The WTO Decision-Making Process: Problems and Possible Solutions

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Abstract
The WTO has become one of the key international organisations responsible for regulating international economic relations among states. At first glance, the WTO Agreement makes very democratic provisions with respect to decision-making. All formal WTO decision-making organs are open to all members. Independent of population size, economic might or contribution to international trade, each member of the WTO wields a single unweighted vote – i.e. one-member-one-vote. Thus at the formal level, all appears to bode well with the WTO decision-making process. This seeming well-being however belies the true nature of the problems and challenges the decision-making process is encumbered with. The article undertakes a descriptive and analytical exegesis of the provisions on decision-making in Articles IX and X of the WTO Agreement. The article is segmented into three main sections. The first section presents a descriptive account of the WTO as an international organisation and the textual provisions on decision-making contained under Articles IX and X of the WTO Agreement. The focus here is to explore the formal provisions on ‘legislative’ decision-making by the two most important decision-making organs of the WTO – i.e. the Ministerial Conference and the General Council. The second section presents a critical analysis of the WTO decision-making process with particular emphasis on the problems, challenges and opportunities that the consensus and single undertaking principles and the Green Room process hold for the WTO. The concluding section explores possible options for reforming the WTO decision-making process. The importance of the principles of sovereign equality of states and the special and differential treatment of developing countries are used in both the second and third sections as key considerations in the discourse on the challenges and possible reform of the WTO decision-making process.

General Overview of the WTO
The Agreement Establishing the World Trade Organisation (WTO Agreement) ushered in a new multilateral trade organisation that replaced the GATT 1947, after the latter had been in operation for almost 50 years. The Uruguay Round of trade negotiations that culminated in the formation of the WTO started off in 1986 as a multilateral trade Round aimed at reforming the GATT 1947. The establishment of a new trade organisation was not on the agenda at the inception of the Uruguay Round. The idea of a new trade organisation was mooted by the EC and Canada in 1990 and in 1991 by the EC, Canada and Mexico. The proposal for a new trade organisation initially faced opposition from the US and developing countries but by 1993, opposition to its establishment had waned and developing countries and the US had agreed to the establishment of the WTO. Negotiations on the WTO were completed in December 1993 and in April 1994, the signatory states ratified the WTO

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3 Peter Van den Bossche, op cit. fn.1.
4 ibid
Agreement which came into force on January 1 1995. Though the WTO Agreement itself is made up of 17 Articles and four annexes, the multilateral trade regime it establishes has been described as:

… a highly complex international treaty system consisting of some 30 multilateral international agreements with supplementary ‘Understandings’, ‘Protocols’, ‘Ministerial Decisions’, ‘Declarations’, and more than 30,000 pages of ‘Schedules of Concessions’ for trade in goods and ‘Specific Commitments’ for trade in services.

International trade relations among states under the GATT/WTO has had a history of politically charged polarities of interests and ideological persuasions. For instance, developing countries during the GATT 1947 era consistently viewed the GATT as a ‘club’ for the rich nations and thus sought to advance their trade interests at the United Nations Conference on Trade and Development. They contended that the GATT provisions of non-discrimination and reciprocity in trade relations were inimical to their interests and would result in a premature opening to trade flows from more industrialised nations who had developed their industrial capacities behind protective barriers. The domestic economies of developing countries thus needed protection in order for them to also develop domestic capacities for trade. This argument encapsulates the principle of special and differential treatment of developing countries.

Developing countries’ participation in the GATT 1947 had therefore been characterised by a partial involvement in the trade regime due to waivers and derogation provisions that granted them special and differential treatment in international trade relations. The partial involvement of developing countries in the GATT was also made possible by the so called ‘GATT a la carte’ – the principle that allowed Contracting Parties of the GATT to pick and choose some of the trade rules and disciplines that they would be bound by. Perhaps the most obvious manifestation of the ‘GATT a la carte’ was the ‘side agreements’ negotiated among developed countries (mostly Organisation for Economic Corporation and Development

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6 The 17 Articles are subdivided under 16 headings - Establishment of the Organization, Scope of the WTO, Functions of the WTO, Structure of the WTO, Relations with Other Organizations, The Secretariat, Budget and Contributions, Status of the WTO, Decision-Making, Amendments, Original Membership, Accession, Non-Application of Multilateral Trade Agreements between Particular Members, Acceptance, Entry into Force and Deposit, Withdrawal, and Miscellaneous Provisions.


10 John Toye and Richard Toye, op cit. fn.8.

11 This was typified by the 1971 10-year waiver of the MFN provisions in the GATT and the ‘Enabling Clause’ of 1979 that made the 10-year waiver permanent.
(OECD) countries) during the 1979 Tokyo Round. These ‘side agreements’ (i.e., the Tokyo Round Codes) were mostly plurilateral in nature and were thus only binding on the countries that acceded to them.

The ability to pick and choose the rules to be bound by and the flexibilities provided by special and differential provisions in the GATT era had a corresponding impact on the participation of developing countries in decision-making, in that, if they did not wish to be bound by a rule (as was the case in a lot of the Tokyo Round Codes), they did not have to concern themselves with the process of decision-making that culminates in the rule.

The establishment of the principle of single undertaking in the WTO Agreement constitutes a very significant departure from the GATT a la carte. Article II:2 of the WTO Agreement states that:

The agreements and associated legal instruments included in Annexes 1, 2 and 3 (… referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.

Thus with the exception of specific derogations in particular multilateral trade agreements (MTAs), all MTAs are binding on all members. Original members of the WTO (i.e., Contracting Parties of the GATT at the inception of the WTO) and acceding members must accept all MTAs as a single package or a single undertaking. If the provisions of Article II.2 are not revised, it would mean that even future MTAs negotiated by members would become binding on all members. This forestalls the recurrence of the Tokyo Round Codes scenario in the WTO era, though, it must be noted that, the WTO Agreement makes room for plurilateral agreements that are binding only on acceding members to such agreements.

The principle of single undertaking is of fundamental importance to decision-making in the WTO because WTO Members, especially developing and least developed countries, can no longer stand aloof and become partial partakers of the decision-making process. Simply put, the era of pick and choose (GATT a la carte) is over. Since all multilateral rules are binding on all Members, it becomes imperative for all Members to participate in the process of decision-making so that their interests will be reflected in any decisions that are multilateral in nature.

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12 WTO Secretariat, ‘Historic Development of the WTO Dispute Settlement System’, http://www.wto.org/english/tratop_e/dispu_e/dispsettlement_e/c2s1p1_e.htm (viewed on 05/05/11).

13 ibid.


16 Article II:2 of the Agreement Establishing the World Trade Organisation.

17 For example, under Article 7:3 of the Agreement of Safeguards, the maximum period that WTO Members are allowed to apply safeguard measures on exports or imports at a time is 8 years. However, Article 9:2 grants a further concession to developing countries to apply safeguard measures for a maximum of 10 years at a time. This derogation is however typical of special and differential provisions in place in the WTO era as against those achieved under the GATT 1947. Here, the derogation does not pertain to an absolute waiver. The derogation rather pertains to an extended period for applying the waiver. Thus, at the expiry of the extended period, the provision(s) under which waiver was applied becomes binding.

18 Article II:3 of the WTO Agreement.
The Increased/Increasing Remit of the International Trade Regime

By the time the Uruguay Round was being metamorphosed into the WTO, other competing issues like sustainable development and environmental protection had become pivotal concerns in the international arena, thus prompting debate about the role trade could play in addressing these issues. Thus the varied interests at play at the birth of the WTO were not merely those of ideological differences between the paradigms of economic development or industrialisation, but also, issues of ethical exploitation of natural resources and the role that both trade and the international organisation responsible for trade should play in tackling issues of environmental degradation.

The polarised interests and paradigms within the trade regime are succinctly captured in the language of the preamble to the WTO Agreement and reveals much about the tensions, political horse-trading and competing interests that had to be ironed-out in order for the WTO to materialise. For example, the balance between economic and environmental interests is captured in the first paragraph of the preamble. Reference is made to the economic objective of “ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services” while at the same time counter-balancing this with the environmental-developmental objective of “allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development”. Perhaps a more telling manifestation of the politics and polarities of interests at play is summed up in the following preambular provision that places equal value on the need to economically exploit national natural resources and that of protecting the environment:

… seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

The principle of reciprocity and mutuality of advantage, a key principle in the GATT 1947, is reinforced in the preamble of the WTO Agreement but in doing so, there is also equal recognition devoted to the need to ensure that developing and least developed countries secure a share in the growth of international trade in a manner that is commensurate with their development needs. Again, the preamble advocates a balance in the need to integrate developing and least developing countries into the multilateral trading system while being sensitive to their peculiar developmental needs.

Of note, is the fact that the advent of the WTO came with new areas of trade regulation at the multilateral level, notably the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) and General Agreement on Trade in Services (GATS). Some disciplines like rules on subsidies, antidumping and safeguard measures that existed in a rudimentary nature in the GATT were developed into ‘self-standing’ multilateral agreements under the

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20 Ibid.
21 Preamble to the WTO Agreement.
22 Ibid.
23 Ibid.
24 Ibid.
25 Annex 1C of the WTO Agreement.
26 Annex 1B of the WTO Agreement.
Apart from the inclusion of new rules and the development of existing ones, newer issues now competing for entry into the multilateral framework include rules on labour standards and competition policy. The increased and increasing remit of the WTO’s regulatory landscape have concomitant implications for decision-making as an increased remit would inevitably extend the regulatory reach of the WTO into areas that, hitherto, would have been the preserve of the state.

**Overview of Some Key Provisions in the WTO Agreement**
In the subsections below, some salient provisions of the WTO Agreement are briefly discussed.

**Status of the WTO**
Articles I and VIII of the WTO Agreement, *inter alia*, establish the WTO as an international organisation with legal personality. Though this may seem quite obvious and normal, it marks a fundamental difference between the GATT 1947 and the WTO. This is because the GATT was technically not an international organisation with legal personality but an agreement among states that was provisionally applied for almost 50 years.

In consonance with the provisions establishing the WTO as an international organisation, Article VI establishes the WTO Secretariat headed by the Director-General. The functions of the Director-General and the staff of the Secretariat are purely administrative in nature and must be free from any national or external influences. Consequently, the Director-General and the Secretariat staff do not (or should not) have any influence on decision-making in the WTO.

Membership of the WTO is not restricted to states. A common customs territory that has autonomy over its external commercial relations and has the competence to assume other responsibilities in WTO membership can accede to the WTO Agreement. This has made it possible for Taiwan, for example, to be a member of the WTO whereas it is yet to be a member of the UN due to disputes about its status as a sovereign state.

**Functions of the WTO**
The WTO is tasked with the responsibility of facilitating the implementation, administration and operation, and furthering the objectives, of the WTO Agreement and the Multilateral
Trade Agreements, while also providing the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.\(^{32}\)

Furthermore, the WTO provides the forum for Members to negotiate on issues relating to their trade relations and the MTAs administered under the WTO and the responsibility of administering both the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU) and the Trade Policy Review Mechanism (TPRM).\(^{33}\) The WTO is also to cooperate with the International Monetary Fund (IMF) and the World Bank so as to enhance coherence in global economic policy making.\(^{34}\)

**Structure of the WTO and its Bodies**

The Ministerial Conference occupies the highest position in the WTO institutional structure. The Conference is composed of representatives of all Members of the WTO at the level of government ministers. Its scope of authority extends to the ability to decide on all matters relating to the MTAs and the WTO Agreement.\(^{35}\) The Ministerial Conference meets at least once every two years and the breadth of power accorded to it is summarised amorphously as follows: “[T]he Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect.”\(^{36}\)

The General Council operates beneath the Ministerial Conference in the WTO institutional structure and consists of representatives from all WTO Members.\(^{37}\) It meets more frequently (i.e. as appropriate) in between the meetings of the Ministerial Conference and is empowered to meet to discharge the functions of the Ministerial Conference between meetings of the Conference.\(^{38}\) This in effect means that the General Council can take decisions on behalf of the Ministerial Conference as its decision-making powers can be exercised by the General Council. Membership of the General Council is open to all WTO Members. The General Council also meets as and when appropriate to discharge the responsibilities of the Dispute Settlement Body (DSB) and the Trade Policy Review Body (TPRB).\(^{39}\) Though the Ministerial Conference is the most powerful body in the WTO, most of the decision-making powers are exercised by the General Council as it operates in four separate capacities depending on the function at hand – i.e. meeting in its own capacity, in the capacity of the Ministerial Conference, convening as the DSB and also as the TPRB.

\(^{32}\) Article III:1 of WTO Agreement.

\(^{33}\) Article III:2-4 of the Agreement Establishing the WTO.

\(^{34}\) Article III:5 of the Agreement Establishing the WTO.

\(^{35}\) Article IV:1 of the Agreement Establishing the WTO. The following are some of the important decisions and declarations made by the Ministerial Conference during meetings between 1996 and 2004 Ministerial Declaration adopted in Singapore (WT/MIN(96)/DEC); Ministerial Declaration on Trade in Information Technology Products adopted in Singapore (WT/MIN(96)/DEC/16); Ministerial Declaration adopted in Geneva (WT/MIN(98)/DEC/1); Ministerial Declaration on electronic commerce adopted in Geneva (WT/MIN(98)/DEC/2); Ministerial Declarations adopted in Doha (WT/MIN(01)/DEC/1); Ministerial Declaration on the TRIPS Agreement and Public Health adopted in Doha (WT/MIN(01)/DEC/2); Decision on Implementation-Related Issues and Concerns, adopted in Doha (WT/MIN(01)/17); Decision on Procedures for Extensions under Article 27.4 of the SCM Agreement for Certain Developing Country Members, adopted in Doha (G/SCM/39); Decision on the ACP-EC Partnership Agreement, adopted in Doha (WT/MIN(01)/15); and Decision on Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas, adopted in Doha (WT/MIN(01)/16).

http://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_02_e.htm#fntext69 (viewed on 17 July 2011).

\(^{36}\) Article IV:1 of the Agreement Establishing the WTO.

\(^{37}\) Article IV:2 of the WTO Agreement.

\(^{38}\) ibid.

\(^{39}\) Article IV:3 of the WTO Agreement.
The MTAs dealing with the substantive trade issues in the WTO have been annexed to the WTO Agreement under Annex 1. Annex 1A contains MTAs related to trade in goods, Annex 1B contains the General Agreement on Trade in Services (GATS) and Annex 1C contains the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement). Of note is the fact that the GATT has been incorporated under Annex 1A as one of the MTAs dealing with trade in goods. It has been renamed GATT 1994 and is legally distinct from the GATT 1947 though the text substantially remains unchanged. The Annex 1 MTAs, with the Annex 2 and Annex 3 MTAs, form the three ‘pillar’ structure upon which regulation of trade in the WTO is founded. Thus the WTO Agreement provides for one Council each to have oversight responsibilities of each of the three Annex 1 category MTAs. There is therefore a Council for Trade in Goods, a Council for Trade in Services and a Council for TRIPS. These MTA specific Councils operate under the guidance of the General Council. There are no specific Councils for the MTAs in Annex 2 and Annex 3. The General Council performs the role of a ‘Council’ for the Annex 2 and 3 MTAs when it sits as the Dispute Settlement Body and the Trade Policy Review Body respectively. There are a host of committees and working groups that operate under each of the MTA specific Councils.

The 2001 Doha Ministerial Declaration established a Trade Negotiations Committee (TNC) responsible for supervising the overall conduct of the Doha Round trade negotiations. The TNC, like the MTA specific councils, operates under the direct authority of the General Council and does not have decision-making powers. It only has supervisory powers with respect to the Doha Round trade negotiations and the outcomes of the negotiations must be accepted by all members in order to have a binding effect. The TNC is open to all WTO members and is chaired by the Director General. Given the mandate of the TNC, it remains to be seen whether it will be maintained as a permanent body, a quasi-permanent body which is revived during later Rounds of trade negotiations, or dismantled altogether when the Doha Round comes to an end.

In summary, the institutional structure of the WTO consists of the Ministerial Conference at the top of the hierarchy, the General Council (which also sits as the Dispute Settlement Body (DSB) and the Trade Policy Review Body (TPRB)), the three Councils for Trade in Goods, Services and TRIPS, committees, and working groups. The TNC has been specially established by the Doha Ministerial Declaration to supervise the conduct of the Doha Round. The WTO Secretariat operates within this broader structure to provide the needed support.

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40 General Agreement on Tariffs and Trade 1994, Agreement on Agriculture, Agreement on the Application of Sanitary and Phytosanitary Measures, Agreement on Technical Barriers to Trade, Agreement on Trade-Related Investment Measures, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (i.e. Agreement on Anti-Dumping), Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (i.e. Agreement on Customs Valuation), Agreement on Preshipment Inspection, Agreement on Rules of Origin, Agreement on Import Licensing Procedures, Agreement on Subsidies and Countervailing Measures, Agreement on Safeguards. The Agreement on Textiles and Clothing expired in 2005 and thus no longer applicable.
41 i.e. Understanding on Rules and Procedures Governing the Settlement of Disputes.
42 i.e. Trade Policy Review Mechanism.
43 Article IV:5 of the WTO Agreement.
44 ibid.
45 Article IV:2 of the WTO Agreement.
46 Article IV:3 of the WTO Agreement.
47 Article IV:7 of the WTO Agreement.
48 Paragraph 46 of the Doha Ministerial Declaration.
administrative support to the various organs of the WTO.\textsuperscript{50} Of significant note is the role of the Director General as the Chairman of the TNC.

Plurilateral trade agreements are also annexed to the WTO Agreement under Annex 4 and contain rules relating to their administration. The status of the WTO Agreement vis-à-vis that of the annexed MTAs is one of superiority in favour of the WTO Agreement. Where there is a conflict between the WTO Agreement and a provision in any of the annexed Multilateral Trade Agreements, the provision of the WTO Agreement prevails to the extent of the conflict.\textsuperscript{51}

This provision shows the ‘constitutional’ importance of the WTO Agreement. It constitutes the foundational ‘norm’ and as such its provisions take precedence over all other ‘norms’ provided for in the MTAs annexed to the WTO Agreement. This, evidently, is in spite of the fact that the bulk of the WTO legal texts and trade policies are to be found in the Annex 1 MTAs.

**Decision-Making in the WTO**

One of the most important provisions in the WTO Agreement is that of the decision-making process, contained in Articles IX and X. Further provisions relating to decision-making on disputes among Members are contained in Annex 2 under the Dispute Settlement Understanding (DSU). The WTO Agreement maintained some of the decision-making procedures practiced under the GATT 1947\textsuperscript{52} and also introduced new procedures resulting in a diversity of decision-making processes with varying degrees of flexibilities and complexities or restrictions.

Foundational to decision-making in the WTO is the principle of one-Member-one-vote.\textsuperscript{53} Thus even though the European Union, for example, is allowed to use bloc voting, the number of votes accorded to it must always reflect the number of its members who are members of the WTO.\textsuperscript{54} Various forms of voting requirements are provided for under Articles IX and X and in the MTAs. Details of these voting requirements are discussed below. Another foundational provision in WTO decision-making is the virtual duopoly given to the Ministerial Conference and the General Council. These two bodies are mainly the ones vested with decision-making powers and membership of these bodies is open to all WTO Members.\textsuperscript{55} Though subordinate bodies like the Councils for Trade in Goods, Services and TRIPS exercise some decision-making powers, they operate under the supervision of the General Council. Thus even where adjudicating Panels and the Appellate Body decide a case between two or more disputing Members under the DSU, the final say – i.e., whether to adopt the decision of the Panel or the Appellate Body – falls on the General Council sitting as the DSB.\textsuperscript{56} *Inter alia,* the combination of the provisions on one-Member-one-vote and the duopoly of decision-making by the Ministerial Conference and the General Council make the WTO a ‘member-driven’ organisation.\textsuperscript{57}

\textsuperscript{50} Peter Van den Bossche, op cit. fn.19.

\textsuperscript{51} Article XVI:3 of the WTO Agreement.

\textsuperscript{52} see Articles IX:1 and XVI:1 of the WTO Agreement.

\textsuperscript{53} Article IX:1 of the WTO Agreement.

\textsuperscript{54} ibid.

\textsuperscript{55} Article IV of the WTO Agreement.

\textsuperscript{56} Article 2:4 of the Dispute Settlement Understanding.

\textsuperscript{57} WTO Secretariat, ‘Understanding the WTO: The Organization, Whose WTO is it Anyway?’ [http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm) (viewed on 10 April 2011).
Provisions on the process of decision-making in the WTO vary depending on the type of decision. Five main types of decisions can be identified. These are: decisions on various matters; decisions on interpretation of the WTO Agreement and the MTAs; decisions on waivers of responsibilities under the WTO Agreement and the MTAs; decisions on amendments to the WTO Agreement and the MTAs; and negotiation of new MTAs.

**Decisions on Various Matters**

Article IX:1 is the cornerstone of the WTO decision-making system, and provides in relevant part that:

> The WTO shall continue the practice of decision-making by consensus followed under the GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. (…) Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.

The consensus and the simple majority procedures of decision-making provided for in Article IX:1 form the ‘normal’ process to be used in WTO decision-making. Thus if no other specific procedure is stipulated in the WTO Agreement or the MTAs, decisions of the Ministerial Conference and the General Council are taken by consensus or a simple majority of votes cast if at the first instance consensus fails. The caption, ‘decisions on various matters’, stems from the fact that the just quoted Article IX:1 provision does not specify the type of decisions of the Ministerial Conference and General Council that require the use of a simple majority of votes cast or a consensus.

In spite of the provision for a simple majority in decision-making, and other various decision-making procedures, the use of consensus has become the default procedure in the WTO. By dint of the wording of the consensus provision in Article IX:1 (quoted above), this procedure pervades almost all subject matters that require decision-making in the WTO.

Consensus is deemed to have been reached if no Member present formally raises an objection to the decision being taken. Consensus here is different from unanimity in that it does not require that all Members must vote in favour or accept a proposed decision, but rather that if no Member present formally raises an objection to a proposed decision, then consensus is deemed to have been achieved. In effect, silence means consent.

**Decision on Interpretations**

The adoption of decisions on interpretations of the WTO Agreement and the MTAs are taken by three-fourths majority of votes cast. Regarding interpretations of Annex 1 MTAs (i.e. MTAs relating to trade in goods, services, and intellectual property rights), the Ministerial

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59 Article IX:1 of the WTO Agreement; see also John H. Jackson, ibid.
60 Article IX:2 of the WTO Agreement.
61 Article IX:3-4 of the WTO Agreement.
62 Article X of the WTO Agreement.
63 Article IX:1 of the Agreement Establishing the WTO.
64 Amrita Narlika, op. cit. fn.9.
65 Footnote 1 of Article IX:1 of the WTO Agreement.
66 Article IX:2 of the WTO Agreement.
Conference and the General Council adopt interpretations after receiving recommendations from the Council with specific oversight responsibility of the MTA at issue. Thus, interpretations of the TRIPS Agreement, for example, can only be adopted by the Ministerial Conference or the General Council after receiving recommendations from the Council for TRIPS.

By vesting in the Ministerial Conference and the General Council the exclusive power to adopt interpretations of the WTO Agreement and the MTAs, these two bodies wield the authority to override interpretations of the said Agreements that proceed from Panel or Appellate Body decisions. In effect, the final say regarding interpretations are not ‘judicial’ but rather ‘legislative’ in nature and hence falls under the purview of the decision-making bodies of the WTO – the Ministerial Council and the General Council. This however does not mean that decisions of Dispute Settlement Panels and the Appellate Body cannot be relied upon in future cases to aid clarification of WTO legal texts during disputes among Members. What it means is that decisions of Panels and the Appellate Body do not have the binding force of rule-setting precedence as it is only the Ministerial Conference and the General Council that possess the power to adopt interpretations and make law. Decisions of Panels and the Appellate Body are restricted purely to resolving disputes and not that of rule-making. This view is supported by the Appellate Body’s reasoning in the US – Wool Blouses case. The Appellate Body held that:

… Article 3.2 of the DSU states that the Members of the WTO ‘recognize’ that the dispute settlement system ‘serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law’. Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to ‘make law’ by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.

Affirmation of the reasoning of the Appellate Body is again found in its decision in the Japan – Alcoholic Beverages II. In this case, the Appellate Body did not concur with the Panel in its opinion that Panel Reports adopted by the Dispute Settlement Body amounted to “subsequent practice” as provided under Article 31 of the Vienna Convention on the Law of Treaties. The basis for the Appellate Body’s rejection of the Panel’s opinion was based on the provisions of Article IX:2 of the WTO Agreement which invests exclusive power in the

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67 William J. Davey, op cit. fn.2.
69 ibid, pp. 19–20.
71 Appellate Body Report on Japan – Alcoholic Beverages (Article 31:1 and 3 of the Vienna Convention of the Law of Treaties provides that “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 3.There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation).
Ministerial Conference and the General Council to adopt interpretations of the WTO Agreement and the annexed MTAs. The Appellate Body thus opined that:

We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994. There is specific cause for this conclusion in the WTO Agreement. Article IX:2 of the WTO Agreement provides: ‘The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements’. Article IX:2 provides further that such decisions ‘shall be taken by a three-fourths majority of the Members’. The fact that such an ‘exclusive authority’ in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.

An example of an ‘authoritative’ interpretation within the terms espoused by the Appellate Body in Japan – Alcoholic Beverages II case is the Ministerial Conference’s Declaration on the TRIPS Agreement and Public Health, adopted on 14 November 2001. The Ministerial Conference stated in this Declaration that:

We agree that the TRIPS Agreement does not and should not prevent members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO members’ right to protect public health and, in particular, to promote access to medicines for all.

**Decision on Waivers**

Decisions on waivers of obligations accruing from the WTO Agreement or the MTAs are taken by three-fourths majority of votes. It must be noted though that in spite of this provision on voting, the consensus procedure applies to decisions on waivers as well. In fact, before the three-fourths majority voting procedure is used, the consensus procedure must first be used and it is only when consensus is not reached that the stated voting procedure is resorted to. With regards to the consensus procedure the General Council Decision on “Decision-Making Procedures Under Articles IX and XII of the WTO Agreement” adopted on 15 November 1995 states that:

On occasions when the General Council deals with matters related to requests for waivers or accessions to the WTO under Articles IX or XII of the WTO Agreement respectively, the General Council will seek a decision in accordance with Article IX:1. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting under the relevant provisions of Articles IX or XII.

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72 ibid.
73 ibid. at 13.
75 Para. 4 of WTO Ministerial Conference Declaration on the TRIPS Agreement and Public Health.
76 Article IX:3 of the WTO Agreement.
If a request for waiver relates to an Annex 1A, 1B, or 1C MTA, the request must first be submitted to the Council that has oversight responsibility of the MTA at issue. For example, if a request for waiver relates to a provision under the GATT 1994, the request must first be submitted to the Council for Trade in Goods. Upon consideration of the request, the relevant Council would then submit a report to the Ministerial Conference (or the General Council) within 90 days of receiving the request. The Ministerial Conference (or the General Council) then decides whether to grant the waiver or not, based on the consensus procedure or the three-fourths majority voting procedure described above. However, if the request for a waiver relates to the extension of a transitional period for the implementation of an MTA, then the only decision-making procedure to be used is the consensus procedure.

An example of a waiver decision made by the Ministerial Conference is the waiver granted to the EC from the MFN provision in Article I:1 of the GATT 1994 to enable the EC to accord preferential tariff treatment to products from African, Caribbean and Pacific states (ACP states). The Ministerial Conference Decision on the ACP-EC Partnership Agreement provides among others that:

Subject to the terms and conditions set out hereunder, Article I, paragraph 1 of the General Agreement shall be waived, until 31 December 2007, to the extent necessary to permit the European Communities to provide preferential tariff treatment for products originating in ACP States as required by Article 36.3, Annex V and its Protocols of the ACP-EC Partnership Agreement, without being required to extend the same preferential treatment to like products of any other member.

**Decision on Amendments**

Any member of the WTO has the right to initiate a proposal to amend provisions in the WTO Agreement or any of the Annex 1 MTAs. The Councils for Trade in Goods, Trade in Services and TRIPS are also empowered to present proposals for amendment of provisions in the MTAs that they have oversight responsibilities. Upon receipt of a proposal for amendment, the Ministerial Conference (or General Council acting on behalf of the Ministerial Conference) normally has a time frame of 90 days to decide whether to submit the proposal to Members for acceptance.

The decision to submit a proposal for amendment to Members is taken by consensus. Where consensus fails, a vote of two-thirds majority is required. Though the consensus and two-thirds majority procedures are the ‘normal’ processes for taking decisions on amendments, Article X provides for an intricate list of special and additional procedures. For example, amendment of Articles IX and X of the WTO Agreements (i.e. provisions relating to

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79 Article IX:3(b) of the WTO Agreement.
80 ibid.
81 Footnote 4 of Article IX:3(b) of the WTO Agreement (an example of a transitional period for implementation of an MTA is Article 65:2 of the TRIPS Agreement which provided a four-year transitional period for the implementation of the TRIPS Agreement by developing country Members while Article 66:1 provided least developing countries a 10-year transitional period).
83 ibid at para. 1.
84 Article X:1 of the WTO Agreement.
85 ibid.
86 Article X:1 of the WTO Agreement.
decision-making and amendments respectively) can only be made by a unanimous acceptance by all WTO Members. The same requirement of unanimity applies to acceptance of amendments to Articles I and II of the GATT 1994 (i.e. provisions on most favoured nation treatment and bound concessions), Article II:1 of the GATS and Article 4 of the TRIPS Agreement (i.e. provisions on most favoured nation treatment). The requirement of unanimity in the just-mentioned provisions shows their fundamental importance in WTO law and policy. Evidently, the GATT, GATS and TRIPS provisions on most favoured nation relate to the principle of non-discrimination among WTO Members, which is, perhaps, the most important foundational pillar of the international trade system. It therefore stands to reason why unanimity is required to amend these provisions on non-discrimination.

A distinction must be made between a decision of the Ministerial Conference (or the General Council acting on behalf of the Ministerial Conference) either by consensus or three-thirds majority to submit a proposal for amendment to Members and the acceptance of the proposal by Members based on unanimity. The decision to submit the proposal to Members for acceptance is just one stage of the decision-making process and the actual acceptance by unanimity marks the completion of the decision-making process. Due to the unanimity requirement in decisions on amendment of the above stated provisions in the WTO Agreement and the MTAs, it is quiet inconceivable that a proposal for amendment that was decided upon by voting instead of consensus would be unanimously accepted by Members. If two-thirds of the Ministerial Conference, for example, voted in favour of submitting a proposal of amendment to Members for acceptance, it is quiet difficult to see how the one-third who voted against it would then suddenly turn around and unanimously accept the amendment, unless, perhaps, some pressure or diplomatic ‘horse-trading’ is brought to bear on them.

A different procedure applies for amendments that alter rights and responsibilities in the WTO Agreement (i.e. with the exception of Articles IX and X, discussed above), multilateral trade agreements relating to goods (Annex 1A MTAs), Parts I, II, and III of the GATS, and the TRIPS Agreement. Amendments that have the effect of altering rights and obligations of Members in the stated Agreements are binding only on Members that accept them. To make such amendments effective, two-thirds of Members must accept them. Objecting Members are however not barred from changing their position as they can decide to accept the amendments at a later date.

In effect Members who refuse to accept amendments that alter rights and obligations have an indirect waiver from adhering to the altered rights and obligations. However, the Ministerial

87 Article X:2 of the WTO Agreement.
88 ibid.
89 Article X:3 of the WTO Agreement.
90 ibid.
91 Article X:5 of the WTO Agreement (Parts I, II, and III of the GATS fall under the following headings - Scope and Definition, Most-Favoured-Nation Treatment, Transparency, Disclosure of Confidential Information, Increasing Participation of Developing Countries, Economic Integration, Labour Markets Integration Agreements, Domestic Regulation, recognition of certificates and licenses, Monopolies and Exclusive Service Suppliers, Business Practices, Emergency Safeguard Measures, Payments and Transfers, Restrictions to Safeguard the Balance of Payments, Government Procurement, General Exceptions, Security Exceptions, Subsidies, Specific Commitments, Market Access, National Treatment, and Additional Commitments).
92 Article X:3 of the WTO Agreement.
93 Article X:3 of the WTO Agreement.
94 ibid.
Conference can vote by a three-fourths majority in support of the position that, the amendment:

… is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference.\textsuperscript{95}

Consequently, though on the face value it appears that Members have a right not to accept amendments that alter rights and responsibilities, such a right may be exercised at the peril of either being voted out of the WTO or a voluntary withdrawal from the WTO.\textsuperscript{96}

Amendments of provisions in the WTO Agreement, the TRIPS Agreement and goods-related multilateral trade agreements (i.e. Annex 1A)\textsuperscript{97} and Parts IV, V and VI of the GATS\textsuperscript{98} that do not have the effect of altering rights and obligations of Members become effective and binding on all Members upon acceptance by two-thirds of Members.\textsuperscript{99}

Amendments of the Dispute Settlement Understanding and the Trade Policy Review Mechanism is effected by a consensus decision of the Ministerial Conference without any further need to submit the decision to Members for acceptance.\textsuperscript{100}

\textit{Negotiation of New Multilateral Trade Agreements}

A fifth type of decision that may be identified is the negotiation of new MTAs as the WTO Agreement creates a forum for Members to advance their trade relations.\textsuperscript{101} In the process of Members advancing their trade relations, as mandated by the WTO Agreement, an obvious offshoot of this provision is the negotiating of new MTAs.\textsuperscript{102} The current Doha Round of trade negotiations thus falls under this specie of decision-making in the WTO. However, if one wants to be pedantic the argument could be made that the Article IX:1 provision on various matters (discussed above) is all-encompassing enough to cover the negotiation of new multilateral trade agreements, hence obviating the need to identify this as a separate specie of decision-making in the WTO.

\textbf{Concluding Remarks on the Descriptive Account}

The above descriptive account of selected provisions in the WTO Agreement and more specifically, the WTO decision-making process has sought to present the functioning of the WTO based on provisions in the WTO Agreement. Based on just the textual provisions presented so far, certain fundamental conclusions can be deduced regarding how the WTO decision-making system appears to work at the formal level.

\textsuperscript{95} Article X:3 of the WTO Agreement.
\textsuperscript{96} ibid.
\textsuperscript{97} ibid.
\textsuperscript{98} Article X:5 of the WTO Agreement (Parts IV, V, and VI of the GATS fall under the following headings - Negotiation of Specific Commitments, Schedules of Specific Commitments, Modification of Schedules, Institutional Provisions, Consultation, Dispute Settlement and Enforcement, Council for Trade in Services, Technical Cooperation, Relationship with Other International Organizations, Denial of Benefits, Definitions, Annexes).
\textsuperscript{99} Article X:4 of the WTO Agreement.
\textsuperscript{100} Article X:8 of the WTO Agreement.
\textsuperscript{101} Article III of the WTO Agreement.
\textsuperscript{102} John H. Jackson, op cit. fn.58.
Firstly, independent of size, economic might or output in international trade, the WTO operates a policy of one-member-one-vote. Thus China with a population of 1.34 billion, constituting 21.7 per cent of the total population of the WTO, has one vote just as Liechtenstein with a population of 35,236, which is 0.001 per cent of the total population of the WTO. Therefore, the principle of sovereign equality of states appears to work in the WTO decision-making process. Giants (e.g. China) and dwarfs (e.g. Liechtenstein) in the WTO are equal by dint of their status as states (or WTO Members).

Secondly, based on the textual provisions, the pervasive use of the consensus principle appears, at the formal level, to ensure a fair representation of diverse interests. The fact that any Member that disagrees with a proposed decision can raise a formal objection against the decision, in which case consensus would not be achieved, should reasonably be a guard against the usurpation or abuse of the decision-making process by some Members. Even if the consensus procedure is not used, the WTO Agreement provides for super-majoritarian requirements in its decision-making processes – for example, three-fourths majority in decisions on interpretations and waivers, two-thirds majority in decisions on amendments and unanimity in decisions on amendments that alter rights and responsibilities. The consensus, unanimity, and high majoritarian thresholds in decision-making should therefore provide a safeguard against ‘dictatorship’.

Consequently, the textual provisions of the WTO Agreement ensure state consent and sovereign equality at the formal level of WTO decision-making. Even where voting is used, states accede to the WTO fully aware of such decision-making procedures and as such, have given prior consent to decisions that may go against their preferences through their accession. There is also the possibility of withdrawal from the WTO if a decision seems objectionable to a Member, or the use of waivers to seek non-application of some provisions in the MTAs and the WTO Agreement. A typical example of the use of waivers in this regard is the Enabling Clause which permanently waives the application of key MFN provisions of the GATT to enable the special and differential treatment of developing countries under the Generalised System of Preferences and the Generalised System of Trade Preferences. The principle of special and differential treatment of developing countries can thus be seen as a body of provisions that allow developing countries to participate in the WTO system on terms that are acceptable to them. Conversely, the developed country Members of the WTO who allow the special and differential of developing countries through, inter alia, the Enabling Clause, do so as an expression of their ‘state consent’.

Thirdly, the decision-making bodies of the WTO (the Ministerial Conference and the General Council) are opened to all Members and so are the Councils for TRIPS, Trade in Goods, and Trade in Services. This makes the WTO a member-driven organisation. In effect, the WTO as a body is wholly intergovernmental in nature as there are no supranational institutions within its structure. As argued above, even decisions of Dispute Settlement Panels and the Appellate Body have the effect of only clarifying WTO rules which must be accepted by the General Council sitting as the Dispute Settlement Body. Importantly, acceptance of such clarifications

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105 See Articles IX and X of the Agreement Establishing the World Trade Organisation.
does not result in rule setting. Thus, at the formal level, the WTO is not just member-driven, it is a ‘Members only club’. The Secretariat exists solely to provide administrative support to this ‘club’. All the various types of decision-making procedures identified above are exclusively entrusted to the institutions whose memberships are restricted only to WTO Members – i.e. the Ministerial Conference and the General Council. These provisions of the WTO Agreement go to buttress the operation of state consent in the WTO and by so doing, ensure sovereign equality of states (or Members).

Based purely on the textual provisions analysed above, all appears to bode well with the WTO decision-making process, at least from a standpoint of participatory democracy achieved through the operation of state consent in decision-making and the sovereign equality of Members. Whether this standpoint is defensible when the informal processes of decision-making are analysed is another matter.

Following these deductions, the next segment of this article will engage in an analysis to ascertain whether the formally fair provisions on decision-making in the WTO Agreement mirror the informal processes of decision-making.

**Problems with the WTO Decision-Making Process**

The first segment of this article engaged in a more descriptive account of the WTO decision-making process without analysing some of the problems and challenges of the system and their possible reform. This segment is divided into three further subsections. The first looks at the problems and challenges with the consensus procedure and the single undertaking requirement. It also conducts an analysis of whether the consensus and single undertaking requirements should be reformed. The second subsection focuses on the informal processes of decision-making in the WTO and the opportunities and challenges they present. The third analyses the implications of WTO decision-making for the concepts of sovereign equality of states and the special and differential treatment of developing countries in the WTO.

**The Consensus and Single Undertaking Requirements**

As observed above, 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. This has rendered discussion on almost all the other procedures of decision-making in the WTO an academic enterprise as they are hardly used. The use of consensus however presents some significant problems for the WTO’s decision-making system.

Currently, the WTO’s membership stands at 156. Reaching consensus among 156 Members is a Herculean task when one considers the fact that each of these Members has specific trade interests. The high level of heterogeneity of interests thus makes the consensus principle difficult to work. The negotiations in the current Doha Round has, for instance, stretched for more than 10 years due, *inter alia*, to the inability to reach consensus on critical issues on export competition, domestic support and market access in

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109 The Doha Round (i.e. Doha Development Agenda) was launched during the fourth session of the Ministerial Conference held from 9th to 14th November in Doha, Qatar in 2001.
agriculture.\textsuperscript{110} Even prior to the current difficulties with achieving consensus on the regulation of agriculture, the Ministerial Conferences in Seattle\textsuperscript{111} and Cancun\textsuperscript{112} ran into deadlocks, prompting Pascal Lamy, then EU Trade Commissioner, and now WTO Director-General, to label the WTO decision-making system as medieval.\textsuperscript{113}

The increased membership and heterogeneity of trade interests aside, the need to secure agreements consistent with Member’s trade needs has resulted in an increased expertise in the ‘hows’ of negotiating, hence making participation by weaker and poorer States in negotiating trade agreements less nominal.\textsuperscript{114}

It is worthy of note though, that the fact that the WTO has 156 Members does not mean that heterogeneous trade needs will result in 156 different positions on trade issues that are deliberated within the WTO decision-making process. The practice in the WTO indicates that Members usually coalesce into groupings that reflect similarities of trade interests.\textsuperscript{115}

However, even in situations where Members congregate into issue groups to advance homogeneous agendas, there would exist other groups that have opposing views and this presents the same difficulty, if not a greater one. For instance, while the Cairns Group\textsuperscript{116} comprise agricultural exporting WTO Members with interest in the liberalisation of agricultural trade, the G-10\textsuperscript{117} are interested in agricultural trade being treated in a special manner due to non-trade issues related to agriculture. The obvious conflicts of different interests that result from the Cairns Group’s position and that of the G-10 is obvious and can only be resolved in a compromise of positions from both sides if consensus is to be achieved.

The sensitive nature of negotiations on agricultural trade in the Doha Round has spawned over 20 coalitions\textsuperscript{118} that have presented proposals and positions on the regulation of agriculture in the WTO.\textsuperscript{119} Examples of some of these groups include the Cairns Group; the G-10; G-20 (interested in more ambitious reform of agriculture in developed countries and

\textsuperscript{111} Third WTO Ministerial Conference held in Seattle, Washington State, USA, from 30 November to 3 December 1999.
\textsuperscript{112} Fifth WTO Ministerial Conference held in Cancún, Mexico from 10 to 14 September 2003.
\textsuperscript{114} Peter D. Sutherland, et al, op cit. fn.108.
\textsuperscript{115} See www.wto.org/english/tratop_e/dda_e/meet08_brief08_e/doc for a summary of some of the active groups in the WTO. : see also Amrita Narlikar, International Trade and Developing Countries: Bargaining Coalitions in GATT and WTO, Abingdon: Routledge, (2003).
\textsuperscript{116} The Cairns Group is composed of the following countries - Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa, Rica, Guatemala, Indonesia, Malaysia, New Zealand, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand, Uruguay.
\textsuperscript{117} The Group of 10 (G-10) in the WTO (i.e. Chinese Taipei, Rep of Korea, Iceland, Israel, Japan, Liechtenstein, Mauritius, Norway and Switzerland) is different from the G-10 States that acceded to the General Agreements to Borrow in 1962 to finance the IMF (i.e. Belgium, Canada, France, Germany, Italy, Japan, Sweden, Switzerland, United Kingdom, and United States).
\textsuperscript{118} ibid.
\textsuperscript{119} ibid.
flexibility for developing countries to institute a more limited liberalisation in agriculture);\(^{120}\) G-33 (also known as ‘Friends of Special Products’, it advances the position that developing countries should be given the flexibility to institute limited market opening to agricultural products);\(^{121}\) Cotton-4 (its specific interest is in trade in cotton);\(^{122}\) and Tropical Products Group (its interest lie in greater market access for tropical products).\(^{123}\)

Other groups with a more permanent existence, not established to deal with specific trade issues are also proliferate in the WTO. Examples include the Quad (United States, EU, Canada and Japan); the ACP Group (comprising African, Caribbean, and Pacific States accorded preferences in the EU); African Group (all African members of the WTO); Asia-Pacific Economic Cooperation forum (APEC); Least Developed Countries; G-90 (composed of the African Group, ACP Group and Least Developed Countries);\(^ {124}\) and the G-6 (Australia, Brazil, European Union, India, Japan, United States).

Through the various groupings weaker states that may not have had the confidence and leverage to defend their interests alone do so by aligning with others to pool their strengths. However, under the consensus procedure, ability to pool strengths does not ensure the success of the position the group stands for, as a lack of consensus from opposing groups often results in a stalemate. In fact, all it takes is an objection from a single Member to block consensus. Each WTO Member effectively wields a veto power under the consensus procedure.

Also, though the building of coalitions can narrow the heterogeneity of interests in the WTO, the proliferation of groups conversely shows the level of diversity of trade interests within the WTO and the concomitant difficulty of reaching consensus among these groups.

For developing countries, though they can, and do pull their strengths together, they would still need the consent of developed countries to push through their agendas.\(^ {125}\) With regards to the participation of developing countries in the WTO decision-making process and their ability to effectively influence the policy direction of the WTO, it can be said that whereas groupings give them a stronger united voice in decision-making, the consensus procedure disables them from using their numerical advantage to steer the direction of WTO policy. Developing countries account for about two-thirds of the total membership of the WTO.\(^ {126}\) If the decision-making bodies of the WTO had resorted to the normal procedure of decision-making – i.e. decision by simple majority of votes cast when consensus fails – developing countries could have been able to use their numerical strength to their advantage.

\(^{120}\) The Group of 20 (G-20) is composed of the following States - Argentina, Bolivia, Brazil, Chile, China, Cuba, Ecuador, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Peru, Philippines, South Africa, Tanzania, Thailand, Uruguay, Venezuela, Zimbabwe.

\(^{121}\) The Group of 33 (G-33) is composed of the following WTO Members - Antigua & Barbuda, Barbados, Belize, Benin, Bolivia, Botswana, China, Congo, Côte d'Ivoire, Cuba, Dominica, Dominican Republic, El Salvador, Ghana, Guatemala, Guyana, Haiti, Honduras, India, Indonesia, Jamaica, Kenya, Mauritius, Madagascar, Mongolia, Mozambique, Nicaragua, Nigeria, Pakistan, Panama, Peru, Philippines, St Kitts & Nevis, St Lucia, St Vincent & the Grenadines, Senegal, Sri Lanka, Suriname, Tanzania, Trinidad & Tobago, Turkey, Uganda, Venezuela, Zambia, Zimbabwe.

\(^{122}\) Cotton-4 is composed of four African countries - Benin, Burkina Faso, Chad, Mali.

\(^{123}\) The Tropical Products Group is composed of Bolivia, Bolivarian Republic of Venezuela, Colombia, Costa Rica, Ecuador, El Salvador, Honduras, Guatemala, Nicaragua, Panama, Peru.

\(^{124}\) http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm (viewed on 19 September 2012)

\(^{125}\) See Amrita Narlikar, op cit. fn.116.

\(^{126}\) http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm (viewed on 6 July 2011).
It is also important to note that even within coalitions that represent developing countries, there can be fundamental differences that sometimes cause them to break ranks. A typical example is Brazil’s position on making concessions on non-farm sectors in direct opposition to positions adopted by its key allies in the G-20, (namely India, China, and Argentina) during the 2008 Geneva Ministerial Conference meeting.\(^\text{127}\) Brazil’s interest in gaining better access into the EU and US ethanol markets contributed to its willingness to make concessions contrary to opposing views from other G-20 allies.\(^\text{128}\) Interestingly, it was the perceived lack of willingness of the Cairns Group, (led by Australia) to directly confront the EU and US policies on agricultural subsidies during the Cancun Ministerial that gave Brazil, a member of the Cairns Group, the impetus to lead the establishment of the G-20.\(^\text{129}\) Unlike the Cairns Group which included developed countries like Australia, Canada and New Zealand, the G-20 is made up of developing countries and thus is more aggressive in advancing the negotiating positions of developing countries on agriculture.\(^\text{130}\) Brazil’s breaking of rank with the G-20 due to national trade interests shows that even among developing country coalitions, sometimes mercantilist self-interest takes precedence over group positions. When such splintering of positions emerge, it does not only weaken the ability of developing countries to use their numerical leverage in decision-making, but also makes it more difficult for consensus to be reached.

The cumbersome nature of the consensus process is made more problematic by the requirement of single undertaking.\(^\text{131}\) During the GATT era when developing countries could pick and choose the rules by which they would be bound, they did not exhibit much interest in actively participating in the decision-making process.\(^\text{132}\) They were more active in advancing their interests through special and differential treatment concessions. Developing countries were, for example, conspicuously unrepresented in a lot of the Tokyo Round Codes, as they opted out of the disciplines proceeding from these codes.\(^\text{133}\) Without making much concessions in trade negotiations, developing countries could still benefit from the lowering of tariffs conceded by developed countries under the MFN principle.\(^\text{134}\) The ability to free-ride on the concessions of other Contracting Members meant that developing countries could still derive some benefit from the trade system without being actively involved in decision-making or making reciprocal concessions.\(^\text{135}\) A few developed countries, notably the Quad –


\(^{128}\) ibid.


\(^{130}\) ibid.

\(^{131}\) Article II:2 of the WTO Agreement.

\(^{132}\) Jeffrey J. Schott and Jayashree Watal, op cit fn.15; Peter D. Sutherland, et al, op cit. fn.108.

\(^{133}\) Peter D. Sutherland, et al, op cit. fn.108.

\(^{134}\) Jeffrey J. Schott and Jayashree Watal, op cit. fn.15.

\(^{135}\) Rorden Wilkinson and James Scott, ‘Developing Country Participation in the GATT: A Reassessment’, World Trade Review (2008), 7, pp. 473-510. Wilkinson and Scott however argue that though there is some merit in the assertion that developing countries benefitted from the trade concessions of industrialised countries in the GATT, their participation in the GATT was more active and nuanced than the free-riding argument purports. See also Bhagirath Lal Das, ‘Strengthening Developing Countries in the WTO’, Third World Network, Trade and Development Series No. 8, http://www.twinside.org.sg/title/td8.htm (viewed on 7 August 2012) Lal Das for instance argues that during the GATT era, developing countries made important concessions like the Multi-Fibre Agreement sponsored by industrialised countries to restrict trade in products like textiles, leather and jute. During the Uruguay Round, which was negotiated under the auspices of the GATT, developing countries made major concessions by allowing the inclusion of disciplines like the TRIPS Agreement and the GATS as multilateral agreements. These
United States, EU, Canada, and Japan – could thus push the trade agenda and as developing countries had the opportunity of opt outs, they did not need to be concerned about decisions that would not be binding on them. However, with the operation of the single undertaking requirement, lack of interest in a particular trade discipline does not exist once it is multilateral in nature. The fact that every WTO Member will be bound by multilateral rules has made it imperative for all Members to be interested in all multilateral rules. If one would be bound by a rule, then it stands to reason for one to be interested in the contents of the rule, and to actively participate and influence the negotiations that determine the contents of the rule. Where there are intractable differences of interest, achieving consensus under the principle of single undertaking becomes a virtual impossibility. For example, three out of the four ‘Singapore Issues’ – trade and investment, trade and competition policy, and transparency in government procurement could not go further in the Doha Round due to the failure to achieve consensus regarding the incorporation of the said issues in the Doha Development Agenda. The only Singapore Issue that had the green light was trade facilitation while government procurement proceeded on a plurilateral basis. Of significance to the WTO decision-making system was the fact that the Doha Ministerial Declaration made it a prerequisite for decision on the Singapore Issues to be taken by explicit consensus. The requirement for an explicit consensus negated the ‘silence means consent’ rule that pertains with the normal consensus procedure. Explicit consensus requires that all Members in favour of an issue formally express their support instead of remaining silent to show their support.

On the one hand, the failure to reach consensus on the Singapore Issues is an example of the problematic nature of the consensus process exacerbated by the single undertaking requirement. However, considering the fact that most developing countries were not in favour of the Singapore Issues being included in the Doha Development Agenda, it is doubtful whether it could have even proceeded if it had been subjected to a vote. Hence, looking at consensus and the single undertaking from another angle, it can be seen as an important advantage in the sense that it can prevent the WTO from proceeding into areas that some Members find objectionable. The failure to proceed with the Singapore Issues under the Doha Round is a clear indication that certain Members, notably developing countries, considered the extension of the WTO’s remit into disciplines like trade and investment, trade and competition policy, and transparency in government procurement as objectionable. The consensus procedure then becomes a powerful expression of the principle of state consent. The importance of gaining the consent of all Members before proceeding with a proposed policy is achieved under the consensus principle. This then promotes greater legitimacy in WTO decision-making.

The Singapore Issues scenario shows the failure of consensus due to objections from a significant number, if not the majority, of Members. But supposing the Singapore Issues had

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136 Jeffrey J. Schott and Jayashree Watal, op cit. fn.15; Peter D. Sutherland, et al, op cit. fn.108.
138 http://www.wto.org/english/tratop_e/minist_e/min01_e/min01_10nov_e.htm (viewed 22 January 2012)
140 Ibid.
142 Peter D. Sutherland, et al, op cit. fn.108, at 63.
had an overwhelming support from Members and only one, or a few Members objected, reaching consensus would have still been elusive. The ability of just one Member, or a few Members to block progress on an issue that has overwhelming support among Members presents obvious problems for the WTO’s decision-making system.\textsuperscript{143}

Also, it must be noted that though, in principle, the consensus procedure has the advantage of ensuring the legitimacy of decisions taken, it does not require all Members to be present when decisions are being taken. Since consensus is reached when no Member present formally raises an objection, the views of non-present Members do not count as long as there is a quorum at the time the decision was made.\textsuperscript{144} Under the Rules of Procedure for Sessions of the Ministerial Conference and Meetings of the General Council, a quorum is constituted by a simple majority of Members.\textsuperscript{145} Some developing countries do not have permanent delegations at the WTO and are therefore not present at all meetings.\textsuperscript{146} For poorer countries that do not have the resources to maintain permanent delegations at the WTO in Geneva, this means that their voices cannot be registered in the decision-making process. Even where poorer states are able to afford permanent delegations at Geneva, they are not able to maintain enough personnel at the WTO to keep up with the volume of meetings of WTO bodies.\textsuperscript{147} In a statement to the General Council in 2002, Miguel Rodríguez Mendoza, the then Deputy Director-General of the WTO, summarised the heavy workload of the previous year as follows:

According to WTO Conference Office statistics, which calculates meetings on the basis of half-day units (that is, a meeting lasting one full day is calculated as two meetings), last year\textsuperscript{148}, there were nearly 400 formal meetings of WTO bodies. On top of that, we had more than 500 informal meetings, as well as some 90 other meetings such as symposia, workshops and seminars organized under the auspices of WTO bodies. All of these competed for delegations’ time. Worse yet, sometimes as many as four to five formal meetings had to be convened at the same time.\textsuperscript{149}

The figures quoted above add up to 1,990, an average of 5.4 meetings a day, and 38.2 meetings per week. When weekends are eliminated from the calculation, the number of meetings held under the WTO’s auspices in 2002 was a staggering 7.6 per day. Admittedly, 2001 was significant in the WTO’s operations due to the launching of the Doha Round. It is therefore reasonable to assume that more meetings of WTO bodies would have been held in the lead-up to the Ministerial Conference meeting in Doha from 9 to 14 November 2001. However as early as 1996, just one year after the coming into force of the WTO Agreement, some developing countries were already expressing concerns about the workload that WTO Members had to deal with.\textsuperscript{150} An excerpt from a speech by the Zimbabwean Minister of

\begin{footnotesize}
\textsuperscript{143} ibid.
\textsuperscript{145} ibid.
http://elibrary.worldbank.org/content/workingpaper/10.1596/1813-9450-1906 (viewed 06/07/11).
\textsuperscript{147} ibid.
\textsuperscript{148} i.e. in 2001.
\textsuperscript{149} Statement by Mr. Miguel Rodríguez Mendoza, Deputy Director-General, WTO to the General Council, 13 February 2002, http://www.wto.org/english/news_e/news02_e/gc_dgdstat_13feb_e.htm (viewed on 06/07/11).
\textsuperscript{150} http://www.wto.org/english/thewto_e/minist_e/min96_e/st45.htm (viewed 06/07/11).
\end{footnotesize}
Industry and Commerce delivered during the December 1996 Singapore Ministerial Conference, expressing these sentiments, is produced below:

My colleague, the Honourable Minister of Trade and Commerce of Tanzania, Ndugu Abdullah O. Kigoda, has briefly outlined the position of the collective membership of the countries of the Southern African Development Community (SADC) on the issues before this Conference. Zimbabwe endorses that position, and wishes to underline two aspects. Firstly, the huge workload that the WTO is setting up for itself and for its Members, especially young members like Zimbabwe. In our view, this Conference should be focusing on the substantive review of the implementation of the Uruguay Round Agreements since the establishment of the WTO in January 1995. The credibility of the WTO system lies in the full implementation of the Uruguay Round results. This implementation process is with respect to the notification obligations, as well as the actual implementation of the substantive commitments. This includes a wide range of subjects, which has put a heavy administrative burden on less-developed countries. We think the WTO has adopted too many agendas. Secondly, the question of the mandate of the WTO. The general view expressed by many speakers, and also in the opening statement by the Honourable Prime Minister of Singapore, Mr. Goh Chok Tong, is that the WTO should concentrate on its core business of promoting worldwide trade. The issues of labour should be dealt with by the ILO, and those of investment and development by the UNCTAD.\textsuperscript{151}

The member-driven nature of the WTO means that it is up to Members to make their presence felt through effective representation. A lack of such representation inevitably affects the ability of all Members to contribute in shaping the policy direction of the WTO. While at the formal level the WTO Agreement provides for a one-member-one-vote system, the practical participatory constraints flowing from logistical, personnel, and technical inadequacies mean that States that lack the wherewithal become either unrepresented in the decision-making process, or that the impact of their representation is negligible. In this regard, Richard Blackhurst, for instance, observes that:

One of the most important distinguishing features of GATT and now the WTO, relative to other organizations, is the much more active role the delegates from member countries play in the WTO’s day-to-day activities. In other words, Geneva-based delegations are a very important part of the WTO’s resources. Indeed, a number of delegations like to stress that the WTO is a “member-driven” organization, presumably in contrast to other un-named international organizations. Thus such considerations as the number of members with permanent delegations resident in Geneva, the size of those delegations, the extent of the individuals’ professional experience with GATT/WTO activities, the support they receive from capitals, and the frequency of ministerial-level meetings are all important for the operation of the WTO.\textsuperscript{152}

It was argued above that the problems with the consensus procedure is exacerbated by the single undertaking principle where multilateral rules are binding on all Members. A counter


argument that has been made in favour of the single undertaking principle is that it has enabled the WTO to deal with difficult subject matters like the extension of WTO regulation to agriculture. The current negotiations on Agriculture under the Doha Round were made possible due to the ‘built-in’ agenda that proceeded from Agreements achieved under the Uruguay Round. Generally, the built-in agenda stipulated a timetable for future work of the WTO regarding new or further negotiations of multilateral disciplines and assessment or reviews of existing multilateral disciplines. Further negotiations on agriculture were timetabled to commence in 2000 and this has become an integral part of the Doha Round. Significantly, it was the triumph of multilateralism achieved under the single undertaking principle that made it possible for the built-in agenda to be set within the context of multilateral and not plurilateral negotiations. The argument of the Sutherland Report regarding the importance of multilateralism reverberates here:

… all WTO Members must keep in mind that simply by virtue of their market power, the giants of the system have options in the manner in which they conduct trade relations. For as long as they choose to exert that market power in a multilateral context, under rules agreed by everyone, the poor and the weak need not fear a return to the law of the jungle.

John H. Jackson trumpets a similar clarion call when he cautions, regarding the importance of multilateralism, that:

…. if the WTO fails to keep abreast of the changes in the world and to evolve as an institution, some of the major users of the institution, and particularly some of the large trading powers, may begin to turn elsewhere to solve their problems. This could mean that these countries would turn to other multilateral institutions, such as the OECD, or to regional organizations, bilateral measures, or even unilateral measures. If the major users become disillusioned, the WTO could gradually atrophy, which would then be disappointing to some of the other users of the system.

The Informal Processes of Decision-Making in the WTO

The previous section highlighted some of the fundamental problems that plague the consensus process in WTO decision-making. One of the informal mediums that has been employed in the attempt to build consensus in WTO decision-making is the use of smaller groups of Members that are notable ‘opinion leaders’ on specific issues. This has become known as the Green Room process.

The Green Room process was started in the GATT 1947 era and is still used in the current WTO decision-making process though it is not provided for in the WTO Agreement. The term ‘Green Room’ is derived from the Director-General of GATT’s Conference Room process.

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153 In all, there were more than 30 built-in agendas that proceeded from the Uruguay Round. http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm#bia (viewed on 22 January 2012).
154 http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm#bia (viewed 22 January 2012).
155 ibid.
which was used to host smaller deliberative group discussions.\textsuperscript{158} Currently, the term ‘Green Room’ has come to be used as a generic name for smaller deliberative groups meetings convened to thrash out thorny issues.\textsuperscript{159} Thus Green Room meetings need not be held in the Director-General’s Conference Room.

Participation in the Green Room meetings is strictly by invitation, hence not all members are allowed to take part in these meetings.\textsuperscript{160} The deliberations and proposals of the Green Room meetings are forwarded to all members for approval on the basis of consensus (either in the General Council or the Ministerial Conference). During the Uruguay Round the ‘Quad’ members – US, EU, Japan, and Canada – were always represented in the Green Room meetings as their concurrence was deemed necessary for reaching consensus on the negotiation issues.\textsuperscript{161} Though India was not a named member of the Quad, it operated as an outsider whose concurrence on issues was also vital for achieving progress.\textsuperscript{162} At the current Doha Round, India and Brazil have increased their leverage earning them positions in the so-called ‘New Quad’, consisting the United States, EU, India, and Brazil, as the main players with Japan and Australia being important members.\textsuperscript{163} The increasing role that China plays in international trade makes it a powerful player in its own right, operating outside the New Quad but exerting influence in agreements.\textsuperscript{164}

The overriding influence that the main power brokers have in the Green Room, and by extension on the decision-making process, is quite ironic considering the explicit provisions of the WTO Agreement regarding the bodies that are supposed to wield decision-making powers. Though the Green Room process is not provided for in the WTO Agreement, it has come to occupy a disproportionately important role in the WTO decision-making process. In July 2006 for instance, the Doha Round was suspended due to the inability of the members of the New Quad to reach an agreement.\textsuperscript{165}

Though the Green Room meetings do not have decision-making powers, they serve as powerful forums for legislative initiative and their unrepresentative nature does not bode well for equal participation in the WTO decision-making process. As an informal deliberative body, it is of significant note that Members not present during Green Room meetings would not have the opportunity to partake in the deliberations that could ultimately result in legislation by the formal decision-making bodies. The power given to all WTO Members to vote would be meaningless if all it is worth is to rubberstamp the results of discussions that majority of Members were not partakers. Evidently, the default consensus procedure of decision-making means that every Member wields a veto power and as such can reject results of deliberations that ensue from Green Room meetings. Nevertheless due to the current

\textsuperscript{159} Jeffrey J. Schott and Jayashree Watal, op cit. fn.15.
\textsuperscript{162} ibid.
\textsuperscript{163} http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm (viewed on 17 July 2011).
\textsuperscript{164} Pieter Jan Kuijper, op cit. fn.161.
\textsuperscript{165} http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm (viewed on 17 July 2011).
system of single undertaking in WTO law, it becomes important for all members to have
equal input in the decision-making process since they will all be bound by multilateral
decisions. If decisions were not binding on all Members, then it would stand to reason why
some Members would have a greater stake in deliberations leading to decisions.

The Green Room process albeit shows the difficult nature of reaching consensus among such
a large body of Members hence the need for a smaller deliberative group that can serve the
purpose of breaking deadlocks, and thereby facilitate the achievement of consensus. However, since the Green Room process is informal and not provided for by the WTO
Agreement, it operates within a regulatory vacuum. There are no clear rules regarding who
gets invited to take part.

In spite of the disadvantages of informality and unrepresentative nature of the Green Room
meetings, it must be noted that due to the use of coalitions, especially in trade negotiations,
the possibility exists for a large body of Members, if not the entire membership to be
represented through their coalition representatives. By belonging to a coalition or group that
is represented in a Green Room meeting, the negotiating positions of the group could be
advanced without all members of the group being present.166

Various propositions have been made by commentators regarding a possible formation of a
formal smaller deliberative group to fill the vacuum currently occupied by the Green Room
Process.167 A lot of these propositions seek to find a more democratic medium by which this
smaller deliberative group can be constituted so as to accommodate the realities of inclusion
of the main power players while still making room for a form of representativeness that could
be reflective of the interests of the entire membership. The next segment of the article
considers a cross section of the proposals that have been made by various commentators
regarding the formation of a smaller deliberative body in the WTO.

Reforming the WTO Decision-Making Process: The Consensus Procedure
With regard to the consensus process, it must be noted from the outset that the WTO
Agreement does not in any way bind Members to resort to decision-making solely by
consensus.168 It only states that the “WTO shall continue the practice of decision-making by
consensus followed under GATT 1947”.169 The rule for decision-making, except in specific
situations where the WTO Agreement or a Multilateral Trade Agreement requires otherwise,
is a simple majority of votes cast if there is an initial failure to achieve consensus.170 The
preference for the consensus procedure is thus a self-imposed preference of practice and not a

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166 http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap7_e.pdf (viewed on 13/07/11); see Pieter Jan
Kuijper, op cit. fn.458.
167 see Richard Blackhurst and David Hartridge, ‘Improving the Capacity of the WTO Institutions to Fulfil Their
Jeffrey J. Schott and Jayashree Watal, op cit. fn.161.; Ernst-Ulrich Petersmann, ‘Challenges to the Legitimacy
and Efficiency of the World Trading System: Democratic Governance and Competition Culture in the WTO’,
Negotiation’, Journal of International Economic Law, 8(2), pp.425-448; Robert Wolfe, op cit. fn.137; Amrita
Narlikar, op cit. fn.9.
168 A deviation from this norm is Article of the Dispute Settlement Understanding which prescribes the
consensus procedure as the only means for decision-making.
169 Article IX:1 of the WTO Agreement.
170 ibid.
binding rule. A change of practice in favour of voting is thus possible to effect without the need to change the rules set out in the WTO Agreement.\textsuperscript{171}

The point was made earlier that an advantage of the consensus principle lies in its ability to block an objectionable direction in WTO policy,\textsuperscript{172} especially where a sizeable number of Members do not favour such a move. It was however argued that where an overwhelming majority are in favour of a decision with only one or a few objecting, it presents a problem in that, progress can be blocked by a small number. One proposition for dealing with this is the critical mass concept.\textsuperscript{173} The concept holds that where an overwhelming majority are in favour of a decision, the few objecting Members should refrain from blocking progress.\textsuperscript{174} The concept of the critical mass within the WTO system appears to anticipate the inclusion of the major players in the trading system – notably the US and the EU. Can critical mass be formed without the participation of the major economies in the WTO? If critical mass cannot be formed without the participation of the major economies, it means that some WTO Members become indispensable. If so, then critical mass cannot be viewed solely in terms of number of membership in favour of a decision, but also in terms of their value share in international trade. The problem this presents – i.e. if contribution to international trade assumes an important role – is that it can legitimise an informal veto in favour of members like the US and the EU. It can also legitimise the side-lining of the needs of the weaker Members of the WTO who may find themselves in the minority when a critical mass is composed without them.

One way of formalising the critical mass concept without necessarily amending the WTO Agreement is through the application of the provisions in Article X of the WTO Agreement regarding amendments that alter rights and responsibilities.\textsuperscript{175} Where an amendment alters rights and responsibilities, at least two-thirds of Members must accept it and it becomes binding only on the Members that accept it.\textsuperscript{176} With the current number of WTO Members (i.e. 155),\textsuperscript{177} two-thirds of the total membership equates to 103 Members, meaning that at most, 52 Members will be in the objecting minority. The exemption accorded to objecting Members however comes with a caveat, in that if the amendment “is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference”.\textsuperscript{178} The added caveat to this provision can serve as a caution against flippant objections that can block progress. The possibility of remaining a Member with the consent of the Ministerial Conference can also serve as a medium for accommodating objecting members whose stance may be well grounded on fact. Accommodating their objections would thus help free the decision-making system from being gridlocked by the objections of a minute group of Members. The WTO Agreement thus


\textsuperscript{172} See Chapter Three, subsection 3.6.1.


\textsuperscript{174} ibid.

\textsuperscript{175} Article X:3 of the WTO Agreement.

\textsuperscript{176} ibid.

\textsuperscript{177} i.e. as at 10 May 2012, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (viewed on 21 May 2012).

\textsuperscript{178} Article X:3 of the WTO Agreement.
incorporates a ‘proto’ critical mass concept which makes reform of practice possible without
the need to amend the text of the Agreement.

Some of the issues that may require a critical mass approach to decision-making may be new
disciplines in which case the provisions on amendments would not apply. The waiver
provisions in Article IX:3-4 could offer a possibility of using existing rules in the WTO
Agreement to give formal status to the critical mass approach in decision-making. A waiver
of responsibilities under the WTO Agreement or the Multilateral Trade Agreements requires
a consensus or three-fourths majority (i.e. 75 per cent or a minimum of 116 Members) for a
decision to be reached.\textsuperscript{179} They however, relate to existing agreements. The critical mass
concept can be introduced into the waiver provisions by extending it to negotiations of new
disciplines, in which case three-fourths (or a higher threshold) of Members in favour of the
introduction of a new multilateral discipline would form the critical mass, and the objecting
Members would be granted a waiver. With the current number of WTO membership, and
applying the proposed extension of the waiver provisions, a maximum of 39 Members would
constitute an objecting minority, whose objection would qualifiy them for a waiver of
obligations.

Again, like the amendment provisions discussed above, the provisions on waivers of
obligations contain a ‘proto’ critical mass concept. The waiver provisions would however
require an amendment of the text as Article IX:3 of the WTO Agreement envisages an
exceptional situation where the waiver applies to ‘a Member’ and not necessarily 39
Members.\textsuperscript{180} Article IX:3 provides in relevant part that:

\begin{quote}
In exceptional circumstances, the Ministerial Conference may decide to waive an
obligation imposed on \textit{a Member}\textsuperscript{181} by this Agreement or any of the Multilateral
Trade Agreements, provided that any such decision shall be taken by three fourths of
the Members (…).
\end{quote}

WTO practice however shows that waivers can be granted to a large group of Members. The
WTO Ministerial Conference Decision on the ACP-EC Economic Partnership Agreement,
adopted in Doha on 14 November 2001,\textsuperscript{183} for instance waived the MFN clause in Article I of
the GATT 1994 till 31 December 2007 to allow “the European Communities to provide
preferential tariff treatment for products originating in ACP States … without being required
to extend the same preferential treatment to like products of any other member”.\textsuperscript{184} The ACP
is currently composed of 79 African, Caribbean and Pacific States.\textsuperscript{185} In 2001 when the
Ministerial Conference approved the waiver, 58 Members of the ACP were members of the
WTO and the European Communities\textsuperscript{186} had 15 Members. Therefore, the actual number of
WTO Members that were exempted from applying Article I of the GATT 1994 in 2001 were
73 - 15 beneficiaries from the EU and 58 beneficiaries from the ACP States. It must be noted
though that on 14 November 2001 when the Ministerial Conference granted this waiver, the
WTO had 142 Members. If the matter had been subjected to a vote then, it would have

\begin{flushright}
\textsuperscript{179} Article X:3 of the WTO Agreement.
\textsuperscript{180} i.e. 39 Members being the current maximum objecting minority.
\textsuperscript{181} Emphasis mine.
\textsuperscript{182} Article IX:3 of the WTO Agreement.
\textsuperscript{183} WT/MIN(01)/15.
\textsuperscript{184} ibid at para.1.
\textsuperscript{185} http://www.acp.int/content/secretariat-acp (viewed on 21 May 2012).
\textsuperscript{186} Now European Union as the Treaty of Lisbon now imbues the European Union with legal personality.
\end{flushright}
required a minimum of 106 consenting Members with 36 Members being the maximum dissenting minority. Thus the 73 Members granted the waiver in 2001 constituted 51.4 per cent of the then membership of the WTO, more than twice the maximum number of dissenting minority as required under Article IX:3 of the WTO Agreement. If 51.4 per cent of the WTO membership can be granted a waiver, it seems logical that if the critical mass concept is transposed into the waiver provisions, the threshold for defining a critical mass could be set at 75 per cent – i.e. using the three-fourths majority voting provisions with respect to waivers as set out in Article IX:3-4 of the WTO Agreement – or 85 per cent, to ensure a relatively broad consensus. The WTO thus needs to read its own history to inspire a proactive use of some of the flexibilities that have been practiced in the past.187

The critical mass concept dovetails into the analysis of the possible reform of the single undertaking principle which is considered below.

It is worth noting though, that in spite of the obvious impasse-prone nature of the consensus procedure in the WTO, it still enjoys support among WTO Members.188 Evidently, for developed countries, they would not want a change in the consensus procedure because developing countries can use their numerical advantage to push through proposals as they have been able to do in the UN General Assembly under the banner of the G-77. On the part of developing countries, their need to get the major economies on board multilateral agreements means that even though the developed countries are in the minority, the only way to get them involved in multilateral rules is through the consensus procedure. The demise of the ITO due to the non-participation of the USA is a constant reminder of the importance of getting the major economies on board multilateral trade rules.

Also, the sensitive nature of new multilateral disciplines in areas like services and intellectual property rights which have implications for domestic regulations make it imperative for all Members to agree under the consensus procedure before committing themselves to new disciplines that intrude into the national regulatory regime. In the UN General Assembly, the success of majority voting to a large extent, lies in the fact that Resolutions of the General Assembly do not have a binding effect.189 Thus Member States who voted against a decision but fell in the minority can still refuse to abide by the decision. The possibility of opt-outs thus makes majority voting practicable.

In the WTO, due to the operation of the single undertaking principle, multilateral rules are binding on all Members, so there is little leeway, if any, for resorting to voting. The stakes are inevitably high. Thus, in spite of the glaring cumbersome nature of the consensus principle, it appears to be a necessary ‘evil’. The Warwick Commission for instance considered the possibility of a double voting procedure – one based on weighted voting calculated on the basis of Member’s contribution to international trade and one based on a majority threshold.190 The Commission however decided against this voting method in favour of the consensus procedure but tempered with the possibility of a critical mass approach.191

187 See chapter 6, section 6.1.
188 Amrita Narlikar, op cit. fn.9.
189 There are exceptions to this rule, but they only relate to matters of internal organisation like the admitting of new members and the suspending of voting rights of members in default of payment of dues.
191 ibid.
The problem with weighted voting is that it has the possibility of creating default vetoes. In the IMF for instance, the US wields a default veto in decisions that require 85 per cent majority to pass as it holds 16.5 per cent of the weighted votes. In decisions that require 70 per cent of weighted votes to pass, the five major Members of the IMF – USA, Japan, Germany, France and UK – hold a veto if they use bloc voting as their weighted votes amount to 36 per cent. Thus in the IMF even in situations where consensus is used, the possibility of the option of weighted voting can make consensus an exacted consent.

In the EU decision-making system, in spite of treaty provisions regarding weighted voting in the Council of Ministers, about 80 per cent of decisions are made by consensus.¹⁹² There thus appears to be a high level of consensus building to ensure general support for proposed legislations making it expedient to obviate the resort to voting. However even in the EU system, the practice of consensus does not guarantee that all member states’ views carry equal weight. Stéphanie Novak for instance observes that:

If an observer were to attend Council meetings he or she would notice next to no evidence of qualified-majority voting. It is very unusual for presidencies to ask delegations to vote. The official explanation is that presidencies will seek consensus around the table and will thus avoid isolating colleagues. This expression of noblesse oblige is, of course, very welcome but is only part of the explanation. Qualified-majority voting is like the sword of Damocles hanging above the negotiation table. It is in the mind of everyone. The Presidency, Commission, and delegations assess the state of negotiation – almost permanently and automatically – in terms of whether there is a qualified majority or a blocking minority … A lack of official voting … does not mean at all that the qualified-majority system is absent, nor does it mean that finding consensus is the general rule.¹⁹³

Thus the knowledge that the failure of consensus would result in voting evidently exerts pressure on Members who know they will lose in a vote to make compromises for consensus to prevail.

A voting system that places emphasis on contribution to international trade as rationale for giving some members of the WTO more say (greater weighted votes) in the decision-making process is fundamentally problematic. It would be like arguing that rich people within a state contribute more to commerce due to their superior purchasing power so they should have a greater say in laws that regulate commerce. It may be an undisputed fact that the rich contribute more to commerce than the poor, but should this give them a right to superior leverage in the legislative process on commercial matters? While the rich would have a legitimate need to be protected in commercial transactions, so would the poor. If anything, it is the poor who may lack the power to get a fair bargain in commercial transactions who would need more protection, through, for example, systems and processes that make it possible for their pertinent interests to be represented. Evidently, transposing norms that are workable in the national context to the international level can sometimes be simplistic and unlikely to yield workable results, if they are workable at all. Even so, gaining greater representation in WTO decision-making bodies due to a Members’ contribution to

international trade still presents an anomaly. Contribution to international trade through imports and exports should be seen as beneficial as this is the central argument of the theory of comparative advantage.\textsuperscript{194} In accordance with the principle of comparative advantage that drives world trade, nations tend to benefit by concentrating their economic production in an area of relative advantage and then trade that advantage for products that they are relatively disadvantaged in.\textsuperscript{195}

Thus the countries that contribute more to international trade are the big winners. Should this also translate into a greater say in the decision-making process? On the one hand, one could argue that since such states are the most active in international trade, they should have a right to a greater say in how the rules of that trading system are made. But what if their greater say results in the creation of rules that are detrimental to others who are less active in international trade? Should being more active in international trade give them the right to determine the rules at the expense of others? The right of influence should not be dependent on who contributes more or less to international trade, but rather on who is bound by the rules. If the rules apply to all then it affects all and as such all must have a right to influence the direction of WTO policies. If I am to be bound by a rule, and I am to make adjustments in my life because of the rule, then it matters not whether I will use the rule more or less actively than others. As long as I am being bound by the rule, I should have a right equal to others who will be similarly bound, to influence the contents and eventual outcome of the rule. An equal right of influence does not mean that this right should be used in a detrimental manner against others. Consequently, those who contribute more to international trade also have a legitimate claim of influence to represent their needs. It is evident that a diversity of needs would almost invariably result in clashes of needs that are opposites. Where others have a greater say, their opposing needs will hold sway and become WTO law. There should thus be an equilibrium of needs that represents the needs of those who contribute more to international trade as well as those who contribute less. This equilibrium of needs should constitute the basic denominator that feeds into the international trade rules. However, this argument begs the question – who decides which needs are legitimate enough to become part of the equilibrium of needs? This can only be decided through negotiations and such negotiations cannot produce a fair outcome or equilibrium if the participants in the negotiations are not equal in their ability to influence the decision-making process. This is where the decision-making system becomes pivotal. Equality of influence is the surest way of achieving fair negotiations that can culminate in an equilibrium of needs. Sovereign equality in the WTO must therefore not be a mere formal provision. It must translate into actual influence that is efficacious enough to feed into the equilibrium of needs, which in turn feeds into the basic rules that bind all members.

Consequently, introducing a weighted voting system in the WTO system is not a prospect that this article will proffer. The resort to un-weighted majority voting is not a realistic prospect due to the reasons adduced above. The operation of consensus in an unweighted voting system appears to be best option in a setup like the WTO where state consent with regards to economic matters is crucial in securing sovereign equality as well. In this regard, with respect to the possible reform of the consensus procedure in the WTO, the position taken in this article is a preference for the continuous use of the consensus procedure in decision-making tempered by a proactive use of the critical mass concept under the Article X provisions on amendments that alter rights and responsibilities. The critical mass concept, as


\textsuperscript{195} Ibid.
discussed above, can also operate effectively under the waiver provisions if they are extended beyond existing disciplines. Evidently, the proposed reforms that have been proffered tilt heavily towards a change in practice, with the exception of the extension of the waiver provisions to new disciplines.

Reforming the WTO Decision-Making Process: The Single Undertaking Requirement

The single undertaking requirement and the consensus procedure are inextricably intertwined due to the perception that if the rule is binding on all then the rule must be agreed by all. Much of the discussions in the above sub-section are therefore relevant for discussing the reform of the single undertaking requirement. The discussion above has shown that though the consensus system is impasse prone WTO Members themselves would not want to abolish it. The single undertaking has an exacerbating effect on the decision-making process because multilateral rules bind all Members so there is nothing like a lack of interest in negotiating multilateral rules. In order to make it a more progressive counterpart of consensus decision-making, the single undertaking requirement would also have to be tempered in a way that makes it less stringent. As stated above, the critical mass approach can work for both consensus and the single undertaking requirement as a less restrictive option.

Also, the exacerbating effect of the single undertaking principle can be tempered with a system of ‘different speeds’ that allow some Members to progress faster with disciplines in areas of interest, while keeping the door open for non-acceding Members to join at a later date if they so wish. Though this may have the effect of a retreat from multilateralism, the ‘different speeds’ system can be used where there are intractable differences and some Members feel strongly about going ahead with a policy. A morbid fear of a return to ‘GATT a la carte’ could become an impediment in the progress of international trade regulation even if such regulation is not multilateral in nature. An overtly stringent application of the single undertaking principle can gridlock the WTO decision-making process and bind the horses and the tortoises of the trade system to compete in the same race under rules that prohibit horses from running faster than tortoises. It is, of course, evident that the ‘different speeds’ approach cannot be used in areas where there must necessarily be a multilateral discipline in place for the international trade system to work well, the regulation of agricultural trade being a typical example. With trade in agriculture, large portions of the population of most developing countries are to be found in varied forms of agrarian enterprises. Heavy subsidisation of the agricultural sector, typically in the US and the EU distort international trade in agriculture and prevents developing countries from being competitive in global and domestic trade in agriculture. Without a strong multilateral discipline in agriculture, a lot of developing countries cannot reap any benefits from their comparative advantage in agriculture.

In spite of the need for the application of the principle of single undertaking in some sectors of trade regulation, it does not also detract from the fact that a more flexible and nuanced approach in other sectors could be explored. This can make the WTO regulatory framework more pliant in its response to divergent and competing needs of Members. The success of the different speeds approach in the EU as evidenced in the Treaty provisions on enhanced cooperation and the Schengen Acquis should provide lessons for the WTO.

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197 Article 20 of Treaty on European Union
198 The Schengen Acquis guarantees free movement of persons typified, inter alia, by “common rules and procedures … applied with regard to visas for short stays, asylum requests and border controls”. The Schengen
The operation of the single undertaking principle in the WTO, as previously discussed, has a fundamental relevance with respect to the ability to influence the decision-making process. Whose needs should hold sway in the determination of WTO policy? If the consensus principle is used, then at the conceptual level, it is expected to result in equilibrium of needs. Of course, this may mean setting rules that require a tortoise and a horse to run at the same speed as they both need to come to a consensus about how fast international trade regulations should progress. Developed countries may want rules in an area like competition policy and this would be commensurate with their level of development. Should developing countries be required to adopt the same rules if this is detrimental to their development needs? The aberrations that would occur (if not already occurring) are evident if any one interest takes precedence over the other(s). In this regard Jagdish Bhagwati observes that:

The appropriate question is: do the negotiating rich countries manage to impose on the negotiating poor countries haste in the trade liberalisation that is negotiated? The answer has to be yes, in the sense that a concerted negotiation will put pressure on all negotiating members to make concessions so that the negotiation is a success. (...) In the end, however, whatever the pressures applied and felt, both rich and poor countries can go only so fast, reflecting political difficulties at either end.  

Thus, if the international trade rules are conceived of as a 100 metre race with participants having varied athletic capabilities, a situation could be envisaged where the rules of the race can require all participants to run at the same speed for the first 50 metres. This forms the basic international trade rules binding on all WTO members. After the first 50 metres, there is no requirement for a participant to continue running to the finish line – i.e. the 100 metre mark – and neither is there a prohibition against running beyond the 50 metre mark at a pace that one wants to run. The remaining 50 metres constitute higher levels of trade rules (i.e. different speeds) that are binding on only the members that want to be bound by them.

Reforming the WTO Decision-Making Process: The Green Room Process

It has been made evident in previous discussions that the existence of the Green Room process in the WTO informally fills the vacuum created by the absence of a smaller deliberative body. Two of the proposed solutions to the Green Room conundrum are briefly discussed below. It is noteworthy that some of the propositions that have been made toward the line of the Executive Board system in the IMF and the UN Security Council system.

Richard Blackhurst and David Hartridge have proposed the use of either the Green Room Process or a WTO Consultative Board depending on the level of interest Members express on an issue. Their proposal envisages a situation where, if a relatively small number of WTO

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Acquis was incorporated under a protocol in the Treaty of Amsterdam and apart from the UK, Ireland also opted out. These opt-outs however do not permanently bar the UK and Ireland from joining the Schengen Acquis at a later date if they so choose, though this would be subject to a unanimous acceptance in the Council. Also, not all aspects of the Schengen Acquis are binding on Denmark in spite of its accession. See ‘The Schengen Area and Cooperation,’ http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/133020_en.htm (viewed on 23 April 2012).

201 Richard Blackhurst and David Hartridge, op cit. fn.167.
Members have an interest in a particular issue they could constitute the Green Room. In such a situation, participation in the Green Room meeting would be open to all Members, but since only a few Members are interested in the issue being deliberated upon, they would be the ones who would reasonably respond to an open invitation to partake in the Green Room meeting. However, in situations where the number of Members interested in taking part in a Green Room meeting exceed a reasonable number that would inhibit efficient deliberation, then the formal WTO Consultative Board would be used. Blackhurst and Hartridge’s proposition with regard to the WTO Consultative Board draws a lot of inspiration from the IMF’s Executive Board, one of the main differences being that it would not have decision-making powers.

The maintenance of an informal Green Room operating side by side a formal Consultative Board is quite a progressive idea. The existence of such a system operating with the awareness and consent of Members is one thing, but its workability would be another matter. A maximum of about 25 to 30 Members usually constitute a Green Room Meeting. Considering the current number of the WTO (i.e. 155), with many more states negotiating accession, having only 25 to 30 Members interested in a particular issue would be quite a rare occurrence. The single undertaking principle has increased the interests of Members (especially developing countries) as they now want to be involved in the deliberative processes and have their views represented. The binding nature of multilateral rules inevitably elicits interest where previously an interest may not have existed. The proposed Consultative Board may thus become the default formal institution that undertakes the role that would have been played by the informal Green Room.

Jeffrey Schott and Jayashree Watal have also proposed a formal status for the Green Room and their proposal is more akin to what pertains in the IMF Executive Board where some Members are able to appoint their own Executive Directors with others congregating into constituencies to elect an Executive Director. They envisage that the:

…. Green Room would have 20 seats, with a certain number reserved for representatives from previously under-represented regions in Latin America and the Caribbean, Africa, and Asia. (…) Some countries will qualify simply because of their dominant trade share; most others, however, will have to coordinate with other trading partners to ensure that their cumulative trade passes the bar.

One major problem with this proposal is its acceptability to developing countries who, finding themselves marginalised in the UN Security Council, and the IMF and World Bank Executive Boards, would hardly agree to another system in the WTO that entrenches their marginalisation. Though the argument of giving some WTO Members automatic seats in a formal Green Room, due to their dominant share in trade, may appear appealing, it presents a democratic problem, among others. The argument was raised above that using value share in international trade to accord privileged status to some Members would be like according the rich a greater voice in decision-making because they contribute more to commerce than the poor. It was argued that the right to effective participation should depend on who is to be bound by the rule. The same argument is adduced here. Like the argument against using value share in international trade to weight votes, using the same criteria to give some

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202 Ibid.
203 Ibid.
204 Jeffrey Schott and Jayashree Watal, op cit., fn.292, at 288.
Members automatic seats in the Green Room while others congregate into constituencies is not a position this article concurs with.

One may also argue that instead of, or in addition to, value share of international trade, population demographics should be the basis since, at the end of the day, WTO policies eventually have effect on people. Thus Members with ‘more people’ should have automatic seats. In the WTO, Member states like China and India will have unparalleled advantage if population plays a major role in according seats to Members in a smaller deliberative body.

Consequently, due to the fact that WTO rules are binding on all Members a full constituency based deliberative body is a more preferred option in this article. In other words, each Member will belong to a constituency and the constituency will in turn elect representatives to a smaller deliberative body. This could be based on regional trade groups of geographical representations. In keeping with the member-driven character of the WTO, how such constituencies would be constructed should be left to the Members to decide – i.e. Members should be able to choose which constituency they would want to join. The smaller deliberative body could be made up of 25 representatives of the constituencies. A designated number of Member states in a particular constituency should be given primacy in according seats. Though it has been stated that using value shares in international trade and population demographics are not supported in this article, the opposition lies in its sole use as the basis for according seats. There should be a legitimate consideration of value share in international trade and population demographics if they are fairly balanced with the number of Member states in a constituency. The anomaly of having crowded constituencies with just one representative, as pertains in the IMF Executive Board, should not be the way forward if the WTO opts for creating a smaller deliberative body as this will legitimise the marginalisation of developing countries. Neither should number of Members states be the sole consideration as this will in turn result in the marginalisation of developed countries considering the fact that developing countries wield a numerical advantage in the WTO. The G-77 block voting in the UN General Assembly may rear its head in the WTO if, in apportioning seats, sole consideration is given to the number of Member states in a constituency.

The smaller deliberative body can act like the EU Commission in its role as initiator of legislative proposals. It would not have decision-making powers but will make proposals that will be subjected to amendments and acceptance by the decision-making bodies – the Ministerial Conference and the General Council. Like the comitology system in the EU, Member states in each constituency can voluntarily form committees tasked with scrutinising WTO legislative proposals upon which basis their representatives will be empowered to make decisions on their behalf. A rotational form of electing representatives can be devised to ensure that all Members within a constituency have a chance of being elected to represent the constituency.

The deliberaive body could also be empowered to formulate model laws with the WTO Secretariat in order to avoid the current trend of rigid harmonisation of international trade law. Though harmonised trade rules promote legal certainty, especially for the commercial entities that are most affected by them, there should be room for soft law approaches to harmonising trade rules. This could be an effective way of using the legal expertise of the Secretariat if it is given a more proactive role to partner with the proposed constituency based deliberative body to formulate model laws on important trade issues. Currently, when a proposed discipline fails to get approval under the consensus system, it becomes effectively dead. If such disciplines are formulated as model laws, Member states of the WTO can adapt
them to their domestic regimes hence obviating the need to engage in cumbersome negotiating processes. In spite of the non-binding nature of most of its decisions, the UN General Assembly has, for instance, been able to establish subsidiary bodies like the International Law Commission and United Nations Commission on International Trade Law (UNCITRAL) that have successfully used the soft law approach to develop international law. UNCITRAL’s model laws have, for example, been instrumental in the creation of international private law.

Caution would however need to be taken to prevent arm-twisting behaviour outside the WTO system where some Members could use such model laws as conditionalities for granting certain benefits in bilateral trade relations or special and differential treatment schemes like the Generalised System of Preferences (GSP). To forestall such occurrences, there could be binding rules to prevent the use of such model laws as conditionalities in trade relations among WTO Members.

**Reforming the WTO Decision-Making Process: Developing Countries and Special and Differential Treatment**

In the preceding discussions, the proposals for reforming the WTO decision-making process have been underlined by the importance of equality. The preference for a fully constituency based deliberative body encapsulates this emphasis on equality. However, if all WTO members are to have equality of influence in the decision-making system, then what is the rationale for according developing countries special and differential treatment? The inconsistency of special treatment with the principle of equality is, to some extent, dealt with by the non-mandatory nature of the GSP. In effect, developed countries are not under a legal obligation to provide the GSP to developing countries. The GSP can thus be conceived of as falling in the domain of the second 50 metre race of trade regulation where participation is voluntary.

**Unequal Timeframes for Adherence to Multilateral Rules**

Some forms of special and differential treatment provisions should be conceived of as part of the equilibrium of needs discussed above. Special and differential treatment provisions that grant developing countries longer timeframes to adhere to multilateral rules is a typical example. Inability to speedily implement a multilateral rule due to the absence or underdeveloped nature of domestic institutions and personnel required to implement the multilateral rule should be a legitimate consideration. This was one of the reasons that underpinned the granting of longer timeframes to developing countries for implementing the TRIPS Agreement. What would be the point in imposing an obligation that cannot be adhered to? Thus, though longer timeframes for adherence to multilateral rules present manifestly unequal treatments, the aim is to achieve equality of responsibilities albeit within unequal timeframes of adherence.

**Non-Reciprocity**

However, special and differential rules on non-reciprocity will be difficult to fit into the equilibrium of needs. To argue that developing countries should have an equal say in the WTO decision-making process but should not make reciprocal concessions in trade

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206 e.g. Articles 65 and 66 of the TRIPS Agreement.
207 GATT Article XXXVI(8).
negotiations would be tantamount to a disequilibrium, a dissonance of equity. Developing countries cannot have their cake and eat it and neither should developed countries.

The anomalies of the non-reciprocity requirements in special and differential treatment have, to some extent, been addressed under the single undertaking principle that was birthed in the Uruguay Round. To insist on non-reciprocity in trade concessions while at the same time insisting on equal participation in decision-making in the current trade system cannot be justified. The non-reciprocity requirement was one of the reasons that accounted for developed countries liberalising trade in areas of interest while maintaining high tariffs in areas where developing countries have trade interests. Non-reciprocity has therefore not worked in the interest of developing countries. Jagdish Bhagwati for instance observes that:

Particularly onerous problems arise for the poor countries, in my view, not over opening their markets through trade concessions, but when the pressures are applied on them to consent to extraneous and harmful demands aimed at appeasing the domestic lobbies in the rich countries on trade-unrelated issues such as intellectual property protection and labor issues (…).

Thus for developing countries, special and differential treatment alone cannot assure their integration into international trade. They need to participate more proactively in the creation of multilateral rules that protect their interests. Succumbing to "harmful demands" will not occur if developing countries focus more on equal participation in decision-making where they can have their trade needs protected under multilateral rules.

It must be noted though that discussion on the special and differential treatment of developing countries often overlooks the special treatment of developed countries in the trade regime. Andrew Charlton and Joseph Stiglitz have criticized the use of parity in the critique of trading relations between developed and developing countries opining that:

… it is inappropriate for the largest and richest countries to be demanding a quid pro quo from the poorest. (…) Demands for reciprocity ignore the egregious unfairness of the world trade system, which over 50 years has reduced tariffs on goods of export interest to the rich countries and protected goods that should be exported by the poor countries.

Bhagirath Lal Das also argues that during the GATT era, developing countries made important concessions like the Multi-Fibre Agreement sponsored by industrialised countries to restrict trade in products like textiles, leather and jute. During the Uruguay Round, which was negotiated under the auspices of the GATT, developing countries again made major concessions by allowing the inclusion of disciplines like the TRIPS and the GATS as multilateral agreements. These are “examples of major concessions given by developing

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208 Jagdish Bhagwati, op cit. fn.199.
209 i.e. reciprocity.
210 Jagdish Bhagwati, op cit. fn.199, at 261.
211 ibid.
213 Bhagirath Lal Das, op cit. fn.135.
countries to the developed countries without insisting on and getting any commensurate concessions from the latter”.  

Consequently, the non-reciprocity argument in the discourse on special and differential treatment fails to address areas where certain forms of ‘non-reciprocity’ worked in favour of developed countries when developing countries made concessions without receiving any in return.

**Reforming the WTO Decision-Making Process: Developing Countries and Plurilateral Trade Agreements**

It has been observed above that special and differential treatment alone cannot aid the integration of developing countries in the trade regime, and neither can it assure their effective participation in decision-making. Another way developing countries can increase their leverage in decision-making is to come up with plurilateral trade agreements on issues that are pertinent to their needs, if those needs cannot be accepted at the moment under the rubric of multilateralism. If plurilaterals are viewed as part of the different speeds concept, they could hold the potential of becoming multilateral agreements in the future. The experience with the Tokyo Round Codes offers an empirical precedence.

If plurilaterals are always negotiated among the developed countries, it means that those who did not participate – i.e. developing countries – did not have any influence in the development of such disciplines. If in the future, these plurilaterals (negotiated among developed countries) assume multilateral status – as some of the Tokyo Round Codes did – it will further marginalise developing countries in terms of their contribution to the creation of WTO law.

Going back to the argument for developing countries to consider negotiating plurilateral trade agreements among themselves, it becomes evident that the multilateral route is not the only way available to developing countries when it comes to creating WTO law. Yes, the non-participation of the major economies may limit the impact of plurilateral agreements negotiated among developing countries, but so were the Tokyo Round Codes with respect to their non-application by developing countries.

An area that developing countries can seriously look at is the regulation of traditional knowledge if it fails recognition under the TRIPS Agreement in the current Doha Round of trade negotiations. Developing countries notably sponsored a proposal to review the TRIPS Agreement in a way that could extend it to protect traditional knowledge. The Doha Ministerial Declaration thus stated that:

> We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this Declaration, to examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge.

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214 ibid.

and folklore, and other relevant new developments raised by Members pursuant to Article 71.1.216

The prospects of extending the TRIPS Agreement to cover traditional knowledge in the Doha Round negotiations seem bleak217 but this should not end its prospects under the WTO regime. A separate plurilateral agreement on protection of traditional knowledge can still be negotiated among developing countries just as developed countries have negotiated the plurilateral Agreement on Government Procurement. If a plurilateral agreement on the protection of traditional knowledge is negotiated, future accession by other states could eventually metamorphose it into a multilateral agreement.

The contribution of developing countries to the creation of WTO law through plurilateral trade agreements can help break the perception of indispensability when it comes to the participation of Members like the USA and EU in WTO disciplines. Developing countries can form their own critical mass without the economic super powers.

Furthermore, plurilateral agreements negotiated among developing countries can serve as bargaining chips in situations where developed countries push for giving multilateral status to plurilaterals that they have sponsored. Again, the Tokyo Round Codes218 serve as a useful empirical example. Some of the Tokyo Round Codes that were plurilateral in their application gained multilateral status during the Uruguay Round – e.g. the Agreements on Subsidies and Countervailing Measures, Technical Barriers to Trade, Import Licensing Procedures, Customs Valuation, and Anti-Dumping.219 If developing countries also had plurilateral agreements negotiated among themselves, these could have served as valuable bargaining chips. In effect ‘if you want a multilateral status for your plurilaterals then we also want a multilateral status for our plurilaterals’. If the necessity of consensus prevents certain agreements sponsored by developing countries from receiving a multilateral status, the flexibility of critical mass can be used in a manner that can break the hegemony of the major developed countries in the creation of WTO law.

Conclusion
The analyses of the informal processes of decision-making in the WTO showed that in spite of the formally fair provisions, the informal procedures of decision-making are problematic and breach the principle of sovereign equality of states. If the provision for one-member one-vote ensures the principle of sovereign equality, then the inability to contribute effectively to deliberations that result in creation of WTO law negates that equality. In effect, formal equality in the WTO does not translate into actual equality. However, the principle of sovereign equality of states is juridical in nature and as such states can be juridically equal without being equal in other respects – for example economic or military capabilities. Thus, in situations where a member’s inability to effectively participate in WTO decision-making is as a result of its economic weakness – e.g. inability to maintain a permanent delegation in Geneva – the case can still be made for the operation of the principle of sovereign equality of states. The principle takes due cognisance of these seeming anomalies. If however, the WTO

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216 Paragraph 19 of the Doha Ministerial Declaration, 14 November 2001, WT/MIN(01)/DEC/1.
217 Boatema Boateng, op cit. fn.215.
218 For example Subsidies and countervailing measures, Technical barriers to trade, Import licensing procedures, Government procurement, Customs valuation, Anti-dumping, Bovine Meat Arrangement, International Dairy Arrangement, Trade in Civil Aircraft.
decision-making system is organised in a manner – whether formally or informally – to diminish the participation of some members then, it raises legitimate concerns about its consistency with the principle of sovereign equality of states.

It must be noted though that state practice at the international level can legitimately breach the principle of sovereign equality because that practice in itself could be an exercise of sovereignty. The concept of sovereignty (and by logical extension sovereign equality) is fluid and should not be used as a ‘strait jacket’ to restrict state practice. Thus in international organisations like the IMF and the World Bank, weighted votes reflecting members’ economic status is used in voting. Also in the EU, weighted votes are used to reflect the population sizes of members. Therefore in such organisations members with higher percentages of weighted votes wield greater decision-making powers than members with lower percentages. Sovereign equality here would be circumscribed by the unequal weights in decision-making. However, states that accede to organisations that practice weighted voting do so as a legitimate expression of their sovereignty.

Perhaps in the WTO system, arguing for the operation of sovereign equality at both the formal and informal levels of decision-making loses sight of glaring asymmetries in members’ status – i.e. their contributions to international trade and population sizes. The question is whether these considerations should be formalised at the level of decision-making in the form of weighted votes. This, evidently, will be a circumscription of sovereign equality. On the other hand, does not the special and differential treatment of developing countries breach the principle of sovereign equality? If all are equal, then the special treatment of some breaches that equality. If developed countries benefit from an informal advantage in decision-making and this equates to inequality, then when developing countries also benefit from a formal advantage by their differential treatment, it also equates to inequality. Thus these two seeming anomalies can live side by side to equilibrate the asymmetries of greater influence over decision-making by developed countries and the special and differential treatment of developing countries.

An attempt has been made in this article to offer proposals for the reform of the WTO decision-making system. One particular observation that needs to be reiterated strongly is the fact that reform of practice can be easily effected in the WTO without the need to amend the text of the WTO Agreement. The use of the critical mass concept was seen as crucial in reforming the consensus and single undertaking principles and it was realised that existing provisions in the WTO Agreement – i.e. provisions on amendments and waivers – can be adapted for use in the critical mass concept. An area in these two provisions where a change of text may be required would the definition of the threshold of consensus. Should the current 66.6 per cent for amendments and 75 per cent for waivers be maintained if used within the context of critical mass, or should a higher threshold of 85 per cent be introduced as the threshold for defining a critical mass? As the critical mass concept presupposes a significantly high number of Members concurring with a proposed policy, the 85 per cent threshold would appear to be a logical threshold for defining a critical mass.

In reforming the Green Room process while still maintaining the concept of equality, the position adopted is a fully constituency based deliberative body where each constituency elects a representative. The use of contribution to international trade (i.e. value share of international trade) and population demographics is proposed as auxiliary considerations for constituting constituencies with the number of Member states in each constituency being the primary consideration for allocating seats. If developed countries like the US want the single
undertaking to operate, then they should realise that it comes at a cost – equality. The fundamental argument adduced above is that equal participation in the creating of trade rules should be viewed in terms of who is bound by the rules and not who contributes more to international trade.

Finally, in reconciling equality with special and differential treatment, the position taken is against binding developed countries to provide GSP schemes to developing countries as this goes against the argument for equality. A voluntary application means developed countries are using their sovereign will to provide such special treatments. The operation of the single undertaking puts the onus on developing countries to be more proactive in articulating their trade needs and having these needs represented in multilateral rules. Deviating from some multilateral rules or being given longer timeframes for adhering to the rules is consistent with a different speeds approach that takes a fair look at the varied abilities of the horses and tortoises of the trade regime.

In maintaining special and differential treatment provisions however, the WTO needs to address the question of who qualifies for developing country status. It will be unconscionable to expect a country like the UK to grant Brazil (or China) special and differential treatment when Brazil has overtaken the UK to become the sixth biggest economy in the world in terms of GDP. Qualifying for special and differential treatment should be based on objective criteria informed by indicators like gross domestic products. This will make it fairer in its application.

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