even true for Japan and large developing countries. With the advent of emerging economies, the WTO today faces a multipolar world. Since the Ministerial Conference in Cancun, major decisions require the consent of a number of countries, including Brazil and India. The accession of China to the WTO in 2001 fundamentally altered the picture. It amounted to the most profound shift. While China still prefers a discrete voice in multilateral negotiations, it is evident that no major agreement can be achieved without its consent. The future accession of Russia will further change the political economy at the WTO. But things not only changed due to large players. Medium and small countries significantly increased their participation and seek to influence the process through ideas and collation building. Efforts at capacity building gradually offer returns. Members increasingly operate in a context of flexible, interest-driven coalitions. They may belong to more than one grouping, depending on in their interests. It is no coincidence that the WTO has seen a growing number of informal coalitions with coordination going beyond the former formula of groups of friends common in the Uruguay Round.

Fourthly, information technology has significantly improved the transparency of WTO work and documentation. Information about the WTO and its activities is broadly accessible and allows for much wider participation of non-governmental organizations in the life of the Organization. The practical role of non-governmental organizations and academic work has significantly enlarged the constituency of the WTO beyond traditional producer interests. More people than ever before take a keen interest in the work of the organization which, for many years, had been a matter of specialists and government officials working outside the limelight of international diplomacy and relations.

II. Towards a Two-Tier Approach

These changes call upon to review the modes of negotiations and decision-making which essentially have remained unchanged since GATT was founded in 1947. It is submitted to expand on the modes of negotiations and decision-making in the WTO and to move towards a dual or two-tier system.

A. Rounds and Permanent Fora of Negotiations

The tradition and success of negotiating tariff concessions and reducing levels of domestic support shows that trade rounds have been able to create the necessary momentum and political pressure. The same is likely to apply to concessions exchanged in the field of services, albeit no long-term experience exists so far. Both areas are able to respond to diverging needs of progressive liberalization and individual levels of commitments. Processes based upon specific requests and offers depend upon a framework which allows going in cycles. Tariff and services negotiations conceived as an ongoing process, short of deadlines and moments of intensive pressure, could hardly succeed. They depend upon give and take, and the possibility to achieve overall package deals in terms of benefits and concessions made in what essentially has remained a mercantilist approach.

It is the shift to negotiating disciplines relating to domestic regulation in WTO law which calls for a review of the negotiating process. These matters differ from individualized concessions. Rules are inherently uniform for all Members alike, independent of levels of

social and economic development and market size. It is much more difficult to accommodate individualized needs in setting international standards. These matters are complex, evolve at different speeds, and induce different levels of interest on the part of Members. It is here that an interest in variable geometry of rights and obligations and membership to instruments arises. Rule-making in WTO law thus should be shaped differently from the process of claims and response in tariff and non-tariff concessions. Ideally, these matters should be dealt with under the agenda of ongoing and continuous work undertaken in different standing fora of the organization.

The question, of course, is whether a dual approach could work or whether ongoing legislation and rule-making inherently depends upon pressure and the outcomes of market access negotiations. Would it have been possible to conclude the TRIPS Agreement, or the basis framework of GATS and the TRIPS Agreement outside the Uruguay Round? While there were few operational linkages, it is evident that they were essentially dependent upon the overall dynamics of the Round. Thus, it is hardly possible to build a two-tier approach upon a complete distinction of concessions, on the one hand, and rule-making on the other hand. We need to take into account the political importance of the agenda item. Basic rule-making, setting the scene and making basic decisions cannot be dissociated from the dynamics of trade rounds. Negotiations on framework agreements, setting the stage for decades to come, are bound to be undertaken within the momentum and drive of trade rounds. How can we combine the momentum of trade rounds, the climaxes they require, and the need for ongoing rule-making? How can we assure that basic principles, rules, rights and obligations are shared by all Members as the core of multilateralism while allowing for differentiation, graduation of legal standards, commensurate with levels of social and economic development, and largely diverging economic interests among Members? How do we avoid divergences further increasing, as some will be bound and contained by disciplines curbing protectionism while other opt out and are eventually left behind. How can we avoid the situation that those assuming fewer obligations are taken seriously? What can we learn from past experience?

B. Constitutional and Secondary Rules

The time has come to learn from distinctions of primary and secondary sources of law. While primary or constitutional rules setting out basic obligations and the framework for specialized regimes need to be set in an overall bargaining process having the political momentum of a round, the implementation of agendas agreed could be left to a secondary process in between rounds. The distinction is firmly established in domestic law with basic distinctions of constitutional law, legislation and executive orders and administrative regulation. It is well established in EC law with the distinction of primary law and secondary rules of regulations and directives. Different sources of law allow the allocation of different modes of decision-making. In international law, the concept of secondary rules is normally used for decisions and acts adopted by the bodies of an international organization. The same is true for the WTO. The concept is used here in a different way. It stands for the proposition of introducing different categories of international agreements within the constitutional framework of multilateral trading system, without necessarily turning the organization into a body of supranational law. The approach allows reducing high-level negotiations to core elements and issues within a package deal, and leaving other issues to subsequent and well-framed negotiations.

Basic agreements set out fundamental rights and obligations of a constitutional nature. They are essential and binding on all Members alike. Today, they comprise the Agreement establishing the WTO, the GATT 1994, GATS and TRIPS. Tomorrow, it could be limited to a single constitutional WTO Agreement comprising the structure and organization; different sources of law and respective modes of decision-making, basic substantive and procedural obligations, in particular non-discrimination, basic disciplines, exceptions and transparency requirements. The basic agreement is binding upon all Members of the WTO alike. Modes to amend the agreement will assure that it remains a truly multilateral instrument and a single undertaking. Modulations among Members, currently pursued by means of largely ineffective Special and Differential Treatment (S&D) could be effected by means of graduation, i.e. linking the operation of rules to economic thresholds and indicators of competitiveness of a Member or even of specific industries.

Specific instruments, on the other hand, could be shaped in the form of secondary rules, subject to the constitutional agreement, and not necessarily binding upon all Members alike. Today they comprise Members' schedules and plurilateral agreements. Tomorrow, they could extend to agreements and understandings implementing particular concepts set out in GATT 1994. It is here that the single undertaking could be left behind and variable geometry could take over. Combinations of single undertaking and variable geometry are conceivable. Solutions may be tailor-made, sometimes binding all Members, sometimes not. Under a new WTO Agreement, different categories of instruments could be created and linked to specific procedures and membership requirements, ranging from single undertaking to bilateral, plurilateral or unilateral obligations.

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