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DEVELOPING COUNTRIES AND DECISION-MAKING IN THE WTO: RECONCILING THE PRINCIPLES OF SPECIAL AND DIFFERENTIAL TREATMENT AND SOVEREIGN EQUALITY OF STATES

A thesis submitted to Middlesex University in partial fulfilment of the requirements for the degree of Doctor of Philosophy

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I dedicate this thesis to my wife, Esther, and my son Shaun. God bless you for your immense sacrifices, especially relocating three times in the past four years to be with me while I pursued this Odyssey of studying for a Doctor of Philosophy in Law. I am very blessed for having your support.

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# Table of Contents

ACKNOWLEDGEMENTS ........................................................................................................... 1

Table of Contents .................................................................................................................. 2

INTRODUCTION .................................................................................................................... 5
  Abstract ............................................................................................................................... 5
  Research Objectives .......................................................................................................... 7
  Research Questions ............................................................................................................ 7
  Research Approach ............................................................................................................ 8
  The Domain of Comparative Law in Legal Research ....................................................... 9
  Applying Comparative Law to the Present Research ......................................................... 14
  Structure of Thesis .......................................................................................................... 18

CHAPTER ONE: SPECIAL AND DIFFERENTIAL TREATMENT OF DEVELOPING COUNTRIES IN GATT/WTO .............................................................. 19
  Introduction .................................................................................................................... 19
  1.1 The Formation of the GATT and the Core Principles of Reciprocity and Mutuality .......................................................... 20
  1.2 International Trade Liberalisation and the Principle of Non-Discrimination .......... 23
  1.3 The GATT and the Principle of Non-Discrimination .................................................. 24
  1.4 The Conceptual Basis of Special and Differential Treatment .................................... 28
  1.5 Raul Prebisch and the Dependencia Theory ............................................................... 30
  1.6 Epochs in the Development of Special and Differential Treatment of Developing Countries in the International Trade System .......................................................... 34
    1.6.1 Special and Differential Treatment: The Primordial Stage in 1948 ................. 34
    1.6.2 The 1954/55 GATT Review Session ................................................................. 35
    1.6.3 The Founding of United Nations Conference on Trade and Development 37
    1.6.4 Legalising the General System of Preferences .................................................. 40
    1.6.5 The Paradigm Shift of the 1980s ..................................................................... 43
  1.7 Critique of the Concept of Special and Differential Treatment ................................. 44
  1.8 The Need for a Legal Definition of Developing Country in the WTO ..................... 49
  1.9 The Adequacy of Special and Differential Treatment as a Tool for Integration into International Trade .................................................. 51
  1.10 The EC – Tariff Preferences Case .............................................................................. 52
    1.10.1 Facts of the Case ............................................................................................... 52
    1.10.2 Decision of the Panel ..................................................................................... 54
    1.10.3 Decision of the Appellate Body ..................................................................... 55
    1.10.4 Analysis of the Appellate Body Decision ....................................................... 55
  1.11 Concluding Remarks ................................................................................................. 61
CHAPTER TWO: THE CONCEPT OF SOVEREIGN EQUALITY OF STATES IN INTERNATIONAL LAW ......................................................... 64
Introduction .................................................................................. 64
2.1 The Principle of Sovereign Equality of States in International Law ........... 68
2.2 The Concept of State Sovereignty ................................................ 72
2.3 The Equality of States .................................................................. 89
2.4 Sovereign Equality and Participation of States in International Organisations:
An Initial Critique ........................................................................... 93
2.5 Concluding Remarks ................................................................. 100

CHAPTER THREE: WTO INSTITUTIONAL STRUCTURE AND DECISION-
MAKING ......................................................................................... 102
Introduction .................................................................................. 102
3.1 A General Overview of the WTO ................................................ 102
3.2 The Increased/Increasing Remit of the International Trade Regime .......... 107
3.3 Overview of Some Key Provisions in the WTO Agreement .................... 109
   3.3.1 Status of the WTO ................................................................. 109
   3.3.2 Functions of the WTO .......................................................... 110
   3.3.3 Structure of the WTO and its Bodies ........................................ 111
3.4 Decision-Making in the WTO ..................................................... 115
   3.4.1 Decisions on Various Matters ............................................... 116
   3.4.2 Decision on Interpretations ................................................ 118
   3.4.3 Decision on Waivers ........................................................... 121
   3.4.4 Decision on Amendments .................................................. 123
   3.4.5 Negotiation of New Multilateral Trade Agreements ................. 127
3.5 Concluding Remarks on the Descriptive Account ................................. 127
3.6 Problems with the WTO Decision-Making Process ................................ 131
   3.6.1 The Consensus and Single Undertaking Requirements .............. 131
   3.6.2 The Informal Processes of Decision-Making in the WTO .......... 145
3.7 Concluding Remarks: WTO Decision-Making: Implications for the Principles
   of Sovereign Equality and Special and Differential Treatment ............. 148

CHAPTER FOUR: DECISION-MAKING AT THE UNITED NATIONS ......... 151
Introduction – The UN: A Brief Historical Background ................................ 151
4.1 Organs of the UN and Decision-Making ........................................ 160
4.2 Decision-Making in the General Assembly .................................... 162
   4.2.1 The Power to Discuss .......................................................... 166
   4.2.2 The Power to Make Recommendations .................................. 168
   4.2.3 The Power to Call the Attention of the Security Council ............ 172
   4.2.4 The Power to Initiate Studies ................................................. 173
   4.2.5 The North-South Dichotomy in General Assembly Decision-Making 176
4.3 Decision-Making in the Security Council ....................................... 178
4.4 The Economic and Social Council ............................................... 192
4.5 Comparison Between Decision-Making in the UN and the WTO .......... 194
4.6 Concluding Remarks .................................................................... 198
CHAPTER FIVE: DECISION-MAKING AT THE INTERNATIONAL MONETARY FUND ............................................................ 202
Introduction .................................................................................................................. 202
5.1 Historical Background ........................................................................................... 204
5.2 Membership of the IMF ....................................................................................... 208
5.3 Structure and Organisation of the IMF ............................................................... 210
  5.3.1 The Board of Governors .............................................................................. 210
  5.3.2 The Executive Board .................................................................................. 217
  5.3.3 The Managing Director and Staff of the IMF .............................................. 227
5.4 Concluding Remarks ............................................................................................ 229

CHAPTER SIX: DECISION-MAKING AT THE EUROPEAN UNION ......... 237
Introduction .................................................................................................................. 237
6.1 Brief History of EU Institutional Development and Decision-Making ...... 238
6.2 EU Institutions and Decision-Making ................................................................. 262
6.3 The European Council ......................................................................................... 262
6.4 The European Commission ............................................................................... 269
6.5 The Council ......................................................................................................... 280
6.6 The European Parliament .................................................................................... 289
6.7 Concluding Remarks ............................................................................................ 294

CHAPTER SEVEN: REFORMING THE WTO DECISION-MAKING PROCESS ................................................................. 297
Introduction .................................................................................................................. 297
7.1 Reforming the WTO Decision-Making Process: The Consensus Procedure . 298
7.2 Reforming the WTO Decision-Making Process: The Single Undertaking
  Requirement ............................................................................................................. 308
7.3 Reforming the WTO Decision-Making Process: The Green Room Process ... 311
7.4 Reforming the WTO Decision-Making Process: Developing Countries and
  Special and Differential Treatment ....................................................................... 317
  7.4.1 Unequal Timeframes for Adherence to Multilateral Rules ....................... 317
  7.4.2 Non-Reciprocity ......................................................................................... 318
7.5 Reforming the WTO Decision-Making Process: Developing Countries and
  Plurilateral Trade Agreements .............................................................................. 320
7.6 Concluding Remarks ............................................................................................ 323

CONCLUSION ............................................................................................................. 326

Table of Documents .................................................................................................... 330
Bibliography ................................................................................................................. 330
Table of Statutes, International Treaties, Agreements, and Declarations .............. 353
Table of Cases ............................................................................................................... 359
List of Abbreviations .................................................................................................... 360
INTRODUCTION

Abstract
This study explores the issue of decision-making in international organisations with a view to providing a lens on the status of developing countries within the World Trade Organisation (WTO), with particular emphasis on their participation in WTO decision-making. The two main principles that form the theoretical lens or framework through which the research is being conducted are, (i) the principle of special and differential treatment of developing countries; and (ii) the principle of sovereign equality of states.

The issue of economic development in developing countries and the role that trade could play is one that has taken centre stage in a lot of international fora for some time now. The need to replace economic aid from developed countries with market access opportunities that allow developing countries to be integrated better into international trade is one of the most central issues in international trade. The ‘aid for trade’ debate has culminated in the current Round of multilateral trade negotiations being christened the ‘Development Round’ because of the focus on the development and trading needs of developing and least developed country Members of the WTO. Special and differential treatment of developing countries is one of the main tools that the General Agreement on Tariff and Trade 1947 (GATT)/WTO system has used in the bid to integrate developing countries better into the international trade system. The adequacy and implications of using special and differential treatment as such a tool for integration is a central theme of enquiry in this research. It needs to be stressed at the outset that integration here is not viewed merely as an increase in contribution to international trade, but most importantly, as the ability to influence the policy direction of the WTO in a way that is favourable to
the development aspirations of developing countries. Effective participation of developing countries in WTO decision-making thus becomes the foundational line of enquiry.

The second theoretical aspect that forms the framework for this research – the principle of sovereign equality of states – is also employed in the enquiry into the participation of developing countries in the WTO because it is one of the fundamental principles of international law which regulates relations among states. The notion that the existence of a state must not be based on, *inter alia*, the military or economic power it wields to assure its existence and prevent interference from other states, has evolved over the centuries and is enshrined in the United Nations Charter. States are deemed equal just by their status as states under international law. The WTO Agreement makes provisions that ensure the operation of sovereign equality of states. For example, the decision-making bodies of the WTO are open to all Members and each Member, independent of contributions to international trade or population size, has one vote when decisions are being taken. The operation of this principle is thus important to the participation of developing countries in the WTO decision-making process.

However, if states are equal, what justifies the special and differential treatment of developing countries, and why should developed countries provide such special treatments exclusively to developing countries? The seeming contradiction between these two principles is explored, and one important concept used in articulating this is the principle of state consent – that is, as sovereign states, developed countries provide special and differential treatment to developing countries by their own volition or consent, and not out of compulsion. Sovereign equality does not prohibit
the expression of state consent even if such consent is exercised in a manner that limits state sovereignty. Also, where special and differential treatment provisions become ineffective in integrating developing countries into the international trade system, the principle of sovereign equality can be used to foster effective participation in decision-making so as to influence the direction of WTO policy in a way that is favourable to the trade interests of developing countries. Consequently, with regards to the participation of developing countries in international trade, special and differential treatment and sovereign equality of states can be seen as complimentary principles that can aid developing countries in their aspirations.

Research Objectives

In sum, the research objectives of this thesis can be summed up in the following three points:

i. To investigate the applicability of the concept of sovereign equality in the WTO decision-making system;

ii. To investigate the reconcilability of the concepts of sovereign equality and special and differential treatment of developing countries in WTO law; and

iii. To explore the possibility of reform of the WTO decision-making system to accommodate asymmetries like members’ international trade output and their consequential influence in decision-making.

Research Questions

To achieve the objectives set out above this thesis poses, explores and seeks to answer two inter-linked research questions, namely:
1. Does the principle of special and differential treatment of developing countries in the WTO negate the principle of sovereign equality of States?
2. To what extent does the operation of the principle of sovereign equality ensure equality in the WTO decision-making process?

Research Approach

In addressing the research questions, the thesis will, in the first two chapters, establish the theoretical framework of the research – i.e. the principle of special and differential treatment and the principle of sovereign equality of states. After establishing this theoretical framework, the study will, in chapter three, conduct in-depth analysis of the WTO decision-making process and seek to explore how the principle of sovereign equality operates within this system. The first three chapters are offered as the main conceptual basis for the research.

After having established the conceptual basis of the research, the focus of the subsequent three chapters will be to conduct a comparative study of the decision-making systems of three international treaty organisations – the United Nations (UN), International Monetary Fund (IMF), and the European Union (EU). The rationale for adopting the comparative legal studies approach is basically to compare the WTO decision-making system with those of three other multilateral organisations so as to ascertain similarities and divergences, and to seek possibilities of learning from both the advantages and disadvantages of these systems. The comparative study segment constitutes an important base from where propositions regarding the reform of the WTO decision-making system could be made in the concluding chapter of the study.
The Domain of Comparative Law in Legal Research

As stated earlier, after establishing the conceptual issues, the study undertakes a comparative study of the decision-making systems of the UN, IMF and the EU using the comparative law approach as a research method. This subsection of the introductory chapter presents a brief overview of comparative law to position the study within the discipline of comparative (international) law. The views of some commentators in the domain of comparative law is briefly sampled below.

A widely supported view asserted by Professor Rene David holds that comparative law deals with three main objectives:

1) to investigate historical and philosophical issues related to law; 2) to help understand and improve one’s own legal system; 3) to establish a better regime in international relations.\(^1\)

The objectives of comparative legal studies articulated by Professor Rene David are consistent with the objective for using it in this present study. The object of comparing two or more legal systems, the principal focus of comparative law, is for the purpose of obtaining “experimental data that will provide the foundation of verifiable inferences.”\(^2\)

In the domain of law, precedent is the empirical legal data upon which new law is built.\(^3\) But what if a particular legal system lacks precedent in a certain area of law?

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\(^3\) ibid.
Relying on foreign precedent and customising the knowledge gained to the social, political, and cultural milieu of one’s own system becomes the logical solution. This is one of the major roles that the comparative method plays in legal research. The second and third objectives of comparative law, articulated by Rene David, are consistent here as well. If, for instance, a country that has been practising a centralised command economy decides to adopt a market economy, it would be inconceivable that it would institute reforms leading to a market economy without researching precedents from foreign systems with already established market economies. The knowledge gained from foreign systems becomes the “experimental data” that informs the creation of new law or the reform of obsolete ones. In effect, the process of comparative study in comparative law aids against a repetition of errors and encourages the adoption of successes (or the prevention of failures) from other systems. There is a circulation of models of law through the study of foreign models.4

It must be stated though that the circulation of models is not necessarily foundational to comparative legal studies. Studying another legal system may help bring a better understanding to one’s own legal system. The current debate among scholars and policy makers regarding the protection of the traditional knowledge of indigenous communities under intellectual property law is a case in point.5 In a lot of indigenous communities, the fact that traditional knowledge is accessed on a communal basis does not necessarily mean that that knowledge is in the public domain in the western

4 Rodolfo Sacco, op cit. fn.2.
Thus studying the concept of public domain in western intellectual property systems may help bring understanding of what ‘public domain’ really means in traditional societies or whether the concept of ‘public domain’ is non-existent in traditional societies. Here, a better understanding would be fostered by a process of differentiation without necessarily the adoption of models.

From the foregoing, it becomes evident that the justification for the existence of Comparative Law as a discipline is not dependent on the circulation of models fostered by the study of foreign systems. Comparative law may foster understanding of divergent systems and by so doing foster better international relations. This would be consistent with Rene David’s third objective of comparative law – to establish a better regime in international relations.

Harold C. Gutteridge describes comparative law as “a method of study and research and not a distinct branch or department of the law”. By this characterisation, the postulation is not that comparative law is not or cannot be a discipline of study in its own merit, but rather that the method of comparing different legal systems or branches of the law does not culminate in a distinct branch of law (like contract law or public law) that regulates relationships and transactions among humans. In this sense, comparative law as a discipline of study can only mean a discipline dedicated to a

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8 ibid.
distinct method of researching the law. It is a tool for researching law but it is not ‘law’.

Viewed in another sense, it could be argued that comparative law is not just a method of legal research but possibly encompasses all forms of law disciplines and legal systems, as it is potentially unrestrictive in its application in legal study. Since comparative law can be employed in, possibly, the study of any law subject or legal system, its elasticity covers the very domain of law. This argument, though, may rather go to buttress the utility of comparative law as a discipline for researching law and not a body of law. Consequently, data generated through the use of the comparative method would not be described as a body of law distinct from other legal subjects and peculiar only to comparative law.

To avoid the confusion that comes with asserting that comparative law is not ‘law’, some have attempted to rename the discipline referring to it sometimes as ‘Comparative Jurisprudence’ or ‘Comparative Legislation’. The predominance of the use of the term ‘Comparative Law’ however shows that such re-christening attempts have not been successful in their bid for replacement. No matter how comparative law is christened, there is consensus among academics that Comparative Law is not a separate branch of the law in the terms articulated above.

Attemps have also been made to classify Comparative Law based on the purpose for which it is employed. Thus propositions like Comparative Legal History, Comparative Legislation, Descriptive Comparative Law, Geographical Comparison,

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10 Gutteridge, op cit., fn.7. at 2.
Material Comparison, Methodological Comparison, Formal Comparison, and Dogmatic Comparison have been used as a form of nomenclature of the discipline of Comparative Law based on the purpose for which the discipline is employed.¹¹ Gutteridge posits that it is doubtful if there is much to be gained by this process of taxonomy, and argues that “[T]he comparative method is sufficiently elastic to embrace all activities which, in some form or other, may be concerned with the study of foreign law”.¹² He cites two broad classifications – Descriptive Comparative Law and Applied Comparative Law – that have attained general acceptance¹³ and argues that this classification is elastic enough to contain current and future employments of the comparative method.

Descriptive Comparative law would be appropriately used to classify the use of the comparative method for solely obtaining information regarding foreign law, while Applied Comparative Law would be used for the employment of the comparative method for any other purpose. This creates a distinction between descriptive or explanatory and functional objectives in the use of Comparative Law. Where comparison is based on showing the differences or similarities between different systems without providing any theoretical or practical solutions to problems, then the comparison is descriptive in nature.

Applied Comparative Law on the other hand may either have a theoretical or practical objective, and must undertake an in-depth analysis of differences or similarities between different legal systems to ascertain the causative factors underlying these differences or similarities and must (if dealing with modern law) analyse the social

¹¹ Gutteridge, op cit., fn.7. at 7.
¹² ibid.
¹³ ibid.
setting that each system under examination operates in.\textsuperscript{14} There must also be a theoretical or practical problem solving objective in Applied Comparative Law. This is in consonance with Rodolfo Sacco’s assertion that the study of other legal systems does not focus only on how these systems function and succeed at bringing legal solutions to problems but also, on the social and cultural systems that enable the legal systems to succeed at providing solutions.\textsuperscript{15}

\textbf{Applying Comparative Law to the Present Research}

Firstly, regarding the objective of investigating historical and philosophical issues related to law, as identified by Rene David, chapters one and two do not only present philosophical/conceptual issues (i.e. special and differential treatment of developing countries, and sovereign equality) relevant to decision-making in the WTO, but also probe into the historical development of these concepts. In chapter four where an in-depth analysis of the WTO decision-making process will be undertaken, both philosophical and historical issues cannot be avoided. Further, in comparing decision-making systems in the UN, IMF and the EU with that of the WTO, the historical and philosophical issues that underpin these decision-making systems will be analysed. Analyses of textual provisions without engagement with the history and philosophy that conditions text would result in superficiality, and culminate in possible erroneous conclusions. In this regard, Rodolfo Sacco argues that:

\begin{quote}
Comparative law enables us to realize that a single written rule will have multiple applications. This multiplicity means that a non-written element exists between the legal source and its interpretation, or it proves that a written rule does not have the force that would be necessary to replace an old
\end{quote}

\textsuperscript{14} ibid at 9.
customary rule. Law cannot be reduced to a written formula. Unwritten elements exist between the written formula and the law – fragments of old customs, that play a role in the mentalities of jurists; information that is communicated verbally at school and is, perhaps, wholly unverified; attitudes rooted in religious or secular ethics; latent notions in the culture of the interpreter. In sum, a whole world of elements exist that play a role in the law and about which we speak with respect to the means of legal interpretation. Comparative analysis has revealed them and has thereby unveiled the unwritten elements of the law, the “cryptotypes.”

Bernhard Grossfeld and Edward Eberle also argue that:

… relying simply on words or letters can capture only part of the meaning of law. History, social milieu, political economy, religion, and ideology provide helpful background to portray better what the legal rule or idea actually means within the contemporary context of geography and semiotics.

The three selected organisations for comparative study – the UN, IMF and the EU – have been chosen to reflect both similarities and differences with the WTO system with regard to the operation of the principle of sovereign equality of states and decision-making. The UN presents the typical example for the operation of sovereign equality of states. As stated above, the principle of sovereign equality of states is enshrined as a fundamental principle in the UN Charter. The operation of one-member-one-vote in the General Assembly is a practical demonstration of the

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16 Sacco, op cit., fn.15. at 1169.
principle of sovereign equality within the UN decision-making system. The UN system thus presents a similarity in the comparative study. There are key differences within a formal body (i.e. the Security Council) with restricted membership, permanent membership, and the use of veto power by the permanent members in the UN system which is not present in the WTO system. The comparative study here will thus aim at investigating the historical, political and philosophical issues relating to the similarities and differences between the WTO system and the UN system. This is one of three objectives identified by Professor Rene David. The second and third objectives of comparative legal studies would also be relevant here – a better understanding of one’s own legal system (i.e. the WTO decision-making system) and the establishment of a better regime in international relations (i.e. possible reform of the WTO decision-making system to benefit all member states and foster better international economic relations).

The IMF presents a difference rather than a similarity as decision-making in this organisation is based purely on weighted votes reflecting actual financial capacities of members. Here formal inequalities based on actual economic abilities of members operate. The rationale for using the IMF decision-making system is designed to draw attention to the direct opposite of the operation of sovereign equality in decision-making processes. By comparing the IMF system with that of the WTO, it is hoped that the research will ascertain whether in spite of the formal operation of sovereign equality in the WTO, its informal systems of decision-making are akin to the formal system of decision-making in the IMF. The ‘unwritten rules’ that operate behind the written rules of decision-making will be investigated. The three stated objectives of comparative legal studies will also be relevant here. The historical and philosophical
underpinnings that inform decision-making in the IMF may contribute to an appreciation of the peculiarities of the WTO system and inform proposals for change. It may also grant insights into how to accommodate asymmetries regarding output in international trade and possible commensurate voting rights.

The last case for comparative study – the European Union (EU) as an international organisation – will present a key analysis that may be crucial in propositions for reform of decision-making in the WTO based on weighted population demographics. The balance between supranationalism and intergovernmentalism and the use of weighted votes based on demographics within the EU system will be key in the study of the EU decision-making system. Also, the multilevel decision-making systems in the EU with bodies like the European Parliament, the EU Council and the EU Commission having varying degrees of decision-making powers will be key in the study. It is hoped that this may provide insights into how demographic asymmetries in the WTO can be overcome to produce a decision-making system that reflects both sovereign equality and equity.

In conducting the comparative legal analysis of the selected decision-making systems, the study will search for nuances in the law that are not readily discernible from written rules. Historical analyses of the development of particular systems, for example, may provide insight into the prevalence of unwritten ‘customs’ and practices that hold greater sway over the written rules, and where divergences may pertain in the written rules, it may be possible to find similarities in the unwritten rules. Such unwritten similarities may hold a greater key to understanding contradictions like divergences of rules in spite of similarities of practice – for instance, formal weighted
votes in the IMF based on country financial contributions and the prevalence of informal leverages in the WTO decision-making system partly due, plausibly, to country contribution in international trade output and the provision of special treatment to developing countries.\textsuperscript{19}

**Structure of Thesis**

To be able to address the issues that have been highlighted here, this thesis is divided into seven chapters and a conclusion as iterated below.

- Introduction
- Chapter One: The Concept of Special and Differential Treatment of Developing Countries in WTO Law
- Chapter Two: The Concept of Sovereign Equality of States in International Law
- Chapter Three: The WTO: Structure and Decision-Making
- Chapter Four: Comparative Study One – Decision-Making in the United Nations
- Chapter Five: Comparative Study Two – Decision-Making in the IMF
- Chapter Six: Comparative Study Four – Decision-Making in the EU
- Chapter Seven: Reforming the WTO Decision-Making Process
- Conclusion

\textsuperscript{19} The ‘Sutherland Report’ for instance noted that developed countries wielded enormous market power and could use this power to further their trade interests if the multilateral system failed to deliver. It thus emphasised the need for the effective working of the multilateral trade regime so as to prevent a survival of the fittest scenario in the international trade system. Peter D. Sutherland \textit{et al}, \textit{The Future of the WTO: Addressing Institutional Challenges in the New Millennium}, Report by the Consultative Board to the Director-General Supachai Panitchpakdi, Geneva: World Trade Organisation, (2004) at 18.
CHAPTER ONE: SPECIAL AND DIFFERENTIAL TREATMENT
OF DEVELOPING COUNTRIES IN GATT/WTO

Introduction

The “special and differential treatment” provision for developing countries in the General GATT 1947/1994 and other multilateral trade agreements under the WTO has been viewed as a mechanism for instituting an equitable world economic system where the development needs of developing and least developed countries (LDC) are not relegated to the periphery.\(^{20}\) The principle of special and differential treatment advocates for a development paradigm to international trade that puts the development needs of developing countries at the centre of the international trade regime. It has been argued that the special and differential treatment of developing countries is therefore justified because their development needs require a special consideration that may necessitate derogation from the normal rules applicable in the trade regime.\(^{21}\) Murray Gibbs observes that the institution of the principle of special and differential treatment of developing countries in the international trade regime is:

\[
\text{… the product of the co-ordinated political efforts of developing countries to correct the perceived inequalities of the post-war international trade system by introducing preferential treatment in their favour across the spectrum of international economic relations.}^{22}\]

\(^{21}\)ibid.
1.1 The Formation of the GATT and the Core Principles of Reciprocity and Mutuality

At its inception, the GATT 1947 did not contain any provisions for the special and differential treatment of any of the Contracting Parties. Non-discrimination expressed through mutuality and reciprocity of obligations was the fundamental principle upon which the GATT 1947 was based. Though the designation of some states as developing countries was not used, of the 23 founding states, almost half could, from hindsight, be said to be developing countries.23 The GATT initially started off as a tariff reduction negotiation forum mooted by the United States of America (US). In the first ‘round’ of tariff reduction talks convened in Geneva, the US invited 15 other states to participate in the talks.24 This was not part of the larger United Nations Conference on Trade and Employment convened in Havana, Cuba, in 1947-1948 which had been convened to establish the International Trade Organisation (ITO). The ITO was meant to be a counterpart organisation of the International Bank for Reconstruction and Development (World Bank) and the International Monetary Fund that had previously been established at the Bretton Woods Conference in 1944.25

Lacking the trappings of an international organisation, the tariff reduction talks convened in Geneva at the invitation of the US were conducted under rules mutually agreed upon by the participating states, hence the name ‘General Agreement on Tariff and Trade’.26 John H. Jackson thus convincingly argues that from a theoretical


26 Judith Goldstein and Joanne Gowa, op cit. fn.24.
standpoint, the GATT was not an international organisation but rather an ‘agreement’. The GATT was supposed to be a temporary agreement that mostly focussed on tariffs and international trade.

The provisional nature of the GATT is further evidenced by the decision of the Contracting Parties to use a ‘provisional protocol of application’ in order to circumvent the legal requirements in some states of ratification of the GATT through the legislative process. The provisional protocol also made it possible for the coming into effect of the GATT in order for Contracting Parties with domestic legal provisions that were contrary to GATT disciplines to continue with their membership of the GATT. The protocol on provisional application for instance made the following provisions regarding the commitments of the governments of Australia, Belgium, Canada, France, Luxemburg, Netherlands, the United Kingdom, and the United States, stating inter alia that:

… provided that this Protocol shall have been signed on behalf of all the foregoing Governments not later than 15 November 1947, to apply provisionally on and after 1 January 1948:

(a) Part I and III of the General Agreement on Tariff and Trade, and

(b) Part II of that Agreement to the fullest extent not inconsistent with existing legislation.

28 ibid.
Thus, from its rudimentary formative moments, the GATT was conceived of as a forum for advancing the benefits accruing from trade amongst states on the basis of mutuality and reciprocity. Using trade to advance the development needs of some less developed contracting parties of the GATT was not on the negotiating agenda. When the International Trade Organisation (ITO) which was supposed to be the substantive international organisation for regulating international trade failed to materialise, due, inter alia, to the failure of the US Congress to ratify it, the GATT which was meant to be a provisional agreement became the de facto international organisation responsible for trade, replacing the still-born ITO. Consequenty, the principles of non-discrimination, mutuality and reciprocity which underpinned the formation of the GATT also became the de facto principles of the international trade regime.

Though the ITO Charter did not come into force, the principle of non-discrimination was also a fundamental principle in the Charter. The Bretton Woods Conference of 1944 had earlier noted regarding non-discrimination in international trade that there was the need “to reduce obstacles to international trade and in other ways promote mutually advantageous international commercial relations.” It is important to note that though the ITO never materialised, much of the provisions contained in the GATT were derived directly from the draft ITO Charter. In fact, the first Round of trade negotiations held in Geneva in 1947 that gave birth to the GATT proceeded concurrently with the drafting of the ITO Charter that was also ongoing in Geneva. Developing countries had however been able to negotiate the introduction of

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30 John H. Jackson, op cit., fn.27. at 18.
31 Judith Goldstein and Joanne Gowa, op cit. fn.24.
32 Bretton Woods Proceedings, vol. 1 at 941.
33 John H. Jackson, op cit., fn.27. at 22.
34 ibid.
derogations from the general principle non-discrimination in the ITO Charter.\textsuperscript{35} This derogation allowed the use of protectionist measures at the national level for the purpose of economic development and reconstruction. When the ITO failed to materialise, the derogation was introduced into the GATT in 1948 as Article XVIII.\textsuperscript{36} The introduction of Article XVIII in the GATT in 1948 marks the primordial stages of the principle of special and differential treatment in the GATT. However, the derogation from the principle of non-discrimination was not applicable only to developing countries. In effect it was not a special treatment and neither was it differential. Equality was the applicable principle in the use of Article XVIII by all Contracting Parties of the GATT 1947. Later amendments to the GATT restricted the use of Article XVIII to only developing countries.\textsuperscript{37}

1.2 International Trade Liberalisation and the Principle of Non-Discrimination

International trade liberalisation achieved through the dismantling or reduction of tariff and non-tariff barriers to trade was fundamental to the establishment of the GATT.\textsuperscript{38} The remit of the GATT was restricted to rules relating to trade in goods. The importance of good economic relations as a tool for maintaining global peace and security was given an important place in international relations in the aftermath of World War II.\textsuperscript{39} It was noted that the use of protectionism by the close of the 1920s negatively affected the effective operation of markets and was a contributive factor to

\textsuperscript{35} Robert E. Hudec, op cit. fn.23.
\textsuperscript{37} ibid.
the occurrence of the Great Depression.\textsuperscript{40} Such massive instabilities in global economics and a lack of good economic relations among states, were exacerbated by protectionist policies, and failed to stabilize peace after World War I. The need to establish a multilateral system of trade based on the principle of non-discrimination after World War II was thus one that had support from both politicians and academics.\textsuperscript{41}

It was this same rationale that informed the founding of the European Coal and Steel Community (ECSC) in 1951.\textsuperscript{42} From its humble beginnings, the ECSC has metamorphosed into the European Union (EU) which has become one of the most notable post World War II regional organisations, and has achieved remarkable successes in economic growth and peace and security through the use of non-discrimination in trade among its members.\textsuperscript{43} The EU has for instance applied non-discriminatory norms beyond trade in goods to include trade in services, and service providers, thus ensuring the operation of the so-called ‘four freedoms’ – free movement of goods, service, persons and capital.\textsuperscript{44}

1.3 The GATT and the Principle of Non-Discrimination

From the conceptual foundation of improving international relations through the benefits of international trade, successive Rounds of trade negotiations under the GATT had aimed at breaking down protectionism usually manifesting through tariff

\begin{footnotes}
\item[40] Theodore H. Cohn, op cit. fn.39.
\item[41] Bretton Woods Proceedings, op cit. fn.32.
\item[44] ibid.
\end{footnotes}
and non-tariff barriers to trade. From the inception of the GATT, the main mechanism that the international trade regime has used to achieve this has been through the application of the principle of non-discrimination.\textsuperscript{45} The principle of non-discrimination is expressed through two main provisions in the GATT – the most favoured nation (MFN) and the national treatment principles.

Under the MFN principle, the most favourable treatment or concession extended to the goods of any country must be automatically extended to all GATT contracting parties.\textsuperscript{46} It must be noted though that the MFN principle in the GATT was not novel in international economic law. As far back as the seventeenth and eighteenth centuries, states were using MFN clauses in bilateral agreements.\textsuperscript{47} These bilateral MFN clauses were however conditional on the receipt of reciprocal concessions in trade. Also, the League of Nations Covenant contained an MFN provision that, \textit{inter alia}, aimed at providing “equitable treatment for the commerce of all Members”.\textsuperscript{48} This MFN provision was not conditional in nature. The MFN provisions in both the ITO Charter and the GATT were drawn from similar provisions that were under the auspices of the League of Nations.\textsuperscript{49}

\textsuperscript{47} For example Article 2 of the Treaty of Amity and Commerce Between The United States and France (February 6, 1778) provided that: The most Christian King, and the United States engage mutually not to grant any particular Favor to other Nations in respect of Commerce and Navigation, which shall not immediately become common to the other Party, who shall enjoy the same Favor freely, if the concession was freer made, or on allowing the same Compensation, if the Concession was Conditional. See also John H. Jackson, ‘Equality and Discrimination in International Economic Law: The General Agreement on Tariff and Trade’ in \textit{The British Yearbook of World Affairs}, (London Institute of World Affairs, 1983), pp.224-239.
\textsuperscript{48} Article 23(e) of the Covenant of the League of Nations.
\textsuperscript{49} Article 23(e) of the Covenant of the League of Nations. See also John H. Jackson, op cit, fn. 27.
In keeping with predecessor unconditional MFN clauses, the main ethos of the MFN principle in the GATT is to prevent more favourable treatment of some contracting parties at the expense of others. The MFN principle thus prohibits trade discrimination among GATT contracting parties. In respect of the MFN principle, Article I of the GATT provides in relevant part that:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, … any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.\(^5^0\)

Whereas a GATT contracting party may apply the same tariff structure for all goods originating from other Member countries (i.e. MFN), such goods may be discriminated against when imported into the domestic market. To prevent such discrimination, the national treatment principle prohibits more favourable or preferential treatment of domestic goods as against foreign or imported ones. Thus once a foreign good from state ‘A’ enters into the domestic market of state ‘B’, that imported good must be treated in the same way similar domestic goods are treated by, inter alia, the legal and administrative systems of state ‘B’. By this principle, discrimination between domestic and imported goods is prevented. Article III of the GATT provides in relevant part that:

\(^{50}\) Article I of the General Agreement on Tariff and Trade, 1947.
The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.\(^{51}\)

In the WTO, the MFN and national treatment principles inherited from the GATT have been extended to the new multilateral trade agreements that emerged from the Uruguay Round, notably the General Agreement on Trade in Services (GATS)\(^{52}\) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).\(^{53}\) The GATT itself has been incorporated under the WTO as one of the multilateral trade agreements that is binding on all WTO members under the principle of ‘single undertaking’.\(^{54}\) It must be noted though that the GATT, as a multilateral trade agreement under the WTO Agreement is legally distinct from the GATT 1947.\(^{55}\) In the current trade regime, MFN and national treatment principles do not only relate to trade in goods as it did under the GATT. In the WTO regime, MFN and national treatment extend to trade in goods, services and service providers.

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\(^{51}\) Article III of the General Agreement on Tariff and Trade (1947).
\(^{52}\) Article II and Article XVII of the General Agreement on Trade in Services.
\(^{53}\) Article 3 and Article 4 of the Agreement on Trade Related Aspects of Intellectual Property Rights.
\(^{54}\) Article II:2 of the Agreement Establishing the World Trade Organisation.
\(^{55}\) Article II:4 of the Agreement Establishing the World Trade Organisation.
1.4 The Conceptual Basis of Special and Differential Treatment

Broadly speaking, the principle of special and differential treatment allows developing countries not to make reciprocal concessions in some trade negotiations.\(^{56}\) They are granted some measure of preferential access into the markets of developed countries and are also permitted the use protectionist policies in their trade relations. Non-reciprocity, preferential market access and the use of protectionist trade policies are typical of the operation of special and differential treatment in the GATT.\(^{57}\)

Special and differential treatment concessions in the multilateral trade agreements emanating from the Uruguay Round of trade negotiations have tended to focus more on granting developing and least developed countries more flexible timeframes for adhering to some of the commitments negotiated during the multilateral trade negotiations (MTNs).\(^{58}\) Provision of technical assistance in the implementation of commitments under multilateral agreements is another feature that is typical of special and differential treatment arising out of the Uruguay Round of trade negotiations.\(^{59}\)

The various stages in the development of the concept of special and differential treatment is given a systematic consideration later in this chapter. This section of the chapter focuses more on the conceptual basis underlining the special and differential treatment of developing and least developed countries in the international trade regime.

\(^{56}\) Article XXXVI:8 of the General Agreement on Tariff and Trade 1947 for instance states that: The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.

\(^{57}\) Robert E. Hudec, op cit. fn.23.

\(^{58}\) e.g. Article 65:2 of the Agreement on Trade Related Aspects of Intellectual Property Rights.

\(^{59}\) e.g. Article 67 of the Agreement on Trade Related Aspects of Intellectual Property Rights.
While using non-discrimination in the international trade regime appeared to be a laudable concept, applying it in relation to the participation of developing countries in international trade presented some problems.\textsuperscript{60} Right from the GATT era, it was feared that the unevenness in levels of economic development, industrialisation and product specialisation of states could result in a situation where the application of the MFN and national treatment principles would become inimical to the development aspirations of developing countries.\textsuperscript{61} These concerns had been expressed by Latin American states during the Bretton Woods Conference in 1944.\textsuperscript{62} They advocated for an international system of stabilising the prices of commodities on the world market to stem the high rates of volatility, especially in the market for primary products.\textsuperscript{63}

Most developing countries specialised in exports of primary products and unstable prices on the world market seriously affected their earning capacities. This was compounded by cheaper imports of manufactured products from industrialised countries. Developing countries thus faced dwindling incomes from their exports and increased imports of manufactured products resulting in balance of payment problems.\textsuperscript{64} It was also thought that cheaper imports suppressed the ability of domestic industries to build productive capacities to compete effectively with the cheaper imports from industrialised countries. There was thus the need to protect domestic infant industries from competition from stronger and more established industries in developed countries.\textsuperscript{65}


\textsuperscript{61} ibid.

\textsuperscript{62} David Pollock, Joseph Love, and Daniel Kerna, op cit. fn.25.

\textsuperscript{63} ibid.

\textsuperscript{64} ibid.

\textsuperscript{65} Peter Van den Bossche, op cit. fn.46. at 26.
The argument in favour of using protectionist policies by developing countries for the purpose of development and industrialisation was premised on the then widely accepted view that opening up to international trade would have a detrimental effect on infant industries in developing countries.\textsuperscript{66} The preferred paradigm of development was import substitution industrialisation which advocates for building domestic capacity for industrialisation and diversifying the potential for trade from primary products and raw materials to manufactured products.\textsuperscript{67}

Simply put, the argument for import substitution industrialisation advances the notion of building domestic capacity to produce products to replace imported ones.\textsuperscript{68} Thomas Fritz notes that the crux of the argument for import substitution development was an opposition to an “[U]nconditional and premature opening towards the world market”\textsuperscript{69} because this “perpetuates the dependency on the export of primary goods and raw materials since due to cheap imports there is no incentive to invest in domestic production capacities”.\textsuperscript{70}

\textbf{1.5 Raul Prebisch and the Dependencia Theory}

One of the most ardent and notable advocates of import substitution industrialisation was the Argentine Economist, Raul Prebisch. From his Latin American background, Prebisch had become convinced that free trade principles would be inimical to the development needs of Latin American states and developing countries in general.\textsuperscript{71}

\textsuperscript{68} John Toye and Richard Toye, op cit. fn.60.
\textsuperscript{69} Thomas Fritz, op cit. fn.20, at 6.
\textsuperscript{70} ibid
\textsuperscript{71} Raul Prebisch, op cit. fn.60.
Though import substitution industrialisation had been practiced especially during the Great Depression of the 1930s, Prebisch was of the opinion that conditions prevailing in developing countries after World War II were such that if they unconditionally opened their domestic markets to international trade, local industries would be suppressed by cheap imports. This would stifle growth and disable developing countries from developing domestic industrial capacities leading to a dependency syndrome. This formed the kernel of his Dependencia Theory that fuelled the argument in favour of import substitution industrialisation.

Import substitution industrialisation thus became the logical response to the development needs of developing countries with similar predicaments. John Toye and Richard Toye describe the predicament of Latin American Countries that necessitated the resort to import substitution industrialisation as follows:

Latin America was … caught in a scissors trap, between low external demand for its primary products, and its own increased demand for imports as it tried to raise average productivity by industrialisation.

Of significance is the fact that Prebisch’s dependencia theory created a north-south distinction in international trade. Prebisch argued that:

Historically, the spread of technical progress has been uneven, and this has contributed to the division of the world economy into industrial centers and

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72 Raul Prebisch, op cit. fn.60.  
74 John Toye and Richard Toye, op cit. fn.60.
peripheral countries engaged in primary production, with consequent differences in income growth. We are now at a transitional stage, in which this division is being gradually weakened, but it may take rather a long time to disappear, as the spread of technical progress into the periphery - limited originally to exports of primary commodities and related activities - is advancing more and more into other sectors, it brings with it the need for industrialization.75

States were not just equal entities enjoying mutual benefits from international trade. The rich, developed and industrialised countries (i.e. the north) occupied the ‘centre’ while the poor, less industrialised developing countries (i.e. the south) occupied the ‘periphery’.76 The ‘centre’ was viewed as the exploiter in international trade while the states on the periphery were the exploited. Protectionism in trade relations with the centre was thus needed to rectify the imbalance in benefits from trade.77

The creation of a distinction between the rich and industrialised ‘centre’ and the poor and less industrialised ‘periphery’ in the international trade system has become one of the seminal rationales for adopting certain special and preferential treatments in favour of states perceived to be on the ‘periphery’ of the international trade system.78 Such special and preferential treatments are viewed as a development aid aimed at integrating developing countries better into the international trade system.79

75 Raul Prebisch, op cit. fn.60. at 251.
76 ibid.
77 Daniel Yergin and Joseph Stanislaw, op cit. fn.73.
distinction between developed and less developed countries thus brings to the fore the special needs of the less developed and the necessity of adopting special treatments to address these special needs.

Apart from special treatment flowing from the distinction created between developed and developing countries, a more substantive issue related to the need to deviate from the non-discrimination principle that formed the foundation of the international trade system. Since developed and developing nations were not equal in terms of economic and industrial development, it was not to be expected that reciprocity in trade relations should exist between them.\(^{80}\) Also, governments of developing countries, it is argued, needed to intervene more in their domestic economies to steer it towards development. Such active government intervention in the economy was justified as necessitating the adoption of protectionist barriers in trade and hence creating the need to deviate from the MFN and national treatment requirements in the international trade system.\(^{81}\) Peter Kleen and Sheila Page observe that:

The idea that developing countries need to intervene more actively in directing their economies than do developed countries still commands considerable support, and is the basic argument behind SDT intended to allow developing countries to follow different policies.\(^{82}\)


\(^{82}\) Peter Kleen and Sheila Page, op cit. fn.79, at 9.
1.6 Epochs in the Development of Special and Differential Treatment of Developing Countries in the International Trade System

The rationale for granting special and differential treatment of developing countries has changed over time depending on what ‘development’ is perceived to be and how it can be attained through the use of policy and trade. They argue that:

In the 1940s and 1950s, development was regarded as virtually synonymous with industrialisation. In the 1960s, weakness and dependency were stressed. In the 1970s and 1980s weak institutions and economic vulnerability were seen as most important. In recent years, the focus has been on poverty.

This section of the thesis examines some of the seminal epochs in the development of the principle of special and differential treatment of developing countries in the GATT and WTO.

1.6.1 Special and Differential Treatment: The Primordial Stage in 1948

As stated earlier, the insertion of Article XVIII in the GATT in 1948 marks the primordial stages of the principle of special and differential treatment. Its introduction into the GATT in 1948 was however not for the purpose of being used exclusively by developing countries. Article XVIII generally recognised that in order to support development programmes and protect industries that are sensitive to the efforts of industrialisation and development of a contracting party, governments may need to intervene and assist in economic development.

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83 Peter Kleen and Sheila Page, op cit. fn.79, at 7.
84 ibid.
85 Thomas Fritz, op cit. fn.20.
1.6.2 The 1954/55 GATT Review Session

The defining moment in the history of special and differential treatment of developing countries in the GATT came in the 1954/55 GATT Review Session when Article XVIII, after being revised, became exclusively applicable to only developing countries.\(^{86}\) In effect, special and differential treatment as a principle in the GATT can be traced to the GATT Review Session of 1954/55.

The revised Article XVIII recognises that the economies of some contracting parties of the GATT (i.e. developing countries) can “only support low standards of living” and are in the early stages of development.\(^{87}\) Provisions were thus made for them to withdraw or modify a concession made in trade negotiations.\(^{88}\) Such modification or withdrawal signifies a temporal derogation from the principle of reciprocity in trade relations. Due to the fact that such contracting parties may need to undertake economic development programmes and policies aimed at raising the standard of living of their people, the derogation allowed the use of protective measures that affect imports. The right to use protectionism is summarised in two main clauses provided beneath: Less developed countries must be allowed:

(a) to maintain sufficient flexibility in their tariff structure to be able to grant the tariff protection required for the establishment of a particular industry; and
(b) to apply quantitative restrictions for balance of payments purposes in a manner which takes full account of the continued high level of demand for


\(^{87}\) Article XVIII:1 of the General Agreement on Tariff and Trade.

\(^{88}\) See Article XVIII:7 of the General Agreement on Tariff and Trade.
imports likely to be generated by their programmes of economic development.\textsuperscript{89}

Of importance is the fact that the 1954/55 GATT Review Session repealed the provision that gave a contracting party the right to veto a decision by another contracting party to impose tariff and quota restrictions.\textsuperscript{90} This paved the way for developing countries to use tariff and quantitative barriers in trade.

Though such protectionist policies may obviously discriminate between imported and domestic goods, hence deviating from the national treatment requirement contained in Article III of the GATT, they are not supposed to violate the MFN requirement.\textsuperscript{91} In effect, the protectionist policy must be evenly applied on all imports. The earliest form of special and differential treatment of developing countries thus placed emphasis on issues relating to the establishment and protection of infant industries and balance of payment difficulties.

In spite of the fact that Article XVIII was revised and made applicable to only developing countries, there was still disquiet among developing countries about the benefits they derived from the international trading system. For instance, in 1958, an expert panel\textsuperscript{92} established by the 1957 GATT Ministerial Conference reported that:

\begin{flushleft}
\textsuperscript{89} Article XVIII:2 of the General Agreement on Tariff and Trade.  
\textsuperscript{90} Manuela Torta, ‘Special and Differential Treatment and Development Issues in the Multilateral Trade Negotiations: The Skeleton in the Closet’, UNCTAD, (2003), at 4.  
\textsuperscript{91} Article XVIII:20 of the General Agreement on Tariff and Trade.  
\textsuperscript{92} The expert panel was headed by Professor Gottfried Haberler. The report of the panel became known as the Haberler Report.
\end{flushleft}
… there is some substance in the feeling of disquiet among primary producing countries that the present rules and conventions about commercial policies are relatively unfavourable to them.\textsuperscript{93}

The report of the expert panel further recommended the use of buffer stocks as a means of stemming the volatility of prices of commodities.\textsuperscript{94} The expert commission also recommended for a reduction in taxes on primary products imposed by developed countries so as to promote demand for primary products like tea, coffee and tobacco.\textsuperscript{95}

\textbf{1.6.3 The Founding of United Nations Conference on Trade and Development}

At the 1961 GATT Ministerial Session, the continued existence of protectionism in agriculture and obstacles to the trade of developing countries prompted the proposal and adoption of the Declaration on the Promotion of the Trade of Less-Developed Countries.\textsuperscript{96} Though concessions on tariff and quantitative barriers to trade had been made with regards to developing countries, concessions on binding preferential market access were not forthcoming. Developing countries thus felt frustrated with the slow advancement of their interests in the GATT and sought to establish a new international organisation that would advance their trade and development needs.\textsuperscript{97} The United Nations Conference on Trade and Development (UNCTAD) was thus founded in 1964 in response to the trade and development needs of developing countries.\textsuperscript{98}

\textsuperscript{94} ibid.
\textsuperscript{95} ibid.
\textsuperscript{96} Ministerial Involvement in the GATT: Note by the Secretariat, MTN.GNG/NG14/W/4, 12 June 1987.
\textsuperscript{98} ibid.
The founding of UNCTAD precipitated the adoption of Part IV in the GATT in 1964. Part IV, comprising Articles XXXVI, XXXVII, and XXXVIII, is solely dedicated to issues of trade and development for developing countries. Notably, though Part IV made provisions for more favourable market access for developing country goods, these provisions were non-binding. Article XXXVI(4) for instance states with regard to market access for developing country goods that:

Given the continued dependence of many less-developed contracting parties on the exportation of a limited range of primary products, there is need to provide in the largest possible measure more favourable and acceptable conditions of access to world markets for these products, and wherever appropriate to devise measures designed to stabilize and improve conditions of world markets in these products, including in particular measures designed to attain stable, equitable and remunerative prices, thus permitting an expansion of world trade and demand and a dynamic and steady growth of the real export earnings of these countries so as to provide them with expanding resources for their economic development.\(^{99}\)

The market access provisions in Part IV could be said to be statements of intent, the implementation of which were left to the discretion of the developed countries that were supposed to grant the preferential market access.

Another significant introduction into the GATT under Part IV was the principle of non-reciprocity. Under the principle of non-reciprocity, when developed countries

\(^{99}\) Article XXXVI:4 of the General Agreement on Tariff and Trade.
make commitments to reduce or remove tariffs and other barriers to the trade of developing countries in trade negotiations, developing countries are not expected or bound to make reciprocal commitments in return.\textsuperscript{100}

One proposal that did not receive a legal backing under the GATT in 1964 was the Generalised System of Preferences (GSP) that had been advocated at the founding of UNCTAD.\textsuperscript{101} The proposed GSP advocated for developed countries to grant preferential market access to developing country exports. Such preferences were however to be given exclusively to developing countries. In effect, adopting the GSP would require a derogation from the MFN requirement in Article I of the GATT since the preferences were to discriminate in favour of developing countries.

Another rationale for the proposed GSP was the need to create a uniform system of preferences for developing countries to replace the myriad systems of preferences that operated along colonial ties. These trade preferences derogated from the MFN requirement but were sanctioned by the GATT under Article I(2)(b) – “‘Preferences in force exclusively between two or more territories which on July 1, 1939, were connected by common sovereignty or relations of protection or suzerainty.’”\textsuperscript{102} This derogation from the MFN, \textit{inter alia}, related to preferences that existed between colonies and their colonisers. Such preferential trade relations continued to exist after the attainment of independence by the colonies. An example is the British Commonwealth preferences that existed between Britain and her former colonies and protectorates.\textsuperscript{103}

\begin{flushright}
\textsuperscript{100} Article XXXVI:8 of the General Agreement on Tariff and Trade.
\textsuperscript{101} Thomas Fritz, op cit. fn.20.
\textsuperscript{102} Article I:2(b) of the General Agreement on Tariff and Trade.
\textsuperscript{103} Annex A of the General Agreement on Tariff and Trade.
\end{flushright}
1.6.4 Legalising the General System of Preferences

The GSP was established in 1968 at the UNCTAD II conference in New Delhi when the US, formerly opposed to the GSP, agreed to its establishment under the GATT. The GSP was however to be temporary, confined to only tariffs, applicable to all developed countries, and be instituted on a voluntary basis. In 1971 the GATT Contracting Parties agreed to a 10-year waiver of the MFN principle with regard to the operation of the GSP in the GATT. There was also a waiver relating to the preferences that developing countries grant each other under the Global System of Trade Preferences (GSTP). The 10-year MFN waiver was secured under Article XXV(5) of the GATT which provides that:

… the CONTRACTING PARTIES may waive an obligation imposed upon a contracting party by this Agreement; Provided that any such decision shall be approved by a two-thirds majority.

However, like the market access concessions agreed under Part IV of the GATT in 1964, the GSP was not mandatory. Developed countries were to apply it on a voluntary basis. The GSP could be introduced, varied or withdrawn at will by the granting state.

Perhaps the most significant development in the special and differential treatment of developing countries was the permanent legal status accorded the GSP by the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller

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106 Thomas Fritz, op cit. fn.20.
107 ibid.
Participation of Developing Countries (more popularly known as the Enabling Clause) in the 1979 Tokyo Round.\textsuperscript{108} It ensured that the 10-year waiver granted to the GSP did not expire in 1981 as expected. The Enabling Clause provides \textit{inter alia} that: “Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties.”\textsuperscript{109}

The permanent MFN waiver granted the GSP in 1979 relates to four areas:

i. Preferential tariffs granted by developed countries to developing country goods;

ii. Differential and more favourable treatment regarding non-tariff measures

iii. The operation of regional or global mechanisms among developing countries to mutually reduce or eliminate tariff and non-tariff barriers; and

iv. Special treatment for least developed countries regarding general or specific preferences accorded to developing countries.\textsuperscript{110}

In spite of the permanent legal status accorded the GSP, the Enabling Clause did not create any binding norms on developed countries in their implementation of the GSP. Consequently, the GSP continued to be implemented on a voluntary basis by


\textsuperscript{110} ‘Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries’ para.2.
developed countries. A new area introduced by the Enabling Clause was the differentiation between developing and least developed countries in the international trade regime. This did not result in any binding commitments either. Constantine Michalopoulos thus observes that:

… the Enabling Clause was a summation, rather than an extension, of the efforts made since 1954 to address the concerns of developing countries within the multilateral trading system.\textsuperscript{111}

Since one of the main rationales for the GSP was the ‘Fuller Participation of Developing Countries’ in international trade as expressed in the official title of the Enabling Clause, it was expected that with time, developing countries would develop their capacity to participate better in the international trade system.\textsuperscript{112} This meant that they would no longer need the preferential treatments and would be able to adhere to the principles of mutuality, reciprocity and non-discrimination. Thus when the GSP was given a permanent legal status, the principle of graduation was introduced to implement a system of phasing out of preferences accorded to developing countries that had achieved advancements in their economic development and as such could adhere to the multilateral trade rules.\textsuperscript{113}

In all, the demands for changes in the international trade system to cater for the needs of developing countries can be summarised under the following:

\textsuperscript{111} Constantine Michalopoulos, op cit. fn.78, at 8.
\textsuperscript{112} ibid.
i. Preferential access into the market of developed countries;

ii. Non-reciprocity in trade relations;

iii. Flexible application of GATT/WTO rules; and

iv. Stability in prices of commodities on the world market\textsuperscript{114}

\textbf{1.6.5 The Paradigm Shift of the 1980s}

The 1980s witnessed trade policy changes in a lot of developing countries. There was a move from the hitherto accepted development paradigm of import substitution industrialisation to export orientation and integration into world trade.\textsuperscript{115} In 1983 for instance, the Leutwiler Group\textsuperscript{116} established by the Director General of GATT, Arthur Dunkel, was of the view that open international trade was beneficial to economic growth and development and that protectionist policies and restrictions to international trade were detrimental to the ability of states to grow economically and to benefit from new technologies.\textsuperscript{117} This view epitomised the consensus of the era – free international trade would culminate in economic growth and development. Examples of states like Korea, Taiwan and Singapore who had employed an export oriented system of economic growth became an inspiration to many other developing countries and they sought to replicate the successes of these states.

This paradigm shift had an important influence on the results of the Uruguay Round of trade negotiations as largely, special and differential treatment of developing countries did not take the form of derogation from multilateral rules. Special and

\textsuperscript{114} Manuela Torta, op cit. fn.90.

\textsuperscript{115} Thomas Fritz, op cit. fn.20, at 10.

\textsuperscript{116} The Leutwiler Group was a group of non-governmental experts named after its Chairman Fritz Leutwiler.

differential treatment now took the form of more flexible time frames for adhering to multilateral rules and provision of technical assistance in the implementation of multilateral rules in domestic legal and administrative systems. For example, in the TRIPS Agreement, developing countries were granted a four-year time frame for implementation\textsuperscript{118} while least developed countries were given a 10-year period for implementation.\textsuperscript{119}

1.7 Critique of the Concept of Special and Differential Treatment

The concept of special and differential treatment of developing countries in the international trade system has not gone without criticism. Some critique have focussed on the utility of the concept as a tool for integrating developing countries into the international trade system, while others have questioned the very conceptual basis for granting special and differential treatment.\textsuperscript{120}

The practice of import substitution industrialisation has, as a result, been abandoned by most developing countries as active involvement in international trade has been viewed as a more preferred option for attaining economic growth and development.\textsuperscript{121}

\textsuperscript{118} Article 65 of the Agreement on Trade Related Aspects of Intellectual Property Rights.
\textsuperscript{119} Article 66 of the Agreement on Trade Related Aspects of Intellectual Property Rights.
\textsuperscript{120} See Joel P. Trachtman, ‘Legal Aspects of a Poverty Agenda at the WTO: Trade Law and ‘Global Apartheid’’, \textit{Journal of International Economic Law}, 6:1, (2003), pp.3-21. Trachtman for instance argues that “S&D is a complex phenomenon - some aspects of S&D are undoubtedly beneficial. However, this concept seems to mask the fact that the international trade system has done little specifically intended to alleviate poverty: it is not special and differential enough.” pp.10-11. See also Edwini Kessie, ‘The Legal Status of Special and Differential Treatment Provisions under WTO Agreements’, in George A. Bermann and Petros C. Mavroidis (eds), \textit{WTO Law and Developing Countries}, Cambridge: Cambridge University Press, (2007) pp.12-35. Drusilla Brown, ‘Trade Preferences for Developing Countries: A Survey of Results’, \textit{Journal of Development Studies}, 24(3), (1988). Brown argues that though preferences accorded to least developed countries stimulate exports in the covered areas of the preferences, the impact on total exports are not significant due to the limited coverage of the preferences. It must be noted though that the study predates the ‘Everything but Arms’ GSP schemes currently maintained for least developed countries by donors like the EU.
Preferential access into the markets of developed countries has become a greater focus of the advocacy for special and differential treatment. Successes achieved by newly industrialising nations, especially in South East Asia, like South Korea, Singapore and Taiwan have aided this paradigm shift from import substitution industrialisation to greater integration and participation in international trade through diversified exports.\footnote{122} It has been argued that import substitution industrialisation tended to overemphasis reliance on the domestic market instead of exploring bigger market opportunities through exports.\footnote{123} Thus even when market access opportunities exist outside the domestic market, industries in countries where barriers to trade exist have been unable to exploit such advantages.\footnote{124}

Even the resort to more preferential market access for developing country goods under the generalised system of preferences has been found to be inimical to the trading interests of developing countries.\footnote{125} Preferences granted under the GSP are non-mandatory. Developed countries can thus withdraw or vary the preferences at will. However, if developing countries had addressed their trading interests through MFN tariff reductions, it would have provided more certainty in market access opportunities due to the binding nature of MFN commitments. Multilateral means of addressing trading interests instead of derogations from multilateral rules exposes developing countries to arm-twisting strategies by powerful economies like the US and the EU. The ‘Sutherland Report’ observes that:

\footnote{122} Henry J. Bruton, op cit. fn.121.  
\footnote{124} ibid.  
For the most part, the US, the EU and other major economies have recognized their interests – and those of their exporters – in seeking to make the multilateral system deliver. (...) But 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. Everyone has an interest in the continued success of the WTO as an institution but no group has a greater interest than the weak and poor.126

Another criticism of special and differential treatment relate to the requirement of non-reciprocity. It is argued that because developing countries sought non-reciprocity in trade negotiations, developed countries concentrated on tariff reduction in areas of trading interest to them while tariffs in areas of trading interest to developing countries remained comparatively higher.127 For instance, there were successive cuts in tariffs for industrial products (manufactures) in both the Kennedy Round which ended in 1967 and the Tokyo Round which ended in 1979.128 Of significance is the fact that these cuts favoured industrial goods which are of trading interest to developed countries. The tariff cuts for goods of export interest to developing countries however did not fare that well. Whereas at the end of the Kennedy Round tariff reduction for goods of interest to developed countries stood at 36 per cent, that for goods of interest to developing countries was 26 per cent, a difference of 10 per cent in favour of developed country goods.129

126 Peter D. Sutherland et al, op cit. fn.19, at 18.
128 Constantine Michalopoulos, op cit. fn.78.
129 ibid.
At the end of the Tokyo Round, tariff reduction for goods of interest to developed countries was 33 per cent as against 26 per cent for goods of interest to developing countries.¹³⁰

Jagdish Bhagwati has argued that the slower pace of tariff reduction for goods of export interest to developing countries is partly attributable to their insistence on non-reciprocity in trade negotiations.¹³¹ Judging on the basis of mutuality and reciprocity, it could be argued that developing countries cannot have their cake and eat it. Bhagwati puts it more bluntly: “If you want a free lunch, you do not eat at the Lord Mayor’s banquet.”¹³²

Andrew Charlton and Joseph Stiglitz have however criticized the use of parity in the critique of trading relations between developed and developing countries. They opine 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.¹³³

It is worthy of note however that by implementing GSP on a voluntary basis, developed countries had instituted some level of preferential market access to

¹³⁰ Constantine Michalopoulos, op cit. fn.78.
¹³¹ Jagdish Bhagwati, op cit. fn.127.
developing country goods. Binding tariff reductions secured on an MFN basis during successive MTNs also provided some level of market access for developing countries. This culminated in two routes of market access for developing country goods – one via the GSP route and one via the multilateral route of binding MFN tariff reductions. It is thus plausible that the refusal of developed countries to reduce tariffs on goods of export interest to developing countries on the same level and pace as those of interest to developed countries stems from an unwillingness to grant developing countries a double advantage through the GSP and MFN routes.

The continued erosion of MFN in the multilateral trade rules have also been criticized as not being conducive for the development of non-discrimination in trade relations. The insistence of developing countries to derogate from MFN provisions under the GSP is a contributing factor to its dwindling importance in the multilateral trade system. The erosion of MFN treatment means that the very foundation of the trade regime is at risk, as the GATT and WTO are founded on principles of non-discrimination in trade relations among members. According to the Sutherland Report:

… nearly five decades after the founding of the GATT, MFN is no longer the rule; it is almost the exception. Certainly, much trade between the major economies is still conducted on an MFN basis. However, what has been termed the “spaghetti bowl” of customs unions, common markets, regional and bilateral free trade areas, preferences and endless assortment of miscellaneous trade deals has almost reached the point where MFN treatment
is exceptional treatment. Certainly the term might now be better defined as LFN, Least-Favoured-Nation treatment.\textsuperscript{134}

1.8 The Need for a Legal Definition of Developing Country in the WTO

A related issue to the above critique of the principle of special and differential treatment is the lack of a legal definition of developing country status in the GATT/WTO. The designation of developing country is a prerequisite for benefiting from special and differential treatment. The designation of developing country status in the WTO is however made through self-declaration.\textsuperscript{135} In other words, there is no established normative standard for determining the level of development of a country that qualifies it to be designated as a developing country. This results in situation where some countries can be at the low end of the developing country ladder while other countries are higher up the ladder in terms of levels of development. At the inception of the Doha Development Round for instance, both Singapore and Ghana were classified as developing countries under the WTO. This classification did not take into consideration the fact that in 1997, Singapore had a per capita income of $32,810 while Ghana had a per capita income of $390.\textsuperscript{136} A study conducted by Karsenty and Laird in the 1980s for instance showed that four developing countries – Brazil, Hong Kong, Korea and Taiwan – reaped more than 50 per cent of the benefits accruing from the GSP.\textsuperscript{137}

\textsuperscript{134} Peter D. Sutherland \textit{et al}, op cit. fn.19, at 19.
\textsuperscript{135} WTO, 'Who are the developing countries in the WTO?' http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm - (viewed on 2 August 2012). In defining developing country status, the WTO states that: "There are no WTO definitions of "developed" and "developing" countries. Members announce for themselves whether they are "developed" or "developing" countries. However, other members can challenge the decision of a member to make use of provisions available to developing countries." (ibid).
\textsuperscript{136} Michalopoulos, op cit. fn.78.
Such disparities in the benefits accruing from the GSP defeats the purpose for its establishment – to afford a general mechanism of trade preferences for all developing countries so as to increase their fortunes in international trade. Evidently, some developing countries are able to take a greater advantage of the GSP due to their level of industrialisation and development.

The case is however different with LDCs. The designation of LDC in the WTO is based on the definition adopted by the UN Economic and Social Council. Countries designated as LDCs “are structurally handicapped in their development process, and in need of a high degree of support, in their development efforts, from the international community”.\(^{138}\) LDCs are also low-income countries severely disadvantaged in their human capital and economic structure.\(^{139}\) Though there would be different levels of development among LDC states, the generally low levels of development in these states have informed their categorisation as LDCs.

The status of LDCs is thus legally defined and recognised in the WTO and the attendant rights that accrue to this status are given.\(^{140}\) Hence the granting of enhanced preferences to LDC states can be justified based on the quite uniform level of low development in these states. Such preferential treatments are not only accorded to LDCs by developed countries. The Decision on Waiver Regarding Preferential Tariff Treatment for Least-Developed Countries\(^{141}\) for instance, made it possible for


\(^{139}\) ibid.

\(^{140}\) Peter Kleen and Sheila Page, op cit. fn.79, at 13.

developing countries to grant preferential market access to LDC products from 1999 to 30 June 2009.

1.9 The Adequacy of Special and Differential Treatment as a Tool for Integration into International Trade

The fundamental rationale for instituting special and differential treatment of developing and least developing countries, as the discussion above has presented, is for the purpose of aiding the economic development of the less developed in the trade regime. Also, by granting them preferential market access, it is expected that developing and least developed countries would be better integrated into international trade. To be able to do this, there was the need for developing countries to derogate from the fundamental principles of non-discrimination and reciprocity in trade relations with developed countries. This was typified by the Enabling Clause which legitimised the adoption of GSP schemes in favour of developing and least developed countries. The adequacy of the GSP as a tool for economic development and integration into international trade however presents problems due to the non-mandatory provisions relating to its application. As stated above, developed countries can vary or withdraw GSP schemes at will.

Quite apart from the non-mandatory manner of its application, GSP granting countries have been noted to use conditionalities as prerequisites for accessing preferences. Some of these conditionalities relate to sensitive issues like labour standards that have not been incorporated into multilateral disciplines at the WTO level but which have become applicable to developing countries that access GSP schemes. To depend solely on GSP as a tool for economic development and integration into international
trade thus means that, the policy choices of developing countries become dependent on the uncertain GSP policies instituted by developed countries. The case EC – Tariff Preferences\textsuperscript{142} sheds some light into this state of affairs. A brief analysis of the case is given beneath.

\section*{1.10 The EC – Tariff Preferences Case}

\subsection*{1.10.1 Facts of the Case}

The EC – Tariff Preferences case was brought against the European Communities (EC) by India due to Council Regulation (EC) No. 2501/2001 which was deemed by India to be discriminatory in the granting of preferences under the EC’s GSP. The regulation at issue sought to apply “a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004”.\textsuperscript{143}

Five categories of tariff preferences were provided for under the Regulation. These were the General Arrangements, special incentive arrangements for labour rights protection, special incentive arrangements for environmental protection, special arrangements relating to least developed countries, and special arrangements aimed at combating drug production and trafficking (the Drugs Arrangements).\textsuperscript{144}

The General Arrangements was accessible to all the countries listed in Annex I of the Regulation (i.e. developing countries) and accorded duty-free access to products that were deemed ‘non-sensitive’ and a preferential tariff scheme for products deemed to

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\textsuperscript{144} Para. 5 of Appellate Body Report on EC – Tariff Preferences.
be ‘sensitive’.145 The special incentive arrangements for labour rights protection and protection of the environment were only accessible to countries that, based on the EC’s determination, had met certain policy standards that protect labour rights and the environment. These special arrangements offered additional preferences to qualifying countries that were not available under the General Arrangements.146 The special arrangements for least developed countries offered additional preferences that were exclusively accessible to least developed countries.147

The Drugs Arrangement also exclusively offered additional preferences not available under the General Arrangements to 12 countries148 determined by the EC to be facing a peculiar problem with production of illicit drugs. The Drug Arrangements thus served as an incentive for local farmers to engage in producing economically viable crops instead of drug related plants.149

India, which was a beneficiary only of the General Arrangements, had argued to the Panel at first instance that “the Drug Arrangements … are inconsistent with Article I:1 of GATT 1994 and are not justified by the Enabling Clause”.150 India further argued that the Drug Arrangements had nullified or impaired benefits accruing to it under the GATT 1994. The crux of India’s objection to the Drugs Arrangements lay in its supposed discriminatory nature, in that it offered more preferential treatment to the 12 predetermined states. It thus viewed the Drug Arrangements as a violation of the MFN principle enshrined in Article I:1 of GATT 1994. Based, inter alia, on the

146 Ibid.
147 Ibid.
148 i.e. Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru, and Venezuela.
150 Para. 3.1 of Panel Report on EC – Tariff Preferences.
foregoing, it was necessary for the EC “to bring the measure at issue into conformity with the GATT 1994”.\footnote{para. 3.3 of Panel Report on \textit{EC – Tariff Preferences}.} India had initially also challenged the consistency of the special arrangements relating to labour rights and the protection of the environment on the same basis as the Drugs Arrangements but later relinquished this challenge.\footnote{Para. 4 of Appellate Body Report on \textit{EC – Tariff Preferences}.}

The EC on its part was of the view that the Enabling Clause was an autonomous right and not an affirmative defence. Consequently, the MFN provision of Article I:1 of GATT 1994 did not apply to the Enabling Clause. Furthermore being a measure maintained under the Enabling Clause, India’s assertion that the Drugs Arrangement had breached Article I:1 of GATT 1994 and nullified or impaired benefits accruing to it under the same was erroneous. The EC further argued that even “[I]f the Panel were to find that the Drug Arrangements fall within Article I:1 of GATT 1994, and that they were \textit{prima facie} inconsistent with that provision, the European Communities requests the Panel to find that they are justified under Article XX(b) of GATT 1994 …”.\footnote{Para. 3.7 of Appellate Body Report on \textit{EC – Tariff Preferences}.}

\textbf{1.10.2 Decision of the Panel}

At first instance, the Panel found that the Enabling Clause was an exception to the GATT 1994 and also that the Drug Arrangements were not consistent with Article I:1 of GATT 1994 and were neither justified by Article 2(a) of the Enabling Clause nor by Article XX(b) of GATT 1994.\footnote{ibid para 8.1(f).} The Panel also found that the Enabling Clause required the application of identical GSP tariff preferences to all developing countries in order to prevent discrimination amongst them. Based on the foregoing, the Panel
held that the EC had nullified or impaired benefits accruing to India under GATT 1994.

1.10.3 Decision of the Appellate Body
On appeal, the Appellate Body inter alia upheld the findings of the Panel on the application of Article I:1 of the GATT to the Enabling Clause and the inconsistency of the Drugs Arrangements with the same, but with some significant variations. To the Appellate Body, the inconsistency of the Drug Arrangements with the Enabling Clause lay in the fact that the selection of the developing countries that qualified for this scheme was done arbitrarily by the EC and not based on objective criteria. The Appellate Body however differed with the Panel on the finding that the Enabling Clause required the application of identical GSP tariff preferences to all developing countries in order to prevent discrimination amongst them. It thus held that Paragraph 3(c) of the Enabling Clause authorized “preference-granting countries to “respond positively” to “needs” that are not necessarily common or shared by all developing countries. Responding to the “needs” of developing countries may thus entail treating different developing country beneficiaries differently.”

1.10.4 Analysis of the Appellate Body Decision
The EC appealed against the findings of the Panel as stated above. The key issues that formed the basis of the Appellate Body’s decision are analysed beneath.

One important question that the Appellate body addressed was whether the Enabling Clause constituted a positive rule that set out obligations or it was an exception.

156 ibid para. 162.
authorising derogation from one or more such positive rules. In establishing whether the Enabling Clause was a derogation from the GATT 1994, the Appellate Body considered the meaning of ‘notwithstanding’ as used in Paragraph 1 and came to the conclusion that: “[T]he ordinary meaning of the term “notwithstanding” is, as the Panel, noted “[i]n spite of, without regard to or prevention by” Based, inter alia, on this analysis, the Appellate Body upheld the finding of the Panel that the Enabling Clause acted as an exception to the MFN provision in Article I:1 of the GATT 1994 and that “as an exception provision, the Enabling Clause applies concurrently with Article I:1” and thus “takes precedence to the extent of the conflict between the two provisions”.

The application of Article I:1 to the Enabling Clause also raised the issue of non-discrimination in the provision of preferences to developing countries. The Panel’s view that the non-discrimination rule in Paragraph 2(a) of Enabling Clause required the provision of identical preferences to all developing countries had the potential effect of bringing to an end the adoption of GSP schemes by developed countries. The Panel had also held that with the exception of a priori limitations the term ‘developing countries’ in Paragraph 2(a) means all developing countries. The threat to the continuance the GSP system lay in the fact that the provision of GSP schemes has been thought of as a voluntary undertaking by developed countries to aid developing countries. Thus the institution of rules that oblige the provision of identical preferences to all developing countries would have taken away the voluntary

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158 ibid para. 90.
159 ibid para. 98.
160 ibid para. 102.
161 ibid.
nature of the GSP and negatively affected the willingness of developed countries to grant such preferences as GSP schemes do not usually provide origin-neutral preferences.\textsuperscript{164} The US is for instance noted for using mandatory criteria to determine developing countries that qualify for GSP status. Some of the considerations that disqualify countries include communism, membership of an international cartel causing harm to the global economy (ostensibly aimed at members of the Organisation of the Petroleum Exporting Countries (OPEC)), expropriation, non-enforcement of arbitral awards, involvement in terrorism, non-observance of the rights of workers, and violation of prohibitions against child labour.\textsuperscript{165} Evidently, a disqualifying condition like communism or membership of an international cartel would result in \textit{de facto} discrimination regarding origin of products, as communist and OPEC countries would be automatically disqualified.

Consequently, the less mandatory interpretation given by the Appellate Body – that preference-granting countries can treat developing countries differently, albeit with the proviso that such treatment must address differences of needs – had the effect of preserving the voluntary nature of the GSP. Thus ‘similarly situated’ developing countries could be treated differently from other developing countries that do not share the same ‘situation’.\textsuperscript{166} However, the objective criteria requirement set by the Appellate Body prevents arbitrary discrimination as GSP granting countries would not be able to institute a closed ended list of countries that qualify for preferences, as was the case with the EC’s Drug Arrangements.

\textsuperscript{164} Michael J. Trebilcock and Robert Howse, op cit. fn.108.
\textsuperscript{166} Peter Van den Bossche, op cit. fn.46, at 683.
It is important to note that the use of objective criteria to ‘respond positively’ to the needs of developing countries in itself ‘sanctions’ the adoption of GSP conditionalities. The Appellate Body held that “[B]road-based recognition of a particular need, set out in the WTO Agreement or in multilateral instruments adopted by international organizations, could serve as such a standard”.\textsuperscript{167} In its reformed GSP scheme after the Appellate Body’s decision in \textit{EC – Tariff Preferences} for example, the EC instituted a GSP Plus which grants greater preferences to countries that have ratified and are implementing a list of 27 international conventions.\textsuperscript{168} Also GSP granting nations can still withdraw (i.e. negative conditionality) or vary their schemes at will. Lorand Bartels thus argues that:

… the provisions on ‘negative’ conditionality in the EC and US GSP programs now present a problem. If differentiation between developing countries is only permissible on the basis of a ‘positive response’ to development needs, this means that differentiation is permitted only when tariff preferences are granted to achieve an objective, not when they are withdrawn to achieve an objective.

\textsuperscript{167} Para. 163 of Appellate Body Report on \textit{EC – Tariff Preferences}.

It might be possible to argue that the relevant development needs are those of the countries that are continuing to benefit from the preferences. However, the difficulty with this argument is that the country from which preferences have been withdrawn will no doubt share these development needs. Any failure to grant the same preferences will therefore be discriminatory.\footnote{Lorand Bartels, op cit. fn.165, at 19.}

The question must be asked whether the WTO or the trade regime is the right forum to address issues like human rights, good governance, labour rights, and environmental protection. If it is, then there should be a general application of these standards in the trade regime. Among others, the preamble to the WTO Agreement and Article XX of the GATT 1994 contain general policy principles on issues like the protection of the environment and the use of prison labour. There is however no multilateral agreement specifically dealing with these policy issues in the way disciplines on, for example, trade in goods and services, or intellectual property rights are addressed at the multilateral level.

Limiting some disciplines largely as conditionalities for accessing GSP schemes granted to developing countries brings to the fore the use of unequal leverages in trade relations between developing and developed countries. For instance in 1997 preferences to Argentina were suspended by the US due to a dispute over intellectual property.\footnote{UNCTAD, \textit{Generalized System of Preferences: Handbook on the Scheme of the United States of America}, (2003).} The US also suspended preferences to Pakistan for some time but later restored it in return for cooperation with the ‘fight’ against terrorism.\footnote{ibid.}
If however GSP conditionalities were uniformly applied in the trade regime as multilateral agreements, they would have gone through a process of negotiations and developing countries would have made inputs into these negotiations that reflect their peculiar interests. Because the regulation of preferences under the GSP has been left, to a large extent, at the discretion of the providing nations, it gives them the leeway to institute norms that otherwise do not normally pertain in the rules based system of the trade regime. Thus, because they are beneficiaries of preferences provided on voluntary basis, developing countries have no say or leverage in the setting of standards for accessing the preferential treatments.

Evidently, the Enabling Clause, as the discussion above shows, contains rules that regulate the granting of GSP schemes to developing and least developed countries. This however does not take away the fact that developed countries can institute, vary or withdraw GSP schemes at will, and also establish requirements conditioned on access to preferences. There is thus an increasing institutionalisation of a dual normative system, a bijuralism in the offing, with regard to the participation of developing countries in the international trade regime. Developing countries would have to meet the ‘normal’ multilateral rules and the ‘extra-normal’ GSP conditionalities.

Commenting on the exclusion of Iran, Cuba, North Korea and Syria from the US’ GSP scheme, Gene Grossman and Alan Sykes argue that:

“It is assuredly possible that geopolitical considerations play a broader role sub rosa in many of the decisions regarding beneficiary status, and there is no
mechanism to ensure that the various criteria are applied in careful and even-handed fashion.”\(^{172}\)

They argue further that the GSP systems run by the US and EC “exhibit a significant degree of “discrimination” and “reciprocity” in their design and their application that goes well beyond simply the more favourable treatment of least-developed nations that was envisioned by UNCTAD.”\(^{173}\).

1.11 Concluding Remarks

The effective operation of the multilateral trade system, it appears, holds good prospects for all participants if the needs of all are addressed in a non-mercantilist manner. As much as it is to be desired that fundamental principles like mutuality, reciprocity and non-discrimination remain the central pillars in the trade regime, a ‘one size fits all’ approach cannot be countenanced. Fairness cannot be conceived solely in the equal application of rules, but perhaps more importantly, in the due regard that is paid to the needs of those who will become more disadvantaged by the equal application of rules. Just as in municipal law positive discrimination is used to rectify inequalities, the needs of poor and disadvantaged states cannot be overlooked by the equal application of multilateral rules. Whatever form non-discrimination, mutuality and reciprocity take in the multilateral system, it appears that as long as wide inequalities persist in the levels of economic and industrial development of WTO Members, there will continue to be the need to derogate from the fundamental rules of the trading system so as to promote some measure of effective equality in the participation of countries in international trade.

\(^{172}\) Gene M. Grossman and Alan O. Sykes, ‘European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries’, *American Law Institute*, (2005), pp.242-243

\(^{173}\) ibid, at 245.
The need to derogate from the fundamental rules of the trading system must however assure a positive integration into international trade based on economic development in developing and least developed countries. In effect, there is the need for a development paradigm to trade. This development paradigm cannot become a reality if its institution is left to the behest of developed countries and their GSP schemes. Special and differential treatment cannot assure integration into international trade when the key decisions relating to its implementation are left to developed countries.

However, a pertinent question that must be asked is whether a sovereign state can be compelled to grant trade preferences even in a treaty organisation that the state has acceded to. Evidently, there is a moral case to be made for being good to others, but can goodness to others be obliged through binding rules? The voluntary nature of the GSP underlies the possible objection to a binding system of trade preferences.

Much as it may be objectionable to oblige goodness to others based on binding rules, the case can be made for prohibiting the use one’s goodness as a tool for manipulation or leverage. It should be possible, for instance, to institute multilateral rules that prevent the use of extra-WTO standards or norms as conditions for granting trade preferences, because contentious issues that have not been incorporated under multilateral rules could easily find their way by stealth into the trade regime under the guise of GSP conditionalities.

As things stand at the moment, it is evident that special and differential alone cannot assure the integration of developing countries into international trade and neither can it be relied on as a development tool. Also, the current direction of special and
differential treatment as evidenced in the post-Uruguay Round MTA’s point towards a more uniform application of multilateral rules. By dint of the application of the single undertaking principle in the WTO Agreement, multilateral rules are binding on all Members of the WTO. The era of ‘pick and choose’ has come to an end. Developing and least developing countries must thus be more assertive in the policy direction of the WTO so their trading needs can be represented under multilateral rules and not under the voluntary largesse of developed countries. For this to happen, developing countries must be more proactive in their participation in decision-making at the WTO.

174 Article II:2 of the Agreement Establishing the World Trade Organisation.
CHAPTER TWO: THE CONCEPT OF SOVEREIGN EQUALITY
OF STATES IN INTERNATIONAL LAW

Introduction

In the previous chapter, the argument was made that special and differential treatment of developing countries in the WTO is aimed at addressing some of the asymmetries of economic power in the trade regime, and by so doing promote ‘effective’ equality in the participation of countries in international trade. However, the actual practice of special and differential treatment presents some of the problems of inequality that it is supposed to address, one of the most significant being the use of conditionalities as pre-requisites for accessing preferential treatment under various developed country GSP schemes.¹⁷⁵ The example of the use of labour standards, among others, in the EU’s GSP (discussed in chapter one) is a case in point. Of note is the fact that regulation of labour standards under the WTO was one of the most hotly debated issues especially prior to the 1996 Singapore Ministerial Meeting.¹⁷⁶ Proposals to incorporate core labour standards as identified under the International Labour Organisation (ILO)¹⁷⁷ under the rubric of multilateral disciplines was described by the

WTO Secretariat as being “among the most controversial currently before the WTO”.\textsuperscript{178} Whereas developing countries were against such incorporation, support for it came from developed countries, notably the EU and the US.\textsuperscript{179} However, the 1996 Singapore Ministerial effectively delineated the WTO’s competence regarding labour standards, noting that the International Labour Organisation (ILO) is the competent body to deal with this issue. The 1996 Singapore Ministerial Declaration states in relevant part that:

We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.\textsuperscript{180}

Reasonably, the Singapore Declaration, made by the Ministerial Conference, the highest decision-making body of the WTO, should have been enough to clarify the position of the WTO on the matter of labour standards. Thus to use labour standards,

\textsuperscript{179} WTO Secretariat, op cit. fn.176.
\textsuperscript{180} ibid.
\textsuperscript{180} Paragraph 4 of the Singapore Ministerial Declaration, 1996
among others, as a condition for granting preferences under the GSP raises legitimate questions of leverage, arm twisting, and inequality in the WTO. Of greater significance is the fact that the very system that was meant to be used to achieve some measure of ‘effective’ equality can become the vehicle for driving a deeper chasm of inequality within the WTO, especially when it comes to influence on the policy direction of the WTO. Elisabeth De Vos thus argues that:

… economic weakness gives the developing states little choice and power to influence the system in this interdependent world. ‘Join the club and conform to the existing rules’ is the present position. Does this leave them with the possibility of a meaningful exercise of their economic sovereignty, or is it a sovereignty without substance?\(^{181}\)

Based on the foundations built in the preceding chapter, this chapter presents the principle of sovereign equality of states as the theoretical framework of this research. In effect, the discussions engaged upon are offered as part of a larger theoretical framework of sovereign equality. Thus the fundamental question that arises is whether special and differential treatment of developing countries enhances their ‘sovereign equality’ in WTO law and if not, how can developing countries ‘protect’ or ‘enhance’ their ‘sovereign equality’ in WTO law. Chapter one focussed, to some extent, on the first part of this question – i.e. does special and differential treatment of developing countries enhance their ‘sovereign equality’ in the WTO? The proceeding chapters will focus on the second part of the question – ‘if not, how can developing countries ‘protect’ or ‘enhance’ their ‘sovereign equality’ in WTO law?’ The aspect of WTO

law that will be used in analysing the second part of the above stated question is the WTO decision-making process. The rationale for focussing on the WTO decision-making process in the proceeding chapters is concisely articulated beneath.

Special and differential treatment is supposed to achieve some form of effective equality in the WTO. Thus Pascal Lamy, the Director-General of the WTO, argues that:

… the WTO goes beyond formal equality and seeks to establish real equality. True equality can only exist between equals. When it comes to trade, some of the less developed countries require certain flexibilities if trade and development are to continue to exist side by side. So the developing countries can enjoy non-reciprocal benefits, in particular special and differential treatment.\(^{182}\)

However, how can equality be achieved if those at the fringes of the trading system do not have the requisite leverage to influence the policy direction of the WTO? The lack of leverage to influence the system would result in the ‘Join the club and conform to the existing rules’ scenario described by DeVos. Consequently, special and differential treatment as a tool for achieving equality is not adequate if it is not matched with effective participation of developing countries in the WTO decision-making process.

Before proceeding to analyse the WTO decision-making process, the fundamental issue of sovereign equality of states in international law will be looked at in this

chapter. The theoretical framework of sovereign equality has been sandwiched between the discussions on special and differential treatment and the WTO decision-making process so as to achieve a hindsight and foresight effect. That is, from hindsight, the discussion on special and differential treatment is supposed to be seen within the larger theoretical framework of sovereign equality and the same framework is supposed to provide a foresight into the discussion on the WTO decision-making process.

2.1 The Principle of Sovereign Equality of States in International Law

The principle of sovereign equality is a fundamental norm that regulates the conduct of states in the international community. Its fundamental nature is evidenced by its enshrinement in the Charter of the United Nations. Article 2:1 of the UN Charter states that: “[T]he Organization is based on the principle of the sovereign equality of all its Members.”\(^{183}\) Though the principles of State sovereignty and equality of States in international law predates the UN Charter, its adoption as the basis of a ‘universal’ international law applicable to all states and not only European states was relatively novel.\(^{184}\) Thus during the Moscow Conference of 1943, a precursor to the UN, the universal application of the concept of sovereign equality of states was recognised in the Declaration of the Four Nations on General Security (Declaration on General

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\(^{183}\) Article 2:1 of the United Nations Charter.

\(^{184}\) Wilhelm G. Grewe for instance argues that even though the congress of Vienna 1814-15 instituted the principle of state consent with regards to decisions affecting the European States in the Concert of Europe established after the Napoleonic Wars, the seeming equality that this brought did not take away the fact that the interests of the Great Powers – Britain, Austria, Russia and Prussia – held sway. Equality with regards to state consent was restricted in its application to the weaker European states in the sense that their consent was only needed on issues that directly concerned them whereas it was presupposed that the consent of the Great Powers was needed on all matters as their interests were pervasive. Wilhelm G. Grewe and Michael Byers, *The Epochs of International Law*, Berlin: Walter de Gruyter GmbH & Co. (2000) pp.429-431.
The meeting of the United States, United Kingdom, China and Russia in Moscow in 1943 was one of the foundational conferences that culminated in the formation of the UN and it preceded the Dumbarton Oaks Conference of 1944 and the San Francisco Conference of 1945. The Declaration on General Security recognised:

… the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security.

The recognition of the sovereign equality of states at the Moscow Conference and also at the Dumbarton Oaks Conference therefore formed the basis of incorporation into the UN Charter. Thus, prior to the establishment of the United Nations, sovereign equality of states already formed the philosophical and normative foundation of the international law that was to be constructed in the post-World War II era.

Though the Declaration on General Security did not contain any definition or explanation of the concept of sovereign equality, the San Francisco Conference of 1945 provided a platform for a discussion on the concept of sovereign equality of

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187 Para.4 of the Moscow Four-Nation Declaration on General Security, October 1943.
188 Bengt Broms, op. cit. fn.186.
States that was to be the foundational norm of the UN Charter. At the San Francisco Conference, Zeineddine of Syria summed up the consensus of the debates of Committee I/1 on the meaning of the concept of sovereign equality of States as including the following four principles:

(1) that States are juridically equal;
(2) that each State enjoys the right inherent in full sovereignty;
(3) that the personality of the State is respected, as well as its territorial integrity;
(4) that the State should, under international order, comply faithfully with its international duties and obligations.

The above summation of the principle of sovereign equality is again emphasised by the Declaration on Friendly Relations and Cooperation among States. The Declaration provides that:

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

It further elaborates on the principle of sovereign equality of States as including the elements of juridical equality of States, the enjoyment by States of the rights inherent in full sovereignty, the duty of States to respect the personality of other States, the

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189 Bengt Broms, op cit, fn.186, at 59.
190 ibid at 60.
192 ibid.
inviolability of the territorial integrity and political independence of the State, the freedom of each State to choose and develop its own political, social, economic and cultural systems, and the duty of States to comply fully and in good faith with their international obligations and to live in peace with other States.\textsuperscript{193} It is evident from the above that the explanation of the principle of sovereign equality of States provided by the Declaration on Friendly Relations and Cooperation Among States is drawn mostly from the summation of the concept given by Zeineddine of Syria at the San Francisco Conference.

Hans Kelsen argued in his 1944 book, \textit{Peace Through Law}, that the principle of sovereign equality is a composition of two generally recognised features of the State in international law – the principle of State sovereignty and the principle of equality of States.\textsuperscript{194} Consequently:

\begin{quote}
[T]o speak of sovereign equality is justified insofar as both qualities are usually considered to be connected with each other. The equality of States is frequently explained as a consequence of or as implied by their sovereignty.\textsuperscript{195}
\end{quote}

Any analysis of the principle of sovereign equality would thus have to address the two composing concepts of sovereignty and equality of States.

\textsuperscript{193} paragraph 59 of Declaration on Principles of International Law, Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations 1970
\textsuperscript{195} ibid.
2.2 The Concept of State Sovereignty

The concept of sovereignty has a long history.\textsuperscript{196} The remit of this research does not extend to an in-depth historical analysis of the concept. The discussion here will focus mostly on current manifestations of the concept while noting its metamorphoses through time. As has been observed by the late Sir Robert Jennings:

\begin{quote}
\ldots the doctrines of sovereignty down the ages have differed from time to time for the very reason that they reflected the needs and problems of their own particular times and were designed to do so.\textsuperscript{197}
\end{quote}

The main focus of the discourse on the current manifestation of the concept of sovereignty in this chapter is thus for the purpose of grasping its current relevance in international law. A historical perspective of the concept will however give a background picture of its metamorphoses through different epochs.

The rudiments of the concept of sovereignty as expressed in Jean Bodin’s \textit{De Republica} (1576) deposited absolute power in the hands of a sovereign who had the power to make laws and was not bound by the law he made.\textsuperscript{198} Bodin’s preoccupation with defining sovereignty in terms of absolute power residing in a sovereign was a response to the political upheavals within the European States of his time.\textsuperscript{199} There was the perception that diffusion of power would result in competing interests for


\textsuperscript{199} Sir Robert Jennings, op cit. fn.197.
ascendancy by the various powers hence resulting in anarchy. The late Professor James Brierly thus observed that:

Bodin was convinced that a confusion of uncoordinated independent authorities must be fatal to a State, and that there must be one final source and not more than one from which its laws proceed. The essential manifestation of sovereignty (…) he thought, is the power to make the laws (…) and since the sovereign makes the laws, he clearly cannot be bound by the laws that he makes …

The concept of sovereignty espoused by Bodin was meant to instil order within the European States of his time and thus was useful for that purpose. Consequently, the first clearly articulated concept of sovereignty imbued in the sovereign, power and authority that is not to be challenged within his realm so that order within the State can be maintained.

The transformation of sovereignty from absolute power resident in a sovereign to power that emanates from the people who have concurred to form a State is often traced to Hugo Grotius’ De Indis (published in 1864 as De Jure Praedae (The Law of Prize and Booty)). To Grotius, the sovereign’s power emanates from the State, and the State is composed of voluntary individuals who have concurred to form the State. The power of the sovereign thus derives from the people who constitute the State. When this conception of unchallenged power is transposed from an individual

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200 Sir Robert Jennings, op cit. fn.197.
201 Quoted in Sir Robert Jennings op cit. fn.197
202 ibid.
203 ibid.
sovereign into State sovereignty, it connotes the power and authority exercised by the institutions of State which occupy the prime position in the hierarchy of power. Other institutions not so imbued or vested with sovereign power and authority operate at a subservient level. Grotius thus stated in *De Jure Praedae* that:

> Truly, there is no greater sovereign power set over the power of the state and superior to it, since the state is a self-sufficient aggregation. Nor was it possible for all of the nations not involved in a dispute to reach an agreement providing for an inquiry by them into the case of each disputant.\(^{204}\)

It must be noted, though, that in spite of the transformation of the concept of sovereignty that Grotius brought, his concept was also apologetic in nature, in the sense that it served to justify the right of the Dutch State to wage a just war.\(^ {205}\) The capture of the Portuguese merchant ship, *Santa Catarina*, by the Dutchman Jacob van Heemskerck in the Strait of Singapore in 1603 is acknowledged as the basis for writing *De Jure Praedae*.\(^ {206}\) Grotius reasoned that the capture of the *Santa Catarina* was justified because the Portuguese had waged a systematic campaign to oust Dutch merchants from the East Indies.\(^ {207}\) From this premise it becomes evident in Grotius’ reasoning that Portuguese hostilities against Dutch trading interests in the East Indies was a violation of the ‘Eighth Law’ which he espouses in *De Jure Praedae*:

\(^{204}\) Hugo Grotius, *Commentary on the Law of Prize and Booty (1603)*, Indianapolis: Liberty Fund Inc. at 36.  
\(^{206}\) ibid.  
\(^{207}\) ibid.
Neither the state nor any citizen thereof shall seek to enforce his own right against another state or its citizen, save by judicial procedure.\textsuperscript{208}

The hostilities meted out by the Portuguese against Dutch merchants in the East Indies were therefore not just a campaign against Dutch citizens but also against the Dutch State – and by logical conclusion a campaign against the sovereignty of the Dutch State. The difference that Grotius brought to the concept of sovereignty by locating in within the State was thus for the purpose of serving the needs of his time in the same way Bodin also did to the concept in his time.

In fact, it has been observed that Grotius’ argument that sovereignty resides in the people who have voluntarily concurred to form a State should not be misconstrued to mean that he was a champion of the kind of democracy discernible in modern day democratic states for:

\ldots he strenuously denied that the Dutch war of independence (1568–1648) had originated in a popular revolt against Philip II of Spain and Portugal. Instead, he reserved the right of resistance for the traditional governing elite, the Dutch magistrates who were bearers of the “marks of sovereignty.”\textsuperscript{209}

Aside from the scholarly contributions to the development of the concept of sovereignty, a key event in international relations which is often cited in the history of the concept is the Peace of Westphalia 1648 which ended the Thirty Years’ War in Europe.\textsuperscript{210} Though it is apparent that before 1648 the idea of sovereignty had already

\textsuperscript{208} Hugo Grotius, op cit, fn.204., at 36.
\textsuperscript{209} Martine Julia van Ittersum, op cit., fn.205, at 8.
started evolving on conceptual and political levels, as evidenced by the works of scholars like Bodin and Grotius and the Dutch revolt against Philip II of Spain and Portugal, the Peace of Westphalia is often cited as a decisive political event with both national and ‘international’ consequences for the emergence of the modern State.\textsuperscript{211} It marked the emergence of the horizontal system of the sovereign State which precluded external interference in the internal affairs of the State. Thus even in spite of the Dutch revolt against Spain and its assertion of independence, it was the Peace of Westphalia that brought about a formal recognition of the Netherlands as a sovereign state by Spain.\textsuperscript{212} Prior to this horizontal system of relations among sovereign States, loose configurations of federal structures based on vertical relationships between sovereign overlords and vassal states were quite proliferate.\textsuperscript{213} Also, the assertion of statehood as an organising concept for polities began to take precedence over the religious affinities that had played an important role in the Thirty Years’ War. Thus:

The Thirty Years’ War was the last major international conflict in Europe in which two religious camps organized their forces as blocs. After 1648 such connections gave way to purely national interests; it is no surprise that the papacy denounced the peace vehemently. For this shift marked the decisive stage of a process that had been underway since the Late Middle Ages: the emergence of the state as the basic unit and object of loyalty in Western civilization. (…) Indeed, the reshaping of the relations among Europe’s states

\textsuperscript{211} Joshua Castellino for instance notes that it is problematic to accord the Peace of Westphalia the definitive origin of the concept of sovereignty though it was a significant event in the evolution of the modern state and its attachment to the concept of sovereignty. See Joshua Castellino, \textit{International Law and Self Determination}, The Hague: Martinus Nijhoff Publishers (2000) at 75-76.

\textsuperscript{212} Wilhelm G. Grewe, op cit., fn.184, at 185

\textsuperscript{213} Joshua Castellino op. cit., fn.211.
for centuries to come that was achieved at Westphalia is but one example of the multiple military and political consequences of this age of crisis.\textsuperscript{214}

The Peace of Westphalia put an end to the Papacy’s claim of power over the polities that hitherto fell under its religious ‘authority’, hence making it possible to exclude external interference in the affairs of the state.\textsuperscript{215} The sovereign did not have to answer to any external authority and was supreme in his/her domain.\textsuperscript{216} The concept of territorial sovereignty (i.e. non interference in matters falling within the territorial jurisdiction of the state) was an offshoot of the Westphalian conception of states. This account of sovereignty is however ‘euro-centric’ in nature as it did not create, at its inception, an international law applicable to all states.\textsuperscript{217} The benefits of non-interference in the internal affairs of the State that evolved from the Peace of Westphalia was to be the preserve of European States for centuries and its non-application to polities typically outside Europe was justified, \textit{inter alia}, under the civilising mission and the extraterritoriality of action by the Great Powers.\textsuperscript{218}

Consequently, even at the inception of the United Nations, the UN Charter made it expressly clear that the foundational principle of sovereign equality of its members did not apply to the colonies of the (mostly) European States which were under the trusteeship system – Article 78 provides that:

\textsuperscript{215} ibid.
\textsuperscript{218} ibid.
The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.\textsuperscript{219}

Admittedly, though the principle of sovereign equality did not extend to the European colonies, the principle of self-determination championed by the UN Charter\textsuperscript{220} became an effective tool in the decolonisation of the colonies, transforming them into sovereign States in their own right.

It is worthy of note though that the Westphalian order did not institute an absolute and lasting system on non-interference even in Europe. Wilhelm Grewe for instance notes that the rationale for interference (on intervention) in Europe after the Peace of Westphalia shifted from religious to political pretensions. He thus argues further that:

\begin{quote}
The major, almost classical cases of intervention of the French Age – the interventions by Louis XIV in favour of the liberty of the German princes, the War of Spanish Succession, the divisions of Poland, the coalition wars against the French Republic and the wars conducted by the French revolutionary government – were now motivated on political rather than religious or confessional grounds.\textsuperscript{221}
\end{quote}

In effect, it was the locus of intervention that shifted and not an actual adherence to any principle of non-intervention. The very fact that the right to wage war still lay within the domain of the state after the Peace of Westphalia showed that a prohibition

\textsuperscript{219} Article 78 of the UN Charter.
\textsuperscript{220} Article 1:2 and Article 55 of the UN Charter.
\textsuperscript{221} Wilhelm G. Grewe, op cit. fn.184, at 332.
against interference without a proscription of the right to wage war was in itself a contradiction.\textsuperscript{222} Thus to deal with this contradiction, the two prominent precursors to the prohibition against war in the UN Charter – the Covenant of the League of Nations 1919 and the Kellog Briand Pact of 1928\textsuperscript{223} – both contained provisions that renounced the use of war as a medium of state policy. The Covenant of the League of Nations contained various provisions prohibiting war, including an “acceptance of the obligations not to resort to war;”\textsuperscript{224} a requirement that signatory states do not stockpile arms;\textsuperscript{225} a provision making war or the threat of war against a signatory state a matter of concern for the whole League;\textsuperscript{226} and an undertaking by signatory states not to resort to war until three months after an arbitral or judicial decision in a dispute.\textsuperscript{227} These prohibitions against war however did not prevent the use of armed aggression by some signatories of the League, typical examples being the invasion of Manchuria in 1931 by Japan, the invasion of Ethiopia in 1935 by Italy and the invasion of Poland in 1939 by Germany.\textsuperscript{228} The failure of the League of Nations to address these grave breaches of its Covenant played an important role in the outbreak of World War II.\textsuperscript{229}

It could be argued, from the above, that without an effective prohibition of the use or threat of use of violence by states in their international relations, as contained under

\begin{footnotes}
\item[223] Article 1 of the Kellog Briand Pact 1928 contains a renunciation of war by the signatory states and Article 2 provides that: “The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.”
\item[224] Paragraph 3 of the Preamble to the Covenant of the League of Nations.
\item[225] Article 8 of the Covenant of the League of Nations.
\item[226] Article 11 of the Covenant of the League of Nations.
\item[227] Article 12 of the Covenant of the League of Nations.
\item[229] ibid.
\end{footnotes}
the UN Charter, the non-intervention corollary of sovereignty would only be effective for states as long as they had the might to prevent interventions by other states. Sovereignty would have had to go with the might to assure its sustenance in the community of states. David Chandler thus argues that:

During the colonial era, the major powers either regulated their territorial acquisitions directly as in Africa and India – or, as in China, Japan and the Ottoman Empire, insisted that their own actions could not be fettered by local domestic legislation, claiming the right to extraterritoriality. Under the Westphalian system, then, superior force was the guarantor of effective sovereignty.

The claim to the right of extraterritoriality is perhaps best exemplified in the Opium Wars where Britain blatantly disregarded domestic regulation in China prohibiting the trade in opium so as to further her lucrative trade in narcotic drugs.

By proscribing the right of states to wage war, except in self-defence or by the authorisation of the UN Security Council, the UN Charter ushered the international community of states from the rule of might to the rule of law in their relations with one another. Aided by the principle of self-determination, newly independent states did not have to show the economic or military might to establish themselves or defend

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230 Article 2:4 of the UN Charter.
231 Chandler op cit., fn.216.
233 Article 51 of the UN Charter.
234 Article 39 and Article 42 of the UN Charter.
themselves from the imperial ambitions of other states. The establishment and continuous existence of the state was based on law – a juridical approach to state sovereignty became the accepted rule.

For instance, most of the colonies that achieved statehood after World War II did not have to resort to a war of independence in their bid to gain independence from their colonisers as the UN Trusteeship system recognised the right of peoples to self-determination and thus fostered a more orderly transition from colony to statehood instead of through a ‘full-blown’ war of independence as may have hitherto pertained. This can be contrasted with other former colonies like the United States and Haiti that had to fight a war of independence to oust their colonisers. By fighting and winning a war that ousted their colonisers, these former colonies were not only able to show that they had the military strength to be sovereign states, but also, importantly, that that same military strength will assure their continuous existence as states.

The juridical approach to State sovereignty is articulated by Hans Kelsen as follows:

The sovereignty of the States, as subjects of international law, is the legal authority of the States under the authority of international law. If sovereignty means “supreme” authority, the sovereignty of the States as subjects of international law cannot mean an absolutely, but only a relatively supreme authority; the State’s legal authority is “supreme” insofar as it is not subjected to the legal authority of any other State. The State is “sovereign” since it is

subjected only to international law, not to the national law of any other State.

The State’s sovereignty under international law is the State’s legal independence from other States.\textsuperscript{237}

Sir Robert Jennings expressed similar thoughts to Kelsen’s by arguing that absolute exercise of power expressed through the law making function of the State presents problems of co-existence with other sovereigns who are similarly imbued with such power and authority; i.e., how does a sovereign power relate to other sovereign powers within the community of sovereigns?\textsuperscript{238} Such relations can only exist without the use of coercion if sovereign power is regulated under a binding system of international law where rule supersedes might.

The above arguments, however, are not meant to paint a perfect picture of a post World War II international system where the rule of law has always triumphed over the rule of might. During the Cold War, the two superpowers – the United States of America and Soviet Union were noted for their interferences in the domestic politics of other states, especially those of geopolitical importance to them and also States in the developing world. Through its ideological stance of internationalisation of communism, for example, the Soviet Union perpetrated varying degrees of interventions in other States typically in Eastern Europe and Asia.\textsuperscript{239} This ideological stance was epitomised in the 1968 and 1979 military interventions in Czechoslovakia.

\textsuperscript{237} Hans Kelsen, op cit. fn.194, at 35.
\textsuperscript{238} Sir Robert Jennings, op cit. fn.197.
and Afghanistan respectively. The Soviet Union also threatened military intervention during the Solidarity crisis of 1980-81 in Poland.

The record of the United States of America regarding interferences in the domestic affairs of other States is no less troublesome. The United States’ dealings with Latin America, for instance, is littered with numerous episodes of direct and proxy military and political interventions. Its military and political interventions in Nicaragua is a case in point as acknowledged clearly in the *Nicaragua Case*. As far back as 1854, the United States Navy launched an assault on the town of San Juan del Norte in Nicaragua in retaliation for an alleged insult to the wealthy US businessman, Cornelius Vanderbilt, and other US officials. The US was also instrumental in installing the Somoza dictatorship in Nicaragua during its military occupation in 1912-1933. In more recent times, the US backed the ‘Contra war’ against the Sandinista government of Nicaragua during the 1980s and its funding of the Violeta Chamorro led opposition coalition that won the Nicaraguan elections in 1990 epitomise its military and political interventions in Latin America. Thus in the 1986 Judgement of the International Court of Justice in the Nicaragua v. United States of America Case, the Court held that:

… the United States of America, by training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and

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241 Ruud van Dijk, op. cit. fn.239.
243 Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) 1986 I.C.J. 14. *(Nicaragua Case).*
244 Noam Chomsky op cit. fn.242, at 129.
245 Ruud van Dijk, op cit. fn.239.
246 *Nicaragua Case*, op cit. fn.243.
aiding military and paramilitary activities in and against Nicaragua, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to intervene in the affairs of another State.\textsuperscript{247}

The above examples of blatant interferences in the domestic political and economic affairs of many States by the superpowers were evident breaches of the principle of non-interference espoused under the concept of sovereign equality of States in the UN Charter.

The Soviet and US type of interference\textsuperscript{248} can be contrasted with multilateral regimes like the WTO where Member States put a restriction on their own sovereignty in order to achieve economic cooperation.\textsuperscript{249} A self-imposed restriction on one’s sovereignty would not amount to a diminution but rather an expression of sovereignty.\textsuperscript{250}

Sovereignty in its past and present manifestations has not been perfect in terms of the link between theory and practice. It is doubtful whether it is even desirable for states to apply a ‘pure’ concept of sovereignty as such a practice will stifle a legitimate expression of sovereignty even when expressed through a self-imposition of restrictions. However, not all restrictions to sovereignty may be desirable as evidenced by the Soviet and US type of forced interventions in the domestic affairs of other States. Consequently, what sovereignty is at the conceptual level is not always what it turns out to be at the practical level. Also, when the term ‘sovereignty’ is used,

\textsuperscript{247} Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) 1986 I.C.J. 14., para.3 of the Summaries of Judgments, Advisory Opinions and Orders of the ICJ.
\textsuperscript{248} i.e. interference by one state in the affairs of another state.
\textsuperscript{250} ibid.
it does not refer to one homogeneous concept that describes the exercise of sovereign power by the State. The concept can be used to describe different facets of State practice at the domestic, inter-State and international levels.

Stephen Krasner for instance identifies four different ways in which the concept of sovereignty is used – international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty.251

Firstly, international legal sovereignty, to Krasner, denotes the mutual recognition that states having formal juridical independence accord to one another within the international community of states.252

Secondly, the Westphalian account of sovereignty is that of non-interference of external entities in the political power structures of the state.253

Thirdly, the emphasis of ‘domestic sovereignty’ is on “the ability of public authorities to exercise effective control within the borders of their own polity”.254 Here, there is a focus on the domestic system of political authority and how it is organised and used to achieve desired results within the territorial confines of a given polity. It is the State’s use of its sovereignty, within its domain, over its citizens. This manifestation of sovereignty is more akin to Bodin’s concept of absolute authority resident in a sovereign; the sovereign here being the institutions of State vested with the powers of the State.

252 ibid at 4.
253 ibid.
254 ibid.
Lastly, interdependence sovereignty denotes that ability of the state to control outflows from and inflows into its territory.255

The way the various manifestations of sovereignty work, or are supposed to work, are not the same. In effect, different rules apply to different manifestations of sovereignty.256 Krasner observes that international legal sovereignty and Westphalian sovereignty do not deal with issues of control but rather of authority and legitimacy; the rule for international legal sovereignty being the recognition accorded to polities possessing formal juridical independence and the rule for Westphalian sovereignty being the exclusion of external actors from interfering, whether de jure or de facto, in matters falling within the territory of the state.257 Domestic sovereignty and interdependence requires the effective exercise of power and control by the institutions of the state.

The different facets of sovereignty identified above do not operate independent of each other. They may be theoretically distinct but there cannot be a watertight distinction at the practical level. For example, the exercise of international legal sovereignty may empower a State to become a signatory to an international treaty organisation like the WTO. The requirements of the treaty commitments would however require an effective operation of domestic sovereignty in order to actualise the treaty commitments. The TRIPS Agreement258 under the WTO system, for instance, binds all member States of the WTO to institute domestic legal and/or administrative systems in order to make the intellectual property protection

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255 Stephen Krasner, op cit., fn.251.
256 ibid at 4.
257 ibid.
258 i.e. Agreement on Trade Related Aspects of Intellectual Property Rights.
requirements of the Agreement effective.\textsuperscript{259} Member States may use their international legal sovereignty to enter into this treaty commitment, but would definitely need their domestic sovereignty to implement and effectuate the requirements of the TRIPS Agreement.

To sum up, some common manifestations often bound up in the conceptualisation of state sovereignty include the existence of territory, population, hierarchy of power at the domestic level, independence, absence of external intervention, international recognition, and capacity to regulate trans-border flows.\textsuperscript{260} All these attributes do not have to be present at the same time in a State though the absence of one of the attributes may be a crucial factor in denying the rights of statehood to a polity. For example, though Taiwan has a stable democratic government and a well-managed economy, an indicator of domestic sovereignty, its lack of international legal sovereignty (i.e. international recognition) has been key in its inability to secure statehood in the international community of states.\textsuperscript{261} In spite of this lack of international recognition, it must be noted though that under the Montevideo Convention on the Rights and Duties of States 1933, international recognition per se is not a prerequisite for the acquisition of statehood. Article 3 of the Convention states that:

\begin{quote}
The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity
\end{quote}

\textsuperscript{259} Articles 42-50 of the Agreement on Trade Related Aspects of Intellectual Property Rights.
and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.

The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.  

However, Article 1 of the same Convention provides that in addition to a permanent population, a defined territory, and government, the capacity to enter into relations with the other states constitutes one of the qualifications of the state as a person of international law. Thus though international recognition may not be a prerequisite to statehood, it would be reasonable to deduce that its attainment would make the capacity to enter into relations with other states efficacious.

In contrast to Taiwan, other states like Somalia, Liberia, Rwanda and Haiti which have been described as ‘failed states’ due to domestic breakdown of government in their recent history have not lacked ‘international legal sovereignty.’

As argued above, other restrictions to State sovereignty can be self-imposed. States, like individuals in municipal law, can enter into agreements that put a restriction on one or more of the manifestations of sovereignty. Hence, sovereignty is not a straight jacket that States must fit their practice in. It is rather a fluid concept that can be used in a versatile way to fit the contours of State practice. Krasner opines that:

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262 Article 3 of the Montevideo Convention on the Rights and Duties of States 1933.
263 Article 1 of the Montevideo Convention on the Rights and Duties of States 1933.
Sovereign states are autonomous actors. They have the right and the ability to enter into contractual relationships. These contracts, even though they are promises that may limit freedom of action, are an indication of the sovereignty of the state, not a curtailment of it.\textsuperscript{265}

2.3 The Equality of States

The second constituent concept of sovereign equality – the equality of States – emerged largely from the natural law school of thought. The principle of equality of States as a doctrine was greatly impacted by the works Hugo Grotius. Grotius’ concept of sovereignty, discussed above, had an inherent principle of equality. His assertion that “there is no greater sovereign power set over the power of the state and superior to it”\textsuperscript{266} was as much an argument in support of the equality of States as it was for State sovereignty. But perhaps the greatest elucidator of the doctrine of equality of States was Emerich de Vattel who likened the community of States to that of the human community. To Vattel, the notion that all humans are equal in the human community, independent of size, wealth or social standing, applies equally to the community of States.\textsuperscript{267} Thus, as “[A] dwarf is just as much a man as a giant: a small republic is no less sovereign than the most powerful of kingdoms”.\textsuperscript{268}

This natural law notion of equality of humans as a natural right was therefore directly transposed into the conception of how States should relate to one another hence creating a consequential connection between equality of States and sovereignty of

\textsuperscript{265} Stephen Krasner, op cit., fn.260, at 5.
\textsuperscript{266} Hugo Grotius, op cit., fn.204, at 36.
\textsuperscript{268} quoted in Djura Nincic, ibid., at 37.
States, and by so doing smelted the two concepts as two indispensable sides of the same coin.

In international law, equality of states is juridical in nature. By their very existence as States, States are legally or juridically equal. Juridical equality here is not just a mere statement that all states are equal by their very existence as states; it translates into equal rights and duties.\textsuperscript{269} That states are juridically equal does not assure equality in other respects, like military or economic prowess. Legal personality and legal capacity are the constituents of juridical equality.\textsuperscript{270} Though the concept of equality of states advanced by earlier commentators like Vattel emanated from a natural law perspective, the increasing influence of legal positivism saw a demise of the natural law leanings for explaining the equality of states.\textsuperscript{271} The universality of the concept of equality of states could not be accepted on the basis that it is natural law but was rather viewed as emanating from the will of states expressed through their consent to the creation of international law.

Article 4 of the Montevideo Convention on Rights and Duties of States provides that:

States are juridically equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not depend upon the power which it possesses to assure its exercise, but upon the simple fact of its existence as a person under international law.\textsuperscript{272}

\textsuperscript{270} ibid.
\textsuperscript{271} Djura Nincic, op cit. fn.267.
\textsuperscript{272} Article 4 of the Montevideo Convention on Rights and Duties of States 1933.
Imbued in the concept of equality of states is the principle of self determination. At
the national level, to regard another as a person having equal rights under the law, is
an affirmation of the fact that, unless prohibited by law, the individual has an
inalienable right to pursue the aspirations that he or she deems fit. Equality before the
law devoid of the right to choose one’s preferences in life due to subjugation to the
will of another person is a contravention of the very basis of equality. It thus follow
that at the international level, one cannot talk of equality of States without the
fundamental principle of self-determination. In effect, self-determination is an
incontrovertible logical consequence of equality of States under international law. The
Declaration on Friendly Relations and Cooperation Among States affirms the link
between equality of States and self determination as follows:

… the principle of equal rights and self-determination of peoples constitutes a
significant contribution to contemporary international law, and that its
effective application is of paramount importance for the promotion of friendly
relations among States, based on respect for the principle of sovereign
equality.\textsuperscript{273}

The notion of juridical equality of States emanated from the conception of States as
being sovereign in their relations with one another hence juridical equality can only
exist between sovereigns because “the sovereignty of States implies that they may not
be subjected to one another, and this subjection is also precluded by their mutual
equality”.\textsuperscript{274}

\textsuperscript{273} Declaration on Principles of International Law, Friendly Relations and Cooperation Among States
\textsuperscript{274} Djura Nincic, op cit. fn.267.
Equality of states is thus a logical extension of State sovereignty. John H. Jackson argues that:

The concept of equality of nations is linked to sovereignty concepts because sovereignty has fostered the idea that there is no higher power than the nation-state, so its “sovereignty” negates the idea that there is a higher power, internationally or foreign (unless consented to by the nation state).  

Thomas Heller and Abraham Sofaer also argue that the importance attached to the concept of sovereign equality of states by lawyers and diplomats is akin to the US Declaration of Independence - “all men are created equal”. Equality here becomes a facilitating tool for international diplomacy in an international system premised on the horizontal relationship among states and not an ‘empire’ oriented vertical relationship. Without the conceptual foundation of sovereign equality of states, ‘the great power States’ would relate to weaker states as vassals and not ‘equals’ in the international community. Thus the concept of sovereign equality of States necessarily relies on international law and not State power. International law must be efficacious in limiting a State’s actions so as to protect the rights of other states. The proscription of the use or threat of use of war in the international relations of States under the UN Charter is an example. The fact that a State may have the military strength to conquer all other States would not justify the use of such strength because international law prohibits it. States must therefore sacrifice a bit of their sovereignty in order for sovereign equality to exist. In other words:

275 John H. Jackson, op cit., fn.249, at 58.
No state is absolutely sovereign, because it must exercise its powers without infringing upon the rights of other sovereign states.\textsuperscript{277}

\section*{2.4 Sovereign Equality and Participation of States in International Organisations: An Initial Critique}

When the principle of sovereign equality is applied in State constructed international organisations it presents some fundamental conceptual problems. Where the principle of one-state one-vote pertains, as in the UN General Assembly and the WTO, there is an evident provision to protect the principle of sovereign equality of states. However, if voting requirements are not based on unanimity or consensus, the majority vote principle will pertain. The problem this presents is that it is very difficult to achieve unanimity in treaty based inter-state organisations hence the resort to majority voting processes. The tortuous process that plagued the ratification of the Lisbon Treaty amending the Treaty on European Union and the Treaty Establishing the European Community is a case in point.\textsuperscript{278} Due to the requirement of unanimity, all the 27 Member states of the EU had to ratify the Treaty before it could come into force. From the Laeken Declaration of 2001\textsuperscript{279} to the ratification of the Lisbon Treaty by the Czech Republic in November of 2009 and the coming into effect of the Treaty in December 2009, the process of ratifying a new treaty for the EU had been dogged with difficult hurdles like the rejection of the Treaty establishing a Constitution for Europe by France and the Netherlands in 2005.\textsuperscript{280} The rejection of the Treaty

\textsuperscript{277} Thomas D. Heller and Abraham C. Sofaer, op cit, fn.276, at 30.
\textsuperscript{280} Paul Berman, op cit. fn.278; Paul Craig, op cit. fn.278.
establishing a Constitution for Europe precipitated the drawing of the Lisbon Treaty. Two rulings of the Czech Constitutional Court was required to pave the way for ratification of the Lisbon Treaty by the Czech Republic, a ruling by the German Constitutional Court was also required and after a first rejection in a referendum in Ireland in June 2008, a second referendum was needed to pave the way for ratification in October 2009.281

Where decisions are made based on majority voting, it presents some level of flexibility in the decision-making process than would have been the case under unanimity or consensus requirements. However, where the majority vote applies, this would mean States whose votes fell in the minority would be bound by the decisions of the majority. In principle, States whose vote fall within the minority will be bound by a decision that they expressly opposed. On the face value, this negates the principle that a sovereign State cannot be bound by an agreement that it has not consented to. The centrality of state consent in international law was highlighted by the Permanent Court of International Justice in the *Lotus Case*.282 The Court opined that:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement

281 ibid.
of common aims. Restrictions upon the independence of States cannot therefore be presumed.\textsuperscript{283}

Consequently, Hans Kelsen for instance argued that the majority vote principle should not be applicable in international organisations like the UN because states whose vote fall in the minority would be bound by the decisions of the majority.\textsuperscript{284}

The majority vote system presents another problem with regards to its consistency with the principle of sovereign equality of States. There is the problem of States being bound by the decisions of other States on issues where in real terms the majority have a lesser stake in the outcome of the decision. In the WTO setting, the fact that industrialised nations form the minority is a typical example. Though industrialised nations form the minority, their output in international trade is by far greater than that of the majority developing countries.\textsuperscript{285} For instance, whereas the value of world merchandise trade for the United States of America in 2009 was 1,057 billion dollars, the combined value of that of all African states was 379 billion dollars.\textsuperscript{286} However, developing countries could use their numerical advantage to make decisions inimical to the trade interests of industrialised countries.

But perhaps a more serious problem arises where the wishes of the minority hold sway due to the leverage they wield in influencing decision-making processes. Such a situation strikes at the very foundation of the concept of sovereign equality of States

\textsuperscript{283} the \textit{Lotus Case} at para.44.  
\textsuperscript{284} Hans Kelsen op cit., fn.194.  
\textsuperscript{286} ibid.
and the democratic legitimacy of decision-making processes in international treaty organisations. This problem is however a very real one as Malcolm Shaw notes:

… it would not be strictly accurate to talk in terms of the equality of states in creating law. The major states will always have an influence commensurate with their status, if only because their concerns are much wider, their interests much deeper and their power more effective.\(^{287}\)

The permanent member status and the veto power given to the US, Russia, France, the UK and China in the UN Security Council are typical examples where there is a formal inequality among member states of the UN in spite of the fact that the UN Charter espouses the principle of sovereign equality of states.

On the other hand, it could be argued that states that accede to treaty-based organisations with majority voting systems do so knowing very well the implications of the voting regime. Thus by giving their assent to such a voting system through accession, they have agreed to a possible limitation of their sovereign equality and since this limitation is self-imposed, it is a legitimate expression of state sovereignty.

The just defended position on decision-making processes in treaty organisations does not completely alleviate some of the fundamental conceptual conflicts it raises regarding sovereign equality. It would be difficult to justify the argument that states that accede to the UN, for example, do so knowing very well that five member states have been formally given special powers that are not accorded to other members. If

\(^{287}\) Malcolm N. Shaw op cit, fn.269, at 193.
the issue of permanent membership of the Security Council and the veto powers are anomalies, (judging on the basis of sovereign equality of states) acceding with full knowledge of this anomaly does not cure nor does it justify the anomaly.

John Jackson also argues that fundamental issues regarding sovereignty arise:

… in connection with many treaty details, such as (for example) when a treaty-based international institution sees its practice and “jurisdiction” evolve over time and purports to obligate the nation members even when they opposed such evolution.

In such an instance, the issue relevant to the current discussion on sovereign equality would be the unequal influence that some members of the ‘treaty-based international institution’ brought to bear on the evolution of the institution’s jurisdiction over time. In effect, if the institution’s (to borrow Jackson’s words again) “… “jurisdiction” evolve over time and purports to obligate the nation members even when they opposed such evolution”, why were the opposing views of the members not reflected in the evolution of the institution’s jurisdiction and practice? Surely, since States are the main architects of treaty-based international law, it is the will of the States, expressed through the institution’s decision-making processes that hold sway.

If the international institution purports to develop “jurisdiction” which is unanimously contrary to the wishes of the member States, they, as the treaty legislators can counteract and stop such a prohibitive evolution. Thus even if the evolution of the

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288 Jackson op cit., fn.196, at 58.
289 ibid.
institution’s jurisdiction was opposed, it is inconceivable that it would have been a unanimous opposition. Even if such opposition was widespread, the fact that the institution’s jurisdiction evolved in the face of opposition should mean that the evolution must have occurred in concert with some member States who had the leverage to influence changes in the institution.

This argument would however be truer in treaty-based institutions like the WTO where there are no supranational structures that operate outside the oversight of member States. Even decisions of dispute settlement Panels and the Appellate Body in the WTO system must be accepted by representatives of member States in the General Council sitting as the Dispute Settlement Body.\footnote{Article IV:3 of the Agreement Establishing the World Trade Organisation.} The WTO system could be described as solely member-driven. This is quite contrary to the EU, where though the EU as a treaty organisation is also member-driven, an organ like the ECJ has supranational competencies and operates independently of the member States.\footnote{See Mary L. Volcanseka, ‘The European Court of Justice: Supranational Policy-Making’, \textit{West European Politics}, 15(3), (1992), pp. 109-12.}

However, even in the EU system, if the ECJ gave a ruling that all member States found objectionable, that ruling could be superseded by treaty amendments orchestrated by the member States. If a trend of ‘objectionable decisions’ are not counteracted with treaty amendments, it would suggest that the member states have decided to live with it, and by so doing given a tacit acceptance, or that amendments would be or have been blocked by some States that are in favour of the trend of ECJ decisions.

Consequently, in the WTO set up, despite the operation of the system of one-member-one-vote, disaffection with the decision-making process due to the informal leverages...
that developed countries bring to bear on decision-making has prompted calls, mostly from developing countries, for a reform of the decision-making process. Such calls for reform in favour of equality in decision-making however fail to balance the argument with the special and differential treatment of developing countries. If all states are equal in terms of rights and duties, what justifies the special treatment of developing countries?

In multilateral financial institutions like the International Monetary Fund (IMF) and the World Bank the use of weighted votes based on member states’ financial contributions means that the concept of sovereign equality is not reflected in their voting systems. Simply put, a one-member-one-vote policy is non-existent and as such, one cannot talk about the operation of the principle of sovereign equality here.

The above anomalies briefly discussed will be analysed in greater detail in the proceeding chapters. The just discussed subtopic however shows that, like the concept of state sovereignty, the operation of sovereign equality in decision-making processes in treaty based international organisations is not perfect. Such imperfections may not solely be the result of practice, but may reflect a problem with the concept itself. Even from a natural law perspective where the concept of equality of states was prominently developed and advanced, the analogy between the equality of humans and the equality of states presents some conceptual problems. Vattel for instance argued that a giant and a dwarf are equal. Supposing there was rationing of food, should the giant receive the same proportion of ration as the dwarf, in spite of the fact that the giant’s requirements of nourishment would be far greater than the dwarf? An

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293 Djura Nincic op cit, at 37, fn.267.
adult and a child are both human and thus equal by dint of their humanity. Should they receive the same ration or should their needs, dictated by their size, inform how much they should receive? Should China, with a population of 1.3 billion, constituting 21.7 per cent of the total population of the WTO, have an equal leverage in decision-making with Liechtenstein which has a population of 36,000, constituting 0.001 per cent of the total population of the WTO? On a practical level one may ask the legitimate question ‘how can 1.3 billion people be equal to thirty-six thousand people just because they have congregated as states?’ The United States of America’s contribution to international trade is greater than the combined output of all the 42 African State members of the WTO.\textsuperscript{294} However, on decisions relating to international trade in the WTO setup, the United States of America has one vote just as each of the 42 African countries. A fundamental concern in the issues raised here is where to draw the line between sovereign equality – legal equality with regards to rights and duties – and equity – what is just and fair. A blind application of equality will evidently not always deliver what is just and fair for both the ‘giant’ and the ‘dwarf’.

2.5 Concluding Remarks

The kernel of the discussion on State sovereignty undertaken so far is the fact that it relates to the supreme power or authority of the State and that the State is only subject to international law and not the national law of another sovereign State. Equality of States on the other hand is juridical in nature and relates to rights and responsibilities and not the actual power that States have at their disposal. As discussed above, both concepts, operating independently or together under the term – sovereign equality of states – present both practical and conceptual anomalies. Some of these anomalies are

\textsuperscript{294} WTO Secretariat, op cit., fn.285.
necessary and a legitimate and practical expression of state sovereignty, while others are aberrations.

But what if a powerful state (or a ‘cartel’ of powerful states) uses its leverage in international institutional systems to internationalise its national policy preferences? This presents a real problem especially due to the proliferation of treaty based international/multilateral organisations in the post-World War II era. The use of unequal leverages to promote policy preferences in multilateral organisations would result in a situation where treaties, one of the primary sources of international law, could become an extension of the national law of the powerful. The decision-making systems in international organisations become crucial in determining sovereign equality as the decisions of these organisations become the treaties and norms that primarily contribute to the formulation of international law. In the next chapter the thesis will focus on the WTO decision-making system and the applicability of the concept of sovereign equality to this system.
CHAPTER THREE: WTO INSTITUTIONAL STRUCTURE AND DECISION-MAKING

Introduction

The WTO decision-making system operates within the broader WTO regulatory regime. Of significance is the Agreement Establishing the WTO (or the WTO Agreement) which makes specific provisions regarding decision-making.\textsuperscript{295} However, some detailed procedures on decision-making are to be found in the Multilateral Trade Agreements annexed to the WTO Agreement.\textsuperscript{296} In order to appropriately position the system of decision-making in the WTO within the general milieu of the WTO regulatory regime, this chapter will commence the discussion on decision-making by undertaking a synopsis of some of the salient provisions in the WTO Agreement that have consequential implications for not only the legal provisions on decision-making, but also the politics of decision-making in the WTO. The chapter is divided into two main segments. The first segment presents a descriptive account of the WTO institutional structure and decision-making procedures and the second segment conducts a critical analysis of the WTO institutional structure and decision-making procedures.

3.1 A 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

\textsuperscript{295} Articles IX and X of the Agreement Establishing the WTO, make provisions on decision-making in the WTO.

\textsuperscript{296} For example, the details on decision-making regarding disputes among WTO Members are provided under the Understanding on Rules and Procedures Governing the Settlement of Disputes.
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 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

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299 Peter Van den Boosche, op cit. fn.297.
300 ibid
pages of ‘Schedules of Concessions’ for trade in goods and ‘Specific Commitments’ for trade in services.\textsuperscript{303}

International trade relations among states under the GATT/WTO has had a history of politically charged polarities of interests and ideological persuasions.\textsuperscript{304} For instance, as observed in chapter one, 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.\textsuperscript{305} 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.\textsuperscript{306} 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 discussed in chapter one.

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.\textsuperscript{307} The partial involvement of developing countries in the

\textsuperscript{304} For more on these issues see Brian Hocking and Steven McGuire (eds.), Trade Politics: International, Domestic and Regional Perspectives, London: Routledge (1999)Robert E. Hudec, op cit. fn.23., John Toye and Richard Toye, op cit. fn.60.;
\textsuperscript{306} John Toye and Richard Toye, op cit. fn.60.;
\textsuperscript{307} 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.
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 (OECD) countries) during the 1979 Tokyo Round.308 These ‘side agreements’ (i.e. the Tokyo Round Codes) were plurilateral in nature and were thus only binding on the countries that acceded to them.309

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),310 they did not have to concern themselves with the process of decision-making that culminates in the rule.311

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:

308 WTO Secretariat, ‘Historic Development of the WTO Dispute Settlement System’, http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm (viewed on 05/05/11).
309 ibid.
311 Jeffrey J. Schott and Jayashree Watal, op cit. fn.292.
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.\textsuperscript{312}

Thus with the exception of specific derogations in particular multilateral trade agreements (MTAs),\textsuperscript{313} 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.\textsuperscript{314}

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 (\textit{GATT a la carte}) is over. Since all multilateral decisions 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.

\textsuperscript{312} Article II:2 of the Agreement Establishing the World Trade Organisation.
\textsuperscript{313} For example, under Article 7:3 of the Agreement of Safeguards, the maximum period that WTO Members are allowed to apply safeguard measures on imports or exports 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.
\textsuperscript{314} Article II:3 of the WTO Agreement.
3.2 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.\(^{315}\) 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.\(^{316}\)

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”\(^{317}\) 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”.\(^{318}\) 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

\(^{315}\) See Peter Van den Bossche, op cit. fn.46, at 597-599.

\(^{316}\) ibid.

\(^{317}\) Preamble to the WTO Agreement.

\(^{318}\) Preamble to the Agreement Establishing the World Trade Organisation.
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.\textsuperscript{319}

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.\textsuperscript{320} 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)\textsuperscript{321} and General Agreement on Trade in Services (GATS).\textsuperscript{322} 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 WTO.\textsuperscript{323} Apart from the inclusion of new rules and the development of existing ones, newer issues now

\textsuperscript{319} Preamble to the Agreement Establishing the World Trade Organisation (WTO Agreement).
\textsuperscript{320} ibid.
\textsuperscript{321} Annex 1C of the WTO Agreement.
\textsuperscript{322} Annex 1B of the WTO Agreement.
\textsuperscript{323} These fall under the Annex 1A MTAs that deal with trade in goods.
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.

3.3 Overview of Some Key Provisions in the WTO Agreement

In the subsections below, some salient provisions of the WTO Agreement are briefly discussed.

3.3.1 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.\(^{324}\)

In consonance with the provisions establishing the WTO as an international organisation, Article VI establishes the WTO Secretariat headed by the Director-General.\(^{325}\) The functions of the Director-General and the staff of the Secretariat are


\(^{325}\) Since its inception in 1995, the WTO has had five Director-Generals. The current Director-General is Pascal Lamy (a French and former EU Commissioner) who came into office on 1 September 2005. The past four Director-Generals are Peter D. Sutherland (from Ireland), 1 July 1993 - 1 May 1995; Renato Ruggiero (from Italy), 1 May 1995 - 1 September 1999; Mike Moore (from New Zealand), 1 September 1999 - 1 September 2002, and Supachai Panitchpakdi (from Thailand), 1 September 2002 - 1 September 2005. It is noteworthy that since the establishment of the position of Director-General in 1965 under the GATT 1947, only one Director-General (Supachai Panitchpakdi) has hailed from a developing country. This is in spite of the fact that developing countries form the majority in the GATT/WTO. Of the eight Director-Generals of the GATT/WTO, seven have been from developed countries (six of them being Europeans).
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.\footnote{See Amrita Narlika, op cit, fn.305. She argues, from a developing country perspective that the role of the Director-General in convening meetings of the ‘Green Room’ has an effect on the decision-making process 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.\footnote{Article XII:1 of 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.

### 3.3.2 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.\footnote{Article III:1 of WTO Agreement.}

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).\footnote{Article III:2-4 of the Agreement Establishing the WTO.} 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.330

3.3.3 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.331 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.”332

The General Council operates beneath the Ministerial Conference in the WTO
institutional structure and consists of representatives from all WTO Members.333 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

330 Article III:5 of the Agreement Establishing the WTO.
331 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#ftext69 (viewed
on 17 July 2011).
332 Article IV:1 of the Agreement Establishing the WTO.
333 Article IV:2 of the WTO Agreement.
Conference between meetings of the Conference.\textsuperscript{334} 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).\textsuperscript{335} 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.

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,\textsuperscript{336} 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 remains unchanged. The Annex 1 MTAs, with the Annex 2\textsuperscript{337} and Annex 3\textsuperscript{338} MTAs, form the three ‘pillar’ structure upon which regulation of trade in the WTO is

\textsuperscript{334} ibid.
\textsuperscript{335} Article IV:3 of the WTO Agreement.
\textsuperscript{336} 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.
\textsuperscript{337} i.e. Understanding on Rules and Procedures Governing the Settlement of Disputes.
\textsuperscript{338} i.e. Trade Policy Review Mechanism.
founded. Thus the WTO Agreement provides for one Council each to have oversight responsibilities of each of the three Annex 1 category MTAs.\textsuperscript{339} There is therefore a Council for Trade in Goods, a Council for Trade in Services and a Council for TRIPS.\textsuperscript{340} 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\textsuperscript{341} and the Trade Policy Review Body\textsuperscript{342} respectively. There are a host of committees and working groups that operate under each of the MTA specific Councils.\textsuperscript{343}

The 2001 Doha Ministerial Declaration established a Trade Negotiations Committee (TNC) responsible for supervising the overall conduct of the Doha Round trade negotiations.\textsuperscript{344} 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.\textsuperscript{345} 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.

\textsuperscript{339} Article IV:5 of the WTO Agreement.  
\textsuperscript{340} Ibid.  
\textsuperscript{341} Article IV:2 of the WTO Agreement.  
\textsuperscript{342} Article IV:3 of the WTO Agreement.  
\textsuperscript{343} Article IV:7 of the WTO Agreement.  
\textsuperscript{344} Paragraph 46 of the Doha Ministerial Declaration.  
\textsuperscript{345} http://www.wto.org/english/tratop_e/dda_e/tnce.htm (viewed on 20 November 2011).
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 especially 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 administrative support to the various
organs of the WTO.\textsuperscript{346} 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{347}

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.

\textsuperscript{346} Peter Van den Bossche, op cit. fn.46.
\textsuperscript{347} Article XVI:3 of the WTO Agreement.
3.4 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\(^{348}\) 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.\(^{349}\) 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.\(^{350}\) 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.\(^{351}\) Though subordinate bodies like the Councils for Trade in Goods, Services and TRIPS exercise some decision-making powers, these are quite peripheral and 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 – that is, whether to adopt the decision of the Panel or the

\(^{348}\) see Articles IX:1 and XVI:1 of the WTO Agreement.
\(^{349}\) Article IX:1 of the WTO Agreement.
\(^{350}\) ibid.
\(^{351}\) Article IV of the WTO Agreement.
The Appellate Body – falls on the General Council sitting as the DSB.\textsuperscript{352} \textit{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{353}

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.\textsuperscript{354} These are: decisions on various matters;\textsuperscript{355} decisions on interpretation of the WTO Agreement and the MTAs;\textsuperscript{356} decisions on waivers of responsibilities under the WTO Agreement and the MTAs;\textsuperscript{357} decisions on amendments to the WTO Agreement and the MTAs;\textsuperscript{358} and negotiation of new MTAs.

\subsection*{3.4.1 Decisions on Various Matters}

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

\begin{quote}
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
\end{quote}

\begin{itemize}
\item Article 2:4 of the Dispute Settlement Understanding.
\item 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 (viewed on 10 April 2011).
\item Article IX:1 of the WTO Agreement; see also John H. Jackson, ibid.
\item Article IX:2 of the WTO Agreement.
\item Article IX:3-4 of the WTO Agreement.
\item Article X of the WTO Agreement.
\end{itemize}
Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.359

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.360 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.361 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

359 Article IX:1 of the Agreement Establishing the WTO.
360 Amrita Narlika, op. cit. fn.305.
361 Footnote 1 of Article IX:1 of the WTO Agreement.
proposed decision, then consensus is deemed to have been achieved. In effect, silence means consent.

### 3.4.2 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.\(^{362}\) Regarding interpretations of Annex 1 MTAs (i.e. MTAs relating to trade in goods, services, and intellectual property rights), the Ministerial 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.\(^{363}\) 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

\(^{362}\) Article IX.2 of the WTO Agreement.

\(^{363}\) William J. Davey, op cit. fn.298.
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*\(^{364}\) 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.\(^{365}\)

Affirmation of the reasoning of the Appellate Body is again found in its decision in the *Japan – Alcoholic Beverages* II.\(^{366}\) 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


\(^{365}\) ibid, pp. 19–20.

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 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.

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367 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).”

368 ibid.

369 ibid. at 13.
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.\(^{371}\)

### 3.4.3 Decision on Waivers

Decisions on waivers of obligations accruing from the WTO Agreement or the MTAs are taken by three-fourths majority of votes.\(^{372}\) 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.\(^{373}\) 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:

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\(^{371}\) Para. 4 of WTO Ministerial Conference Declaration on the TRIPS Agreement and Public Health.  
\(^{372}\) Article IX:3 of the WTO Agreement.  
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.\footnote{General Council Decision on “Decision-Making Procedures Under Articles IX and XII of the WTO Agreement”, adopted on 15 November 1995, para.1.}

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.\footnote{Article IX:3(b) of the WTO Agreement.}

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.\footnote{Ibid.} 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.\footnote{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).}

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.

3.4.4 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.

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379 ibid at para. 1.
380 Article X:1 of the WTO Agreement.
381 ibid.
382 Article X:1 of the WTO Agreement.
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 decision-making and amendments respectively) can only be made by a unanimous acceptance by all WTO Members.\textsuperscript{383} 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).\textsuperscript{384} 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.\textsuperscript{385} 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-

\textsuperscript{383} Article X:2 of the WTO Agreement.
\textsuperscript{384} ibid.
\textsuperscript{385} See chapter 1 for a more extensive discussion of the MFN principle.
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 this 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.

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386 Article X:3 of the WTO Agreement.
387 ibid.
388 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).
389 Article X:3 of the WTO Agreement.
390 Article X:3 of the WTO Agreement.
391 ibid.
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 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.\(^{392}\)

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.\(^{393}\)

Amendments of provisions in the WTO Agreement, the TRIPS Agreement and goods-related multilateral trade agreements (i.e. Annex 1A)\(^{394}\) and Parts IV, V and VI of the GATS\(^{395}\) 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.\(^{396}\)

\(^{392}\) Article X:3 of the WTO Agreement.

\(^{393}\) ibid.

\(^{394}\) ibid.

\(^{395}\) 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).

\(^{396}\) Article X:4 of the WTO Agreement.
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.\footnote{Article X:8 of the WTO Agreement.}

\section*{3.4.5 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.\footnote{Article III of the WTO Agreement.} In the process of Members advancing their trade needs, as mandated by the WTO Agreement, an obvious offshoot of this provision is the negotiating of new MTAs.\footnote{John H. Jackson, op cit. fn.354.}

\section*{3.5 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.

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,\footnote{Reuters, 'China 2010 Census Shows 1.3 billion Population', 27 April 2011, http://www.reuters.com/article/2011/04/28/us-china-census-idUSTRE73R0DA20110428 (viewed on 17 June 2011).} constituting 21.7 per cent of the total population of the WTO, has one vote
just as Liechtenstein with a population of 35,236401 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.402 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

402 See Articles IX and X of the Agreement Establishing the World Trade Organisation.
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.\textsuperscript{403} The principle of special and differential treatment of developing countries, discussed extensively in chapter one, 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, \textit{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 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

\textsuperscript{403} Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries’, Decision of 28 November 1979 (L/4903).
above are exclusively entrusted to the institutions whose membership 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 which the thesis will delve into.

Following these deductions, the next segment of this chapter 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. The two principles that underpin the theoretical framework of this thesis – the principle of special and differential treatment of developing countries and the principle of sovereign equality of states – will be foundational in the scrutiny and analysis of the informal processes of decision-making in the WTO. The discussed deductions and their applicability to the informal processes of decision-making in the WTO will also play a pivotal role in the comparative analysis that the thesis will engage in subsequent chapters – i.e., comparing the formal and informal processes of decision-making in the WTO with that of the UN, IMF and the EU.
3.6 Problems with the WTO Decision-Making Process

The first segment of this chapter 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 of the chapter 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.

3.6.1 The Consensus and Single Undertaking Requirements

As observed in the previous chapter, 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 159. Reaching consensus among 159 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

\[\text{\footnotesize \textsuperscript{404}}\, \text{http://www.wto.org/english/tratop_e/whatis_e/tif_e/org6_e.htm (viewed on 24 April 2013).} \]

\[\text{\footnotesize \textsuperscript{405}}\, \text{See Peter D. Sutherland, op cit. fn.19, at 61-68.} \]
has, for instance, stretched for more than 10 years\textsuperscript{406} due, \textit{inter alia}, to the inability to reach consensus on critical issues on export competition, domestic support and market access in agriculture.\textsuperscript{407} Even prior to the current difficulties with achieving consensus on the regulation of agriculture, the Ministerial Conferences in Seattle\textsuperscript{408} and Cancun\textsuperscript{409} 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{410}

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{411}

It is worthy of note though, that the fact that the WTO has 159 Members does not mean that heterogeneous trade needs will result in 159 different positions on trade issues that are deliberated within the WTO decision-making process. The practice in

\textsuperscript{406} 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.


\textsuperscript{408} Third WTO Ministerial Conference held in Seattle, Washington State, USA, from 30 November to 3 December 1999.

\textsuperscript{409} Fifth WTO Ministerial Conference held in Cancún, Mexico from 10 to 14 September 2003.


\textsuperscript{411} Peter D. Sutherland, \textit{et al}, op cit. fn.19.
the WTO indicates that Members usually coalesce into groupings that reflect similarities of trade interests.\footnote{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).}

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\footnote{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.} comprise agricultural exporting WTO Members with interest in the liberalisation of agricultural trade, the G-10\footnote{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).} 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\footnote{http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm (viewed on 4 July 2011).} that have presented proposals and positions on the regulation of agriculture in the WTO.\footnote{ibid.} 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 flexibility for developing countries to institute a more
limited liberalisation in agriculture);\textsuperscript{417} 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);\textsuperscript{418} Cotton-4 (its specific interest is in trade in cotton);\textsuperscript{419} and Tropical Products Group (its interest lie in greater market access for tropical products).\textsuperscript{420}

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);\textsuperscript{421} 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

\textsuperscript{417} 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.

\textsuperscript{418} 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, Grenada, Guatemala, Guyana, Haiti, Honduras, India, Indonesia, Jamaica, Kenya, Korea, 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.

\textsuperscript{419} Cotton-4 is composed of four African countries - Benin, Burkina Faso, Chad, Mali.

\textsuperscript{420} The Tropical Products Group is composed of Bolivia, Bolivarian Republic of Venezuela, Colombia, Costa Rica, Ecuador, El Salvador, Honduras, Guatemala, Nicaragua, Panama, Peru.

\textsuperscript{421} http://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.htm (viewed on 19 September 2012)
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.\textsuperscript{422} 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.\textsuperscript{423} 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.

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

\textsuperscript{422} See Amrita Narlikar, op cit. fn.412.
\textsuperscript{423} http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm (viewed on 6 July 2011).
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. Brazil’s interest in gaining better access into the EU and United State’s ethanol markets contributed to its willingness to make concessions contrary to opposing views from other G-20 allies. Interestingly, it was the perceived lack of willingness of the Cairns Group, (led by Australia) to directly confront the EU and United States’ 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. 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. 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. During the GATT era when developing countries could pick and choose the rules by which they would be bound, they did not

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425 ibid.
427 ibid.
428 Article II:2 of the WTO Agreement.
exhibit much interest in actively participating in the decision-making process.\textsuperscript{429} They were more active in advancing their interests through special and differential treatment concessions. Developing countries were, for example, conspicuously unrepresented in the Tokyo Round Codes, as they opted out of the disciplines proceeding from these codes.\textsuperscript{430} 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.\textsuperscript{431} 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.\textsuperscript{432} A few developed countries, notably the Quad – 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.\textsuperscript{433} 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,

\textsuperscript{429} Jeffrey J. Schott and Jayashree Watal, op cit fn.292; Peter D. Sutherland, \textit{et al}, op cit. fn.19.

\textsuperscript{430} Peter D. Sutherland, \textit{et al}, op cit. fn.19.

\textsuperscript{431} Jeffrey J. Schott and Jayashree Watal, op cit. fn.292.

\textsuperscript{432} Rorden Wilkinson and James Scott, ‘Developing Country Participation in the GATT: A Reassessment’, \textit{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.twnside.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 are “examples of major concessions given by developing countries to the developed countries without insisting on and getting any commensurate concessions from the latter.”

\textsuperscript{433} Jeffrey J. Schott and Jayashree Watal, op cit. fn.292; Peter D. Sutherland, \textit{et al}, op cit. fn.19.
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.\textsuperscript{434} 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\textsuperscript{435} – 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.\textsuperscript{436} The only Singapore Issue that had the green light was trade facilitation\textsuperscript{437} 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.\textsuperscript{438} 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

\textsuperscript{435} http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_10nov_e.htm (viewed 22 January 2012)
\textsuperscript{436} ‘Understanding the WTO: The Doha Agenda’, http://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm (viewed on 07/07/11).
\textsuperscript{437} Ibid.
\textsuperscript{438} Paragraphs 20, 23, 26 and 27 of the Doha Ministerial Declaration, 20 November 2001, WT/MIN(01)/DEC/1.
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. As argued in the previous chapter, 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.\(^{439}\)

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 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.\(^{440}\)

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

\(^{439}\) Peter D. Sutherland, \textit{et al}, op cit. fn.19, at 63.

\(^{440}\) ibid.
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{441} 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{442} Some developing countries do not have permanent delegations at the WTO and are therefore not present at all meetings.\textsuperscript{443} 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{444} 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{445}, 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'


\textsuperscript{442} ibid.


\textsuperscript{444} ibid.

\textsuperscript{445} i.e. in 2001.
time. Worse yet, sometimes as many as four to five formal meetings had to be convened at the same time.\textsuperscript{446}

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{447} An excerpt from a speech by the Zimbabwean Minister of 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

\textsuperscript{446} 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_ddgstat_13feb_e.htm (viewed on 06/07/11).

\textsuperscript{447} http://www.wto.org/english/thewto_e/minist_e/min96_e/st45.htm (viewed 06/07/11).
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.\footnote{Statement by the Honourable N.M. Shamuyarira, Zimbabwean Minister of Industry and Commerce delivered on 10 December 1996, at the Singapore Ministerial Conference, 9-13 December 1996. Full statement available online at http://www.wto.org/english/thewto_e/minist_e/min96_e/st45.htm (viewed 06/07/11).}

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.449

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.450 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

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450 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).
multilateral disciplines. 451 Further negotiations on agriculture were timetabled to commence in 2000 and this has become an integral part of the Doha Round. 452 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 (quoted in chapter one) reverberates here as well:

… 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. 453

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

452 ibid.
453 Peter D. Sutherland, et al, at 18, op cit. fn.19.
disillusioned, the WTO could gradually atrophy, which would then be disappointing to some of the other users of the system.454

3.6.2 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 which was used to host smaller deliberative group discussions.455 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.456 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.457 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. 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. 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. 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.

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.

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459 ibid.
461 Pieter Jan Kuijper, op cit. fn.458.
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 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.463

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.464 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. Chapter seven 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.

3.7 Concluding Remarks: WTO Decision-Making: Implications for the Principles of Sovereign Equality and Special and Differential Treatment

The analyses of the informal processes of decision-making in the WTO shows 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

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463 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.
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, as observed in chapter two, 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 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. It was observed in chapter two that the concept of sovereignty (and by logical extension sovereign equality) is fluid and should not be used as a ‘straight 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. A more in-depth engagement of this discussion is undertaken in chapter seven.
CHAPTER FOUR: DECISION-MAKING AT THE UNITED NATIONS

Introduction – The UN: A Brief Historical Background

The main focus of this chapter is to present an account and analysis of the UN decision-making system. It is however deemed appropriate to situate the analysis in its proper historical context so a brief historical account of the founding of the UN is presented in this introductory segment.

The UN is the successor organisation to the League of Nations which was established in 1919 after the end of World War I, but collapsed in the late 1930s when it could not avert the outbreak of World War II.\textsuperscript{465} Just like the League of Nations, the UN was born after a world war (that is, World War II) and thus has, as its founding principle, the ethos of maintaining world peace through the prevention of war.\textsuperscript{466} Though the League of Nations was the immediate predecessor to the UN, the need for international cooperation as a medium for ensuring peace from war goes further back than the founding of the League of Nations. Perhaps the most prominent international cooperations that acted as landmark precursors to the UN are the Peace of Westphalia 1648, the Congress of Vienna 1815, and the League of Nations 1919.\textsuperscript{467} It is worthy of note that these three predecessor systems were all born out of the throes of war – the Peace of Westphalia, after the 30-year religious


\textsuperscript{467} See Randall Lesaffer (ed.) Peace Treaties and International Law in European History: From the Late Middle Ages to World War One, Cambridge: Cambridge University Press, (2004).
war in Europe; the Congress of Vienna, after the Napoleonic Wars; and the League of Nations, after World War I.\footnote{Randall Lesaffer, op cit. fn.467.}

Evidently, the reference here to the Peace of Westphalia, the Congress of Vienna, and the League of Nations as the predecessors of the UN is an acute abbreviation of the history of international cooperation and for instance fails to give due cognisance to the Hague Peace Conferences of 1899 and 1907 which were more international in nature in terms of participation by states outside of Europe.\footnote{See Joseph Hodges Choate, \textit{The Two Hague Conferences}, Princeton: Princeton University Press (1913).} As observed in chapter two\footnote{See the introductory section in chapter two.} placing undue emphasis on the Peace of Westphalia as the starting point of modern international relations is problematic as systems of international cooperation were already in existence.\footnote{See Joshua Castellino, op cit. fn.211.; Benno Teschke, \textit{The Myth of 1648: Class, Geopolitics and the Making of International Relations}, New York: Verso (2003); Randall Lesaffer, \textquote{The Grotian Tradition Revisited: Change and Continuity in the History of International Law}, \textit{British Yearbook of International Law} 73(1), (2002), pp.103-139.} That said, the remit of this thesis does not extend to an in-depth presentation of the history of international organisations.\footnote{For more on this see Bob Reinalda, \textit{Routledge History of International Organizations: From 1815 to the Present Day}, Abingdon: Routledge (2009); William E. Butler (ed.), \textit{On the History of International Law and International Organization: Collected Papers of Sir Paul Vinogradoff}, New Jersey: The Lawbook Exchange, (2009).} However, though the Peace of Westphalia and the Congress of Vienna were essentially European arrangements they impacted greatly on the development of the modern nation-state as the main locus of sovereignty (necessitating non-interference in the domestic affairs of the sovereign state), and hence the concomitant recourse to the state as the basic unit of engagement in international cooperation.\footnote{Nico Schrijver, \textquote{The Changing Nature of State Sovereignty}, British Yearbook of International Law 70(1), (1999) pp.65-98; Adolphus William Ward and Paul Dalen, \textit{Cambridge Modern History Volumes I-5}, Kindle Edition, (2011).} In spite of the increasing relevance of non-state actors in current international affairs, the predominance of the state as the basic unit around which international regulation is
constructed is still strong,474 and this makes the mention of the systems that projected the state to the forefront of international relations indispensable in any account of the current international system which the UN epitomises.

The actual conceptual beginning of the UN can be traced to the war aims of the Allied Nations in their fight against the Axis Powers during World War II.475 The embryonic seeds of the UN were sown in the Atlantic Charter issued by Franklin Roosevelt, the President of the United States, and Winston Churchill, the Prime Minister of the United Kingdom, on August 14 1941476 in which they recognised the need for “the establishment of a wider and permanent system of general security.”477 Roosevelt and Churchill agreed on eight principles upon which “the national policies of their respective countries … base their hopes for a better future for the world.”478 The Atlantic Charter, inter alia, affirmed a renunciation of any territorial or other aggrandizement;479 that territorial changes must be in accord with the wishes of the people concerned;480 the recognition and restoration of sovereign rights and self-government for those who have been deprived these rights;481 the furtherance of equal access to trade for all states, both the victors and the vanquished;482 economic cooperation among states to secure improved labour standards, economic advancement, and social security for all;483 the destruction of Nazi tyranny;484 the freedom for all to “traverse the high seas and oceans”;485 and that “all nations of the world, for

476 Atlantic Charter, 14 August 1941.; see also Stephen C. Schlesinger, op cit. fn.466.
477 Principle 8 of the Atlantic Charter, August 14 1941.
478 The Atlantic Charter, August 14 1941.
479 Principle 1 of the Atlantic Charter, August 14 1941.
480 Principle 2 of the Atlantic Charter, August 14 1941.
481 Principle 3 of the Atlantic Charter, August 14 1941.
482 Principle 4 of the Atlantic Charter, August 14 1941.
483 Principle 5 of the Atlantic Charter, August 14 1941.
484 Principle 6 of the Atlantic Charter, August 14 1941.
485 Principle 7 of the Atlantic Charter, August 14 1941.
realistic as well as spiritual reasons must come to the abandonment of the use of force."\(^{486}\) On January 1, 1942 in Washington DC, the principles espoused by the Atlantic Charter were adopted by 26 nations\(^{487}\) including the USSR and China in the Declaration by United Nations.\(^{488}\) This was the first time that term ‘United Nations’ was used to represent the collaborative efforts of those states who were committed to establishing international peace and security and who stood against the Axis powers.\(^{489}\) Thus, in the Moscow Declaration on General Security\(^{490}\) that ensued from the meeting of the United States, United Kingdom, China and the Soviet Union in Moscow in October 1943, there was a reaffirmation of the Declaration by United Nations,\(^{491}\) and by extension, a reaffirmation of the Atlantic Charter principles. The Moscow Declaration on General Security further recognised:

… the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security.\(^{492}\)

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\(^{486}\) Principle 8 of the Atlantic Charter, August 14, 1941.

\(^{487}\) The states that signed the Declaration of United Nations were the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, China, Australia, Belgium, Canada, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, El Salvador, Greece, Guatemala, Haiti, Honduras, India, Luxembourg, Netherlands, New Zealand, Nicaragua, Norway, Panama, Poland, South Africa, and Yugoslavia.


\(^{490}\) Declaration of the Four Nations on General Security, October, 1943

\(^{491}\) The first two paragraphs of the preamble to the Moscow Declaration on General Security stated that “The governments of the United States of America, United Kingdom, the Soviet Union, and China; United in their determination, in accordance with the declaration by the United Nations of January, 1942, and subsequent declarations, to continue hostilities against those Axis powers with which they respectively are at war until such powers have laid down their arms on the basis of unconditional surrender.

\(^{492}\) Paragraph 4 of Moscow Declaration on General Security, 1943.
Between June 5 1942 and March 1 1945, 19 other states signed the Declaration by United Nations. In the progress towards the founding of the UN, the four major powers – the United States, United Kingdom, Soviet Union, and China – played the leading role in pushing the agenda for a new post-war international organisation, though the influence of the United States under President Franklin Roosevelt in this direction was unquestionably greater than the leaders of the other three powers. In spite of the leading role of the United States in the preparatory stages of the UN, agreement among the major powers was deemed necessary hence meetings like the Moscow Meeting of 1943, the Tehran Meeting of 1943, and the Dumbarton Oaks Meeting of 1944 brought together the four major powers to iron out accords. The restricted constitution of these preparatory meetings was a harbinger of the greater powers that the four major powers were to play in the UN.

The meeting of the four major powers in Dumbarton Oaks produced a document which, though did not reflect a completed UN Charter, contained the principal issues they had reached agreement on. The results of the Dumbarton Oaks meeting was thus meant to be a form of working document to be used during the San Francisco Conference which would have a more broad based representation from many states. Four main organs were recommended by the Dumbarton Oaks Proposals – a General Assembly, a Security Council, an International Court of Justice, and a Secretariat. The Dumbarton Oaks Proposals made room for the main organs to establish subsidiary agencies and envisaged

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493 Mexico, Philippines, Ethiopia, Iraq, Brazil, Bolivia, Iran, Colombia, Liberia, France, Ecuador, Peru, Chile, Paraguay, Venezuela, Uruguay, Turkey, Egypt, and Saudi Arabia.
496 A. Leroy Bennett, op cit. fn.489.
497 Ibid.
498 Ibid.
499 Chapter IV of the Dumbarton Oaks Proposals.
500 Ibid.
that the Economic and Social Council would be a subsidiary agency under the General
Assembly.\(^{501}\) However, this proposal was defeated during the San Francisco Conference as
the Economic and Social Council and the Trusteeship Council were made principal organs
of the UN in addition to the four proposed under the Dumbarton Oaks Proposals.\(^{502}\)

Unlike proposals on voting procedures in the other principal organs, the Dumbarton Oaks
Proposals did not contain any scheme on voting in the Security Council as the major
powers could not agree a formula.\(^{503}\) The Proposals stated that “[T]he question of voting
procedure in the Security Council is still under consideration”.\(^{504}\) The Soviet Union
favoured an unlimited veto power for the permanent members of the Security Council
while the United States favoured a restricted veto.\(^{505}\) Another disagreement ensuing from
Dumabarton Oaks was the Soviet Union’s position that all 16 republics of its Union be
granted individual membership of the UN.\(^{506}\)

These disagreements, \textit{inter alia}, were addressed in the Yalta Conference in February 1945
during a meeting of the Soviet Union, United States and United Kingdom.\(^{507}\) At the Yalta
Conference, the three powers agreed that Ukraine and Byelorussia would become
‘independent’ members of the UN and the United State’s position on a restricted veto
prevailed.\(^{508}\) The use of the veto could not be extended to block a procedural vote and there
was a requirement that a member would abstain from voting on an issue regarding a

\(^{501}\) Chapter IX of the Dumbarton Oaks Proposals.
\(^{502}\) Article 7 of the UN Charter.
\(^{503}\) Robert C. Hilderbrand, \textit{op cit.} fn.495.
\(^{504}\) Chapter VI (Sec.C) of the Dumbarton Oaks Proposals.
\(^{505}\) Stephen C. Schlesinger, \textit{op cit.} fn.466.
\(^{506}\) \textit{ibid.}
(1949).
\(^{508}\) Wilhelm G. Grewe, \textit{op cit fn.465}. 

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dispute that it was involved in.\textsuperscript{509} The veto could however be used for more important matters like decisions on enforcement of actions against a member of the UN.\textsuperscript{510} This by implication meant that it would be a practical impossibility for the Security Council to decide to institute an enforcement action against any of its permanent members, as it would be unreasonable to expect that a permanent member against whom an enforcement measure is proposed would concur to such a decision by refusing to use its veto power. With the restriction of the veto being procedural in nature, the Soviet Union was willing to retract its prior position of unlimited veto.

The San Francisco Conference which opened on 25 April, 1945 and culminated in the signing of the UN Charter by 50 states on June 26, 1945 marked the final stage of the conferences and negotiations that had been taking place between the Allied Nations during World War II regarding the founding of an international organisation, as espoused under the Atlantic Charter and confirmed by the ‘Declaration by United Nations’. At the San Francisco Conference there was a lot of criticism from other state delegates, notably from Australia and States in the Americas, of the constitution of the Security Council – specifically, the reservation of five permanent memberships (of a total membership of eleven at the time) – and the veto powers accorded to these permanent members but the big powers were not prepared to compromise.\textsuperscript{511} There is an episode reported during the debates at the San Francisco Conference where one of the delegates from the United States tore a copy of the draft UN Charter, signifying that there would be no Charter if the position of the big powers regarding permanent membership of the Security Council and

\textsuperscript{509} ibid.  
\textsuperscript{510} ibid.  
the veto did not hold sway. It thus became evident that if the big powers did not have their way, the Charter would not come into fruition. Superior leverage won the day. The restriction of the veto to the five permanent members of the Security Council was a dramatic change from the League of Nations where every member wielded a veto power.

The account of the founding of the UN will be incomplete without mention of the input of non-governmental organisations and civil society in general. There was wide public support for an international organisation that could secure peace from war, especially in the United States and the United Kingdom and many private and non-governmental organisations presented proposals for the founding of this post-war organisation. Examples of some of the prominent NGOs include the Commission to Study the Organisation of Peace, established in 1939 in the United States, Commission for a Just and Durable Peace, founded by the Federal Council of Churches of Christ in the United States, the League of Nations Union in the United Kingdom, the Swedish Association for the League of Nations, the Swiss Association for the League of Nations, and the Universities Committee on Postwar International Problems, headquartered in Boston in the United States. In 1943, the Declaration on World Peace was published by a group composed of Catholic, Protestant, and Jewish religious leaders. In a seven point Declaration, the group advocated that:

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512 A. Leroy Bennett, op cit. fn.489.
513 ibid.
514 ibid.
516 ibid.
518 ‘Time Magazine US, ‘U.S. At War: Seven Points for Peace’, (October 11, 1943), http://www.time.com/time/magazine/article/0,9171,774623,00.html (viewed on 19 September 2012). Among the religious leaders who issued the Declaration on World Peace were the following: Bishop
The organization of a just peace depends upon . . . recognition . . . that not only individuals but nations, states and international society are subject to the will of God as embodied in the moral law.

The dignity of the human person as the image of God must be set forth in all its essential implications. . . . States, as well as individuals, must repudiate racial, religious or other discrimination. . . .

The right of all peoples . . . must be safeguarded within the framework of collective security. The progress of undeveloped, colonial, or oppressed peoples toward political responsibility must be the object of international concern.

National governments and international organization must guarantee the rights of ethnic, religious and cultural minorities to economic livelihood . . . equal opportunity for educational and cultural development . . . political equality.

An enduring peace requires the organization of international institutions [to] develop . . . international law, guarantee . . . international obligations . . . assure collective security by drastic limitation and continuing control of armaments, compulsory arbitration . . . adequate sanctions to enforce the law.

Henry St. George Tucker, Presiding Bishop of the Episcopal Church and President of the Federal Council of Churches; Dr. Henry Sloan Coffin, Moderator of the Presbyterian Church in the U.S.A.; Dr. Ferdinand Q. Blanchard, Moderator of the Congregational Christian Churches; Bishop G. Bromley Oxnam, Secretary of the Methodist Church's Council of Bishops; Roman Catholic Archbishops Edward Mooney of Detroit, Samuel A. Stritch of Chicago, Robert E. Lucey of San Antonio; Rabbi Israel Goldstein, President of the Synagogue Council of America.
International economic collaboration to . . . provide an adequate standard of living . . . [to] replace the present economic monopoly and exploitation of natural resources by privileged groups and states.

. . . Steps must be taken to provide for the security of the family . . . collaboration of all groups and classes in the interest of the common good, a standard of living adequate for self-development and family life, decent conditions of work, and participation by labor in decisions affecting its welfare.519

The contribution of NGOs and civil society to the founding of the UN was thus significant. The high degree of interest from civil society was recognised and delegates from many NGOs participated in the deliberations leading to the San Francisco Conference and during the Conference itself.520 The important role that NGOs and civil society in general played in the founding of the UN is testament to their continuous involvement in the UN on an official basis.521

### 4.1 Organs of the UN and Decision-Making

The UN has six main organs – the General Assembly, Security Council, Economic and Social Council, Trusteeship Council, International Court of Justice, and the Secretariat.522 These constitute the principal organs of the UN and Article 7 of the Charter provides for the establishment of subsidiary organs to operate under the principal organs. The designation of the six mentioned organs as being principal and others as subsidiary obviously creates a distinction between these two groups with regards to status in the UN.

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520 Bill Seary, op cit. fn.515.
522 Article 7 of the UN Charter.
Also, the principal organs are empowered to create subsidiary organs as and when deemed necessary.\(^\text{523}\) The Military Staff Committee, a subsidiary organ of the Security Council, is the only subsidiary organ established by the Charter and this is defunct since difference between members’ prevented it being established as an effective organ.\(^\text{524}\)

The UN Charter provides for decision-making procedures in each of its principal organs. Consequently, to undertake a full analysis of decision-making in the UN would require an analysis of the decision-making processes in, at least, all the principal organs. Such a task however falls outside the remit of the current study. The thesis will thus focus mainly on decision-making in the General Assembly and the Security Council. A short descriptive overview of decision-making in the Economic and Social Council will also be given. These organs have been chosen to facilitate the comparative study between the WTO and the UN and also to aid analysis of some of the proposals that have been made regarding a reform of the WTO decision-making process, notably, the need for an organ with a restricted membership. Analysis of decision-making in the General Assembly would thus aid the comparative study of the current system of decision-making in the WTO typified by an all-member constitution of its decision-making organs. Decision-making in the Security Council would, on the other hand, provide a comparative analytical window into how an organ with restricted membership in the WTO might look like.

Most of the formal products of decision-making in the United Nations (i.e. the General Assembly, the Security Council and the Economic and Social Council) come in the form of

\(^{523}\) Article 7:2 of the UN Charter.

\(^{524}\) Article 47 of the UN Charter. See also Ralph M Goldman, 'Is it time to revive the UN military staff committee?’, Center for the study of armament and disarmament. California State university, Occasional Papers Series, 19.
resolutions. Resolutions are formal expressions of opinions of the decision-making bodies of United Nations on a particular matter or issue. Resolutions usually have a preamble and an operative section. Results of UN decision-making are also conveyed in the form of declarations. Declarations are used to express opinions of high political concern. The term ‘decision’ is mostly reserved for internal procedural matters like elections, appointments, venues and times for convening meetings, and the adoption of a text that depicts the consensus of members. Some other expressions of UN decision-making are framed as programmes of action, treaties and conventions.

4.2 Decision-Making in the General Assembly

Of the six principal organs of the UN, the General Assembly is the only organ composed of the entire membership of the UN. Members of the UN become automatic members of the General Assembly on accession to the UN. Article 9:1 of the UN Charter states that: “The General Assembly shall consist of all the Members of the United Nations”. As the deliberative organ of the UN, the composition of the General Assembly is of vital importance as it offers every member the opportunity to contribute to the deliberative process during its plenary sessions. Being the only organ composed of the entire membership of the UN, this represents the best expression of the principle of sovereign equality of states in the UN.

527 ibid.
528 UN Non-Governmental Liaison Service and Gretchen Sidhu, op cit. fn.521.
529 ibid.
530 ibid.
531 Article 9 of the UN Charter.
The Charter provides for decision-making in the General Assembly to be undertaken through voting and each member wields a single vote.\textsuperscript{532} Decisions on important questions in the General Assembly are made by a majority of two-thirds of members present and voting.\textsuperscript{533} Article 18:2 provides a non-exhaustive list of questions that are deemed important and as such require a two-thirds majority vote – recommendations regarding the maintenance of international peace and security; the election of non-permanent members of the Security Council; election of members of the Economic and Social Council and the Trusteeship Council; the admission of new members to the UN; the suspension of rights and privileges of membership, the expulsion of members; questions regarding the operations of the trusteeship system; and budgetary questions.\textsuperscript{534} Since the stated issues are a non-exhaustive list of important questions, the General Assembly is empowered under Article 18:3 to determine questions that require a two-thirds majority vote. Such a determination is made by a simple majority vote. All other questions not deemed important are also decided by a simple majority vote.\textsuperscript{535}

Though voting in the General Assembly is the preserve of member states, non-members can be accorded different levels of observer status and in exceptional situations, some observers have been given the opportunity to address plenary sessions of the General Assembly. Examples include Pope Paul VI in 1965\textsuperscript{536} and Yasser Arafat in 1974.\textsuperscript{537}

\textsuperscript{532} Article 18:1 of the UN Charter.
\textsuperscript{533} Article 18:2 of the UN Charter.
\textsuperscript{534} ibid.
\textsuperscript{535} Article 18:3 of the UN Charter.
The work of the General Assembly is broken into six main committees - the First Committee (Disarmament and International Security Committee); the Second Committee (Economic and Financial Committee); the Third Committee (Social, Humanitarian and Cultural Committee); the Fourth Committee (Special Political and Decolonization Committee); the Fifth Committee (Administrative and Budgetary Committee); and the Sixth Committee (Legal Committee). Apart from these six main committees, there are a host of subsidiary organs created under the General Assembly. The subsidiary organs of the General Assembly can be grouped under boards, Commissions, Committees, Councils and Panels, and Working Groups and others.

The General Assembly’s meetings can be categorised into three – regular sessions, special sessions and emergency special sessions. Regular sessions are held annually “commencing

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539 Examples include: Board of Auditors (established by GA Resolution 74 (I)); Trade and Development Board (established by GA Resolution 1955 (XIX)); United Nations Joint Staff Pension Board (established by GA Resolution 248 (III)) and Advisory Board on Disarmament Matters. See http://www.un.org/en/ga/about/subsidiary/boards.shtml (viewed on 30/12/11).
540 Examples include: Disarmament Commission (established by GA resolution 502 (VI) and S-10/2), International Civil Service Commission (established by GA resolution 3357 (XXIX)), International Law Commission (established by GA resolution 174 (II)), United Nations Commission on International Trade Law (UNCITRAL) (established by GA resolution 2205 (XX)).
541 Examples include: Committee on Contributions [established by GA Resolution 14 (I A)], Ad Hoc Committee on Criminal Accountability of United Nations Officials and Experts on Mission [established by GA resolution 61/29], Advisory Committee on Administrative and Budgetary Questions [established by GA Resolution 173 (II)], Executive Committee of High Commissioner's Programme (UNHCR) [established by GA Resolution 1166 (XII)], High-level Committee on South-South Cooperation [established by GA Resolution 33/134], Special Committee on Peace-keeping Operations [established by GA Resolution 2006 (XIX)].
542 Examples include: Human Rights Council [established by GA resolution 60/251], Governing Council of the United Nations Environment Programme [established by GA resolution 2997 (XXVII)], Panel of External Auditors of the United Nations, the Specialized Agencies and the International Atomic Energy Agency [established by GA resolution 347 (IV) and 1438 (XIV)].
on the Tuesday of the third week in September, counting from the first week that contains a working day”. Though regular sessions are normally held at the headquarters of the UN in New York, a majority of members, can, under provisions in Rule 3 and Rule 4 of the Rules of Procedure of the General Assembly, cause a regular session to be held at a location other than the UN Headquarters.

Special sessions of the General Assembly can be convened by the Assembly itself by fixing a date for such a session, or through a request of the Security Council communicated to the members by the Secretary General. Special sessions are convened within 15 days of receipt of a request from the Secretary General.

Emergency special sessions of the General Assembly are convened within 24 hours of receipt of a request from the Secretary General. The Security Council can request emergency special sessions by a majority vote of any nine of its members and so can a majority of members voting in the Interim Committee or through the concurrence of a majority of members expressed within 30 days of the Secretary General communicating a request by a member of the UN. In both the convening of special sessions and emergency special sessions, the Secretary General does not act on his own authority by requesting such sessions but rather serves as the conduit through whom requests are made by the Security Council, a member of the UN, or by majority of members according to the relevant laid down procedures.

546 Rules 8(a) and 9 of the Rules of Procedure of the General Assembly, A/520/Rev.17.
548 ibid.
551 ibid.
With regards to decision-making in the General Assembly, apart from the categorisation of questions into important and ‘ordinary’, the Charter also provides for other categorisations of functions of the General Assembly that have direct implications for decision-making. These include the power to discuss,\(^{553}\) consider,\(^{554}\) make recommendations,\(^{555}\) call attention to,\(^{556}\) and initiate studies.\(^{557}\)

### 4.2.1 The Power to Discuss

The General Assembly is empowered to discuss any questions or any matters that fall within the scope of the Charter.\(^{558}\) As stated earlier, the scope of the UN Charter is defined in Articles 1 and 2. These Articles establish the aims and objectives of the UN. The power to discuss extends to issues pertaining to the powers and functions of any organ of the UN and also the power to consider, as per Article 11, “the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and regulation of armaments …”\(^{559}\) Legally, the power to discuss in Article 10 and the power to consider in Article 11 are the same.\(^{560}\) The drafting history of the Charter, during the Dumbarton Oaks Conference provide some insight into why ‘discuss’ is used in Article 10 and ‘consider’ is used in Article 11. It was thought that the power to consider would include the power to make recommendations.\(^{561}\) However, since the Charter explicitly provides for the power to make recommendations in the same Article 11, it makes the distinctions between discuss and consider redundant.\(^{562}\)

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553 Articles 10 and 11:2 of the UN Charter.
554 Article 11:1 of the UN Charter.
555 Articles 10, 11, 12.
556 Article 11:3 of the UN Charter.
557 Article 13:1 of the UN Charter.
558 Article 10 of the UN Charter.
559 Article 11 of the UN Charter.
561 ibid.
562 ibid.
The power to discuss matters relating to the maintenance of international peace and security can be initiated by any member of the UN, the Security Council or by a non-member state. A non-member state however can only utilise this provision if it is a party to a dispute and if it accepts in advance, in relation to the dispute, the obligations of peaceful settlement of disputes as provided in the UN Charter.

It is worthy of note though, that Article 2:7 of the Charter makes it clear that the jurisdiction of the UN does not extend to “matters which are essentially within the domestic jurisdiction of any state”, and also that members are not obliged to submit matters falling within the domestic domain to the UN for settlement. This provision, obviously, puts a restriction on the power the General Assembly has to discuss (or consider) any issues within the scope of the Charter. In effect, since the scope of the Charter excludes the domestic affairs of members, the power to discuss given to the General Assembly also precludes the domestic affairs of members. The practice of the General Assembly however indicates that what constitutes a domestic affair is narrowly defined. Issues that pertain to the violation of human rights, for example, are deemed to be a threat to world peace hence falling under the purposes and principles of the UN and not exclusively under the domestic domain. During the apartheid era in South Africa, for example, the General Assembly (and other UN bodies) discussed and passed several resolutions about the apartheid policies of the then South African government.

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563 Article 11:2 of the UN Charter.
564 They include: General Assembly Resolution 395(V), 2 December 1950, declared that "a policy of 'racial segregation' (apartheid) is necessarily based on doctrines of racial discrimination"; General Assembly Resolution 1899 (XVIII), 13 November 1963, urged all states to desist from supplying South Africa with petroleum; on 23 August to 4 September 1966 the UN Division of Human Rights held an International Seminar on Apartheid in Brasilia, and was the beginning of many more international seminars held for the same purpose; on 30 November 1973 the General Assembly by Resolution 3068(XXVIII), approved the International Convention on the Suppression and Punishment of the Crime of Apartheid; on 14 December 1989, the General Assembly adopted by consensus the 'Declaration on Apartheid and its Destructive Consequences in Southern Africa'. - (Resolution A/RES/S-16/1).
4.2.2 The Power to Make Recommendations

Apart from the power to discuss, the General Assembly is empowered to make recommendations to the entire membership, to a specific member (or members), to the Security Council, and to non-member states. The power to make recommendations is restricted by provisions in Article 12 of the Charter. Under Article 12, the General Assembly is barred from making recommendations regarding a dispute or situation if the Security Council is exercising its Charter jurisdiction in respect of that dispute or situation. The Security Council can however request the General Assembly to make a recommendation on a dispute or situation even if such a dispute or situation is on the Security Council’s agenda. An express request from the Security Council thus alleviates the prohibition. In order to keep the General Assembly abreast with the Security Council’s agenda the Secretary General of the UN is empowered, with the consent of the Security Council, to notify the General Assembly, when it is in session, and the members of the UN when the General Assembly is not in session, of matters regarding the maintenance of international peace and security being dealt with by the Security Council.

It must be noted though that the prohibition in Article 12 deals with a specific dispute or situation (or specific disputes or situations). Thus the General Assembly has power to make recommendations on general issues concerning international peace and security and such recommendations could touch generally on matters on the Security Council’s agenda, without specifically referring to those matters on the Council’s agenda. A more liberal interpretation of the restrictions in Article 12 has been offered by the Legal Counsel of the

565 Articles 10 and 11 of the UN Charter.
566 Article 12 of the UN Charter.
567 ibid.
Secretary General, positing that if the Security Council was not exercising its jurisdiction at the moment the recommendation was being made by the General Assembly, then the Article 12 prohibition would not be applicable.\textsuperscript{569}

A very important example that shows how the General Assembly can overcome the limitations contained in Article 12 is the Uniting for Peace Resolution\textsuperscript{570} where the General Assembly used its power of recommendation to assert that:

\begin{quote}
… if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.\textsuperscript{571}
\end{quote}

An impasse in the Security Council due to a veto cast by the Soviet Union had disabled the Security Council from instituting enforcement measures against North Korea after it attacked South Korea.\textsuperscript{572} The absence of the Soviet Union’s representative in the Security Council due to a boycott had previously made it possible for the Council to pass a resolution recommending to members to offer assistance to South Korea to enable it repel

\begin{footnotesize}
\textsuperscript{569} General Assembly, Twenty-third Session, Third Committee, 1637th meeting, A/IC.31/SR. 1637, para. 9.
\textsuperscript{570} General Assembly Resolution 377 A (V) adopted on 3 November 1950.
\textsuperscript{571} ibid, para.1.
\end{footnotesize}
the armed attack from North Korea.\textsuperscript{573} The end to the Soviet boycott of the Security Council thus made it possible for her to use her veto power hence disabling the Security Council from further action in the Korean crisis. The ‘Uniting for Peace’ Resolution enabled the General Assembly to act in the absence of the exercise of the Security Council’s competence.

The absence of the Security Council’s competence in the Uniting for Peace saga was two fold – Soviet veto disabling the Security Council from action and the deletion of the Korean Crisis from the Council’s agenda. In effect, the deletion of the Korean Crisis from the agenda of the Security Council meant that it was not exercising jurisdiction in that matter and this enabled the General Assembly to act without breaching the Article 12 prohibition against a simultaneous consideration of the same matter by the General Assembly while the Security Council was seized of that matter.\textsuperscript{574} As stated earlier, the compromise made between the Soviet Union and the USA in the Yalta Conference, made it possible, within the Charter, to prevent the use of the veto in procedural issues in the Security Council.\textsuperscript{575} As deletion of a subject matter from its agenda is considered a procedural issue, the Security Council can proceed via this option in order to allow the General Assembly to fulfil a subsidiary role of making recommendations in areas (like enforcement actions) that hitherto would have been a primary competence of the Security Council. Prior to the Uniting for Peace Resolution, the Security Council had used the ‘technique’ of deleting contentious subject matters from its agenda to enable the General Assembly to perform its subsidiary function of maintaining international peace and

\begin{flushright}
\textsuperscript{573} General Assembly Resolution 83 adopted on 27 June 1950. \\
\textsuperscript{574} See ICJ Advisory Opinion on \textit{Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory}, ICJ Reports 2004, p.149, paras. 27-28. \\
\textsuperscript{575} Article 27.3 of the UN Charter.
\end{flushright}
security. This is evidenced in matters like the Spanish Question, and the Greek Border Incidents. In both the Spanish Question and the Greek Border Incidents, the deletion of the matters from the Security Council’s agenda, paved the way for the General Assembly to pass resolutions making non-binding recommendations of action to members.

Though such manoeuvring has afforded some flexibility in addressing contentious issues in the UN, the current practice of the General Assembly shows that the more liberal opinion offered by the Legal Counsel of the Secretary General – mentioned above – reflects the current state of affairs in respect of the application of Article 12. Thus, there has not been the need for the Security Council to delete matters from its agenda before the General Assembly could consider and make recommendations on such matters. The International Court of Justice consequently held, in its Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory that:

Indeed, the Court notes that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security (... for example, the matters involving Cyprus, South Africa, Angola, Southern Rhodesia and more recently Bosnia and Herzegovina and Somalia.) It is often the case that, while the Security Council has tended to focus on the aspects of such matters related to

578 ibid.
international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects.\(^{579}\)

**4.2.3 The Power to Call the Attention of the Security Council**

The General Assembly is empowered to “call the attention of the Security Council to situations which are likely to endanger international peace and security”.\(^{580}\) Though the power to determine the existence of a threat to or breach of the peace is vested in the Security Council,\(^{581}\) the power of the General Assembly to call the attention of the Security Council to situations that are likely to threaten or breach the peace, is a proactive measure to prompt the Security Council to fulfil its Article 39 functions and its other complementing functions framed within the context of ensuring the preservation of international peace and security.\(^{582}\) Eckart Klein and Kay Hailbronner argue that the power of the General Assembly to call the attention of the Security Council:

… is meant to strengthen its position vis-a-vis the SC. It functions as a compensation to the GA for the assignment to the SC of the primary responsibility for the maintenance or international peace and security by the Charter.\(^{583}\)

The Article 11:3 power of the General Assembly was, for instance, used when after terminating South Africa’s Mandate in Namibia by Resolution 2145 (XXI), the General

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\(^{579}\) ICJ Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, pp.149-150, para. 27. See also Alexander Orakhelashvili, ‘Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Opinion and Reaction’, *Journal of Conflict and Security Law*, 11(1), (2006), pp.119-139.

\(^{580}\) Article 11:3 of the UN Charter.

\(^{581}\) Article 39 of the UN Charter.

\(^{582}\) Eckart Klein and Kay Hailbronner, op cit. fn.568.

\(^{583}\) ibid at 250.
Assembly called the attention of the Security Council to this Resolution. 584 By doing this, the Security Council’s intervention was sought to use its power of enforcement to ensure a withdrawal of South Africa from Namibia. 585 Evidently, enforcement actions by the Security Council cannot be taken unless it has first determined that there is a threat to or breach of the peace. 586 However, when the General Assembly calls the attention of the Security Council to a situation that has the likelihood of endangering international peace and security, the content of such a call may contain facts that would presuppose that the General Assembly has taken a view which may be akin to a ‘determination’ that there is a threat to or breach of the peace. This appears to be a natural consequence of the Article 11:3 power as was observed by the ICJ in its Advisory Opinion on Namibia. 587 The ICJ held that:

… it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design. 588

4.2.4 The Power to Initiate Studies

Article 13 of the UN Charter empowers the General Assembly to initiate studies and make recommendations. 589 Evidently, wielding the power to just initiate studies without the ability to make recommendations that proceed from such studies would have been a serious limitation. The power to initiate studies and make recommendations under the Charter is

585 ibid.
586 Article 39 of the UN Charter.
587 ICJ Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa).
589 Article 13:1 of the UN Charter.
aimed at promoting international co-operation in the political, economic, social, cultural, educational and health fields, and encouraging the progressive development and codification of international law.  

The Article 13 power to initiate studies and make recommendations has featured prominently in the establishment of subsidiary UN bodies like the International Law Commission (ILC), the United Nations Commission on International Trade Law (UNCITRAL), the Sixth Committee, the Legal Sub-Committee of the Outer Space Committee, and the United Nations Conference on the Law of the Sea. These subsidiary bodies have contributed in no small way to the development and codification of international law in the post World War II era.


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590 Article 13:1 of the UN Charter.

It must be noted though that neither the Article 13 powers nor any of the other Charter powers given to the General Assembly, and by extension its relevant subsidiary bodies, empower them to legislate on international law.\footnote{See Anthony D’Amato, ‘On Consensus’, \textit{Canadian Year Book of International Law}, 105 (1970) pp.104-122. } The conventions and treaties that have arisen out of the exercise of the General Assembly’s competence (and that of its subsidiary bodies), are not automatically binding on states. States, using their sovereign power of consent accede to these treaties and conventions.\footnote{Paul Szasz, ‘General Law-Making Process’, in Oscar Schachter and Christopher C. Joyner (eds.), \textit{United Nations Legal Order: Volume 1}, Cambridge: Cambridge University Press, pp.35-108. } It can be argued however that through its powers of discussion, initiation of studies and recommendation, the General Assembly has, through its own resolutions and the work of its subsidiary bodies like the ILC and UNCITRAL, been able to affect positively the development and codification of international law through consensus building and soft law approaches.\footnote{see Arnold N. Pronto, ‘Some Thoughts on the Making of International Law’, \textit{European Journal of International Law} 19(3), (2008).}

While noting, from the above, that the General Assembly lacks a legislative power, it does not however mean that all its decisions are non-binding in nature. Generally, the binding nature of the decisions of the General Assembly is restricted to the internal workings of the UN. For instance, under Article 19 of the Charter, a member of the UN in two years arrears of its contributions is barred from voting except the General Assembly decides to allow the
defaulting member to vote. Thus during its 66th Session in October 2011, the Central African Republic, Comoros, Guinea-Bissau, Liberia, Sao Tome and Principe, and Somalia were in arrears of their contributions and would have been barred from voting, but the General Assembly decided by its Resolution 66/4 (11 October 2011) to allow the said members to vote.\textsuperscript{598} Other example of the binding effect of decisions by the General Assembly include the admission of new members,\textsuperscript{599} suspension of the rights of membership,\textsuperscript{600} election of members to the Economic and Social Council and non-permanent members of the Security Council,\textsuperscript{601} and the approval of the budget of the UN.\textsuperscript{602}

4.2.5 The North-South Dichotomy in General Assembly Decision-Making

At the formal level of decision-making in the General Assembly, the UN Charter provides the framework for decision-making. Formal provisions on voting – e.g. two-thirds majority for important decisions and simple majority for ordinary decisions – determine how formal decision-making in the General Assembly operates. Behind this formal façade, informal systems of decision-making reveal much of the power politics and the use of groupings in decision-making in the General Assembly.\textsuperscript{603} Johan Kaufmann argues in this regard that:

In the U.N. large countries, including the two Super Powers, can only achieve results if they can convince a majority of U.N. members of the correctness of their positions. “Great Power” now rests with the Group of 77. Since that Group alone constitutes a majority, it can, in effect, force through any decision which it wants.

\begin{itemize}
\item \textsuperscript{598} \url{http://www.un.org/en/ga/about/art19.shtml} (viewed on 30/12/11).
\item \textsuperscript{599} Article 4:2 of the UN Charter.
\item \textsuperscript{600} Article 5 of the UN Charter.
\item \textsuperscript{601} Article 18:2 of the UN Charter.
\item \textsuperscript{602} Article 17 of the UN Charter.
\end{itemize}
However, the Group of 77 has gradually realized that such abuse of its power may lead to counter-productive results, and it has shown an increased willingness to negotiate towards consensus.\textsuperscript{604}

Much of the politics of General Assembly decision-making has been played out in the North-South dichotomy in international economic relations.\textsuperscript{605} Spurred on by their liberation from colonisation and the belief that the world economic order, among others, was fashioned in favour of developed countries, developing countries sought to use their numerical advantage in the UN General Assembly to bring about a new world international order.\textsuperscript{606} The Group of 77 (G-77), founded in 1964 by 77 developing country members of the UN\textsuperscript{607} (currently made up of 132 members\textsuperscript{608}), typifies the North-South divide in UN decision-making. An off-shoot of the power play between the North and South and the need to establish a new international economic order culminated in the establishment of the United Nations Conference on Trade and Development in 1964, which developing countries saw as a forum for advancing their economic and development needs.\textsuperscript{609}

The UN’s mandate in the field of economic and social co-operation espoused under Chapter IX of the Charter, and placed under the General Assembly’s remit has provided the impetus for the Assembly to act in areas like human rights where action in the Security Council has been frustrated by western powers with permanent seats in the Council.\textsuperscript{610} Thus in its persistent failure to pass economic sanctions against South Africa during the

\textsuperscript{604} Johan Kaufmann, at 18, op cit. fn.603.
\textsuperscript{606} ibid at 113-142
\textsuperscript{607} http://www.g77.org/doc/ (viewed on 13 February 2012).
\textsuperscript{608} http://www.g77.org/doc/members.html (viewed on 13 February 2012).
\textsuperscript{609} Rosemary Righter, op cit. fn.605.
period of apartheid, it was through the actions sponsored by the G-77 members in the General Assembly that culminated in resolutions where voluntary economic and diplomatic sanctions were adopted by member states of the UN. Importantly, the absence of a veto power in the General Assembly has meant that a few members are not able to block progress where a majority of members hold a different opinion. As long as the two-thirds majority threshold can be achieved, progress can be made, and the G-77 has been very active in seizing this advantage though the need to secure consensus in other situations has elicited the need to cooperate with other interests, notably from the North.

4.3 Decision-Making in the Security Council

The Security Council is constituted of fifteen members, with five of them – i.e. China, France, Russia, the United Kingdom, and the United States – being permanent. As related in the introductory section of this chapter, the position of the permanent membership seats is a direct consequence of the new power structure that emerged from World War II. At the founding of the UN, the Security Council was constituted of 11 members but a change was effected in 1963 to reflect the growing number of membership of the UN, especially due to the decolonisation of many countries in Africa. The 10 non-permanent members of the Security Council are elected for a two-year period by the General Assembly. The two main criteria provided by the Charter for election of non-permanent members are the ability of a member to contribute to the maintenance of international peace and security and a regard for equitable geographical distribution.
the criteria for election of non-permanent members, the Charter gives primacy to the ability to contribute to the maintenance of peace and security.\textsuperscript{617} However, the need to ensure equitable geographical distribution of the non-permanent seats currently appears to have taken a more central focus.\textsuperscript{618} The greater consideration given to equitable geographical representation does not however guarantee that each member of the UN will have its turn as a non-permanent member of the Security Council. From 1945 to 2012, 72 UN members have never been elected as non-permanent members of the Security Council.\textsuperscript{619}

The UN Charter accords the primary responsibility of maintaining international peace and security to the Security Council\textsuperscript{620} though this is a primary and not an exclusive responsibility of the Council. The greater weight accorded to the Security Council in the discharge of this primary responsibility is evidenced by the fact that, unlike the General Assembly, the UN Charter makes express provisions regarding the binding nature of decisions emanating from the Security Council. The Charter provides that: “[T]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”.\textsuperscript{621} The binding nature of Security Council decisions are however predicated on their consistency with the purposes and principles of

\textsuperscript{617} Article 23:1 of the UN Charter.
\textsuperscript{620} Article 24:1 of the UN Charter.
\textsuperscript{621} Article 25 of the UN Charter.
the UN. Article 24:2 of the UN Charter, expressly provides that the Security Council shall act in accordance with the purposes and principles of the UN in the discharge of its Charter duties.

Each of the 15 members of the Security Council wields a single vote – i.e. one member one vote. The right to vote by both permanent and non-permanent members of the Security Council is not exercisable where a member is involved in a dispute and a decision of the Council relates to that dispute. In such a situation the Charter requires that the member in question “shall abstain from voting.” Unlike the General Assembly where the distinction between important and ordinary matters has a consequential effect on the percentage of votes needed to carry through a decision, decisions of the Security Council on all matters, including procedural matters, are made by an affirmative vote of nine members – i.e. at least 60 per cent of the votes cast. However, in the Security Council, the distinction between procedural and non-procedural matters determines when the veto power can be used. Each of the five permanent members wields a veto power and this power can only be exercised in respect of decisions on non-procedural matters. Consequently, in non-procedural matters, the nine minimum affirmative votes must either include the five votes of the permanent members or a permanent member may choose to abstain from voting, in which case its abstention would not be counted as veto. For example, in Resolution 1973 (2011), the Security Council decided by an affirmative vote

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622 Article 24:2 of the UN Charter.
623 Article 27:1 of the UN Charter.
624 Article 27:3 of the UN Charter.
625 ibid.
626 Article 27 of the UN Charter.
628 ibid.
of 10 members to impose a no-fly zone in Libya.\textsuperscript{629} There was no dissenting vote as the other five members abstained from voting. The abstentions included Russia and China.\textsuperscript{630} The abstentions of Russia and China did not have a blocking effect.

It is noteworthy though that in spite of the fact that non-permanent members do not have veto powers, they could exercise a ‘collective veto’ if seven non-permanent members act together to cast a dissenting vote. Even if all the five permanent members cast an affirmative vote in such a situation it would still fall below the required 9 affirmative votes or the 60 per cent threshold.

Non-permanent members can also lobby to influence a permanent member to either use its veto power or threaten to use it. A typical example is the Security Council’s avoidance of passing a resolution that would go against India’s interests in Kashmir knowing well that such a proposal would elicit a veto from the Soviet Union.\textsuperscript{631} Jeremy Greenstock for instance observes that:

India, however, the majority of whose population would regard UN intervention as an unacceptable indication that there was a case to arbitrate, has steadfastly refused to allow the Security Council to place Kashmir on its agenda. While not a


\textsuperscript{630} ibid (the other 3 abstentions were Germany, Brazil and India).

Permanent Member of the Council, India carries enough weight, and can find enough support from within the P5, to wield an effective veto on this issue.\textsuperscript{632}

The example of India’s influence in the Security Council, though not a permanent member, is just one case in point. Other examples include Indonesia on the issue of East Timor,\textsuperscript{633} and, more notoriously, Israel’s perennial reliance on the USA to veto Security Council resolutions that are not in its interests.\textsuperscript{634} Between 10 September 1972 and 21 April 2004, the USA used the veto on, at least, 35 occasions to block decisions on issues that were of interest to Israel.\textsuperscript{635} Thus in spite of the fact that Israel has even never been elected as a non-permanent member of the Security Council\textsuperscript{636} it has been able to effectively use its lobbying to influence actions (or more accurately, inactions) of the Security Council in its favour.

Though there is a determined number that constitutes the Security Council, non-members of the Council can be invited to participate in discussions of the Council if it is determined that the interests of the non-member are specially affected\textsuperscript{637} or that the non-member is party to a dispute under consideration in the Security Council.\textsuperscript{638} This privilege, however, does not extend to a power to vote in the deliberations of the Council.\textsuperscript{639} Only permanent and non-permanent members may exercise this right. The only exception to this rule – i.e.

\textsuperscript{633} ibid.
\textsuperscript{637} Article 31 of the UN Charter.
\textsuperscript{638} Article 32 of the UN Charter.
\textsuperscript{639} Articles 31 and 32 of the UN Charter.
where a non-member of the Security Council may be allowed to vote – is under Article 44 where a non-member, contributing personnel in a military action sanctioned by the Security Council, would be invited to contribute to decisions regarding the employment of its forces.  

A non-member, in the context of the above discussions, may either be a member of the UN but not a member of the Security Council or may not at all be a member of the UN. This creates two categories of non-members of the Security Council who may participate in the deliberations of the Council. The distinction between these categories of non-members is important because whereas Article 31 provides that a member of the UN who is not a member of the Security Council may participate in the Council’s deliberations if its interests are “specially affected”, a non-member of the UN can only participate in Council deliberations if it is a party to a dispute.

The nature and effect of the Security Council’s decisions are bound in the weight of responsibilities accorded to it by the Charter. As observed above, as the organ imbued with the primary responsibility of maintaining international peace and security, it stands to reason that the Charter provides for the decisions of the Security Council to have a binding effect. The responsibility to maintain international peace and security may, for instance, require the use of various forms of pressure or force. This may require military and/or non-military force and the Charter grants the Security Council the power to undertake

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640 Article 44 provides that: “When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

641 Article 31 of the UN Charter.

642 Article 32 of the UN Charter.

enforcement measures to give effect to its decisions.\textsuperscript{644} Non-military enforcement measures “may include complete or partial interruption of economic relations and or rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”\textsuperscript{645} The Council’s coercive power to enforce its decisions is perhaps, the closest comparison to the coercive power of the state at the national level. International law (and the international system) has often been viewed as a form of organised anarchy as it lacks the coercive force readily available to the state at the national level to enforce law.\textsuperscript{646}

Though not novel\textsuperscript{647} the Articles 41 and 42s’ powers of enforcement given to the Security Council constitute an important ‘executive’ mandate. The utility of this mandate is however seriously circumscribed by the provisions in Article 39 of the Charter which states that:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or

\textsuperscript{644} Articles 41 and 42 of the UN Charter.
\textsuperscript{645} Article 41 of the UN Charter.
\textsuperscript{647} Article 16 of the Covenant of the League of Nations for instance provided that “Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not. It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.”
decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.\textsuperscript{648}

In effect, if the Security Council is unable to determine the existence of a threat to the peace, a breach of the peace, or an act of aggression, no enforcement actions under Articles 41 and 42 can be secured to restore or maintain international peace and security. This poses a fundamental problem as a veto by one of the permanent members of the Security Council, can effectively block the determination of an act as one that constitutes a threat to the peace, a breach of the peace, or an aggression. Claus Kress has thus argued that:

\ldots the politically motivated failure of the Security Council to characterize Iraq’s invasion of Kuwait as an act of aggression offers an excellent illustration of the unfortunate results that might follow if the Security Council’s determination of an act of aggression is recognised as a procedural prerequisite for the commencement of investigations into an alleged \ldots aggression.\textsuperscript{649}

Under Article 2 (4) of the UN Charter, the threat or use of armed force is prohibited. The Article 2(4) prohibition is however alleviated under Articles 42 and 51. Under Article 42, the Security Council, by the issuance of a Resolution, can authorise the use of armed force. Article 51 on the other hand provides for states to use armed force for purposes of individual or collective self-defence.

\textsuperscript{648} Article 39 of the UN Charter.
Article 51 states in its relevant part that:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.  

Evidently, in spite of the Charter provisions under Article 51 recognising the right to self-defence, the role of the Security Council in ensuring international peace and security extends to situations where there is a legitimate use of self-defence by a state. The objective of maintaining international peace and security is fundamental in the UN Charter, hence this objective justifies intervention by the Security Council even where there is a legitimate use of the right to self-defence.

Article 42 is of particular importance to the discussion since it empowers the UN Security Council to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”. Action taken by the Security Council under Article 42 “may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations”.

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650 Article 51 of the UN Charter.
652 Article 42 of the UN Charter.
653 ibid.
The difference between the two derogations to the prohibition on the use of force is that whereas, Article 42 requires a decision by the UN Security Council for the use of force (and is thus under the auspices of the UN), the use of force for purposes of self-defence under Article 51 does not require a decision of the Security Council. Thus whereas unilateral action in the use of force is allowed under Article 51, the same cannot be said of Article 42 as it relates to collective action under the Security Council and by extension, the UN.

The use of force under Article 42 is also dependent on provisions set under Article 39, which requires the Security Council to determine an alleged act as constituting a breach of the peace or an act of aggression before a decision under Article 42 to use force can be reached for the purpose of restoring peace and security. A case in point of the above scenario is the multilateral force against the Taliban regime in Afghanistan led by the US, after the September 11 terrorist attacks in the US. The Security Council, in Resolution 1368 (2001) stated inter alia that the Council:

Calls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable;” and “Expresses its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations.654

Resolution 1368 thus determined the terrorist acts as acts of aggression as required by Article 39 of the UN Charter, and sanctioned the use of force under Article 42 ‘in accordance with its responsibilities’ of maintaining international peace and security. It is worthy of note that in spite of Claus Kress’s observation that reaching agreement on the determination of acts of aggression in the Security Council is a highly political and polarized undertaking (due to the use of veto by Permanent Members), Resolution 1368 provided an opportunity for collective action in the Security Council and the UN system in general.

Rosalyn Higgins has thus argued that though the use of the veto by the five Permanent Members of the Security Council has been viewed as being problematic in arriving at decisions under Article 42 of the UN Charter, “the veto is an integral part of what was provided for in the Charter: the Permanent Members were certainly intended to have this power to control the use of force by the Security Council”.656

Christine Gray further argues that the Security Council, during and after the Cold War, has generally avoided determining an aggressor in inter-state conflicts.657 Consequently, one of the logical implications of determining an aggressor, i.e. the use of force under Article 42, to restore peace and security has not been frequent and thus lacks an established tradition of precedence.658 Like Resolution 1368 that authorized armed intervention in Afghanistan, the resort to the use of armed force by the US-led

655 ibid para. 5.
656 Rosalyn Higgins, op cit. fn.651, at 262.
658 ibid.
multilateral force under authorization of the Security Council, in Operation Desert Storm was a peculiar situation as affirmed by the UN Secretary General:

The Iraqi invasion and occupation of Kuwait was the first instance since the founding of the Organisation in which one Member State sought to completely overpower and annex another. The unique demands presented by this situation have summoned forth innovative measures which have given practical expression to the Charter’s concepts of how international peace and security might be maintained.\(^{659}\)

It must be argued though that as novel as the resort to the use of force in Iraq under the mandate of the UN may appear, it was not the first of its kind. In 1950 for instance, the UN Security Council voted for the use of force to repel North Korea’s aggression against South Korea. Notably, the Soviet Union had boycotted the Security Council in 1950\(^{660}\) and China’s seat was also unoccupied due to controversy as to the legitimate government with the right of representation at the UN.\(^{661}\) As such the Soviet Union and China could not use their veto powers to block the Security Council from passing a resolution to use force against North Korea. On Soviet Union’s assumption of its seat in the Council, further action could not be secured hence precipitating a resort to the General Assembly in the ‘Uniting for Peace’ saga related above.\(^{662}\)

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\(^{660}\) Christian Tomuschat, op cit. fn.572.

\(^{661}\) See Robert A. Madsen, op cit. fn.261.

\(^{662}\) See section 4.2.2 above.
Also in 1966, the Security Council passed a resolution that mandated the use of force, if necessary, to prevent shipment of oil to Southern Rhodesia (now Zimbabwe), which was then under white minority rule.\textsuperscript{663} The Resolution called upon:

\begin{quote}
\ldots the Government of the United Kingdom of Great Britain and Northern Ireland to prevent, by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia, and empowers the United Kingdom to arrest and detain the tanker known as \textit{Joanna V} upon her departure from Beira in the event her oil is discharged there.\textsuperscript{664}
\end{quote}

Prior to the issuance of the above Resolution, the Security Council had decided on Resolution 217 (1965) which imposed economic and diplomatic sanctions on Southern Rhodesia. Resolution 221 (1966) (above), was thus issued to enforce the economic and diplomatic sanctions and in this particular case, a single Member of the UN – the United Kingdom – was empowered under Article 42, to use force if necessary.

Examples of unanimity among the permanent members of the Security Council on matters relating to Articles 41 and 42 are few and far between. The problems with Articles 39, 41, and 42 of the of the Charter, with regards to decision-making in the Security Council has resulted in the emergence of other mediums of maintaining international peace and security without reliance on the provisions of the said articles.

\textsuperscript{663} Security Council Resolution 221 (1966).

\textsuperscript{664} ibid para.5.
The use of consensus building and co-operation in the peace-keeping operations of the UN has, for instance, emerged as a less forceful medium of maintaining international peace and security outside Article 42, hence circumventing the obvious problems of Article 39.665

It is also worth mentioning that the obvious recipes for deadlock in decision-making in the Security Council is tempered by the recognition of regional arrangements or agencies as legitimate mediums for maintaining international peace and security.666 Thus during the Liberian civil war in the 1990s, for instance, the Economic Community of West African States (ECOWAS) constituted a Monitoring Group (ECOMOG) and intervened in the Liberian conflict to restore peace.667 ECOWAS as a regional ‘agency’ evidently took opportunity of the Charter competence under Article 52 to intervene in the Liberian conflict.668 In the same vein, the Article 51 provisions on collective self-defence makes it possible for agencies outside the Security Council to intervene in conflict situations purely under the banner of individual or collective self-defence.669 Notable organisations that have been formed under the Article 51 competence include the North Atlantic Treaty Organisation (NATO)670 and the erstwhile Warsaw Treaty Organization of Friendship, Cooperation, and Mutual Assistance (Warsaw Pact).671

666 Articles 52, 53, and 54 of the UN Charter.
668 ibid.
669 Article 51 of the UN Charter.
670 Article 5 of the North Atlantic Treaty specifically makes mention of Article 51 of the UN Charter as providing the legal competence for the establishment of NATO – “The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations.”
4.4 The Economic and Social Council

This segment on the Economic and Social Council will briefly focus on a descriptive account of its constitution and formal procedures of decision-making. As stated earlier, decision-making in the General Assembly and the Security Council are the main focus of this chapter.

The Economic and Social Council (ECOSOC) operates under the authority of the General Council and directly discharges the responsibilities emanating from the economic and social co-operation objectives espoused under Chapter IX of the UN Charter. Under the banner of economic and social co-operation, the UN is to promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions to international economic, social, health, and related problems; and

international cultural and educational co-operation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

ECOSOC is composed of 54 UN members elected by the General Assembly for a three-year term. The original number that composed the ECOSOC at the founding of the UN

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Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.  


Article 60 of the UN Charter.

Article 55 of the UN Charter.
was 27, but like the Security Council, increased membership of the UN made it imperative
to increase the size of ECOSOC from 27 to 54.\textsuperscript{675} Each member of the ECOSOC has one
representative and a retiring member can be eligible for immediate re-election.\textsuperscript{676}

ECOSOC serves as the centre for harmonising the activities of numerous specialised
agencies established either under the auspices of the UN or brought into relation with the
UN in fulfilment of the social and economic objectives of the UN.\textsuperscript{677} ECOSOC is also
empowered to “make suitable arrangements for consultation with non-governmental
organisations which are concerned with matters within its competence”.\textsuperscript{678} As related in the
introductory segment of this chapter, NGOs played a significant role in the formation of the
UN and the recognition of their continual importance to the work of the UN, especially in
the field of economic and social matters, is recognised in the ECOSOC. In effect, though
states are the main players in the General Assembly and Security Council, the ECOSOC
serves as a forum where other international organisations or agencies and international civil
society can be brought into the work of the UN.

The principle of one member one vote operates in the decision-making procedures of the
ECOSOC and decisions are made by a majority of members present and voting.\textsuperscript{679}
Representatives of the specialised agencies either established under the auspices of the UN
or brought into relationship with the UN can participate in the deliberations of ECOSOC
but they do not have the right to vote.\textsuperscript{680}

\textsuperscript{674} Article 61 of the UN Charter.
\textsuperscript{675} ibid.
\textsuperscript{676} ibid.
\textsuperscript{677} See Chapter X of the UN Charter (especially Article 63).
\textsuperscript{678} Article 71 of the UN Charter.
\textsuperscript{679} Article 67 of the UN Charter.
\textsuperscript{680} Article 70 of the UN Charter.
4.5 Comparison Between Decision-Making in the UN and the WTO

The main rationale for undertaking a study of decision-making in the UN in this chapter is for the purpose of conducting a comparative analysis between decision-making in the WTO and that of the UN. This segment of the chapter thus fulfils this aim. Comparing the analysis of the WTO decision-making system in chapter three and the decision-making in the UN in this chapter, a number of similarities and differences are discernible.

On the legal plane, the most evident similarity between the WTO and the UN is the fact that both are international organisations brought into being by the will of states. In fact, the history of the WTO shows that the initial idea to form an international organisation responsible for trade was mooted within the framework of the UN and the series of conferences held to establish the aborted International Trade Organisation (ITO) were convened under the auspices of the UN. The predecessor of the WTO – the GATT 1947 – was thus brought into relationship with the UN under the above discussed mandate of the ECOSOC.

Like the GATT 1947, the WTO is also brought into relationship with the UN. The WTO Agreement for instance states that:

“The privileges and immunities to be accorded by a Member to the WTO, its officials, and the representatives of its Members shall be similar to the privileges and immunities stipulated in the Convention on the Privileges and Immunities of

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The organisational affinity on the legal plane aside, the operation of the principle of sovereign equality in the General Assembly of the UN applies in WTO decision-making bodies as well. Just as Article 9 of the UN Charter makes the General Assembly open to all UN members, so also Article IV of the WTO Agreement makes the Ministerial Conference and General Council open to all WTO members. The one member, one vote rule applies in the General Assembly, Security Council and the Economic and Social Council\(^{683}\) and this same rule applies in the Ministerial Conference and the General Council of the WTO\(^{684}\). However, in the UN decision-making organs – i.e. the General Assembly, Security Council and Economic and Social Council – it is only the General Assembly that is open to all UN members. Both the Security Council and the Economic and Social Council have restricted membership. Thus, in spite of the fact that the one member, one vote rule applies in both the UN and the WTO, the restricted membership in the Security Council and the Economic and Social Council means that this rule is not as universal in the UN as it is in the WTO system.

Though at the formal level the WTO decision-making bodies are opened to all members, the restricted participation in the ‘Green Room’ meetings has the effect of an informal organ with both restricted membership and permanent members. The Quad members are always represented in Green Room meetings giving them a semblance of permanent membership in the Green Room. The Green Room has thus assumed an unofficial status as the ‘Security Council’ in the WTO. The difference, though, is that the Green Room

\(^{682}\) Article VIII:4 of the WTO Agreement.

\(^{683}\) Articles 18, 27, and 67 of the UN Charter.

\(^{684}\) Article IX:1 of the WTO Agreement.
meetings do not have decision-making powers as whatever deals are struck in such meetings would still have to be accepted by the entire membership meeting either in the Ministerial Conference or the General Council.

Another obvious difference between the UN and the WTO is the existence of the veto power and the five permanent seats in the Security Council. Under the consensus provision in Article IX of the WTO Agreement, every member of the WTO effectively wields a veto power. However, as was discussed in chapter three, the existence of this default veto power in the WTO can be irrelevant if a member is not strong and assertive enough to defend its interests. The inability of some members to utilise their default veto in the WTO leaves the utilisation of this power to the stronger members. In effect, a restricted use of members’ veto can operate informally in the WTO due to the superior leverage of some members. As evidenced in the discussions in chapters one and three, throughout the history of the trade regime the USA, with the EU have exercised superior hegemonic influence in the affairs of the GATT/WTO. Failure of the ITO to materialise, for instance could be said to be the result of the exercise of an unofficial veto by the USA.

Again, during the Uruguay Round the Quad members – USA, EU, Japan and Canada – acting together exercised unofficial vetoes as their concurrence was deemed necessary for the progress of the trade negotiations. In the current Doha Round, the New Quad – USA, EU, China, India, (with Brazil) – has assumed the exercise of the ultimate unofficial veto. Not only is the use of this unofficial veto in the WTO akin to the exercise of the official veto in the Security Council, but also, it is strikingly similar to the history of the formation of the UN. The powers that emerged from World War II – USA, UK, Soviet Union

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685 Pieter Jan Kuijper, op cit., fn.458.
(Russia), and China – exercised superior leverage during the San Francisco Conference and, for example, their position on the constitution of the Security Council, the permanent membership in the Council, and the veto powers of the permanent members held sway in spite of objections from other states. The perception that without the involvement of the Great Powers, the UN project would fail is similar to the current perception in the WTO that without the concurrence of economic superpowers like the USA and EU, the WTO project would fail, precipitating a resurgence of bilateralism and regionalism.⁶⁸⁶

The allocations of powers and responsibilities among the three decision-making organs of the UN is also distinct from what prevails at the WTO. The General Assembly is tasked with deliberative functions, the Security Council with the primary responsibility of maintaining international peace and security, while the Economic and Social Council is tasked with coordinating and performing the economic and social objectives of the UN. Though in the WTO set up, apart from the Ministerial Conference and the General Council there are subordinate bodies like the TRIPS Council, the Council for Trade in Goods and the Council for Trade in Services, tasked with specific duties, they are not decision-making bodies and they operate under the supervision of the General Council.⁶⁸⁷ Also, in spite of their lack of decision-making powers, these subordinate bodies in the WTO are open to all members. The Ministerial Conference and the General Council fulfil both deliberative and ‘executive’ functions and all members are to participate in these function.

Obviously, the UN has a broader mandate than the WTO and this necessitates a more diverse distribution of powers and responsibilities. The mandate of the WTO can actually be fitted into a subset of the economic and social co-operation responsibilities that the

⁶⁸⁶ Peter D. Sutherland, et al, op cit. fn.19.
⁶⁸⁷ Article IV.5 of the WTO Agreement.
Economic and Social Council is tasked with. As stated above, the WTO, like the GATT, is brought into relationship with the UN as a specialised agency operating under the coordination of the Economic and Social Council. Thus the breadth of responsibilities accorded to one organ of the UN – the Economic and Social Council – goes far beyond the entire mandate of the WTO as an organisation.

However, in spite of the fact that the WTO has a more restricted mandate in comparison to the UN, it does not follow that it cannot develop a structure where decision-making powers and responsibilities are distributed among it different organs.

4.6 Concluding Remarks
A reform of the WTO decision-making system can take a cue from the way the General Assembly and the Security Council are constituted. With the current number of the WTO edging closer to that of the UN, the system where all the WTO decision-making bodies are opened to all WTO members is evidently unworkable. Having a system where the decision-making organs operate either as both deliberative/legislative and executive bodies, or solely as deliberative/legislative bodies without any provision for an executive body is a ‘perfect’ recipe for deadlock in decision-making. M. J. Peterson for instance observes that even at the inception of UN, the way the General Assembly was constituted meant that it could not have fulfilled executive functions.688 He states that:

Even with its original membership of 51 states, sending several hundred delegates, the General Assembly was far too large to be an executive council. Nor could it serve as an administrative agency because its sessions were initially limited to the

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fall season. Executive functions were allocated elsewhere, to the Security Council, the Economic and Social Council, and the Trusteeship Council, while administrative functions were given to the Secretariat and the task of promoting cooperation in the particular administrative or technical areas to the specialized agencies. 689

The WTO needs a smaller body akin to the Security Council but without the exercise of a veto power by any member. More detailed proposals regarding how such a body could be constituted will be considered in Chapter Seven. It will suffice to state for now that the abuse of the veto power by the permanent members of the Security Council should serve as a lesson of how not to further gridlock the already impasse-prone decision-making system of the WTO. Also, the apprehension of some weaker states in the WTO that the formation of a smaller body with restricted membership would lead to a formalisation or institutionalisation of their marginalized status, should be pragmatically assessed by them. As things stand, some stronger members of the WTO are already exercising a higher level of unofficial veto power. Formal equality is thus a myth. A practical way to deal with this problem could be the creation of a formal body constituted in such a manner that whittles down individual leverage. If, for example, regional groupings similar to the EU are given official status in the WTO, these can be used to constitute a smaller group. In effect, every WTO member would be represented in a smaller body through its regional group. By so doing, the possibility of having some powerful members as default permanent members in a smaller WTO body would be alleviated. In the UN system, the formal recognition of regional groups, and the use of collective self-defence as mediums through which international peace and stability could be furthered can be a good lesson for the WTO.

689 M. J. Peterson, op cit. fn.688.
A smaller executive body in the WTO set-up can be tasked with primary, and not exclusive, functions so that, like the Uniting for Peace situation, when it fails to reach a decision, a body like the General Council or the Ministerial Conference can assume a secondary responsibility in the area that the executive body failed. In this way, a few members cannot hold the entire membership hostage to parochial agendas. It is apparent though that with the current operation of the consensus principle in the WTO, it would be highly unlikely for a bigger body like the General Council or the Ministerial Conference to succeed at breaking a deadlock that could not be broken in a smaller executive body. To resolve this, a provision could be made in the WTO Agreement to the effect that if a deadlocked matter proceeds from the smaller executive body to the General Council or Ministerial Conference, decision-making should proceed by voting and not consensus. In the UN General Assembly, the formal provisions regarding voting have not been a hindrance to the ability to seek consensus. However, where consensus could not be reached, matters have proceeded by resort to voting. The knowledge that an imperative provision in the WTO Agreement providing that failure to reach consensus should result in a mandatory vote, may serve as an effective way of prodding some members away from stubbornly holding on to certain parochial bargaining chips.

A resort to voting though must also take into consideration, the fact that the success of this system in the General Assembly has hinged on the fact that its decisions are not binding on member states. In the numerous resolutions against the apartheid regime in South Africa that failed to pass in the Security Council but succeeded in the General Assembly, the Assembly could only recommend non-binding measures. Influential countries, notably the USA and UK, did not adhere to some of these non-binding resolutions. There may therefore be the need to temper the effect of the single undertaking requirement in the
WTO with a more proactive use of the waiver provisions under Article IX of the WTO Agreement.

Another point worthy of note is the fact that General Assembly resolutions may espouse some ideals that may not need a radical change in the domestic policies of member states. The same cannot be said of the WTO. The intrusive nature of some of the areas that are being advocated for inclusion under the WTO, like competition policy, would require fundamental domestic legislative changes. Such high levels of intrusiveness evidently raise the stakes of interest and scrutiny in the decision-making process. Thus, whereas there is the need to harmonise international trade law to achieve more certainty in trade relations, the WTO may want to explore other mediums of soft law approaches to harmonisation, instead of the rigid approach that is currently being pursued. The General Assembly’s use of the International Law Commission and UNCITRAL can provide useful lessons for the WTO on how to use soft law approaches in the creation of law.
CHAPTER FIVE: DECISION-MAKING AT THE INTERNATIONAL MONETARY FUND

Introduction

In the last two chapters, the spotlight has been on decision-making in the WTO and the UN. Some formal similarities and differences between the two decision-making systems were observed. It was also observed that in spite of some of the formal differences, some of the informal systems of decision-making in the WTO mirror some of the formal systems of decision-making in the UN. Perhaps the most obvious were the ‘Green Room’ meetings in the WTO, which has a semblance of the Security Council in the UN, and the exertion of unequal leverage which could result in a de facto restricted veto power exercisable only by those with the power to do so. Consequently, official recognition of Great Power influence in the UN is mirrored by an ‘unofficial’ operation of Great Power influence in the WTO. ‘Unofficial’ is used in this sense to denote the lack of textual legal authority in the WTO for the exercise of Great Power influence as all members are formally equal and have equal access to all the decision-making organs.

The International Monetary Fund (IMF or the Fund) presents another example of decision-making in a multilateral institution. In the previous chapter, the UN was used as an example of an international organisation that operates by the principle of sovereign equality of states epitomised by the practice of one-member one-vote in the General Assembly and the openness of the Assembly to all members. The anomaly in the operation of sovereign equality in the Security Council was noted. In this chapter, the focus on the IMF provides another example of an international organisation where
decision-making is based solely on the economic status of members. Thus in the present comparative study of decision-making systems in the selected international organisations, the IMF provides a useful example of the use of state sovereignty to ‘breach’ the principle of sovereign equality through its weighted voting system. It also provides an example of states limiting their economic sovereignty in order to achieve peaceful economic cooperation and co-existence at the international level.  

The chapter is divided into three major segments. The first presents a historical account of the founding of the IMF, the second highlights the organisational structure and decision-making within the IMF and the third concludes with an analysis of some of the advantages and disadvantages of the IMF decision-making system that can serve as a guide to reforming the WTO decision-making system. The comparative analysis between the WTO decision-making system and that of the IMF is woven into the discussions in all the three segments.

The segment on the organisational structure and decision-making of the IMF draws from two main sources of information – factual information from the Articles of Agreement of the IMF and IMF official documents on the one hand, and critical academic commentary on the Fund’s organisational structure and decision-making on the other.

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691 Articles of Agreement of the IMF, By-Laws of the IMF, and Rules and Regulations of the IMF.

5.1 Historical Background

The IMF, like the UN and the GATT/WTO system, has its founding roots in World War II and the need to promote international cooperation among states. The effect of the Great Depression of the 1930s on the breakdown of international economic relations and its contribution to the outbreak of World War II is a well-documented occurrence in world history. The need to build international multilateral institutions to instil global economic stability to avert a recurrence of the Great Depression was one of the main objectives that culminated in the founding of the so called Bretton Woods Institutions – the International Monetary Fund and the International Bank for Reconstruction and Development (more popularly known as the World Bank). The IMF and its sister organisation, the World Bank, were the products of the Bretton Woods Conference held in July 1944, at Bretton Woods, New Hampshire, in the USA. Delegates from 44 states attended the Bretton Woods Conference. As was observed in chapter one, the Bretton Woods Conference identified the need “to reduce obstacles to international trade and in other ways promote mutually advantageous international commercial relations.” This formed the vision for the negotiations that culminated in the GATT 1947 and the still-born International Trade Organisation. The IMF and the GATT/WTO thus share an affinity both in terms of history and the

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696 Morten Boas and Desmond McNeill, op cit. fn.695.
697 Ibid.
698 Bretton Woods Proceedings, vol. 1 at 941.
philosophy of achieving international peace through a well-managed and mutually advantageous system of international economic cooperation among states.\(^699\)

The Articles of Agreement of the IMF provide that its objectives are to promote international monetary cooperation, facilitate the expansion and growth of international trade, promote exchange rate stability, the establishment of a multilateral system of payments for transactions, and to act as a lender in situations where members need emergency funds to correct balance of payment maladjustments.\(^700\)

Like the UN, the objectives of the IMF were not novel. Prior to the founding of the IMF, an international system of exchange rates based on the gold standard had been in operation from 1876 to 1914.\(^701\) There were efforts to restore this system after World War I but these efforts did not yield a positive result.\(^702\) The World Economic and Monetary Conference convened in London in July 1933 had, for instance, failed to reach agreement on the suitable exchange rate for the dollar.\(^703\) The Great Depression had also been exacerbated by ‘a race to the bottom’ in currency devaluations with countries adopting high barriers to trade and restrictive exchange rate practices.\(^704\)

This resulted in the building of monetary blocs around the dominant economic powers – the UK, USA and France.\(^705\) The ‘sterling bloc’ formed around the UK, the ‘dollar

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\(^{699}\) Robert Gilpin, op cit. fn.695; David M. Andrews, op cit. fn.695.


\(^{702}\) Ibid.


\(^{704}\) Ibid.

\(^{705}\) Robert Gilpin, op cit. fn.695.
bloc’ around the USA, and the ‘gold bloc’ around France. In 1936 however, the USA, UK and France agreed on a common system to ensure some stability in exchange rates. This became known as the Tripartite Declaration.

The Bretton Woods Conference was thus a culmination of past efforts, which though had failed, provided grievous lessons about the importance of global economic stability in ensuring international peace and security. The lessons from the past failed efforts served as a springboard to launch new multilateral institutions to fill in the international institutional void in the management of international economic relations. Of note is the leading role that the USA and the UK played in the founding of the IMF through the works of their leading representatives, Harry Dexter White, from the USA Treasury Department, and John Maynard Keynes, from the UK Treasury. Thus, like the Atlantic Charter that saw the USA and UK charting a pioneering role in sowing the seeds for the founding of the UN, the same can be said about the role these two states played in the founding of the IMF and its sister organisations – the World Bank and later the GATT 1947. It is apt to say that their leading roles in the founding of these multilateral institutions after World War II was commensurate with their roles as Great Powers whose involvement and leadership in

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706 Robert Gilpin, op cit. fn.695.
707 Edward Bernstein, op cit. fn.703.
the founding of multilateral institutions was deemed crucial to the success of these institutions.\footnote{711}

Richard Gardner thus observes that:

\ldots the Bretton Woods Conference and the crucial negotiations that preceded it were very much an Anglo-American affair, with Canada playing a useful mediating role. For historical reasons that were unique, these three countries had an unusually large influence in the negotiations. Germany, Italy, and Japan, countries that today hold a large measure of economic power, were then enemy countries and thus not represented at Bretton Woods. France was still under German occupation; its government-in-exile played only a marginal role. The less-developed countries played nothing like the part they play today in international economic conferences. The Soviet Union came only at the last minute and sat on the sidelines.\footnote{712}

It is apparent from the history of the founding of the IMF, that the same influential role the USA played at the Bretton Woods Conference mirrors its role in the founding of the GATT 1947, and even the demise of the ITO.\footnote{713}

It is important to note that the same rationale that inspired the work on the founding of the UN to commence before the end of World War II also underpinned the founding of the Bretton Woods Institutions. It was thought that galvanising the international political will to address the economic (and other) problems that played a contributing

\footnotesize{\footnote{711}{Raymond Vernon, op cit. fn.710.}}
\footnotesize{\footnote{712}{Richard N. Gardner, op cit. fn.709, at 20.}}
\footnotesize{\footnote{713}{see chapter one, above.}}
role to the outbreak of World War II would be difficult once the war had ended and countries turned their attention to domestic reconstruction.\(^714\) Consequently, the dominant Allied states in wartime automatically played varying degrees of dominance in the multilateral institutions created within that time frame.\(^715\)

5.2 Membership of the IMF

From an initial 40, membership of the IMF has grown to 187.\(^716\) Any state that has autonomy over its own foreign policy can be a member of the IMF.\(^717\) A prospective member must also accede to the Articles of Agreement of the IMF to become a member as this details the rights and responsibilities of membership. On accession to the IMF, a new member is supposed to pay a quota subscription. The quota subscription is money paid to the Fund which determines a member’s voting rights and the amount a member can borrow or receive from the IMF on a periodic basis. This is known as the special drawing rights.\(^718\) Member countries that contribute more in terms of their quota subscriptions are also entitled to borrow more under the special drawing rights.\(^719\) In this sense, the IMF is akin to a credit union. The quota subscriptions constitute the primary source of the IMF’s financial resources which it in turn lends to member states in times of difficulty.\(^720\)

The amount to be paid by each member as quota subscription is not voluntarily determined by the member based on how much money it wants to contribute to the

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\(^714\) Richard N. Gardner, op cit. fn.709.
\(^717\) Victor Argy, op cit. fn.700.
\(^718\) Richard N. Gardner, op cit. fn.709.
\(^720\) ibid.
Fund. The quota subscription of each member is broadly determined based on the member’s economic size.\textsuperscript{721} Hence members with relatively bigger economies and with higher economic performances are allocated bigger quota subscriptions which also determine the percentage weight of their votes. The quota subscriptions are not static as they are subjected to five yearly reviews and can either be adjusted upward or downward based on a member’s current economic size.\textsuperscript{722}

In terms of membership, the IMF and WTO share some core similarities though there are some differences as well. Both institutions are international treaty organisations created by states and as such are subjects of public international law. In both the IMF and the WTO, accession is contingent on acceptance of responsibilities that may result in a self-imposed restriction on state sovereignty. However, unlike the IMF where a key prerequisite is that a prospective member must be a state with control over its own foreign policy, the WTO is more lenient on the issue of statehood as customs territories with autonomy over their external commercial relations can accede to the WTO Agreement.\textsuperscript{723} Also, in the WTO accession is not based on calculation of a member’s quota subscription which varies dependent on economic size or status. In the WTO, the principle of single undertaking discussed in chapter three is the most critical prerequisite for accession.

\textsuperscript{721} Treasurer's Department, op cit. fn.719.  
\textsuperscript{722} ibid.  
\textsuperscript{723} Article XII:1 of the WTO Agreement.
5.3 Structure and Organisation of the IMF

Article XII of the Articles of Agreement of the IMF makes provisions for the organisational structure and management of the Fund. It establishes “a Board of Governors, an Executive Board, a Managing Director, and a staff”. The IMF operates an organisational model that is quite different from the WTO and the UN though it is also a multilateral organisation built on the same paradigm of international cooperation among states. The institutional structure of the IMF draws inspiration from the joint-stock company model where a person’s vote is commensurate with the percentage value of the shares owned.

5.3.1 The Board of Governors

The Board of Governors sits at the apex of the IMF organisational structure and is vested with powers directly accorded to it by the Articles of Agreement, but is also empowered with competence in respect of all powers not directly conferred on it or on the Executive Board by the Agreement.

This position of the Board of Governors translates into decision-making as it is the highest decision-making body of the IMF and the final arbiter when it comes to the interpretation of the Articles of Agreement of the Fund. The Articles of Agreement provides for different levels of majority votes in the decision-making process. The predominant majorities required for decision-making in the IMF are the 85 percent majority, 70 percent majority, and the simple majority. For example an 85 percent majority.

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724 Article XII:1 of the Articles of Agreement of the IMF.
725 Morten Boas and Desmond McNeill, op cit. fn.695.
726 Article XII:2(a) of the Articles of Agreement of the IMF.
majority is needed for a decision to change quotas while a 70 percent majority is needed for decisions regarding how a member is to pay its quota subscription after an upward review. In situations where the Articles of Agreement has not specifically determined the majority of weighted votes required to carry through a decision, all decisions of the Board of Governors are to be made by a majority of the weighted votes cast.

In spite of the provisions regarding voting requirements, the By-Laws of the IMF makes room for consensus. It provides that: “At any meeting the Chairman may ascertain the sense of the meeting in lieu of a formal vote but he shall require a formal vote upon the request of any Governor”. The practice of consensus is given a more detailed analysis in the subsection on the Executive Board.

The Board of Governors represents the member states that have acceded to the IMF’s Articles of Agreement and are selected based on the determinations of the members. In effect, the Articles of Agreement does not prescribe how members select their representatives who serve on the Board. In most cases however, the Governors representing the respective members of the IMF are ministers of finance, governors of the central bank or a senior government official of similar status. The Board of Governors consists of one Principal Governor representing a member and an Alternate Governor. The substantive or Principal Governors are entitled to vote

728 Article III:2(c) of the Articles of Agreement of the IMF.
729 Article III:3(d) of the Articles of Agreement of the IMF.
730 Section 11 of the By-Laws of the IMF.
731 ibid.
732 ibid.
734 Article XII:2(a) of the Articles of Agreement of the IMF.
while an Alternate Governor can only vote in the absence of his/her Principal Governor.\textsuperscript{735}

Majority of the annual meetings of the Board are convened in Washington D.C. With the current number of the Fund standing at 187, there, consequently, are 187 Governors constituting the Board of Governors. As the IMF organisational structure draws inspiration from that of a private company with shareholders, the annual meeting of the Board of Governors could be said to be akin to annual general meeting of shareholders of a company. Pursuant to Article XII:2(d) of the Articles of Agreement of the IMF, a majority of Governors constituting, at least, two-thirds of the total voting power of the Fund form a quorum in any meeting of the Board of Governors. Article XII makes provision for a system where, on a specific question, votes can be cast by Governors without the Executive Board requesting the Board of Governors to meet.\textsuperscript{736} Decisions like remuneration, benefits and election of Executive Directors can be made based on votes cast via mail.\textsuperscript{737}

Article XII:2(b) provides that: “The Board of Governors may delegate to the Executive Board authority to exercise any powers of the Board of Governors, except the powers conferred directly by this Agreement on the Board of Governors.” The powers delegated to the Executive Board thus falls within the domain of powers not directly or explicitly conferred on the Board of Governors by the Articles of Agreement. The directly conferred powers that cannot be delegated include those relating to approval of increases in members’ quotas, special drawing right allocations, approval of accession of new members, decisions on compulsory

\textsuperscript{735} Article XII:2(a) of the Articles of Agreement of the IMF.
\textsuperscript{736} Article XII:2(f) of the Articles of Agreement of the IMF.
\textsuperscript{737} Alexander Mountford, op cit. fn.733.
withdrawal of members and amendments of the Funds’ Articles of Agreement and By-Laws. The Board of Governors also exercises the responsibility of electing or appointing the Executive Directors.

There are two committees – the International Monetary and Financial Committee (IMFC) and the Development Committee – that are constituted by Governors drawn from the Board of Governors. Pursuant to Article XII:2(j), the Board of Governors of the Fund is empowered to create advisory committees.

The IMFC came into being in 1999 by a Resolution of the Board of Governors to succeed the Interim Committee. It was established to be a permanent committee and it mirrors the constitution of the Executive Board in terms of country distribution and number. The IMFC is thus made up of 24 Governors from member states and it “deals with unfolding events that may disrupt the global monetary and financial system.” It is vested with monitoring and advisory roles. Its monitoring roles include scrutiny of global liquidity and resource transfer to developing countries while its advisory role relates to the provision of advice to the Board of Governors.

Proposals from the Executive Board with regards to amendment of the Articles of Agreement are considered by the IMFC and it is also tasked with the responsibility of receiving and discussing reports from the Executive Board and the Managing Director on matters of critical importance to the global economy and the Fund.

739 ibid.
740 Alexander Mountford, op cit. fn.733.
742 ibid.
743 ibid.
744 Alexander Mountford, op cit. fn.733.
Thus the general work of the IMFC feeds into its advisory service to the Board of Governors. Due to its status as an advisory body, the IMFC does not wield decision-making powers. It meets on a biannual basis normally during the spring and just before the annual meeting of the Board of Governors in September-October.\textsuperscript{745} Despite its status as an advisory body, Alexander Mountford has observed that the IMFC is very influential.\textsuperscript{746} He states that:

The IMFC has in practice become the main source of ministerial-level advice, guidance, and feedback to the Executive Board on all the main issues facing the Fund. Although it is formally an advisory committee, in practice its communiqué plays an important role in the establishing of the Fund’s work program for the period ahead. The IMFC has discussed, influenced, and endorsed every major initiative that the Fund (…). In practice, its advisory role has evolved in such a way that it is the IMFC that, at the highest political level, has provided ministerial-level endorsement of the decisions taken by the Executive Board.\textsuperscript{747}

The important advisory role of the IMFC is crucial in the analysis of decision-making in the IMF. The only body in the IMF where all members are represented is the Board of Governors. In spite of the value of a member’s weighted vote, there is an opportunity to use it directly at the level of the Board of Governors. The restricted membership of the IMFC and its significance in the Funds decision-making process means that even at the level of the Board of Governors, there could be a double diminution of the influence of weaker states – firstly, their weakness is made apparent

\textsuperscript{745} ’A Guide to Committees, Groups and Clubs’ op cit. fn.741.
\textsuperscript{746} Alexander Mountford, op cit. fn.733.
\textsuperscript{747} ibid at 8.
by the weighted voting system where the value of a member’s vote is determined by its quota subscription and; secondly the restricted membership of the IMFC which, though an advisory committee, wields a lot of influence in the decision-making process.

The Development Committee on the other hand is constituted of 25 Governors drawn from the Boards of Governors of the IMF and World Bank.\(^\text{748}\) The ‘Development Committee’ is the short name for the Joint Ministerial Committee of the Boards of Governors of the Bank and Fund on the Transfer of Real Resources to Developing Countries. The main rationale for its establishment is to advice the IMF and World Bank’s Boards of Governors on key development issues in developing countries and the needed financial resources required to spur their economic development.\(^\text{749}\) Like the IMFC, the Development Committee meets on a biannual basis.

It is worthy of note that though the (current) membership of both the IMFC and the Development Committee is drawn from a broad spectrum of states from developing countries, transition economies and developed countries, the members of the G-8 – the USA, UK, Russia, Japan, Italy, Germany, France, and Canada – are represented in these two committees.\(^\text{750}\)

\(^\text{748}\) Leo van Houtven, op cit. fn.727.
\(^\text{749}\) ibid.
\(^\text{750}\) The IMFC is constituted of Governors from the following countries: Singapore (Chair), Algeria, Australia, Belgium, Brazil, Canada, Chile, China, Denmark, France, Gabon, Germany, India, Italy, Japan, Netherlands, Nigeria, Russia, Saudi Arabia, Spain, Switzerland, Thailand, United Arab Emirates, United Kingdom, and United States.

The Development Committee is constituted of Governors from the following: Bahrain (Chair), Argentina, Australia, Belgium, Brazil, Canada, China, Côte d’Ivoire, Egypt, France, Germany, India, Italy, Japan, Mexico, Morocco, Netherlands, Russia, Saudi Arabia, South Africa, Sweden, Switzerland, Thailand, United Kingdom, United States, and Zimbabwe. Source http://www.imf.org/external/np/exr/facts/groups.htm (viewed on 10 March 2012).
There are quite a few similarities between the Board of Governors of the IMF and the Ministerial Conference of the WTO. Like the Ministerial Conference, the Board of Governors is mostly constituted of ministerial (or senior government) level representatives. Also, like the WTO Ministerial Conference, every member is represented on the Board of Governors of the IMF. The key difference has to do with the weighted voting system where in the WTO, each member has a single un-weighted vote while the IMF operates a directly opposite system. Also, the restricted membership of the IMFC does not have a formal similar counterpart in the WTO system. Perhaps the informal role played by the Green Room meetings could be said to be a bit like the IMFC in the sense that it does not wield decision-making powers. Just like the IMFC, the recommendations of the Green Room (or ‘Green-Room-like’ meetings) are subject to approval by a higher decision-making organ – in the case of the IMFC, the Board of Governors, while in the case of the WTO, the Ministerial Conference or the General Council.

Of note is the fact that, though the Green Room process in the WTO is ad hoc in nature, the Trade Negotiations Committee (TNC) that operates directly under the supervision of the General Council has a formal status.\textsuperscript{751} Thus, as a formal non decision-making organ that operates under a higher decision-making organ, the TNC may formally play a role similar to the IMFC. The TNC, unlike the IMFC however, is open to all WTO members. Consequently, in terms of restricted membership, the Green Room process shares similarities with the IMFC, while in terms of formal status the TNC is more akin to the IMFC.

\textsuperscript{751} The Trade Negotiations Committee was established by the 2001 Doha Ministerial Declaration.
5.3.2 The Executive Board

The Executive Board is below the Board of Governors in the IMF’s organisational hierarchy. It operates on the basis of powers directly accorded to it by the Articles of Agreement and powers delegated to it by the Board of Governors. Section 15 of the By-Laws of the IMF provides that:

The Executive Board is authorized by the Board of Governors to exercise all the powers of the Board of Governors except those conferred directly by the Articles of Agreement on the Board of Governors.

The breadth of this delegation of powers to the Executive Board is really wide as it is the Executive Board that is “responsible for conducting the business of the Fund, and for this purpose shall exercise all the powers delegated to it by the Board of Governors”. Also, this means that where the Articles of Agreement empowers the Fund to act in any area, that power automatically falls within the remit of the Executive Board. This is because pursuant to Article XII:2(a), all powers not directly accorded to any of the IMF organs by the Articles of Agreement are vested in the Board of Governors. It is, therefore, this Article XII:2(a) competence of the Board of Governors that has been delegated to the Executive Board. The Executive Board thus makes the decisions that would have been made by the Board of Governors under Article XII:2(a).

752 Article XII:2(b) and 3(a) of the Articles of Agreement of the IMF.
753 Article XII:3(a) of the Articles of Agreement of the IMF.
The Executive Board consists of 24 Executive Directors, five of whom are appointed by the five members with the largest quotas (i.e. USA, Japan, Germany, France and the UK) with the remaining 19 elected to represent the remaining 182 members. At the inception of the IMF, the Executive Board had 12 Executive Directors, but increase in size of membership over time has necessitated the increase in the number of the Directors. Though the Articles of Agreement of the Fund do not formally accord the right to any other members (apart from the ones with the five largest individual quotas) to directly appoint an Executive Director to the Board, the current reviewed quotas allow China, Saudi Arabia and Russia to appoint their own Directors. Consequently, eight of the 187 members of the Fund directly appoint their own Executive Directors to the Executive Board leaving 179 members to elect the remaining 16 Executive Directors.

The members who do not exercise a right to appoint their own Executive Directors congregate into constituencies to elect a Director to the Executive Board. These constituencies vary in size. For instance Bangladesh, Bhutan, India, and Sri Lanka form one constituency while the two constituencies with the largest number of members – i.e. 22 and 21 members respectively – represent most of the African country members of the IMF. It is worthy of note that the constituency with the

755 Article XII:3(b) of the Articles of Agreement of the IMF.
756 Francois Gianviti, op cit. fn.754.
largest number of members, representing 22 African countries, has the lowest weighted vote of 1.55 percent.\textsuperscript{761} Thus, electing a Director to the Executive Board through the constituency system does not translate into actual influence in decision-making. Algeria, Ghana, Morocco and Tunisia (grouped with Afghanistan, Iran, and Pakistan) are among the very few African countries represented in less crowded constituencies. Increasing developing countries’ representation and influence at the Executive Board are among some of the central proposals made regarding reform of decision-making and governance in the IMF.\textsuperscript{762}

The various constituencies elect a Director to serve for a two-year period and at the expiry of this term, a new Director is elected (or the same Director is re-elected) to represent the members of the constituency.\textsuperscript{763} In spite of the inability of most IMF members to appoint their own Directors to the Executive Board, Article XII:3(j) makes room for members without direct representation on the Board to send a representative to any meeting of the Board in situations where an issue under consideration particularly affects the member. This provision also allows attendance of Executive Board meetings by a member’s representative if the Board is considering a matter that arose as a result of a request made by the member.\textsuperscript{764}

Section 19 of the By-Laws of the IMF further elaborates on the representation of members who are not eligible to appoint their own Executive Directors. Pursuant to Section 19:1(a) of the By-Laws, the Executive Board is vested with the power to

\textsuperscript{763} Article XII:3(d) of the Articles of Agreement of the IMF.
\textsuperscript{764} Article XII:3(i) of the Articles of Agreement of the IMF.
determine whether a matter under consideration particularly affects a member and this determination is final. However, a member need not request to attend a Board meeting before the process of determining its qualification to attend the meeting is effected. The Executive Board can, on its own initiative, make a determination that a matter under consideration in a meeting particularly affects a member and thus invite the member in question to attend the said meeting (or meetings). It is however not mandatory for a member to request to attend a meeting even if the matter under consideration particularly affects it and neither is a member obliged to attend Executive Board meetings when invited.

A fundamental feature of the Executive Directors of the Board that distinguishes the IMF from other international organisations like the WTO and UN is that the Articles of Agreement are silent about the status of the Directors as representatives of the members appointing or electing them. Thus unlike the WTO where members appoint their officials to represent their positions in the decision-making organs, the formal legal situation of the IMF is different. In this regard Francois Gianviti observes that:

There are … a number of other reasons for concluding that the Executive Directors are not representatives of their constituents, regardless of whether they are elected or appointed. For instance, in contrast with the UN charter and those of other organizations, the IMF’s Articles never use the term “representatives” when referring to Governors or Executive Directors. (…) In this respect, it may be noted that the UN Convention makes a distinction between “representatives of members at meetings convened by a specialized

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765 Section19:1(c) of the By-Laws of the IMF.
766 ibid.
767 Section19:1(a) of the By-Laws of the IMF.
agency” … and “officials” of a specialized agency … For purposes of the Convention, the UN Secretariat has been informed that Executive Directors of the IMF are not “representatives of members” but “officials of the Fund”.\textsuperscript{768}

The assertion that Executive Directors (and Governors) are not representatives of members appointing or electing them should be seen as a formal position. It would be difficult to conceptualise a situation where, especially, Executive Directors appointed by the eight countries that exercise the right of appointment would expressly go against the wishes of their appointers. This is even more the case considering the fact that votes in the Executive Board are not equal but based on the weighted votes of the appointing member or electing constituency. Again, if Executive Directors are not expected to represent their appointers or constituencies, it would be difficult to reconcile the fact that members that do not have a right to appoint an Executive Director are given the opportunity of ‘temporal’ representation if the Board is deciding an issue that particularly affects them, while this same opportunity is not granted to members that directly appoint Directors to the Board.\textsuperscript{769} Obviously, this would be due to the fact that an appointed Director would represent the positions of its appointer in deliberations of the Board that affect his/her appointer’s interest.

Richard Swedberg, for instance, observes that the Executive Director appointed by the USA is “ordered by law to clear his or her decisions with the Secretary of the Treasury”.\textsuperscript{770} Evidently, the idea that Executive Directors do not represent their appointers or electors cannot be sustained by the facts. Also, considering the fact that

\textsuperscript{768} Francois Gianviti, at 46, op cit. fn.754.
\textsuperscript{769} Section 19 of the By-Laws of the IMF.
the aims and objectives of the IMF, as provided in the Articles of Agreement, are all economic in nature, one would expect that these economic objectives would constitute the central ethos of IMF decision-making.  

Influence from the leading economies are however brought to bear on the decision-making process and the Executive Board becomes prone to making decisions based not on economic considerations alone but also on the political influences of the great economic powers of the IMF.

David Finch argues that if economic considerations formed the basis of Executive Board decisions, it would not be able to explain why the Fund continues to lend to certain countries that exhibit low levels of compliance with IMF conditionalities. The conditionalities themselves are supposed to be based on economic considerations as they are thought to restructure economies in crisis. Non-compliance would thus mean that the rationale for lending has been breached and as such subsequent lending would not have been forthcoming. Consequently, continuous lending in such circumstances may denote non-economic influences outside the Executive Board itself, and the countries with the clout to exert this influence are the leading economies in the IMF. This lends further credence to the notion that Executive Directors are not dispassionate technical bureaucrats who are insulated from the controls of their appointers and electors.

Morten Boas and Desmond McNeill also argue that:

772 ibid.
774 ibid.
775 ibid.
Formally, the IMF is not granted very much autonomy. The chain of command is supposed to run directly from governments of member countries to the IMF. Thus, when the IMF works out lending arrangements, including conditionalities, the IMF formally acts not on its own, but as an intermediary between the will of the majority of the membership and the individual member country. However, it is very clear that those who contribute the most to IMF … are also given the strongest voice in determining policies. This means that the IMF, if it is an intermediary, is an intermediary between the strongest economies in the world and individual member countries, and not necessarily between the majority and the individual.776

It must be noted though that in spite of the varying weights of vote reflected in the composition of the Executive Board, the norm in decision-making is consensus. The practice of consensus does not however preclude a resort to voting as any Executive Director can request a formal vote to be taken.777 Pursuant to Rule C-10 of the Rules and Regulations of the IMF, the Chairman of the Executive Board778 is tasked with the responsibility of ascertaining “the sense of the meeting in lieu of a formal vote.”779 Judging ‘the sense of the meeting’ of the Executive Board is an ascertainment of the consensus of the meeting.780 The practice of consensus may help shore up the role of weaker states in Executive Board decision-making as it is apparent that a resort to formal voting would entrench their marginalized position due to the weighted vote system.

777 Rule C-10 of the Rules and Regulations of the IMF.
778 i.e. the Managing Director of the IMF.
779 Rule C-10 of the Rules and Regulations of the IMF.
780 Leo van Houtven, op cit. fn.727.
However, achieving consensus would not mean that all the Executive Directors exercise equal leverage\textsuperscript{781} as is formally the case in the WTO decision-making organs, for example. In the WTO, votes are not weighted so, in principle, every member’s consent is required for consensus to work. It was also observed in chapter four that in the UN General Assembly, consensus building is fundamental to creation of international conventions that members accede to, as the Assembly operates by the un-weighted one-member one-vote system. Consequently, to talk about consensus decision-making in a body with weighted votes would be an exaggeration or over simplification of the reality. Consensus may be ‘exacted’ by those with the largest votes as the rest of the membership (represented through their Executive Directors) would know all too well that if the matter is subjected to a vote, they would loose. For example, in the decisions that need 85 per cent majority\textsuperscript{782} to pass, the USA with 16.5 per cent of the weighted votes\textsuperscript{783} single-handedly wields a veto. Knowledge that a proposed policy would be objected to by the USA, would require amendment or bargaining in order to bring the USA on board. In decisions that require 70 per cent majority,\textsuperscript{784} the five member countries with the largest weighted votes exercise a default veto if they act together as their combined votes account for 36 per cent of the total weighted votes.\textsuperscript{785} Reflecting on the USA’s decision-making powers in the Executive Board, Peter Kenen observes that:

\textsuperscript{781} Leo van Houtven, op cit. fn.727.
\textsuperscript{782} An example is Article XV:2 of the Articles of Agreement of IMF which provides for 85 percent majority of weighted votes on a decision relating to variation in the valuation of quota subscription. Pursuant to Article XII:3(b)(ii) 85 percent majority of weighted votes is needed to either increase or decrease the number of elected Executive Directors.
\textsuperscript{784} For example, pursuant to Article XV:2 of the Articles of Agreement, 70 per cent majority of weighted votes is needed to determine the principle of valuing quota subscriptions.
\textsuperscript{785} IMF Finance Department, op cit. fn.783.
It is fairly safe to say that the U.S. voting share will never fall below 15 percent of the total voting power in the IMF without the consent of the United States. Such a change would deprive the United States of its ability to block decisions requiring an 85 percent majority, including decisions to change Fund quotas and to amend the Fund’s Articles of Agreement. It is, in fact, nearly impossible to strip the United States of that blocking power, because the same 85 percent majority is needed to approve an increase or redistribution of IMF quotas.

It should also be noted that U.S. participation in the Fund is governed by the Bretton Woods Agreement Act, not by a treaty, and that U.S. quota increases are treated as appropriations, although they are not treated as budgetary outlays because they represent an exchange of assets between the United States and the Fund. Therefore, both the Senate and the House of Representatives must approve all decisions involving increased U.S. participation in the Fund, and they would be sure to reject any change in the distribution of IMF quotas that deprived the United States of its ability to block those critical decisions.  

Thus, consensus in the IMF may be more accurately described as agreement based on the tacit acceptance of the superior leverage of the great economic powers. Leo van Houtven also observes that:

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786 Peter B. Kenen, op cit. fn.760, at 10-12.
The Board works as a college of officials who devote themselves full time to the tasks and purposes of the IMF. The “sense of the meeting,” which the chairman must ascertain, is a position that is supported by Executive Directors having sufficient votes to carry the question if a vote were taken. “Consensus” denotes unanimity. While unanimity remains the objective, the Chairman and the Board view the achievement of “a large majority” as sufficient for many decisions.\textsuperscript{787}

In comparison to the IMF, the WTO does not have any organ that is similar in function or constitution to the Executive Board of the IMF. Even the informal Green Room meetings would fail the test if compared to the Executive Board. The Green Room meetings are informal and lack decision-making powers. These attributes are totally opposite to the powers of the IMF Executive Board. The only similarity is the restricted composition of both the Green Room meetings and the Executive Board. However, even this similarity is limited by the fact that the composition of the Green Room meetings varies in terms of size and participants based on the issue being discussed. There are also no objective criteria for invitation to Green Room meetings. However, the very resort to the Green Room meetings, though not possessing the similarities of the IMF Executive Board, may indicate the need for a smaller deliberative or decision-making body in the WTO akin to the Executive Board of the IMF. As was discussed in chapter three, the fact that all WTO organs are open to all members is problematic as it retards the decision-making process and makes it very difficult to achieve consensus, hence the resort to informal processes of breaking deadlocks in the decision-making process.

\textsuperscript{787} Leo van Houtven, op cit. fn.727, at 23.
5.3.3 The Managing Director and Staff of the IMF

The Executive Board is chaired by the Managing Director of the IMF who, though acting as the chairman of the Board, does not possess voting powers. The inability to exercise voting powers is only waived in situations where there is an equal division in the votes cast.\textsuperscript{788} This scenario is however virtually implausible as most Executive Board decisions are taken by majorities that exceed 50 per cent. Even where a simple majority of weighted votes is required to carry through a decision of the Board,\textsuperscript{789} getting a 50-50 divide of votes remains unlikely.

The managing Director is appointed by the Executive Board and his/her tenure can also be terminated by the Board.\textsuperscript{790} Article XII:4(b) provides that:

\begin{quote}
The Managing Director shall be chief of the operating staff of the Fund and shall conduct, under the direction of the Executive Board, the ordinary business of the Fund. Subject to the general control of the Executive Board, he shall be responsible for the organization, appointment, and dismissal of the staff of the Fund.\textsuperscript{791}
\end{quote}

The Managing Director and operating staff of the IMF do not represent members and are as such required to execute their duties entirely for the purposes of the Fund and no other authority.\textsuperscript{792} Members are therefore charged to respect the international

\textsuperscript{788} Article XII:4(a) of the Articles of Agreement of the IMF.
\textsuperscript{789} e.g. Art. XXVII:1.
\textsuperscript{790} ibid.
\textsuperscript{791} Article XII:4(b) of the Articles of Agreement of the IMF.
\textsuperscript{792} Article XII:4(c) of the Articles of Agreement of the IMF.
character of the functions discharged by the operating staff and in this respect refrain from any attempts to influence them in the discharge of their duties.\textsuperscript{793}

The overriding principle in the recruitment of the operating staff of the Fund is that of “securing the highest standards of efficiency and of technical competence”.\textsuperscript{794} Though there is mention of paying “due regard to the importance of recruiting personnel on as wide a geographical basis as possible”,\textsuperscript{795} the emphasis is on technical excellence hence making the geographical requirement a secondary one. Ngaire Woods observes that:

\begin{quote}
Unlike other UN institutions, the Fund and Bank are situated in the capital of the US government in Washington, DC, and work exclusively in English. This, combined with the fact that they draw a large proportion of their staff from graduate programs in North America makes the Fund and Bank the most ‘Anglo-Saxon’ of the current generation of international organisations.\textsuperscript{796}
\end{quote}

The Managing Director is obliged to report any breaches committed by a member in respect of the obligations they have assumed to the Executive Board, under the Fund’s Articles of Agreement.\textsuperscript{797} For example, pursuant to Article XXVI:2 of the Articles of Agreement, failure by a member to fulfil its obligations under the Agreement could result in a decision refusing the member in question from using the resources of the Fund. This is referred to as a declaration of ineligibility.\textsuperscript{798} Persistence of the breach

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{793} ibid.
\item \textsuperscript{794} Article XII:4(d) of the Articles of Agreement of the IMF.
\item \textsuperscript{795} ibid.
\item \textsuperscript{796} Ngaire Woods, op cit. fn.715, at 234.
\item \textsuperscript{797} Francois Gianviti, op cit. fn.754.
\item \textsuperscript{798} Article XXVI:2 of the Articles of Agreement of the IMF.
\end{itemize}
\end{footnotesize}
of obligations by the offending member could result in a suspension of its voting rights.\textsuperscript{799} A report of the Managing Director regarding a member’s breach of the Articles of Agreement can therefore result in action by the Executive Board.

The role of the Managing Director in the IMF is thus different from that of the Director General of the WTO in that, whereas action can be initiated against a member by the Executive Board, based on a report by the Managing Director, the Director General of the WTO is not vested with such powers. In fact, none of the institutions of the WTO (not even the General Council sitting as the Trade Policy Review Body) is vested with the power to initiate actions against a member for breach of its obligations under any of the multilateral trade agreements of the WTO. Only a WTO member can initiate action against another member for a breach of WTO rules where the member initiating the action has had its interests impaired or nullified by the offending member.\textsuperscript{800} The emphasis on a member-driven organisation is therefore more pronounced in the WTO. Perhaps, in the WTO the notable significant roles that the Director General performs in the decision-making process, is in the convening of Green Room meetings and chairing of the TNC. As has been discussed above, these bodies that the Director General performs roles in, are not formal decision-making bodies.

5.4 Concluding Remarks

From the above, it is apparent that though the WTO and the IMF share some similarities, the differences are vast. The most obvious differences are the joint-stock company model and the weighted voting system of the IMF. The restricted

\textsuperscript{799} Article XXVI:2(b) of the Articles of Agreement of the IMF.

\textsuperscript{800} Article 3:8 of the Dispute Settlement Understanding of the WTO.
membership of the Executive Board, the IMFC and the Development Committee are also key divergences and so is the more empowered role of the Managing Director of the IMF. The principle of special and differential treatment that is critical to the participation of developing countries in the WTO does not feature in the IMF system.

However, the current system in the IMF where, mostly, some developed countries have become the creditors and developing countries the borrowers can provide some insight into the relationship between developed and developing countries in the WTO.

In the IMF, policy prescriptions that have become known as the Washington Consensus feed into the conditionalities that are attached loans.\textsuperscript{801} The leading Western developed countries in the IMF are noted for promoting the Washington

\begin{footnotesize}
Consensus.\textsuperscript{802} Hence the conditionalities can be viewed as an indirect economic policy prescription from the leading creditor countries to the developing countries that are recipients of IMF credit, with the IMF serving only as the intermediary.\textsuperscript{803}

Though in the WTO set-up there is nothing like a ‘creditor nation’ and a ‘borrower nation’, accessing certain forms of special and differential treatment produces the same scenario where GSP benefactor nations set conditionalities for developing countries that want to benefit from higher levels of special and differential treatment.\textsuperscript{804} As was discussed in chapter one, the EU, for example, is noted for its ‘GSP Plus’ which grants higher levels of preferences to developing countries that have ratified and implemented a list of 27 international conventions and treaties. Here, as in the IMF, the giver has control over the conditionalities, and the recipient must accept the conditionalities in order to receive a benefit. As special and differential treatment is a principle enshrined in WTO rules, the WTO becomes a formal medium through which these conditionalities are maintained. The Appellate Body established in the \textit{EC – Tariff Preferences} case that, setting of conditionalities contingent on access to GSP is not in itself prohibited as long as it is based on objective criteria and applied in a non-discriminatory manner – i.e. non-discriminatory with regards to its application to developing countries that have similar needs.\textsuperscript{805}

\textsuperscript{802} Ngaire Woods, op cit. fn.801; Rick Rowden, op cit. fn.801; Moises Naim, op cit. fn.801, Charles Gore, op cit. fn.801.

\textsuperscript{803} Ngaire Woods, op cit. fn.801; Rick Rowden, op cit. fn.801; Moises Naim, op cit. fn.801, Charles Gore, op cit. fn.801.

\textsuperscript{804} e.g the ‘GSP Plus’ scheme maintained by the EU.


\textsuperscript{805} Appellate Body Report in European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R.
It can therefore be argued that, though in the WTO decision-making system weighted votes based on economic status do not formally exist, the differences in ‘economic weights’ can be, and are, brought to bear on the decision-making process. This can produce an informal system of ‘weighted’ votes. The use of GSP conditionalities is a typical example. Of course, it is not mandatory for developing countries to seek special and differential treatment from developed countries, in which case they would not have to meet any conditionalities set for accessing the GSP schemes of the developed countries. The same argument can be made for accessing IMF loans. Developing countries do not have to take on the ‘Washington Consensus’ conditionalities of the IMF by not taking IMF loans. Creditor nations cannot influence the domestic economic policies of debtor nations if the debtor nations stop accessing credit. Such an argument, whether in the WTO or IMF set-ups, would however fall under the category of things that are easier said than done. In effect, as long as developing countries have the need for economic assistance, whether through access to IMF loans, or special and differential treatment, the scales of leverage in decision-making will continue to be tilted in favour of the countries whose advantageous economic status make them the benefactors in both the WTO and the IMF.

Another major formal difference between the IMF and the WTO is the operation of the principle of sovereign equality of states. As was realised in chapter three, the operation of the one-member-one-vote system and the openness of all WTO organs to all members ensures a formal equality, and by extension a preservation of the principle of sovereign equality of states. The predominance of the weighted voting system and the restricted membership, especially, of the Executive Board of the IMF makes the principle of sovereign equality of states non-existent. With the IMF
therefore, the only aspect of the principle of sovereign equality that applies is the fact that members are sovereign states that have acceded to the Fund's Articles of Agreement. The sovereignty of the members as states does not translate into equality in the decision-making process. Like the joint-stock company model, individuals who are equal under the law of the land are not equal with respect to their influence over the decisions of the company in which they own shares. Those with a greater percentage of the shares have votes equivalent to the size of their shares. So also, in the IMF, sovereign equality can only be conceived of as equality of states under international law and not equality in terms of actual influence in the organisations that states join. As was cited in chapter three, Hans Kelsen argued that:

The sovereignty of the States, as subjects of international law, is the legal authority of the States under the authority of international law. If sovereignty means “supreme” authority, the sovereignty of the States as subjects of international law cannot mean an absolutely, but only a relatively supreme authority; the State’s legal authority is “supreme” insofar as it is not subjected to the legal authority of any other State. The State is “sovereign” since it is subjected only to international law, not to the national law of any other State. The State’s sovereignty under international law is the State’s legal independence from other States.\(^{806}\)

The implications of Kelsen’s argument, with respect to decision-making and conditionalities in the IMF and WTO, can be two fold: first, by being subjected to conditionalities, whether in the IMF or WTO, states experience a diminution of their

\(^{806}\) Hans Kelsen, op cit. fn.194, at 35.
sovereignty, as they are subjected to the policy preferences of the creditor or benefactor states. The second implication can be seen as an opposite side of the first argument – states that accept conditionalities in both the IMF and the WTO do so as a legitimate expression of their sovereignty. It is an expression of state consent. The problem with the second argument is how to construe consent where there are no viable alternatives to choose from. If IMF loans or special and differential treatment provisions are effectively indispensable to the countries that need them, then their consent to the conditionalities tied to the loans or differential treatment may be seen more as an exacted consent, and this would raise legitimate issues of sovereignty and equality.

Thus, in the debates about how to reform the WTO decision-making process, any proposal that tend to favour an IMF-like Executive Board in the WTO must take due cognisance of how such a body with restricted membership can be constituted in an organisation like the WTO that predominantly enshrines formal sovereign equality in its decision-making system. It may be argued that the UN, for example, has enshrined the principle of sovereign equality its Charter\textsuperscript{807} and yet has principal organs like the Security Council and the Economic and Social Council that have restricted membership. There is even a form of weighted voting in the Security Council by dint of the operation of the veto power by the five permanent members. However, in an organ like the Economic and Social Council, there is a ‘rotational’ system of electing new members after ‘old’ members have completed serving their term. Consequently, every UN member has the opportunity to serve as a member. This preserves sovereign equality by ensuring equality of possible representation. What is perceived as a

\textsuperscript{807} Article 2:1 of the UN Charter, 1945.
problem in the UN system is the permanent membership with its attendant veto power in the Security Council. If this is inconsistent with the principle of sovereign equality, then, in adopting models from other systems like the UN and the IMF, it is the areas of inconsistency that the WTO must avoid.

The fundamental ethos of the principle of sovereign equality can still be maintained if a smaller body with restricted membership is formed in the WTO. The use of constituencies in the IMF can be adapted to the WTO system in a manner that can still protect the weaker states in the decision-making process. If, for example, each constituency is formed factoring in economic (i.e. contribution to international trade in terms of exports and imports), geographical, and population indicators, each constituency could be given a single unweighted vote. In this way, each constituency would have an equal voice in decision-making. A more detailed analysis of this prospect is explored in chapter seven where prospects for reforming the WTO decision-making system is considered in detail. It will suffice to say for now that the existence or creation of a body with restricted membership in the WTO, would not necessarily affect the continuous significance of the principle of sovereign equality of states if constituencies are formed in a manner that reflects important indicators like the number of members in each constituency, contribution to international trade, geographical representation, and population size.

On the issue of conditionalities and its implications for the principle sovereign equality in the WTO, a case can be made for requiring GSP granting nations from using disciplines that have failed integration into WTO rules as conditionalities for access to GSP schemes as this could increase the regulatory burdens of GSP recipient
states. It also brings to the fore the need for developing countries to seek solutions to their trade needs through binding multilateral rules as undue attachment to special and differential treatment could expose them to additional regulatory requirements outside what pertains under WTO rules.
CHAPTER SIX: DECISION-MAKING AT THE EUROPEAN UNION

Introduction

In the last two chapters, it has been made evident that international cooperation in various fields, (especially economic relations) was deemed vital to the maintenance of international peace and security and this spurred the creation of multilateral organisations after World War II.\textsuperscript{808} \textit{Inter alia}, political and economic instability in Europe had made it the nerve centre that fomented the occurrence of both World War I and World War II.\textsuperscript{809} The need to secure peace in Europe in the aftermath of World War II was thus more pertinent. Like the GATT/WTO and the IMF, the use of economic cooperation among states to secure peace and prosperity became one of the main rationales that instigated European integration, culminating in the European Union.\textsuperscript{810} The Laeken Declaration that started the process that led to the signing of the Treaty of Lisbon for instance stated that:

For centuries, peoples and states have taken up arms and waged war to win control of the European continent. The debilitating effects of two bloody wars and the weakening of Europe's position in the world brought a growing realisation that only peace and concerted action could make the dream of a

\textsuperscript{808} See footnote 693 above.
strong, unified Europe come true. In order to banish once and for all the
demons of the past, a start was made with a coal and steel community. Other
economic activities, such as agriculture, were subsequently added in. A
genuine single market was eventually established for goods, persons, services
and capital, and a single currency was added in 1999.\footnote{The Laeken Declaration on the Future of the European Union, available online at http://european-convention.eu.int/pdf/lknen.pdf (viewed on 21 April 2012).}

Thus, though a regional organisation, unlike the WTO, UN, and IMF that are
international organisations, the EU shares the same philosophy of achieving peace and
prosperity through economic cooperation.\footnote{Barry J. Eichengreen, op cit. fn.810.}

This chapter, like the previous two chapters conducts a comparative study with the
ultimate aim being the focus on the need for reform of the WTO decision-making
system, and to that extent seeks to understand how other models of decision-making
systems may be able to help reform that of the WTO. The focus of this chapter will
be the decision-making system of the EU with a view to comparing it to that of the
WTO system. The comparative analysis is generally woven into the general
discussion of the EU decision-making system.

6.1 Brief History of EU Institutional Development and Decision-Making

An analysis of the historical development of the EU is inextricably intertwined with
the development of the institutions that make up the EU, the development of their
treaty competences over time and the role of these institutions in EU decision-making.

This section of the chapter presents a brief history of the EU with emphasis on the
development of the EU institutions and the roles these institutions have played in
decision-making in the EU in successive treaty amendments. It is hoped that discussing this history can provide some comparative insight into the WTO’s own development and the current state of its institutions and their decision-making competences.

The EU came into being in 1992 under the Treaty on European Union (also known as the Maastricht Treaty). Its roots though go further back. Starting with the European Coal and Steel Community (ECSC) in 1951 a series of treaties culminated in the Treaty on European Union in 1992 and eventually the current Treaty of Lisbon in 2007.813 From the humble beginning of six countries (France, West Germany, Italy, Belgium, Luxemburg, and Holland) that initially formed the ECSC, the EU has metamorphosed into a formidable regional economic and political entity having 27 member states.814

As stated above, the founding of the ECSC was spurred by the need to prevent the occurrence of conflicts among states through intergovernmental action.815 The main objective of the ECSC was to create a common market in coal and steel amongst the six participating states. A seminal innovation introduced by the ECSC Treaty was a four institutional structure – the High Authority, Council of Ministers, the Assembly,


and the Court of Justice. 816 These four institutions became pivotal in the subsequent institutional architecture of the EU as they were the foundation stones around which later institutions were built and later reforms in these four institutions had huge constitutional implications for the move towards European integration. 817 The initial move towards integration under the ECSC Treaty was marked by emphasis on “... discrete economic sectors which could be managed efficiently and technocratically by supranational institutions, away from the fray of politics”. 818

This is one of the main propositions that the functionalist paradigm for explaining European integration has put forward. Juliet Lodge, describing the functionalist paradigm of European integration states that:

Functionalism starts with the premise that by promoting functional cooperation among states it may be possible to deter them from settling disputes over competition for scarce resources aggressively. The Logic behind the approach is to prevent war not negatively – by keeping states apart – but positively by engaging them in cooperation ventures ... to establish functionally specific agencies, initially in what were then seen as non-contentious areas like welfare. These were to transcend national boundaries and be managed by rational technocrats (not swung by the vagaries of political

816 Sionaidh Douglas-Scott, op cit. fn.815.
ideology and power-hungry political parties) owing allegiance to a functionally specific organisation not to a given nation.\textsuperscript{819}

From its early beginnings, the centre of policy initiative in decision-making at the supranational levels has been the High Authority (which later became the Commission).\textsuperscript{820} However, in order to create a balance between the supranational powers given to the High Authority (the Commission) and the interests of the governments of the Member States, the Council of Ministers was empowered to serve as a coordinator between the High Authority and the member states and to some extent monitor the High Authority.\textsuperscript{821} The Assembly (later the European Parliament) played an advisory role in decision-making hence it was the least powerful of the four institutions. The balance between supra-nationalism and inter-governmentalism was therefore struck at the commencement of the European integration that led to the founding of the EU.\textsuperscript{822} The members of the Council of Ministers were responsible to their governments and the High Authority was to represent the interests of the ECSC. The European Court of Justice played the role of a neutral judge in conflicts between the Member States and between the Member States and the institutions.\textsuperscript{823}


It must be noted though that the functionalist paradigm for explaining European integration is not the only one that has been proffered. The neo-realist approach has for instance focussed more not on the intergovernmental manifestations of European integration but rather on the supranational manifestations that have witnessed greater levels of state involvement to safeguard sovereignty. See Andrew Moravcsik, ‘Preferences and Power in the European Community: A Liberal Intergovernmental Approach, \textit{Journal of Common Market Studies}, 31 (1993), 473; Sionaidh Douglas-Scott, op cit. fn.815; Paul Craig and Gráinne De Búrca, \textit{EU Law: Text, Cases, and Materials}, Oxford: Oxford University Press, (2003).

\textsuperscript{820} Paul Craig, and Grainne De Búrca, op cit. fn.818.

\textsuperscript{821} ibid.


\textsuperscript{823} ibid.
The next major stage in the development of the EU came with the Treaty of Rome in 1957. The Treaty of Rome established the European Economic Community (EEC) and further extended the integration commenced under the ECSC. The Treaty of Rome among other features, removed trade barriers among member states, established a common customs tariff within the EEC and a common market where the free movement of goods, services, people and capital (to some extent) was guaranteed. Other policy areas like competition, agriculture, and a common commercial policy were also established.

With the extension of the domain of the EEC, there was a commensurate need to balance supranational interests with intergovernmental ones. The degree of legislative autonomy in the decision-making of the Commission that pertained under the ECSC was thus reduced in the EEC with the sway of power tilting in favour of the Council of Ministers. The Commission, the most supranational of the Community institutions was restricted mostly to the role of initiating legislation while the Council had the power of approving the legislation initiated by the Commission. The Commission also had powers to negotiate international agreements on behalf of the EEC and served as a ‘watchdog’ of the Treaty. The Assembly still played an advisory role and though its supervisory role over the Commission remained intact, it diminished with the diminished decision-making role of the Commission. These developments portrayed the reluctance of the Member States to ceding more powers to a supranational entity that they could not directly control. The increasing role of the

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824 Treaty Establishing the European Economic Community, 1957.
826 ibid.
828 ibid.
829 ibid.
Council could thus be seen as a greater preference for inter-governmentalism.\textsuperscript{830} The voting procedures in the Council also portrayed the interplay between intergovernmental and supranational interests in the development of EU integration. Under the Treaty of Rome, the Council could vote on some issues by a simple majority, on some by a qualified majority, and on others by unanimity.\textsuperscript{831} Craig and de Burca have argued that:

> The issue of voting in the Council is crucial to the nature and development of the Community, since, crudely speaking, it influences strongly whether intergovernmentalism – i.e. the interests of each of the Member States – or supranationalism – i.e. the overall interest of the Community – has greater sway.\textsuperscript{832}

After the EEC, the next treaty of major significance was the Single European Act (SEA) which came into effect in 1987. From the EEC to the SEA however, a lot of events took place that continued to show the interplay between supra-nationalism and inter-governmentalism in EU integration. Notable of these events was the Luxemburg Accord of 1966 that halted the move towards majority voting in the Council due to very strong objections from France.\textsuperscript{833} The Luxembourg Accord effectively granted veto rights to Member States by requiring that if a member state raised objections to a decision by citing that the decision affected important national interests, negotiations would continue till unanimity is achieved.\textsuperscript{834} This retrenchment to unanimity voting in the Council was due to strong opposition from France under President De Gaulle, who

\textsuperscript{830} George Tsebelis and Geoffrey Garrett, op cit. fn.827.
\textsuperscript{831} Paul Craig and Gráinne De Búrca, op cit. fn.818, at 12.
\textsuperscript{832} ibid.
\textsuperscript{833} Paul Taylor, The Limits of European Integration, Kent: Croom Helm Ltd. (1983).
\textsuperscript{834} ibid.
favoured a system where the Member States of the EEC were more in charge of the
direction of the Community’s policies, especially under the Common Agricultural
Policy.\textsuperscript{835}

Another form of inter-governmental cooperation in foreign policy had also been
achieved in 1969 under the European Political Cooperation (EPC) though this body
operated outside the EEC framework. The Commission and the Assembly (European
Parliament) did not have any participation in the EPC.\textsuperscript{836}

Due to the fact that the institutional structure of the EEC favoured more inter-
governmentalism than supra-nationalism, the move towards European integration
could be hampered if Member States, through the legislative competence of the
Council failed to pass regulations that would project integration, especially in the
creation of the common market. A period of stagnancy subsequently prevailed in the
common market project. This period has notably been referred to as ‘euro-sclerosis’
due to the snail-paced progress that prevailed in the establishment of the common
market which was supposed to guarantee the operation of the four freedoms – i.e. free
movement of goods, services, persons, and capital.\textsuperscript{837} The Community institution that
pushed the supranational agenda furthest within this period was the European Court of
Justice (ECJ). Through its decisions, the ECJ established foundational principles like
the supremacy of Community law over national law and the principle of direct effect

\textsuperscript{835} Paul Taylor, op cit. fn.833.
which gradually oriented the Community towards supra-nationalism. In the *Ven Gend en Loos* case, for instance, the ECJ held that:

…the [European ] Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields. (…) Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals, but is also intended to confer upon them rights which become part of their legal heritage.

The *Ven Gend en Loos* case was seminal in establishing the principles of direct effect of EU law in the domestic legal systems of Member States and supremacy of EU law (or Community law as it then was) over domestic laws. Also, through the ECJ’s encouragement of the use of preliminary references of cases on Community law from national courts to the ECJ, uniformity in the application of Community law was achieved and this also gave the ECJ the opportunity to interpret the Treaty in a teleological manner that projected Community integration (supra-nationalism) over state interests (inter-governmentalism). In this regard Paul Berman has stated that:

Notwithstanding the emphasis placed in public international law on the intentions of the parties to international agreements, the European Court of

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840 Case 26/62, [1963] ECR 1, at paragraph 4 of the decision.
841 See Paul Berman, op cit. fn.278.
Justice only rarely has recourse to the *travaux preparatoires* of EU Treaties and to the negotiator’s intentions.\^[842]\]

The importance of preliminary references of cases dealing with Community/EU law to the ECJ has had a seismic effect on the development of the EU because most of these cases involved private individuals – i.e. litigation between private individuals (or corporate entities) or between individuals and the state. One of the watershed cases in the development of the common market, and by extension EU integration, was the *Cassis de Dijon*\^[843]\] case. The *Cassis de Dijon* case established the principle of mutual recognition which holds that goods that have been legally produced in a Member State of the EU should have free access to the markets of other Member States without being subjected to any further regulatory requirements once they satisfy the “…mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the customer”.\^[844]\]

Compared to the institutional structure of the WTO and its decision-making system the supranational role played by the ECJ is one of the fundamental differences between the EU and the WTO. Whereas the ECJ has supranational powers in that its decisions are binding on Member States and forms part of EU law enforceable in national legal systems, the same cannot be said of the Dispute Settlement system of the WTO. In the WTO system, the Member States’ representatives in the General Council act as the Dispute Settlement Body that has the final say on the decisions of

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\^[842]\ Paul Berman, op cit. fn.278, at 4.


\^[844]\ ibid para.2.
Dispute Settlement Panels and the Appellate Body.\textsuperscript{845} Thus even though Panels and the Appellate Body are vested with some level of judicial competence, their decisions are not final as they are subject to acceptance by the Member States.\textsuperscript{846} The ‘judicial’ system of the WTO could be said to be fundamentally intergovernmental in nature with the member states acting as the final arbiters and wielding the sole authority to give authoritative interpretations to the WTO Agreements.\textsuperscript{847} There is an absolute dominance of the Member States to the extent that only a Member State can initiate a case against another Member State for breach of WTO law.\textsuperscript{848} Unlike the EU system, litigation between private entities cannot be referred by national courts to the WTO Dispute Resolution Panels or the Appellate Body for consideration.

Within the EU integration process, the coming into effect of the SEA in 1987 with the main aim of completing the Common Market project could thus be seen as an attempt by the political institutions of the Community to catch up with the ECJ in promoting Community interests.\textsuperscript{849} The SEA extended qualified majority voting in the Council and the internal market project became a Treaty imperative thus widening the domain of authority of the Commission in order to achieve the objective of a barrier free common market.\textsuperscript{850}

The SEA also introduced two important changes with respect to the role of the European Parliament in the decision-making process – the cooperation procedure and the assent procedure. Under the cooperation procedure the European Parliament could

\textsuperscript{845} Article IV:3 of the WTO Agreement.
\textsuperscript{846} Appellate Body Report on \textit{Japan – Alcoholic Beverages II} p.13.
\textsuperscript{847} Appellate Body Report on \textit{Japan – Alcoholic Beverages II} p.13.
\textsuperscript{848} Article 1:1 of the Dispute Settlement Understanding.
\textsuperscript{850} ibid.
give its opinions on the Commission’s draft regulations and directives.\textsuperscript{851} It could ask the Commission to amend its legislative proposals and the Commission was required to take account of the opinions of the European Parliament.\textsuperscript{852} The assent procedure required that the European Parliament give its assent to proposed EU enlargements and international agreements that the Commission negotiates.\textsuperscript{853}

By 1993 when the Treaty on European Union (TEU or Maastricht Treaty)\textsuperscript{854} came into effect, the ethos towards European integration had increased with more European states acceding to the EU. The most far reaching constitutional changes that transformed the integration process came with the Maastricht Treaty which established the European Union.\textsuperscript{855} Also, the Maastricht Treaty (i.e. TEU) effected a major institutional change by the establishment of the ‘three-pillar’ structure “for what was henceforth to be the European Union, with the European Communities as the first of these pillars and the EEC Treaty being officially renamed the European Community (EC) Treaty”.\textsuperscript{856}

The European Union was thus created as the umbrella organisation under which the original EC and the new additions – the Common Foreign and Security Policy and the Justice and Home Affairs – were grouped to form the three pillar institutional structure. The EC pillar and the second and third pillars – the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA)\textsuperscript{857} were to be served by

\textsuperscript{851} Andrew Moravcsik, op cit. fn.849.
\textsuperscript{852} ibid.
\textsuperscript{853} Paul Craig and Gráinne De Búrca, op cit. fn.818.
\textsuperscript{854} Treaty on European Union, 1992.
\textsuperscript{855} ibid.
\textsuperscript{856} ibid.
\textsuperscript{857} Later changed to Police and Judicial Co-operation in Criminal Matters (PJCC) by the Treaty of Amsterdam.
‘a single institutional framework’ according to Article 3 of the Maastricht Treaty. The ‘birth’ of the EU thus brought with it treaty provisions and institutional changes that transformed the EU beyond a mere regional free trade community.\textsuperscript{858} The political dimension of EU integration advanced by the Maastricht Treaty necessitated a commensurate advancement in the development of democratic institutional structures.\textsuperscript{859}

Apart from the more political additions in the second and third pillars ushered in by the Maastricht Treaty, it also had an immense impact even in the Community pillar with the introduction of economic and monetary union (EMU) and single currency. Notably, the UK and Denmark obtained major opt-outs from the EMU.\textsuperscript{860} The UK further negotiated opt-outs from the Social Chapter of the TEU and later, the Schengen Acquis which guarantees free movement of persons typified, \textit{inter alia}, by “common rules and procedures … applied with regard to visas for short stays, asylum requests and border controls”.\textsuperscript{861} The Schengen Acquis was incorporated under a protocol in the Treaty of Amsterdam and apart from the UK, Ireland also opted out.\textsuperscript{862}

These opt-outs however do not permanently bar the UK and Ireland from joining the

\textsuperscript{858} Sionaidh Douglas-Scott, \textit{op cit. fn.815}.


Schengen Acquis at a later date if they so choose, though this would be subject to a unanimous acceptance in the Council.\textsuperscript{863} Also, not all aspects of the Schengen Acquis are binding on Denmark in spite of its accession.\textsuperscript{864}

The Maastricht Treaty and its succeeding amendments (i.e. the Treaty of Amsterdam and the Treaty of Nice) extended the role of the European Parliament from the cooperation and assent procedures under the SEA to become a co-legislator with the Council on most issues under the co-decision procedure.\textsuperscript{865} The European Parliament was transformed into a legitimate decision-making organ sharing legislative competence with the Council in areas like the single market, free movement of workers, the environment, research, education, health, culture and consumer protection. These powers were however mainly exercised within the Community pillar. The CFSP and the Police and Judicial Co-operation in Criminal Matters (PJCC), introduced under the Treaty of Amsterdam to replace the JHA pillar, were mainly intergovernmental organs where the Council and the European Council dominated.\textsuperscript{866} The Treaty of Amsterdam however transferred a majority of the functions under the erstwhile JHA to the Community pillar.\textsuperscript{867} The use of the qualified majority vote in the Council also became the main procedure of decision-making after successive amendments from the Maastricht Treaty through to the Treaty of Nice.\textsuperscript{868}

The procedure for decision-making in the Community pillar – i.e. the Commission initiating legislation and the European Parliament and the Council approving (or

\textsuperscript{863} Georgia Papagianni, op cit. fn.862.
\textsuperscript{864} ibid.
\textsuperscript{865} Sionaidh Douglas-Scott, op cit. fn.815.
\textsuperscript{866} ibid.
\textsuperscript{868} ibid.
rejecting) the Commission’s legislative proposals through the co-decision procedure—
became known as the Community Method.\textsuperscript{869}

In spite of the major achievements that the EU had attained there were still major
problems in its institutional structure and persistent criticisms of it having a
democratic deficit.\textsuperscript{870} A closer scrutiny of the EU decision-making process reveals
that the input of numerous ‘faceless’ committees, agencies and bureaucrats at both the
Commission and the Council of Ministers is by far more than the input of the
representatives of the national governments meeting in the Council.\textsuperscript{871} Sionaidh
Douglas-Scott, for instance, observed that about 80 percent of EU measures were
agreed by unelected national technocrats or bureaucrats at the Commission and the
Council of Ministers before they reached the level of the national representatives
meeting in the Council.\textsuperscript{872} A mere approval of an already prepared and agreed text
without a significant personal input by the representatives of the Member States in the
Council may hardly pass the test of the decision-making process being guided and
controlled by democratic states. The deliberations and activities of these ‘faceless’
and unelected committees, agencies and bureaucrats are not open to public scrutiny,
neither are they controlled or supervised by a representative institution like the
European Parliament.\textsuperscript{873} Also their activities in the decision-making process are not
open to contestation at the European Court of Justice.\textsuperscript{874}

\textsuperscript{869} Sionaidh Douglas-Scott, op cit. fn.815.
\textsuperscript{870} See footnote 859 above.
\textsuperscript{871} Andreas Follesdal and Simon Hix, op cit. fn.859.
\textsuperscript{872} Sionaidh Douglas-Scott, op cit. fn.815.
\textsuperscript{873} Giandomenico Majone, op cit. fn.859.
\textsuperscript{874} ibid.
This prompted Lord Ralf Dahrendorf, a former EU Commissioner, to assert in a 2001 article that:

It is hard to escape the conclusion that democracy and the nation-state are tied to each other. The weakening of the nation-state by a process of internationalization is, by the same token, a weakening of democracy. So far, we have not been able to apply the principles of democracy to political spaces beyond the nation-state. (...) What about the European Union? Is it not an example, even a successful example, of democracy beyond the nation-state? (...) The EU has laid down quite serious tests of democratic virtue for so-called accession countries. If, however, it applied these tests to itself, the result would be dismal. It is not a joke to say that if the EU itself applied for accession to the EU, it would not be admitted because it is insufficiently democratic.\(^\text{875}\)

The institutional imbalance typified by the use of the Community Method in decision-making in the Community pillar and the use of intergovernmental processes in the CFSP and PJCC pillars also engendered a lot of criticism. During the negotiating process that led to the Maastricht Treaty, Jacques Delors, the then President of the Commission, criticised this institutional arrangement as a system that will create an ‘organised schizophrenia.’\(^\text{876}\) Delors’ fears were borne out when the Maastricht Treaty was ratified. Even after later amendments to the Maastricht Treaty (i.e. Treaty of Amsterdam and Treaty of Nice), Sionaidh Douglas-Scott asserted that:

\(^{875}\) Ralf Dahrendorf, op cit. fn.859, at 11.

Indeed, trying to provide a single, effective, theory of EU institutions is well nigh impossible. For rather than unity it might seem that the EU is a fragmented, polycentric, multi-level creature – a ‘post-modern’ structure, as much made up of informal networks as of formal institutions.877

The concerns regarding the democratic legitimacy of the EU decision-making process and the institutional imbalance, *inter alia*, were recognised by the Laeken Declaration which noted the need to carve-out a new EU that could effectively respond and contribute to the management of globalisation while also bringing its decision-making process closer to the EU citizens.878 Thus, in carving out a new treaty for the EU, a more inclusive convention procedure was opted for after the adoption of the Laeken Declaration in December 2001, instead of proceeding with an intergovernmental conference, which had been the procedure for amending all the previous Treaties.879

The ensuing convention – the Convention on the Future of Europe – took place from March to June in 2002 and resulted in a draft Constitutional Treaty.880 By 2004 when member states of the EU had agreed on a final text of the Constitutional Treaty, membership of the EU had reached 25. ‘No’ votes in referenda in France881 and the Netherlands882 however halted progress to the adoption of the Constitutional Treaty, leading to a fall back on the Treaty of Nice as the operative treaty.883

877 Sionaidh Douglas-Scott, op cit. fn.815, at 45.
880 Ibid.
882 Ibid.
883 Ibid.
The ‘no’ votes in France and Netherlands were followed by a period of reflection resulting in some changes in the Constitutional Treaty to address concerns by some critics who saw it as creating a super-state. The period of reflection gained some concrete grounds for action by March 2007, when Member States made a commitment to move ahead towards ratification of a new treaty. This renewed commitment hinged on a strategy which aimed at reaching political agreement on pivotal issues that would serve as the mandate for an intergovernmental conference to be held at a later date.

It is of significance that in spite of the failure of the Constitutional Treaty it was not totally dead. The Constitutional Treaty fed into the text of the new treaty that was being negotiated as the political agreement that was achieved regarding work on a new treaty “indicated that the new Treaty was to follow the text of the Constitutional Treaty unless otherwise specified by the mandate”. Work on the new treaty thus proceeded in the aforementioned format and after an informal agreement among Member States, the Treaty of Lisbon was formally signed on 13 December 2007.

The Treaty of Lisbon, the eventual outcome of a reform process commenced by the Laeken Declaration in 2001, had its own significant rollercoaster moments. Two rulings of the Czech Constitutional Court was required to pave the way for ratification of the Lisbon Treaty by the Czech Republic, a ruling by the German Constitutional Court was also required and after a first rejection in a referendum in Ireland in June

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886 ibid.
887 ibid. at 39.
888 ibid.
889 2008/11/26 - PL. ÚS 19/08: TREATY OF LISBON I.
2008, a second referendum was needed to pave the way for ratification in October 2009.\footnote{Sara Binzer Hobolt, op cit.} Paul Berman observes that “the road leading to the entry into force of the Lisbon Treaty in December 2009 was one of the most troubled of any European Union agreement”.\footnote{Paul Berman, op cit. fn.278, at 3.}

The institutional and decision-making anomalies that plagued the EU and necessitated a new treaty (or Constitutional Treaty as was initially proposed) strikes a reverberating consonance with the current state of the WTO and how a reformed WTO institutional and decision-making system might look like. What lessons, for instance, can the WTO learn from the departure from the unanimity requirements of the Luxembourg Accord with the successive extension of qualified majority voting starting with the SEA to the current Lisbon Treaty? The importance of relaxing the rigid stance on consensus in the WTO decision-making system cannot be overemphasised, noting the current membership of the WTO which stands at 159, not to mention the almost certain new power politics that will be played-out in the decision-making system with the Ministerial Conference approval of Russia’s accession on 16 December 2011.\footnote{http://www.wto.org/english/thewto_e/minist_e/min11_e/min11_e.htm (viewed 22 August 2012).}

It can thus be seen that though the EU integration project has widened in regulatory scope and depth and in membership, the integration process has been oiled by a fair degree of flexibility and versatility. This is made evident in important compromises and opt-outs like the Luxembourg Accord, the varied levels of opt-outs of the EMU by the UK and Denmark and the total opt-out of the Schengen Acquis by the UK and
Ireland with Denmark acceding but securing a non-total application.\textsuperscript{894} This ability to wait for other members to come on board before proceeding further with a proposed policy (epitomised in the Luxembourg Accord) and, where the overwhelming majority move ahead with a policy while leaving the door open for future participation by the objecting few (epitomised by the Schengen Acquis scenario), has become symbolic of the different speeds approach in European integration.\textsuperscript{895}

Also the progressive integration in the EU to its present state under the Lisbon Treaty is significant in the analysis of the WTO regulatory system. From a modest Community of six members convened to tackle management of coal and steel for the common good, the current regulatory reach of the EU in its Member States’ legal systems is almost ubiquitous.\textsuperscript{896} This has been made possible by the relative homogeneity of its member states in terms of geography, politico-economic ideology, shared history, religion (or the ‘lack’ of it), and ethnicity.\textsuperscript{897} In effect, its regional make-up has fostered its integration. For the global and extremely heterogeneous membership of the WTO, the evident question is how far can its regulatory interventions go – both in terms of the breadth of regulatory nomenclature dealing with specific trade policies and their depth, in terms of their intrusion into national systems. The cacophony of ‘trade and’ and ‘trade related’ disciplines that are increasingly vying for inclusion into the trade regime may need a rethink.

\textsuperscript{895} Miroslav N. Jovanovic, \textit{The Economics of European Integration: Limits and Prospects}, Cheltenham: Edward Elgar Publishing Ltd. (2005).
While it has been argued that the WTO could learn lessons from the different speeds approach that has helped the EU integration process, it must be noted that this principle is not absent within the WTO itself. The existence of plurilateral trade agreements in the WTO, with specific provisions made under the WTO Agreement with respect to such agreements,\textsuperscript{898} shows that the single undertaking requirement is not all that pervasive. In this regard, the political agreement on the renegotiated plurilateral Agreement on Government Procurement on 15 December 2011 during the WTO Ministerial Conference deserves mention.\textsuperscript{899} Whereas the Doha Round negotiations have passed a tenth year without a final agreement, negotiations on the Agreement on Government Procurement have been completed and the Agreement was formally adopted on 30 March 2012.\textsuperscript{900} This could be said to be a positive example of different speeds at work in the WTO system.

The GATS approach to limited application of multilateral rules is another example. The national treatment provisions in the GATS, for example, do not cover all service trades.\textsuperscript{901} WTO Members were required to indicate in their schedules of commitment, the services that they wanted to be covered under the national treatment provisions of the GATS and the limitations that apply.\textsuperscript{902} Some common limitations include the following: nationality or residence requirements with regards to executives; exceptions relating to land ownership by foreign service suppliers; tax exemptions and subsidy injections applicable only to domestic service suppliers; and requirements

\textsuperscript{898} Article III:1 of WTO Agreement.
\textsuperscript{899} http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (viewed on 26 April 2012).
\textsuperscript{900} Ibid.
\textsuperscript{901} Article XVII of the GATS.
\textsuperscript{902} Article XVII of the GATS.
that protect against capital flight – which may oblige some investment in local currency.\textsuperscript{903}

Also, mention must be made of the ‘\textit{GATT a la carte}’ system which had a fair degree of flexibility in that Member States could pick and choose disciplines they wished to be bound by.\textsuperscript{904} This, again, was an example of different speeds as typified by the Tokyo Round Codes that were binding on only those that had acceded to them.\textsuperscript{905} Thus, in comparison to the WTO era, the relative speed with which Rounds of trade negotiations were completed under the GATT was, to a large extent, due to the non-binding nature of some of the agreements. The operation of the non-reciprocity requirement with respect to the special and differential treatment of developing countries also helped a speedier negotiation process\textsuperscript{906} and could be said to be a manifestation of different speeds.

Thus it can be asserted with some confidence that the concept of moving at different speeds is not alien to the GATT/WTO system. If anything, it could be argued that this had been the norm until 1995 when the single undertaking requirement became effective by the entry into force of the WTO Agreement. The WTO may therefore have to ‘read’ the history of EU integration to inspire nostalgia of its own past. At the multilateral level where single undertaking applies, flexibilities like opt-outs or limited applications of some provisions would have to be considered if the WTO is to be delivered from the impasse-prone strictures of its decision-making system.

\textsuperscript{903} Article XVII of the GATS.
\textsuperscript{904} WTO Secretariat, ‘Historic Development of the WTO Dispute Settlement System’, http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_ebt_e/c2s1p1_e.htm (viewed on 05/05/11).
\textsuperscript{905} ibid.
\textsuperscript{906} See Jeffrey J. Schott and Jayashree Watal, op cit. fn.292.
The current state of the EU institutional structure and its decision-making system is considered in the next segment of the chapter.

6.2 The EU Institutional Structure after Lisbon

The decision-making procedures in the EU is a feature of its institutional structure. Hence to talk about the EU’s institutional structure would by extension result in talking about powers of decision-making in the EU institutions or organs. The Treaty of Lisbon produced two Treaties – the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The TEU sets out the broad principles that govern the internal and external workings of the EU while the TFEU “organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences”.

The determination and delimitation of areas of competence in foundational to decision-making in the EU as these show where the Treaties empower EU institutions to wield either exclusive competence or shared competence with the Member States. In the areas where the EU has exclusive competence, Member States cannot legislate, except if so empowered by the EU or for the purpose of implementing EU law. Where there is shared competence in an area, both the EU and its Member States can legislate and adopt legally binding acts but with the proviso that Member States can only legislate if the EU has not already legislated or has ceased from legislating on the matter at issue. The exclusive and shared competence arrangements work under

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907 Article 1:1 TFEU.  
908 Article 2:1 TFEU.  
909 Article 2:2 TFEU.
three higher principles established under Article 5 TEU – the principle of conferral, the principle of subsidiarity, and the principle of proportionality.

Under the principle of conferral, the EU is only empowered to act within the limits that Member States have conferred upon it in the Treaties for the purpose of attaining the objectives of the Treaties.\(^{910}\) The principle of subsidiarity is most relevant in the area of shared competence. The EU is bound under this principle to:

... act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.\(^{911}\)

The principle of proportionality provides that the EU shall, with respect to the content and form of its actions, not exceed what is necessary to achieve the objectives of the Treaties.\(^{912}\) To ensure compliance with the principles of subsidiarity and proportionality, there is an attached Protocol\(^{913}\) to the Treaty of Lisbon giving more provisions on how these principles ought to work. The Commission is for instance obliged to consult widely before proposing legislative acts.\(^{914}\) Such consultations are, where appropriate, to take into account the regional and local dimension of the envisaged action.\(^{915}\) National Parliaments have also been given a role in scrutinizing proposed EU legislation to make sure they comply with the principles of subsidiarity

\(^{910}\) Article 5:2 TEU.  
\(^{911}\) Article 5:3 TEU.  
\(^{912}\) Article 5:4 TEU.  
\(^{913}\) Protocol on the Application of the Principles of Subsidiarity and Proportionality.  
\(^{914}\) Article 2 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality.  
\(^{915}\) Ibid.
and proportionality. The Commission is thus to “forward its draft legislative acts and its amended drafts to national Parliaments at the same time as to the Union legislator”. The Union legislative institutions are bound in similar fashion as the Commission. The compliance rules also require that draft legislative acts contain detailed statements that will allow appraisal of compliance with the principles of subsidiarity and proportionality.

The compliance rules have evidently been put in place to ensure the protection of Member States’ sovereignty. They also show that sovereignty is not only expressed in the refusal to cede away competences that hitherto lay in the national domain, but that when such competences have been ceded to inter-governmental and supra-national institutions, there can still be mechanisms to safeguard against their abuse.

Another important consideration in decision-making in the EU is the Treaties’ provisions on enhanced cooperation. Enhanced cooperation is the formal Treaty competence for the operation of the different speeds approach in EU integration. It allows Member States who wish to proceed with more enhanced cooperation between themselves to do so but this is restricted to the areas where the EU does not have exclusive competence. Decisions flowing from enhanced cooperation are binding only on the participating States. Though non-participating states may partake in the deliberative process of decision-making, they are not allowed to vote.

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916 Article 4 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality.
917 Ibid.
918 Article 5 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality.
919 Article 20 TEU.
920 Article 20:1 TEU.
921 Article 20:4 TEU.
922 Article 20:3 TEU.
The above discussed principles that underpin decision-making in the EU were not introduced by the Treaty of Lisbon, but are in fact survivals from previous EC/EU Treaties. One of the major institutional reforms ushered in by the Treaty of Lisbon was the abolishing of the three pillar structure that was introduced by the Maastricht Treaty. There is now a single pillar – the EU – which is imbued with legal personality.\textsuperscript{923}

6.2 EU Institutions and Decision-Making

Like the principles of subsidiarity and proportionality discussed above, the EU institutions provided for by the Treaty of Lisbon are not new. Article 13 TEU provides for seven EU institutions – the European Council, European Parliament, the Council, European Commission, Court of Justice of the European Union, European Central Bank, and the Court of Auditors.

The discussion on this segment of decision-making in the EU will focus on the institutions that contribute to policy formulation and legislative decision-making – i.e. the European Council, European Parliament, the Council, and the European Commission (or Commission).

6.3 The European Council

The European Council, an intergovernmental body composed of the Heads of State or Government of all EU Member States,\textsuperscript{924} was accorded official status as an institution of the EU for the first time under the Treaty of Lisbon.\textsuperscript{925} Though it has been operative since 1974 providing political leadership to the EEC/EU integration process...

\textsuperscript{923} Article 47: TEU.
\textsuperscript{924} Article 15:2 TEU.
\textsuperscript{925} Article 13 TEU.
at the level of Heads of State and Governments of Member States, it was not officially recognised as an EU institution. The SEA however gave it an official recognition though it was still not imbued with Treaty competence as an institution of the EU.\footnote{Article 2 SEA.}

Apart from the Heads of State or Governments of Member States, the President of the European Council and the President of the Commission are members of the European Council.\footnote{Article 15:2 TEU.} Though the position of President of the European Council is not new, the Treaty of Lisbon has reformed this by making the President’s position permanent.\footnote{Article 15:5-6 TEU.} Previously, this position was held by Heads of State or Governments of Member States on a six-month rotational basis. Now, the President of the European Council is elected for a two-and-half-year term and is eligible for re-election for a second term after the expiry of the first term.\footnote{Ibid.} The maximum term of office is thus five years. The President is also not to hold any national office. The High Representative of the European Union responsible for Foreign Affairs and Security Policy is empowered under Article 15:2 TEU to take part in the work of the European Council though she is not a composing member.

The European Council meets twice every six months\footnote{Article 15:3 TEU.} and where the TEU and TFEU have not specifically provided, its decisions are taken by consensus.\footnote{Article 15:4 TEU.} However, when it comes to issues with respect to Common Foreign and Security Policy, the norm for decision-making is unanimity, except the TEU or TFEU requires
otherwise.\textsuperscript{932} Apart from decision-making by consensus and unanimity, the TEU and TFEU provide for two other forms of decision-making in the European Council – i.e. decision-making by qualified majority vote\textsuperscript{933} and simple majority.\textsuperscript{934}

Though it does not have legislative powers, its political leadership has been crucial in the development of the EU especially during the various intergovernmental meetings that have led to changes in the EU Treaties.\textsuperscript{935} The political leadership of the European Council was notably crucial in thawing the stalemate that plagued ratification of the Treaty of Lisbon. Article 15:1 TEU provides that: “[T]he European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof.”\textsuperscript{936} The lack of legislative competence however, does not mean that the European Council does not wield decision-making powers. For example, pursuant to Article 16:6 TEU, the Council, with respect to foreign affairs, is to elaborate the EU’s external action based on guidelines laid down by the European Council. In matters relating to Common Foreign and Security Policy, if decision-making in the Council results in a stalemate, the Council may refer the matter to the European Council for it to decide by unanimity.\textsuperscript{937} The European Council thus serves as a vital political forum for brokering agreements. One would expect that if the Council fails to reach agreement by qualified majority on a Common Foreign and Security Policy issue, requiring the European Council to decide on the matter by unanimity would exacerbate the stalemate. If qualified majority voting failed to produce a result, logically, unanimity

\textsuperscript{932} Article 24:1 TEU.  
\textsuperscript{933} e.g. Article 15:5 TEU.  
\textsuperscript{934} e.g. Article 48:3 TEU.  
\textsuperscript{936} Article 15:1 TEU.  
\textsuperscript{937} Article 31:2 TEU.
on the same matter would seem impossible. However, because the European Council is expected to provide impetus for development and political direction to the EU, it is expected to be a forum where these objectives would be concretised into decision-making. It is therefore not surprising that the TEU accords the European Council a pivotal role in decision-making regarding the revision of the Treaty.\textsuperscript{938}

Also, in provisions with respect to Common Foreign and Security Policy\textsuperscript{939} and Common Security and Defence Policy\textsuperscript{940} the European Council and the Council virtually dominate the decision-making processes. The European Council is thus more active in sensitive areas that touch on the sovereignty of Member States. As has been discussed in the first segment of the chapter, the ascendency of inter-governmentalism over supra-nationalism becomes more evident in sensitive areas of national sovereignty, hence necessitating the predominance of intergovernmental institutions and processes in the decision-making requirements.

Under Article 7:2 TEU the European Council can determine by unanimity that there is a serious and persistent breach of the values of the EU by a Member State. Based on the determination of the European Council, the Council can, by a qualified majority vote, suspend certain rights of the said member (e.g. voting rights). Also, at the initiative of the European Parliament, and with the consent of the Parliament, the European Council can, by unanimity, adopt a decision on the composition of the

\textsuperscript{938} Article 48 TEU.
\textsuperscript{939} Articles 21 to 41 TEU.
\textsuperscript{940} Articles 42 to 47 TEU.
European Parliament.\textsuperscript{941} This same power of the European Council applies to determination of the Commission’s composition.\textsuperscript{942}

It is obvious from the above that the European Council is vested with strategic powers of decision-making that, though not legislative in nature, are crucial to the functioning of the EU. Apart from providing the general impetus for development and political direction to the EU, the role of the European Council in decision-making is felt more in institutional issues like decisions regarding the composition of the European Parliament or the Commission,\textsuperscript{943} in decision-making on provisions that fall under the Common Foreign and Security Policy,\textsuperscript{944} and on the Common Security and Defence Policy,\textsuperscript{945} and in decisions on reform of the TEU and TFEU.\textsuperscript{946}

It must also be noted that as a body mostly composed of Heads of State or Governments of Member States, these leaders can influence EU legislation through the Council. The Council is composed of ministers from Member State governments.\textsuperscript{947} These ministers, at the national level, are subordinate to their respective Heads of State or Governments. It is therefore not to be expected that when they operate at the European level, they do so independently of the wishes of their national superiors who also compose the European Council. Article 16:2 TEU, for example provides that: “The Council shall consist of a representative of each Member State at the ministerial level, who may commit the government of the Member State in question and cast its vote”. It is inconceivable that ministers would commit their

\textsuperscript{941} Article 14:2 TEU.
\textsuperscript{942} Article 17:7 TEU.
\textsuperscript{943} Articles 14:2 and 17:7 TEU.
\textsuperscript{944} Articles 21 to 41 TEU.
\textsuperscript{945} Article 42:2 TEU.
\textsuperscript{946} Article 48 TEU.
\textsuperscript{947} Article 16:2 TEU.
governments without the Heads of Government or State having a say in the matter at the national level. As was mentioned above, in the Luxembourg Accord, President De Gaulle’s insistence on the use of unanimity in the Council when important national interests were at stake was in part due to his intergovernmental interests as against the building of supranational systems that Member States did not control over.\footnote{948} Thus, as an intergovernmental legislative institution, the positions that Member State ministers take in the Council would logically be in consonance with the preferences of their superiors who sit in the European Council. Unlike, the Commission that is under a Treaty obligation to act independently from any national or other influence, the Council is not so obliged.\footnote{949}

When examined in the context of the organs of the WTO (in terms of its composition), there is no organ that is comparable to the European Council. The highest decision-making body – the Ministerial Conference – is composed of ministerial level representatives of Member States. However, the inter-governmental nature of the European Council is synonymous with the decision-making organs of the WTO – i.e. the Ministerial Conference and the General Council.

Beside its constitution at the level of Heads of State or Governments of Member States, the European Council, in terms of its Treaty competence of providing political leadership and impetus for development, operates like the Ministerial Conference of the WTO. Though the Ministerial Conference is the highest decision-making body of the WTO, it delegates most of its powers to the General Council which meets more frequently. The bi-annual meetings of the Ministerial Conference thus serve more as

\footnote{948}{Paul Taylor, op cit. fn.833.} \footnote{949}{Article 17.3 TEU.}
political leadership meetings that set the agenda for WTO action at the level of the General Council and the other subordinate committees.

The European Council also shares similarities with the WTO decision-making organs in terms decision-making procedures like the use of consensus and unanimity. As with the WTO decision-making organs, sovereign equality is secured by the direct representation of all Member States in the European Council. Independent of size or might, each EU Member State has only one representative at the European Council and when decisions are made by consensus, unanimity, or simple majority, each Member State exercises a single vote. The situation with sovereign equality is however different when decisions are taken by qualified majority voting. Here, the Member States with bigger populations have a greater say as weighted votes are based on population demographics.

Though at the formal level it is expected that the use of consensus, unanimity and simple majority vote will ensure equality in decision-making in the European Council, the situation at the informal level is quite different. Jonas Talberg observes that:

A large home market makes a state more influential in economic negotiations, military capabilities enable a state to exercise leadership in the EU’s foreign and security policy and population size grants voice in an EU conceiving of itself as a democratic community. (…)

As a result, the interests of the larger Member States tend to set the framework for European Council negotiations. Where the interests of France, Germany and the UK conflict, they nevertheless set the terms within which agreements
must be sought. Where these states see eye-to-eye on an issue, or even have arrived at pre-agreements, it is extremely difficult to achieve outcomes that diverge from this position.  

Consequently, in spite of the formal provisions, the realities of superior leverage are brought to bear on decision-making in the European Council. This is very similar to what pertains in WTO decision-making where, in spite of the formal provisions on equality, the countries with superior economic leverage are able to exert more influence in decision-making. Informal superior vetoes thus exist in the European Council as they do in the WTO system where consensus among the Quad members is usually deemed crucial for progressing with decisions.  

6.4 The European Commission

As discussed in the first segment of this chapter, the Commission is one of the four initial institutions created at the genesis of the EU integration process. The Commission has retained its supra-national status from the ECSC through to the outcome of the Treaty of Lisbon. Currently, each Member State of the EU provides one Commissioner each for appointment. The process leading to the constitution of the Commission starts with the European Council proposing a President for the Commission by a qualified majority vote. The proposed candidate for the presidency of the Commission is then subjected a simple majority vote in the

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951 Pieter Jan Kuijper, op cit. fn.458.
953 Article 17:7 TEU.
If elected, the Council, acting by common accord with the President, adopt a list of Commissioners proposed by Member States. The High Representative of the Union for Foreign Affairs and Security Policy is also a member of the Commission and is appointed by the European Council acting by a qualified majority vote and with the Agreement of the President of the Commission. Since each Member State selects one Commissioner, there are 27 Commissioners, including the President and the High Representative of the Union for Foreign Affairs and Security Policy. The Commissioners operate as a college and are thus subjected to a collective vote of consent by the European Parliament before finally being appointed by a qualified majority vote by the European Council.

The procedure for composing and appointing the Commission is a very winding and cumbersome one, but given the powers accorded to it by the Treaties, and the fact that it operates as a supranational body, it stands to reason that the Member States, acting through the Council and the topmost intergovernmental body – the European Council – have a lot of say in the appointment process. The European Parliament, which is directly elected by EU citizens, also exercises a significant influence in the appointment process. In fact, the TEU makes the Commission responsible to the European Parliament by providing that:

The Commission, as a body, shall be responsible to the European Parliament.

… the European Parliament may vote on a motion of censure of the Commission. If such a motion is carried, the members of the Commission shall resign as a body and the High Representative of the Union for Foreign

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954 Article 17:7 TEU.
955 ibid.
956 ibid.
Affairs and Security Policy shall resign from the duties that he carries out in the Commission.\textsuperscript{957}

The Commission operates like the executive arm of government in national systems backed by specialised ministries or the civil service.\textsuperscript{958} It is made up of departments that are called Directorates-General.\textsuperscript{959} The Directorates-Generals (D-Gs) are divided into specialised departments responsible for different policy areas that fall within the ambit of EU competence as provided for in the Treaties.\textsuperscript{960}

The powers of the Commissions as provided under Article 17 TEU include promotion of the general interest of the EU, ensuring the application of the Treaties and EU law, overseeing the application of EU law under the Control of the European Court of Justice, executing the EU budget and managing programmes, and exercising coordinating, executive and management functions as laid down in the Treaties.\textsuperscript{961}

Other functions under Article 17 TEU are ensuring the EU’s external representation\textsuperscript{962} and achieving inter-institutional agreements through initiation of the EU’s annual and

\textsuperscript{957} Article 17:8 TEU.
\textsuperscript{958} Damian Chalmers, \textit{et al}, op cit. fn.879.
\textsuperscript{959} ibid.
\textsuperscript{960} The following are the various D-Gs in the Commission – Agriculture and Rural Development (AGRI); Budget (BUDG); Climate Action (CLIMA); Communication (COMM); Competition (COMP); Economic and Financial Affairs (ECFIN); Education and Culture (EAC); Employment, Social Affairs and Inclusion (EMPL); Energy (ENER); Enlargement (ELARG); Enterprise and Industry (ENTR); Environment (ENV); EuropeAid Development & Cooperation (DEVCO); Eurostat (ESTAT); Foreign Policy Instruments Service (EEAS); Health and Consumers (SANCO); Home Affairs (HOME); Humanitarian Aid (ECHO); Human Resources and Security (HR); Informatics (DIGIT); Information Society and Media (INFSO); Internal Market and Services (MARKT); Interpretation (SCIC); Joint Research Centre (JRC); Justice (JUST); Maritime Affairs and Fisheries (MARE); Mobility and Transport (MOVE); Regional Policy (REGIO); Research and Innovation (RTD); Secretariat-General (SG); Taxation and Customs Union (TAXUD); Trade (TRADE); Translation (DGT).
\textsuperscript{961} Article 17:1 TEU.
\textsuperscript{962} With the exception of the common foreign and security policy and other cases provided for in the Treaties.
multiannual programming. In exercising its functions, the Commission is required to be ‘completely independent’. Members of the Commission are therefore not to seek nor take instructions from any government, institution, body, office, or entity.

One of the most important powers of the Commission is that of legislative initiative. Article 17:2 provides that: “Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise.” This gives the Commission a virtual monopoly over legislative initiative. However, as will be discussed below, the Council is empowered to require the Commission to undertake studies and present proposals. When acting under this provision, though it is eventually the task of the Commission to submit the proposal requested by the Council, it is, in actual fact, the Council that initiates the whole process by requesting the Commission to submit a proposal. Article 225 TFEU also empowers the European Parliament in similar fashion to request the Commission to submit legislative proposals when it considers that an EU act is needed to implement the Treaties.

The role that the Commission plays in the EU legislative process is not restricted to initiating legislation, but also in the implementation of legislation. As stated above, one of the powers accorded to the Commission is that of ensuring and overseeing the application of the Treaties and EU law. In the process of implementing EU law, the Commission is empowered to adopt measures akin to delegated legislation. In this regard, Article 291 TFEU provides that: “Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers

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963 Article 17:1 TEU  
964 Article 17:3  
965 ibid  
966 Article 241 TFEU  
967 Article 291.2 TFEU
on the Commission (…)”. The power of the Commission to adopt implementing measures is however significantly circumscribed by the involvement of various committees that represent Member States. The process of involvement of committees in the Commission’s implementing powers is called comitology. New rules regarding how national representatives in committees control adoption of implementing measures by the Commission were passed by the European Parliament and the Council on February 4 2011. Under the new Regulation, there are two main procedures in the comitology process that control the use of the Commission’s implementing powers – i.e. the examination procedure and the advisory procedure.

The examination procedure is used when the Commission is adopting implementing measures that have either a general scope or specific measures that have potentially important impacts in areas like agriculture, fisheries, environment, health, trade, and taxation. Implementing measures under this procedure, if rejected by a qualified majority of the relevant committee representing Member States, will not be adopted. If a proposed measure is rejected, the Commission can either amend the proposed measure and resubmit it or forward the rejected measure to an appeal committee for consideration.

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968 Article 291:2 TFEU.
970 Regulation of the European Parliament and the Council, PE-CONS 64/10.
972 Ibid.
973 Ibid.
974 Ibid.
The advisory procedure is used in less sensitive areas like an individual measure in the field of culture.\textsuperscript{975} The Commission under this procedure “must take the utmost account of the committee’s opinions, which are adopted by a simple majority.”\textsuperscript{976}

Evidently, the main aim of the comitology system is to protect national interests and to ensure that the delegated legislation powers of the Commission do not exceed the confines imposed by the legislative bodies – the European Parliament and the Council. The safeguards to prevent abuse of the Commission’s implementing powers are further tightened by the ability of both the European Parliament and the Council to scrutinise the process leading to the adoption of an implementing measure.\textsuperscript{977} The European Parliament or the Council could thus inform the Commission that a proposed implementing measure exceeds the power conferred on it. If this happens the Commission will have to amend or withdraw the proposed measure.\textsuperscript{978}

The Commission’s role in ensuring and overseeing the application of the Treaties and EU law is not restricted to delegated legislation as it has a judicial component. Pursuant to Article 258 TFEU, the Commission is empowered to deliver a reasoned opinion it finds that a Member State of the EU has failed to fulfil its obligations under the Treaties. The Member State at issue is obliged to comply with the Commission’s opinion after being given the opportunity to respond to the Commission’s opinion.\textsuperscript{979} The Commission is empowered to initiate legal action against the State in question at the Court of Justice if it fails to comply with the Commission’s opinion within a

\footnotesize{\textsuperscript{975} Council of the European Union, op cit. fn.971.  
\textsuperscript{976} ibid.  
\textsuperscript{977} ibid.  
\textsuperscript{978} ibid.  
\textsuperscript{979} Article 258 TFEU.}
This Treaty competence given to the Commission makes it the guardian of the Treaties. In *Commission v Germany* [2003] the Court of Justice held that:

The Commission’s function, in the general interest of the Community, is to ensure that the Member States give effect to the Treaty and the provisions adopted by the institutions thereunder and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end. Given its role as guardian of the Treaty, the Commission alone is competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations and to determine the conduct or omission attributable to the Member State concerned on the basis of which those provisions should be brought.

While the Commission has power to initiate action against a Member State, it can also bring action against the Council and the European Parliament:

… on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Member States, and the other institutions of the EU have the same Treaty competence under Article 263.

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980 Article 258 TFEU.
981 Joined Cases C-20/01 and C-28/01 *Commission v Germany* [2003] ECR I-3609.
982 Ibid paras. 29-30.
983 Article 263 TFEU.
Apart from the official EU institutions and other bodies that are involved in the decision-making processes of the Commission, Article 11:1 TEU obliges the institutions of the EU to, “by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action”. EU institutions are, in this regard, to maintain open, transparent and regular dialogue with civil society and representative associations.  

As the EU institution tasked with the main powers of legislative initiative, the Commission’s role in engaging with civil society and representative associations is very crucial. Pursuant to Article 11:3 TEU, the Commission is to carry out broad consultations with parties concerned so as to achieve coherence and transparency in the actions of the EU. The Commission, in compliance with this Treaty provision, maintains a website – Your Voice in Europe – where it solicits the opinions of civil society and representative associations through consultations. Discussions with civil society also takes place on online social networks like Facebook, Twitter, Flicker, and Youtube. This forms part of the its Interactive Policy Making initiative. According to the Commission:

The objective of the Interactive Policy Making (IPM) initiative is to use modern technologies, particularly the Internet, to allow both Member State administrations and EU institutions to understand the needs of citizens and enterprises better. It is intended to assist policy development by allowing more rapid and targeted responses to emerging issues and problems, improving the

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984 Article 11:2 TEU.
986 See http://europa.eu/take-part/social-media/index_en.htm#0 for a full list of the EU institutions’ engagement with civil society using online social networks. (viewed 4 April 2012).
assessment of the impact of policies (or the absence of them) and providing greater accountability to citizens.\textsuperscript{987}

The Treaty of Lisbon has also given EU citizens a measure of power to initiate legislation.\textsuperscript{988} Pursuant to Article 11:4 TEU, at least, one million EU citizens from a significant number of Member States “may take the initiative of inviting the European Commission,” operating within the ambit of its powers, to submit proposals on matters that they consider EU legislation is necessary for implementing the Treaties.\textsuperscript{989}

In spite of the Treaty provisions on the independence of the Commission and its evident supranational powers, it is obvious that there are important checks and balances built into the powers of the Commission to ensure accountability to Member States and EU citizens through various roles played by committees, the European Parliament, the Council and EU citizens.

In comparison to the WTO institutional structure, the institution that would have been most similar to the Commission is the WTO Secretariat. However, lacking supranational executive powers, the WTO Secretariat’s similarity to the Commission would only lie in purely administrative functions and the fact that Secretariat staff, including the Director General, are supposed to be independent of any national or other influence in the discharge of their duties.\textsuperscript{990} Thus in terms of an institution vested with executive and supranational powers, the WTO does not have a body akin

\textsuperscript{987} http://ec.europa.eu/yourvoice/ipm/index_en.htm (viewed 4 April 2012).
\textsuperscript{988} Article 11:4 TEU.
\textsuperscript{989} ibid.
\textsuperscript{990} Article VI:4 of the WTO Agreement.
to the Commission. Bemoaning the lack of empowerment of the Director General of the WTO and the very passive nature of the Secretariat, the Sutherland Report observed that the role of the Director General has been reduced to that of a marketing executive of the WTO.\textsuperscript{991} It thus proposed a role for the Secretariat that would make it a “Guardian of the Treaties”.\textsuperscript{992} The same title – i.e. ‘guardian of the Treaty’ – was used by the European Court of Justice in its ruling in \textit{Commission v Germany} which was quoted above. The Court of Justice however used this title in reference to the Commission’s supranational powers – i.e. making a determination that a Member State was in breach of EU law and initiating infringement actions against it. Thus in calling for more empowerment of the Director General and Secretariat of the WTO, and making them proper ‘Guardians of the Treaty’ the implications may be two fold – either imbuing them with supranational powers to be able to play a more proactive role like proposing new WTO regulations\textsuperscript{993} or giving them a position short of supranational powers but active enough to contribute positively in areas like trade negotiations where brokering consensus among Member States would be needed. The latter position seems to be the preferred option of the Sutherland Report.\textsuperscript{994}

If a smaller deliberative body is established in the WTO, it could operate in similar fashion as the Commission, with respect to legislative initiative. As was discussed in chapter three, the Green Room has informally filled the vacuum that has been left by the absence of a smaller deliberative or executive-like body in the WTO. The informal legislative initiative role sometimes played by the Green Room process may look like

\textsuperscript{991} Peter D. Sutherland \textit{et al}, op cit. fn.19, at 18.
\textsuperscript{992} ibid p.73.
\textsuperscript{994} Peter D. Sutherland \textit{et al}, op cit. fn.19, at 18.
the similar role played by the Commission. However, while the Commission is a formal body, the Green Room process is not. Participants of the Green Room do not reflect the entire membership of the WTO and if a policy initiative comes from the Green Room, or from other informal sources like issue groups, there are no structures in place, like the comitology system, to ensure that these policy initiative have been scrutinised by national representatives or other recognised representative bodies.

In the previous chapter, it was realised that in the IMF, though the Executive Board fulfils the need for a smaller body in the decision-making process, the use of weighted votes and the restricted right of representation by Members with smaller subscription quotas meant that that bigger economies have a greater say and representation. Also, the Executive Board, which oversees the running of the IMF and is given wide decision-making powers due to delegation from the Board of Governors. In the WTO, the need for a smaller body can take some inspiration from the operation of both the Commission and the Executive Board of the IMF. The use of the constituency system of representation in the Executive Board can be borrowed into the WTO system, albeit with due regard placed on a composition that is reflective of membership, geographical distribution, population demographics, and contribution to international trade. The Commission’s role in initiating legislation can be borrowed into this smaller body in the WTO which could be required to act by consensus so as to safeguard smaller states whose smaller population or contribution to international trade may find them in relatively more crowded constituencies. Representatives of the Constituencies would be expected to consult with their constituencies but would also be given some freedom to negotiate and strike bargains with the mandate given by their constituencies. The process of consulting with constituencies would prevent the
occurrence of renegade representations. This would be similar to the comitology system in the Commission where implementing measures are subject to some control by national representatives. The constituency members will be like the comitology and their representatives like the Commissioners.

Thus this constituency based body could be given non-exclusive, but greater, powers of legislative initiative (like the Commission) that will be subject to acceptance by the decision-making bodies – the Ministerial Council or the General Council.

6.5 The Council

The Council, like the Commission, is one of the initial four institutions brought into being by the ECSC. It is composed of ministerial representatives of EU Member States. Each Member State is represented by a minister in a Council meeting. Though the Council is a single EU institution, it is configured in a way that allows ministers responsible for different policy areas in their national governments to represent their states when legislation is being passed in their sectors of expertise. Consequently there are ten Councils responsible for different policy sectors and if any of these Councils meet to pass legislation, it will still be a meeting of the Council as an EU institution. The Council is a co-legislator with the European Parliament on majority of issues in the EU. There is thus a form of bicameral legislature in the EU law making process with the members of the Council representing the Member States and

995 General Affairs; Foreign Affairs; Economic and Financial Affairs; Justice and Home Affairs (JHA); Employment, Social Policy, Health and Consumer Affairs; Competitiveness (internal market, industry, research and space); Transport, Telecommunications and Energy; Agriculture and Fisheries; and Environment, Education, Youth, Culture and Sport.
the European Parliament directly elected by EU citizens and as such representing their electorates. The Council meets at least once a month.998

There are three main formal procedures of decision-making in the Council – decisions taken by simple majority, by unanimity, and by qualified majority. Pursuant to Article 240:3 TFEU, decisions on procedural matters and adoption of Rules of Procedure of the Council are taken by simple majority vote. The simple majority vote is also used in situations where the Council requests the Commission to undertake studies and submit proposals to it.999 This power of the Council can be used for legislative initiative. In this sense though legislative initiative is one of the core functions of the Commission, it does not wield an absolute monopoly in this domain. By requesting the Commission to undertake studies and submit proposals, the Council is in fact initiating legislation. This is more so as the Commission, failing to submit a requested proposal, is obliged to give reasons to the Council.1000

The Council votes on unanimity, mostly, on matters that Member States consider very sensitive – for example, security, foreign affairs and taxation – and thus want their interests to be fully represented without the possibility of being outvoted.1001 When decisions in the Council are taken by simple majority and unanimity there is formal equality among members as votes are not weighted. A one-member-one-vote policy prevails. Equality is even more enhanced where unanimity applies.

999 Article 241 TFEU.
1000 ibid.
Article 16:3 provides that: “The Council shall act by a qualified majority except where the Treaties provide otherwise”. Pursuant to this provision, the normal procedure for decision-making in the Council is qualified majority voting. Currently, under the formula in place, a qualified majority is a minimum of 255 weighted votes out of a total of 345 (i.e. 74 per cent).\(^{1002}\) This must be matched by a majority of Council members, in cases where the Council is adopting an Act based on the Commission’s proposal.\(^{1003}\) If an Act by the Council is not based on a proposal from the Commission qualified majority is defined as 255 weighted votes plus two-thirds of Council members.\(^{1004}\) A Member State may also request for confirmation that the votes in favour of a decision represents, at least, 62 per cent of the total population of the EU.\(^{1005}\)

After a transitional period that expires on 30 October 2014 (i.e. from 1 November 2014), the minimum requirement for decision-making under the qualified majority system is 55 per cent of Council members (i.e. 15 members) comprising 65 per cent of the population of the EU.\(^{1006}\) A blocking minority must consist of at least four Council members\(^{1007}\) representing more than 35 per cent of the total population of Member States.\(^{1008}\) In situations where the Council is not acting based on a proposal from the Commission, qualified majority is defined as at least 72 per cent of Council members representing at least 65 per cent of the total population of Member States.\(^{1009}\) However, pursuant to Article 3:2 of the Protocol on Transitional Provisions

\(^{1002}\) Article 3:3 of the Protocol (No. 36) on Transitional Provisions.  
\(^{1003}\) ibid.  
\(^{1004}\) ibid.  
\(^{1005}\) ibid.  
\(^{1006}\) Article 16:4 TEU.  
\(^{1007}\) ibid.  
\(^{1008}\) Article 238:3(a) TFEU.  
\(^{1009}\) Article 258:3(b) TFEU.
attached to the Treaty of Lisbon, between 1 November 2014 and 31 March 2017, a member of the Council can request that a decision be taken using the current weighted voting system.

The new configuration of qualified majority was introduced by the Treaty of Lisbon to reflect a double majority – i.e. a majority of EU population and a majority of Member States. The double majority vote system has been introduced to forestall a situation where a few Member States with large population sizes can carry through decisions without the agreement of majority of the Member States. There is thus a measure of sovereign equality carved into the requirement for majority in terms of EU population to be matched by a majority of Member States. Democracy based purely on population is thus tempered by sovereignty.

It must be noted that though the current weighted votes in the Council are based on population, they are not a direct statistical reflection of a Member’s actual population size. The table below shows the population sizes and weighted votes accorded to EU Member States.

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Table 6.1 – Population size of Member States in 2011\textsuperscript{1011} and weighted votes for each Member State in the Council\textsuperscript{1012}

<table>
<thead>
<tr>
<th>Country</th>
<th>Population</th>
<th>Weighted Vote</th>
</tr>
</thead>
<tbody>
<tr>
<td>Germany</td>
<td>81,751,602</td>
<td>29</td>
</tr>
<tr>
<td>France</td>
<td>65,048,412</td>
<td>29</td>
</tr>
<tr>
<td>Italy</td>
<td>60,626,442</td>
<td>29</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>62,435,709</td>
<td>29</td>
</tr>
<tr>
<td>Spain</td>
<td>46,152,926</td>
<td>27</td>
</tr>
<tr>
<td>Poland</td>
<td>38,200,037</td>
<td>27</td>
</tr>
<tr>
<td>Romania</td>
<td>21,413,815</td>
<td>14</td>
</tr>
<tr>
<td>Netherlands</td>
<td>16,655,799</td>
<td>13</td>
</tr>
<tr>
<td>Belgium</td>
<td>10,951,266</td>
<td>12</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>10,532,770</td>
<td>12</td>
</tr>
<tr>
<td>Greece</td>
<td>11,309,885</td>
<td>12</td>
</tr>
<tr>
<td>Hungary</td>
<td>9,985,722</td>
<td>12</td>
</tr>
<tr>
<td>Portugal</td>
<td>10,636,979</td>
<td>12</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>7,504,868</td>
<td>10</td>
</tr>
<tr>
<td>Austria</td>
<td>8,404,252</td>
<td>10</td>
</tr>
<tr>
<td>Sweden</td>
<td>9,415,570</td>
<td>10</td>
</tr>
<tr>
<td>Denmark</td>
<td>5,560,628</td>
<td>7</td>
</tr>
<tr>
<td>Ireland</td>
<td>4,480,858</td>
<td>7</td>
</tr>
<tr>
<td>Lithuania</td>
<td>3,244,601</td>
<td>7</td>
</tr>
<tr>
<td>Slovakia</td>
<td>5,435,273</td>
<td>7</td>
</tr>
<tr>
<td>Finland</td>
<td>5,375,276</td>
<td>7</td>
</tr>
<tr>
<td>Estonia</td>
<td>1,340,194</td>
<td>4</td>
</tr>
<tr>
<td>Cyprus</td>
<td>804,435</td>
<td>4</td>
</tr>
<tr>
<td>Latvia</td>
<td>2,229,641</td>
<td>4</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>511,840</td>
<td>4</td>
</tr>
<tr>
<td>Slovenia</td>
<td>2,050,189</td>
<td>4</td>
</tr>
<tr>
<td>Malta</td>
<td>417,617</td>
<td>3</td>
</tr>
</tbody>
</table>

The table above shows that the weighting of votes is not a mirror image reflection of population size. Hence, unlike the IMF where a Member’s quota subscription equates to its weighted vote, the same cannot be said of the population based weighting of votes in the Council. Though Germany’s population is 16.7 million more than France, 19.3 million more than the UK, and 21.1 million more than Italy, they all have a


\textsuperscript{1012} Article 3:3 of the Protocol (No. 36) on Transitional Provisions.
weighted vote of 29. Perhaps the greatest anomaly in the weighting system is the votes accorded to Poland. Germany’s population is 43.5 million more than that of Poland (i.e. more than double) and yet Poland has just 2 votes less than Germany. Evidently, the weighted votes are more the outcome of negotiations and political bargaining rather than a depiction of population size. When the new formula for the qualified majority system becomes effective (tentatively) from 1 November 2014, the anomalies in the individual weighted votes of Member States will dealt with as the new system gives more credence to actual population as against the use of an arbitrary negotiated figure to reflect population size.

However, in spite of the use of qualified majority voting in the Council and the impact the weighted votes have in this process, there is evidence that members of the Council are able to achieve unanimous support for decisions 80 per cent of the time hence discounting the need for a vote. The resort to voting thus occurs on only 20 per cent occasions of decision-making in the Council. There 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. Stéphanie Novak thus 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

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1016 ibid.
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.\textsuperscript{1017}

With representation from Member States at the ministerial level and having legislative powers the Council on the face value resembles the WTO Ministerial Council. However, looking at the active role it plays in decision-making and the frequency of its meetings, the Council is, in function, more akin to the General Council of the WTO. With the Ministerial Conference meeting on a bi-annual basis, its meetings serve more as political leadership and guidance to the WTO hence making it more similar to the European Council. The WTO system has no bicameral system of decision-making where the decisions taken by one body will have to be decided on again by another body. Delegation of powers from the Ministerial Conference to the General Council means that it operates in the stead of the Ministerial Conference.

In terms of decision-making procedures, the informal use of consensus in the Council is similar to the formal use of consensus in the General Council of the WTO. However, the fact that on about 20 per cent of occasions the Council resorts to voting,

shows that when consensus fails, the medium of voting is a ready tool for arriving at decisions. The predominance of the use of consensus in the General Council and Ministerial Conference in spite of the fact that there is Treaty competence to resort to voting is one of the problems identified in the WTO decision-making system in chapter three. The flexibility of the use of consensus and voting in the Council could serve as a good example for the WTO decision-making bodies to soften their stance on the use of consensus and avail themselves of some of the other voting procedures prescribed in the WTO Agreement.

It was also realised in the above sections of this chapter that a lot of committees representing Member States operate in the Council and the Commission and work on the legislative text before it reaches the Ministers sitting in the Council. Though this system has been criticized as being undemocratic they are crucial to achieving consensus in decision-making and ensuring that disagreements that could have occurred at the Council of Ministers level are dealt with at the committee levels. The filtering process that guides the progress of legislation from the proposal stage to the point where it reaches the formal bodies responsible for passing the legislation is very important. As Douglas-Scott observed, about 80 per cent of legislative texts are approved at the committee levels before they reach the members of the Council.

The possible lesson here for the WTO is how to build a formal, transparent, and democratic filtering mechanism to screen proposals from various Members and groups before these proposals reach the decision-making bodies. The smaller deliberative body considered above could serve, not only as a forum for legislative

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1018 Giandomenico Majone, op cit. fn.859.
1019 Sionaidh Douglas-Scott, op cit. fn.815.
initiative, but also as a filtering mechanism for proposals from Members and groups in the WTO.

Weighted votes based on population demographics is typical of qualified majority voting in the Council. If weighted votes based on population is used in the WTO decision-making process, it could present problems as countries like China and India could wield virtual vetoes. The challenge would be how to preserve sovereign equality while still taking due cognisance of population dynamics. Countries like China and India may legitimately argue that in terms of regulatory impact on people, their populations are more affected and as such they should have a bigger say in the decision-making process. Other members like the USA, EU, and Japan may also argue legitimately that they contribute more to international trade and must therefore have a say commensurate to their contribution.

In the WTO setup, the idea of weighted votes based on population would be problematic because unlike the EU where population based weighting of votes is supposed to represent democracy with the EU citizen in mind, in the WTO the intergovernmental nature of its constitution makes stretching democracy beyond the constituting Member States difficult. Whereas the EU has established EU citizenship vested with democratic rights expressed, *inter alia*, through electing of representatives to the European Parliament, a co-legislator with the Council, the WTO does not purport to, directly, represent WTO citizens. The mantra of a member-driven organisation holds sway. As such, democracy may be restricted to participation of states and not the citizens of the state. The voice of the people can only be represented through their government representatives in the WTO decision-making bodies. This
places a lot of responsibilities on governments to ensure that they consult with their constituents before committing the state to obligations at the WTO level. The much touted member-driven nature of the WTO thus comes with democratic responsibilities for members as the views of their respective citizens can only have representation at the WTO level if the governments consult with its citizens and advance the interests of its citizens in the decision-making process.

6.6 The European Parliament

Much has been said about the European Parliament in the discussions above. This subsection will thus not regurgitate the issues already dealt with. Article 14:1 TEU provides that:

The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties.\textsuperscript{1020}

Currently the normal procedure in the EU legislative decision-making is the co-decision procedure (now called the ordinary legislative procedure under the Treaty of Lisbon).\textsuperscript{1021} Under the Treaty of Lisbon there are special legislative processes\textsuperscript{1022} where either the consultation procedure or the consent procedure is used.

\textsuperscript{1020} Article 14:1 TEU.
\textsuperscript{1021} Article 289:1 TFEU.
\textsuperscript{1022} Article 289:2 TFEU.
Under the consultation procedure, the European Parliament is consulted by the Council for its opinion on a legislative or non-legislative proposal. The European Parliament may, in its opinion, approve, reject or propose an amendment but the Council is not legally bound to take the Parliament’s opinion into account in its final decision. The Council is however legally bound to consult the Parliament before taking its decision. Relatively few areas like the internal market, competition law and the Common Foreign and Security Policy fall under the consultation procedure.

The assent procedure introduced by the SEA is now the consent procedure. Like the consultation procedure, it is a special legislative process which requires the consent of the European Parliament before the Council progresses with a decision. The Parliament cannot amend the Council’s proposal but can veto it by refusing to give its consent. An example is Article 7:1 TEU where the Council will require the consent of the European Parliament when determining that there is a clear risk of a serious breach by a Member State of the values espoused by the Treaty.

The members of the European Parliament are elected based on universal adult suffrage by EU citizens. The seats are allocated to Member States based on population size. Currently, Germany has the most number of seats – 99 seats –

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1024 ibid.
1025 ibid.
1026 ibid.
1028 Article 289:2 TFEU.
1029 Jean-Claude Piris, op cit. fn.1027.
1030 Article 14:3 TEU.
followed by France with 74 seats and Italy and the UK with 73 seats. The Member state with the least seats is Malta – 6 seats. The Treaty of Lisbon has maximum and minimum limits with respect to seat allocation to Member States. Under the new rule, no Member State can have more than 96 seats or less than 6 seats. Germany will thus lose 3 seats in the next elections to the European Parliament when the new maximum limit introduced by the Treaty of Lisbon takes effect.

While the Treaty of Lisbon is explicit about the position of the European Parliament as a co-legislator with the Council, it also makes room for national Parliaments to contribute in certain situations to the decision-making process at the European Level. Under 48 TEU, for instance, national Parliaments are included in revision process of the Treaties. The Protocol on the Role of National Parliaments in the European Union also provides that:

Commission consultation documents (green and white papers and communications) shall be forwarded directly by the Commission to national Parliaments upon publication. The Commission shall also forward the annual legislative programme as well as any other instrument of legislative planning or policy to national Parliaments, at the same time as to the European Parliament and the Council.

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1032 Ibid.
1033 Article 14:2 TEU.
1034 Ibid.
1035 Article 1 of the Protocol (No 1) on the Role of National Parliaments in the European Union.
Also, as discussed above, national Parliaments play an important role in scrutinising draft legislations to make sure they comply with the principles of subsidiarity and proportionality.

Compared to the WTO, there is not institution in the WTO that is constituted like the European Parliament. The criticism of democratic deficit in the EU has favoured the increased fortunes of the European Parliament as democratic reforms in the EU have seen it transformed from an advisory body into a fully legislative body. In the WTO, it would be inconceivable to have a body whose members are directly elected by citizens of WTO Member States. As argued above, the member-driven nature of the means that the focus of decision-making is on the participating states and this puts responsibilities on these states to ensure democratic consultations at the national level before committing the state at the WTO level. Where national parliaments or other democratic forums exist in Member States, governments would do well to involve the representatives of the citizens in discussions of proposed disciplines in the WTO so as to ensure their input. In the USA, Congress is to some extent involved, at the national level, with deliberations of negotiating issues in the WTO.\footnote{See John H. Jackson, ‘Sovereignty - Modern: A New Approach to an Outdated Concept’, \textit{American Journal of International Law}, 782-802 (2003); Matthew Schaefer, ‘Sovereignty, Influence, Realpolitik and the World Trade Organization’, \textit{Hastings International and Comparative Law Review}, 25, (2001-2002) 341; WTO Trade Policy Review Body, ‘Trade Policy Review Report by United States’ 5 May 2008, WT/TPR/G/200.} For instance, it was the refusal to Congress to approve ratification of the Charter of the ITO that led to the USA not partaking in it leading to the demise of the ITO.\footnote{John H. Jackson, op cit. fn.27.}

It is thus possible for national democratic processes to feed into WTO negotiations, and by extension, decision-making. For developing countries, seeking democratic
support of their negotiating positions at the national level and effectively articulating this can help bolster their leverage. Consequently, though there is no provision for a WTO parliament, national parliaments and civil society can be engaged effectively. The problem though with an inordinate attachment to such a practice would be its detrimental effect on the WTO decision-making process, as all Member States could come to WTO negotiations claiming to have a specific mandate from their Parliaments or citizens. Whose citizen’s preferences should have pre-eminence? Without a fair system of give-and-take where the needs of all Members feed into WTO policies, some citizens of WTO Member States will be bound by the preferences of the citizens of other Member States.

Perhaps a lesson that can be learned from the analysis of the European Parliament is the use of population demographics in its constitution. Unlike the Council where population considerations become relevant in the weighting of votes, in the European Parliament the significance of population lies in the actual number of representatives from Member States. The possible example here for the WTO could be how to factor in population demographics in a smaller deliberative body that is constituency based. Just as the Treaty of Lisbon sets minimum and maximum limits with respect to representation from EU Member States, a constituency formula can be devised in the WTO stipulating minimum and maximum numbers in each constituency. Taking into consideration a variety of indicators – e.g. regional representation, population demographics, and contribution to international trade – a number of constituencies can be created that will in turn elect a representative each to a smaller deliberative body. The weighting process thus only becomes relevant in the constitution of the constituencies but not in the voting processes in the smaller deliberative body. In
effect, the use of weighted votes will be absent and if decisions are taken by consensus, some semblance of equality can still be achieved as those in relatively more crowded constituencies will still have an equal vote as those in less crowded constituencies.

6.7 Concluding Remarks
The EU decision-making system is very peculiar in its multilevel makeup. Typified by a mixture of intergovernmental, supranational and parliamentary mechanisms in its decision-making process, it is a system that is workable in a relatively smaller organisation like the EU. However, some of the safeguards built into the EU’s decision-making system can hold valuable lessons for the WTO. For example, as discussed above, the legislative initiative exercised by the Commission can hold prospects for a smaller constituency based deliberative body in the WTO that could have non-exclusive powers of policy initiatives. The role that national Parliaments play in the EU may not formally fit well into the WTO system, but at the informal level, Member States have a duty to engage the democratic institutions and civil society in the discussions of proposed WTO disciplines. Notably, the USA has been proactive in this direction and developing countries especially can shore-up their leverage by doing the same. If governments know that their electorates will hold them accountable for their actions at the WTO, they will take the concerns of their electorates more seriously at the WTO level and not allow themselves to be bullied by the economically powerful states. As was discussed in chapter three, all WTO Members have a single non-weighted vote (at least at the formal level). The ability to use this ‘equal’ right lies in the hands of all and must thus be used when it matters
most – when decisions are being taken. Complaining after decisions have been taken and the trade disciplines come into effect will be tantamount to a wasted opportunity.

It is also worthy of note that in the EU, there are no special and differential treatments where some EU states are given more preference into the markets of others. The operation of the four freedoms – free movement of goods, services, persons and capital – ensures that each Member State would be able to use its comparative advantage to trade within the common market. Bernard Hoekman has thus argued that in the WTO set-up, pre-eminence should be given to the subject of market access for all goods and services by WTO Members and this should include agricultural products and labour intensive manufactures like textiles and apparels. The discussions in chapter one showed that it can be detrimental for developing countries to seek their trade needs mainly through derogations from multilateral rules under special and differential treatment provisions. Developed countries can introduce, vary, graduate or withdraw GSP schemes at will. Developing Countries cannot hinge their aspirations on such a precarious system as GSP schemes are voluntary and operate largely outside the multilateral framework where disciplines are binding.

Obviously, under the single undertaking principle, seeking broad derogations from multilateral rules is no longer possible. Negotiating multilateral rules that effectuates the proper operation of comparative advantage in the WTO is thus more important for developing countries than special and differential treatment as it operates now.

The discussions above have also shown the importance of institutions and their decision-making competences. When institutions are vested with powers, what are the safeguards against abuse? The analysis of the Commission’s supranational powers showed that there are controls put in place by Member States through the comitology process for example, and also the ability of Member State Parliaments to scrutinise the Commission’s legislative proposals. In the WTO, empowering an existing institution like the Secretariat (and the Director General) or creating a smaller deliberative body should not be anathema as long as strong safeguards can be put in place to protect the Members’ concerns.
CHAPTER SEVEN: REFORMING THE WTO DECISION-MAKING PROCESS

Introduction

Based on the comparative analysis undertaken in the previous three chapters, the discussion in this chapter synthesises some of the propositions already made in the comparative analyses in order to arrive at a workable model for possible reform in the WTO decision-making system. The comparative analysis shows the importance of institutions and voting systems in decision-making processes in international organisations.

In the WTO system and the General Assembly of the UN, the voting system at the formal level is typified by an unweighted system of one-member-one-vote and representation is open to all members. Ideally, this is the most democratic as everyone’s voice counts whether it requires a simple majority, a high majority threshold, consensus, or unanimity for decisions to be made. In a large organisation like the WTO, combining full membership of decision-making bodies by all Members with consensus decision-making was found to be problematic. A discussion on how this can be reformed using, inter alia, some of the examples from the other decision-making systems analysed in the previous chapter is undertaken below.
7.1 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.\textsuperscript{1039} It only states that the “WTO shall continue the practice of decision-making by consensus followed under GATT 1947”.\textsuperscript{1040} 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.\textsuperscript{1041} The preference for the consensus procedure is thus a self-imposed preference of practice and not a 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{1042}

In chapter three the point was made that an advantage of the consensus principle lies in its ability to block an objectionable direction in WTO policy,\textsuperscript{1043} 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{1044} The concept holds that where an overwhelming majority are in favour of a decision, the few

\textsuperscript{1039} A deviation from this norm is Article of the Dispute Settlement Understanding which prescribes the consensus procedure as the only means for decision-making.
\textsuperscript{1040} Article IX:1 of the WTO Agreement.
\textsuperscript{1041} ibid.
\textsuperscript{1043} See Chapter Three, subsection 3.6.1.
objecting Members should refrain from blocking progress.\textsuperscript{1045} 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 United States 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 numbers of membership, 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 United States 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{1046} 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{1047} With the current number of WTO Members (i.e. 159),\textsuperscript{1048} 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

\begin{flushleft}
\textsuperscript{1045} ibid.
\textsuperscript{1046} Article X.3 of the WTO Agreement.
\textsuperscript{1047} ibid.
\textsuperscript{1048} http://www.wto.org/english/thewto_e/whatis_e/hif_e/org6_e.htm (viewed on 24 April 2013).
\end{flushleft}
be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference”.

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 in 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 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. 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

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1049 Article X:3 of the WTO Agreement.
1050 ibid.
constitute an objecting minority, whose objection would qualify 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. Article IX:3 provides in relevant part that:

In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members (...).

WTO practice 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, 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”.

The ACP is currently composed of 79 African, Caribbean and Pacific States. In 2001 when the Ministerial Conference approved the waiver, 58 Members of the ACP were members of the WTO and the European

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1051 Emphasis mine.
1052 Article IX:3 of the WTO Agreement.
1053 WT/MIN(01)/15.
1054 ibid at para.1.
1055 http://www.acp.int/content/secretariat-acp (viewed on 21 May 2012).
Communities 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 benefactors 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 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. As observed in chapter six, the WTO needs to read its own history to inspire a return to some of the flexibilities that have been practiced in the past.

The critical mass concept dovetails into the analysis of the possible reform of the single undertaking principle which is considered in the next section of this chapter.

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.

Evidently, for developed countries, they would not want a change in the consensus

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1056 Now European Union as the Treaty of Lisbon now imbues the European Union with legal personality.
1057 See chapter 6, section 6.1.
1058 Amrita Narlikar, op cit. fn.305.
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 also 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. As was observed in chapter four, the success of majority voting in the UN General Assembly, to a large extent, lies in the fact that resolutions of the General Assembly do not have a binding effect.\textsuperscript{1059} 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 –

\textsuperscript{1059}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.
one based on weighted voting calculated on the basis of Member’s contribution to international trade and one based on majority threshold.\textsuperscript{1060} The Commission however decided against this voting method in favour of the consensus procedure but tempered with the possibility of a critical mass approach.\textsuperscript{1061}

As was observed in chapter five, weighted votes have the possibility of creating default vetoes. In the IMF for instance, the USA 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, even in situations where consensus is used, the possibility of the option of weighted voting can make consensus an exacted consent. The Washington Consensus scenario mentioned in chapter five becomes the inevitable result. This illusion of consensus was also observed in the analysis of the EU decision-making system. It was realised that in spite of the fact that consensus was used 80 per cent of the time in the Council (though the EU Treaties make provisions for qualified majority voting), the knowledge that the failure of consensus would result in voting exerts pressure on Members who know they will lose in a vote to make compromises for consensus to prevail.

Furthermore, the analysis of decision-making in the Security Council of the UN in chapter four showed that the existence of veto powers in weighted voting systems is susceptible to gross abuse. Thus, whether there is a formal or informal (i.e. default)
veto, the abuse of privileged positions has a high possibility of occurrence consensus can become the preserve of a few members who have enough weighted votes to wield vetoes.

A 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 is 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.\(^{1062}\) 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.¹⁰⁶³

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 and those

¹⁰⁶³ WTO Secretariat op cit. fn.1062.
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 thesis 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 by this thesis 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 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.

7.2 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 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 opened 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 United States and the EU distort international trade in agriculture and prevents developing countries from being competitive in global and domestic trade in agriculture.\(^\text{1064}\) 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.

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.1065

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.

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

It has been made evident in previous discussions in the preceding chapters 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 tow the line of the Executive Board system in the IMF and the UN Security Council system.\(^{1066}\)

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.\(^{1067}\) Their proposal envisages a situation where, if a relatively small number of WTO Members have an interest in a particular issue they could constitute the Green Room.\(^{1068}\) 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


\(^{1067}\) Richard Blackhurst and David Hartridge, op cit. fn.464.

\(^{1068}\) ibid.
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.\textsuperscript{1069} 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. 159), with many more states negotiating accession, having only 25 to 30 Members interested in a particular issue would be quite a rare occurrence. As discussed in chapter three and this chapter,\textsuperscript{1070} 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.

\textsuperscript{1069} Richard Blackhurst and David Hartridge, op cit. fn.464.
\textsuperscript{1070} See chapter three subsection 3.6.1.
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.\(^{1071}\)

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

\(^{1071}\) Jeffrey Schott and Jayashree Watal, op cit., fn.292, at 288.
share in international trade to weight votes, using the same criteria to give some Members automatic seats in the Green Room while others congregate into constituencies is not a position this thesis 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. But as the discussion on the EU decision-making system showed, using population demographics can give automatic vetoes to the more populous states. Thus the use of the double majority vote based on population and number of Member states has, for instance, been devised in the EU as the new form of qualified majority voting. 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 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 by the thesis, 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.

As proposed in chapter six, 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 deliberative 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. As observed in chapter four, UNCITRAL’s model laws have 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 GSP schemes. 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.

1072 See chapter four, subsection 4.2.4.
7.4 Reforming the WTO Decision-Making Process: Developing Countries and Special and Differential Treatment

In the previous sections of this chapter, 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.\textsuperscript{1073} 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.

7.4.1 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.\textsuperscript{1074} 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

\textsuperscript{1073} Thomas Fritz op cit. fn.20.
\textsuperscript{1074} e.g. Articles 65 and 66 of the TRIPS Agreement.
adherence to multilateral rules present manifestly unequal treatments, the aim is to achieve equality of responsibilities albeit within unequal timeframes of adherence.

7.4.2 Non-Reciprocity

However, special and differential rules on non-reciprocity\textsuperscript{1075} and GSP 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 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. It was argued in chapter one\textsuperscript{1076} that 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. This, Jagdish Bhagwati for instance observes that:

\begin{footnotesize}
\begin{enumerate}
\item GATT Article XXXVI(8).
\item See chapter one, section 1.7.
\end{enumerate}
\end{footnotesize}
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 (…).\textsuperscript{1078}

Chapter one concluded with the observation that special and differential treatment alone cannot assure the integration of developing countries into international trade and that they need to participate more proactively in the creation of multilateral rules that protect their interests. Succumbing to ‘harmful demands’\textsuperscript{1079} 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. As stated in chapter one, Andrew Charlton and Joseph Stiglitz have criticized the use of parity in the critique of trading relations between developed and developing countries opining that:

\begin{quote}
\ldots 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
\end{quote}

\textsuperscript{1077} i.e. reciprocity.
\textsuperscript{1078} Jagdish Bhagwati, op cit. fn.1065, at 261.
\textsuperscript{1079} ibid.
reduced tariffs on goods of export interest to the rich countries and protected goods that should be exported by the poor countries.\textsuperscript{1080}

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.\textsuperscript{1081} 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 countries to the developed countries without insisting on and getting any commensurate concessions from the latter”.\textsuperscript{1082}

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 any in return.

\textbf{7.5 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

\begin{flushleft}
\textsuperscript{1080} Andrew Charlton and Joseph Stiglitz, op cit. fn.132, at 19.
\textsuperscript{1081} Bhagirath Lal Das, op cit. fn.432.
\textsuperscript{1082} ibid.
\end{flushleft}
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.\textsuperscript{1083} 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 and folklore, and other relevant new
developments raised by Members pursuant to Article 71.1.\textsuperscript{1084}

The prospects of extending the TRIPS Agreement to cover traditional knowledge in
the Doha Round negotiations seem bleak\textsuperscript{1085} 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.

\textsuperscript{1083} See Boatema Boateng, ‘Whose Democracy? Rights-Based Discourse and Global Intellectual
Property Rights Activism’ in Robin Mansell and Marc Raboy (eds.), \textit{The Handbook of Global Media

\textsuperscript{1084} Paragraph 19 of the Doha Ministerial Declaration, 14 November 2001, WT/MIN(01)/DEC/1.

\textsuperscript{1085} Boatema Boateng, op cit. fn.1080.
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 Codes\textsuperscript{1086} 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.\textsuperscript{1087} 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.

7.6 Concluding Remarks

In this chapter, an attempt has been made 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 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 by the thesis was 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 was 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 USA 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 thesis argued 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 more fair in its application.

CONCLUSION

In the discussion of the WTO decision-making system in chapter three and the comparative analysis undertaken in chapters four, five, and six, two main things stood out in the decision-making systems analysed. Firstly, configuration of representation in decision-making bodies and secondly, the voting systems used in the decision-making process. In other words, who gets a say in decision-making and how influential is that say (if they get it)? These two lie at the heart of all the decision-making systems analysed in the aforementioned chapters. Independent of formal provisions, ‘who gets a say’ and ‘how influential that say is’ will determine whether there is equality or inequality. If there is inequality, then this means that in spite of formal provisions with respect to equality, the decision-making system informally accords special treatment to some members. In chapter one, the discussion dwelt mostly on the special and differential treatment of developing countries while chapter two focussed on the concept of sovereign equality. There appeared to be a problem reconciling special treatment with sovereign equality. One argument that was adduced in support of reconciling this seeming anomaly was that, since developed countries maintained special and differential treatment schemes on their own volition, it is an expression of their sovereign will. In this sense, the ‘equality balance’ is not hampered in anyway. It however only partially solves the problem. Why are special and differential treatment provisions to be enjoyed only by developing countries? The argument of equity was therefore adduced to add more credence to the ‘equality balance’ in spite of the special and differential treatment of developing countries. It was argued that equality cannot not be conceptualised strictly on the basis of equal application of rules. The example was given that, supposing food rations were being
dished out, would it be fair to give the giant the same ration as the dwarf considering the fact that their nourishment needs would be vastly unequal? In the same token, in apportioning workloads, would it be fair to give the dwarf the same workload as the giant? If the giant is given more rations than the dwarf, then this seeming inequality can only be compensated for by giving the giant more workload than the dwarf. This would result in ‘equity-equality’.

Thus, in the WTO decision-making system, the informal superior leverages and greater economic weights that developed countries bring to bear on the decision-making system is equilibrated by the special and differential treatment of developing countries. Therefore, special and differential treatment of developing countries in the WTO setup is not an aberration, with respect to the operation of the principle of sovereign equality of states. It is rather an equilibrating tool that effectuates the operation of sovereign equality in practice. It is evident that in the WTO decision-making system, developed countries exercise superior leverage in the decision-making system in spite of the formal provisions that accord equality to all Members. This appears to be the situation generally in the creation of public international law as observed by Malcolm Shaw:

… it would not be strictly accurate to talk in terms of the equality of states in creating law. The major states will always have an influence commensurate

\[1089\] An equilibrating tool in this regard may be the use of the concept of proportionality in reconciling the principles of special and differential treatment and sovereign equality of states. Thus in analysing these two principles, it does not have to be an ‘either or’ analysis but rather a proportionality analysis – i.e. where to place more emphasis on which principle without totally subjugating the other. See Andenas M. and Zleptnig, S. op cit. fn.6.
with their status, if only because their concerns are much wider, their interests much deeper and their power more effective.\textsuperscript{1090}

There is thus default special treatment of the major powers in law creation at the international level which can only be countered by some level of commensurate special treatment of the less powerful.

In proposing reforms to the WTO decision-making system, deviating from formal equality in order to recognise the superior power of developed countries would give them a double advantage – formal and informal superior leverage. Consequently, formal equality creates an official level playing field, informal superior leverage will inevitably operate in favour of developed countries and special and differential treatment should operate in favour of developing countries. This way, the balance is achieved.

Thus in answering the first research question posed in the introduction to the thesis – ‘Does the principle of special and differential treatment of developing countries in the WTO negate the principle of sovereign equality of States?’ – the answer, based on all the previous discussions, analyses and the just adduced argument, would be a no.

The second research question posed was – ‘To what extent does the operation of the principle of sovereign equality ensure equality in the WTO decision-making process?’ Formal provisions on equality, epitomised by one-member-one-vote and the participation of all Members in decision-making bodies, ensure the operation of

\textsuperscript{1090}\textit{Malcolm N. Shaw op cit., fn.269, at 193}
sovereign equality. The reality of informal superior leverages creates inequalities that favour developing countries. Special and differential treatment is unequal treatment in favour of developing countries. Therefore sovereign equality in the WTO must necessarily operate in tandem with special and differential treatment in order to arrive at equity-equality.
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Agreement on Trade Related Aspects of Intellectual Property Rights – TRIPS

Agriculture and Rural Development – AGRI

Budget – BUDG

Climate Action – CLIMA

Communication – COMM

Common Foreign and Security Policy – CFSP

Competition – COMP

Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries – Enabling Clause

Dispute Settlement Body – DSB

Dispute Settlement Understanding – DSU

Economic and Financial Affairs – ECFIN

Economic and Monetary Union – EMU

Economic and Social Council – ECOSOC

Economic Community of West African States – ECOWAS

Economic Community of West African States Monitoring Group – ECOMOG

Education and Culture – EAC

Employment, Social Affairs and Inclusion – EMPL

Energy – ENER

Enlargement – ELARG

Enterprise and Industry – ENTR
Environment – ENV

EuropeAid Development and Cooperation – DEVCO

European Coal and Steel Community – ECSC

European Communities – EC
European Court of Justice – ECJ

European Economic Community (EEC)

European Union – EU

Eurostat – ESTAT

Foreign Policy Instruments Service – EEAS

General Agreement on Tariff and Trade – GATT

General Agreement on Trade in Services – GATS

Generalised System of Preferences – GSP

Global System of Trade Preferences – GSTP

Group of 10 – G-10

Group of 20 – G-20

Group of 33 – G-33

Group of 77 – G-77

Health and Consumers – SANCO

Home Affairs – HOME

Humanitarian Aid – ECHO

Human Resources and Security – HR

Informatics – DIGIT

Information Society and Media – INFSO

Internal Market and Services – MARKT

International Bank for Reconstruction and Development – World Bank

International Labour Organisation – ILO
International Monetary and Financial Committee – IMFC
International Monetary Fund – IMF
International Trade Organisation – ITO
Justice and Home Affairs – JHA
Interpretation – SCIC
Joint Research Centre – JRC
Justice – JUST
Least Developed Countries – LDC
Maritime Affairs and Fisheries – MARE
Mobility and Transport – MOVE
Most Favoured Nation – MFN
Multilateral Trade Agreements – MTAs
North Atlantic Treaty Organisation – NATO
Organisation for Economic Corporation and Development – OECD
Organization of the Petroleum Exporting Countries – OPEC
Police and Judicial Co-operation in Criminal Matters – PJCC
Regional Policy – REGIO
Research and Innovation – RTD
Secretariat-General – SG
Single European Act – SEA
Taxation and Customs Union – TAXUD
Trade Negotiations Committee – TNC
Trade Policy Review Body – TPRB
Treaty on European Union – TEU
Treaty on the Functioning of the European Union – TFEU
United Kingdom – UK
United Nations – UN

United Nations Commission on International Trade Law – UNCITRAL

United Nations Conference on Trade and Development – UNCTAD

United States of America – US

Warsaw Treaty Organization of Friendship, Cooperation, and Mutual Assistance – Warsaw Pact

World Trade Organisation – WTO