



**UNIVERSITY of the
WESTERN CAPE**

FACULTY OF LAW

DEPARTMENT OF MERCANTILE AND LABOUR LAW

**Exclusive Greenroom Meetings Of The WTO: An Examination Of The Equality
Principle in the Decision-Making Process of the Multilateral Trading System**

**Dissertation Submitted In Partial Fulfillment of the Requirements For The
Degree of Master of Laws (LL.M) In
International Trade, Investment and Business Law**

By

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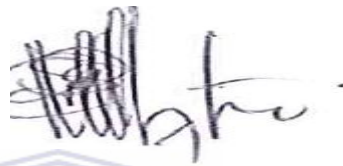
Of

Prof. Riekie Wandrag

DECLARATION

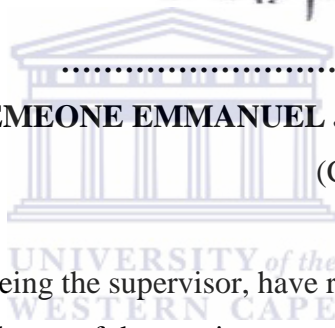
I, **GOEMEONE EMMANUEL JUDAH MOGOMOTSI** declare that this research is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Signed at **GABORONE** this **21st** day of **MAY 2013**.



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I, **RIEKIE WANDRAG**, being the supervisor, have read this research paper and approved it for partial fulfillment of the requirements of the Masters of Law Degree in International Trade, Business and Investment Law, of the University of the Western Cape.

Signed at **BELVILLE** this DAY OF **MAY 2013**.

.....

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DEDICATIONS

To my loving mother



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Deserving to be acknowledged for making the trip to and stay in the Western Cape a reality is my uncle, Ralph Mabe, without him the thought of asking for an unpaid leave from work would have never crossed my mind. *Montsamaisa bosigo ke mo leboga bo sele*. The Faculty of Law, University of the Western Cape's role for nurturing me and supporting me through the unfamiliar academic path of International Trade law is deeply appreciated.

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The Almighty's Love is immeasurable, without HIM nothing is possible, I shall forever sing praises unto his name. Psalm 68:4 'Sing unto God, sing praises to his name: extol him that rideth upon the heavens by his JAH, and rejoice before him.'

KEYWORDS

Developing Countries: There is no WTO definition of “developing” countries. However, the World Bank definition is all countries that are not regarded as high income countries according to the 2011 definition of the World Bank. According to this definition all countries with a GNI per capita lower than US\$ 12 475 per annum will fall in to this category.

Developed Countries: There is no WTO definition of “developed” countries. However, the World Bank definition is all countries that are regarded as high income countries according to the 2011 definition of the World Bank. According to this definition all countries with a GNI per capita from US\$ 12 476 per annum will fall in to this category.

General Agreement on Tariffs and Trade (GATT) is a multilateral agreement regulating international trade. It was negotiated during the UN Conference on Trade and Employment and was the outcome of the failure of negotiating governments to create the International Trade Organization (ITO). GATT was signed in 1948 and lasted until 1993, when it was replaced by the World Trade Organization in 1995.

Transition Economies: A transition economy or transitional economy is an economy which is changing from a centrally planned economy to a free market. Transition economies undergo economic liberalisation, where market forces set prices rather than a central planning organization. They are mainly former territories of the Soviet Union.

International Monetary Fund: An organisation of 188 countries, working to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world.

World Trade Organization: Is an organization that intends to supervise and liberalize international trade. The organization officially commenced on January 1, 1995 under the Marrakech Agreement, replacing the General Agreement on Tariffs and Trade (GATT), which commenced in 1948. The organization deals with regulation of trade between

participating countries; it provides a framework for negotiating and formalizing trade agreements, and a dispute resolution process aimed at enforcing participants' adherence to WTO agreements which are signed by representatives of member governments.

World Bank: An international financial institution that provides loans to developing countries for capital programs. The World Bank's official goal is the reduction of poverty. According to the World Bank's Articles of Agreement (as amended effective 16 February 1989), all of its decisions must be guided by a commitment to promote foreign investment, international trade, and facilitate capital investment. This is distinguishable from the **World Bank Group (WBG)** which is a family of five international organisations *viz* International Bank for Reconstruction and Development; International Development Association ; International Finance Corporation ; Multilateral Investment Guarantee Agency and International Centre for Settlement of Investment Disputes. The term "World Bank" generally refers to just the IBRD and IDA, whereas the term World Bank Group or WBG is used to refer to all five institutions collectively.

Consensus: Is a group decision-making process that seeks the consent, not necessarily the agreement of participants and the resolution of objections.

Ministerial Conference: The ministerial conference, which has to meet at least once every two year, is the highest decision making. The Ministerial Conference can take decisions on all matters under any of the multilateral trade agreements.

Doha Round: The Doha Development Round or Doha Development Agenda (DDA) is the current trade-negotiation round of the World Trade Organization (WTO) which commenced in November 2001. Its objective is to lower trade barriers around the world, which will help facilitate the increase of global trade. As of 2008, talks have stalled over a divide on major issues, such as agriculture, industrial tariffs and non-tariff barriers, services, and trade remedies.

Multilateral trading system: This refers to the system operated by the WTO. Most nations — including almost all the main trading nations — are members of the system.

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CHAPTER I

INSTITUTIONAL DIAGNOSIS: DECIPHERING THE PROBLEMS BESIEGING THE WTO DECISION-MAKING

1. INTRODUCTION

1.1. Background of the Study

International organisations use one or a combination of three types of decision-making rules for most non-judicial action: ‘majoritarian’ (decisions are taken by a majority vote of member states, and each member has one vote); ‘weighted voting’ (decisions are taken by a majority or super-majority, with each state assigned votes or other procedural powers in proportion to its population, financial contribution to the organization, or other factors); or ‘sovereign equality’.¹ Sovereign equality has been taken to imply that all member states should have an equal voice in the deliberations of international associations of states.²

A cursory comparative analysis of the decision making processes of the major international economic organisations viz the International Monetary Fund (IMF), World Bank and the World Trade Organisation (WTO) has been made to the effect that the IMF and World Bank are sometimes described as staff-driven organizations. By contrast, the WTO (whose entire budget is only a little more than the travel budget of the IMF)³ is member-driven in the sense that governments make and sign multilateral and plurilateral trade agreements among themselves, leaving the WTO Secretariat to provide administrative and technical support. The structure of the WTO is (at least in theory) more directly representative of member states than that of both the

¹ Steinberg RH ‘In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO’, *International Organization*, Vol. 56, No. 2 (Spring 2002) 339.

² Gaubatz KT ‘Democratic States and the Sovereign Equality Norm’ available at <http://kktg.net/kurt/publications/pubs/Sovereign%20Equality.pdf> accessed 23rd September 2012.

³ Woods N and Narlikar A, ‘Governance and the limits of accountability: the WTO, the IMF and the World Bank’, *International Social Science Journal* Number 170, November 2001. Pp.569-583, p.570.

International Monetary Fund and the World Bank, because decision-making at all levels of the WTO is member driven and because all states enjoy an equal vote.⁴

In respect of the decision making processes of the IMF and the World Bank, in comparison with the WTO, a different approach of arriving at decisions by member states has been adopted. The weight of votes a member country has is dependent on the extent of their capitalisation at inception of formation of these two Bretton Woods institutions. It has been noted that like at its sister organisation, the International Monetary Fund (IMF), the distribution of votes at the World Bank was set up to reflect each member country's comparative economic strength (based on a mix of reserves, international trade volumes and national income).⁵ The allocation of voting shares at the World Bank was accompanied by paid-in capital, the allocation of voting shares is also linked to the quota a country has in the IMF. Thus the link between the scale of financial backing provided to the Bank and the degree of decision-making power was established.⁶

With regards to the WTO, Developing countries have become increasingly active.⁷ This has led to decision-making by consensus becoming a very contentious issue. The concepts of consensus and unanimity in the WTO are consistent with the principle of sovereign equality. It could be said that the system of decision-making by consensus only worked in the pre-Uruguay Round years.⁸ The contention arises from the fact that European Union (EU) and the United States have dominated bargaining and outcomes at the WTO from its early years, despite

⁴ Woods N and Narlikar A 'Governance and the limits of accountability: the WTO, the IMF and the World Bank', *International Social Science Journal* Number 170, November 2001 570.

⁵ Griffith-Jones S *Governance of the World Bank* accessed at http://stephanygj.net/papers/Governance_of_the_World_Bank_Paper_prepared_for_DFIG.pdf (accessed 20 September 2012) .

⁶ Griffith-Jones S 'Governance of the World Bank' available at http://stephanygj.net/papers/Governance_of_the_World_Bank_Paper_prepared_for_DFIG.pdf accessed 20th September 2012.

⁷ See generally Michalopoulos C 'The Developing Countries in the WTO' (1999) 22 *World Economy* 117–143.

⁸ Dube M 'The Way Forward for the WTO: Reforming the Decision Making Process' 2012 *SAIIA Occasional Paper Number* 118 10.

adherence to consensus decision-making.⁹ The power struggles between the developed, industrialised countries and the developing member states of the WTO had led to the collapse of the Seattle Ministerial Conference and Cancun talks.¹⁰

1.2. STATEMENT OF THE RESEARCH PROBLEM

Theoretically, the decision-making of the WTO can be made by equal-voting of member countries.¹¹ However, since the inception of the GATT in 1947, the predecessor to the WTO, there has never been a single casting of votes in the multilateral trading system.¹² The organisational culture of the WTO is that decisions are normally taken by consensus. Consensus in the WTO means explicit or implicit acceptance by all members of an agreement that is superior to any offered in the talks.¹³

Due to a wide array of issues covered by the scope of the WTO in comparison to the GATT which was focused on tariffs, and viewed as a rich nations club, developing nations have taken active participation in the WTO negotiations.¹⁴ As a result of the expanded membership of the multilateral trading system from twenty-three members of the GATT in 1947, to one hundred and fifty seven member states of the WTO as at 24th August 2012,¹⁵ consensus building has become a very difficult endeavour for the WTO. In order to avoid deadlock, a system of Green room meetings was introduced at the critical stages of the Tokyo (1971-79) and the Uruguay (1986-94) rounds, in this informal system adopted by the Director-General, small group of

⁹ Jones K 'Green room politics of the WTO and the WTO's crisis of representation', *Progress in Development Studies* 9, 4 (2009) 350.

¹⁰ See generally Narlikar A & Wilkinson R 'Collapse at the WTO: a Cancun post-mortem' (2003) *Third World Quarterly* 25:3 460.

¹¹ Nordström H 'Participation of developing countries in the WTO-new evidence based on 2003 records' available at www.noits.org/noits06/Final_Pap/Hakan_Nordstrom.pdf (accessed 21 September 2012).

¹² http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm#ministerial (accessed 24 September 2012).

¹³ Jones K, 'Green room politics of the WTO and the WTO's crisis of representation', *Progress in Development Studies* 9, 4 (2009) 350.

¹⁴ Pauwelyn J, 'New Trade Politics for the 21st Century', *Journal of International Economic Law* 11(3) 573.

¹⁵ http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (accessed 25 September 2012).

countries were invited to bargain over contentious issues which proved to be obstacles of progress.¹⁶ This informal procedure which has been adopted as well as part of the culture of the WTO has resulted in the exclusion of many developing countries not participating in the greenroom from key discussion and negotiation stages.¹⁷

In light of the foregoing, there arises an academic need to assess the place of exclusive Greenroom meetings of the WTO within the broader context of the principle of sovereign equality in the decision making process of the multilateral trading system. The said examination from the position and/or perspective of developing countries shall be used to inform practical proposals for reform in the WTO decision-making process.

1.3. RESEARCH QUESTIONS AND OBJECTIVES

This research intends to probe fundamental constitutional framework and practical decision making processes of the WTO, particularly the participation of developing and smaller economies. In that regard, the study raises the following questions: whether the interests and participation of developing countries are sufficiently safeguarded in the decision-making process of the WTO. It will also attempt to highlight the underlying conflicting and divergent economic and trading interests of developing nations *vis-a-vis* the developed nation in the multilateral trading system decision-making process. Furthermore, the paper will try to demonstrate that the prevailing informal decision making structure of the WTO *viz.* the Greenroom meetings is inconsistent with the core principle of the WTO decision making. It shall also suggest workable areas of reforming the decision making process of the WTO to safeguard the interests of member states irrespective of their economies and size.

The main research question which is, whether the interests and participation of developing countries are sufficiently safeguarded in the decision-making process of the WTO

¹⁶ Jones K 'Green room politics of the WTO and the WTO's crisis of representation' (2009) 9(4) *Progress in Development Studies* 350.

¹⁷ See generally Jones K 'Green room politics of the WTO and the WTO's crisis of representation' (2009) 9(4) *Progress in Development Studies* 349-357.

would be resolved by considering three sub-facets; what is the structure and background of decision making process of the multilateral trading system; what are the constraints to the principle of sovereign equality and transparency in the WTO decision making process; and finally whether in the light of the developments in the multilateral trading system and negotiations environment there exists a justifiable need to reform the WTO decision making system.

The objectives of the study are as follows:

To discuss the concept of sovereign equality in the multilateral trading system decision making system within the constitutional framework of the WTO in contra-distinction with other international economic institutions. Further to discuss the dichotomy between WTO constitutional provisions that guarantees equality of participation of member state and the prevailing practice of Greenroom meetings.

The study would also attempt to demonstrate with an aid of relevant examples the underlying power-struggles between developing and developed countries over the equal involvement of the former in the decision-making procedures of the WTO, which can lead to paralysis of the multilateral trading system.

Lastly, to analyse the developments in the WTO, particularly the position of the developing nations and protection of their interests during negotiation stages in the WTO make necessary recommendations and/or conclusions.

1.4. SIGNIFICANCE OF THE STUDY

The study will provide critical analysis of the WTO decision making process and the position of developing countries in the multilateral trading system negotiations in light of the stalled Doha Round which its status is uncertain. The study will further contribute to academic assessment of the decision making framework of the WTO and proposals for reform to cater for new dynamics and the ever expanding membership which is necessary for providing much

needed legitimacy and acceptance for the WTO decisions.

1.5. RESEARCH METHODOLOGY AND LIMITATIONS OF THE STUDY

As a desktop type of research, a thorough review of available literature would be made. On primary sources regard will be given to international treaties and/or conventions would be consulted whenever necessary *viz* WTO Agreements, WTO statistics, and WTO Members' proposals where applicable. The secondary sources reference will be taken from various background papers, working papers of various authors, academic or scholarly journal articles as well as other academic material such as textbooks would be paid regard to. Internet sources of recent and updated information will also be referred to.

1.6. LITERATURE REVIEW

Jones's¹⁸ journal article entitled *Green room politics and the WTO's crises of representation* discusses the Green room meetings of the WTO within the broader organisational framework. It briefly discusses the historical development of the Green room practice in the consensus building process. It further notes the benefits of resorting to the informal meetings and their necessity for arriving at consensus. The article concludes by suggesting need for reforms without proposing what can be done to address the imbalances complained of.

New Trade Politics for the 21st Century an article authored by Pauwelyn¹⁹ points out that the WTO has not adapted to changes, remains centred and continues to follow the same negotiating techniques the GATT followed more than 60 years ago. It further points out the fact of explosion of membership of the WTO, the bulk of the majority being the developing countries and economies in transition. The article also discusses the 'closed politics' of the GATT/WTO

¹⁸ Jones K, 'Green room politics of the WTO and the WTO's crisis of representation', *Progress in Development Studies* 9, 4 (2009) 349-357.

¹⁹ Pauwelyn J, 'New Trade Politics for the 21st Century', *Journal of International Economic Law* (2008)11(3) 559-573.

system. This work however, does not in sufficient details discuss the procedural aspects of the decision making process, the analysis is more econometric than legal.

Narlikar and Wilkinson in their joint journal article *Collapse at the WTO: a Cancun post-mortem* analyses the collapse of the WTO Ministerial Conference in 2003 in Cancun, Mexico. They posit that the collapse was due to the deep-rooted malady within the WTO and that the multilateral trading system is riddled with some serious flaws of institutional design. The authors conclude that the WTO system in order to move forward and benefit its members, the inequality issues needs to be addressed directly and urgently. Even though the authors discuss the inequality and inefficiency of the WTO decision making process, it is general in its discussion not focusing son Green room meetings and discussing the phenomena extensively.

One of the latest additions in this subject matter authored by Dube²⁰ entitled *The Way Forward for the WTO: Reforming the Decision-Making Process* discusses the failure to reach a decision in the ongoing negotiations dubbed the Doha Round. The learned author posits that the Doha Round remains in limbo and, with it, the multilateral trading system. She further strongly argues that increasing popularity of regional and bilateral trading agreements is indicative of the WTO members' frustrations with the latter. The paper notwithstanding the fact that it is making some cogent institutional reforms does not differentiate between short-term and long-term implementation of the same.

1.7. CHAPTER BREAKDOWN

This paper is intended to be divided into five chapters:

Chapter one comprises the background to the research, the research problem and questions, the objectives of the study, the methodology, and a literature review.

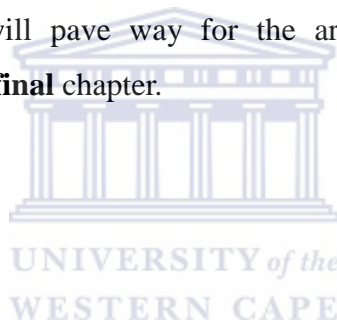
²⁰ Dube M 'The Way Forward for the WTO: Reforming the Decision Making Process' (2012) *SAIIA Occasional Paper Number 118* 1-30.

The **second chapter** comprises an analysis of the brief background of the multilateral trading system decision making process, from the GATT to the WTO in comparison to other international economic organisations *viz* the IMF and WTO.

The **third chapter** shall discuss the constraints to the principle of sovereign equality and transparency in the WTO decision making process. Specifically the [non] participation of the developing nations and transition economies in Green room meeting. It shall further attempt to illustrate the underlying tension between developing nations and their developed counterparts.

Chapter four shall point out the impact of the negotiation procedures on the multilateral trading system making specific references to the Seattle and Cancun Ministerial conference, and to the stalled Doha Round of negotiation.

The foregoing chapters will pave way for the articulation of the conclusions and recommendations in the **fifth and final** chapter.



CHAPTER II

THE WORLD BANK, IMF AND WTO: DECISION MAKING IN [UN] HOLY TRINITY²¹ OF THE INTERNATIONAL ECONOMIC ORDER

2. INTRODUCTION

2.1. Historical perspective on the establishment of the New International Economic Order

Global social policy is currently managed through a variety of institutions in addition to the WTO, including in particular what are popularly called the Bretton Woods Institutions (BWIs): the International Monetary Fund (IMF or the Fund) and the World Bank Group (WBG).²² These institutions came into being almost seventy years ago and are playing an important and at times controversial role in the world economy.

The 1930s was a period when the world experienced one of the worst economic recessions known in human history referred to as the Great Depression, which demonstrated that the pursuit of nationalistic beggar-thy-neighbour policies can have dramatic and devastating effects.²³ In order to prevent a repetition of this destructive experience, the Bretton Woods system consisting of the IMF and the World Bank was created in 1944 to post World War II economic system.²⁴

The establishment of the international economic order as a necessary framework to be out in place as institutional mechanisms to prevent future armed conflict of global scale was

²¹ Adapted from Peet R *Unholy Trinity: The IMF, World Bank and WTO*, 2 ed (2012).

²² Garcia FJ 'Justice, The Bretton Woods Institutions and the Problem of Inequality', Boston College Law School Legal Studies Research Paper Series, Research Paper No.158 June 10, 2008 .4.

²³ Shukla SP 'From GATT to WTO and Beyond', UNU World Institute for Development Economics Research (UNI/WIDER) Working Paper No. 195 2.

²⁴ Liebscher K 'The Importance of the Bretton Woods Institutions for Small Countries Opening Address', Proceedings of OeNB Workshops No.3 entitled '60 years of Bretton Woods- The Governance of International Financial System-Looking Ahead', June 20-22 2004 10.

discussed when the World War II was still being heavily fought. The allies, specifically the United States and the United Kingdom agreed to the general objectives of the post-war economic order through the conclusion of the Atlantic Charter of August 1941.²⁵ The specific details of this new order were then developed, in stages, through the negotiations that produced the United States-United Kingdom Lend-Lease Agreement of February 1942, the International Monetary Fund (IMF) Agreement of July 1944 and the United States proposed charter of December 1945.²⁶

2.1.1. International economic constitutionalism

The World Bank²⁷ and the International Monetary are commonly referred to as ‘Bretton Woods Institutions’ as reference to their ‘place of birth’. In that regard Wood notes that in 1994 in Bretton Woods, New Hampshire, United States of America a global conference with an object to establish global economic rules which would prevent replay of the Great Depression and its aftermath was attended by ‘one and half parties’.²⁸ The metaphorical statement ‘one and half parties’ US was clearly the most powerful country at the table and so ultimately was able to impose its will on the others having just emerged from the war with economic superiority over its Western Allies,²⁹ including an often-dismayed Britain which can be said to be a ‘limping partner’ in that it had little of a choice because of its economic embarrassment to resist the demands and economic leadership of the USA.³⁰

²⁵ Irwin DA, Mavroidis PC & Sykes AO ‘The Genesis of the GATT’ 2008 New York: Cambridge University Press p.14. Available at <http://faculty.chicagobooth.edu/workshops/international/archive/pdf/Irwin,%20D..pdf> (accessed 17 January 2013)

²⁶ Hudec RE *Developing Countries in the GATT/WTO Legal System*, 2 ed (1987) 20.

²⁷ Hudec RE *Developing Countries in the GATT/WTO Legal System*, 2 ed (1987) 20.

²⁸ Woods N ‘Bretton Woods Institutions’ in Weiss TG & Daws S (Eds) *Oxford Handbook on The United Nations* (2006) 1.

²⁹ Woods N ‘Bretton Woods Institutions’ in Weiss TG and Daws S (Eds) *Oxford Handbook on The United Nations* (2006) 4.

³⁰ Available at https://en.wikipedia.org/wiki/Bretton_Woods_system (accessed 13 May 2013).

Ikenberry makes a very critical jurisprudential assertion when he states that the core principles and values embedded and/or enshrined in the Bretton Woods accord was an unprecedented experiment in international economic constitution building.³¹ The results of the global conference in New Hampshire was the establishment of an international rule making institutions for post-war monetary and financial relation as a step in the historic reopening of the world economy. The Anglo-American agreements established sophisticated rules that would attempt to reconcile openness and trade expansion with the commitments of national governments to full employment and economic stabilisation.

The main function of international financial institutions today, which are anchored on the international economic constitutionalism developed in the Bretton Woods, is to provide the best framework for the governance of globalization so that this process becomes a win-win outcome, in which all economies ultimately benefit through productivity and growth effects.³² This system is one of the core institutions which international economic law is premised upon, the basis which world peace and security is based on.³³

The original Bretton Woods agreement also included plans for an International Trade Organisation (ITO) but these lay dormant until the WTO was created in the early 1990s.³⁴ The General Agreement on Tariffs and Trade which had a *de facto* role as an international organisation before the creation of the WTO in that sense is often viewed by some as one third of the Bretton Woods system that was created after World War II to ensure a stable trade and economic world environment.³⁵ The modus operandi of the WTO and its *sister organisations*, the World Bank and the IMF emphasise in their development discourses the role of *trade*

³¹ Ikenberry GJ 'The Political Origins of Bretton Woods' in Michael D. Bordo & Eichengreen B (ed) 'A Retrospective on the Bretton Woods System: Lessons for International Monetary Reform' (1993) 155.

³² Liebscher K 'The Importance of the Bretton Woods Institutions for Small Countries Opening Address' Proceedings of OeNB Workshops No.3 entitled '60 years of Bretton Woods- The Governance of International Financial System-Looking Ahead' June 20-22 2004 8.

³³ See generally Raustiala K 'Rethinking the Sovereignty Debate in International Economic Law' (2003) 6(4) *Journal of International Economic Law* 841-878.

³⁴ <http://www.brettonwoodsproject.org/item.shtml?x=320747> (accessed 13 May 2013).

³⁵ Available at <http://www.ll.georgetown.edu/intl/guides/gattwto/> (accessed 13 May 2013).

mainstreaming (through the strengthening of the private sector) as a development tool, while spreading the political idea that trade is not only an economic tool but also a political vehicle to achieve international peace and social stability worldwide.³⁶ The overarching philosophy underpinning the new international economic order is that development through trade and its consequent macro-economic adjustments is to be reached in long run and thus this political spectrum of ideas highlights that international trade will carry development.³⁷

2.2. Bretton Woods Voting Model: General overview

Weighed voting is fundamental to the workings of the IMF and World Bank. The principle that all member countries have the right to vote but cast different numbers of votes to reflect key differences between them was enshrined in the original Bretton Woods constitutions and has dominated their work ever since.³⁸ This has been shown to have resulted in a severe democratic imbalance with a voting structure that is massively biased against the developing and poor countries.

It is customary, in the language of the Bretton Woods Institutions, to refer to the number of votes a member country has as its ‘voting power’. No doubt this is what its voting power is *intended* to be, but it is certainly not its power in the true sense of the term, but its *weight*, in the sense of weighted voting.³⁹

³⁶ Iorio M ‘Global Governance, International Development Discourses and National Policy-Making: Highlights of Critical Issues’, International Gender and Trade Network Discussion Paper, p.6. Available at http://www.wto.org/english/forums_e/ngo_e/posp68_igtn_e.pdf (accessed 31 December 2012).

³⁷ Iorio M ‘Global Governance, International Development Discourses and National Policy-Making: Highlights of Critical Issues’, International Gender and Trade Network Discussion Paper, p.6. Available at http://www.wto.org/english/forums_e/ngo_e/posp68_igtn_e.pdf (accessed 31 December 2012).

³⁸ Vestergaard J ‘The World Bank and the Emerging World Order: Adjusting to Multi-polarity at the Second Decimal Point’ Danish *Institute for International Studies Report* 2011:05. Available at www.diis.dk/.../RP2011-05-World-Bank-voice-reform_web.pdf (accessed 6th January 2013).

³⁹ See Leech D & Leech R ‘Voting Power in the Bretton Woods Institutions’ (2005) 22(4) *Homo Oeconomicus* 605–627

2.2.1. The World Bank

2.2.1.1. Organisational Structure of the IBRD

As a multilateral institution the World Bank is owned by the governments of its 188 member countries. The Bank is run like a cooperative, and the member countries are shareholders of the Bank, with shares based on the size of each country's economy.

The World Bank is an international financial institution that provides loans to developing countries for capital programs.⁴⁰ It came into existence on December 27, 1945 following international ratification of the agreements reached at the United Nations Monetary and Financial Conference of July 1 to July 22, 1944 in Bretton Woods, New Hampshire.⁴¹ The World Bank's official goal is the poverty reduction. According to the World Bank's Articles of Agreement (as amended effective 16 February 1989), all of its decisions must be guided by a commitment to promote foreign investment, international trade, and facilitate capital investment.

The **World Bank** is distinguishable from the **World Bank Group (WBG)**⁴² which is a family of five international organisations viz International Bank for Reconstruction and Development (IBRD); International Development Association (IDA); International Finance Corporation (IFC); Multilateral Investment Guarantee Agency (MIGA) and International Centre for Settlement of Investment Disputes (ICSID).

⁴⁰Available at

<http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20653660~menuPK:72312~pagePK:51123644~piPK:329829~theSitePK:29708,00.html> (accessed 12 May 2013).

⁴¹Available

at

http://www.princeton.edu/~achaney/tmve/wiki100k/docs/International_Bank_for_Reconstruction_and_Development.html (accessed 12 May 2013).

⁴²Available at <http://www.investopedia.com/terms/w/world-bank-group.asp> (accessed 12 May 2013).

The term ‘World Bank’ generally refers to just the IBRD whereas the term World Bank Group or WBG is used to refer to all five institutions collectively.⁴³ For the avoidance of doubt, for purposes of this research, the World Bank shall refer solely to the IBRD to the exclusion of other constituent organisations of the World Bank Group. To become a member of the Bank, under the IBRD Articles of Agreement, a country must first join the International Monetary Fund (IMF), Membership in IDA, IFC and MIGA are conditional on membership in IBRD.⁴⁴

At the apex of the leadership structure, the shareholders *viz* member states are represented by a Board of Governors, which consists of Ministers of Finance or Development and Central Bank Governors. The governors meet annually and have the ultimate responsibility for making decisions and maintaining oversight of the Bank. However, prior to 2010, there were 24 Executive Directors who sat on the Executive Board made the day-to-day decisions. From November 2010 the number of Executive Directors increased by one to 25.⁴⁵

Each of the Executive Directors represents either a single country or a group of countries. Only the five largest shareholders (France, Germany, Japan, the United Kingdom, and the United States) appoint their own Executive Director, while the other countries are grouped into constituencies that are represented by one Executive Director (for example, one sub-Saharan African Executive Director represents 22 countries). China, the Russian Federation, and Saudi Arabia each elect its own Executive Director.⁴⁶ The other Executive Directors are elected by the

⁴³ House of Commons International Development Committee, *The World Bank Fourth Report of Session 2010-11* Vol. 1, House of Commons London: The Stationery Office Limited. Available at <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmintdev/606/606.pdf> (accessed 12 May 2013).

⁴⁴ Available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:22427666~menuPK:8336899~pagePK:51123644~piPK:329829~theSitePK:29708,00.html> (accessed 12 May 2013)

⁴⁵ Available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/BODEXT/0,,contentMDK:22494475~menuPK:64020004~pagePK:64020054~piPK:64020408~theSitePK:278036,00.html> (accessed 13 May 2013).

⁴⁶ Available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/BODEXT/0,,contentMDK:22494475~menuPK:64020004~pagePK:64020054~piPK:64020408~theSitePK:278036,00.html> (accessed 13 May 2013).

other members. The voting power distribution differs from agency to agency within the World Bank Group. The Executive Directors usually meet twice a week for general oversight of the Bank.

2.2.1.2. Voting system

The voting system of the Executive Board of Directors is based on the shareholding of the member countries that have appointed or elected a given Executive Director. Thus, while it is the same persons that are on the Board of Executive Directors of the IBRD, IDA and the IFC, their voting power depends on which of these three WBG bodies a given vote is cast for, given that countries' relative shareholding is not the same for each of these three bodies.

Most decisions require a simple majority, although there are some important exceptions to this rule. Special majorities are required for issues such as capital increases and amendment of the Articles of Agreement.⁴⁷ Amendment of Articles requires approval by the Board of Governors, support from at least 60% of member countries and at least 85% of total voting power.⁴⁸ The latter criterion is what effectively gives the US a veto on fundamental changes in the Bank. Given that the US has just over 15% of total voting power, no amendment of the Articles can be decided without the support of the US.

Increases in the Bank's capital also require a special majority, although here only a 75% majority applies⁴⁹, however, it is worthy to note that in the context of an increase of the Bank's capital, each and every member country has a right to subscribe to a proportionate share of the

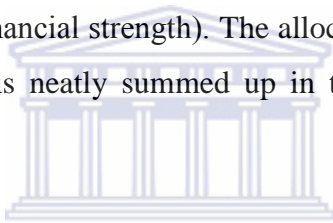
⁴⁷ See generally Article II and Article VIII of the International Bank for Reconstruction and Development Articles of Agreement available at <http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf> (accessed 17 January 2013).

⁴⁸ Article VIII of the International Bank for Reconstruction and Development Articles of Agreement available at <http://siteresources.worldbank.org/EXTABOUTUS/Resources/ibrd-articlesofagreement.pdf> (accessed 17 January 2013).

⁴⁹ Article II Section 2(b) of the Articles of Agreement of the IBRD reads "The capital stock may be increased when the Bank deems it advisable by a three-fourths majority of the total voting power."

increase. This in effect means that no member country can have its share of total shares reduced without its concurrence, a principle known as ‘pre-emptive rights’ or right of first refusal. Pre-emptive rights on share issue are a company law principle found in various English speaking common law jurisdictions.⁵⁰The implication is that, since any realignment of voting power requires a selective capital increase, voting power reform can only be undertaken if all 188 member countries agree unanimously.

When the Executive Board makes decisions about loans and other policies, voting is not based on a one vote- per-country rule. Instead, voting power is weighted and is based on a country’s quota. Under the current quota formula, each member country receives a base of 250 votes. Additionally, member countries receive votes based on the size of their economies (they receive one additional vote for each share of stock held by that country, which depends on that country’s relative economic and financial strength). The allocation of quotas and the relationship between the IBRD and the IMF is neatly summed up in the World Bank Group website as follows:



According to IBRD Articles of Agreements membership in the Bank is open to all members of the IMF. A country applying for membership in the Fund is required to supply data on its economy, which are compared with data from other member countries whose economies are similar in size. A quota is then assigned, equivalent to the country's subscription to the Fund, and this determines its voting power in the Fund. This quota is also used to determine the number of shares allotted to each new member country in the Bank. All members of the Bank receive votes consisting of share votes (one vote for each share of the Bank's capital stock held by the member) plus basic votes (calculated so that the sum of all basic votes is equal to 5.55 percent of the sum of basic votes and share votes for all members).⁵¹

⁵⁰ See generally Naude T ‘Rights of First Refusal or Preferential Rights to Contract: A Historical Perspective on a Controversial Legal Figure’ (2004) 1 *Stellenbosch Law Review* 66.

⁵¹ Available at <http://web.worldbank.org/WBSITE/EXTERNALN> (accessed 13 May 2013).

The United States is the largest shareholder and it carries 15.85 of the vote which as discussed above effectively translates into a veto power. Member countries that have larger shares of the total quota have larger voting percentages.⁵² Therefore, wealthier countries hold more voting power than the poorer countries.

2.2.1.3. A glimpse into the 2010 reforms

The then president of the World Bank Robert Zoellick expressed the vision and desire to reform the decision-making processes within the World Bank Group generally as follows:

A modernized [World Bank Group] must represent the international economic realities of the early 21st Century... [W]e are significantly increasing developing and transition country voice across the Group... This realignment strengthens our ability to continue to support the smallest poor members, and demonstrates that a greater say for emerging and developing countries brings with it greater responsibility for the financial soundness of the Bank Group.⁵³

The World Bank introduced reforms on the voting power of its members which came into effect in 2010. The said reforms as reflected by the diagram below resulted in the spreading through of some of the voting power of certain members which have since been gained by other members.⁵⁴ The 2010 reforms introduced an office of the Executive Director which its member is voted in by three (3) African countries on their own as a constituency *viz* Angola, Nigeria and

⁵² U.S Department of Treasury International Programs, 'Justification of Budget Appropriations FY2013 Budget Request', p.13. Available at http://www.treasury.gov/about/budgetperformance/Documents/FY2013_CPD_FINAL_508.pdf (accessed 13 May 2013).

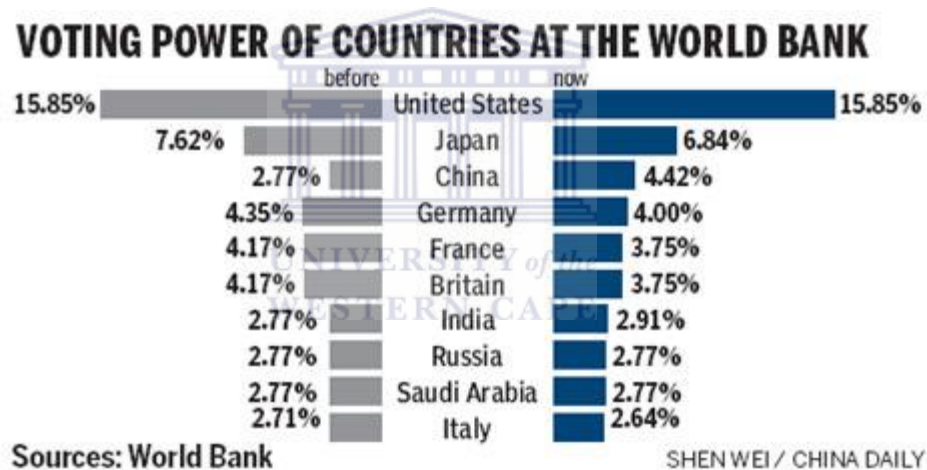
⁵³ Zoellick R speech quoted in Wade R. H & Vaentergaard J 'The Future of the World Bank: Why More "Voice Reform" Is Needed' 2. Available at http://cde.williams.edu/wp-content/uploads/2012/10/The-Future-of-the-World-Bank_RWade.pdf (accessed 6 January 2013)

⁵⁴ Available at [http://siteresources.worldbank.org/DEVCOMMINT/Documentation/22553921/DC2010-006\(E\)Voice.pdf](http://siteresources.worldbank.org/DEVCOMMINT/Documentation/22553921/DC2010-006(E)Voice.pdf) (accessed 17 January 2013).

South Africa⁵⁵ which countries can be said to be leading economies in Africa regarding their GDP.

It is quite critical to note that the sole veto power wielding shareholder is still holding tight to its veto. In effect, the ingrained imbalance of a practically one member controlling stake situation still exists, what has happened is that few of the emerging economies have temporarily been appeased by increasing their shareholding. The spreading over of those shares did not result in the sovereign nations being equal in the decision making structures of the World Bank.

The following diagram shows major shareholder of the World Bank, how their voting strengths were before and after the reform of 2010:



Source:⁵⁶

According to the World Bank the developing and transition countries gained 3.13 per cent of the voting shares at IBRD, bringing them to 47.19 per cent which represented a total shift of 4.59 per cent since 2008.⁵⁷ However, it has been observed that despite the said reforms, grave

⁵⁵ Available at <http://siteresources.worldbank.org/BODINT/Resources/278027-1215526322295/BankExecutiveDirectors.pdf> (accessed 13 May 2013)

⁵⁶ Available at http://www.chinadaily.com.cn/business/2010-04/27/content_9778666.htm (accessed 18 January 2013).

⁵⁷ Massion N 'The poor pay but the rich rule the World Bank' *The Brunei Times* 22 May 2010. Available at <http://www.bt.com.bn/features/2010/05/22/poor-pay-rich-rule-world-bank> (accessed 18 January 2013).

imbalances still remain in that the 78 of countries eligible to borrow from IBRD still have only a third of voting power (34.1 per cent) in comparison to the more than one quarter of votes held by the 27 countries of the European Union.⁵⁸ African countries gained a mere 0.19 per cent more of the newly available quota of votes in 2010 reform process, this has not changed the bargaining power of African countries by increasing any of its.

In reality then, high-income countries still hold between themselves almost 61% of the vote, with middle-income countries getting under 35%, and low-income countries a mere 4.46%. In effect deep rooted imbalances which have historically existed in the governance system of the World Bank remains notwithstanding the purported reforms. Inequalities of power between sovereign state are entrenched in the Bretton Woods system as reflected in the World Banking voting power, the imbalance which the almost 70 years of existence of this institution has not cured. The same nations which emerged victorious in World War II are still dominant and hold a controlling stake in the World Bank, a position which leaves the governance of this institution at their mercy in a literal and figurative sense. The United States of America hold a veto power in the World Bank, a weapon of governance that no any other nation possesses.

2.2.2. International Monetary Fund

The historical determination of voting structure and power of constituent states of the IMF is succinctly captured by Van Houtven whose views are not only academic but most importantly practical due to his past association with the IMF. The distinguisher who has served Secretary to the IMF and Counsellor to the managing Director for a period of 19 years notes as follows:

Each member country is assigned a quota, which is its participation in the capital of the IMF and determines its voting power. In addition, quotas determine each member's share in any allocations of SDRs. The original formula used at Bretton

⁵⁸ Horton A 'Analysis of World Bank voting reforms: Governance remains illegitimate and outdated' (2004) 1 *Bretton Woods Project*. Available at <http://www.brettonwoodsproject.org/doc/wbimfgov/wbgovreforms2010.pdf> (accessed 14 & 18 January 2013).

Woods for the calculation of the quotas of the 45 countries that participated in the conference included as economic variables national income, reserves, external trade, and export fluctuations. The quota formula was, and continues to be, directed in the first place at meeting the capital requirements of the institution.⁵⁹

The above observation is the interpretation of the constitutional documents establishing the IMF as agreed upon by the negotiating parties during the Bretton Woods conference. In that regard, Mountford argues that any assessment of the IMF's governance structure must start from the Articles of Agreement, which are the IMF's "constitution" which establish its purpose; provide for the establishment of the main organs and define their relative roles in a decision-making system, delineate other significant governance features (notably weighted voting and special majorities), embody important underlying principles of governance.⁶⁰

2.2.2.1. Determination of a Quota

When a country joins the IMF, it is assigned an initial quota in the same range as the quotas of existing members that are broadly comparable in economic size and characteristics.⁶¹ The IMF uses a quota formula to guide the assessment of a member's relative position. The current quota formula is a weighted average of GDP (weight of 50 percent), openness (30 percent), economic variability (15 percent), and international reserves (5 percent).⁶² For this purpose, GDP is measured as a blend of GDP based on market exchange rates (weight of 60 percent) and on PPP exchanges rates (40 percent). The formula also includes a "compression factor" that reduces the dispersion in calculated quota shares across members.

⁵⁹ Van Houtven L 'Governance of the IMF: Decision Making, Institutional Oversight, Transparency, and Accountability' Pamphlet Series No. 53 International Monetary Fund, Washington DC (2002), p.5.

⁶⁰ Mountford A 'The Historical Development of IMF Governance' IEO Background Paper, Independent Evaluation Office of the International Monetary Fund May 2008 5.

⁶¹ International Monetary Fund Fact Sheet available at <http://www.imf.org/external/np/exr/facts/pdf/quotas.pdf> (accessed 18 January 2013).

⁶² Virmani A 'Global Economic Governance: IMF Quota Reform' (2011) 9.

Quotas are denominated in Special Drawing Rights (SDRs), the IMF's unit of account. The largest member of the IMF is the United States, with a current quota of SDR 42.1 billion (about \$64 billion), and the smallest member is Tuvalu, with a current quota of SDR 1.8 million (about \$2.7 million).⁶³

2.2.2.2. Quota as determinant for weighted voting

Woods in his seminal work notes that despite the practice of Boards work by consensus, all their work is underpinned by an awareness of the voting power.⁶⁴ The quota largely determines a member's voting power in IMF decisions. Each IMF member's votes are comprised of basic votes plus one additional vote for each SDR 100,000 of quota.⁶⁵ The 2008 reform fixed the number of basic votes at 5.502 percent of total votes. The current number of basic votes represents close to a tripling of the number prior to the effectiveness of the 2008 reform.

It worthwhile to note at this juncture that in the Bretton Woods system of governance member states representation on the Executive Board is not equal, only few large shareholders in both the IMF and the World Bank have their own seats and these shareholders are United States of America, Japan, Germany, France, the United Kingdom, China, Russia and Saudi Arabia.⁶⁶ It is common cause that there is no African country seating in the Board as of right. The 25

⁶³ Steinki B & Bergthaler W 'Recent Reforms of the Finances of the International Monetary Fund: An Overview' E-book 2. Available at

<http://ebooks.narotama.ac.id/files/European%20Yearbook%20of%20International%20Economic%20Law%202012/3.4%20%20Recent%20Reforms%20of%20the%20Finances%20of%20the%20International%20Monetary%20Fund;%20An%20Overview.pdf> (accessed 18 January 2013).

⁶⁴ Woods N 'Bretton Woods Institutions' in Weiss T.G & Daws S (Eds) '*Oxford Handbook on the the United Nations*' 2006 1.

⁶⁵ Available at <http://www.bankpedia.org/index.php/en/106-english/i/23259-international-monetary-fund-imf> (accessed 18 January 2013).

⁶⁶ See generally Ladd P 'Options for democratising the World Bank and the IMF', Christian Aid commissioned by Southern African Regional Poverty Network (SARPN)' available at http://sarpn.org/documents/d0000527/Ladd_WB_IMF.pdf (accessed 11 January 2013).

Executive Directors sit on the Executive Boards of the World Bank and 24 Executive Directors of the IMF make the day-to-day decisions, each Executive Director represents either a single country or a group of countries.⁶⁷ In the World Bank, the five largest shareholders appoint their own Executive Director, while the other countries are grouped into constituencies that are represented by one Executive Director (for example, two sub-Saharan African Executive Directors, one representing 19 countries and the other representing Angola, South Africa and Nigeria).⁶⁸

2.2.2.3. Special majority and the United States of America's veto power

In series of meetings in 1966-67 during the negotiations on the main features of the future Special Drawing Rights (SDR's) a new requirement for a special majority being 85% of the total votes of the Board of Governors on certain issues was introduced. It gives certain members or group of members a veto power over decisions which require this special majority of weighted votes.⁶⁹

The effect of this special majority requirement has led to a situation that only one member state has an individual veto power over major decisions. The United States of America as the only member with more than 15% of the weighted votes in the IMF, which currently stands at 16.75% of the votes has a veto power of special majority decision as all other members.⁷⁰

⁶⁷ Available at <http://www.investinganswers.com/financial-dictionary/economics/international-monetary-fund-imf-984> (accessed 18 January 2013).

⁶⁸ Kaluza K & Kaluza M 'Governance and Accountability of the World Bank', The University of Iowa Center for International Finance and Development 3. Available at http://blogs.law.uiowa.edu/ebook/sites/default/files/Governance_&_Accountability-World_Bank.pdf (accessed 16 January 2013).

⁶⁹ Mountford A 'The Historical Development of IMF Governance', IEO Background Paper, Independent Evaluation Office of the International Monetary Fund, May 2008 9.

⁷⁰ Available at <http://www.imf.org/external/np/sec/memdir/members.aspx> (accessed 18 January 2013).

In an instance when the 85 per cent majority vote is required to pass any decisions requiring a super-majority, this gives the US veto power in all but one of the institutions of the World Bank Group - at the IDA the US representative has around 13 per cent of votes. In this case the US and any one of 23 of the 24 remaining representatives may combine to block any critical decisions.⁷¹

The inequality of the member states is glaring and beyond doubt is that one member out of currently 188 member international institutions can by its sole and discretionary action block the decisions of the organisation and yet other countries do not have similar power. No decision requiring special majority can pass without the approval and support of the United States of America including the reforms to democratise the World Bank and the IMF. This basically means that these institutions are unlikely to be significantly be reformed without the agreement of the United States of America.



2.3 BIRDS-EYE VIEW OF THE REFORMS: STEPPING TOWARDS DEMOCRATISATION OF THE BRETTON WOODS SYSTEM?

Following the reform in decision-making in its Bretton Woods sister organisation, the IMF has been engaged in internal discussion for reforming its own governance structure. The quotas are regularly reviewed every five years and adjusted to suit changes in economic positions of power when necessary.⁷²

The IMF is engaged in a new round of negotiations over governance reform, but acrimony persists and already-agreed changes remain unimplemented. It was initially thought that the review of the current voting quotas as sanctioned by the highest decision making body of

⁷¹ Available at <http://www.brettonwoodsproject.org/item.shtml?x=537848> (accessed 9 January 2013).

⁷²Gnath K, Mildner S & Schmucker C 'G20, IMF, and WTO in Turbulent Times: Legitimacy and Effectiveness Put to the Test' 18. Available at

http://www.swpberlin.org/fileadmin/contents/products/research_papers/2012_RP10_Gnath_mdn_Schmucker.pdf

(9th January 2013).

the IMF, the Board of Governors to be completed by January 2013 yet decision seems to be far from sight.⁷³

The envisaged reform in the governance structure of the IMF among other sanctioned the re-alignment of balance of power though not in a radical manner in tilting the scale from traditionally powerful shareholders. The IMF secretariat sums up the effects of the reform as captured in the 14th General Review of Quotas will as follows:

- double quotas from approximately SDR 238.4 billion to approximately SDR 476.8 billion, (about US\$720 billion at current exchange rates).
- shift more than 6 percent of quota shares from over-represented to under-represented member countries.
- shift more than 6 percent of quota shares to dynamic emerging market and developing countries (EMDCs).
- Significantly realign quota shares. China will become the 3rd largest member country in the IMF, and there will be four EMDCs (Brazil, China, India, and Russia) among the 10 largest shareholders in the Fund, and
- preserve the quota and voting share of the poorest member countries. This group of countries is defined as those eligible for the low-income Poverty Reduction and Growth Trust (PRGT) and whose per capita income fell below US\$1,135 in 2008 (the threshold set by the International Development Association) or twice that amount for small countries.⁷⁴

The seemingly existence of a deadlock over implementation of the 2010 proposed reforms reflects divergent views of the shareholders, the emerging and developing nations are desirous of having far reaching reforms, while developed nations will naturally protect their long

⁷³ Available at <http://www.imf.org/external/np/exr/facts/quotas.htm> (accessed 18 January 2013).

⁷⁴ Available at <http://www.brettonwoodsproject.org/art-571567> (accessed 7 January 2013).

power in the governance of this intergovernmental organisation.⁷⁵ The main debates in the quota formula review are over the inclusion of factors that measure trade openness and volatility, as well as the balance between the market-exchange-rate valuation of GDP with the purchasing power parity (PPP) valuation of GDP. Developing countries prefer the PPP valuation.⁷⁶

The IMF board discussed the formula again at end of September 2012, but failed to come to an agreement. There has been a tendency for the negotiations to take place at G20 finance ministers' meetings, a body which has no representative structure and excludes most of the world's countries thus creating informal structures of decision-making within the IMF which exists without the reach of the IMF governance structures.⁷⁷

2.4 DECISION-MAKING IN MULTILATERAL TRADING SYSTEMS: FROM GATT TO WTO

The International Trade Organization (ITO) was planned while bitter fighting still raged around the world; it was intended to form the third leg of the post-war international economic arrangements, along with the International Monetary Fund (IMF) and the World Bank.⁷⁸ The General Agreement on Trade and Tariffs (GATT) was established in 30 October 1947 before the signing of a more elaborate and comprehensive international agreement which sought to establish the ITO known as the Havana Charter.⁷⁹ Largely because of political division within the United States that resulted from the compromises embedded in the institution and its Charter,

⁷⁵ Wroughton L 'IMF vote reform bogged down by delays, deadlock' *Reuters News Agency*, 8 October 2012. Available at <http://www.reuters.com/article/2012/10/08/us-imf-governance-idUSBRE8970B120121008> (accessed 18 January 2013).

⁷⁶ <http://www.brettonwoodsproject.org/art-571567> (accessed 7th January 2013).

⁷⁷ Gnath K, Mildner S & Schmucker C 'G20, IMF, and WTO in Turbulent Times: Legitimacy and Effectiveness Put to the Test', *German Institute for International and Security Affairs Research Paper* 9/2012.

⁷⁸ Miller J N 'Origins of the GATT - British Resistance to American Multilateralism' *Working Paper* No. 318 (2008) 1. Available at <http://www.levyinstitute.org/pubs/wp318.pdf> (accessed 31 December 2012).

⁷⁹ Shukla SP 'From GATT to WTO and Beyond' UNU World Institute for Development Economics Research (UNI/WIDER) *Working Paper* No. 1952.

the ITO was never established.⁸⁰ The free trade agenda was forced to balance on a thin branch - the provisional GATT.

Unlike some if not most international and/or intergovernmental institutions, the GATT did not assign decision making power to its constituent members in proportion to their raw bargaining power, quite specifically the United Nation Security Council in which only five members have veto power; or the IMF in which voting is historically tied to cash contributions a member made.⁸¹ In the GATT each contracting party was given one vote, and a nation or class of nations is given formally superior voting power. From 1959 to 1994 the GATT was governed by consensus decision-making rule, since 1959 when developing countries joined the GATT in large numbers the primary decision-making rule was decisions must be arrived at through consensus.⁸²

The decision-making process in the WTO remains largely unchanged from that of its GATT predecessor. The WTO decision-making process continues to be guided by four key principles: the consensus-rule, one member-one vote, member-driven character and the importance of informal processes.⁸³ Notwithstanding the fact that the constitutional documents of the GATT/WTO do provide for one member-one vote, voting itself virtually ceased to exist in 1959, ever since decisions have been arrived at through consensus.⁸⁴

⁸⁰ Hoekman B 'The WTO: Functions and Basic Principles' 1 available at <http://www.terry.uga.edu/~eornelas/Econ4040/WTO-basics.pdf> (accessed 18 January 2013).

⁸¹ Steinberg RH 'Consensus Decision-Making at the GATT and WTO: Linkage and Law in a Neorealist Model of Institutions' 1995 (72) *Berkeley Roundtable on the International Economy Working Papers*.

⁸² Narlikar A 'WTO Decision-Making and Developing Countries': *South Centre Trade Related Agenda, Development and Equity Working Paper* No. 11 5.

⁸³ Liang M 'Evolution of the WTO Decision-Making Process' 2005 (9) *Singapore Year Book of International Law* 125-132.

⁸⁴ Steinberg RH 'Consensus Decision-Making at the GATT and WTO: Linkage and Law in a Neorealist Model of Institutions' 1995 (72) *Berkeley Roundtable on the International Economy Working Papers*.

The Marrakesh Agreement Establishing the WTO hereinafter ‘the Marrakesh Agreement’ clothe consensus as primary decision making mode of the WTO with constitutional protection, and voting to be resorted to when consensus cannot be reached. Article IX thereof provides that:

WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States which are members of the WTO. Decisions of the Ministerial Conference shall be taken by majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.⁸⁵

The first footnote in Marrakesh Agreement explains the manner in which members of the WTO arrive at consensus; this is often referred to as ‘negative consensus’.⁸⁶ However the important feature of the WTO decision-making process, which distinguishes it from the Bretton Woods institutions as discussed above is the possession of veto-power inherent in all WTO members irrespective of economic size and/or might. Countries have equal voting power irrespective of their economic size; the public international law doctrine of sovereign equality of states finds strict application in WTO legal system.⁸⁷

The GATT system was characterised over and above the consensus and one member-one-vote manner of decision-making especially after the rapid expansion of membership by informal processes and procedures of discussion of issues to facilitate and/or nurture consensus. The

⁸⁵ Article IX of the Marrakesh Agreement Establishing the WTO.

⁸⁶ Footnote 1 reads “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.”

⁸⁷ WTO legal system is considered to be a *lex specialis* within the broader public international law. See generally Limy P ‘The Place of the WTO and its Law in the International Legal Order’ (2006) 17 Vol.17 No.5 *European Journal of International Law* 969-984.

Green Room is an informal institution in the decision making-process of the GATT which has been subsumed into the WTO processes and culture. The “green room” literally refers to the décor of the Director-Generals boardroom.⁸⁸ Within the language of decision-making in the WTO it the metaphor for meetings called on informal basis by the Director-General which do not fall within any established structures of the WTO; these meetings are called to discuss particular aspects of the negotiations. Attendance is at the discretion of the convenor of the Green Room, however, tradition has emerged that certain countries have permanent seats in the Green Room to the exclusion of the majority members of the WTO which are developing countries.⁸⁹

2.5 CONCLUSION

The WTO differs fundamentally from the World Bank and the IMF on governance system in a sense that it is member driven organisation which little authority has been delegated to the secretariat, nearly all WTO councils and committees including the General Council which handles the organisation’s day-to-day operations are plenary committees which effectively means that decision-making involves the representatives of all WTO members.⁹⁰

The Bretton Woods system of decision making which applies weighted voting method discriminates between sovereign member states of the IMF and the World and creates individual states which have more say than others in the governance of the these institutions. In contrast, the WTO system of negative consensus as a primary tool of decision making and the one member-one vote manner applies the international law principle of sovereign equality which emphasis on equality of states irrespective if geographical, economic or military might. The constitutional documents establishing the WTO do not create classes of different members, each country irrespective of when it joined the GATT/WTO or the size of its GDP has equal rights

⁸⁸ Jones K ‘Green room politics of the WTO and the WTO’s crisis of representation’ (2009) 9(4) *Progress in Development Studies* pp.349-357, p.350.

⁸⁹ Jones K ‘Green room politics of the WTO and the WTO’s crisis of representation’ (2009) 9(4) *Progress in Development Studies* 350.

⁹⁰ Available at http://www.wto.org/english/thewto_e/gcounc_e/gcounc_e.htm (accessed 2 March 2013).

and contributes in terms of weight of the votes on formal decision making structures of the multilateral trading system.

It is quite critical to note that in all the trinity organisations that make international economic order, informal structures in decision making processes play a major role. The only distinction between the Bretton Woods Institutions and the WTO in so far as informal decision making structures are concerned is that in the WTO the informality of the said structures has been formalised by the involvement of the Director-General who convenes the informal meetings which have since adopted the décor of his official boardroom being the Greenroom. On the other hand in the WTO and the IMF informal clubs of economically powerful nations such as the G7, G20 and BRICS hold informal caucuses to discuss and agree on the agenda businesses of these organisation, however, only amongst themselves without the blessing and involvement of the secretariats of the IMF and WTO



CHAPTER III

THE GREENROOM AND SOVEREIGN EQUALITY OF MEMBERS: FAIRNESS AND TRANSPARENCY OF THE WTO DECISION-MAKING PROCESS

3.1. INTRODUCTION

3.1.1. Jurisprudential definition of the doctrine of Sovereign Equality

The concept of an international community made up of sovereign States is the basis of the intellectual framework for international law.⁹¹ One of pre-eminent scholars of jurisprudence in the previous millennium Hans writing during the interesting epoch of the development of international relations *viz* the 1940's notes that the term "sovereign equality probably means sovereignty *and* equality, two generally recognized characteristics of the States as subject to international law; for to speak of 'sovereign equality' is justified only insofar as both qualities are considered to be connected to each other."⁹² That is to say, from a purely juridical perspective, sovereignty refers to a valid legal order that allocates authority and jurisdictional competence.⁹³

The second characteristic of the phrase 'sovereign equality' as denoted by Kelsen has been understood by Cohen to mean that no single sovereign state should be able to prevail over all others and impose its will as law.⁹⁴ In essence, the doctrine of sovereign equality is succinctly

⁹¹ Schreuer C 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?' (1993) 4 *European Journal of International Law* 447.

⁹² Kelsen H 'The Principle of Sovereign Equality of States as a Basis for International Organization', (1943-1944) Vol. 53 No 2 *Yale Law Journal* 207.

⁹³ Cohen J.L 'Whose Sovereignty? Empire versus International Law' (2004) 15 No.3 *Ethics & International Affairs* 14.

⁹⁴ Cohen J.L 'Whose Sovereignty? Empire versus International Law' (2004) 15 No.3 *Ethics & International Affairs* 14.

captured by Lee, wherein he states that ‘sovereign equality is the concept that every sovereign state possesses the same legal rights as any other sovereign state at international law’.⁹⁵

True to his nature of discussing legal philosophy in a rather complicated jurisprudential language, Professor Kelsen sums up the concept of equality in international law by stating that the principle of equality so formulated is but a tautological expression of the principle of legality. That is, the principle that the general rules of law ought to be applied in all cases in which, according to their contents, they ought to be applied.⁹⁶

3.1.2. The concept of equality of all nations in the WTO

The WTO, like many other international or intergovernmental organisations is formed by States through cession of their sovereignty, transferring some of their functions and power to these treaty creatures.⁹⁷ The decisions of representatives of governments and of the European Communities members of the Trade Negotiating Committee to establish the WTO are captured in the Final Act embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.⁹⁸ The constitutional document establishing the WTO is the Marrakesh Agreement Establishing the World Trade Organization hereinafter the ‘Marrakesh Agreement’ or ‘WTO Agreement’.⁹⁹

The equality of all sovereign States which are Members of the WTO is apparent from the close reading of the Marrakesh Agreement. Article IV of the WTO Agreement delimitates the structure and powers of different organisational bodies of the WTO, at the apex is the Ministerial

⁹⁵ Lee T. H ‘International Law, International Relations Theory, and Pre-emptive War: The Vitality of Sovereign Equality Today’ (2004) Vol.64 *Duke Law Journal* 147.

⁹⁶ Kelsen H ‘The Principle of Sovereign Equality of States as a Basis for International Organization’ (1943-1944) Vol. 53 Number 2 *Yale Law Journal* 20.

⁹⁷ Schreuer C ‘The Waning of the Sovereign State: Towards a New Paradigm for International Law?’ (1993) 4 *European Journal of International Law* 452.

⁹⁸ Available at http://www.wto.org/english/docs_e/.../03-fa.pdf (accessed 4 March 2013).

⁹⁹ Available at http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm (accessed 4 March 2013).

Conference which is the repository of all powers and functions of the multilateral trading body.¹⁰⁰ The Ministerial Conference meets bi-annually. It is worthwhile to note for emphasis sake that this august governance structure of WTO is made up of all constituent states irrespective of geographical size, economic and/or military might.

In between the Ministerial Conferences, WTO law provides that the exercise of power shall be conferred upon the General Council which is composed once again by representatives of all Members.¹⁰¹ The decision-making structures of the WTO from the reading and interpretations of the document establishing it do not provide for discrimination of Members in their participation in the running of the organisation.

3.1.3. Deciding in and/or for the WTO: Equal peers and equal footing?

The most interesting and important characteristic of the WTO which is distinguishable from the other international economic organisations specifically the World Bank and the IMF is the equality of sovereign States in the formal decision making process. A conscious qualification by prefixing the decision making process with “formal” as distinguished from informal decision-making processes is quite critical for reasons that will be clear below.

The decision-making mechanism of the WTO is enunciated in Article IX of the Marrakesh Agreement. The rule in respects to decision making provides that:

WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote...¹⁰²

¹⁰⁰ Article VI (1) reads “There shall be a Ministerial Conference composed of all the Members, which shall carry out the functions WTO and take actions necessary to this effect.”

¹⁰¹ Article IV of the Marrakesh Agreement Establishing the World Trade Organization.

¹⁰² Article IX of Marrakesh Agreement Establishing the World Trade Organization.

Low simplified the genesis of this provision by noting that the starting point is adherence to the “practice” of consensus decision-making only resorting to voting on the basis of one Member one vote principle in case of disagreements.¹⁰³ Narlikar argues that the GATT which decision-making processes has been adopted without modification emphasised on process-related fairness rather than outcome related fairness.¹⁰⁴ The author’s argument is that the GATT/WTO formal system of arriving at decisions is formally fair yet wanting in substantive fairness thus in a way questions of legitimacy of the decisions made might arise. This view is shared by Sharma who points out that negotiating by consensus within a large member WTO is not an easy task, but how decisions are made and agreements are reached matters.¹⁰⁵

The one-Member-one-vote principle which is applied equally across board irrespective of the economic size of a Member has been part of the multilateral trading system for as long as it has been institutionalised in the manner and form as we know it. The GATT 1947 Article XXV on Joint Action by Contracting Parties at sub-article 3 provides that:

Each contracting party shall be entitled to have one vote at all meetings of the CONTRACTING PARTIES.¹⁰⁶

The principle of one-Member-one vote is akin to the democratic principle of universal suffrage¹⁰⁷ and is considered to be a foundational aspect of decision-making in the WTO.¹⁰⁸ Another distinguishing feature of the WTO decision-making system is the virtual

¹⁰³ Low P ‘WTO Decision-Making for the Future’ *Staff Working Paper ERSD-2011-05* 5.

¹⁰⁴ Narlikar A ‘Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO’ (2006) *The World Economy* 1014.

¹⁰⁵ Sharma S ‘WTO Decision Making: A Broken Process’ WTO Cancun Series Paper No. 4 (2003), Institute for Agriculture and Trade Policy .3.

¹⁰⁶ Article XXV (3) of GATT 1947.

¹⁰⁷ <http://www.thefreedictionary.com/universal+suffrage> accessed 21st March 2013.

¹⁰⁸ Ansong A ‘The WTO Decision-making process: Problems and Possible Solutions’ 6, Available at <http://ssrn.com/abstract=2180230> (accessed 6 March 2013).

duopoly given to the Ministerial Conference and the General Council which is embodied with decision-making powers and whose membership is open to all Members.¹⁰⁹

The principle of democratic and equal votes in the WTO system is found across various legal provisions in the multilateral trading agreements which makeup WTO law. Narlikar posits that such decision-making practices could have worked to the advantage of the developing countries who were the overwhelming majority in the expanded GATT/WTO. However, such numerical advantage was never exploited because the actual practice of decision-making is not based on majority voting but on consensus.¹¹⁰ On the composition of developing countries members in GATT/WTO, Patel notes that at the start of the Uruguay Round in 1986 only 63 developing countries were members of the GATT. At the launch of the Doha Round in 2001 which its conclusion is still eluding the WTO up to date, 106 of the then 144 WTO member states were developing countries.¹¹¹

In light of the above, it can be safely concluded that the formal rules in the GATT/WTO constitutional documents have never discriminated or distinguished between member states on the roles they are to play in the decision-making process. The principle of one-Member one-vote presents the most lucid of examples on how the doctrine of sovereign equality in international relations can manifest itself. The WTO regime on the face of it operates on the basis of equality of sovereign peers.

3.1.4. Consensus in multilateral trading context

The WTO decision-making culture and traditions are inheritance from its institutional predecessor, the GATT. Ehlermann and Ehring note that the WTO did not only continue the

¹⁰⁹ Ansong A 'The WTO Decision-making process: Problems and Possible Solutions' p.6, Available at <http://ssrn.com/abstract=2180230> (accessed 6 March 2013).

¹¹⁰ Narlikar A 'Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO' (2006) *The World Economy* 1014.

¹¹¹ Patel M 'New Faces in the Green Room: Developing Country Coalitions and Decision-Making in the WTO' Global Trade Governance Project, *GEG Working Paper 2007/3315*.

practice of decision-making by consensus as it had emerged under the GATT 1947, it even replaced votes with consensus where votes had existed in the GATT such as in relation to accession and waivers.¹¹² In agreement with this position Ansong states that the consensus principle has become pervasive in its application in WTO decision-making hence becoming the norm and not just one of the many decision-making procedures provided for under the WTO Agreement.¹¹³

The development of the tradition of decision-making by consensus emanated from practice under GATT 1947. Although the formal rules in Article XXV: 4 of the GATT 1947 called for the decisions of the *contracting parties* to be taken by majority votes, or in certain cases by two-thirds majority of votes. However, as early as 1959, in practice most decisions were taken based on consensus.¹¹⁴ The evolution of consensus as a primary mode of decision-making in the GATT and the philosophy underlying the same has been discussed by Footer as follows:

Contracting parties to the GATT derive their ability to meet and take decisions from their adhesion to a multilateral treaty....The GATT, like the IMF and World Bank, was a post-war creation; however, the CONTRACTING PARTIES to the GATT never embraced weighted voting for decision-making...Decision-making by consensus in GATT practice follows a discernible trend in other international *fora*, beginning in the mid-1960's. Interest in use of the consensus technique increased with the number of developing countries entering the international system in the wave of decolonization and their accumulation of large voting majorities in international organizations.... Majority voting appeared increasingly

¹¹² Ehlermann Cand Ehring L 'Decision-making in the World Trade Organization: Is the consensus practice of the World Trade Organization Adequate for making, revising and implementing rules in international trade?' (2005) 8 (1) *Journal of International Economic Law* 63.

¹¹³ Ansong A 'The WTO Decision-making process: Problems and Possible Solutions', p.6. Available at <http://ssrn.com/abstract=2180230> (accessed 16th March 2013).

¹¹⁴ Steger D.P, 'The Future of the WTO: The Case for Institutional Reform' (2009) 12 (4) *Journal of International Economic Law* 7.

useless for decision-making in international society because of the danger of alienating powerful majorities or producing important disaffected minorities.¹¹⁵

The unique history of the GATT distinguishes it from other international economic organisation, therefore creates the understanding of equality of members irrespective of the initial contributions in monetary terms to the establishment of the organisation. The adoption of consensus in the GATT system sought to balance the interests of the economic super-powers and the majority developing countries whose contribution to the functional multilateral trading system cannot be overemphasised.

3.1.4.1. Consensus not unanimity

WTO practices what is known as ‘negative consensus’. That is to say consensus is deemed to be reached on a matter if no objection is voiced at the meeting at which the decision is to be taken.¹¹⁶ The interpretation of the consensus principle is covered in the first footnote¹¹⁷ of the Marrakesh Agreement. Jaime¹¹⁸ quoting Lafer¹¹⁹ extensively asserted that the WTO consensus based decision-making system has been characterised as follows:

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

¹¹⁵ Footer ME ‘The Role of Consensus in GATT/WTO Decision-making’, (1996-1997) 653 *North Western Journal of International Law & Business* 662-663.

¹¹⁶ McMillan E ‘Doha Decision-Making: Implications of the Consensus and Single-Undertaking Principles for Developing Countries’, *Commonwealth Trade Hot Topics*, Issue No.71 .2. Available at <http://www.thecommonwealth.org/files/221610/FileName/THT71DohaDecision-Making.pdf> (accessed 16th March 2013).

¹¹⁷ The body concerned shall be deemed to have decided by consensus on a matter submitted before its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.

¹¹⁸ Jaime T ‘Consensus and majority voting in the WTO’, *World Trade Review* (2009) 8:3 422.

¹¹⁹ Lafer C ‘Outgoing Chairman Highlights WTO’s Unique Decision-Making Process’, *WTO Focus* (1998) 27 .3

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 in 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 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 member to be bound by an undesired decision. Consensus thus contributes to the legal security of all WTO members as well as binding force of its norms.

From the reading of the above quote which is the philosophical illumination of the first foot-note to Marrakesh Agreement Establishing the WTO, the genesis of consensus is not premised on the total agreement of the resolution(s) proposed, but the general acceptance of the decision to be made, expressed by the quietness of the members in attendance of certain body of the WTO meeting. The general acceptance of the resolution as distinguished from total agreement might be informed by the nature of binding effect of WTO agreements; the single undertaking rule. A Member might not be in total agreement with the resolutions but for a fact that "cherry picking" is not allowed in the WTO, because the deal being discussed offers something to a Member which is worthy than objecting to a minor issue which is of greater interest to other Members. The thinking which informs consensus operating in the minds of representatives of states that 'a deal is better than no deal at all', hence consensus which is not unanimity *per se*. In light of above line of thinking, Ansong opined that '...the failure to reach consensus on the Singapore Issues is an example of the problematic nature of consensus exacerbated by the single undertaking requirement.'¹²⁰

In *toto*, the preceding discussions from the philosophical basis of sovereign equality in Public International Law as adapted in the *lex specialis* being WTO law to the nature of formal decision-making processes in and/or within WTO has been brightly summed up by the current and out-going Director-General Pascal Lamy in his speech by stating that:

¹²⁰ Ansong A 'The WTO Decision-making process: Problems and Possible Solutions' 20. Available at <http://ssrn.com/abstract=2180230> (accessed 19th March 2013).

The sovereign equality of states requires formal equality between states of different sizes and power. This principle is fully respected at the WTO. While most international economic organizations have a restricted body alongside their plenary body, the WTO is unusual in that the totality of its Members participate, as a matter of law, in all of its bodies – from the Ministerial Conference, which meets at least once every two years, to the General Council, which functions during the interim period, not to mention each of the councils and committees. All of the decisions are taken according to the principle ‘one government/one vote’ and by consensus. While it is true that this rule of consensus is responsible for certain sluggishness in the negotiations, it does enable all states, whatever their share in international trade, to express their views and to participate on an equal footing.¹²¹

Briefly the formal equality of all state as evidenced by the rules of procedure governing decision-making and governance in the WTO confirms state compliance with the doctrine of sovereign-equality. However, whether indeed the WTO adheres to this principle in relation to substantive equality as opposed to black letter law is as contained in WTO treaties and/or agreements can only be assessed by probing the actual manner and practice of arriving at consensus.

3.2. THE GREEN-ROOM AS MECHANISM FOR CONSENSUS BUILDING

The notion of the ‘Green Room’ is derived from the Director-General of the GATT’s Conference Room because of its décor. It has since attained secondary meaning despite the change of the décor of the said conference room to refer to smaller meetings convened by the WTO’s Director General as consensus building initiative when consensus appear difficult or impossible to attain

¹²¹ Lamy P ‘The Place of the WTO and its Law in the International Legal Order’, *The European Journal of International Law* (2007) Vol. 17 No.5 973.

in a General Council set-up open to all Members. It is not necessary that the Green Room meetings be held in that particular conference room.

The informal meetings go against the member-driven nature of the organisation. It empowers the Secretariat, the Director-General or the chairmen of committees. This is because: they decide which members to invite to informal sessions; and they determine the frequency, conduct, extent of participation, and parameters for discussions.¹²² The period between the 1999 Seattle and the 2005 Hong Kong Ministerial Conferences saw an increased use of informal mechanisms through which the “key” countries (including those thought to represent key constituencies or coalitions – were brought into more select informal negotiating groups – e.g. “Green Room”-type meetings, mini-ministerials, etc.¹²³

Since its inception in 1995, many developing countries have felt little ownership in the WTO or its agreements, growing frustration and anger at the lack of effective participation in WTO decision making, particularly for African countries, was a major cause of the breakdown of talks at the 1999 WTO meeting of trade.¹²⁴

WTO members have zealously protected the consensus rule, and are clearly determined to defend their veto right and high levels of participation or voice. Apart from one decision on the accession of Ecuador and a few close calls where some countries pushed for a vote, in the first 10 years of the WTO, no voting has taken place, not even on waivers or the appointment of director-generals. All decisions were taken by consensus. Hence, notwithstanding the relatively light

¹²² South Centre, ‘Comparative Assessment Of Developing Country Participation In The Governance Of Global Economic Institutions’ Analytical Note C/GGDP/AN/GEG/3 (August 2006) 13. Available at <http://www.g24.org/TGM/scen0806.pdf> (accessed 15th May 2013).

¹²³ South Centre, ‘Comparative Assessment Of Developing Country Participation In The Governance Of Global Economic Institutions’ Analytical Note C/GGDP/AN/GEG/3 (August 2006) 13. Available at <http://www.g24.org/TGM/scen0806.pdf> (accessed 15th May 2013).

¹²⁴ Sreenivasan G and with Grinspun R ‘Governance and Decision Making at the WTO: Ensuring Effective Participation for Poverty Eradication’, *Canadian Council for International Co-operation Trade and Poverty Series* (December 2002) 7.

fallback voting rules on the books – $\frac{3}{4}$ for waivers and interpretations, simple majority for most other decisions – all WTO activity occurred with the (albeit sometimes tacit) agreement of all WTO members. Even though developing countries make up $\frac{3}{4}$ of the WTO membership, they as well vehemently defended the consensus rule.¹²⁵

Woods notes that even post 1995 after the establishment of the WTO which has retained its predecessors decision-making culture including the Green room consultations are usually convened at the initiative of the Director General and include the powerful Quad (United States, European Union, Japan and Canada) as well as countries deemed to have a vital interest in the issue under discussion and countries which have traditionally played a leading role in the GATT (such as Brazil and India representing developing countries, and Bangladesh representing the least developed countries).¹²⁶ This in effect means that the majority of the developing nations are excluded from these core yet informal decision-making processes.

Kaushik observes that the Green Room meeting developed earlier in the GATT years when main players decided that it was time to undertake further tariff reduction or make other trade rules, the GATT secretariat provided a forum being the Director General's conference room for these main players to undertake informal discussions.¹²⁷ The Green Room comprised of up to eight countries until the Tokyo Round, as broader and systematic rule-making issues entered the purview of the Uruguay Round, a full Green Room could have had as many as thirty (30) countries.¹²⁸ From an institutional point of view, the Green Room represented an adaptation by the Director General along with the United States of America and the European Community

¹²⁵ Pauwelyn J 'The Transformation of World Trade' 12. Available at http://www.law.berkeley.edu/files/spring05_Pauwelyn.pdf (accessed 15th May 2013).

¹²⁶ Woods N 'Accountability in Global Governance', (2002) Human Development Report Occasional Paper, United Nations Development Programme .22. Available at http://hdr.undp.org/en/reports/global/hdr2002/papers/Woods_2002.pdf (accessed 15th May 2013).

¹²⁷ Kaushik A 'The Emerging Role of LDCs in WTO Decision-Making Process', *Commonwealth Hot Trade Topics* (2009) Issue 66 3

¹²⁸ Kaushik A 'The Emerging Role of LDCs in WTO Decision-Making Process', *Commonwealth Hot Trade Topics* (2009) Issue 66 .3

(later European Union) to facilitate agreements among a growing membership on increasingly complicated negotiating agenda.¹²⁹

The Green Room was institutionalised as part of the informal culture and traditions of WTO decision-making process, being initiated by the Director General from the Tokyo Round which became entrenched in the Uruguay Round.¹³⁰ During the Uruguay Round, the GATT employed an informal system of meetings at critical stages of the negotiating process, in which small group of countries were invited to thrash out particularly difficult or sensitive issues with the objective of working out a compromise solutions into a smaller and intensive set-up.¹³¹

3.2.1. Composition of the Green Room

The composition of the Green Room is dependent on the issue(s) under discussion. Historically the innermost circle of the main players who constituted the core of the Green Room and often met even before an issue reached the Green Room is the “Quad” viz the USA, the European Union, Japan and Canada.¹³² These countries have always been in attendance of all Green Room meeting since time the adoption of this informal procedure during the Tokyo Round. During the Uruguay Round other developed countries in the Green Room included Australia, New Zealand, Norway and Switzerland.¹³³ While the developed countries have been adequately represented and their interests taken a good care of in the Green Room, there is a notable development which larger developing economies, particularly Brazil, India and South

¹²⁹ Jones K ‘Green room politics and the WTO’s crisis of representation’, *Progress in Development Studies* (2009) 9 352.

¹³⁰ Hoekman B ‘The WTO: Functions and Basic Principles’ in B. Hoekman, A. Mattoo and P. English, (Eds) *Development, Trade and the WTO*, (2002) 48

¹³¹ Liang M ‘Evolution of the WTO Decision-Making Process’, (2005) 9 *Singapore Yearbook of International Law and Contributors*, p.126.

¹³² http://www.wto.org/english/thewto_e/glossary_e/quad_e.htm (accessed 15th April 2013).

¹³³ See generally Singh J.P, ‘Wiggle Rooms: New Issues and North-South Negotiations during the Uruguay Round’, available at <http://www.ruig-gian.org/ressources/dupont-Singh.pdf> accessed 21st March 2013.

Africa endeavour to assert themselves for be afforded representation in these exclusive meetings.¹³⁴

Dube observes that the geo-political shift in the world has increased demands for an increased representation of developing countries beyond the ‘emerging economies’ and other selected smaller countries.¹³⁵ The growing stake of developing countries in the world economy has fortified their claim in its management and confidence in asserting that claim, which is a recognisable change as historically the poorest developing countries have been slow to assert themselves in the GATT and the WTO.¹³⁶ A core preoccupation of those keen to ensure greater fairness in the multilateral trading system is the representation of small, weak and poor countries in WTO negotiations and in ensuring their participation in the WTO system generate concrete benefits for them.¹³⁷

Developing countries have developed a dislike of the Green Room meetings and similar informal exclusive consultative meetings pointing out at the unfairness and the resultant inequalities arising in the decision-making process of the WTO due to the invitation-only meetings, the outcomes of which are in a way pushed through various coercive measures for acceptance by all members.¹³⁸

¹³⁴ Jones K ‘Green room politics and the WTO’s crisis of representation’, *Progress in Development Studies* (2009) 9 352.

¹³⁵ Dube M, ‘The Way Forward for the WTO: Reforming the Decision Making Process’, *SAIIA Occasional Paper* Number 118, July 2012 18.

¹³⁶ Sutherland P and Sewell J ‘Challenges facing the WTO and policies to address global governance’ in G.P Sampson (Ed) *The Role of the World Trade Organization in Global Governance* p86.

¹³⁷ Birkbeck CD and Harbour M ‘Developing Country Coalitions in the WTO: Strategies for Improving the Influence of the WTO’s Weakest and Poorest Members’, *GEG Working Paper 2011/63*. Available at <http://www.globaleconomicgovernance.org/wp-content/uploads/Deere-and-Harbour.Developing-Country-Coalitions-in-the-WTO.pdf> (accessed 20 March 2013).

¹³⁸ Liang M ‘Evolution of the WTO Decision-Making Process’, (2005) 9 *Singapore Yearbook of International Law and Contributors* 126.

The *modus operandi* of these informal meeting exclusionary, which are meant to build consensus on the sidelines of formal negotiations is that they are discriminatory in participants selection. Further, they do not give effect to the fundamental principles underlying the WTO of equality of all members and equal participation of sovereign states to legitimise and ensure fairness in the decision making process. The rationale for developing countries to have been up in arms against the system of the Green Room is noted as follows:

The first and most obvious problem with informal consultations is that they can lack transparency, and most developing countries have argued that such was indeed the case with both the GATT and the WTO. Informal meetings were often by invitation only, or through a process of self selection by a small clique within the WTO. The most infamous in this genre were the Green Room meetings, where the Secretariat often treated the list of the invitees as confidential in order to avoid a flood of requests for participation from the excluded. The only way of tracing the proceedings of such meetings was through occasional briefings from the invited developing countries. As it was in the Green Room that consensus was negotiated, which was then presented as a *fait accompli* in the formal meetings, exclusion proved especially costly.¹³⁹

Laing critically observes that attendance is not on the basis of peer equality of members but that the criteria have never been transparent with 'typical attendants' that is the 'QUAD'.¹⁴⁰ These countries which attend the Green Room out of some sort of *de facto* right of attendance are developing, major trading economies, which suggests that due to the sheer size of their economies they have assumed superiority and 'enhanced equality' over their sovereign counterparts from developing countries.

¹³⁹ Narlikar A 'WTO Decision-Making and Developing Countries', *Trade-Related Agenda, Development and Equity (T.R.A.D.E.) Working Paper* No. 11 (2011), South Centre 43.

¹⁴⁰In WTO parlance "Quad" refers to Canada, EU, Japan and the United States. See http://www.wto.org/english/thewto_e/glossary_e/quad_e.htm (accessed 21st March 2013).

The practice of Green Room meetings has overshadowed the earlier observation that unlike other International Financial Institutions (IFI's) the WTO's decision-making process does not discriminate amongst countries on the basis of the size of their economies, military might or even geographical size. In light of the foregoing it is necessary to make a suggestion at this juncture that the Green Room somewhat has divided participation of members in the WTO between developing and developed countries to the detriment of the majority. Few powerful economies control the decision-making process informally which results are later on brought to the majority who had been sidelined by the process for ratification under the guise of consensus.

3.2.2. Legitimacy and fairness of WTO decision-making process

The WTO Members have been criticized for adopting, during the Uruguay Round, treaty provisions that failed to realize a measure of fairness vis - à - vis developing countries.¹⁴¹ It has been observed by critics more often than not that the WTO is 'pathologically secretive, conspiratorial and unaccountable to sovereign states and their electorate.'¹⁴² The prevailing opinion that the WTO is not a transparent institution was illustrated in the Seattle riots and subsequent failed WTO meeting in 1996.¹⁴³

The legitimacy of the manner in which the WTO arrives at its decisions as an institution has been put to the test by the ensuing intra-organisational challenges to balance the interests of the developing and developed countries amid a growing number of members of the WTO which

¹⁴¹ Panizzon M 'Fairness, Promptness and Effectiveness: Creating a Good Faith Standard for WTO Dispute Settlement Procedures', *NCCR Trade Working Paper 2007/19* 1. Available at http://phase1.nccr-trade.org/images/stories/publications/IP8/procedural%20justice_nccrworkingpaper_2007_19.pdf (accessed 21st March 2013).

¹⁴² Panizzon M 'Fairness, Promptness and Effectiveness: Creating a Good Faith Standard for WTO Dispute Settlement Procedures', *NCCR Trade Working Paper 2007/19* 1. Available at http://phase1.nccr-trade.org/images/stories/publications/IP8/procedural%20justice_nccrworkingpaper_2007_19.pdf (accessed 21st March 2013).

¹⁴³ Mori W 'The Role of Civil Society in the WTO - Transparency, Participation and Efficiency' *Murdoch University E Law Journal*, VOL. 14, No. 2 (2007) 261. Available at http://elaw.murdoch.edu.au/archives/issues/2007/2/Elaw_role_civil_society_WTO.pdf (accessed 21st March 2013).

makes it very difficult if not impossible to arrive at a consensus. An institution can claim legitimacy to the extent that governments and the public accept it, together with its rules, decision-making processes and activities.¹⁴⁴ Legitimacy of the WTO has been subject of study of various author and scholars on International Trade Law, International Relations and International Economists among others, Eaglton-Pierce and Nicolaid is made an interesting observation in their in-depth study of the institutional culture of the WTO, and in a rather long quotation they state as follows:

In the WTO context, discussion of input-legitimacy refers to the procedural conditions and scope for democratic voice within the organisation...First, it is useful to recall perhaps the ‘major and unsustainable discrepancy’ in the business of rule-making and decision-making at the WTO: the coupling of an automatic and binding system of laws under powerful surveillance with the informal, *ad hoc* practice of bargaining and negotiation. The importance of informal political practices in establishing agendas and codes of conduct within the WTO is impossible to overstate, a legacy drawn from the ‘club’ atmosphere of the General Agreement on Tariffs and Trade (GATT). But when informality becomes the institutional *modus operandi*, weaker actors are always vulnerable to power-based manipulation where there is a lack of transparency. Second, the need to perform well in negotiating arenas is, of course, closely tied to the technical resources and competences of each Member State. In terms of legitimacy, specific concerns lie in several aspects of the negotiating processes, including: the use of Green Room forums for select Members, the core protocols on the negotiation of rules, the politicising of types of formula, issue linkages, and the role of the Secretariat. An additional important – yet overlooked – dimension of negotiation involves timing and pace: pressures applied to finalise a Round or reach consensus at a Ministerial

¹⁴⁴ Gnath K, Mildner S, and Schmucker C ‘G20, IMF, and WTO in Turbulent Times: Legitimacy and Effectiveness Put to the Test’, *German Institute for International and Security Affairs Research Paper 9/2012 7*.

Conference can often bear heaviest on those endowed with the fewest resources to fully realise the consequences of policy implementation.¹⁴⁵

The tradition and/or practice of exclusion in the informal consultations and decision-making structures of the WTO has mostly been blamed for the unfairness it results in, leading to the reluctance of the developing countries to accept the decision so reached in their absence which are often looked with suspicion in that they are to the sloping benefit to the developed countries. That result in doubted legitimacy of the decisions and/or resolutions reached, interestingly it has been observed that while the Green Room process has come to symbolise a process under which a handful of developed countries disproportionately influenced the outcome of multilateral rounds of trade negotiations. It should also be acknowledged that the Uruguay Round outcome (to which Green Room process is often linked), was produced by the atypical historic circumstances framing the ultimate trade round of the GATT era.¹⁴⁶ The developing countries were not actively participating in the Uruguay Round negotiations notwithstanding their numerical majority leaving the conclusion of agreements on few developed countries.

Notwithstanding the inherent unfairness of the Green Room meetings in respect to the excluded participation of majority of developing countries, it seems to have been a necessarily evil in some instances, including historical events that led to the very formation of the WTO. However, the degree of separation between the Green Room process and the inability of smaller WTO Members to have their concerns and perspectives reflected in its results, calls into question of the legitimacy of WTO rules which in theory, supersede domestic law making processes.¹⁴⁷

¹⁴⁵Eagleton-Pierce M and Nicolaidis K, 'A Project on Global Trade Ethics, WTO reform and Domestic Politics', p.6. Available at <http://www.princeton.edu/~pcglobal/conferences/wtoreform/oxford%20paper.pdf> (accessed 21st March 2013).

¹⁴⁶ Tsai C 'Regional and Issue Specific Coalitions in the WTO: The contribution of ASEAN to legitimizing decision-making', *United Nations University Comparative Regional Integration Studies Working Papers W-2007/10* 10. Available at <http://www.cris.unu.edu/fileadmin/workingpapers/20071207142108.W-2007-10.pdf> (accessed 21st March 2013).

¹⁴⁷ Tsai C 'Regional and Issue Specific Coalitions in the WTO: The contribution of ASEAN to legitimizing decision-making', *United Nations University Comparative Regional Integration Studies Working Papers W-*

It is imperative to note that the historical context in which the Green Room meetings developed has changed, the era which developing countries were not much motivated to take active participation in GATT negotiations. The developing countries are demanding their stake in WTO rule-making. As an organisation which prides itself for being member driven and equal participation of all sovereign nations there should not be difficulty in painting the room greener to allow the participants reflects the composition of membership of the WTO. The organisation being dominated by developing and transition economies should reflect the realities of memberships which will lend legitimacy to the WTO decision-making process.

The internal power dynamics within the WTO however have changed over the years. Developing and transition economies have grown confident and since demanded equal participation in decision-making process. There are two water-shed events in international relations particularly in multilateral trade negotiations which have highlighted the sharp divided between developed and developing countries. The fact that developing countries will no longer accept decision made for and/or on their behalf in their absence either in the Green Room or the dark room somewhere by the powerful nations and some select few developing nations without the involvement of the majority. These historical events are the dramatic collapsing of the Seattle Ministerial and the Cancun Ministerial.

3.3. CONCLUSION

The exclusion of majority of developing countries from the informal consensus building discussions in the WTO where in actual fact agreements are reached by the minority on behalf of the majority has led to doubts over procedural legitimacy of the WTO decisions. The famous or infamous practice of Greenroom meetings has led to a sharp divide between the traditional power brokers within the WTO and the emerging and developing countries which are developing the

2007/10, p.10. Available at <http://www.cris.unu.edu/fileadmin/workingpapers/20071207142108.W-2007-10.pdf> accessed 21st March 2013.

institutional confidence to challenge and even reject decisions taken in their absence by a club of few countries.

The entrenchment of greenroom meeting which in a way silence the voices and views of the majority members of the WTO perpetuate the view that the organisation such as its predecessor is a club of the rich. The democratic deficiency resulting from exclusion of the majority in the multilateral trading system decision-making process creates institutional inertia, stalling progress in negotiations and conclusions of trade agreements. There exists grave inequality in the practice of the WTO decision-making notwithstanding the hallowed principles of equality of members which the WTO prides itself with, at least on a formal level. In actual fact the developing countries despite being in the majority are sidelined due to the exclusionary greenroom meeting.

It is impossible to suggest that there is fairness and transparency in the WTO decision-making when far-reaching and binding decisions are made when the overarching majority are left in the dark about how those decisions are arrived at. The current culture of informal consensus building is inherently unfair and seems only to further the interests of to the exclusion of the economically weak and numerically strong.

The boldness of the developing countries in rejecting the greenroom came to the fore in Seattle which shall remain in the hallmarks of the history of WTO and also during the Cancun ministerial which can be said to be the turning point in the decision-making process of the WTO.

CHAPTER IV

COLLAPSE OF NEGOTIATIONS IN SEATTLE AND CANCUN: REVOLUTION AGAINST THE GREEN ROOM?

4.1. INTRODUCTION

4.1.1. Human face to the WTO: The Seattle Collapse

The third WTO Ministerial Conference was held from November 30 to December 3 1999 in Seattle, the United States of America. It was intended to launch the New Round of negotiations after the Uruguay Round. The four-day meeting did not reach any conclusion and the conference was suspended without any Ministerial Declarations issued.¹⁴⁸ The dominant image of the WTO's Seattle meeting was rioters in the streets and disarray in the conference hall.¹⁴⁹

The unusual interest in the operations of the WTO by civic society was manifested by the protests that rocked Seattle, Washington in late 1999. This was an incredibly significant moment in the history of popular protests.¹⁵⁰ Not only did the protestors succeed in disrupting the meetings of the world's most influential trade-governing bodies, but the event drew together incredibly diverse constituencies that represented a wide range of interests, many of which would seem to be incompatible at first sight.¹⁵¹ The scenery of the dramatic and historical external resistance to the WTO has been succinctly and vividly captured by Smith in his eloquent narration as follows:

On the evening of November 29 1999 Seattle business and political leaders hosted an elaborate welcoming party for delegates attending the World Trade

¹⁴⁸ <http://www.meti.go.jp/english/report/downloadfiles/gCT0017e.pdf> (accessed 5 April 2013).

¹⁴⁹ Wolfe R 'Crossing the river by feeling the stones: where the WTO is going after Seattle, Doha and Cancun' (2004) 11:3 *Review of International Political Economy* 574

¹⁵⁰ Vidal J 'The Real Battle for Seattle', *The Observer*, 5 December 1999. Available <http://www.guardian.co.uk/world/1999/dec/05/wto.globalisation> (accessed 6 April 2013).

¹⁵¹ The WTO History Project, University of Washington, Seattle. Available at <http://depts.washington.edu/wtohist/> (accessed 8 April 2013).

Organization's Third Ministerial Conference. At the same time, thousands of activists rallied at a downtown church in preparation for the first large, public confrontation in what became the "Battle of Seattle." Protesters emerging from the overflowing church joined many thousands more who waited, while variously dancing, chanting, and conversing, in a cold Seattle downpour to join the march. Marchers donning union jackets or rain ponchos that proclaimed their opposition to the World Trade Organization and celebrated the "Protest of the Century" filled several city blocks as they proceeded to the city's football stadium, the site of the WTO welcome party and the target of that evening's protest. An estimated 14,000-30,000 marchers formed a "human chain" three or four people across that was to encircle the stadium and dramatize the crippling effects of the debt crisis on the economies of the global South. The protest deterred more than two thirds of the expected 5,000 guests from attending the lavish welcoming event. Although the human chain's symbolism of the "chains of debt" might have been lost on many delegates, the efforts of protesters supporting the international campaign to end third world debt ("Jubilee 2000") helped to highlight for some protesters and onlookers the enormous inequities of the global trading system as they kicked off a week of street protests and rallies against the global trade regime.¹⁵²

Protesters came from all over the world, not just the developed countries. They ranged from human rights groups, students, environmental groups, religious leaders, labour rights activists etc wanting fairer trade with less exploitation and even right-wing protectionist groups were there also arguing against the current corporate-led free trade.¹⁵³ Shafaeddin in his conference paper¹⁵⁴ quoted the eminent Yale University scholar in referring to failure of international trade negotiations in Seattle who stated that: "what Seattle showed was that there is

¹⁵²Smith J 'Globalizing Resistance: The Battle of Seattle and the Future of Social Movement'. Available at http://depts.washington.edu/pcls/documents/research/Smith_GlobalizingResistance.pdf (accessed on 8 April 2013).

¹⁵³ Shah A 'WTO Seattle Protest, 1999', *Global Issues*. Available at <http://www.globalissues.org/article/46/wtoprotests-in-seattle-1999> (accessed 8 April 2013).

¹⁵⁴ Shafaeddin M 'The Political Economy of WTO with Special Reference to NAMA Negotiations', Paper prepared for presentation: The Conference on Political Economy of International Organization, Geneva, January, 29-31 2009
7 Available at http://mpira.ub.uni-muenchen.de/10894/1/draft_finalPDF.pdf (accessed 4 April 2013).

a lot more angst beneath the surface”.¹⁵⁵ Professor Emeritus Summers in his seminal work opines that the ‘Battle of Seattle’ was a battle on two fronts, on one front it was a battle between the worshippers of efficiency and the missionaries of human and social rights; and on the other front, it was a battle between those who pursued the claimed economic gains of comparative advantage and those who rejected, at least in part, its economic consequences.¹⁵⁶

The motive behind the infamous Seattle protest by a global alliance of Non-Governmental Organisations (NGO’s) was to block and defeat the secretive and highly controversial Multilateral Agreement on Investments (MAI).¹⁵⁷ The motivating factor behind opposing the MAI has been captured as follows:

Global civil society mobilized and defeated the secret and highly controversial Multilateral Agreement on Investments (MAI). The MAI was to be a WTO, Phase 2, or a more powerful WTO. The powers-that-be behind MAI, the leaders of the 30 richest countries of the world making up the Organization for Economic Cooperation and Development (OECD), had made a bad miscalculation. They thought that they could easily approve the MAI, an agreement aimed at bestowing almost absolute rights to TNCs and other investors over and above the rights of citizens and countries. The MAI would allow transnational corporations unparalleled access to the resources of a country with minimal obligations or responsibilities to that country. The MAI wanted to transfer enormous power to transnational corporations (TNCs). If the MAI were passed, then that would have seriously eroded the sovereignty of nations and citizens.¹⁵⁸

¹⁵⁵ Garten J, International Herald Tribune, 9 December 1999.

¹⁵⁶ Summers C ‘The Battle in Seattle: Free trade, Labor Rights, and Societal Value’, *University of Pennsylvania Journal of International Economic Law* (2001) Vol. 22 Issue 1 83.

¹⁵⁷ Perlis N ‘The Collapse of the WTO Agenda in Seattle’, *Civil Society- The Third Global Power 1*. Available at http://www.info3.de/ycms_alt/artikel_141.shtml (accessed 9th April 2013).

¹⁵⁸ Perlis N ‘The Collapse of the WTO Agenda in Seattle’, *Civil Society- The Third Global Power*, p.1. Available at http://www.info3.de/ycms_alt/artikel_141.shtml (accessed 9th April 2013).

After the failure to insert investment in the GATT regime in the aftermath of the Second World War, a second - and ultimately unsuccessful - attempt to develop a multilateral agreement on investment took place in the Uruguay Round which attempt developing states continued to strongly resist an investment treaty in the newly created WTO (1995).¹⁵⁹ Nevertheless, the US and, in the course of the Uruguay Round, the EU as well as the other industrialised states become convinced of the idea. Investment was back on the international agenda.¹⁶⁰ Many NGOs called their “plot” to kill the MAI the Dracula strategy”: stopping the negotiations by simply bringing public attention to a treaty proposal that cannot stand up against the light. Not having direct bargaining leverage at their disposal, the NGOs tried to use the power of arguments and symbols to reach their goals.¹⁶¹ A more comprehensive discussion on the resistance by developing countries and civic society towards adoption of the MAI which sparked public protest in Seattle notes that:

While the need for foreign direct investment (FDI) is generally recognised -- even among the sceptics -- the push for an international agreement has been rather lukewarm in some countries. This lack of enthusiasm or sometimes even an outright hostility could be a serious problem for the international trading system and for capital markets. *First*, the question of MAI divides the WTO member countries into those who support the idea of an agreement and those who are against it. In other words, this is a divisive issue which could also hamper progress in other areas of WTO jurisdiction. *Second*, the division has gone along the lines of important country groupings -- developed versus some less developed

¹⁵⁹ Tieleman K ‘The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Public Policy Network’, *Case Study for the UN Vision Project on Global Public Policy Networks* 4. Available at http://www.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf (accessed 9 April 2013).

¹⁶⁰ Tieleman K ‘The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Public Policy Network’, *Case Study for the UN Vision Project on Global Public Policy Networks* 4. Available at http://www.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf (accessed 9 April 2013).

¹⁶¹ Tieleman K ‘The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Public Policy Network’, *Case Study for the UN Vision Project on Global Public Policy Networks* 14. Available at http://www.gppi.net/fileadmin/gppi/Tieleman_MAI_GPP_Network.pdf (accessed 9 April 2013).

countries (LDCs). This, too, is a serious business because of the interest of developed countries in having LDCs integrated into the multilateral trading system. *Third*, FDI has been growing dramatically over the last decade or so, resulting in a rapid pace of globalisation and a significant contribution of foreign capital to investment in many countries of the world. Unfortunately, the growth of FDI has been uneven, with some LDCs benefiting more than others, leading many people in academia and policy circles to fear that the latter countries, or at least some of them, will be ‘marginalised’.¹⁶²

The exclusionist MAI in that it was largely negotiated by industrialised OECD countries without participation of developing nations and inclusion of NGO’s as asserted above had direct and indirect repercussions on the excluded constituency. In the opinion of the NGO’s, the human population of the majority members of the WTO who had no input in negotiating the agreement were to suffer most. As a result, the battle in Seattle was to infuse fairness in the business of the WTO by seeking to protect the human interests over business interest of large multinational corporations of developing countries. The former Director-General of the WTO, Renato Ruggiero who had just vacated office in 1999 notes that the presence in Seattle of thousands of people from all over the world signalled a new reality, still very much incomplete and unbalanced, that is taking shape.¹⁶³

4.1.2. Diplomatic Politics: The *Internal Narrative* of the Seattle collapse

Wolfe states that the Ministerial meetings are an obvious thread running through the history of the multi-lateral trading system, beginning with the Havana Conference that drafted the Charter for an International Trade Organisation that never saw light of the day.¹⁶⁴ The internal narrative about the failure of Seattle Ministerial is premised mostly around the problems in the conduct of the meeting itself. Raghavan argues that the Seattle Ministerial ended in failure when a number

¹⁶² Ruggiero R ‘Reflections After Seattle’, *Fordham International Law Journal* (2000) 24(1) .9.

¹⁶³ Ruggiero R ‘Reflections After Seattle’, *Fordham International Law Journal* (2000) 24(1) 9.

¹⁶⁴ Wolfe R ‘Crossing the river by feeling the stones: where the WTO is going after Seattle, Doha and Cancun’, *Review of International Political Economy* (2004) 11:3 575.

of small economies refused to be manipulated, marginalised and left out of the decision-making processes and acquiesces in decisions cooked up in ‘secretive’ so-called ‘green room’ processes.¹⁶⁵

The Battle in Seattle not only took place in the streets, quite importantly within the Convention Centre where the ministerial conference was being held at, there were various forms of resistance against the major powers dominating the WTO by some of the developing country government representatives within the formal ‘negotiating’ processes.¹⁶⁶

In many respects, the Seattle meeting was politically premature, as a broad consensus had not emanated from the preparatory process in Geneva.¹⁶⁷ The failure to reach consensus at preparatory stage was evidenced by the fact that when WTO ministers arrived in late November 1999, the draft declaration officially on the table was some 32 pages long and contained nearly 400 bracketed items indicating disagreement among members.¹⁶⁸ Ambassador Amorin, the Brazilian Permanent Representative to the United Nations and other International Organisations in Geneva in this regard came out rather strongly in a post-ministerial pessimistic view with the benefit of hindsight by stating that if one looks at the background and preparation process of the Conference, the prospects for its success were never bright.¹⁶⁹

One of the most contentious and very divisive issues pre-Seattle which had been poised to be the ultimate cause of the collapse of the talks, was the insistent inclusion of core labour

¹⁶⁵Raghavan C ‘Seattle WTO Ministerial ends in failure’, *Third World Network* 1. Available at <http://www.twinside.org.sg/title/deb2-cn.htm> (accessed 9 April 2013).

¹⁶⁶ Keet D ‘The WTO-led system of global governance: Tactical options and strategic debates amongst civil society organisations worldwide’, *Institute of Global Dialogue Occasional Paper No.32* (2002) 4.

¹⁶⁷ Bernal RL ‘Sleepless in Seattle: The WTO Ministerial of November 1999’, *Social and Economic Studies* 48:3 (1999) 62.

¹⁶⁸ Westin S ‘Seattle Ministerial: Outcome and Lessons Learned’, Testimony on Finance, U.S. Senate, United States General Accounting Office *GAO/T-NSIAD-00-86* 8.

¹⁶⁹ Amorin CLN ‘The WTO from the Perspective of a Developing Country’, *Fordham International Law Journal* Vol.24:1 (2000) 99.

standards in WTO talks by developed countries.¹⁷⁰ Some WTO member governments in Europe and North America believe that the issue must be taken up by the WTO in some form if public confidence in the WTO and the global trading system is to be strengthened through the formation of a working group to study the issue of trade and core labour standards.¹⁷¹ Developing-country officials have said that efforts to bring labour standards into the WTO represent a smokescreen for undermining the comparative advantage of lower-wage developing countries and argue that better working conditions and improved labour rights arise through economic growth.¹⁷² They say that if the issue of core labour standards became enforceable under WTO rules, any sanctions imposed against countries with lower labour standards would merely perpetuate poverty and delay improvements in workplace standards.¹⁷³

The recurring issue of legitimacy and fairness of the WTO decision-making process was one of the important causes of the ultimate breakdown of talks in Seattle. The Agreements defined by Quad states were then forced upon Southern members who were most vulnerable to the pressures of these powerful economic actors.¹⁷⁴

Developed and developing countries were diametrically opposed on what should be discussed and negotiated on. The former were of the view that the agenda should be broadened to include what have been termed ‘divisive issues’ such as labour, environment and investment while the latter group of countries felt that negotiations should focus on developmental issues.¹⁷⁵ Wolfe in this respect posits that the failure of Seattle foundered on the concerns of developing

¹⁷⁰ Summers C ‘The Battle in Seattle: Free trade, Labor Rights, and Societal Value’, *University of Pennsylvania Journal of International Economic Law* (2001) Vol. 22 Issue 1 65.

¹⁷¹ http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm (accessed 9 April 2013).

¹⁷² See generally Fields GS ‘International Labor Standards and Decent Work: Perspectives From the Developing World’ in R. J. Flanagan & W. B. Gould IV (Eds), *International labor standards: Globalization, Trade and public policy* 61-80.

¹⁷³ http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm (accessed 9 April 2013).

¹⁷⁴ Smith J ‘Globalizing Resistance: The Battle of Seattle and the Future of Social Movement’ 3. Available at http://depts.washington.edu/pcls/documents/research/Smith_GlobalizingResistance.pdf (accessed on 8 April 2013).

¹⁷⁵ Bernal RL ‘Sleepless in Seattle: The WTO Ministerial of November 1999’, *Social and Economic Studies* 48:3 (1999) 69.

countries that new negotiations were not possible until results of the Uruguay Round had been implemented.¹⁷⁶

4.2. THE MEXICAN VERSION: COLLAPSE AT CANCUN

Mexico hosted the fifth WTO Ministerial Conference in the city of Cancun in September 2003. The ministerial came about one and half years after the launch of the Doha Development Agenda whose initial date of conclusion was 1st January 2005.¹⁷⁷ The Cancun Ministerial was part of the road to completing the Doha round of trade negotiations initiated in the fourth session of ministers in Qatar in 2001.¹⁷⁸ Cho notes that the Cancun Conference was expected to deliver a solid, workable framework to fulfil the Doha Development Agenda and to herald a positive signal to the global trading community.¹⁷⁹

Notwithstanding the optimism and euphoria during pre-ministerial days, the Cancun Ministerial collapsed, failing to address developed countries' prevailing protectionism in the sectors of agriculture and textiles, on which many developing countries depend for their subsistence.¹⁸⁰ Raju observes that the success (or failure) of the Conference depended on the negotiations on whether the WTO members agreed on the 'modalities' for negotiating new tariffs and reducing the farm subsidies of the developed countries under the Agriculture Agreement.¹⁸¹

¹⁷⁶ Wolfe R 'Crossing the river by feeling the stones: where the WTO is going after Seattle, Doha and Cancun', *Review of International Political Economy* (2004) 11:3 575.

¹⁷⁷ http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm (accessed 10 April 2013).

¹⁷⁸ Titumir RM 'The Collapse of Cancun: A Perspective on the Problematic' (2004) 21(2) *Social Science Review [The Dhaka University Studies, Part-D]* 70.

¹⁷⁹ Cho S 'A Bridge Too Far: The fall of the Fifth WTO Ministerial Conference in Cancun and the Future of Trade Constitution', *Journal of International Economic Law* 7(2), p.220.

¹⁸⁰ Cho S, 'A Bridge Too Far: The fall of the Fifth WTO Ministerial Conference in Cancun and the Future of Trade Constitution', *Journal of International Economic Law* 7(2), p.220.

¹⁸¹ Raju KD 'Beyond Cancun: A Failed Road Map?' *Ab Initio*, Vol. 2, New Delhi, May 2004

p.1. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=851924 (accessed 10 April 2013).

The Cancun Ministerial Conference was actually an extension of the currently stalled Doha Development Agenda.¹⁸² The Cancun talks failed because the agenda of the WTO's Doha Round is complex and ambitious, dealing with issues that have been the most difficult in the past, including agriculture, textile tariffs and trade barriers in developing countries.¹⁸³ The circumstances and factors that contributed to the meeting in Cancun's collapse have been neatly in the Catholic Agency for Development Report as follows:

The meeting collapsed, just like Seattle, following a North-South split created by the unwillingness or inability of the EU and US to hear and respond to developing country concerns. If anything, in Cancun the divide was more striking, since this time the EU and the US had resolved their differences on agriculture before the meeting. However there were also important, and encouraging, differences with Seattle, notably the increased unity and clarity of the developing country positions in Cancun, which could herald a welcome geopolitical shift in the WTO, and even beyond.¹⁸⁴

The collapse of the Cancun ministerial has been directly attributed to the underlying differences in issues to be negotiated on; the opposed interests of the developing countries on one hand, and the developed countries, in particular the EU and the US. However, it is worthwhile to note that it is not the fact that differences existed *per se* but the way and manner in which the decisions were arrived at that brought about the abrupt end to the Cancun ministerial due to failure to agree on text of the proposed resolutions. In that regard Khor notes that, in the

¹⁸² Iqbal BA 'Collapse of WTO Cancun Summit', p.7. Available at http://www.sarid.net/sarid-journal/2004_Iqbal.pdf (accessed 10th April 2013).

¹⁸³ Lawrence RZ Lipsky J and Glassman J, 'Cancun Collapse Won't Halt Global Trade Reform', *Global Issues: Special Edition*, p.1. Available at <http://www.hks.harvard.edu/fs/rlawrence/Global%20Issues.%20Cancun.%2011.04.03.pdf> (Accessed on the 10th April 2012).

¹⁸⁴ 'The Cancun WTO Ministerial Meeting, September 2003 What happened? What does it mean for development?' Submission by the Catholic Agency for Overseas Development (CAFOD) to the Submission to the International Development Select Committee, p.1. Available at <http://www.oecd.org/tad/xcred/16686227.pdf> (accessed on 15th April 2013).

end it was the WTO's lack of transparency and non-participatory decision-making process that caused the "unmanageable situation" that led to the collapse of the Cancun Ministerial.¹⁸⁵ The developing countries refused to be pushed into a corner and have proved that they are now a force to be reckoned with.¹⁸⁶

4.3. DOHA DEVELOPMENT AGENDA: CURRENT STATE OF PLAY

The Doha Round is the latest round of trade negotiations which aim is to achieve major reform of the international trading system through the introduction of lower trade barriers and revised trade rules.¹⁸⁷ This round of WTO negotiations named the Doha Development Agenda was launched in Doha (Qatar) in November 2001.¹⁸⁸ It is historically significant to note that the Doha Round is the first round after the establishment of the WTO in 1995.

Twelve years after the launching of the round of negotiations, no deal has been reached by the ever growing membership of the WTO. This is making it the longest running negotiation in the post-war era and the end is not in sight as yet.¹⁸⁹ Members of the World Trade Organization (WTO) continue to disagree about prospective liberalization in the areas of Agriculture and non-agricultural market access (NAMA), and this rift has delayed the discussion of other important issues on the negotiating agenda, particularly Services.¹⁹⁰ The year 2011 was seen as an opportunity to conclude WTO Doha trade negotiations, but key divisions again proved

¹⁸⁵ Khor M 'Behind the Collapse of the Cancun Ministerial', Third World Network Report, 16th September 2003. Available at <http://www.twinside.org.sg/title/twninfo76.htm> (accessed 17th April 2013).

¹⁸⁶ Yallopragada R, Roe R, Parachuri M & Toma A 'The Collapse at Cancun: The Fifth Ministerial Conference of the World Trade Organization' (2005) 32(1) *South-western Economic Review Proceedings* 65.

¹⁸⁷ http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (accessed 17 April 2013).

¹⁸⁸ <http://ec.europa.eu/trade/creating-opportunities/eu-and-wto/doha/> (accessed 17 April 2013).

¹⁸⁹ Hufbauer GC Schott J.J, Adler M, Brunel C, and Wong WF 'Figuring Out the Doha Round' 1. Available at http://www.wto.org/english/res_e/reser_e/dialogue_paper_schott_e.pdf (accessed 18 April 2013).

¹⁹⁰ Hufbauer GC, Schott J.J, Adler M, Brunel C, and Wong WF 'Figuring Out the Doha Round' 1. Available at http://www.wto.org/english/res_e/reser_e/dialogue_paper_schott_e.pdf (accessed 18 April 2013).

insurmountable.¹⁹¹ The breadth of issues covered by Doha, however, has made it difficult to assemble a package agreeable to the then 153 WTO members.¹⁹² The general consensus by various scholars is that failure to address contradictory interests between developed and developing states have made the efforts to achieve the goals set out in the Doha Declaration overly difficult to meet.¹⁹³ Developing countries have moved from the periphery of the international trade order to its centre.¹⁹⁴

The Doha Round of trade talks presented a litmus test to all role players, particularly G20 leaders, of whether the world economies are ready and able to address the lingering question of global imbalances in the macroeconomic environment in a cooperative way, and the failure of such a test serves as a testimony that the developed-developing divide is too wide to go unnoticed.¹⁹⁵ The international community is ruled by the geopolitical and economic muscular, making it incapable of managing macroeconomic imbalances that are persistent. The institutional constraints and stumbling blocks to successful conclusion of the current round of multilateral trade negotiations have been succinctly stated by Drache and Froese as follows:

...the biggest reason for an inability to conclude a deal in the Doha Round is the comparative weaknesses of a single undertaking model of deal-making in relation to other forms of multilateralism. The consensus among scholars is that the

¹⁹¹ International Monetary Fund, 'The WTO Doha Trade Round—Unlocking the Negotiations and Beyond', IMF Strategy, Policy, and Review Department, Washington DC 2. Available at <http://www.imf.org/external/np/pp/eng/2011/111611.pdf> (accessed 17 April 2013).

¹⁹² International Monetary Fund, 'The WTO Doha Trade Round—Unlocking the Negotiations and Beyond', IMF Strategy, Policy, and Review Department, Washington DC, p.2. Available at <http://www.imf.org/external/np/pp/eng/2011/111611.pdf> (accessed 17 April 2013).

¹⁹³ See generally Sutherland P 'Political leaders must commit the resources and time to conclude the Round' in Baldwin R and Evenett S (Eds) in *Why World Leaders Must Resist the False Promise of Another Doha Delay*, Centre for Economic Policy Research (2011).

¹⁹⁴ Koopmann G 'Doha Development Round Perspective', *Review of European Economic Policy* Volume 40, Number 4, July/August 2005 235.

¹⁹⁵ Zedillo E 'Political leaders must commit the resources and time to conclude the Round' in R. Baldwin and S. Evenett (eds) in *Why World Leaders Must Resist the False Promise of Another Doha Delay*, Centre for Economic Policy Research (2011).

growth of the multilateral trade system, from the 23 Members that participated in the first round of GATT negotiations at Geneva in 1947, to the 123 members that completed the Uruguay Round in 1994, to the 150 Members of the WTO today, has strained the institution's multilateral negotiating model considerably.¹⁹⁶

The proactive stance taken by developing countries in the 2001 Doha meeting, wherein such countries prescribed their interests instead of adopting what was given in the agenda as it was shows that all countries, despite the size and macroeconomic strength, are ready to negotiate.¹⁹⁷ Also at the heart of the Doha deadlock are the political concerns of the Chinese and US, which are deemed to lack vision.¹⁹⁸ It has been observed by scholars that until the US and Chinese leaders manage to find some room for compromise by loosening their domestic political constraints, the Doha will remain deadlocked.¹⁹⁹

There are differing opinions on the future prospects of the Doha Round of trade negotiations. Those who are in support of continuing the Doha Round of trade negotiations hold the belief that the potential opportunities on the economic, symbolic, and systemic fronts that are presented by the Doha Round talks make it difficult to pack and leave without exploring such opportunities.²⁰⁰ WTO members expect that a final deal should provide relatively larger benefits

¹⁹⁶ Drache D and Froese MD 'Deadlock in the Doha Round: The Long Decline of Trade Multilateralism' 13.

Available at <http://www.worldtradelaw.net/articles/drachedoha.pdf> (accessed 18th April 2013).

¹⁹⁷ See generally, Page S 'Developing Countries: Victims or Participants- Their Changing Role in International Negotiations', Overseas Development Institute (2003)

¹⁹⁸ Baldwin R and Evenett S (Eds) 'Why World Leaders Must Resist the False Promise of Another Doha Delay', Centre for Economic Policy Research (2011).

¹⁹⁹ Baldwin R and Evenett S (Eds) 'Why World Leaders Must Resist the False Promise of Another Doha Delay', Centre for Economic Policy Research (2011).

²⁰⁰ Trejos A 'The Doha Round: What to do after so many wasted opportunities' in Baldwin R and Evenett S (eds) in *Why World Leaders Must Resist the False Promise of Another Doha Delay* (2011) Centre for Economic Policy Research.

for developing countries if Doha is to meet its advertised goal of being a “development round”.²⁰¹

Dube makes a critical observation when she posits that key to the apparent failure of the Doha Development Agenda is the failure of the decision-making process at the WTO.²⁰² The concern about how to revive/continue or proceed with the Doha Round and the interest in exploring how to improve the WTO’s negotiating function have an important systemic governance dimension – how to have decision-making that is accountable, legitimate, efficient and delivers on the core objectives of the system.²⁰³ That is to say more than the disagreements and/or conflicting approaches by developing and developed countries over substantive contents of the stalled negotiations, the main problem lies on the procedural aspects of decision making.

4.4. CONCLUSION

Developing countries have grown assertive, which is quite apparent in the ongoing or the negotiations which refuses to finish having gained momentum from Seattle through Cancun Ministerial. From the look of things, developing countries are not going to accept decision made without their active involvement within the WTO structures exclusively by few developed countries as it was the case during the GATT era.

For progress to be attained in the multilateral trading system and for the WTO to remain effective and relevant, it has to become responsive to the demands of the majority developing countries. Without reforms in the decision-making process of the WTO the Doha Development Agenda seems destined not to bear fruit. The collapse of Doha might not be as dramatic as the

²⁰¹ Hufbauer GC, Schott JJ, Adler MC Brunel, and Wong WF ‘Figuring Out the Doha Round’ 14. Available at http://www.wto.org/english/res_e/reser_e/dialogue_paper_schott_e.pdf (accessed 18 April 2013).

²⁰² Dube M ‘The Way Forward for the WTO: Reforming the Decision Making Process’, SAIIA Occasional Paper Number 118, July 2012 5.

²⁰³ Birbeck CD ‘The Future of the WTO: Governing Trade for a Fairer, More Sustainable Future’ in *2011 Trade And Development Symposium-Perspectives on the Multilateral Trading System: A Collection of Short Essays* (2011) 4.

Battle of Seattle; however, it is important that it does not fail. Consequences of the failure of the current round of negotiations would be dire to the continued existence of the formalised multi-trading system.

In light of the foregoing, reforming the WTO appears to be inevitable, legitimacy and fairness in its decision-making process is critical for its existence. A way has to be found in democratising the WTO in the true substance as contemplated by its constitutional documents. The continued growth of WTO makes single undertaking and consensus unworkable and impractical.

The Greenroom as a catalyst for building of consensus is unacceptable to the majority of members; in fact the use of the exclusive mini-meetings at the behest of the Director-General or Chair of Negotiations is a major contributory factor to the revolt of developing countries. In that regard, the WTO has to adapt to the changes in its composition and accept the reality that developing countries are not going to be forced to accept decisions they are not in agreement with, or quite importantly those they had no input in making. The panacea to the WTO decision-making legitimacy problems at the moment is reform to the negotiation process to make it more transparent and inclusive.

CHAPTER V

LAYING A FRAMEWORK FOR WTO DECISION-MAKING REFORM: CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSIONS

5.1.1. Institutional Weakness of Consensus Building

In practice voting has never taken place in the WTO, some believe that the reason is to avoid the implementation of the principle of one Member one vote which developing countries are of the view does not reflect real economic powers and weight in the multilateral trading system.²⁰⁴ Despite the voting procedures in the WTO following the one Member one vote principle, the vast array of possibilities comprised in the trade-negotiations arena allow more powerful members to exert some influence in the course of the institution.²⁰⁵ In that regard some authors in the field of international trade law argue that the doctrine of equality of state in WTO constitutionalism is only a formality; consensus in fact reflects the underlying power relations between Members, the powerful nations using it to influence the decision-making process to serve their interest.²⁰⁶

Historically the poorest developing countries have been slow to assert themselves in the GATT/WTO despite the fact that every member formally enjoys an equal say in the development of consensus decision-making.²⁰⁷ The informal WTO decision-making mechanism particularly

²⁰⁴ Cottier T and Takenoshita S 'The Balance of Power in WTO Decision-Making: Towards Weighted Voting in Legislative Response' (2003) 58 *Aussenwirtschaft* 171-214.

²⁰⁵ Azpurua-Alfonso JM 'Why is the World Trade Organization Facing a Legitimacy Crisis?' University College London School of Public Policy .5. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=10060988 (accessed 2 May 2013).

²⁰⁶ Ziegler A and Bonzon Y 'How to reform WTO decision-making? An Analysis of the Current Functioning of the Organization from the Perspectives of Efficiency and Legitimacy', *NCCR Trade Working Paper* No. 2007/23, May 2007 15.

²⁰⁷ Sutherland P and Sewell J 'Challenges facing the WTO and policies to address global governance' in Sampson G.P *The Role of the World Trade Organization in Global Governance* (2001) 86.

the use of the Greenroom meetings which gained prominence during the Uruguay Round and had gained centre-stage in the WTO decision making has been adapted and slightly reformed in the recent past.²⁰⁸ In brevity of language, the manner of reaching consensus has been captured in illustrative manner by Kwa as follows:

Decision-making essentially takes place in ‘concentric circles’. First, the US and the EU come together to decide on a common position. The circle is then expanded to Japan and Canada. They make up the ‘Quad’. After this, the circle is enlarged to include other developed countries, followed by friendly developing countries (e.g. South Africa, Chile, Singapore etc). This group is sometimes known as ‘Friends of the Chair’. And finally, other influential developing countries, such as India and Malaysia are brought on board, since they carry weight, and it would be impossible for the ‘majors’ to leave them out. China, a new member, also falls into this category. The majority of developing countries never make it into this circle of decision-making.²⁰⁹

This model of decision-making in the multilateral trading system has also been described by Blackhurst as ‘concentric circle model’ which starts small and keeps expanding upon resolution of issues discussed privately.²¹⁰ The developing countries have expressed dissatisfaction and displeasure in the manner and practice of exclusive informal Greenroom meetings during the Seattle Ministerial.²¹¹ These insignificant reforms such as the inclusion of large developing countries can be said to be a reaction to the indisputable fact that consensus

²⁰⁸ Alexandroff A.S (Ed) ‘Can the World be Governed? Possibilities for Effective Multilateralism’ (2008) 331

²⁰⁹ Kwa A ‘Power Politics in the WTO’ (2 ed), Edited by Bamford A, *Focus on the Global South* (2003) 36-37.

²¹⁰ See generally Blackhurst R ‘Reforming WTO Decision-Making: Lessons from Singapore and Seattle’ in Deutsch K and Speyer B (Eds), *The World Trade Organization Millennium Round: Freer Trade in the Twenty-First Century*, (2005).

²¹¹ See generally Blackhurst R ‘Reforming WTO Decision-Making: Lessons from Singapore and Seattle’ in K. Deutsch and B. Speyer (Eds) *The World Trade Organization Millennium Round: Freer Trade in the Twenty-First Century* (2005).

building worked when the GATT-WTO culture was a rich man's club.²¹² The inner circle only became controversial after the first WTO ministerial in Singapore, when a Greenroom of 34 countries left all other ministers loudly wondering why they had come.²¹³

In Seattle and Cancun, the practice of Greenroom meetings did not function adequately, and there were numerous complaints about lack of information flow out of the room and, in some cases, apparent misjudgments as to the 'true' positions held by certain parties.²¹⁴ By the Cancun meetings, the environment of consensus building had been radically transformed by the Southern countries for which knowledge-based bargaining provided new advantage and leverage in the bargaining table.²¹⁵

5.1.2. Bolting from the Greenroom towards the transparent room: Reforming the decision-making in the WTO

In April 2002 a group of developing countries under the auspices of "The Like-Minded Group" delivered a set of proposals which sought to ensure that the pre-ministerial preparatory process and the actual conduct of the Ministerial Conferences would be 'transparent, inclusive and predictable.'²¹⁶ In response to the objections of the developing countries, the WTO secretariat introduced some minor changes during the Seattle towards the Cancun Ministerial.²¹⁷ Sutherland and Sewell note that in Seattle, the WTO Director-General Mike Moore and the US

²¹² See Narlikar A 'New Powers in the Club: The Challenges of Global Trade Governance' (2010) 86(3) *International Affairs* 717-728.

²¹³ Wolfe R 'Still foggy after all these years: Reform proposal for the WTO' in Alexandroff A.S and Raj B (Eds) *Trends in World Trade Policy: Essays in Honor of Sylvia Ostry* (2004) 8.

²¹⁴ Davey W.J, 'The WTO: Looking Forwards', *Journal of International Economic Law* Vol. 9 No. 1 .5.

²¹⁵ Drache D 'The Structural Imbalance of the WTO Reconsidered: A Critical Reading of the Sutherland and Warwick Commissions' *CHAOS International* 14. Available at <http://www.ieim.uqam.ca/IMG/pdf/Drache20130123.pdf> (accessed 5 May 2013).

²¹⁶ Wolfe R 'Still foggy after all these years: Reform proposal for the WTO' in Alexandroff A.S and Raj B (eds) 'Trends in World Trade Policy: Essays in Honor of Sylvia Ostry' (2004) 10.

²¹⁷ Sutherland P and Sewell J 'Challenges facing the WTO and policies to address global governance' in Sampson GP *The Role of the World Trade Organization in Global Governance* 2001 87.

Trade Representative made concerted, good-faith effort to broaden participation of delegations in the negotiations with the goal to keep the Greenrooms to a minimum. In Cancun, the penchant for improvisation in the WTO procedures was also evident in the selection process of the 'Friends of the Chair' and/or 'Facilitators' appointed to organise discussion in identified areas with an attempt to keep geographical representation in mind.²¹⁸ Some reforms introduced in the informal decision-making processes in the WTO worth discussing are the following:

5.1.2.1. Mini-ministerial's

Wolfe notes that another interesting innovation is meetings held to provide leadership for the WTO, a set that include informal meetings of ministers or senior capital-based officials where participation rather than being sectoral or regional is somehow meant to reflect full WTO membership, these meetings have come to be called "mini-ministerials" which resemble the current Greenroom meetings of ambassadors in Geneva.²¹⁹ This seeks to involve more representatives of various countries who would ordinarily be excluded from the traditional greenroom. The difference between these mini-ministerials and the greenroom meetings is that there is improved transparency on their convening and the business transacted therein. The decisions arrived at are likely to have acceptable levels of legitimacy as opposed to those taken in highly secretive and exclusionary greenrooms.

5.1.2.2. One-to-One Confessionals

The system of confessionals featured strongly among the new methods introduced to arrive at consensus in Cancun.²²⁰ The intensity of these meetings ensures that a serious problem – even though endured by only one smaller country – will find a solution, even if the price paid is a

²¹⁸ Narlikar A and Wilkinson R, 'Collapse at the WTO: a Cancun post-mortem', *Third World Quarterly* (2004) 25:3 450.

²¹⁹ Wolfe R 'Still foggy after all these years: Reform proposal for the WTO' in Alexandroff AS and Raj B (Eds) *Trends in World Trade Policy: Essays in Honor of Sylvia Ostry* (2004) 9.

²²⁰ Pfetsch FR 'Chairing Negotiations in World Trade Organization', Paper to presented at the 3rd Bi-annual International Conference on Negotiation, Paris, 15th November, 2007 17.

series of long efforts and sometimes very tense situations.²²¹ They involve a facilitator attempting to meet with country representatives bilaterally to try to shift the discourse to actual bottom-lines.²²²

5.1.2.3. *Sharing a seat: Developing country response toward exclusionary Greenroom Culture*

The lack of transparency and exclusivity of trade negotiations meetings combined with the limited resources of weak states meant that developing countries themselves were isolated from decision-making processes.²²³ In light of these glaring disparities and institutional incapacities, developing countries have now increasingly sought to build coalitions as the primary means of improving their representation in the WTO.²²⁴

Whilst no proposal for restructuring the WTO have been endorsed, the actual practices of negotiation and consensus-building have gradually shifted, the most significant has been the proliferation of developing country coalitions and their inclusion as joint-representative platforms in the WTO decision-making processes.²²⁵ The recent emergence of a multitude of developing country coalitions reflects fundamental changes in the landscape of developing country positions in the WTO and shows that such coalitions are beginning to change the organization's dynamics.²²⁶ Nowadays far more countries are willing to invest diplomatic

²²¹ Pfetsch FR 'Chairing Negotiations in World Trade Organization', Paper presented at the 3rd Bi-annual International Conference on Negotiation, Paris, 15th November, 2007 17.

²²² Narlikar A and Wilkinson R 'Collapse at the WTO: a Cancun post-mortem', *Third World Quarterly* (2004) 25:3 451.

²²³ Patel M 'New Faces in the Green Room: Developing Country Coalitions and Decision-Making in the WTO', *Global Economic Governance Project Working Paper 200/33*, September 2007 3.

²²⁴ Patel M 'New Faces in the Green Room: Developing Country Coalitions and Decision-Making in the WTO', *Global Economic Governance Project Working Paper 200/33*, September 2007 3.

²²⁵ See generally Patel M 'A Governance Audit of the WTO: Roundtable Discussion on Making Global Trade Governance Work for Development', *Global Economic Governance Programme* University College, Oxford 1-21. Available at <http://www.globaleconomicgovernance.org/wp-content/uploads/GEGHEIPublicForum181007.pdf> (Accessed 9 January 2013).

²²⁶ Rolland SA 'Developing Country Coalitions at the WTO: In Search of Legal Support' 2007 48(2) *Harvard International Law Journal* 483.

resources into the creation and maintenance of coalitions; additionally, at least some coalitions involving developing countries have acquired unprecedented influence and bargaining power that goes beyond the sum of resources of the individual members.²²⁷

The type of coalitions has also significantly diversified over time, reflecting the more complex and broader agenda of trade negotiations and signed agreements., the changing membership of the GATT and the WTO, as well as the WTO's evolving relationship with other international entities (for instance UNCTAD) have influenced the style of developing country coalitions.²²⁸ At least some of the coalitions that were active at the Cancun Ministerial had already appeared at the Doha, if not before *viz* the LMG, the African Group, the ACP, the LDC, and the Small and Vulnerable Economies.²²⁹ As means for negotiation strategy, governments and coalitions can continue to attempt to frame negotiations in public opinion by reference to principles that favor their positions and counter the campaigns of their adversaries, calling on NGOs and the media for help.²³⁰ Coalition building is based on various considerations and factors, in that regards Jones observes as follows:

Coalitions in the WTO can take various forms, and the distinctions are important in understanding how they affect the issue in WTO decision-making. Many coalitions, for example, form along sectoral or around particular trade issue, such as agriculture and services. When coalitions form along single dimension, joint representation will be similarly circumscribed. Such coalitions generally reflect..."exchange trust", a calculation of net benefits of the coalition based on a

²²⁷ Narlikar A 'Bargaining over the Doha Development Agenda: Coalitions in the World Trade Organization', *Latin American Trade Network Paper Series* No. 34 .2.

²²⁸ Rolland SA 'Developing Country Coalitions at the WTO: In Search of Legal Support' 2007 48(2) *Harvard International Law Journal* 483.

²²⁹ Narlikar A 'Bargaining over the Doha Development Agenda: Coalitions in the World Trade Organization', *Latin American Trade Network Paper Series* No. 34 11.

²³⁰ Odell JS 'Growing power meets frustration in the Doha round's first four years', in Crump L and S. J Maswood S.J (Eds) *Developing Countries and Global Trade Negotiations* (2007) 31.

focused negotiating object, as represented in the game theoretical framework described above.²³¹

More recently, it has become customary for some developing countries to be involved in inner circle consultations in their *ex officio* capacity as co-ordinators of coalitions; this shift to explicitly include coalitions in WTO decision-making began with preparations for the Doha Ministerial in 2001, and has since become further institutionalised.²³² Developing countries have decided to join coalitions to have a common representation over common issues thus ‘sharing a seat’ in the Greenroom as opposed to total exclusion. Blackhurst in consolation to the developing countries on the use of coalitions to currently afford them a representation in the greenroom metaphorically notes that “*sharing a seat may not be ideal, but it is a lot better than never being allowed the room.*”²³³

5.2. REFORMING THE WTO DECISION-MAKING: A LEAP INTO THE FUTURE

5.2.1. Theoretical context of the discussion for reform

Notwithstanding the opposition towards the prevailing atmosphere of negotiations and decision-making in the WTO, there has been little action toward radical over-hauling of the WTO decision-making frame-work. Birbeck makes an interesting observation which highlights the conservatism surrounding the envisaged reforms when she stated:

Recommendations on WTO governance and institutional reform strangely provoke fear in the minds of many trade analysts. Some reject that reform is necessary; others contend that reform is not politically plausible, that the time is not ripe, or that the first priority must be to bolster existing aspects of the WTO.

²³¹ Jones K ‘Regionalism and the Problem of Representation in WTO’, p.10. Available at <http://www.uibk.ac.at/csi/conferences/papers2005/jones.pdf> (accessed on 6 May 2013).

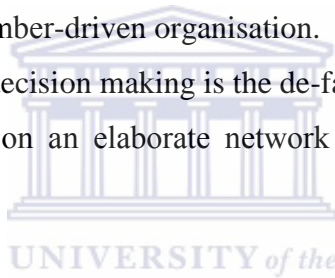
²³² 2007 WTO Forum Report, p.6. Available at https://www.wto.org/english/res_e/booksp_e/public_forum07_e.pdf (accessed 6 May 2013).

²³³ Blackhurst R ‘Reforming WTO Decision-Making: Lessons from Singapore and Seattle’, *Working Paper No. 63* Centre for Research on Economic Development and Policy Reform’ p.17.

Reform can indeed start by working with what exists, but there is also scope for innovation. Those who reject the need for reform risk taking for granted the credibility and relevance of the very system they mean to defend. For those who suggest waiting, the question they must answer is when the right time to address systemic challenges will arrive.²³⁴

Dube notes that any proposals for reform of the WTO decision-making processes have to be understood within the context of its organisational make-up *viz* the current four main tenets of decision-making in the multilateral trading system which is as follows:

- The WTO is a one-member one-vote organisation thereby allowing equal status to all members irrespective of their trade shares or economic size.
- The WTO is a member-driven organisation.
- Consensus based decision making is the de-facto norm in the WTO.
- The WTO relies on an elaborate network of informal processes to get to a consensus.²³⁵



Therefore in seeking to reform the WTO decision-making process consideration of the institutional culture and features should be paid regard to and to an extent possible not lost in entirety. In academic circles some commentators are of the view that there exists a positive correlation between the revival of the currently stalled Doha Development Round and exploration on how best to improve the WTO's systemic governance dimension - how to have decision-making that is accountable, legitimate, efficient and delivers on the core objective of the multilateral trading system.²³⁶ As a result, the importance of the need to reform cannot be over-emphasised. What needs to be discussed suggested and eventually agreed upon are the nature,

²³⁴ Birkbeck CD 'The Future of the WTO: Governing Trade for a Fairer, More Sustainable Future', International Centre for Trade and Sustainable Development 2.

²³⁵ Dube M 'The Way Forward for the WTO: Reforming the Decision Making Process', *SAIIA Occasional Paper Number 118*, July 2012 19.

²³⁶ Birkbeck C.D, 'The Future of the WTO: Governing Trade for a Fairer, More Sustainable Future', International Centre for Trade and Sustainable Development 3.

form and/or shape of the long called for reforms to be implemented for better function of the multilateral trading system.

Any of the proposed reforms to the WTO decision-making process seeking to make it more transparent, inclusive and therefore creating legitimate and widely acceptable decisions amongst its constituent states should retain the core principles underlying the WTO as an international intergovernmental institution. Quite critically a unique quality of being 'member driven' organisation which distinguishes the WTO from other sister international economic organisation *viz* the IMF and the World Bank should not be lost in the process of reform which would alienate the WTO from its membership.

The formal equality of nations constituting the WTO irrespective of their economic size or trading volume is an interesting principle of public international law which is one of the overarching principles underpinning WTO law. This principle informs the doctrine of non-discrimination which is the basis of trade rules emanating from the legislation and jurisprudence of the WTO. In light of the foregoing, member states of the WTO are put on equal footing to each other reflecting their equal importance to the functioning of multilateralism. It is worth noting that the impasse bewildering the Doha Development Agenda and the round of negotiations which is refusing to end is a build-up of issues from Seattle through Cancun ministerial. The point of contention and/or disagreement though seemingly centered on the substance of negotiations in fact boils down to the procedures and processes of arriving at the substance.

Developing countries as reflected and discussed extensively above objects to how WTO makes its decision, they feel and justifiably so excluded from the process which in practice is an anti-thesis of the principle of sovereign equality of WTO members. The proposed thesis is that any proposal for reform should consolidate and concretise the practice of equality in multilateral trading negotiations. Any deviation from the principle of equality of nations in the WTO system is likely to be met with imaginable levels of contempt and rejection amongst the majority of members which is made up by developing countries.

An academic consensus exists to the effect that the WTO's practice of decision-making through consensus is no longer easy due to the expanded membership from the GATT days to now.²³⁷ It is quite interesting to note that developing countries are not desirous for the scrapping of consensus as the primary manner of deciding over issues in the WTO. This proposition is supported by Liang who notes as follows:

...the question of whether modifications should be made to the consensus principle on which WTO decision-making is based, or whether, in those cases voting is foreseen, it should be used more readily in order to avoid blockages and improve efficiency. However, given the implications of adopting alternative approaches to decision-making, most WTO members expect that consensus will remain the rule. It would be inconceivable that the WTO would resort to voting to break any impasse.²³⁸

The above proposition has been received by some commentators with academic surprise considering the fact that developing countries have been complaining bitterly of being excluded from consensus building mechanism. In that regard one might expect them ordinarily to call for a decision-making model which allows them as a majority to dominate WTO proceeding and most probably use their numerical power to excise majoritarian tyranny through voting against the developed countries which have dominated GATT/WTO system over the past forty year despite being in the minority. This paradox was discussed and justified by Dube in her observation that:

It is interesting to note that developing countries in particular are very keen on the retention of consensus in decision-making, despite its current inefficiencies and marginalising effect, because they believe this to be their only means of ensuring that their voices are heard. This is mostly a practical consideration and is based on

²³⁷Liang M 'Evolution of the WTO Decision-Making Process' 2005 (9) *Singapore Year Book of International Law* 128.

²³⁸ Liang M 'Evolution of the WTO Decision-Making Process' 2005 (9) *Singapore Year Book of International Law*, 128.

the understanding that the voting system would never work in the context of the WTO.²³⁹

The suggestions and recommendations for reform that aims at improving the participation of the developing countries and alleviating the effects the damaging practice of Greenroom meetings have on the interests on developing countries must chiefly among other considerations recognise the interests of developing countries. As discussed above, developing countries' view of reforming the WTO decision-making process should retain consensus as a primary manner of making decisions. Any proposal for reform that abolishes consensus, or dilute the power that consensus grants to developing countries over their developed counterparts seems that it will not receive acceptance.

From the developing country point of view, the idea of reform is to grant them access in the decision-making process without taking what they already have, it is not the tool that they seek to discard but how the tool is used that they wish it be made more transparent and open to all irrespective of the size of the economy or volume of trade a member has. Developing countries are strong supporters of the consensus practice as it provides them with the assurance that they will not be confronted with decisions that may be detrimental to their interests.²⁴⁰

5.3. SUBSTANTIVE REFORM PROPOSAL: A TWO-TIER APPROACH

The institutional reform agenda is not a technical, legalistic or bureaucratic matter that can be dealt with without taking into consideration of the political demands and concerns driving divergent perspectives and expectations about the end goal(s) of the WTO.²⁴¹ What has to be kept 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 to be considered is whether the developing

²³⁹ Dube M 'The Way Forward for the WTO: Reforming the Decision Making Process', *SAIIA Occasional Paper Number 118*, July 2012 19

²⁴⁰ Ismail F 'Reforming the World Trade Organization', *World Economics* 10 (4) 109-46.

²⁴¹ Birkbeck C.D 'The Future of the WTO: Governing Trade for a Fairer, More Sustainable Future', International Centre for Trade and Sustainable Development 7.

nations themselves consider it politically feasible and in their best interest.²⁴² The decision-making reforms proposed at this point which tries to balance their political interest and economics and trading considerations are; consensus-critical mass; and; creation of WTO Consultative Board.

5.3.1. Critical Mass: A tradition of majority voting without a majority rule

The Warwick Commission hereinafter “the Committee” on the need to reform consensus and the exercise of veto by members has the following to say:

Consensus-based decision-making can be cumbersome if the need for a consensus enables a single player or a few players to block outcomes and stifle progress. Preventing a decision from being taken may be entirely legitimate where vital interests are at stake; the more so if there is a shared perception among a significant group of countries that a particular outcome is undesirable. But equally, blocking may lack legitimacy where its aim is more to prevent others from moving an agenda forward than it is about avoiding a policy outcome perceived as harmful by those exercising a veto.²⁴³

The Warwick Report²⁴⁴ 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”.²⁴⁵ The so-called envisioned critical mass model of decision-making in the

²⁴² Tijmes-Lhl J ‘Consensus and majority voting in the WTO’, *World Trade Review* (2009) 8:3 429.

²⁴³ Warwick Commission 2007. *The Multilateral Trade Regime: Which Way Forward?* Warwick: The University of Warwick 42.

²⁴⁴ Warwick Commission *The Multilateral Trade Regime: Which Way Forward?* 2007 Warwick: The University of Warwick.

²⁴⁵ Elsig M, ‘Learning From Sutherland and Warwick: With A Little Help From The Secretariat Using Critical Mass’

6. Available at http://phase1.nccrtrade.org/images/stories/publications/IP2/Waterloo_Paper.pdf

(accessed 8 May 2013).

multilateral trading environment refers to a practice is where countries refrain from blocking consensus where critical mass of countries support a proposed change.²⁴⁶ In this aspect Ansong notes quite correctly that:

The point was made earlier that the advantage of the consensus principle lies in its ability to block an objectionable direction in WTO policy, especially where a sizeable number of Members do not favour such a move. It was however argued that where an overwhelming majority is in favour of decision with only one or a few objecting, it presenting a problem in that, progress can be blocked by a small number. One proposition for dealing with this is the critical mass concept. The concept holds that where an overwhelming majority is in favour of a decision, the few objecting Members should refrain from blocking progress.²⁴⁷

It has been observed that the earliest appearance of a critical mass approach was in the Tokyo Round (1973-79) when non-tariff measures were negotiated including among others technical barriers to trade, customs valuation, import licensing, anti-dumping and subsidies and countervailing measures.²⁴⁸ Low further goes on to note that the MFN rights of GATT contracting parties were protected by a decision of the 28th November 1979 (L/4905) which explicitly stated that the existing rights and benefits of contracting parties which are not parties to the agreements entered through “critical mass” manner are not affected by those agreements.²⁴⁹ The Committee explicitly stated that they do not believe that any voting system would be desirable in the context of critical mass decision-making.²⁵⁰ Professor Roland in discussing the nexus between single undertaking and the proposed critical mass approach has the following to say:

²⁴⁶ Jackson JH 'The WTO “Constitution” and the Proposed Reforms: Seven “Mantras” Revisited’, *Journal of International Economic Law* 4(1) 67.

²⁴⁷ Ansong A ‘The WTO Decision-making process: Problems and Possible Solutions’ 26, available at <http://ssrn.com/abstract=2180230> (accessed 9 May 2013).

²⁴⁸ Low P ‘WTO Decision-Making for the Future’, *Staff Working Paper ERSD-2011-05* 7.

²⁴⁹ Low P ‘WTO Decision-Making for the Future’, *Staff Working Paper ERSD-2011-05* 7.

²⁵⁰ Warwick Commission *The Multilateral Trade Regime: Which Way Forward?* 2007 30.

The emphasis here is to preserve the single undertaking approach enough to allow cross-sectoral bargaining while letting some individual Members opt out from making concessions under some agreement. Once critical mass of Members agrees on a complete package, some countries could be allowed to opt out certain agreement or making concessions under these agreements.²⁵¹

In light of the fore-going, it becomes clearer that the adoption of critical mass presupposes some sort of departure from the principle of single undertaking. Single Undertaking in the context of the WTO means that every item of the negotiation is part of the whole and indivisible package and cannot be agreed separately, and also that upon accession a country wishing to become a member of the WTO has to accept unequivocally the entire agreements entered into multilaterally without exception.²⁵² Stoler posits that using the single undertaking and the creation of the WTO to force developing countries to accept all of the WTO's new obligations was their single biggest mistake; the inapplicability of the one-size-fits-all model has created problems for negotiations, for implementation and for decision-making.²⁵³

The protection of the interests of the developing countries to participate in the critical mass decision-making proposed model as a variant of consensus in the WTO has been considered by the Warwick Committee in its report. The committee advised that the WTO membership should collectively undertake to provide any necessary technical support, capacity building and infrastructural needs in order to favour the participation of developing countries so wishing to participate in an agreement and derive tangible benefits from such participation.²⁵⁴

²⁵¹ Rolland SE 'Redesigning the Negotiation Process at the WTO', (2010) 13(1) *Journal of International Economic Law* 84.

²⁵² http://www.wto.org/english/tratop_e/dda_e/work_organ_e.htm (accessed 9 May 2013)

²⁵³ Stoler A 'Breaking the Impasse: A Critical Mass Approach to Multilateral Trade Negotiations', *CPP Symposium on the Future of the Multilateral Trade System Paper* 4-5. Available at http://www.iit.adelaide.edu.au/docs/critical_mass_speech_final.pdf (accessed 9 May 2013).

²⁵⁴ Warwick Commission *The Multilateral Trade Regime: Which Way Forward?* (2007) Warwick: The University of Warwick 32.

Further the Committee in a recommendation which might be of high beneficial value to developing countries who might not be in a position to bind themselves in the initial critical mass concluded agreements to later 'opt-in', that is to say those countries which initially opted-out shall have unchallengeable and unqualified right to join the accord at any time in the future on terms no more demanding than those undertaken by signatories to the accord in question.²⁵⁵

It is submitted that the proposed critical mass reform to the consensus coupled with single undertaking principle will likely protect the interests of developing countries who would otherwise not be in a position to strenuously bind themselves through single undertaking initiative, but rather allow them to abstain from certain WTO agreements they are uncomfortable with. It is also critical to note that the abstainers will not be left out in the cold forever, but shall remain entitled to initial and ratify the said agreements when they are politically and economically ready to do so. From the developed countries perspective, they will no longer feel constrained and frustrated by the exercise of veto-power of developing countries over issues they are not in a position to accept as yet.

This mechanism provides an opportunity for small developing economies with limited negotiation capacity to focus on the aspect and sectors that are most important to them while knowing that they will not be subject to problematic commitments in other areas that they had no opportunity or capacity to bargain for.²⁵⁶

It is further opined that the embarrassment and collapse of Seattle might have never been necessary had this been the primary decision-making mechanism of the WTO for reason that developed countries could have negotiated and agreed on Singapore Issues with the participation of developing countries which were in a position to continue with such agenda items. On the other hand issues of interest to developed countries could have not been thrown out with other rejected issues.

²⁵⁵ Warwick Commission *The Multilateral Trade Regime: Which Way Forward?* (2007) Warwick: The University of Warwick 32.

²⁵⁶ Rolland SE 'Redesigning the Negotiation Process at the WTO', 2010 *Journal of International Economic Law* 13(1) 86.

The constitutional possibility of applying the critical mass concept without the necessity of amending the WTO Agreement is through the application of the provisions in Article X of the WTO Agreement regarding amendment that alter rights and responsibilities.²⁵⁷

5.3.2. Creation of a Management Body

As a membership driven organisation, the WTO does not have an executive body or management board to steer it or to interact in a regular and purposeful way with civil.²⁵⁸ The Sutherland Report recommended the establishment of a senior officials' consultative body whose main functions would be to discuss political and economic matters, provide some political guidance and facilitate transition of negotiations taking place at WTO headquarters to the Ministerial Conference.²⁵⁹ The Sutherland Commission was an officially appointed consultative board reporting to the WTO's Director-General engaged to undertake institutional stock taking of the WTO and to propose how to make the WTO more efficient and relevant going forward.

A consultative board proposed by the Sutherland Commission seeks to bridge the gap between the Ministerial Conferences as a transparent and inclusive consensus building mechanism. On the complexion that the proposed body is to take, Hoekman explains that:

There are two flavors to proposals along these lines. One is to emulate the management structure of the IMF or World Bank, in which a Board of 20 to 30 representatives is given decision-making powers. The other is to use a board as an instrument through which to identify compromise positions in negotiations, suggest solution when WTO councils or committees fails to achieve consensus,

²⁵⁷ Ansong A 'The WTO Decision-making process: Problems and Possible Solutions' 26, available at <http://ssrn.com/abstract=2180230> (accessed 9 May 2013).

²⁵⁸ Drache D 'The Structural Imbalance of the WTO Reconsidered: A Critical Reading of the Sutherland and Warwick Commission', *CHAOS International* 2.

²⁵⁹ Steger DB 'The Future of the WTO: The Case for Institutional Reform', (2009) 4(12) *Journal of International Economic Law* 819.

engage in strategic thinking and help to set priorities to further the mandate of the organization.²⁶⁰

It is worthwhile to contextualise the suggestion on the basis of the afore-stated proposal in that consensus as proposed to be reformed is to be implemented as circumscribed as critical-mass of members minus the single undertaking approach. In this light, the consultative body is to be used to enhance and build-up the critical mass of issues between the Ministerial Conferences. The consultative body or bodies as envisioned will be constituted by members over issues they are interested one which they intend supporting to build up a critical-mass and enter into agreements regarding such trade issues they have immediate negotiating issues over.

To make the consultative bodies inclusive they need not be permanent as the critical mass mode suggests that there cannot be permanent negotiating interests in the absence of single undertaking approach to multilateral trade negotiations. The permanence of cluster consultative body shall in this sense survive during the life of the negotiating round. The critical-mass idea presupposes that it is unlikely that all membership be interested in all issues in negotiations as countries have an option of 'opting out' from negotiations when the issues in discussions are not of economic and/or political importance to it until it deem to enter into such agreement and commits itself later on.

5.4. OVERALL CONCLUDING REMARKS

For the developmental agenda of the currently stalled round of WTO negotiations it has to reflect the interest of the developing countries which forms the majority of the membership of the multilateral trading system. It is the developing countries which understand and know more than anyone else the developmental issues and challenges they are faced with, therefore leaving them out in the cold when developed countries are locked up in the greenrooms does not in one way assist in pushing the development agenda.

²⁶⁰ Hoekman B 'Proposal for WTO Reform: A Synthesis and Assessment', *Policy Research Working Paper No. 5525*, (2011) *The World Bank* 8

It has been recognised that for developing countries to alleviate poverty of their populations and improve their economies they need to be active in the multilateral trading system and engage in international commerce, thus requiring them to liberalise their economies. It is often touted that it is 'trade not aid' that can sustainably do away with poverty in developing countries, it therefore boggles the mind who these economically weaker nations are to trade internationally if they are excluded from the rule making of international trade.

In light of the foregoing it is submitted that the insignificant contribution of developing countries in the volume of trade in world is not due to their disinterest in taking a significant role in trade, their interest is reflected by their sheer number in the membership of the WTO. However, their failure to make a considerable impact in international business and commerce is due to the fact that they are excluded where it matters, decision-making processes of the WTO. To further the development agenda of the WTO translating it from rhetoric into tangible and concrete results the decision-making processes and procedures of the WTO have to be reformed to make them open, transparent and inclusive of the majority interest in the international trading system and institutional frame-work.

It is rather impossible to play the game which its rules one is not aware of and does not even appreciate. The current informal rule-making mechanism in the WTO system serves the interests of those who make the rules. Multilateral negotiations are not a charitable exercise; it is inconceivable how the interests of the non-greenroom invitees would be taken care of. For the equality of member's mantra and member driven philosophy of the WTO to be realised reforming the decision-making process to include the interests of the developing countries becomes inevitable.

The reluctance by the minority developed countries which are content with the status *quo* to reform the decision-making process from being elitist to being inclusionary and transparent which results shall be legitimately accepted decisions by the majority is a major contribution to the stalling of the Doha Development Agenda or the Doha Round of Negotiations. The WTO is yet to conclude a successful round of negotiations after its inception in 1995; however, it has

found itself embroiled with shameful pictures of developing countries revolt in two Ministerial Conferences already.

This research has attempted to illustrate that notwithstanding the existence of formal equality in the WTO Agreement which seeks to protect at least on a formal black letter law perspective, in reality arising from the practice of the WTO as adopted from its predecessor there is striking inequality amongst members. There exists an '*institutional apartheid*' resulting in the tyranny of the minority over the majority membership of the WTO.

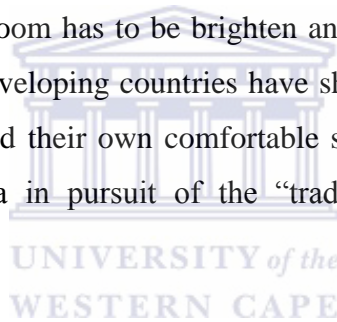
Furthermore, the research has by way of examples and references to previous failed Ministerial *viz* Seattle and Cancun a 'liberation struggle' by the majority who are fighting to free themselves from the exclusionary and discriminatory practices of the multilateral decision-making processes. The institutional infighting within the WTO over the need to reform and take into consideration the trading interest of the majority by involving them in an open and transparent decision-making system which shall be a departure from the current state of affairs is continuously blocking progress in the multilateral trading area.

The argument raised by this research is that the Doha Round has stalled much not over the issues but on the procedure adopt to arrive at the issues on the Agenda. The majority is of the view that a round of negotiations cannot be purported to be of their developmental interests while those seeking to develop are excluded from negotiating about their own development.

Moreover, developing countries are not in any position to accept any change in the current WTO decision-making model which shall vest more power in the hands of the minority akin to the Bretton Woods institutions *viz* IMF and the World Bank. The general consensus within developing countries as reflected in the substantive introductory chapter of this research is that the entire international economic system and its institutions have to be reformed to reflect the true composition of membership and deal away with the disparity between few developed countries and majority developing members. The impending reforms to the weighted voting systems of the WTO and IMF are not in any way different from the WTO's need to reform its formal and informal decision-making structures.

Finally, workable areas of reforming the decision making process of the WTO to safeguard the interests of member states irrespective of their economies and size have been suggested and proposed. This research makes an unequivocal argument that unless the decision-making process of the WTO is reformed to take into consideration the interests and equal participation of the global south members little or totally no progress in the current round of negotiations and going forward shall be realised.

In conclusion it is submitted that a question is not whether the WTO's decision-making procedures have to be reformed, but how they can be reformed in a manner that is acceptable the 'critical mass' of members. The said reforms are overdue, if the membership is interested in saving the round of negotiations which have stalled inordinately longer than usual, the majority has to be appeased and the greenroom has to be brighten and be transformed into a transparent and accommodating room. The developing countries have shared a seat in the greenroom more than it is necessary, they now need their own comfortable seat around the negotiating table to further the developmental agenda in pursuit of the "trade not aid" principle for the own development.



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