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Rules, norms and enforcement in the WTO

Abstract. Globalization creates a demand for international rule-making, and the WTO remains the forum for creating binding and enforceable international trade rules. The WTO therefore needs an effective decision-making system capable of resolving diverging interests. Although scholars, policymakers, and activists have long debated the relationship between trade agreement and trade norms, in truth we know very little about this relationship. And in this area the author's scientific work aims to provide society with greater insights into the relationship between trade agreement, trade convention and international trade (WTO) rules.

Keywords: International trade, international law, general agreement tariffs and trade, United Nations, World Trade Organization.

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Noteikumi, normas un tiesību piemērošana Pasaules Tirdzniecības organizācijā

Anotācija. Globalizācija rada pieprasījumu pēc starptautisku noteikumu pieņemšanas, un Pasaules Tirdzniecības organizācija (PTO) joprojām ir forums, lai radītu saistošus un izpildāmus starptautiskās tirdzniecības noteikumus. Tāpēc PTO ir nepieciešama efektīva lēmumu pieņemšanas sistēma, kas spēj noregulēt atšķirīgas intereses. Kaut arī zinātnieki, politiķi un aktīvisti jau sen diskutē par tirdzniecības līgumu un tirdzniecības normu savstarpējām attiecībām, mums, patiesībā, vēl ir diezgan maz zināms par šīm attiecībām. Un šajā jomā mana zinātniskā darba mērķis ir sniegt sabiedrībai plašāku ieskatu par attiecībām starp tirdzniecības līgumu, tirdzniecības konvenciju un starptautiskās tirdzniecības (PTO) noteikumiem.

Atslēgas vārdi: starptautiskā tirdzniecība, starptautiskās tiesības, Vispārējā vienošanās tarifiem un tirdzniecībai, Apvienoto Nāciju Organizācijas, Pasaules Tirdzniecības organizācija.

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Правила, нормы и правоприменение в ВТО

Аннотация. Глобализация создает потребность в международно-правовом регулировании многих, связанных с торговлей, вопросов и ВТО остается форумом для создания обязательных и подлежащих исполнению правил международной торговли. Поэтому ВТО нуждается в эффективной системе принятия решений, способной урегулировать расходящиеся интересы. Хотя ученые, политики и активисты давно дискутируют о взаимосвязи между торговыми соглашениями и торговыми нормами, нам по-прежнему очень мало известно об этой взаимосвязи. В связи с этим, моя научная работа направлена на предоставление обществу более глубокого понимания взаимосвязи между торговым соглашением, конвенцией по торговле и правилами (ВТО) по международной торговле.

Ключевые слова: международная торговля, международное право, Генеральное соглашение по тарифам и торговле, Организации Объединенных Наций, Всемирная торговая организация.

Even when laws have been written down, they ought not always to remain unaltered. As in other sciences, so in politics, it is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars.
Aristotle

Introduction

The thought is the father to the deed, and the multilateral trading system could never have been built if it had not first been imagined. The World Trade Organization (WTO) is not the product of just one idea, however, or even one school of thought [1, 3]. It instead represents the confluence of, and sometimes the conflict between, three distinct areas of theory and practice. Law, economics and politics have each inspired and constrained the capacity of countries to work together for the creation and maintenance of a rules-based regime in which members with widely different levels of economic development and asymmetrical political power work together to reduce barriers to trade. In this process, legislation of the WTO (rules and norms) plays very important role to improve trade situation member of the WTO countries.

Aristotle would likely approve of the way that the decision-making processes of the multilateral trading system allow for adaptation, innovation and an emphasis on unwritten norms over formal rules. A literal reading of GATT 1947 and the Agreement Establishing the World Trade Organization (WTO Agreement) gives one only an imperfect idea of how decisions are made, with the procedures that are actually followed having evolved over decades of experience, improvisation and accommodation. That evolution was neither easy nor settled, however, and one bloc or another often proposes tweaks or major changes in how issues are deliberated, decisions are made and commitments are enforced. [1, 202]

The goal of the present research is to overview problems of agreement in the sphere of trade (WTO), to inform readers on problems of legislation, and to review norms of enforcement and the rules for decision-making in the WTO.

The research task: to discuss international trade and analyse WTO agreements, also decision-making rules in the WTO. The World Trade Organization (WTO) currently has a membership of 148 sovereign States and independent customs territories. Its agreements cover some 95% of international trade and regulate the trade of goods and services as well as the protection of intellectual property rights. Its membership comes close to that of a universal organisation, even more so if one considers that a significant proportion of the remaining non-Members are currently negotiating their accession to the WTO. The reason why the WTO is important and unique is also that it has been and continues to be the forum in which trade negotiations take place at the worldwide level in subsequent rounds. These negotiations result in binding international agreements that can be enforced in a highly effective, compulsory and exclusive quasi-judiciary way.

Together with other factors, the strong increase of international trade (significantly faster than the growth of world GDP) and of other aspects of economic interaction (e.g. investment) has resulted in an increased international economic interdependence. In view of this interdependence, nation-state governments cannot regulate effectively anymore in many areas [2, 67-69], which is why effective international governance is needed in order to manage globalisation. At a time when global governance is more necessary than ever before [3], the WTO is a forum in which the international community can achieve many important things, given its rule-making vocation, its broad membership and its effective enforcement mechanism.

The rules for decision-making in the WTO

The Vienna Convention on the Law of Treaties defines a «treaty» to be «an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation» (Article 2.1(a)). Somewhat less precisely, it defines an «international organization» simply to be «an intergovernmental organization» (Article 2.1(i)). One might more bluntly describe a treaty as an instrument by which countries agree to place voluntary limitations on the exercise of their sovereignty, and an international organization as a body that the states agree to create in order to facilitate the development and execution of these sovereignty-constraining instruments. Any treaty or international organization will necessarily involve some derogation of sovereignty in this sense, but the states never abdicate their sovereignty altogether, no matter what the terms of a treaty or the rules of an international organization may be.

What is at issue in the architecture of the WTO is just how far members wish to go in the apparent relaxation of their sovereignty in order to reach agreements efficiently, to achieve an appropriate level of liberalization and to enforce the rules with an optimal level of predictability. As desirable as those objectives may be, they must also be balanced against countries' interests in preserving and exercising their right to «policy space» and allowing for some degree of flexibility in the implementation and, when necessary, the revision or even the abrogation of these agreements. Table 6.1 elaborates on the balance between these objectives by showing the range of options for three of the architectural issues. The first issue is the way that agreements are packaged, which range from one option that leaves the greatest leeway to individual states (i.e. plurilateral agreements based on code reciprocity) to another that leaves them with the least (i.e. a strict single undertaking), with a compromise position in-between. There is a similar array of least-to-most derogations for the ways that decisions are reached in the WTO and how the decision-making bodies of the organization are structured.

Taxonomy of options in the decision-making of the WTO

WTO members have collectively made very different choices in these three areas. They elected for their decision-making procedures and bodies to choose the option that involves the least derogation of sovereignty: the principle of consensus ensures that even the smallest member can block the adoption of any decision that it considers contrary to its interests, and

	Least derogation of sovereignty	Compromise position	Most derogation of sovereignty
Packaging of agreements	Plurilateral agreements based on code reciprocity that states are free to accept or reject	Plurilateral agreements based on MFN treatment that states are free to accept or reject	A single undertaking under which all members must adopt all agreements concluded in a round
Decision making procedures	Principle of consensus (i.e. approval requires that no member formally objects to a decision)	Voting based on a qualified majority(e.g. two thirds, three quarters, etc.), whether or not weighted	Voting based on a simple majority (50 per cent plus one), whether or not weighted
Decision making bodies	All decisions are made in bodies in which all members have the right to be represented	An executive board is established with limited membership that has only consultative authority	An executive board is established with limited membership that has both negotiating and executive authority

all members are represented in all bodies. This stands in contrast to the decision made on the packaging of agreements, in which case members chose a single undertaking. The seeming mismatch between these choices is notable, as is the fact that there appears to be much more willingness on the part of countries to revisit the single undertaking plurilateral choice than to reopen the issue of voting versus consensus.

The GATT 1947 and evolving practice

When one reviews the institutional provisions of the GATT 1947, it becomes clear that Article XXX of the GATT 1947 inspired Article X of the WTO Agreement on amendments, and Article XXXIII of the GATT 1947 inspired Article XII of the WTO Agreement on accessions.

Article XXV: 4 of the GATT 1947 states that: except as otherwise provided for in this Agreement, decisions of the Contracting Parties shall be taken by a majority of the votes cast. [4, 881]

Article XXV: 3 gave each contracting party one vote. Special majorities were called for in Articles XXIV: 10, XXV: 5 and XXXIII. Article XXIV: 10 provided for a two-thirds majority for approving a regional trade agreement that does not fully comply with the requirements of Article XXIV: 5-9. Article XXV: 5 provided for waivers of obligations but required that «any such decision shall be approved by a two-thirds majority of the votes cast and that such majority shall comprise more than half of the contracting parties.»

Voting did take place, but routinely only on decisions for waivers under Article XXV: 5 and on accessions under Article XXXIII of the GATT 1947. In relation to other business, the Contracting Parties did not usually proceed to a formal vote in reaching decisions, but the Chairperson took the sense of the meeting [4, 1098-1099]. Even on waivers, a consensus in the GATT Council very often preceded the votes. Notable exceptions prove this rule, and one such situation occurred in 1990 at the annual session of the Contracting Parties when the EEC requested a vote by roll call on a waiver for the German Democratic Republic's trade preferences to former Soviet bloc countries. Despite the surprise and confusion this caused to many delegated, who did not even have time to seek instructions, the unperturbed Chairman

applied the existing procedures and immediately proceeded to the vote by roll call.

In the early days of the GATT, the Chairman of the Contracting Parties often resolved questions of interpretation through rulings that were tacitly or expressly accepted or put to a roll-call vote [4, 875].

Over the years, decision-making by consensus became increasingly prevalent with the number of developing countries entering the international system in the wave of decolonisation and their accumulation of large voting majorities, although this is not a sufficient explanation if one looks at the early days of the GATT [5]. The GATT Analytical Index stated in 1995 that the most recent recorded decision of the Contracting Parties adopted by vote, other than decisions on waivers or accession, was in 1959 [6, 115]. However, the United States called for and obtained a vote in 1985 on whether to hold a special session of the Contracting Parties for the purpose of launching a new round of negotiations (the Uruguay Round) [7, 88].

The GATT 1947 is thus a partial answer to the question of where the rules on voting in the WTO Agreement come from. When the WTO Agreement was drafted, the evolution from votes to consensus (a term that did not even appear in the GATT 1947) was reflected in Article IX: 1 of the WTO Agreement by making consensus the first choice. Article XVI: 1 reinforced this by stipulating that the WTO be «guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947». Yet, it is important to note that voting was not abandoned in the text of the new Agreement and one can also say that the text gives it a more prominent role (vote when no consensus) than the GATT practice had (outside the area of waivers and accessions). This justifies posing the question about the intentions and expectations of Uruguay Round negotiators.

The WTO's decision to revising and implementing trade rules

As is well known, the process of decision-making in the WTO is dominated by the practice of consensus [8, 718]. As is also well known, consensus means that «no Member, present at the meeting when the decision is taken, formally objects to the proposed decision» [9]. Often, at least one Member objects to a proposal, and in those circumstances, the next step is typically a protracted effort to reach consensus by overcoming the existing resistance, e.g. by finding a compromise. If this does not work, no decision is taken.

How decisions are made: consensus versus voting

The executive board is GATT. Despite the fact that there were no references to it in GATT 1947, the principle of consensus is the single most important rule in the decision-making processes of the multilateral system. While some may question whether the system is well-served by a rule that confers a veto power on every member, there is also a widespread belief that the WTO members would likely oppose any efforts to replace consensus with voting.

This contrasts with Article IX: 1 of the WTO Agreement, which does not require consensus for all cases. While the first sentence states that «the WTO shall continue the practice of decision making by consensus followed under GATT 1947», the second sentence allows votes: «except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting». Those decisions are reached with a (simple) majority of the votes cast.

An exception is Article 2.4 of the DSU, according to which the DSB decides by consensus, with the notable exception of the reverse consensus mechanism for the key steps of a dispute settlement procedure [10]. Hence, except for the DSB, the bodies of the WTO would normally decide according to a two-step approach: consensus if possible, otherwise vote.

The Rules of Procedure contain quite detailed rules on how votes would take place. Rule 16 of the Rules of Procedure for Sessions of the Ministerial Conference and of the Rules of Procedure for Meetings of the General Council provides that a majority of Members must be present for votes to take place (quorum). Rules 29/34 specify that when decisions are required to be taken by vote, such votes are to be taken by ballot but that the representative of any Member may request, or

the Chairperson may suggest, that a vote be taken by raising cards or roll call. Where the WTO Agreement requires a vote by a qualified majority of all Members, the Ministerial Conference/ General Council may decide that the vote be taken by airmail ballots or ballots transmitted by telegraph or facsimile. The respective Annex 1 of these Rules of Procedure contains further details for such airmail/telex/telefax ballots, inter alia a notice to be sent to each Member and a time-limit of maximum of 30 days [11]. The Councils, Committees and other subordinate bodies of the WTO, however, are required by Rule 33 of their respective Rules of Procedure to refer a matter to the General Council whenever they are unable to reach a decision by consensus [12].

Article 9(2) of the Vienna Convention on the Law of Treaties foresees that the «adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule». Yet, this only goes for the adoption of the text which does not yet result in the States being bound. A majority vote in which up to a third of the negotiation participants are outvoted, therefore risks reducing the number of States that will later sign up (and ratify). Even if there are in many cases other reasons for non-signing or non-ratification, it is interesting to point out that the number of signatories of many UN-sponsored conventions is far below the number of conference participants, in fact this is the fate of the Vienna Convention itself.

In international trade, it is desirable that the number of countries that sign up to the agreements should be as large as possible for economic and legal reasons. It is therefore productive if trade agreements are shaped in such a manner that, if possible, all become a party. This involves a search for compromises, persuasion and sometimes a certain degree of pressure on other States. Sometimes, an agreement with partial reach is better than no agreement, and in those cases plurilateral agreements are the best choice. However, Article X: 9 of the WTO Agreement requires consensus of the Ministerial Conference for adding a plurilateral agreement to Annex 4 [13].

The required consent of every single State for that State to be bound by an international agreement constitutes an in-built preference for the status quo in international law (by default, this status quo amounts to a lack of legal disciplines, otherwise the status quo comprises those legal disciplines that have emerged so far). This contrasts with domestic democracies (representative or direct) where simple majority votes are formally neutral on making or not making, unmaking or changing rules. Obviously, in comparison, international rule-making is highly cumbersome and less effective, possibly more cumbersome and less efficient than it should be in the light of today's demand for international governance in a world of increased international interdependence and eroding independence of single States as regulators.

Amendment

The default rule on amendments in public international law is Article 40 of the Vienna Convention, according to which an amendment does not require the consent of all parties, but obviously no party is bound by the amendment unless it gives its consent. With one exception, Article X of the WTO Agreement is stricter [14]. It first provides that the Ministerial Conference must approve an amendment proposal with a two-thirds majority of the Members, if it cannot reach consensus within 90 days. Then, two thirds of the Members must accept (i.e. ratify) the amendment for it to become effective: for all Members, where the amendment does not alter substantive rights and obligations; for those who accept the amendment, where it does alter substantive rights and obligations. The former procedure, however, requires a three-quarter majority decision by the Ministerial Conference. Amendments to the DSU require consensus, which is less burdensome than the normal amendment procedure in that no ratification is needed.

Modifications of Articles IX and X of the WTO Agreement, of the most favoured-nation treatment rules and of Article II of GATT 1994 (on bindings) require every Member's consent.

Accession

A special form of amendment is the accession of a new Member to the WTO. Such accession is an amendment of the WTO Agreement because this Agreement is modified so as to cover an additional subject of international law. Legally, the standard WTO Accession Protocol amends the WTO Agreement by becoming an integral part of the WTO Agreement. Nevertheless, the Accession Protocol is an agreement between the new Member and the WTO (Article XII: 1 of the WTO Agreement), not an (amendment) agreement between new and old Members. In terms of decision-making, Article XII: 2 stipulates that the Ministerial Conference approves the accession agreement by a two-third majority of the Members. Yet, when a new Member accedes, Article XIII permits Members to exclude the application of the WTO Agreement in relation to the new Member by so notifying the Ministerial Conference.

Renegotiation of Commitments

In the WTO Agreement, rights and obligations are also set out in each Member's schedule of commitments. As is known, this part of the Agreement accounts for the majority of the famous 25,000 pages. If a Member intends to modify or withdraw a GATT concession (typically a tariff concession), Article XXVIII of the GATT 1994 provides for the possibility to do so according to a procedure that is considerably lighter than the amendment procedure under Article X of the WTO Agreement. Preferably, that Member should reach agreement with other Members primarily concerned (principal supplier(s) and Members holding an initial negotiation right) and with those having a substantial interest, i.e. only a subset of WTO Members. If no agreement is reached, the Member in question can nevertheless proceed (unilaterally) with the modification or withdrawal of its concession and the other Members with rights under Article XXVIII may then withdraw substantially equivalent concessions initially negotiated with that Member.

Article XXI of the GATS provides for a similar, but slightly stricter procedure for a Member that wishes to modify a commitment it has made in its services schedule.

Waiver

In exceptional circumstances, the Ministerial Conference and the General Council may waive particular WTO obligations of any given WTO Member by a three-quarters vote. Waivers are exemptions for certain Members from specific WTO obligations. They must be temporary (although they can be extended) and reviewed annually [15].

Conclusion

In today's highly interlinked and globalised world, it is essential for each country to ensure political and economic stability so that both local communities and those living in the neighbouring countries could feel safe. In this global process, international trade treaties, trade convention, trade legislation and international trade relations play an important role to improve macroeconomic situation and to increase growth in income. The author thinks primarily, that the concept of trade stability, simplicity and neutrality should be acknowledged as a multi-faceted phenomenon. All these perspectives on trade simplicity are equally important.

Today the WTO's really has very good simple and stable liberal legislation but globalization and global processes require legislative reforms. A reform of the current system can mean two basically different things: on the one hand, one can think of changing the rules on decision-making in the WTO Agreement (along with changing the practice). On the other hand, reform can mean exploring the scope for improvement within the framework of the existing rules, i.e. changing the practice, but not the rules. We believe that, for both dogmatic and pragmatic reasons, the latter should receive priority over the former. First, it would be extremely difficult to achieve a modification of the rules on decision making in the present context where the adoption of new multilateral trade rules is in general rather difficult. Second, before resorting to proposing legislative change, one should explore the existing rules and the extent to which improvements are possible within their limits without formal change, as only such an exercise can reveal the need, if any, for legislative change

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