

# Learning From Sutherland and Warwick: With A Little Help From The Secretariat Using Critical Mass

Manfred Elsig<sup>1</sup>  
[manfred.elsig@wti.org](mailto:manfred.elsig@wti.org)

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## Introduction

Designing decision-rules for international governmental organizations (IOs) is a contentious exercise. Re-design is even more controversial and difficult to achieve. This paper discusses two reform suggestions related to how to improve decision-making in the WTO. These proposals have been promoted in two recent reports on the future of the WTO. The first report (the *Sutherland Report*) advocates among other things a stronger role for the WTO Secretariat (Sutherland et al. 2004). The second report (the *Warwick Report*) endorses a critical mass approach to decision-making (Warwick Commission 2007). Before discussing these reform proposals, this paper starts with disclosing the author's assumptions underlying the paper.

First, a large number of IOs have come under intensified scrutiny from an ever growing number of stakeholders. Many of these organizations display poor performance and appear insufficiently equipped for tackling the upcoming challenges of the 21<sup>st</sup> century. The sources of underperformance, however, are not only found in the organizations (in a narrow sense), but to a large degree emanate from conflicting interests of the members delegating to IOs. From the international relations literature, we have come to understand that there are various ways IOs help overcome obstacles to cooperation (Keohane 1984). However, the nature of cooperation (and the dominating anarchical system assumption) has changed over time. In today's world, IOs need to provide services beyond the general functions attributed to these in the past, such as

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<sup>1</sup> World Trade Institute Bern and Graduate Institute of International and Development Studies, Geneva

lowering transaction costs, tackling information asymmetries and enhancing compliance with agreed rules. IOs should also strive to go beyond controlling for the abuse of powerful states in the system (Grant and Keohane 2005). IOs can provide an important political platform for addressing global challenges. The multilateral platform offers a legitimized regulatory apparatus if two conditions are met: on the one hand, if the system allows for active participation and deliberation which potentially translates into influence (input legitimacy); on the other hand, if the processes result in improving societal problem-solving (output legitimacy, e.g. good performance). Seen in this light and supported by much of the literature on the WTO's Dispute Settlement Understanding (DSU), the WTO offers one of the most legalized multilateral platforms to settle disputes that controls to a large degree for arbitrary discrimination and the dominance of powerful states. The DSU's performance is assessed from various viewpoints (legal and political metrics) rather positively in comparison to other international courts.<sup>2</sup> The institutional development of the legislative branch of the system (the negotiation platform), however, has not kept up with the litigation apparatus, de facto creating an imbalance between rule-making and rule-implementation.

Second, reform projects can take various forms. The most likely reform type is incremental in nature characterized by small and timid steps to accommodate some of the pressures from outside and from within a system. In contrast to small reform steps, are so-called package deal in re-design. In this case, institutional reform is part of larger package where horse-trading allows for (difficult to anticipate) design changes. As the Uruguay Round results indicate, grand institutional reforms are easier to be carried through as part of a "single undertaking" Against this background, it is interesting to note that many contracting parties prefer not to embark on negotiations leading to institutional change in the current trade talks.<sup>3</sup> The hope that the inter-round period will produce tangible results corresponds to turning a blind eye on re-design.

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<sup>2</sup> It's another question if the rules reflect the interests of the powerful actors in the system.

<sup>3</sup> This relates to rule-making. Negotiations on modifying the DSU are currently underway. They are not formally part of the Doha negotiations, but the pressure to link negotiations on reforming dispute settlement with other trade issues is present. In order to achieve "results", linkages will eventually prove pivotal. This is reflected in a recent public statement by the Chairman of the DSB, of the Special Session) at a conference at the Graduate Institute, Geneva: "The DSB reform needs the round, the round does not the DSB reform and will not wait for us" (Ambassador Ronald Saborío Soto, 27 February 2008).

Third, dominating paradigms are difficult to change. Paradigms serve various functions, they are often constructed, advanced and defended by the powerful insiders of a system and by those who believe to profit from the status quo (Ruggie 1982). As a consequence, impetus for reform needs to develop from outside the inner circles of IOs. In relation to the WTO's ways of conducting its daily business, two such paradigms have become somehow dominant and "sticky" and its supporters are reluctant to engage in debates on change: the member-driven organization and the single package approach.<sup>4</sup> Many of the trade diplomats' alleged interests converge around these concepts and thus a type of mental "decision-making trap" is created (Scharpf 1988). This paper critically addresses both paradigms and offers another approach to unblocking the current impasse in decision-making (without attempting to offer a competing paradigm but rather driven by problem-solving).

Fourth, the WTO is not an institution *sui generis*. Thus, the paper advocates learning from other IOs suggesting a comparative focus on decision-making. As the WTO is one the most legalized international organizations (Goldstein et al. 2000), this paper encourages comparison with the most advanced IO in global governance: the European Union. Therefore, when discussing reform proposals lessons from EU integration are introduced into the analysis.

### **More Help from the Secretariat<sup>5</sup>**

While the *Warwick Report* has been largely silent on the function of the WTO Secretariat, the *Sutherland Report* has elaborated on the role of the Director-General (DG) and the WTO staff by dedicating a chapter to this topic (Chapter IX). They refer to a type of *mailaise* as the DG acts more as an international spokesperson and marketing executive than as an important player in the negotiations in Geneva. In addition, the lack of intellectual input from the Secretariat and the Deputy DGs is lamented. The optimal use of advise, expertise and deal brokering capacities should be further explored. The system suffers from "a proliferation of back-seat drivers, each seeking a different

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<sup>4</sup> On mantras and myths, see Jackson 2001 and Steger 2007

<sup>5</sup> This section draws on findings from Elsig (2007)

destination, with no map and no intention of asking the way”. In conclusion, the report calls for a new institutional voice and creating a true guardian of the treaties.

The member-driven nature of the WTO is per se not a problem (and many IOs are increasingly becoming member-driven), but it may create principal costs that are often underestimated (Thompson 2006). These costs need to be weighted against agency costs due to delegation (e.g. misuse of agents’ autonomy that leads to poor performance). Evidence indicates that the role of the Secretariat has even decreased over time in the negotiation process (Sutherland et al. 2004, Elsig 2007). There are various ways to empower the Secretariat. Looking at the current negotiations, it seems that we face the problem of what is a peculiar version of the “endless cycling” dilemma. In the absence of a clear institutionalized agenda-setting, parties constantly table proposals (Riker 1980). The WTO system exhibits opaque processes leading up to negotiation texts that eventually are the basis of final negotiations. There is not sufficiently transparency as to the role of various actors in agenda-setting. Sometimes these texts develop from the various groups when the chair is pushed by other parties to come out with a text; at other times, the DG is asked to provide some compromise formula (but less frequent today than in the past) or texts are informally created in smaller circles (e.g. G4) and eventually multilateralized within a system of concentric negotiation circles. One way to overcome endless cycling is to streamline decision-making procedures by attributing agenda-setting power to a particular actor within the system (e.g. a elected group (a new form of the G18 group), or a supranational actor). In a recent statement, the chair of an important negotiations committee portraying once again an overtly optimistic view put forward his wish that countries should get ready for a “real negotiation” - after no less than “two years of positioning.”<sup>6</sup> In reality, the positioning has been going on for 7 years prior to another attempt to signal to contracting parties to move forward.

Strengthening the Secretariat could be one option to be explored. The contracting parties of the WTO elect a DG and a defined number of additional DDGs to take responsibility for certain regulatory sub-topics. They would run the Secretariat jointly similar to European Commission in the EU. The DDGs, nominated by the DG and approved *in corpore* by the contracting parties, manage a certain portfolio related to tasks

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<sup>6</sup> BRIDGES Weekly Trade News Digest - Vol. 12, Number 13 16 April 2008

and services the organization provides (e.g. GATT, GATS, TRIPS, DSB, Implementation, Technical Assistance). There could be a new two-step procedure envisaged, comparable to the co-decision procedures in the EU. In a 1st step of decision-making procedure, the Secretariat (DG and his DDGs)<sup>7</sup> - who represents the general systemic interests - tables proposals based on the input of the contracting parties in the various Committees that serve an advisory function. These proposals should not reflect the mathematical average of all positions formally and informally communicated, but the Secretariat should balance the vital interests of the contracting parties with the systemic interests represented by the Secretariat. Then, these proposals are discussed and deliberated in a 2nd step by the General Council or other specialized Committees and accepted or rejected based on a qualified majority voting (QMV) procedure. Various possibilities of weighted voting need to be explored (see Cottier and Takenositha 2003); ways are to be found to overcome the institutional attitude that voting is “counter-cultural” in this institution (*Warwick Report*). The current system with small group negotiations already recognizes a hierarchy within the international trading system (e.g. G4, FIPS, green room representation), a weighted voting mechanism would thus only formalize this hierarchy and tackle the current “organized hypocrisy” (Steinberg 2002).

It is also clear that not all areas demand the same QMV thresholds. Decisions on interpreting provisions of the Customs Valuations Agreement should be treated differently from negotiation to agree on new rules that intrude in national cultural and societal environments. In addition, members should not engage individually in painstaking regime management issues (micro-management of the budget, control of research activities) and should be encouraged to decide by QMV to delegate more discretion to the Secretariat (Sutherland et al. 2004). The history of US trade policy in the late 1920s and early 1930s has illustrated the costs of principals controlling and micro-managing trade policy which eventually led to pressure to delegate ad an *ad hoc* basis more power from Congress to the President. This eventually led to various forms of

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<sup>7</sup> Today's DDG act more as deputies to the marketing executive and lack operational activities where their expertise can be used efficiently.

temporary delegation and institutional control of cherry-picking based on protectionist motives.<sup>8</sup>

The history of design change in decision-making in the European Union shows the pivotal role of intergovernmental conferences (e.g. Maastricht, Amsterdam, Nice, Lisbon) to overcome institutional dead-locks. The EU debate on competence between member-states and the Community to “negotiate trade” illustrates this nicely (Elsig 2002). The mode of internal decision-making on foreign trade policy slowly shifted from unanimity to QMV. Areas, such as intellectual property rights and various services sectors moved gradually towards weighted voting. Two key factors have led to increased delegation and strengthening of Community competence (*vis-à-vis* a model of shared competence): the increasing number of EU members and growing pressure to deliver as a key sponsor of the trading system (Elsig 2002). Today’s challenge for the WTO as an organization is similar.

Finally, to accommodate concerns related to sovereignty transfer, more delegation to the Secretariat could go hand in hand with more *at locus control* by the key principals (national trade ministries). The suggestion by the *Sutherland Report* to convene yearly meetings to unblock certain issues and if necessary engage in horse-trading (as it happens in the EU during Ministerial Meeting) would be an additional control mechanism to sell “more delegation” at home.

## **Critical Mass Revisited**

While the decision-making mode based on a critical mass approach has already received lukewarm approval in the *Sutherland Report*, the *Warwick Report* has taken up this idea and has offered some reflections on how to move forward. The idea of using critical mass decision-making in the negotiations is not new. This negotiation logic has been tried during the Tokyo Round negotiations to design specific rules codes and have seen a first revival after the Uruguay Round to push for sector agreements on particular services. Currently, a number of negotiations on Non-Agricultural Market Access (NAMA) and in the area of services experiment with critical mass. But how different from the single

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<sup>8</sup> Starting with the Reciprocal Trade Agreement Act (RTAA) in 1934.

undertaking are the results from critical mass really? Does pushing for critical mass hollow out the concept of single undertaking that has reached paradigm status? VanGrasstek and Sauvé (2006) remind us that the single undertaking does not mean that it has a uniform consistency and application by contracting parties.<sup>9</sup> In other words, some single package agreements with in-built flexibility might not be that different from critical mass with little flexibility.

While the *Warwick Report* refers to a distinction to be made between critical mass involving market access and critical mass involving rules, it does not offer an analytical way to differentiate between these two different co-operation challenges. It is argued that both have a precedent without acknowledging potential differences. Furthermore, the report suggests that certain criteria should be observed when following this decision-making procedure. In a nutshell, the report demands that results of critical mass negotiations shall not impact on “the existing balance of rights and obligations” and that the rights acquired by the signatories “shall be extended to all Members on a non-discriminatory basis, with the obligations falling only on signatories”. The authors send out different signals: while an already existing but not often used decision procedure is promoted, the report attaches onerous conditions for going down this path. This might make the proposal a non-starter.

In analytical terms, I suggest to differentiate between critical mass agreements that imply to be consistent with the most-favorite nation (MFN) clause and other agreements that are plurilaterals in nature and exhibit club-good characteristic. It has become general wisdom that MFN automatically applies to all non-participants and that the free-trading problem should not be prevalent in most cases.<sup>10</sup> I suggest exploring in more detail what are the obligations and rights non-participants face? What are the free-riding incentives that impact not just outcomes of the negotiations, but exhibit spoiling capacities throughout the negotiations? What are the free-riding effects on different regulatory schemes, be they global generic standards on market regulation or rules with market-correcting functions (M&A, investments, SPS+, TRIPS+, antidumping,

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<sup>9</sup> Agreements negotiated under the single undertaking have more flexibility or differential treatment provisions and exceptions than those agreement negotiated outside the single undertaking (know as critical mass agreements).

<sup>10</sup> See VanGrasstek and Sauvé (2006) who argue that all Singapore issues with exception of competition should not be problematic as to the free-riding problem.

subsidies), national treatment provisions (non-discrimination and fair processes), clear target measures to improve market access in goods and services through tariff reductions, or rules on the elimination of other non-tariff barriers.

If generic standards allow for flexibility then, I assume, there exists an important incentive to participate in negotiations.<sup>11</sup> The incentive structure for those participating and abstaining in critical mass negotiations appears different. If some leading trading nations agree to increase generic standards through a critical mass approach, they will anticipate the effects of the MFN extension clause. From a rational perspective, it is to be expected that parties negotiate in the shadow of the market power of the non-participants. They need to have a sort of safeguard that they can take measures against abuse of free-riding.<sup>12</sup> If this is not the case, results to be expected will be limited in scope and effect. A similar logic applies to market-opening strategies, where countries are critical about free-riding (e.g. lowering reciprocal tariffs in medical devices or environmental goods if other important exporters abstain and continue levying higher tariffs). In this case the free-riding effects might even be more direct and transparent than in cases related to generic standards (e.g. health provisions, SPS).

In addition, it remains to be seen whether the sector agreements under the GATS are such a success story often told to illustrate the potential for critical mass **with** MFN extension.<sup>13</sup> The degree of commitment is obviously influenced by severity of the free-rider problem. Free-riders might even have an incentive not to engage in the plurilaterals as they get a lunch for free and do not need to justify their positions as clearly as within the context of multilateral negotiations. Club members need to see some benefits of co-operating beyond existing rules. In other words, the MFN extension needs to be revisited and the free-riding problem further analysed. To attach too many conditions discourages

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<sup>11</sup> In cases where flexibility is constrained (e.g. TRIPS), pressure to change rules has led to more flexibility (see TRIPS and Public Health Debate)

<sup>12</sup> Let us illustrate this with an hypothetical example: the products of country A get 25 years protection (patent rights) under the plurilateral TRIPS+ agreement on certain products from the country B (as negotiated in a critical mass agreement, where A is not a member). Member B, however, faces the situation that its products might only get 10 years of protection in country A. If country A is an important competitor of country B on the world market, this creates negative incentives on the negotiations.

<sup>13</sup> The leading providers of financial services have shown more enthusiasm for accession negotiation with important new members than for the plurilaterals.

solutions in the WTO context and further shifts these issues onto the platforms of bilateral and unilateral trade arrangements.

Finally, an (older) issue of debate from the International Relations literature could be instructive in understanding newer development in the global trading system: the role of absolute vs. relative gains for states. With the emergence of new trade powers (the making of a multi-polar trade world), some of the regional leaders (not to speak of hegemons) might shift their cooperation strategies gradually from absolute to relative gains vis-à-vis some trading partners. There is lack of research that has taken up these systemic pressures and how they might affect different negotiation logics in the future (including going bilateral).<sup>14</sup>

## **Importing Variable Geometry from the EU**

A concept that has been actively “tested” in the context of EU integration (and that accounts for critical mass approaches) has been the idea of “variable geometry”. Variable geometry in the EU context is seen predominantly as a temporary deviation from a uniform ideal (see Jachtenfuchs 1997:5). Those who go ahead are perceived as “avant-gardist” or part of “core Europe” in a multi-speed community (Scharpf 2000:24). Some grand projects seem to fall into the avant-garde perspective. One interesting feature is that it seems these areas predominantly advantage those moving quicker (e.g. Schengen Regime, EURO zone, defense initiatives (e.g. the Western European Union)). Membership allows for some type of (functional) club good benefits with only limited MFN-type of positive spillover to non-participants.<sup>15</sup> The decision for non-participation is related mainly to sovereignty concerns. Cooperation in these fields has the characteristics of a cooperative coordination game.

This concept is very different from a concept of “Europe à la carte” or translated to the global trading system “WTO à la carte”. The so-called Tokyo Codes were seen as the latter version and this also helped to create the idea to constrain cherry-picking and

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<sup>14</sup> see Grundig 2006

<sup>15</sup> It remains to be seen whether staying out of the EURO is a beneficial strategy for the long-run, while in the short run gains can be observed.

engaging all in the system by closing loop-holes in the Uruguay Round. In the EU context, the British opt-out from social policy (differentiation in the so-called social protocol in the Maastricht Treaty) comes to mind. This exception seems more a long-term opt-out following the à la carte logic. This type of laggard strategy by some members leads to a slowing effect on deeper integration for other members.<sup>16</sup> These type of differentiated integration holds characteristics of non-cooperative game theory.

## **Conclusion**

The paper aims to contribute to a de-mystification of leading paradigms. I have argued that more analytical work is needed to overcome the cultural obstacles to delegate supplementary power to supranational actors (e.g. Secretariat). Moreover, additional work is needed to understand the promises and perils of critical mass decision-making. The paper proposes to explore new forms of reaching decisions within the WTO, including allocating a stronger role for the Secretariat, the selective recourse to weighted voting and the use of plurilateral approaches. It shares the view that the combination of single package and consensus has led to a type of “decision-trap” from which it is difficult to escape. Or as VanGrasstek and Sauvé put it “paradoxically, instead of encouraging bold deals by causing each country to focus on those parts of the package that they most dearly desire, the single undertaking might promote timidity by causing each country to focus on those things that they most fear” (2006:858).

The paper ends with two additional observations. First, whether engaging in the single package or pushing for creating club models (with limits to MFN extension), a key challenge remains to assist developing countries (beyond the BRICSAM) to integrate into the system. Here, ideas of non-static differentiated integration need to be re-visited, such as the concept of graduation (see Cottier 2006). The example of the EU has shown that in order to successfully go down the path of different speed integration, rich members need to provide incentives and well targeted resources to help the integration process.

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<sup>16</sup> Variation in labor-related standards have further hindered additional integration in providing services (including labor mobility) across Europe, see Debate on *Bolkestein Directive*.

Solidarity across nations is an important factor to allow for resource transfers. The EU has invested a large amount of financial resources in developing infrastructure and other basic services in member-states. Within the WTO context, the Aid for Trade debate has opened the door for developing instrument to assist smaller and weaker parties to further integrate in the world trading system. Assistance to address supply side constraints should go hand in hand with technical assistance to mainstream trade within development strategies and further co-ordination among the IOs working in this area. Now, this emerging consensus on how to move forward needs to be backed with financial resources.

The EU example also tells another story about this economic integration project facing limits (partly due also to integration fatigue). New modes of decision-making have been applied beyond the logics of multi-speed or à la carte Europe. The EU has engaged and experimented more recently with what is called “open co-ordination”. This type of co-operation was introduced in the Treaty of Amsterdam (introduced in the fields of employment and social policy). It strives to promote rules in sensitive areas where integration following the old logic seems difficult. It is designed as a learning and peer-pressure exercise characterized by “multi-level and recursive processes of joint problem analyses and goal setting, self-commitment and self-evaluation, combined with common monitoring and central benchmarking capacities (Scharpf 2000:25). But, eventually, it is a type of adaptation process among states in the waiting room to gain time for more preparing more integration and harmonization in the future. The WTO’ use of its trade policy review mechanism follows a similar logic of peer-pressure. This is good starting point, but this type of co-ordination might not suffice to tackle existing obstacles and challenges for the trading system that call for bolder steps.

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