TRANSPARENCY AND ACCOUNTABILITY IN WTO DECISION-MAKING PROCEDURES: A DEVELOPING COUNTRY PERSPECTIVE

by

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LIST OF ABBREVIATIONS

ACP	African, Caribbean and Pacific Countries
ACWL	Advisory Centre on WTO Law
ANC	African National Congress
CG-18	Consultative Group of Eighteen
DC	Developing country
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
DTI	Department of Trade and Industry
ECOSOC	Economic and Social Council
EC	European Community
EEC	European Economic Community
EP	European Parliament
ETI	European Transparency Initiative
EU	European Union
FSF	Financial Stability Forum
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
G7	Group of 7
G8	Group of 8
G20	Group of 20
GDP	Gross Domestic Product
GTZ	German Agency for Technical Co-operation
IMF	International Monetary Fund
ITO	International Trade Organisation
ITU	International Telecommunication Union
MEP	Member of the European Parliament
MFA	Multi-Fibre Arrangement
MFN	Most-favoured-nation treatment

MTN	Multilateral trade negotiations
NEDLAC	National economic development and labour council
NGO	Non-governmental organization
OECD	Organization for Economic Co-operation and Development
OTC	Organisation for Trade and Co-operation
QMV	Qualified majority voting
RTA	Regional Trade Agreement
SAIIA	South African Institute of International Affairs
TRALAC	Trade Law Centre of Southern Africa
SPS	Sanitary and Phytosanitary Measures
TIPS	Trade and Industry Policy Strategies
TRIPS	Agreement on Trade-Related Intellectual Property Rights
TRIMS	Trade-Related Investment Measures
TRPRs	Trade-Related Performance Requirements
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US/USA	United States of America
USTR	United States Trade Representative
WCO	World Customs Organisation
WIPO	World Intellectual Property Organisation
World Bank	International Bank for Reconstruction and Development
WTO	World Trade Organisation

KEY TERMS:

World Trade Organisation; General Agreement on Tariffs and Trade; Multilateral trading system; Decision-making; Transparency; Accountability; Consensus; Dispute Settlement System; Developing Countries; Developed Countries; South Africa; Trade Negotiations

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DECLARATION

I declare that the thesis hereby handed in for the qualification Doctor Legum at the University of the Free State, is my own independent work and that I have not previously submitted the same work for a qualification at/in another University/faculty. I further cede copyright of the thesis in favour of the University of the Free State.

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CHAPTER 1
INTRODUCTION

1.1 INTRODUCTION

Although developing countries over the past few years have shown a commitment and determination to play a more active role in the World Trade Organisation (WTO), including its decision-making processes,[1] this has not always been the case.[2] From the early 1960s, when most of these countries attained political independence and formally joined the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT), to the time of the WTO's formation and for a while afterwards, developing countries were by-and-large passive bystanders, seemingly content to let others carry on with the trade negotiations, dispute settlement and other GATT/WTO processes while they watched from the sidelines. The minimal participation of developing countries went on despite both the GATT and the WTO boasting, at least in theory, arguably the most democratic decision-making processes among international organisations.[3]

With specific reference to South Africa, while it was an early participant in the multilateral trading system[4] and elected to assume a developed country status during the GATT era,[5] the reality is that it had many of the features commonly associated with developing countries. Examples of this includes the fact that by 1993,[6] up to 56.7

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1 The increased interest in the multilateral trading system shown by developing countries has been attributed to, among other things, the changes brought about by the demise of communism and the emergence of the US as the sole superpower, which have led to trade being seen as the key to economic development. See Gordon 2006: 91. Developing countries have therefore felt compelled to play a more active role in the GATT/WTO. New formations such as the G20 are also helping to bring the smaller countries together in pushing for more inclusive practices in the multilateral trading system. See paragraphs 6.3 and 6.4 below.

2 As Gordon rightly points out, "[developing countries] were largely absent at the birth of GATT and through most of its evolution and growth". See Gordon 2006: 82.

3 One of the underlying principles in both the GATT and WTO decision-making processes is that each member has one vote, suggesting that all members enjoy equal status irrespective of their economic size or share of world trade.

4 South Africa was among the original 23 countries that signed the GATT agreement in 1947.

5 South Africa only started showing an interest in obtaining a developing country status in the early 1990s. See Hirsch 1993: 54. This would, among other things, allow it to gain preferential access to the markets of the most developed economies in the world.

6 It should be noted that only recently has monitoring of living conditions and poverty received proper attention in the whole of South Africa. Prior to 1994, this aspect was largely neglected in the former "TBVC states" in particular, where almost half the country's population resided and

percent of the population was estimated to be living below the poverty line[7] and the average unemployment rate was estimated to be 29,4%.[8] Furthermore, for much of this time, South Africa, as with many developing countries, faced serious balance of payments challenges.[9] As a consequence, it was inevitable that South Africa would also experience many of the problems that developing countries encountered, including those relating to its participation in the multilateral trading system. It made little difference that the government at the time refused to acknowledge the country's status as a *de facto* developing country.[10]

Based on the above factors, and taking into account the fact that South African eventually elected to assume a developing country status during the Uruguay Round, in this study, South Africa is treated as having been a developing country, both during the GATT era and presently under the WTO. This, it was believed, would help achievie a better and more accurate understanding of South Africa's conduct and challenges throughout the time it has been involved in the multilateral trading system.

Various explanations have been given for developing countries' virtual absence from the GATT/WTO. These range from skepticism on the part of these countries regarding the effectiveness and genuineness of the system in promoting their interests,[11] to these countries' colonial past[12] and allegations of their willingness to let others take decisions for them as long as the benefits of the most-favoured-nation

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where the standards of living were much lower compared to the rest of South Africa and poverty was rife. See Hirschowitz and Orkin 1997: 4. See also: http://countrystudies.us/south-africa/65.htm (Accessed 20/08/10).

7 Although the definition of poor people often used by many countries is the one provided by the World Bank, which refers to people living on less than US$ 1 a day, here poverty is understood in the broader sense, which is also becoming increasingly common and takes into account aspects such as "the standard of living and quality of life of an individual, household or family...assessed in the context of, and in relation to, the socio-economic and resource profile of society." See Development Policy Research Unit 2008: 3.

8 See Klasen and Woolard 1999: 11.

9 The GATT Secretariat 1993: 3.

10 During the GATT era, the South African government rejected proposals for the country to obtain a developing country status, citing the belief that such a step would be damaging to the country's image abroad. See Hirsch 1993: 54. This was the case despite comparable countries such as China, Brazil and India electing to retain this status.

11 See Mosoti 2001: 232. Furthermore, according to Gordon, the failure by the provisions of the GATT to cater for the needs of developing countries reinforced the perception that the Agreement would not serve their interests and that developed countries, which were instrumental in shaping the provisions, were opposed to their goal of economic development. See Gordon 2006: 87 – 88.

12 Gordon 2006: 86.

(MFN) principle and "special and differential" treatment remain in place,[13] and the exorbitant costs involved and intimidation by larger trading nations.[14] While there is an element of truth in some of the reasons advanced, they tend to be generalisations that omit to take into account other factors that impact on the behaviour of individual countries.

In view of calls from both inside and outside the WTO for full integration of the smaller, developing countries into the world economy,[15] as well as the potential benefits that greater involvement in WTO activities can bring to these countries, a more detailed and country-specific investigation is necessary. In this study, particular attention is paid to the procedures for decision-making in the WTO and the extent to which the principles of transparency and accountability are observed in implementing these procedures. This study seeks to show that in the absence of these two principles, decision-making procedures in the WTO are susceptible to abuse and manipulation, which often come at the expense of the weakest members. It is further argued that this creates some obstacles and accounts, at least in part, for the poor participation of developing countries in many WTO processes. Although the main emphasis in this study is on South Africa, references are frequently made to developing countries generally in cases where there are similarities or to illustrate a particular point.

It should be mentioned at the outset that a distinction is drawn between rule-making and decision-making, and that the formal rules applicable to both are also different. While rule-making is concerned with formulating new rules, e.g. new international agreements, decision-making involves the implementation of rules already in existence.[16] This work is concerned with the latter.

It must also be pointed out that, while this study proceeds from the assumption that lack of meaningful participation in decision-making and other WTO processes is detrimental to the developmental goals of South Africa and other developing

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13 Oyejide 2000:116.

14 www.tralac.org/pdf/African_Countries_and_the_WTO_Dispute_Settlement_System.itf (Accessed on 10/03/08) (from an article entitled "African Countries and the WTO Dispute Settlement System").

15 Mosoti 2001: 232.

16 Ehlermann et al 2005: 500.

countries,[17] it is not proposed in any way that other factors have had no role to play in the challenges facing these countries. Indeed, there is little doubt that in the case of South Africa factors such as industrial policy, poor trade facilitation, lack of investment etc. have played a significant role in the country's current trade and economic situation. Just by way of example, at the centre of South Africa's industrial policy during the Apartheid era were a number of onerous objectives that were not sustainable in the long-term. These included, among others, the government's emphasis on employment creation for white workers only, evading international sanctions and satisfying the desires of elite consumers keen on maintaining life-styles resembling those of the rich in the most advanced economies.[18] Such an industrial policy, which was in place for many decades, was obviously not conducive to development. Chang rightly points out that "[t]o change [South Africas' economy] into one that is capable of improving the living standards of the vast majority of the population...within a politically acceptable time frame is a truly mind-boggling exercise."[19]

Notwithstanding the role of these other factors, however, the focus of this inquiry is determining the main reasons behind South Africa's less than satisfactory involvement in the WTO over the years, especially in the decision-making processes. While finding answers to this question cannot single-handedly rid South Africa of its trade and developmental problems, it will certainly contribute to broader efforts in this regard. Such answers will help the country to fine-tune its trade policies and strategies so that they address appropriate issues. In this way, resources and efforts will not be spent barking up the wrong tree and the possibility of finding solutions that are likely to work will increase.

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17 The basis of this assumption is that the mechanisms for determining, for example, what issues are put on the trade negotiations agenda or the rulings of WTO dispute settlement panels will generally benefit only those who partake in the processes, as only they can influence the outcomes by presenting their positions. Of course, in the case of the dispute settlement mechanism, the beneficiaries include those who participate as third parties.

18 Chang 1997: 1.

19 Chang 1997: 2.

1.2 TRANSPARENCY AND ACCOUNTABILITY DEFINED

There are a number of ways in which transparency is construed. In one sense, it is viewed as not just a critical part of good governance, but also as an independent regulatory tool and an integral part of the administrative law of states. Transparency in this sense, which has also been referred to as regulatory transparency, is mostly entrenched in developed countries, while it is still something of a foreign concept in developing countries.

In another sense, transparency is seen as the ability of stakeholders in an organisation to keep track of what it does.[20] In the context of the WTO, this entails the ability of members, their citizens and civil society organisations to scrutinise the work of the organisation.[21] Included in this conception of transparency is the ability of the smaller, developing members to participate in the organisation's activities, which is essential for guaranteeing procedural fairness and equity for all stakeholders.[22] This is the sense in which transparency is understood in this study.

As far as accountability is concerned, its meaning can be gathered from the definition of "accountable", which the Compact Oxford English Dictionary defines as "required or expected to justify actions or decisions." From this definition, "accountability" can be said to refer to the way in which an individual or organisation is held responsible for its actions. Burral and Neligan expand on this definition by saying that, in the context of an organisation, accountability offers a means for the organisation to assume responsibility for its policies and procedures, for the way in which it develops its mission and values, and for how it is able to measure performance against its stated goals.[23]

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20 A more comprehensive definition of "transparency" in this sense is provided by van Bijsterveld in the following terms: "The principle of transparency requires clarity with regard to decision-making, actions, and policies at both the national and international level, in public, mixed, and private institutional settings as to: their positioning in the overall context of institutional decision-making; the organisational context in which they are set; the allocation of powers within that structure, the actual process of their establishment, including the parameters according to which it takes place, and their content, including their status". Van Bijsterveld. 2004. Available at: www.ip-rs.sl/fileadmin/user.../pdf/.../Agenda_Bijsterveld-Paper

21 Esty 1998: 123.

22 Clarke and Morrison 1998: 851.

23 Burral and Neligan 2004: 7.

In recent years, there has also been an increase in the number of commentators supporting the conception of accountability that entails organisations being answerable to a broader array of stakeholders affected by their actions, as opposed to only those who are formally recognised as members of the particular organisation.[24] It is in the above senses that "accountability" is used in this study.

1.3 SOUTH AFRICA'S WTO POLICY

Having indicated that a substantial amount of attention in this study is devoted to South Africa, another question that is raised is whether or not South Africa's own policies or conduct could be limiting its more robust participation in WTO decision-making processes. While it is accepted that problems emanating from the procedural and structural shortcomings of the WTO could be acting as an impediment to South Africa's effective and unrestrained involvement in the organisation, it is worth enquiring just how much the country's own actions or inactions have also contributed to the problem. The significance of this question is appreciated when one considers that other comparable countries are participating more effectively in almost all the WTO processes. If these other countries are managing much better than South Africa, despite their limited resources and other challenges, the question then becomes whether South Africa is perhaps adopting the wrong policies in its approach to the WTO.

1.4 STRUCTURE OF THE STUDY

This study is divided into a total of seven chapters. The first chapter is the introduction. The second chapter, entitled *Origins of the Multilateral Trading System: the GATT Era*, retraces the history of the multilateral trading system since the days of GATT 1947, up to the formation of the WTO. It serves mainly to provide some background information to help explain the origins of some of the decision-making practices existing in the WTO today.

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[24] Burral and Neligan 2004: 7.

The third chapter, appropriately called *The WTO and its Decision-making Process*, examines the procedure for taking decisions in the WTO, focusing mainly on the differences between theory and practice. It also looks at the interpretation of the concept of "consensus" in the WTO context, how this impacts on developing countries in particular, and what can be learnt from past experiences.

The fourth chapter, named *Comparison with Other International Organisations*, compares the procedures for taking decisions in the WTO to those followed in several other international institutions. The institutions considered are the International Monetary Fund (IMF), the European Union (EU) and the United Nations (UN). While not all of these organisations are economic institutions like the WTO, each of them, like the WTO, operates internationally and has a very diverse membership, both in terms of size[25] and global standing. Even more importantly, all of their procedures for decision-making have important aspects that could potentially help address the challenges confronting their WTO equivalent, and from which the WTO can learn.

In the fifth chapter, the focus is on the WTO dispute settlement process and the history of participation in it by developing countries, especially South Africa. Entitled *The WTO Dispute Settlement System*, this chapter looks at the accessibility of the process to the smaller, poorer WTO members, and explores the reasons behind their limited use of the process up to now.

The sixth chapter looks at, among other things, South Africa's own policies and general approach towards the WTO. Entitled *South Africa's Participation in the World Trade Organisation,* it seeks to determine the extent to which South Africa's own actions have also contributed to the country's limited involvement in WTO activities. The last chapter is the conclusions and recommendations for the way forward.

1.5 METHODOLOGY

This study takes the form of qualitative research. In order to put the current WTO decision-making practices into proper perspective, a background study of decision-

[25] Here size is referred to in economic, geographical and population terms.

making practices of the WTO's forebearer, the GATT, is conducted in the second chapter. In the third chapter the current decision-making procedures followed in the WTO are examined, with a lot of attention devoted to the existing disparities between the rules contained in the various WTO agreements and the actual manner of their implementation. The concept of "consensus" and its interpretation in the WTO is also examined in this chapter.

A comparative survey of the mechanisms for taking decisions in a number of international institutions is conducted in the fourth chapter. The aim here is to establish the extent to which the WTO's procedures allow for democratic representation of its members, and whether or not they are in line with international standards and practices.

The institutions surveyed, namely the IMF, the EU and the UN, have been chosen for specific reasons. Firstly, like the WTO, they operate internationally and all of them have members that are unequal in terms of both their political and economic standing. Secondly, between them, these organisations use the older and more recent methods of decision-making in international organisations, thus making it possible to compare the various methods and identify the weaknesses and strengths of each. In investigating the decision-making methods of the various institutions, numerous sources, including international agreements, textbooks, journal articles and the Internet, are used.

The extent of South Africa's and other developing countries' involvement in the WTO dispute settlement process, as well as the reasons for it, are considered in the fifth chapter. It could be argued that the reason for a country such as South Africa appearing only a few times in WTO dispute settlement hearings is because there are simply no complaints to lodge or defend. However, it cannot be ruled out that the reasons might have to do with the numerous obstacles that small and medium countries commonly encounter when trying to lodge WTO complaints. This is particularly so considering the fact that South Africa engages in a substantial amount

of cross-border trade annually,[26] and trade disputes are bound to arise every now and then.

A good example of the obstacles referred to above is the fact that the primary remedy available to a complainant under the WTO dispute settlement system is the right to retaliate in equal measure against the offending country.[27] When the offending country happens to be an economic giant such as the US or the EU, and a country like South Africa wins the claim, an attempt by the latter to retaliate against one of the two giants would most likely hurt South Africa more than any of the other two countries, as South Africa depends more on its trade relationship with the two countries than *vice versa*. [28] This would surely act as a potential deterrent against South Africa instituting a claim, even in instances where the claim is legitimate.

To determine South Africa's involvement, or lack thereof, in the dispute settlement system, publications by the South African Department of Trade and Industry (DTI), the WTO and other relevant agencies are examined. In addition, several officials from the DTI are interviewed to find out, among other things, what, in their opinion, are the obstacles to participation. Aspects such as the number of times South Africa has appeared before WTO dispute settlement panels and the capacity in which this was done are given particular attention. Because of the comparable circumstances of South Africa and countries such as Brazil and India, the latter countries' level of participation in the dispute settlement system is also examined.

In the sixth chapter, the focus shifts to South Africa's internal policies and general outlook towards the WTO, and how these have impacted on the country's involvement in WTO processes. Particular attention is paid to South Africa's reaction to trade sanctions during the apartheid era, its key objectives in the multilateral trading system upon its return to the international fold, as well as its co-operative arrangements with other WTO member countries and how these have affected the country's involvement in WTO decision-making. The experiences of the United States

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26 For example, in 2008, South Africa's import trade amounted to US$ 91,058.75, and its export trade amounted to US$80,207.60. See Sandrey et al 2010: 24.

27 See par 5.4 below.

28 See par 5.4 below.

of America and the European Union, two of the most active WTO members, are also examined in order to assess the extent to which South Africa can learn from them.

The investigation is concluded by providing a summary of the findings. Based on these findings, some conclusions are drawn, followed by a number of recommendations.

CHAPTER 2
ORIGINS OF THE MULTILATERAL TRADING SYSTEM: THE GATT ERA

2.1 INTRODUCTION

In order to fully appreciate how decision-making in the WTO context works, it is essential to be familiar with the GATT and its own decision-making methods. This is mainly because many of the practices now followed in the trade regulatory regime administered by the WTO, including its decision-making processes, have their roots in the GATT. This study would thus be incomplete if it failed to discuss the processes that shaped and guided GATT activities. For these reasons, this chapter is dedicated to retracing the role of the GATT in the evolution of world trade and its regulation, which is underpinned by the institution's standing of close to 50 years as the leading global authority for regulating international trade.

2.2 THE BRETTON WOODS SYSTEM AND THE DEMISE OF THE ITO

The origins of the current multilateral trading system can be traced back to the years leading up to World War II, when many countries around the world implemented protectionist measures that nearly brought international trade to a standstill.[29] These measures were mostly a reaction to legislation enacted in the US in 1930 known as the Smoot-Hawley Tariff Act. This legislation raised tariffs on over 2000 items in that country to unprecedented levels, prompting similar reactions from the US' trade partners, who also felt compelled to raise tariffs.[30] The same legislation is also blamed for the protracted duration of the Great Depression, which in turn contributed to the start of World War II.[31]

It was against this background that leaders of the allied countries that had won the war proposed the establishment of new international institutions to regulate global economic affairs.[32] Their primary goal was to avoid a repeat of the adverse

29 Jackson 1998:15; Matsushita et al 2003:1; Mora 1993: 106; Weir 1996: 2.
30 Jackson 1998:15.
31 Manard 1992: 377; Jackson 1992: 441; Pauwelyn 2006: 12.
32 Kennedy 1998: 422.

repercussions of the flawed economic policies of the pre-war period.[33] The ensuing Bretton Woods conference in 1944 led to the adoption of the Bretton Woods Agreement, whose main focus was on monetary and banking issues, and which paved the way for the establishment of the IMF and the International Bank for Reconstruction and Development (World Bank). The conference also noted the need for a third institution that would deal with trade and development issues.[34]

In 1946, another conference was convened under the auspices of the Economic and Social Council (ECOSOC) to consider the proposed third institution for trade and development.[35] This led to a follow-up meeting in Geneva in 1947, where the focus was on three main areas, namely preparing a charter for an institution to be known as the International Trade Organisation (ITO),[36] negotiating a multilateral agreement aimed at reciprocal reduction of tariffs, and drafting the 'general clauses' regarding tariff obligations.[37] The ITO Charter was never adopted, despite its draft having been completed at a conference in Havana in 1948. This was primarily due to its rejection by the US Congress, which perceived the institution and certain provisions of its charter as having the potential to interfere with US national sovereignty.[38] However, the results of work done in the other two areas were combined to create the GATT.[39]

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33 Dam 1970: 10; Hudec 1971: 1302; Trebilcock and Howse 1999:20; Watson et al 1999: 12 –13.

34 Jackson 1992: 442; Jackson 1998:15; Stewart 2000-2003: 27; Vazquez 2004: 589.

35 Jackson 1992: 441; Watson et al 1999:13; Matsushita et al 2003:1.

36 The ITO was to constitute the third arm of the Bretton Wood system.

37 These 'general clauses' imposed obligations on countries to refrain from a variety of measures restricting trade. See Matsushita et al 2003:1.

38 Trebilcock and Howse 1999: 21; Watson et al 1999:14; Jackson 2000: 196; Stiles 1996: 121; Laidhold 1999: 429; Anonymous author 1968: 1806.

39 The initial idea behind the GATT was "...to record the result of a tariff conference that was envisaged at the time as being the first of a number of such conferences to be conducted under the auspices of the ITO". See Dam 1970: 11, quoted in Verenyov 2003: 454.

2.3 THE GATT AS AN INSTITUTIONAL BASIS FOR THE MULTILATERAL TRADING SYSTEM

2.3.1 Improbable Role

The fact of the ITO being stillborn meant that the GATT, which had been adopted provisionally in 1948, remained as the only set of rules regulating international trade and the trade negotiations.[40] In these circumstances, countries turned to the GATT to resolve their growing number of trade-related problems and disputes.[41] However, as can be expected, the GATT in its original form did not address many critical trade issues such as how developing countries were to be treated in the new regulatory system, and had left it to the still anticipated ITO to do so.[42] Therefore, it was inevitable that, given the abrupt manner in which the GATT was made to assume the role initially intended for the ITO, it would struggle to cope with many of its new responsibilities.[43]

The first potential obstacle to the GATT's effectiveness was the fact that technically, it had never come into force, but was only applied on a provisional basis.[44] This arrangement came about as a result of a compromise struck by the parties to reconcile their conflicting interests during negotiations. It so happened that the discussions on the GATT were completed ahead of those on the ITO Charter.[45] Many of the parties felt that, even though the GATT was subordinate to the ITO, its adoption had to precede the finalisation of the ITO Charter. One of the reasons given was that the contents of the tariff concessions already negotiated, still a secret at the time, would soon become known and delays in bringing them into effect could interfere with global trade patterns. The other reason was that the USA negotiators were operating

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40 Watson et al 1999:14; Jackson 1998:12; Jackson 2000:195; Dam 1970:11; Mora 1993: 107. It is important to note that while the GATT eventually adopted many of the provisions contained in the Havana Charter, which constituted the basis of the ITO, it remained a contractual agreement instead of a standing organisation. See Anonymous author 1968: 1806.

41 Jackson 1999: 101.

42 Lunt 1994: 614. See also Anonymous author 1968: 1808.

43 Berrische 1991: 500.

44 Manard 1992: 377.

45 The GATT was completed in October 1947, while the ITO Charter was to be finalised towards the end of 1948. See Jackson 2000:195; Matsushita et al 2003:2.

on the basis of a temporary authorisation allowing them to act without Congressional approval.[46] They were therefore eager to see the GATT come into force before the expiry date of their authorisation in mid-1948.[47]

At the same time, however, there were other parties who were obliged to submit the GATT to their parliaments for scrutiny before they could sign it. Realising that they would later need to obtain parliamentary approval for the adoption of the ITO Charter, these parties were concerned that the political effort needed to get the GATT approved might put the approval of the more important ITO Charter at risk. Consequently, they felt that the best approach would be to submit the two documents together as a package, and wished to await the completion of the ITO Charter before signing the GATT.

This impasse was resolved through a compromise in the form of the Protocol of Provisional Application. In terms of the Protocol, the GATT was to be applied by eight of the members "provisionally on and after 1 January 1948", and the rest of the twenty three members would apply it soon afterwards.[48]

Another factor that impacted on the GATT's effectiveness was the fact that it had been designed to be only a small trade agreement within the institutional context of the ITO, and lacked the necessary institutional structures.[49] The GATT had neither a secretariat nor a basic constitution, and its decision-making and enforcement procedures were under-developed.[50] This posed quite a challenge for the GATT in its new role as a surrogate for the failed ITO. Referring to the deficiencies in the GATT's enforcement procedures, Feeney remarks that "[the GATT] lacked any enforcement mechanism to counteract states complying with GATT provisions only when it was in their best interests to do so".[51]

The GATT, which was initially perceived to be a strictly trade-oriented treaty, also sometimes found itself at odds with the domestic laws of some of its signatory

46 Jackson (1992: 442).
47 Jackson (1998:18).
48 Jackson (1998:18); Matsushita (2003: 2); Vazquez (2004: 589).
49 Dam (1970:11); Jackson (1998: 12); Jackson (2000: 17-18); Mosoti (2001: 235).
50 Jackson (2000:18); Matsushita (2003:3); Verenyov (2003: 456); Gordon (2006: 85).
51 Feeney (2002: 101).

countries, especially where sensitive issues such as environmental protection were concerned. Thus, efforts to implement its provisions would occasionally encounter strong resistance.[52]

Over time, however, efforts were made to equip the GATT sufficiently for its expanded role. Shortly after the 1948 Havana Conference, when the creation of the ITO was still anticipated, an "Interim Commission for the ITO" comprising a small number of staff was set up in preparation for the new organisation. When the ITO did not materialise, this group of people was inherited by the GATT and effectively became its secretariat.[53] In addition, a committee comprising trade ministers from member countries was created and occasionally met to address important GATT issues. The day-to-day decision-making was, however, left to the Council of Representatives, made up of appointees from member countries' permanent GATT delegations.[54] In a GATT Review Session in 1955, a protocol was also drafted which envisaged the creation of an Organisation for Trade and Cooperation (OTC) to provide an institutional framework for the GATT. This protocol, however, also failed to make it past the US Congress, and the proposed organisation never came into being.[55] On numerous other occasions, the GATT was amended to include many of the provisions that had been included in the draft Charter of the ITO.[56]

Despite these challenges, the GATT survived and for 47 years served as the principal regulatory institution for international trade.[57] During this period, the cross-border trade landscape also changed dramatically.

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52 See, for example, Urgese's discussion of the US legislation protecting sea mammals, which was regarded to be in violation of GATT provisions. Urgese 1998: 457 – 503. See also Wair 1996: 2 - 3.

53 Manard 1992: 377; Jackson 1998:19; Matsushita 2003:3.

54 Trebilcock and Howse 1999: 36.

55 Jackson 1998:19; Stiles 1996: 121.

56 Dam 1970:11.

57 Laidhold 1999: 430; Kennedy 1998: 423 – 424; Gordon 2006: 85.

2.3.2 The Trade Negotiations

A total of eight negotiating rounds were concluded under the GATT's auspices. The first six rounds, lasting from 1947 to 1967, centred around tariff cuts on a reciprocal basis.[58] The concessions negotiated during these rounds led to a reduction in the average global tariffs on manufactured goods from 40% in 1947 to 5% in 1999. [59]

As the objective of eliminating tariffs neared its fulfilment, various GATT members turned their attention to non-tariff barriers as a way of suppressing foreign competition.[60] The proliferation of 'grey area measures'[61] increased and the need to reconsider the strategy for eliminating obstacles to trade liberalisation became harder to ignore.[62] This led to the seventh GATT round, the Tokyo Round, which took place between 1973 and 1979.

While the Tokyo Round also continued on the theme of tariff reductions, unlike the previous rounds, it tackled the issue of non-tariff barriers to trade for the first time.[63] New areas such as government procurement policies, subsidy policies, custom valuation policies and technical standards were included in the negotiations. Furthermore, for the first time, the negotiators acknowledged the need for "differential measures" to give special and more favourable treatment to developing countries.[64] The agreements emanating from this round were, however, only binding on the parties that voluntarily accepted them.[65]

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58 Manard 1992: 379. See also Kennedy 1998: 421. The first six GATT rounds were in 1947-Geneva; 1949-Annecy; 1951- Torquay; 1956- Geneva; 1960-61-Geneva and 1963-67-Geneva (known as the Kennedy Round). For a detailed discussion of developments during the Kennedy Round, see Rehm 1968: 403 – 434.

59 Trebilcock and Howse 1999: 21.

60 Venkataraman 1999: 533 – 354; Kennedy 1998: 421.

61 These were actions on the part of the GATT signatories which were neither clearly in contravention of the GATT nor obviously in line with its provisions.

62 Jackson 1998:20-21.

63 Manard 1992: 379; Lal Das 1998:2; Trebilcock and Howse 1999: 21; Matsushita et al 2003: 6; Pauwelyn 2006: 18.

64 However, developing countries themselves charged that the Tokyo Round failed to deliver on the promise of special advantages made to them. See Farless 1981: 303.

65 Trebilcock and Howse 1998: 21; Lal Das 1998: 2.

Shortly after the end of the Tokyo Round, some leading developed countries expressed a desire to include, in the trade talks, several new sectors previously falling outside the scope of the GATT.[66] Exporters of agricultural products, mostly in developing countries, also wanted to put agriculture on the negotiations agenda.[67] In addition, some members were pushing for the elimination of the protectionism that had evolved in the international textile and clothing trade as a result of the Multi-Fibre Arrangement.[68] All of these factors led to the eighth and final round of GATT, the Uruguay Round, which lasted from 1986 to 1993. The most significant outcome of the Uruguay Round was perhaps the creation of the World Trade Organisation (WTO) as a replacement for the GATT.[69]

2.4 DECISION-MAKING UNDER THE GATT

2.4.1 Overview

The text of GATT (1947) provides for joint action by signatory states in a number of provisions. Under Article XXV, each contracting party has one vote in all GATT meetings[70], and the joint decisions of contracting parties are to be taken by a majority of votes cast.[71] Provision is also made for a waiver of obligations imposed by the Agreement, provided that such a decision has the approval of a two- thirds majority of votes cast, and that such a majority constitutes more than half of all contracting parties.[72]

Furthermore, Article XXXIII requires a two-thirds majority vote of all the parties for accession of new members. In Article XXX, the consent of all the parties is required to

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66 These issues, namely international trade in services, trade-related intellectual property (TRIPS) and trade-related investment (TRIMS), were steadily replacing traditional goods as income earners for these countries. See Trebilcock and Howse 1999:22; Mavroidis 1992: 374; English 1988: 366; Reitz 1996: 557. The inclusion of some of these sectors, it must be said, went against fervent objections from developing countries, which were concerned that their liberalisation could result in damage to budding industries in these countries, due to superior foreign competition. See Gordon (2006: 96).

67 Lal Das 1998: 2; Mavroidis 1992: 374.

68 The Multi-Fibre Arrangement exempted the textiles and clothing from GATT disciplines, thus allowing countries to place quotas on imports of various textiles and clothing categories.

69 Reitz 1996: 557.

70 Article XXV (3).

71 Article XXV (4).

72 Article XXV (5).

amend Part I of the agreement on the MFN principle and the principle on tariff bindings. The rest of the agreement can be changed by a two-thirds majority of all the parties, with only those who accept the changes being bound by them. In all these provisions, the underlying principle is that of 'one country, one vote'.

Looking at the above provisions, most of them set a relatively low threshold for taking GATT decisions and, for some time after the GATT came into operation, they were generally adhered to by signatory states.[73] This was exemplified by a 1959 recommendation on freedom of contract in transport insurance, which was taken by a majority decision, as well as the fact that, in granting waivers and deciding on the accession of new contracts, decisions were traditionally taken by a two-thirds majority.[74]

However, things changed after a while. By 1958, European and US negotiators in particular were increasingly seeking to interpret and implement GATT provisions in a way that suited their particular interests, in order to protect certain domestic programmes, mainly for political expediency.[75] This was seen in the exclusion of the textile and clothing industry, in which most developing countries enjoy a comparative advantage,[76] from the GATT disciplines in 1974.[77] Until 2004, the sector was regulated separately under the Multi-Fibre Arrangement (MFA), and remained the only major manufacturing industry subjected to extensive quota restrictions by the major importing countries.

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73 Paulwyn 2006: 21.

74 Paulwyn 2006: 20.

75 Stiles 1996 121. See also Panitchpakdi 2001:433, who argues that part of the problem is that politicians always go to international fora and preach "free trade" to other countries, and yet they are not prepared to tell the same thing to their own Parliaments and Congress because their domestic industries, such as agriculture, are opposed to free trade. For more information see Tiefer (1998: 46 and 52 – 55) on the challenges encountered by US Presidents Bush and Clinton in the 1990s, which involved divisions and internal politics over free trade within their own political parties, as well as the Supreme Court's refusal to overturn state laws, such as those involving state taxation of foreign enterprises and state procurement, which disadvantaged foreign suppliers. See also the comments of Aldonas in Aldonas 2007: 31.

76 Comparative advantage is said to arise out of a country's greater endowment with the factors of production relative to others.

77 The importance of the textile and clothing industry to developing countries lies in its potential to improve the trade and development situation of these countries through job-creation and the earning of foreign exchange. See Athulathmudali 2007: 1. See also Gordon 2006: 88 – 89.

Agriculture has also not been regulated in terms of the basic rules applicable to other sectors since the GATT days.[78] In 1955, for instance, the US was exempted from its obligations under article XI, thereby allowing it to impose quantitative restrictions on foreign agricultural products. The reason for granting the waiver, according to one commentator, was the belief held by GATT contracting parties that "a refusal would damage the GATT system by forcing the United States either to defy GATT principles openly or to withdraw from the GATT altogether."[79]

Another explanation for why derogations from basic GATT rules were permitted was that "...the parties at fault [had] sufficient economic and political power that it [was] impracticable to obtain compliance from them when they [were] determined not to comply."[80] Yet another school of thought was that the law has only a limited role to play in the conduct of international trade, and any attempt at strict regulation and enforcement would fail because of the dynamic and fluid nature of world trade.[81] According to the proponents of the latter view, the value of the GATT had to be seen in terms of its role as a forum for negotiating trade problems and facilitating compromises, despite such compromises not always being strictly according to the negotiated rules.

The rudimentary treaty language of the GATT has also been blamed for failing to provide proper guidance to signatory states, which in turn is said to have resulted in

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78 See Hudec 1992: 77. See also Stiles 1996: 121. As Gordon puts it, "[e]ven as comparative advantage ordained that most poor nations should specialize specialise in primary products and farm goods, agricultural policies in most industrialized industrialised nations completely protected their farmers." See Gordon 2006: 88.

79 Filipek (1989: 137-138). See also Lunt 1994: 622 for another instance in which the US acted unilaterally to terminate the benefits of the Generalised System of Preferences extended to a number of countries under the GATT. See GATT BISD 265/203, which was adopted on 28 November 1979. See also Wair 1996: 17- 21 for a discussion of two cases involving unilateral trade embargoes by the US on importation of tuna products harvested with high levels of incidental dolphin mortality. Other instances of unilateralism on the part of the US involved the imposition of economic and trade sanctions on other countries in response to political and other forms of conduct by these countries which were completely unrelated to trade. As of May 1985, the US had in place at least seven programmes of economic sanctions against twelve countries. See Henderson 1986: 176.

80 Jackson, quoted in Mora 1994:109. Developed countries, which were largely responsible for violations of GATT principles, also managed this partly because developing countries were mostly absent when the GATT was established and during most of its evolution and growth. See Gordon 2006: 82.

81 Mora 1994: 110. See also Klabbers, who points out that another reason given for organisations adopting a "soft" approach to how they are run is because the law is sometimes deemed to be too inflexible, with the result that it leaves no room for manouevre when political practicalities demand some changes. See Klabbers 2001: 411.

conflicting views regarding the policy goals of the system.[82] As remarked by Farless, "[i]n practice...the GATT rules [had] not served as rules of general application, but more akin to the provisions of a contract... In this sense, there [was] no effective outside enforcement, and each party [was] free to renegotiate the meaning of the contract whenever circumstances [made] such action favourable."[83]

As shown later on in this study, in these kinds of circumstances, i.e. where the parties are free to negotiate and renegotiate the terms of their agreement as they deem fit and without adhering to any guiding principles or rules, considerations of transparency and accountability often cannot thrive and the interests of the weakest countries become the first casualties.[84]

Moreover, whatever the real reason behind the derogations, there is little doubt that they place developing countries at a disadvantage relative to their developed counterparts. As shown in the examples of agriculture and textiles and clothing referred to above, the derogations have generally occurred in situations where developing countries have a comparative advantage,[85] effectively eroding what should have been the main benefits accruing to these countries from their participation in the GATT. Thus, while the GATT's soft and loose rules mostly benefited strong countries, the other side of the coin was that for the most part, they adversely affected the interests of weaker countries.

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82 Jackson (1999: 102).

83 Farless (1981: 307). Berrisch also said the following about the GATT's procedures for dispute resolution: "[t]he mediation of ...conflicting interests is not always based on a pure legal strategy, but is often approached pragmatically with a goal of achieving consensus between the parties. This may even include tolerance of deviation from certain provisions of the GATT." He lamented the fact that the GATT's flexible approach to interpreting and enforcing its rules had the potential to be dangerous and to result in the erosion of the GATT legal order. See Berrisch (1991: 498 and 500). See also Pauwelyn (2006: 13), where he says that "[t]he original GATT was...more like a gentlemen's club than a legal regime".

84 See par 5.1 below.

85 See Hudec (1992); Athulathmudali (2007: 1); Stiles (1996: 121); Gordon (2006: 88 – 89).

2.4.2 Prescribed Procedure versus Practice

As pointed out above, notwithstanding the GATT provisions prescribing the procedure for taking decisions, actual practice differed significantly.[86] With the passage of time, negotiation and consensus replaced voting as the basis for decision-making and became entrenched GATT traditions.[87] Intense and lengthy consultations would be held until a common ground was found, and voting became extremely rare.[88] Another GATT tradition, namely "not to allow progress to be frustrated by one party's obstinacy unless it happened to be one of the major trading powers",[89] also ensured that disagreements were reduced to a minimum.

Baldwin makes some interesting observations based on his experiences while working at the GATT in the 1960s, which explain, at least in part, the basis of these deviations. He points out that the older generation of GATT officials stationed in Geneva at the time strongly believed that insisting on strict enforcement of GATT's underlying principles without paying "sufficient regard to the special economic circumstances of particular members" would be a grave mistake.[90] In their opinion, he says, the participation of the major trading nations in the multilateral trading system was critical to the survival of the GATT and attainment of liberalisation, and therefore disregarding the negotiated rules was justified if it guaranteed that these countries would remain part of the negotiations.

The view that participation of the major trading countries ought to be secured at all costs would persist in later years and found application in more serious cases. As Baldwin puts it, "[i]t has involved a willingness to introduce new forms of discrimination between countries and to utilise quantitative and other non-price

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86 See Farless 1981: 307.

87 Pauwelyn describes the steps followed in undertaking the consensus procedure in the following terms: "[i]n the majority of cases, prior to formal meetings an agreement was worked out. Only subsequently was a decision taken and this mostly by consensus as interpreted by the Chairman, that is, in the absence of a formal objection from any contracting party present on the floor...". See Pauwelyn 2006: 21. See also Stiles 1996: 121. See also Hoekman and Kostecki 1995: 40; Matsushita et al 2003: 12.

88 www.southcentre.org/publications/wtodecis/workingpapers11.pdf (Accessed on 03/02/05).

89 Hoekman and Kostecki 1995: 40.

90 Baldwin 2000: 35.

means to limit imports on the ground that these derogations were needed to continue with the general liberalisation process."[91]

An example of this practice was seen when the provisions of the EEC Treaty were examined to determine whether or not the free trade area it established met the requirements of article XXIV of the GATT. A working party established for this purpose failed to come up with a conclusive answer. When the matter was referred to the Intercessional Committee, it too did not produce a definite answer and, instead, concluded that "it would be more fruitful if attention could be directed to specific and practical problems, leaving aside for the time being questions of law and debates about the compatibility of the Rome Treaty with Article XXIV of the General Agreement."[92] No formal decision was ever taken on the issue. In all likelihood, the two bodies were reluctant to give a ruling that would risk alienating the EEC and perhaps causing it to pull out of the GATT.

The decision not to use the "one country, one vote" principle had the effect of rendering irrelevant the fact that developing countries comprised the majority of GATT membership, which would work in their favour during voting. Furthermore, the practice of allowing only the bigger countries to block progress in the negotiations gave these countries a lot of power over the smaller countries in determining the course of the trade negotiations. As demonstrated by the example involving the textiles and clothing sector above,[93] this kind of unchecked power is susceptible to abuse.

An additional setback for developing countries was the emergence of another practice - the "green room" meetings. In terms of this practice, the bigger countries essentially took decisions on certain major issues among themselves and then presented them as *fait accompli* to the rest of the GATT signatories.[94] The lack of transparency and accountability surrounding this process generated a lot of mistrust and resentment from smaller countries, which felt that the practice unduly took away their right to have a say in decisions taken by the organisation. The green room

91 Baldwin 2000: 36.
92 Berrisch 1991: 498 – 499.
93 See par 2.4.1 above.
94 Footer 2006: 168 – 169.

process, which was subsequently inherited by the WTO after the Uruguay Round, is discussed in greater detail later on in this study.[95]

It must be pointed out, however, that the disparate treatment between developed and developing countries in the GATT has also been attributed to the fact that, for much of the time that the GATT was in force, many developing countries were not active participants and, therefore, had little or no influence on how its rules were developed, interpreted or enforced.[96] While in some instances the failure of developing countries to participate in GATT activities was due to circumstances beyond their control,[97] in others there is no obvious explanation for their lack of participation. To the extent that it was within the capability of developing countries to be involved in GATT activities but they did not become involved, it can be argued that they have only themselves to blame.

2.5 SOUTH AFRICA AND THE GATT

2.5.1 Pre-1947

South Africa was an early player in the multilateral trading system, having taken part in both the debates leading up to the GATT's formation and in all the subsequent rounds of trade negotiations held under the GATT's auspices.[98] For much of this time, South Africa assumed a "developed country" status and only sought reclassification as a "developing country" towards the end of the GATT era.[99] An episode related by Hudec concerning debates held at the time when the ITO was still anticipated[100] gives one an idea of just how much a part of the discussions that preceded the creation of the GATT South Africa was.[101]

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95 See par 3.8 below.
96 Gordon 2006: 82.
97 For instance, in the early years of the GATT, a vast majority of developing countries were still under colonial rule and not eligible to participate independently in the GATT. There was also the issue of costs.
98 See Macrory et al 2005: 352. See also par 1.1 above.
99 See par 1.1 above.
100 It should be borne in mind that most of the GATT's text was drawn from the substantive obligations and enforcement procedures of the ITO Charter.
101 Hudec 1975: 35 – 37.

The incident concerned the meaning and scope of the "nullification and impairment" clause[102] proposed by Australia and the US for inclusion in the ITO Charter. In previous trade agreements, the standard "nullification and impairment" clause had covered the right of an aggrieved party to request formal consultations with the nullifying party and nothing more. However, Australia and the US sought to widen the scope of the clause to include the creation of a decision-making body that would be endowed with the power to make third party rulings concerning the merits of a claim. The proposal also included the possibility of using the rulings of the new body to support formal claims for compensatory adjustments.

The South African delegation expressed some reservations about the proposal. Their first concern was that without some guidelines regarding when the nullification procedures would be applicable, it would be difficult to know where to draw the line. Their other concern was that the remedies suggested in instances where "nullification and impairment" were found to exist were the same sanctions used in cases involving breaches of legal obligations. The South Africans felt that the proposed clause would have the effect of giving the ITO power to create new obligations where none existed, and wanted the use of sanctions to be restricted to clear violations of legal obligations.

The Australian and US delegations defended their suggested version of the "nullification and impairment" provisions, contending that the sanction of retaliation by another state, which formed part of their proposal, had been in existence for a long time. They argued that the proposal only sought to introduce a new principle in terms of which the ITO would have the power to restrict its members' ability to apply an old remedy.

Unconvinced by this argument, the South African delegation contended that the proposal to grant the ITO power to make recommendations and to authorise compensatory withdrawal of obligations would be prejudicial to a defendant who disagreed with the organisation's ruling. They reasoned that, in so far as such a

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[102] The clause was meant to address situations where measures taken by governments, but which were not covered by the Charter, stood in the way of expected benefits of tariff reductions.

defendant was concerned, its conduct would be subject to the exercise of power by the ITO, even though it was perfectly legitimate. The Australians and Americans eventually conceded that the proposal was problematic, but still pressed on with their demand, on the flimsy ground that the power sought for the ITO "was needed and the Organisation could be trusted not to abuse it".[103] More importantly, for the present purposes, the complaint by South Africa led to a review of the proposal and precipitated a genuine effort to redraft it with a view to effecting some improvements.

2.5.2 Post 1947

Following the formation of the GATT, South Africa actively participated in its activities. South Africa was an original signatory to the agreement and took part in each of the multilateral trade negotiation rounds that the GATT organised. South Africa even observed the Tokyo Round Codes on Import Licensing and Customs Valuation, which it had accepted voluntarily.[104]

Along with the leading trading countries and a few developing countries most affected by the particular issue under discussion, South Africa was also a regular participant in the exclusive "green room" meetings, where many of the important GATT decisions took shape.[105] In use since the 1960s, the "green room" meetings were held during the negotiations supposedly to explore points on which the parties were most likely to agree to a compromise and to seek solutions to the most contentious issues.[106]

In view of the above, it can be reasonably argued that South Africa was an active participant in GATT decision-making, both in the preparations ahead of the institution's formation and in the subsequent trade negotiations.

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103 Hudec 1975: 37.

104 The GATT Secretariat 1993: 2.

105 The other regular participants were the Quad (United States, The EC, Japan and Canada), Switzerland, India, Mexico, Singapore, Brazil, South Korea, Hong Kong, Australia and Argentina.

106 As mentioned previously, even though the "green room" meetings are justified by saying they enable the participants to identify aspects on which they needed to focus in their research, bargaining and consensus-building efforts (See Deese, 2007: 104), they were heavily criticised by the poorer countries for their lack of transparency and accountability.

2.5.3 Involvement in the GATT Dispute Settlement Process

Even though, over time, the GATT developed separate and independent mechanisms for decision-making and dispute settlement, both mechanisms were, for the most part, underpinned by a political process characterised by the eschewing of rule-oriented regulation and preference for more non-directive consultative procedures.[107] In the words of Pauwelyn, "[w]hilst GATT did inaugurate the creation of a legal-normative regime for world trade, at its core it remained a profoundly political bargain."[108] Speaking more specifically about the GATT dispute settlement mechanism, Pauwelyn further remarked that "...GATT's enforcement mechanism (Article XXIII) was a diplomatic procedure set up to maintain a balance of concessions in the face of future uncertainties, not an independent judicial system to ensure the impartial enforcement of GATT rules."

As shown elsewhere in this study,[109] this preference for "diplomacy" running through both the GATT decision-making and judicial mechanisms has had a profound impact on transparency and accountability in the GATT/WTO system as they pertain to countries with circumstances similar to those in South Africa.[110] On these grounds, it was thought appropriate to include an examination of South Africa's relationship with the GATT dispute settlement system in this chapter. This, it is hoped, will help facilitate a better appreciation of the extent of transparency and accountability, or lack thereof, in the GATT system as a whole, and show that South Africa's active involvement in the GATT decision-making mechanism may not have made the country immune to the adverse effects of lack of transparency and accountability in the broader GATT system.

Generally speaking, the level of involvement displayed by South Africa in the areas of GATT decision-making discussed above was not so evident in the GATT dispute settlement process. This is reflected in the fact that, throughout GATT's nearly 50

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107 Hudec 1971: 1299 – 1300.
108 Pauwelyn 2005: 14.
109 See par 2.4.2 and par 3.2.
110 i.e. countries experiencing developing country challenges irrespective of whether or not their governments have officially declared them as such.

years of existence, no complaints were ever brought against South Africa and that South Africa only lodged one Article XXIII complaint, which went all the way to a panel hearing.[111] These figures do not compare favourably with those of other countries, including some comparable countries such as Brazil and India, over the same period.

Admittedly, there were several occasions on which South Africa utilised other mechanisms provided by the GATT to seek redress for what it perceived to be a violation of its rights. However, these measures fell short of South Africa itself requesting fully-fledged GATT panel hearings. In one instance in 1988, South Africa approached the Uruguay Round Surveillance Body to protest steps taken by Canada to subject South African imports of wool worsted fabrics and clothing items to fixed quota restrictions. Following Article XXII consultations, an inter-governmental arrangement was reached, thereby putting the matter to rest.

In another instance, South Africa made a submission as an interested third party in a complaint lodged by Chile against the imposition of quota restrictions by the EC on imports of dessert apples. A GATT dispute settlement panel ruled in favour of Chile and South Africa, finding that the EC's conduct was a violation of Articles X, XI and XIII of the GATT.[112]

Other complaints lodged by South Africa against its trading partners include the following: a complaint against the imposition of orange quotas by Japan; a request for the reclassification of defatted maize germ exported to the EC; a request for an increase in the cotton quota to the United Kingdom; and a complaint against iron and steel export quota to the EC.[113]

One might ask why it is a problem if South Africa lodged or defended only a few or no disputes in the GATT dispute settlement system. The truth is, although it is not a problem *per se*, questions do arise when one considers that South Africa was involved in significant amount of international trade during the GATT era, which made

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111 The GATT Secretariat 1993: 172.

112 GATT Panel Report, European Economic Community- Restriction on Imports of Dessert Apples – Complaint by Chile, L/6491, adopted 22 June 1989, BISD 36S/93.

113 The GATT Secretariat 1993: 173.

it quite likely that trade disputes with other countries would arise.[114] Furthermore, other comparable countries, including Brazil and India, were much more involved in the system, thus raising the question as to why the situation was different for South Africa.[115]

A bit of background might, at least in part, help explain South Africa's minimal participation in the GATT dispute settlement process. Since the 1920s, South Africa had pursued an inward-looking development strategy guided by a trade policy that was designed to promote import-substitution. Thus, the country's trade policy was for a very long time characterised by selective tariff protection and binding import controls.[116]

In the 1970s, South Africa's trading partners managed to pressure it to lower quantitative restrictions, but this did not last for long. When the balance of payments situation in the country deteriorated in the early 1980s, the progress towards liberalisation was quickly brought to a halt.[117] Furthermore, the imposition during the same decade of international trade sanctions targeted at the apartheid regime, as well as the growing economic instability resulting from the country's explosive political situation at the time,[118] encouraged more protectionism in South Africa. A combination of all these factors ensured that South Africa's trade links with the rest of the world, including fellow GATT signatories, were significantly reduced.

In addition, developing countries, of which South Africa was effectively a part, despite the government refusing to acknowledge this,[119] generally had a dismal success record before GATT dispute settlement panels, compared to developed countries. This conclusion is supported by a comprehensive study of the GATT dispute settlement cases between 1948 and 1989, conducted by Hudec, Kennedy and Sgarbossa.[120] According to the study, out of a total of 207 cases heard during the

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114 For example, by 1991, South Africa's merchandise exports were valued at US$23.7 billion, and merchandise imports at US$23.7 billion. See GATT 1993: 9.
115 See par 5.5.2 below.
116 The GATT Secretariat 1993: 3.
117 The GATT Secretariat 1993: 3.
118 Macrory 2005: 352.
119 See par 1.1 above.
120 Hudec et al 1993: 3; see also Reitz 1996: 566 – 572.

relevant period, 88 (43 %) resulted in a ruling, and of these, 68 (77%) were confirmed as violations on the part of the defendants.[121] A further 64 cases out of the 207 were resolved through settlement or other types of concessions.[122] Out of the overall 207, another 55 (27%) were withdrawn or abandoned following an impasse[123] or because a complainant yielded to "arm-twisting" or bilateral demands.[124]

The most revealing part of the study relates to the total number of complaints by and against individual governments. It showed that the GATT dispute resolution mechanism was dominated by a handful of big countries. The US, the EC and EC members, Canada and Australia, accounted for 73 percent of the claims lodged, while the US, the EC and EC members, Canada and Japan, appeared as defendants in 83 percent of the cases. [125]

The mechanism's sheer domination by big countries means that it was scantily used by the majority of GATT members, most of which were developing countries. Indeed, the study revealed that in only 44 (19%) of the complaints and 29 (13%) of the defences were developing countries involved as parties.[126] As stated above, while this might seem to suggest that developing countries had few or no disputes to lodge or defend, the explanation is more complex. Considering that in many instances developing country concerns and complaints were quelled by developed countries by meting out unilateral sanctions or threatening the withdrawal of aid even before they could reach the dispute settlement stage,[127] it came as no surprise that the latter countries were generally absent from the GATT dispute settlement system.

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121 Hudec et al 1993: 9.

122 Hudec et al 1993: 11.

123 This is where a defendant refuses to comply with a GATT ruling and the complainant ends up giving up on the claim.

124 These are instances where a complainant, after lodging a complaint, subsequently withdraws it due to pressure from the defendant to abandon the claim. In view of the GATT reality that rich countries frequently imposed their will and interpretations of GATT rules on other parties and meted out sanctions to those with opposing views, inevitably, it was the weaker countries that bore the brunt of these "arm-twisting" tactics. See Brewster 2006: 255. See also Gathii 2008: 1363. In all likelihood, it was mostly developing countries that were forced to give up their claims because of the imbalance in the power relations between them and developed countries.

125 Hudec 1993: 28 – 30.

126 Hudec 1993: 30.

127 See par 5.1 below.

That the rich and powerful countries were more successful in the GATT dispute settlement process was also hardly surprising since the GATT evolved to become what Abbot calls a "private interest community". He describes this as a group (in this case a group of countries) having no independent community interests or goals, concerned only with fulfilling the wishes of its individual members and having as its only social role the task of providing a forum for the resolution of private disputes.[128]

In view of the GATT's approach of limiting its involvement to maintaining a minimum degree of order without being directly involved in the formulation and enforcement of rules regulating the relationship between its contracting parties, this means that the contracting parties were, for the most part, left to their own devices to promote and protect their individual interests as best they could. In this kind of setup, it was to be expected that the strongest countries would dominate, while the weaker ones and their interests would be compromised.

It also could not have helped that the procedures followed in the GATT dispute settlement system were sometimes not clearly defined, nor were they the ones prescribed in the agreement itself. For example, when confronted with issues involving interpretative difficulties, the issues would sometimes be submitted to the Chair of the Contracting Parties[129] for his determination, and his ruling would normally be accepted without question.[130] This clearly raised issues of transparency and accountability, considering the fact that Chairs of the Contracting Parties came mostly from industrialised countries. Developing countries would therefore have had some doubts regarding their ability to act impartially. One could add, however, that this is unlikely to have had a significant impact on South Africa, since in those days, South Africa was much more of a GATT insider than these other countries.[131]

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128 Abbot (1992: 114). Stiles also speaks of "neoliberal institutionalism," which he says was applied during the Uruguay Round. This theory holds that, while international institutions have a role to play in interntional affairs, states are their driving force. See Stiles (1996: 120). See also McLarty (1994: 268) regarding a discussion on whether or not the GATT 1947 operated as a judicial body, as opposed to a diplomatic body.

129 The Chair of Contracting Parties was head of the GATT Secretariat during the GATT era. See Hudec (1998: 108).

130 Jackson (1967: 145); Steward (2003: 29).

131 See par 2.5.1 above.

In addition, the fact that the ultimate remedy provided for in the dispute settlement mechanisms of various agreements administered by the GATT was retaliation did not give the weaker contracting parties much of an incentive to institute claims.[132] As one writer put it, "[t]he economic sanctions ... used in GATT, consisting of the retaliatory increase of import restrictions by the country injured, do not adequately serve the needs of small countries with little bargaining power as consumption markets."[133] This was because whatever retaliatory measures they could take would not be enough to hurt rich countries in a way that would cause them to alter the conduct in question. On the contrary, such a measure would harm the weaker countries, as they often depended on trade with rich countries.

The factors highlighted above, coupled with others, such as the length of time it took for a GATT case to be brought to finality, the costs involved and the fact that the losing party could block a panel report[134], would all have contributed to South Africa's modest participation in the GATT dispute settlement process in the same way that they did with other countries experiencing more or less the same challenges. More importantly for the purposes of this study, the whole discussion further underscores the fact that the GATT's preference for a political and nondirective bargaining went beyond its decision-making processes, and extended to other facets of the system, such as dispute settlement. In so doing, the discussion also drew attention to the reality that the distinction drawn between the various aspects of the GATT was not as profound as it might have appeared to be at first, and that there was a common thread running through all of them in the form of a bargaining process that ensured lack of transparency and accountability, which in turn guaranteed domination of weak countries by strong ones.

2.6 SUMMARY AND CONCLUSION

A knowledge of the history and background of the GATT and its decision-making processes is critical to understanding the WTO and its own decision-making

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132 For example, article VI of the Subsidies Code made provision for a contracting party to retaliate against an export or a domestic subsidy by imposing countervailing duties equal to or less than the subsidies. See Coccia 1986: 1 – 44 for a detailed discussion of the dispute settlement mechanism under the Subsidies Code.

133 Anonymous author 1968: 1816.

134 Laidhold refers to the GATT system as being "formally non-binding".

mechanisms. Such knowledge is essential to appreciating how the WTO, which is the GATT's successor, came to be and why it functions the way it does. By studying the GATT, it becomes possible to explain the origins and basis for many of the decision-making practices followed in the WTO today. The study of the GATT also facilitates an assessment of the extent to which the WTO has succeeded in improving on the legacy of the GATT.

In the case of South Africa, it was actively involved in the GATT right from the start, and participated in all the rounds of trade negotiations that the GATT organised. However, South Africa's active involvement in the trade negotiations was not matched by its use of the dispute settlement system. While the country's absence from the GATT dispute settlement hearings was repeated across most of the developing world, comparable countries, such as Brazil and India, were much more involved, thus raising questions about the real reasons behind South Africa's non-participation.

Factors such as South Africa's pursuit of an inward-looking development strategy, international trade sanctions, being compelled to abandon complaints even before they reached the panel stage, and the use of retaliation as the ultimate remedy for the winning party, are among the most likely contributors to the country's modest participation in the GATT dispute settlement system.

From the above, it becomes clear that the use of diplomacy in the GATT and the consequent domination of weak countries by strong ones as a result of the lack of transparency and accountability were not restricted to decision-making. Instead, as shown above, diplomacy was used in other aspects of the GATT and had the same adverse consequences for developing countries.

CHAPTER 3
THE WTO AND ITS DECISION-MAKING PROCESS

3.1 INTRODUCTION

The need for new and better institutional mechanisms and a dispute settlement system for the GATT became clear long before the launch of the Uruguay Round of negotiations.[135] Decades of deviations from the GATT's core legal principles in the form of officially sanctioned waivers, coupled with long-running quotas that went contrary to GATT rules on quantitative restrictions, and the imposition of high tariffs by developed countries on goods of the greatest export interest to developing countries, had left the GATT with a battered image.[136] In addition, the complexity and sensitivity of the issues arising during the trade negotiations were also increasingly beyond what the GATT was equipped to deal with. All of these factors led to the decision to create a new organisation that would replace the GATT in regulating international trade. Thus, the WTO was born.[137]

There were high expectations of the new organisation from developing countries. In particular, they anticipated having more say in the WTO, and expected more tangible and favourable outcomes from its consensus-based approach to negotiations and voter equality.[138] These expectations were perhaps partly due to the fact that developing countries had played a greater role in the establishment of the WTO, compared to the part they had played in the formation of the GATT.[139] However, as

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135 See Jackson 1998: 16; Hudec 2002: 82; Fasan 2003: 162-163; Trebilcock et al 1999: 35-36; Dam 1970: 11; Freneau 2003: 3; Granger 2006: 524. The proposal for commencing the Uruguay Round negotiations was, however, strongly resisted by some countries, both developed and developing, which felt that it came too soon after the previous round of negotiations. See Sprance 1998: 1242.

136 Kennedy 1998: 442.

137 Jackson 1992: 451. For further comments on the evolution of the GATT and its shortcomings, see Watson et al 1999: 15; Jackson 2000: 196.

138 Gordon 2006: 81. Under the previous (GATT) regime, efforts to promote the interests of the poorer countries did not achieve much. Obstacles to achieving this objective included exceptional clauses, promotion of regional integration, creation of export cartels and import substitution strategies. In the words of Barral, "[e]xcept for particular experiences, we cannot identify any successful impacts from these strategies for the development within the poorer countries." See Barral 2006: 218.

139 A majority of developing countries that were colonies in 1947 represented themselves in the Uruguay Round as independent states. See Gordon 2006: 93.

shown later on in this chapter, these expectations may have, at least for some of the countries, been misplaced.

As an organisation, the WTO has multiple functions. It acts as a forum for negotiations on the expansion of world trade, and member governments go there to negotiate trade agreements. Members also look to the WTO for resolution of trade disputes. The main procedure prescribed for decision-making during the negotiations is consensus, and if consensus fails, provision is also made for voting.[140] However, with the number of members now standing at around 153,[141] reaching consensus has become quite difficult. The diverse and often conflicting interests now represented in the WTO mean that there is a constant threat of a deadlock,[142] as well as a growing inability on the part of the organisation to react legislatively in order to rectify dubious Panel and Appellate Body decisions.[143]

At the same time, voting hardly ever takes place in the WTO. This means that developing WTO members who share the same views on particular issues cannot use their majority to sway decisions in their favour, despite the rules permitting them to do so. This disparity between theory and practice reflects the broader imbalance in power relations between developing and developed countries found in many WTO agreements and practices.[144] In the words of Rolland, "...this formal equality [i.e. one country, one vote system] yields to power plays increasingly drawing resentment from many developing members that feel disenfranchised from the process."[145]

One might ask why developing countries do not just leave the multilateral trade system altogether, instead of continually complaining about its perceived unfairness and bias in favour of developed countries. The reality is that developing countries, as with many developed countries, continue to hold on to the belief that open trade with the rest of the world is essential to their prosperity and development. In the words of Nguyen, "[t]he belief that a liberal trade regime will confer ... benefits upon those who

140 Article IX: 1 of the WTO Agreement.
141 This figure was last updated on 23 July, 2008. See the WTO website at: http://www.wto.org/english/theWTO_e/whatis_e/tif_e/org6_e.htm (Accessed on 30/07/09).
142 Jackson 2001: 74; Verenyov (2003: 469-470).
143 Ehlermann et al 2005: 51.
144 Gordon 2006: 93 – 94.
145 Rolland 2007: 247.

become members has long propelled the multilateral trade regime's persistent objective of increasing its members."[146] This view is also echoed in the preamble to the WTO Agreement, which is a reflection of the members' convictions. It reads as follows, "[t]he Parties to this Agreement, *recognizing* that their relations in the field of trade and economic [endeavour] should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand."[147]

Developing countries also appreciate the fact that the WTO can, at least potentially, be a useful platform for achieving their developmental aspirations, even though realising this potential is currently made difficult by the existing disparity between prescribed rules and practices in the WTO. Thus, the complaints voiced by developing countries do not necessarily signify their objection to the core principles underlying the WTO, but rather their general dissatisfaction with the way WTO rules and decisions are made and implemented.

In this chapter, the procedures for decision-making in the WTO are put under scrutiny. In particular, an effort is made to determine the extent of the disparity between theory and practice in the WTO decision-making process, its impact, as well as the reasons why it happens. In assessing the impact of these discrepancies, particular attention is paid to developing countries.

3.2 THEORY VERSUS PRACTICE

Decision-making in the WTO takes place at two important levels.[148] Firstly, it takes place in the Ministerial Conference, which is the organisation's main governing body, comprising trade ministers from all member countries.[149] The Ministerial Conference convenes once every two years and during the time that it is not in session, another body, the General Council, oversees the day-to-day running of the WTO.[150] The General Council constitutes the second level of WTO decision-making, and is made

146 Nguyen 2008: 243.
147 Marrakesh Agreement Establishing the World Trade Organisation, April 15, 1994, 1867 U.N.T.S. 154, 33 I. L. M.1167.
148 Jawara et al 2004: 13-16.
149 Article IV (1) of the Agreement Establishing the WTO.
150 Article IV (2) of the Agreement Establishing the WTO.

up of ambassadorial level country representatives. Negotiations in the General Council take place on a daily basis throughout the year.

When it comes to the powers of the WTO decision-making bodies referred to above, the Ministerial Conference has the authority to take decisions on all issues covered under any of the multilateral trade agreements.[151] Four particular instances are contemplated by the WTO Agreement in which voting may occur, namely: a decision interpreting any of the multilateral trade agreements, which may be taken by either the Ministerial Council or the General Council and must be adopted by a three-quarters' majority of members;[152] a decision on a waiver of an obligation imposed on a member by any of the multilateral trade agreements, also to be adopted by a three-quarters' majority;[153] decisions involving amendments to provisions of the multilateral trade agreements, which may require consent of all the members or a two-thirds' majority, depending on the specific provision targeted for amendment;[154] and a decision on the admission of a new member, which requires a two-thirds' majority of members.[155] In all meetings of the Ministerial Conference, each member has one vote.[156]

In the case of the General Council, in addition to overseeing the daily operations of the WTO and implementing decisions of the Ministerial Conference, it also acts as the Dispute Settlement Body and Trade Policy Review Body.[157] The General Council enjoys decision-making powers in respect of all these functions, although it remains accountable to the Ministerial Conference for everything it does. In all meetings of the General Council, each member has one vote.[158]

The General Council also works through a number of subsidiary bodies, namely the Council for Trade in Goods, the Council for Trade in Services and the Council for Trade-Related Aspects of Intellectual Rights, all of which oversee the functioning of

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151 Article IV (1).
152 Article IX (2).
153 Article IX (3).
154 Article X.
155 Article XII (2).
156 Article IX (1).
157 Article IV (3) and (4).
158 Article IX (1).

the WTO agreements dedicated to the trade fields to which they are assigned[159]. These subsidiary bodies have themselves established their own smaller bodies to which they allocate tasks.[160]

It is important to note that although formal meetings are regularly held in the WTO to take decisions, it is mostly in the informal consultations held on the sidelines of these formal meetings that consensus is built and important decisions take shape.[161] This is more so because in practice, voting effectively does not take place in the WTO. Interestingly, no record of these informal consultations is kept, with the result that no-one besides the parties involved gets to know what actually transpires during the consultations, and what the details of the discussions are that led to consensus.

From the accountability point of view, it would appear that the WTO is fairly compliant, considering the fact that all the members are represented in both the Ministerial Conference and the General Council. However, accountability in the true sense requires more than mere representation in the organs of a particular organisation. It also demands that the level of influence exerted on the management and personnel of the organisation by the various representatives and their response to this influence be the same and on the basis of equality.[162] As shown later on in this chapter, developed countries wield far more power and influence in the WTO and its decision-making processes compared to developing countries.[163]

The procedure to be followed by the WTO in decision-making is prescribed in article IX (1) of the Agreement Establishing the WTO (WTO Agreement) in the following terms: "[t]he WTO shall continue the practice of decision-making by consensus followed under the GATT 1947". This contrasts with GATT 1947, which only made specific provision for voting and did not mention consensus. The WTO Agreement

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159 Article IV (5).
160 Article IV (6).
161 See www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm#ministerial
162 Woods and Narlickar (2001:573).
163 The prevailing view amongst developing countries is that the leadership and personnel of the WTO Secretariat actively work to advance the interests of developed countries. For example, the Secretariat has been accused of aggressively promoting the inclusion of issues of importance to developed countries in the most recent rounds of multilateral trade negotiations. See Focus on Global South and the WTO (2002: 7).

further provides for the possibility of voting where consensus cannot be reached.[164] For example, even though the Ministerial Conference and the General Council are permitted to give authoritative interpretations of the WTO Agreement and other covered agreements,[165] where consensus cannot be reached on the interpretation of a specific provision, an interpretation is to be adopted by a three-fourth's majority vote.[166]

In practice, however, voting hardly ever takes place in the WTO. When one or more members reject a proposal, the next step is usually a lengthy bargaining process aimed at overcoming whatever obstacles might be preventing consensus.[167] This bargaining, according to Cho, "reflects and reinforces power disparities among participants [and]...tends to shape international commerce in a mercantilist, or sometimes exploitative, fashion."[168] The practice has also effectively taken away the promise of a stronger voice for poorer countries that came with the replacement of the GATT by the WTO[169], and tends to strengthen the view that there is no accountability to the poorer countries on the part of the WTO.

One episode that illustrated just how entrenched the lack of voting is in the WTO occurred during the Doha Round negotiations, when attempts were made to implement paragraph 6 of the Doha Declaration.[170] Due for implementation before December 2002, the provision could only be implemented in August 2003 because one WTO member refused to endorse the proposed draft proposal, thereby blocking consensus. Even though voting was available as an option, it was never considered and deliberations carried on long after the set deadline had passed. This was the case despite the blocked measure having the potential to save thousands of lives by making desperately needed medicines available.

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164 Articles 4 and 10.
165 Article 9.2.
166 Sprance 1998: 1245.
167 Ehlermann et al 2005: 500.
168 Cho 2005: 485.
169 The WTO formalized the consensus-based approach to negotiations and voter equality. See Gordon 2006: 81.
169 Paragraph 6 of the Doha Declaration reads as follows: "[w]e recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem..."

In light of some criticism induced by the democratic deficit created by the shunning of voting, which in turn resulted in the lack of transparency and accountability, the question has been asked as to whether or not participatory democracy is an appropriate model for an international organisation such as the WTO. Some commentators have suggested that the answer to this question lies in the particular organisation's level of "integration", i.e. the scope of competence it has been granted, as well as the influence that its institutions or organs have on the members.[171]

In the context of the WTO, organs such as the dispute settlement mechanism have features that suggest a high level of integration.[172] Despite having these features, the dispute settlement system in particular is not run in the same way that similarly integrated systems are run. For example, its proceedings are still not open to anyone who wishes to attend them, the Appellate Body members are appointed on a part-time basis, and its rulings have no direct application in domestic courts.[173]

It should not come as a surprise, therefore, that the discrepancy between the powers exercised by some organs of the WTO and the level of control or say that members have over them have given rise to some discontent. These organs, and through them the WTO itself, have been criticised for how they have used the WTO's power and democratic deficit to promote the interests of private corporations, exclude the views of smaller, poorer countries from trade negotiations and advance free trade in disregard of other important considerations such as environmental protection and workers' rights.[174]

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171 See Stein 2001: 493. "Integration" has been described as being "marked by a significant transfer of national power [which] may reach a level high enough to speak appropriately about 'constitutionalisation' and a 'constitutionalised' system." Stein2001: 495. A 'constitutionalised' system has, in turn, been described as "a legal order established by international treaties giving birth to an international organisation that behaves as if its founding instruments were not a treaty governed by international law, but a constitutional charter governed by a form of constitutional law". See Wailer, referred to in Stein 2001: 495.

172 These include the following fallback procedures accompanied by strict adherence to deadlines regarding when the next step in the procedure must kick in; member's inability to block a decision; the use of negative consensus; imposition of restrictions on when an appeal is possible and employment of centrally controlled retaliatory measures.

173 See Stein 2001: 502.

174 Stein 2001: 504.

3.3 THE MEANING OF CONSENSUS

The decision-making practices in the multilateral trading system have gone through different phases over the years, mostly in response to changing circumstances in the system. In the early years of the GATT, when there were only a few contracting parties, it was not uncommon for a decision to be taken by less than unanimity.[175] However, with the growth in the number of members, voting soon became the exception, and consensus decision-making the rule.[176] But what exactly is consensus?

The term "consensus" has never been given a clear definition in both the GATT and the WTO.[177] As mentioned above, Article IX of the WTO Agreement simply incorporates formally, into the WTO rules the customary decision-making practices of the GATT. This GATT "customary practice" entailed regarding a member to be in agreement with the outcome of a meeting if such a member was not represented in that meeting or, if represented, its representative failed to challenge the decisions taken there.[178] This means that even if a member is absent from a meeting at which a particular decision is taken, based on the fact that that member's objection is not registered, the member's consent is presumed.

This conception of consensus has been defended by the WTO leadership on the grounds that it is the "democratic guarantee" of the WTO, since "everyone has a voice."[179] In reality, however, the opposite is often true. Decision-making by consensus can only be democratic if WTO members are in a position to express their objection. Unfortunately, power politics and the fact that poorer members are unable to send representatives to many of the meetings ensures that these members' ability

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175 E.g. the amendment of part II of the GATT in 1948 was effected with less than unanimity; the adoption of a recommendation on freedom of contract in transport insurance in 1959 was adopted by a majority decision; and the outcomes of the majority of GATT trade negotiation rounds were actually accepted by only a small percentage of GATT parties. See Pauwelyn 2005: 20.

176 E.g. resolutions on investment for economic development, the disposal of surplus products, and the liquidation of strategic stocks were adopted by consensus in 1955; several Tokyo Round results were implemented through decision-making by consensus in 1979. See Pauwelyn 2005: 20.

177 Kenworthy 2000: 3.

178 Madeley 2003: 1; Ehlermann et al 2005: 55; Verenyov 2003: 430; Yen 2006: 19; Sprance (1998: 1245).

179 Focus on Global South and the WTO (2002: 2).

to voice their dissent is severely restricted.[180] The result is that many of the decisions taken in WTO meetings, which are often crafted beforehand by major powers amongst themselves,[181] pass without being scrutinised or challenged by poorer countries. This lack of oversight by developing countries clearly compromises both the transparency and accountability of the WTO in that it denies these countries a say in decisions that often end up binding them.

The shift towards consensus practice in the GATT/WTO is, for the most part, rooted in politics. During the 1960s when the GATT membership started to grow dramatically and become more diverse, a new set of challenges for the multilateral trading system emerged. These included some serious substantive disagreements.[182] To avoid decisions they perceived to be detrimental to their interests being taken, some dominant GATT contracting parties, already aware of the rapidly growing numbers of developing countries, resolved to curtail the use of voting.[183] They achieved this goal by pushing for voting to be replaced by consensus. The prevailing view among the major countries was that the switch to consensus was necessary if their remaining in the system was to continue to be worthwhile.[184] In the words of Alexovicova and Van den Bossche, "[t]he most common explanation for [adopting consensus] ...is that ...voting majorities were held by a large number of small and/or weak members that could adopt any decision..., which would sooner or later alienate the more powerful members from the organisation."[185]

Developed countries also find consensus attractive because, unlike voting, it allows them to make use of their clout to influence decisions. Even though consensus seemingly gives all members equal protection,[186] in reality the stronger countries are able, because of their greater political and economic muscle, to sustain their vetoes more effectively than their weaker counterparts.[187] The latter countries' wealth and influence often insulates them from any real or potential intimidation or threats that

180 Focus on Global South and the WTO 2002: 2.
181 Pauwelyn 2005: 21.
182 Pauwelyn 2005: 23.
183 Ehlermann et al 2005: 499.
184 Pauwelyn 2005: 23.
185 Alexovicova et al. 2005: http://ssrn.com/:abstract=977461
186 This is because any one member can in theory veto any decision.
187 Cottier et al 2003: 176.

may be directed at them with the aim of swaying them from their negotiating positions. This inevitably results in outcomes of the negotiations that largely reflect the views of the stronger countries, as opposed to those of the weaker ones.

For developing countries, the use of consensus in the GATT/WTO has generally resulted in their exclusion from decision-making. The narrow interpretation given to the concept and the consequent disregard for the reality that many developing countries are not in a position to send representatives to all WTO meetings have led to what Panitchpakdi calls "under-recognition of the position of developing countries".[188] It simply does not make sense that the WTO follows decision-making procedures that result in the exclusion of the majority of its members, and these procedures need to be reviewed. The current procedures also, without a doubt, amount to a disregard for the principles of transparency and accountability to the extent that they deny developing countries a say in decision-making.

Notwithstanding the differences between developing and developed countries concerning the overall merits of consensus, it is generally agreed that alternative decision-making procedures must be adopted and that they must accommodate the concerns of its developing members, both in terms of cost and voice, if the process is to remain relevant and legitimate.[189] At the same time, there is awareness across the board that this must be done in a manner that will continue to uphold the identity and relevance of the WTO as a commercial and economic institution, and take into account the economic and development interests of all its members.[190]

To conclude, there is no disputing that some of the arguments advanced in support of consensus, such as the view that decisions taken with the consent of all members are likely to endure because of popular support and that consensus takes care of the critical question of how to safeguard the interests of the major trading countries, are

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188 Panitchpakdi 2001: 429. Quite often, peer pressure and negotiated trade-offs among WTO members also ensure that the smaller countries find it difficult, if not impossible, to block consensus, which has to be done publicly. See Yen 2006: 19.

189 Alexovicova et al. 2005: http://ssrn.com/:abstract=977461

190 Kenworthy 2000: 3; Alexovicova et al. 2005: http://ssrn.com/:abstract=977461

190 Kenworthy 2000: 3.

190 Alexovicova et al. 2005: http://ssrn.com/:abstract=97746

190 Kenworthy (2000: 3); Alexovicova et al. 2005: http://ssrn.com/:abstract=977461

sound. However, the reality is that the current interpretation and application of the concept of consensus in the WTO does not support some of the arguments. This is seen in the fact that the present conception of consensus does not seek nor ensure the consent of all the members, as evidenced by the objections made by many countries that regard the procedure to be exclusive.

Moore makes an interesting observation that the reason why consensus is sometimes circumvented in organisations that purport to be practicing it is because when it comes to certain issues, universal agreement is simply not achievable.[191] He opines that it is sometimes necessary to consider employing different procedures in deciding different issues. This is quite correct, considering that some issues are more sensitive than others and are therefore more likely to elicit greater resistance from members. Moore also rightly argues that the idea that it is acceptable to substitute consensus with imposition of policies on unwilling members is not only undemocratic but also dangerous. He asks the following question: "...what makes us think that coercion and threats can produce lasting solutions?"[192]

3.4 THE NEED FOR A SMALL LEADERSHIP GROUP

While the idea of forcing decisions on unwilling members is clearly objectionable, there is no denying that the large number of WTO members makes decision-making difficult. One of the areas most affected by this problem in recent years is setting the organisation's policy agenda. This was evident, for example, during the preparations leading to the Singapore Ministerial meeting. Discussions on the agenda of the Ministerial meeting were held in successive *ad hoc* meetings at various venues around the world.[193] Notwithstanding all the discussions that had preceded the meeting, the agenda was very slow to take shape and, in the opinion of some members, was lacking in ambition.[194]

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191 Moore 2005: 365.

192 Moore 2005: 365.

193 The meetings, at which the Quad (the US, the EU, Japan and Canada) were invariably present, were held in Vancouver (November 1995), Brisbane (February 1996), Lausanne (July 1996), Christchurch (July 1996) and Singapore (April 1996) among other places. See Wolfe 1996: 698.

194 Wolfe 1996: 698.

In view of this problem of inefficiency in taking decisions, there seems to be little doubt that a smaller leadership group is necessary for the WTO. However, to avoid controversies similar to those that have arisen around the use of "green room" meetings, the composition of such a group would have to be considered carefully, taking into account issues such as its representivity and giving an equal say to the smaller members, among others. The WTO can also learn from the experiences of the Consultative Group of Eighteen, as elaborated below.

3.5 LESSONS FROM THE CONSULTATIVE GROUP OF EIGHTEEN

To the credit of the WTO's predecessor, the GATT, a short-lived but genuine effort was made in the mid-1970's to address the growing problem of unwieldiness and inefficiency in GATT decision-making due to the growing number of members. This involved the establishment of what came to be called the Consultative Group of Eighteen (CG-18). Initially, the CG-18 comprised 18 full members who occupied two seats each, plus nine alternate members who, although permitted to take part in the meetings, had only one seat each.[195] The group's aim was to "discuss trade problems from a political viewpoint, anticipate developments, and facilitate the 'concentration of policies in the trade field'".[196]

Despite initially enjoying considerable support among the GATT contracting parties, the CG-18 also encountered a number of challenges quite early on in its existence. While its promoters had hoped that it would come to assume the role of originating GATT policy and managing the multilateral trading system, these hopes were quickly cut short. This was primarily because some of the contracting parties, fearing that the group would infringe on their sovereignty, insisted that the CG-18 should only act in an advisory capacity and not take any binding decisions.[197]

There were also persisting disagreements concerning the appropriate number of representatives in the CG-18. When the membership was increased from 18 to 22 in order to accommodate new members, for example, there were some contracting

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195 Linscott. 1989: http://findarticles.com/p/articles/mi_m1052/is_n8_v110/ai_7539361/
196 Blackhurst et al 2005: 464 – 465.
197 Blackhurst et al 2005: 465.

parties that felt the group was growing too large to be efficient.[198] These concerns were perhaps justified, considering the fact that in the final days of the CG-18, when its meetings were attended by as many as 45 delegates, the meetings were reported to have become quite unmanageable and inefficient.[199]

The GATT contracting parties could also not agree on the appropriate political level of the delegates to represent them in the CG-18. While some countries were sending high-level officials, others only sent representatives from their Geneva delegations.[200] Furthermore, the CG-18 was perceived to be lacking in transparency. An example of this was the fact that GATT members not participating in the group were not allowed to see documents that were sent to the CG-18 by the Secretariat.[201] This could only have served to diminish the credibility of the group in the eyes of the members excluded from its meetings.

A combination of all of the abovementioned factors led to irreconcilable differences among the GATT members, which in turn resulted in the eventual breakup of the CG-18. The group never met again after 1985.

There are a number of important lessons that the WTO can learn from the CG-18 experience. One is the fact that, irrespective of the restrictions on efficiency and effectiveness brought about by too large a group of decision-makers, it cannot be taken for granted that members of an organisation would be willing to cede power to a smaller group to take decisions on their behalf. This is true for both the members who wield substantial influence within the organisation and feel that the existence of the smaller group would diminish their influence, as well as for the weaker members who feel that their interests would not be adequately represented by the small group. Thus, based on lessons from the CG-18, "green room" meetings, in which important WTO decisions are taken in absence of the majority of developing countries, are likely to continue to draw complaints from excluded members and, if no remedial action is taken, this could lead to the eventual demise of the WTO.

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198 Blackhurst et al 2005: 466.
199 Linscott. 1989: http://findarticles.com/p/articles/mi_m1052/is_n8_v110/ai_7539361/
200 Linscott. 1989: http://findarticles.com/p/articles/mi_m1052/is_n8_v110/ai_7539361/
201 Blackhurst et al 2005: 465.

At the same time, the CG-18 experience also confirmed that once the representatives in a decision-making body exceed a certain number, it becomes quite difficult to get them to agree on anything, and the process starts to become unmanageable. In addition, once the members begin to perceive the decision-making body as being ineffective, as happened in the case of the CG-18, they may start questioning whether or not it is worthwhile to continue to participate in it. It is thus critical for the WTO to come up with a procedure for decision-making that can achieve the necessary balance between, on the one hand, adequate and equitable representation of all its members in the entire process, and, on the other hand, avoiding having too many participants that the process becomes impossible to manage.

Lastly, the demise of the CG-18 highlighted the importance of transparency in a decision-making body representing a variety of interests, and the fact that such a body should always be accountable to those it is supposed to represent. The perceived absence of these two attributes in the CG-18 contributed to its loss of legitimacy in the eyes of those GATT members that felt left in the dark about what it was doing. Unless the WTO ensures that it is perceived to be sufficiently transparent and accountable by all its members, it runs the risk of suffering the same fate as the CG-18.

3.6 POSSIBLE REASONS FOR RETAINING THE OPTION OF VOTING

One question remains unanswered: How come, following the choice of consensus as a preferred method of decision-making in the WTO, the possibility of voting was still there, even though it seems to be clear that there was never any intention to proceed to a vote if consensus proved to be difficult? The answer to this question is not clear and may never be known. However, one can speculate based on the surrounding circumstances.

To begin with, the answer could lie in the evolving practice of GATT 1947. When the GATT was first created, questions relating to its interpretation were regularly decided through rulings of the Chairman of the Contracting Parties, which would later be

tacitly or expressly accepted by the parties or otherwise put to a vote.[202] However, as pointed out earlier, this changed as the number of developing countries joining the GATT increased after decolonisation and developed countries realised that the votes amassed by the former would give them decisive control during decision-making.[203] Although consensus was clearly their preferred method of decision-making, developed countries would have learnt from the GATT days that voting could be effectively avoided without formally removing it from the rules as an option.[204]

Another possible reason for including voting as an option, and which complements the one mentioned above, could have been to disguise the fact that WTO rules tended to favour certain members over others, lest the disfavoured members declined to commit themselves to the WTO Agreement. This possibility is not far-fetched, considering that one of the reasons many developing countries joined the WTO was because they were consciousof their greater numbers and the opportunity to use their votes to influence decisions within the organisation.[205]

3.7 THE EFFECTS OF THE CURRENT PRACTICE

The controversial nature of the consensus rule has led to a number of problems being linked to its application. Some of these problems have resulted in serious disruption of the WTO's ability to function properly, and have occasionally appeared to threaten its very existence. Perhaps the biggest challenge has been to find common ground among the WTO's 153 members during decision-making. As more countries have joined the GATT/WTO and their composition has become more diverse, achieving consensus has proved to be increasingly difficult, leading to endless delays before a decision is taken. In some cases, a complete collapse of negotiations has followed disruptions by WTO members and civil society groups disgruntled with the way in

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202 Pauwelyn 2005: 20; Ehlermann and Ehring 2005:61.

203 Ehlermann and Ehring 2005:62; Footer 1997: 663-664. See par 2.5.3 for the description and role of the Chairman of the Contracting Parties.

204 The avoidance of voting, although not formally adopted, was an established GATT practice long before it was officially incorporated into the WTO Agreement.

205 Speaking about the situation that developing countries find themselves in with regard to the multilateral trading system, Gordon contends that "...as Third World countries surveyed the legal landscape left in the wake of the WTO Agreements, and struggled to comply with its countless requirements while witnessing how industrialized nations were implementing them, they began to question whether they might have been duped on some level." See Gordon 2006: 104.

which decisions are taken.[206] In the eyes of many, the persistent inability on the part of the Ministerial Conference and General Council to take important decisions since the formation of the WTO in 1994 serves as proof of the serious shortcomings of consensus.[207]

The inefficiencies inherent in the consensus rule also manifest themselves regularly in day-to-day bargaining in Geneva, whether in the negotiations for a new agreement, in revising an old one or simply seeking to apply an existing rule. Examples of these were seen in the WTO's failure to agree on, among other things, the rules to regulate the de-restriction of documents; granting observer status to other international organisations; the accession of Iran; and repeated failures by the Committee on Regional Trade Agreements to reach a final conclusion after its review of free trade or custom union agreements.[208] The delays resulting from the use of the consensus rule also make it difficult for the WTO to respond urgently to the demands of today's interdependent world, whether by effecting amendments to the WTO Agreement or through its interpretation.

A further problem with the consensus rule is that the search for consensus, which often involves some compromises, can lead to outcomes that are diluted and lacking in substance.[209] This is seen in the DSU, which Weiss refers to as a "controversial instrument of compromise". According to Weiss, "[c]onciliation and adjudication methods are mixed in the DSU. This is...a consequence of the very often quite vague and generous terms of substantive WTO law with their lack of clarity, their ambiguity and need for improvements and clarifications."[210]

All in all, notwithstanding the alleged advantages of the consensus rule,[211] it is saddled with a lot of problems, and it is going to be extremely difficult for the WTO to

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206 Alexovicova et al. 2005: http://ssrn.com/:abstract=977461
207 Alexovicova et al. 2005: http://ssrn.com/:abstract=977461
208 Ehlermann et al 2005: 65.
209 Ehlermann et al 2005: 67.
210 Weiss 2004: 101.
211 These include ensuring wide support for decisions taken and making it improbable for a decision to be taken against the will of the powerful members, whose co-operation is often essential for meaningful application of the decision. See Broude 2004: 289.

ignore calls for the review of its application and to consider replacing it with a more workable method.

3.8 CIRCUMVENTING GENUINE CONSENSUS

The difficulties involved in achieving consensus, coupled with the WTO's rejection of voting, have led to the organisation adopting some rather controversial practices in trying to secure every member's consent. These practices essentially seek to circumvent the willful agreement of WTO members by employing, among other things, diplomacy and persuasion.[212] The use of these practices has, however, attracted widespread criticism from developing countries in particular, which feel that their interests are compromised in the process.

Perhaps the most controversial of these WTO practices are the "green room" meetings. These meetings follow the "concentric circles" model to induce consent among WTO members. Krueger explains how this model works in the following terms: "[a]n inner circle of countries, whose number has varied from eight in specified subject areas to thirty-four when a broad range of issues were being discussed, serves as the basic discussion, debate and (when necessary) negotiating group. The results are then provided to a larger circle or to all the other members, frequently with a recommendation that a consensus decision be taken on the issue(s) under consideration."[213]

Inherited from the GATT era, the "green room" meetings are normally convened to discuss the most contentious issues on the negotiations agenda.[214] They are attended mostly by developed countries and a handful of developing countries, thus making them quite exclusive. One of the main justifications for holding the meetings is that they facilitate consensus building. In the words of Blackhurst and Hartridge, "[t]he Green Room or inner circle model [is] the organisation's *de facto* way of dealing with the fact that while membership in virtually every GATT and now WTO body is open to all GATT-WTO members, once the active participation in a group/committee exceeds

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212 It has been alleged that some members have even used threats of retaliation against others to persuade them to co-operate. See Focus on the Global South and the WTO 2002: 2.

213 Krueger 1998: 49.

214 Blackhurst et al 2005: 455.

a certain number (say 25 or 30), discussion, debate and negotiation become increasingly cumbersome, inefficient, and ultimately impossible."[215]

Although the concern about the inefficiencies associated with decision-making by large groups is legitimate, the exclusion of a majority of developing countries from the "green room" meetings is deemed by many of these countries to be a cause for concern.[216] Without actually participating in the meetings, developing countries have no way of understanding the nature and full details of political negotiations and compromises that eventually lead to the final outcomes.[217] Yet, most of the time these outcomes end up constituting the core of the agreement that ultimately binds all WTO members. This means that there is actually no accountability towards the poor majority in so far as the outcomes of the "green room" meetings are concerned.

In addition, the manner in which these outcomes are obtained is open to being challenged on the grounds of a lack of legitimacy. The fact that most WTO members do not participate in the process of producing these outcomes makes their legality questionable. Moreover, the procedure further complicates the already complex trade negotiations by risking the rejection of their outcomes by WTO members who find them objectionable.[218]

Indeed, in recent years, WTO members excluded from the "green room" meetings have become more vocal about their opposition to the procedure. This, for example, was seen during the Singapore Ministerial meeting when, after the contents of the Ministerial Declaration had been agreed on with regard to all but a few sensitive issues, ministers from 34 of the then 128-member WTO came together and hammered out a proposal for the text of the remaining issues. When it was time to secure consensus on the final draft declaration, the members who were excluded in the drafting of the proposed text voiced their disgust at how the text had been agreed

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215 Blackhurst et al 2005: 457.

216 Typically, the participants in the "green room" meetings include the Quad (the US, EU, Japan and Canada) and other countries considered to have a vital interest in the matter to be decided. The latter countries have traditionally included the likes of Brazil, India, South Africa and sometimes Bangladesh. See Woods and Narlikar 2001: 11. The rest of the WTO members, the vast majority of which comprise developing countries, are generally excluded.

217 Woods and Narlikar 2001: 11.

218 Rolland 2007: 247.

on. They made it clear that in their view, "the way in which the draft declaration had been prepared was undemocratic, unfair, and disgraceful, that they were no longer willing to accept decision-making processes that always presented them with *faits accompli,* and that they attached the highest priority to fundamentally revising the way important decisions are arrived at in the WTO."[219]

When the same exclusive procedure was repeated at a subsequent Ministerial meeting in Seattle three years later, the protests took a violent turn, leading to the collapse of the negotiations.[220] In a statement criticising the way in which the Ministerial meeting was conducted, the African ministers remarked that the proceedings during the meeting lacked transparency and that African countries were generally marginalised in the discussions pertaining to issues of utmost importance to them and their future.[221]

The WTO has taken some steps to try to deliver transparency to its members. For example, the documentation relating to submissions made to the Ministerial Council, as well as the minutes of formal and informal meetings, are now available on the organisation's website. However, the prevailing view among developing countries and NGOs is that the publication of reports and minutes of meetings can be no substitute for actual participation in meetings where crucial decisions are taken.[222] A more open and equitable process of determining who attends the green room meetings would help dispel the perception of bias among its poorer members and other stakeholders.

Some commentators have defended the WTO by arguing that it has implemented significant reforms since the Seattle Ministerial Conference. Moore, for instance, points to two initiatives in particular, one of which is said to involve engaging heads of delegations in lengthy plenary discussions and meetings ahead of Ministerial meetings. Another one is said to entail efforts to fully involve ministers and

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219 Blackhurst and Hartridge 2005: 455-456.

220 Horlick 2000: 175. Some of the issues whose exclusion from the agenda of the Seattle Ministerial conference sparked the violence include human rights, working conditions and the rights of communities to choose and apply their own policies and standards. See Davey 2001: 303 – 304.

221 Fasan 2003: 151. Commenting on the unjust marginalisation of developing countries by the rich countries in the WTO, Cho has noted that the former countries are not asking for "special favours," but are only seeking that the latter countries "play by the rules". Cho 2005: 484.

222 Woods and Narlikar 2001: 11.

delegations from all countries during the actual negotiations.[223] Moore credits these changes with being responsible for the successful launch of the Doha Round.

However, considering the fact that the Doha Round has also ended in a stalemate, it seems that the reforms alluded to by Moore were not far-reaching enough. They have obviously failed to address the problems around the WTO decision-making mechanism and other aspects of the organisation. Indeed, it has been argued that the situation of the poorest WTO members has deteriorated, as they continue to forego many of the privileges they have enjoyed over the past 40 years or so.[224]

Fasan explains the tendency to disregard the interests of developing countries in WTO processes such as "green room" meetings, by indicating that the notion that the interests of various members of an organisation, especially where some are weak and others are strong, can be reconciled by merely concluding an agreement is generally overstated.[225] In his view, all regimes favour one side or the other. According to him, "[t]hey establish hierarchies of values emphasizing some and discounting others".[226] A look at most of the international organisations operating in the world today, including the WTO itself, the UN and the IMF,[227] confirms that Fasan's observation is true. Many of these organisations are dominated by a small group of powerful countries, which allows them to exercise a lot of influence over the organisation's activities and decisions, often to the detriment of the less powerful members.

Another controversial WTO practice related to the "green room" procedure pertains to the determination of the circumstances in which consensus is deemed to have been reached or likely to be reached. The perception among developing countries is that whenever developed countries support a particular proposal, an "emerging consensus" is regarded to exist and they are expected to conform to the proposal. On the contrary, they argue, like-mindedness among developing countries in respect of a

223 Moore 2005: 363.
224 Gordon 2006: 82.
225 Fasan 2003: 149. See also Puchala et al 1982: 250.
226 Fasan 2003: 149.
227 See Chapter 4.

particular idea is not accorded the same treatment.[228] This, developing countries contend, is particularly the case if one or two of the major developed countries object to it.[229] This practice clearly amounts to bias against developing countries, and only serves to widen the existing divisions within the WTO.

An equally controversial WTO practice relates to the presumption that being unrepresented in a WTO meeting signals a member's agreement or consent to the outcomes of such a meeting. As pointed out earlier, this practice is prejudicial to developing countries, in that it ignores the reality of their situation.[230] Because of the small size of their delegations and the constraints they face in terms of expertise, developing countries often find it impossible to send representatives to each of the hundreds of meetings that take place at the WTO annually.[231] Their delegates are frequently forced to decide which of several meetings they will attend, since the meetings sometimes take place at the same time. Thus, for developing countries, what is deemed to be consent is often imposed by circumstances and lack of choice.

Furthermore, as stated earlier, even in those meetings that developing WTO members are able to attend, they often find themselves under pressure to give up their right to block a decision. The stigma of being an obstacle to progress tends to weigh too heavily on most of them, many of whom are recipients of aid and other forms of assistance from developed countries. An example of the pressure experienced by developing countries was seen in the fact that some of them had initially opposed the inclusion, in the Uruguay Round, of issues such as services, intellectual property and investment measures, but eventually relented following what have been called "aggressive demands" by developed countries.[232]

While conceding that the circumstances prevailing today make it much harder to manage the multilateral trading system than was the case during the GATT era,[233] the

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228 Madeley 2003: 1.
229 Madeley 2003: 1.
230 See para 3.3 above.
231 Madeley 2003: 1.
232 Fasan 2003: 154.
233 Today, the gap between the various WTO members, especially the big trading countries, in terms of their outlook on trade, has grown much wider. There has also been a significant increase in the number of members over the years. See Wolfe 1996: 691.

need for the WTO to adapt to these changes must be balanced against its responsibilities towards all its members. One of the WTO's stated objectives is to promote economic growth and development in its member states.[234] If the WTO adopts decision-making practices that tend to sideline a certain section of its membership, then it is not living up to these objectives.

It has been suggested that, in order to bring about a more balanced and effective approach to adapting the WTO to its evolving environment, it would be better if policy leadership were provided by government ministers as opposed to lawyers.[235] This would facilitate more efficiency, since the ministers are often the ones endowed with the ultimate power to make important decisions. To facilitate the ministers' grasp of the reasons why trade-offs are needed and the substance of such trade-offs, it is critical that the WTO engages them regularly on these issues. Regular meetings can also be used to build consensus.[236]

3.9 WHAT NEXT FOR DEVELOPING COUNTRIES?

Having focused on the shortcomings of the WTO decision-making process up to now in this chapter, the question is whether or not there are any positive aspects that may justify developing countries retaining their membership of the organisation. Owing to the challenges they have faced for most of their time in the multilateral trading system, a majority of developing countries have elected to remain outside the system by invoking "special and differential" treatment provisions and not binding their tariffs.[237] This would seem to be a logical step for them, considering their history in the system.

However, a few lessons can be learnt from the experiences of a group of WTO members from East Asia. In the 1980s, they decided that, since the policies of import-substitution had not worked for them up to that point, they would try a new approach. They had come to believe that their previous policies had hindered their ability to take full advantage of the trade opportunities available to them. These countries were also

234 This is stated in the preamble to the WTO Agreement. See par 3.1 above.
235 Wolfe 1996: 698 and 700.
236 Wolfe 1996: 700.
237 Wolfe 1996: 693 – 694.

aware that the margin of preference for their products going into the OECD market had diminished substantially over the years.[238]

As part of their new strategy, the East Asian countries sought to gain greater and more secure access to the markets of developed countries, as well as to increase their involvement in the creation of new trade rules. To this end, they increased their involvement in the multilateral trading system, including by introducing carefully planned and well thought out liberalisation packages.[239]

Against all odds, these countries' strategy worked, and many of them have succeeded in growing their economies. Today, they are considered to be among the leading success stories of trade liberalisation. If anything, their experiences are an indication that, despite the hurdles faced by developing countries in the multilateral trading system, it is possible to overcome them by implementing the right policies. The story of these countries also serves to show that the way to tackle the challenges and unfairness of the current trading system is perhaps not by seeking exemptions from its disciplines, but by participating in it with the objective of transforming it and influencing its future direction.

One common and important ingredient in the stories of developing countries that have successfully used the multilateral trading system has been sound political leadership. Most of these countries had the good fortune of having political leaders who had the wisdom and foresight to realise that, despite the WTO's shortcomings, it has the potential to act as a catalyst for the change necessary to enhance the performance of their economies. This change, according to Sutherland, "...often means confronting vested interests, reducing the role of the state, reforming institutions, and taking on corruption".[240]

Countries such as Cambodia, China and Saudi Arabia are recent examples of how critical good leadership is. All of these countries only acceded to the WTO not so long ago, and yet they have since witnessed significant growth in their economies, albeit to

238 Wolfe 1996: 694.
239 Wolfe 1996: 694.
240 Sutherland 2008: 126.

different degrees. At the time of joining the WTO, each of these countries was led by individuals who were able to appreciate that, in order to move their countries forward, it was necessary to abandon bad economic habits and open up their economies to the rest of the world.[241]

To realise their vision, these leaders made joining the WTO an important part of their strategy.[242] In Cambodia, the government of Hun Sen streamlined the import tariff structure by reducing tariffs to only four rates, and lowered the import duty from an average of 35 percent to below 20 percent. Saudi Arabia's Prince Abdullah used WTO membership to, *inter alia,* achieve his country's goal of reducing its dependence on the oil industry and diversify into other areas. In China, Deng used accession to the WTO to implement his party's (the Chinese Communist Party) aim of modernising the Chinese economy. In this regard, WTO membership was the vehicle for stimulating reforms and opening up the country to the outside world.

Of course, in all the three countries, it was critical that the measures adopted by the leadership be accompanied by the hard work necessary to weed out the bad economic practices that had become entrenched over many years. This was made possible by the efforts and dedication of junior ministers and officials in the different countries, who did the ground work at national and provincial levels.[243]

Thus, rather than abandon the WTO altogether because of shortcomings related to its imperfect decision-making processes and lack of transparency and accountability, the rest of the developing world might benefit more by following the example of the countries mentioned above. This they can do by seeking to use their WTO membership as a catalyst for improving their own systems of governance at home, while at the same time campaigning to transform WTO decision-making processes from within.

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241 Hun Sen, Deng Xiaping and Prince Abdullah were the respective leaders of Cambodia, China and Saudi Arabia, and spearheaded their countries' accession to the WTO. Sutherland 2008: 127.

242 Sutherland 2008: 134.

243 Sutherland 2008: 127 -128.

3.10 SUMMARY AND CONCLUSION

In the preceding discussion, it was seen that, unlike the GATT which only provided for decision-making by voting, the WTO Agreement makes provision for decision-making by both consensus and voting. However, since voting seldom takes place in the WTO, consensus is effectively the only procedure used.

It was also seen that consensus as understood in the WTO presumes that a member is supportive of the outcomes of a meeting if the member is unrepresented in the meeting, or if its representative in that meeting does not object to the decision. This interpretation of consensus, it was further noted, sidelines many developing countries that lack the capacity to send representatives to all WTO meetings, and in the process compromises both transparency and accountability in the organisation. A suggestion was made for this interpretation of consensus to be reviewed.

Another issue highlighted in the discussion was that even though developed and developing countries do not quite see eye-to-eye in respect of what the best procedure for decision-making in the WTO is, it is generally accepted that such a procedure must give developing countries an equitable say in the organisation, if the organisation's legitimacy is to be preserved. It was also shown, however, that WTO members are generally aware that, irrespective of the procedure adopted, it is critical that the WTO's identity and relevance as a commercial and economic institution be maintained.

The discussion also looked at the lessons that the WTO can learn from the CG-18. These include the fact that awareness of the shortcomings of decision-making by a large group does not necessarily guarantee willingness on the part of members to cede decision-making power to a smaller body;[244] that reaching consensus in a large group is quite a challenging task and can result in the group becoming ineffective; and that transparency and accountability towards all members are essential for an organisation's continued legitimacy.

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[244] See par 3.5.

It was further seen that the use of consensus has been associated with a number of problems that have adversely affected the functionality of the WTO. These include difficulties in trying to convince all the 153 members to agree to a proposal, as well as long delays in completing the trade negotiations or their complete abandonment due to withdrawals by disgruntled members or disruptions by civil society groups who feel marginalised by the procedure.

An observation was also made that the general exclusion of developing countries from "green room" meetings, which is where the most important WTO decisions are negotiated and take shape, means that the WTO does not account to these countries as far as the outcomes of these meetings are concerned.

Lastly, it was noted that in spite of all the challenges that developing countries encounter as members of the WTO, there are several of them that have managed to overcome these challenges in order to make the multilateral trading system work for them. Refusing to be discouraged by the negative aspects of the system, they decided to use it to penetrate the markets of developed countries and to improve their involvement in creating new trade rules.

It was also noted that the success of these developing countries was to a large extent due to the good leadership skills and vision of their rulers at the time of their accession to the WTO. These leaders were able to assess the situation of their respective countries and devise a strategy that would make their membership of the WTO work to their advantage.

To conclude, although the establishment of the WTO has helped ameliorate some of the weaknesses associated with the GATT,[245] the creators of the former institution missed a golden opportunity to fix some of the major problems that have afflicted the multilateral trading system for a long time. In particular, their decision to not only continue the practice of decision-making by consensus,[246] but to formally incorporate it into the WTO agreements, despite consensus showing the propensity to sideline the majority of members and being susceptible to long delays, went against both logic

[245] E.g. lack of proper institutional mechanisms and, as shown later in chapter 5, lack of certainty in dispute settlement hearings.

[246] Along with the interpretation given of consensus in the multilateral trading system.

and the stated objectives of the WTO. The continued use of the "green room" meetings also severely compromises transparency and accountability within the WTO, as it did with the GATT.

If the WTO is to remain relevant and legitimate, it needs to quickly find alternative decision-making procedures that will eliminate the problems mentioned above once and for all. As demonstrated by the recent disruptions of WTO meetings and deadlocks in its negotiations, the failure to act risks consequences worse than the demise of the CG-18, which is the collapse of the entire multilateral trading system.

CHAPTER 4
COMPARISON WITH OTHER INTERNATIONAL ORGANISATIONS

4.1 INTRODUCTION

It has been argued that there is a pattern in the choice of decision-making methods used by various international organisations during different periods in history.[247] In the nineteenth and early twentieth century, for instance, it is said that the preferred method was unanimity, while majority voting was popular during and after World War II. In the last 30 years or so, majority voting is said to have given way to consensus.[248]

This perceived pattern notwithstanding, the reality is that once the various organisations are in operation, their rules and practices tend to evolve differently, both in terms of pace and substance. Hence, it would be a mistake to assume that the decision-making procedures provided for at the organisations' inception remain unchanged, or that their evolution will follow the same path. The kind of changes that an organisation's rules or practices undergo will also inevitably influence how efficient and effective it becomes over time. Thus, there is always a possibility for the various organisations to learn from each other's experiences.

In this chapter, the current procedures for decision-making in several prominent international and regional organisations are examined. The aim here is to determine how these procedures compare with those of the WTO, and to be able to assess the latter's strengths and weaknesses. It is also hoped that the exercise will help identify good decision-making practices being followed in these other organisations, which the WTO can emulate. The organisations examined here are the UN, the IMF and the EU.

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247 Alexovicova and van den Bossche 2005: 7.
248 Alexovicova and van den Bossche 2005: 7.

4.2 UN DECISION-MAKING PROCESS

4.2.1 Background

Decision-making in the UN is regulated by the organisation's Charter. Among the many functions of the UN, two of the most important are acting as a forum for negotiations between its members on various topics of global significance and shaping policies of governments, both at the national and international level.[249] Strictly speaking, only governments are eligible to participate in formal UN decision-making.[250] They are the only ones that can negotiate, vote and affirm or reject official UN agreements. However, the involvement of other stakeholders is encouraged and facilitated through their invitation to attend sessions of some of the organisation's various bodies and to make informal submissions, as well as engaging in advocacy efforts. Some of the stakeholders allowed this privilege include non-state entities such as Palestine and the Holy Sea, as well as a host of NGOs.[251]

Within the UN system, there are six principal bodies, namely the Trusteeship Council, the International Court of Justice, the Secretariat, the General Assembly, the Economic and Social Council (ECOSOC) and the Security Council. However, only the latter three are involved in decision-making. In practice, all three essentially follow the same decision-making procedures, with first preference usually given to consensus.[252] Where consensus cannot be reached, a number of other alternatives, including voting and entering reservations,[253] are also used to facilitate a decision. In all three bodies, each member state is permitted only one vote during voting.[254]

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249 UN Non-government Liaison Service 2003: 3.

250 UN Non-government Liaison Service 2003: 3. See also Stein 2001: 496.

251 UN Non-government Liaison Service 2003: 3-4; Stein 2001: 496. See also Alvarez on the expanding role of NGOs as behind-the-scenes originators and enforcers of many UN treaties. Alvarez 2006: 333. See also Zhengling's discussion of the debates regarding the advantages and disadvantages of NGO participation in policymaking in the WTO. Zhengling 2004: 419 – 493.

252 Many UN fora effectively equate consensus with unanimity. See Goldring. 2006: http://www.un.org/Pubs/chronicle/2007/issue1/0107p18.htm

253 A reservation is a declaration made by a state in which it purports to exclude or alter the legal effect of certain provisions of the treaty in their application to that state. See Article 2 (1) (d) of the Vienna Convention on the Law of Treaties (1969).

254 Articles 18 (1), 67 (1) and 27 (1) of the UN Charter.

4.2.2 The General Assembly

The General Assembly is the main deliberative body of the UN[255] and is constituted by the entire membership of the organisation. When voting does take place in the UN, issues of critical importance are decided by a two-thirds majority. All other matters are decided by simple majority.[256] Although some of the more than 150 items handled by the General Assembly annually are discussed and decided in a plenary session, the majority of them are dealt with by its six specialised committees, a measure intended to make it easier for the body to manage its heavy workload. The six committees specialise in (i) disarmament and international security; (ii) economics and finance; (iii) social, humanitarian and cultural concerns; (iv) special political and decolonisation issues; (v) administrative and budgetary affairs; and (vi) legal subjects.[257]

4.2.3 ECOSOC

ECOSOC's main responsibility is to coordinate the economic and social work of the UN and its specialised agencies and bodies.[258] In addition, it also engages in the formulation of policy recommendations, carrying out studies and convening international conferences, among other things.[259] ECOSOC comprises 54 member states elected for a term of three years by the General Assembly. Various world regions are allocated a pre-determined number of seats, and only UN members from a particular region can be elected to occupy seats earmarked for their region.[260]

As in the General Assembly, first preference is given to consensus in taking decisions during ECOSOC meetings, even though voting is provided for and used if consensus cannot be reached. Likewise, during voting, decisions are taken on the basis of a simple majority. In both the meetings of ECOSOC and its various committees, only member states currently serving a term are permitted to vote, notwithstanding the fact

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255 It is in the General Assembly where formal decisions of the UN are finally made.
256 Article 18 (2) and (3) of the UN Charter.
257 UN Non-government Liaison Service 2003: 5.
258 Article 63 (1) and (2) of the UN Charter.
259 Article 62 (1), (2) and (3) of the UN Charter.
260 There are 14 seats for Africa, 11 for Asia, 6 for Eastern Europe, 10 for Latin America and the Caribbean, and 13 for Western Europe and other states.

that attendance of these meetings is open to all members of the General Assembly.[261]

4.2.4 Security Council

The Security Council has the primary responsibility of maintaining international peace and security, and its decisions in executing this mandate are binding on all UN member states.[262] It comprises 15 members, five of which are permanent and the other ten are elected for two-year terms by the General Assembly.[263] The Security Council uses a variety of methods in seeking to diffuse disagreements falling within its mandate before they break out into all-out conflicts or, if conflict has already broken out, to restore peace. These methods include calling on the parties to reach a peaceful settlement, recommending mediation, formulating principles for resolving the matter, requesting the Secretary General to conduct an investigation, and seeking to facilitate a ceasefire.

As far as the number of votes required to pass a decision are concerned, in the Security Council a distinction is drawn between procedural and substantive matters. For decisions on procedural matters, there must be at least nine affirmative votes cast by any of the member states, while decisions on substantive matters require at least nine affirmative votes, including those of all the permanent members.[264] This effectively means that a decision on a substantive issue can be blocked by a single negative vote by any of the permanent members.[265] Like the General Assembly and ECOSOC, the Security Council also has several committees which assist in carrying out some of its responsibilities.

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261 Article 69 of the UN Charter.
262 Article 25 of the UN Charter.
263 The permanent members of the Security Council are China, France, the Russian Federation, the United Kingdom and the United States.
264 Article 27 (2) and (3) of the UN Charter.
265 A permanent member wishing to avoid supporting a particular decision, but also not wanting to block it, can choose to abstain from voting altogether.

4.2.5 Parallel Informal Decision-making Process

Alongside the formal process of UN decision-making described above, there is simultaneous, rigorous, behind-the-scenes bargaining that goes largely unrecorded. In Smith's words, "...so much of the negotiations process takes place in private and informal settings closed to all but those directly involved".[266] In many instances, these informal discussions result in outcomes that eventually form the basis of formal UN decisions. Proponents of these off-the-record meetings contend that without them, the compromises they facilitate would not be possible.

There are unmistakable similarities between informal discussions held on the sidelines of official meetings of the various UN bodies and the "green room" meetings common in the WTO. For example, in both instances, the proceedings are unrecorded and open only to certain members. However, there are important differences too. One is that, in determining who gets involved, the UN seems to place more emphasis on which parties have the most interest in the issues to be addressed, or are best positioned to resolve the problem at hand,[267] and less on the identity and might of the parties, as appears to be the case in the WTO.

In the past, for instance, the UN has set up *ad hoc* informal groupings of members, whose goal was to facilitate the implementation of the organisation's decisions. The composition of the group has often been determined on the basis of factors such as a special competence for addressing a particular situation of conflict based on shared history, past involvement, regional status, available resources or strong reputation.[268] As Smith rightly points out, by including even the small states and NGOs in the deliberations, informal meetings at the UN "give [these] actors ...avenues of influence they otherwise would have lacked, and ...their inclusion can indicate that they are considered valuable in regard to issues at hand".[269] In contrast, restricting attendance of "green room" meetings to mostly developed countries has led to questions

266 Smith 2004: 2.
267 UN Non-government Liaison Service 2003: 19. See also Smith 2004: 8-9.
268 Smith 2004: 9.
269 Smith 2004: 15. With particular reference to the UN Security Council, it must be said, however, that complaints have been made that its informal consultations result in the rest of the members being sidelined by the permanent five.

regarding the legitimacy of the process and given rise to accusations of discrimination on the part of the WTO by developing countries.

4.2.6 Differences in Approach between the UN and WTO

It is also important to stress that, with perhaps the exception of the Security Council, the endeavour to secure consensus in the UN bodies discussed above generally involves a concerted effort to reconcile opposing positions among member states.[270] Furthermore, as stated previously, UN members actually vote when consensus cannot be reached. This is in sharp contrast to the approach adopted in the WTO, where consensus is interpreted to mean that if a member state is not represented in a meeting, or where it is represented but fails to oppose a decision, such a member must be deemed to be in agreement with the decision. Considering the fact that voting almost never takes place in the WTO, these differences highlight the varying degrees of importance each institution seems to attach to the input made by its members in decision-making. While the UN seems to be prepared to go to considerable lengths to seek input from every one of its members on most issues,[271] the same cannot be said about the WTO.

4.2.7 Lessons from the Security Council

As the UN organ most criticised for being undemocratic in arriving at its decisions, the Security Council could offer some important lessons for the WTO. Calls for its reform have grown louder every year since the early 1990s,[272] mainly due to its controversial and inconsistent handling of situations that are supposed to fall under its mandate. In this regard, the conflicts in Iraq and Rwanda come to mind.

The proponents of reform have identified the composition of the Security Council, which comprises 15 UN members out of more than a hundred, and of which only five can exercise a veto, as being the main problem. They maintain that effectiveness and fairness are unlikely to occur in an environment where a few powerful states enjoy

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270 UN Non-government Liaison Service 2003: 20-21.

271 Peace and security are notable exceptions, being the exclusive domain of the Security Council.

272 See Weiss 2003: 147. See also United Nations University. 2004: http://update.unu.edu/archive/issue34_20.htm

complete dominance and do pretty much as they please. To quote Paul and Nahory, "[p]owerful governments that claim to champion 'freedom', 'democracy' and 'good governance' have been known to behave despotically in the international arena, bending small states to their will and acting in violation of international law. Such powers sit in the [security] council and cannot be expected to solve problems that they themselves have created."[273]

A lesson for the WTO is that, in as much as large decision-making bodies may be ineffective and cumbersome, creating a smaller structure for the WTO, as some have proposed, will not necessarily result in a process that is responsive to the interests of every member. Factors such as representivity and accountability within the decision-making body are clearly also critical. At the same time, however, it would be impractical to insist that a small, developing country must wield the same amount of influence as a powerful, wealthy trading country. Thus, what is needed is a structure that is at once representative and not too large, while at the same time allowing the smaller countries an opportunity to use their combined strength to give weight to their views.

4.2.8 Inevitability of Domination by Powerful Members

In an analysis of the UN's failure to act to prevent the Rwanda genocide despite several clear warnings that it was about to take place, Wan raises some interesting points that help shed light on why WTO shortcomings such as inadequate transparency and accountability persist despite years of trying to rectify them. He argues that, as long as sovereignty lies with states, it is inevitable that the UN and other international organisations will be constrained in their ability to exercise full independence in terms of how they behave.[274] Instead, he says, their actions will, at least in part, always reflect the will of the states that created them, especially the more dominant ones. Quoting Jervis, Wan agrees that "states will establish an institution if and only if they seek the goals that the institution will help them reach".[275]

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273 Paul and Nahory. 2005: http://www.globalpolicy.org/security/reform/2005/0713thesis.htm
274 Wan 2007: 21.
275 Wan 2007: 21-22.

According to Wan's theory, there are about three mechanisms by means of which states are able to exercise control over international organisations.[276] Firstly, there is the act of delegation, crystallised in the contractual agreement creating the organisation and spelling out its mandate. The agreement can be rule-based, which results in more direct involvement of the states in the formulation of the organisation's policy and the setting of its agenda. Alternatively, it can be discretion-based, giving the organisation more flexibility to determine its own policy and develop its agenda. Secondly, there is the institutional environment within which the entity functions. It could be one where individual thinking and roles among actors in a group are encouraged, or one where everything is dictated from the top. The latter can result in the preservation of the *status quo* and quashing of any attempts to bring about change. Lastly, the extent to which an institution is monitored and required to report back is also important. This will determine the degree to which the institution can act independently, without any restrictions in the form of state intervention.

Applying this theory to the WTO, it would seem that the WTO falls in the category of organisations where the institutional environment is such that almost everything is dictated from the top. This is evidenced, for example, by the fact that the WTO Secretariat and Director-General play only a minimal role in the organisation's decision-making,[277] and the constant reminder in WTO documents and speeches that it is a "member driven organisation"[278]

One can thus explain the continued lack of transparency and accountability in the WTO as being indicative of the wishes of its leading members. As mentioned previously,[279] these members are said to sometimes use undue pressure to force the weaker members to submit to their demands. It would therefore make sense for the leading members to not want such conduct to be exposed by transparent procedures. The same goes for the fact that the WTO hardly ever uses voting in decision-making, despite the WTO Agreement making provision for it. Lack of voting helps developed members to avoid what would be inevitable defeat in almost every WTO decision because of their smaller numbers.

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276 Wan 2007: 10.
277 Alvarez-Jimenez. 2010: http://www.idrc.ca/en/ev-151548-201-1-DO_TOPIC.html.
278 Shaffer 2005: 429 – 438.
279 See par 3.8.

4.3 IMF DECISION-MAKING PROCESS

4.3.1 Background

At the time of the IMF's inception in 1944, the agreement concluded between the 44 participating countries was for them to relinquish part of their autonomy with regard to the management of their domestic monetary and financial matters to the organisation.[280] In return, these countries were to become eligible for IMF financial support in instances where they experienced balance-of-payments problems, as well as being able to participate in a multilateral, rules-based monetary system.[281] The system worked quite well in the beginning, mainly because the IMF was able to ensure similar treatment for all its members by specifying the issues it could raise during its consultations with members, and the conditions it could impose before agreeing to provide financial assistance.[282]

However, things changed when the members' right to formulate their own exchange rate policies was restored following the breakdown of the Bretton Woods system in 1973 and the second amendment of the IMF's constitutive document, the Articles of Agreement.[283] The role of the IMF became somewhat unclear, with the result that there was uncertainty regarding what it was supposed to look out for in its consultations with members, the range of issues it could bring up or the conditions it could insist on before providing funding.[284]

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280 This came in the form of agreement by these countries to maintain a par value exchange rate system, with the exception of instances where a country was experiencing fundamental disequilibrium in its balance of payments. The countries also agreed to submit to regular checks by the IMF. See Tarullo 2006: 288; Dodge and Murray 2006: 362. See also Sanders 2000: 38.

281 Bradlow 2000: 152; Sanders 2000: 38; Tsai 2000: 1319 – 1320; Griesgraber and Ugarteche 2006: 351; Masson 2007: 894; Momani 2007: 916.

282 Bradlow 2000: 152. See also Hanson, who has argued that "[t]he financial information that guides investor decisions – such as credit ratings, and measures of interest rate or exchange rate risk – only proves useful when the processes through which this information is produced are themselves standardized across markets ...". Hanson 2003: 64.

283 Tarullo 2006: 292; Dodge and Murray 2006: 364; Masson 2007: 889.

284 Bradlow 2000: 153; Tan 2006: 507 – 508. The IMF has been accused of taking advantage of the situation by imposing conditions that coerce members into accepting policies that they do not want and which later prove to be harmful. See Griesgraber and Ugarteche 2006: 351.

The lack of clarity regarding the functions of the IMF and how it should perform them led to inconsistencies in the way that different members were treated by the organisation.[285] This differential treatment has become most notable in how the IMF relates to its rich members, most of which no longer rely on IMF funding and other services that the organisation provides,[286] and the way in which it deals with its poorer members, many of whom continue to depend on IMF funding.

Because of their continued need for IMF assistance, many of the poorer countries find themselves forced to concede to the demands made by the organisation as conditions for providing financial assistance.[287] Over the years, these demands have increased steadily and expanded into areas initially not contemplated under the original agreement.[288] In practical terms, this has meant that the IMF has become a dominant participant in shaping the policies of its poor members.[289] This view is shared by Tsai, who has contended that "while traditional stand-by arrangements require only cursory reform, the [subsequent arrangements] include considerably more structural conditions and allow longer periods of repayment, indicating the IMF's increased ability to influence the debtor nations' economic policy."[290]

The same cannot be said about the IMF's relationship with its richer members. Their wealth has allowed them to act independently of the IMF, and to a large extent to disregard its views.[291] Notwithstanding this, these countries have continued to exert enormous influence over decision-making in the IMF.[292] This has made it possible for

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285 Tan 2006: 507 – 522.

286 These countries have access to alternative sources of funding. E.g. the Bank for International Settlement, the Organisation for Economic Co-operation and Development and the G8.

287 See Tarullo 2006: 288; Griesgraber and Ugarteche 2006: 352 – 353. Although the failure of a country to comply with IMF conditions does not necessarily result in breach of contract or breach of international law, it can result in the organisation restricting the country's credit or suspending the release of the next payment. See Tsai 2000: 1322.

288 Areas such as legal and judicial reform, the environment, privatisation, military expenditures are now covered by IMF conditionalities. Bradlow 2000: 153. See also Hanson 2003: 65; Tan 2006: 508. For other conditions commonly imposed by the IMF, see Tsai 2000: 1321.

289 To rid themselves of what they perceived to be unwelcome IMF interference, middle-income developing countries such as Argentina, Brazil, Indonesia, Russia and Turkey have stopped borrowing from the organisation and at the same time are fast-tracking repayment of their outstanding debts. See Tan 2006: 508; Masson 2007: 890.

290 Tsai 2000: 1320.

291 Tarullo 2006: 291. The IMF has been accused of shying away from making tough calls when it sees industrialised countries violate its rules. See Dodge and Murray 2006: 367.

292 This can be seen from these countries' domination of the IMF's executive board. See Bradlow 2000: 154. See also Griesgraber and Ugarteche 2006: 353.

rich IMF members to exercise effective control over the organisation's policies,[293] while at the same time not being subject to the outcomes emanating from these policies.[294] This, as Bradlow rightly points out, "is a situation ripe with potential for abuse", and can only result in policies that are restricted to the interests of rich countries' citizens.[295] It is against this background of the IMF as a political institution, rather than a purely technocratic one, that its decision-making procedures are examined in this chapter.

4.3.2 The Current Procedure

The IMF's Articles of Agreement give the primary decision-making responsibility to a board of governors made up of one governor and one alternate governor from each of the organisation's 185 member states.[296] The board of governors meets once every year and, although it continues to make decisions on major organisational issues such as increasing of quotas and admitting new members, in its absence, the day-to-day running of the IMF is delegated to an executive board.[297] The latter is a permanent body comprising executive directors appointed by the members. It is here that the majority of the IMF's decisions are made.

In the executive board, first preference in taking decisions is given to consensus,[298] failing which voting is resorted to. In practice, the process entails intensive efforts by the chair of a particular meeting to secure the broadest support for the issue to be decided on from among the executive directors. The aim of the chair in this regard is to try as far as possible to ensure that if voting becomes necessary, the support obtained is enough to guarantee the majority of votes needed.[299]

Representation of member states on the executive board is based on a quota system linked to a number of variables. Under the latest amendments introduced as part of a

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293 Naiman 2000: 107. Indeed, it has been argued that the IMF's policies and programmes are to a large extent determined on the basis of the changing political and economic interests of its most powerful members. See Tan 2006: 508.

294 See Tan 2006: 508.

295 Bradlow 2000: 155.

296 Article XII, section 2 (a).

297 Article XII, section 3 (a).

298 Consensus in the sense of "unanimity".

299 Brettonwoodsproject. 2005: http://www.brettonwoodsproject.org/art-351636

two-year programme between 2006 and 2008, these variables include GDP, openness, variability and reserves.[300] While these variables have been adjusted numerous times, as shown below, the changes have not done much to alter the fundamental functioning of the executive board.[301]

The quota allocated to each country is critically important, as it determines the extent of the country's eligibility to borrow from the IMF, its voting power and the amount of its subscription.[302] Under the current setup, of the 24 directors who constitute the board, five are appointed by the five members with the largest quotas, i.e. the United States, Japan, Germany, France and the United Kingdom.[303] The respective values of the votes of Russia, China and Saudi Arabia are also large enough to allow them each to elect an executive director in their own right. The rest of the IMF's membership is divided into 16 constituencies, each of which elects one director to the executive board. Prior to the 2006-2008 reforms, the whole of sub-Saharan Africa, being the least represented region on the IMF board, had two representatives, while Western Europe, the most represented region, had a total of eight representatives.

From the above, it is clear that despite some attempts to implement reforms, decisions affecting the majority of IMF members still lie in the hands of a few rich countries not accountable to anyone.[304] This, as stated above, is open to abuse and must be corrected.[305] However, as Camdessus rightly says, the "[n]ecessary popular support for ... reforms cannot be ensured unless whole populations, including the poorest segments, have their say."[306] Even the IMF's managing director, Strauss-Kahn, recently acknowledged that there is still a lot to be done to ensure that the IMF

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300 IMF Survey Online. 2008: http://www.imf.org/external/pups/ft/survey/so/2008/NEW032808A

301 The IMF executive board remains mostly under the control of a small minority of rich countries due to the fact that over the years, the number of board members has not been increased in line with the growing number of member states. See Bradlow 2000: 154.

302 Van Houtven 2002: 5.; Tarullo 2006: 288 – 289.

303 Article III, section 3 (a) (i). The make-up of the IMF's governance structures, including the executive board, has been criticised for continuing to be based on the economic and military power distribution of the 1940s. See Griesgraber and Ugarteche 2006: 351; Dodge and Murray 2006: 365 and 370.

304 The IMF, along with other international financial institutions, have been accused of refusing to accept responsibility for its role in shaping the current international financial system, for promoting the liberalisation of the global macroeconomic policy and implementing domestic institutional reforms in times of crisis. See Hanson 2003: 66.

305 See Masson 2007: 891 – 892 for some of the recommendations that have been made in this regard.

306 Camdessus 2001: 364.

is sufficiently representative and accountable.[307] He was, however, quick to stress that the recent measures taken by the organisation to bring about reforms were a step in the right direction, and would make it possible to further rebuild the legitimacy of the IMF.[308]

4.3.3 General Review of Members' Quotas

An important inclusion in the IMF's Articles of Agreement is the requirement to review members' quotas every five years.[309] This provision ensures that the members' evolving economic circumstances are assessed on a regular basis. This in turn helps to bring to the attention of the IMF the extent to which each country's representation in decision-making is in or out of step with its standing in the world.[310]

The WTO can surely benefit from emulating this practice. By incorporating within its own rules a mechanism for regularly reviewing its operational procedures, including those for decision-making, the WTO would facilitate the monitoring of the extent to which these procedures are helpful in bringing it closer to achieving its stated objective of raising the standard of living among the citizens of its member countries. Considering the fact that discontent regarding the inadequacy of transparency and accountability in decision-making procedures within the multilateral trading system has been evident since the GATT days, and yet the same procedures were passed on to the WTO, one cannot help but conclude that serious and objective mechanisms for self-evaluation are lacking in the multilateral trading system.

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307 IMF Survey Online. 2008: http://www.imf.org/external/pups/ft/survey/so/2008/NEW032808A. Others have, however, altogether dismissed the need for the IMF, arguing that poor countries would be better off without it since they would no longer need to divert resources from essential services such as health and education to service loans they do not really need or could source more cheaply elsewhere. See Naiman 2000: 113.

308 The reforms, according to Strauss-Kahn, have resulted in the voting share of 135 member countries reflecting their economic standing in the world more realistically. See IMF Survey Online. 2008: http://www.imf.org/external/pups/ft/survey/so/2008/NEW032808A.

309 Article III, section 2 (a).

310 i.e. economically and in terms of other factors that have to be considered under the Articles of Agreement.

4.3.4 Waning Legitimacy

Much like in the WTO, the problem of diminishing legitimacy has become a lot more pronounced in the IMF in recent years.[311] The trouble started in the wake of a series of financial crises in emerging markets, which began in 1994. To avoid a recurrence of these crises, the Group of Seven (G7) major industrialised countries[312] decided that they needed to intervene by playing a more direct role in the management of the international monetary system. Part of the G7's strategy was to create the Financial Stability Forum (FSF) as well as the G20,[313] to work alongside the IMF.[314] It was thought that the two would give the G7 more flexibility to operate outside the rigid confines of IMF rules. However, an unfortunate consequence of this decision was that the two entities encroached on the authority of the more representative and democratic IMF, rendering it weaker in the process.

In addition, the effect of the G7's continued hands-on involvement in IMF activities, even after stability was restored to the international monetary system, was to compromise the organisation's independence. As Van Houtven has pointed out, "[the G7's] frequent contact with the IMF management on both policy and operational issues lack transparency and are perceived by many as interference with the mandate of the Managing Director and the authority of the Executive Board."[315] Inevitably, this has led to other members questioning the authority in terms of which the IMF's decisions are made.

To the extent that the G7 is deemed by other IMF members to be usurping functions properly exercisable by other agencies, the situation is comparable to that prevailing

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311 Tan 2006: 507; Masson 2007: 889.

312 Members of the G7 are Canada, France, Germany, Italy, Japan, United Kingdom and the United States.

313 The G20 (or Group of Twenty) referred to here is a body comprising finance ministers and central bank governors of prominent industrialised countries and developing economies, and acts as "a forum open and constructive discussions between industrial and emerging-market countries on key issues related to global economic stability. www.g20.org/about_what_is_g20.aspx Accessed on 08/09/10. It is made up of the finance ministers and central bank governors of the following 19 countries: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, Republic of Korea, Turkey, United Kingdom and the United States of America. The G-20 is a separate entity from the G20 developing countries alluded to in pars 6.3 and 6.4 below.

314 Van Houtven 2004: 18.

315 Van Houtven 2004: 18.

in the WTO. In the WTO, decision-making powers that belong to the entire membership are, in reality, exercised by only a handful of members. In both instances, the alleged usurpers contend that the conduct complained of is for the benefit of everyone and the organisation, while their critics argue that they are motivated only by self-interest. More importantly, in both cases, the perceived abuses by a few have sown deep divisions among members, while also undermining the legitimacy of the two organisations. In the next section, the results of work done by two panels of experts established to look into, among other things, the problem of dwindling legitimacy in the WTO and IMF respectively, are examined.

4.3.5 The Manuel Report versus the Sutherland Report

Not so long ago, both the IMF and the WTO decided to set up high-level panels of experts to conduct investigations and make recommendations on the measures that the two organisations could adopt to address the challenges they were facing, including those relating to governance. Frequently, such panels, constituted mostly by outsiders, are established in the hope that they can provide an unbiased and bold analysis that will drive the desired reforms forward, especially in cases where there is a political deadlock.[316] It is also thought that an evaluation made by disinterested but knowledgeable parties is likely to bring about fresh ideas that can help an organisation improve its performance.[317]

In the case of the IMF, on 4 September, 2008 it established the Committee on IMF Governance, headed by the former South African finance minister, Trevor Manuel.[318] The Committee produced its final report (hereinafter referred to as the Manuel Report) on 24 March 2009. For its part, the WTO, in June 2003, created a Consultative Board led by Peter Sutherland, the former Director General of GATT and

316 Pauwelyn 2005: 329.

317 Pauwelyn 2005: 329.

318 The other members of the Committee on IMF Governance Reforms were Michel Camdessus, former managing director of the IMF; Kenneth Dam, professor at the University of Chicago; Mohamed El-Erian, CEO of Pacific Investment Management Co.; Sri Mulyani Indrawat, Minister of Finance in Indonesia; Guillermo Ortiz, governor of the Bank of Mexico; Robert Rubin, Centre for Foreign Relations; Amartya Sen, Professor at Harvard University; and Zhou Xiaochuan, governor of People's Bank of China.

chairman of BP plc & Goldman Sachs International.[319] Its report entitled "the Future of the WTO: Addressing Institutional Challenges in the New Millennium" (hereinafter referred to as the Sutherland Report) was issued on 17 January 2005.

4.3.5.1 The Manuel Report[320]

The specific mandate of the Committee on IMF Governance Reform was to give advice on the adequacy and effectiveness of the IMF's framework for decision-making.[321] Most of the challenges confronting the IMF in the area of decision-making have already been alluded to in the preceding sections, and it was with many of these in mind that the Committee drafted its 27-page report. Considering the fact that the Manuel Report was only released in March 2009, it is too early to make an accurate assessment of its impact and reception among academics and other interested parties. All the same, comparing its recommendations to those of the Sutherland Report will certainly help in gauging the latter's strengths and weaknesses. This is particularly true with regard to recommendations pertaining to some of the problems common to the two organisations, such as their eroding legitimacy and equitable representation of members in decision-making. The report is divided into seven sections, and some of its most important recommendations are highlighted below:[322]

- Fast tracking the process of revising quotas so that it is finalised by 2010, as well as amending the Articles of Agreement to facilitate the consolidation of chairs in the Executive Board. These measures are deemed necessary to speed up the implementation of the changes required in the current make-up of the IMF Council and Executive Board.

- Limiting the composition of the IMF Council to only three members at a time, with such members' specific make-up being determined on a rotational basis. It is further proposed, however, that the Council must continue to accept inputs from the Executive Board and management. The intention here seems to be to make the

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319 The other members of the Consultative Board are Jagdish Bagwati, professor at Columbia University; Kwesi Botchwey, executive chairman of African Development Policy Ownership and former Ghanian Minister of Finance.

320 See the Committee on IMF Governance Reform (2009: 1 – 27).

321 IMF. 2009: http://www.imf.org/external/np/sec/pr/2009/pr0988.htm

322 See the Committee on IMF Governance Reform (2009: 3 – 4).

Council more efficient in carrying out its functions, while at the same time ensuring that all the members have an equitable say and participation in the activities of the Council.

- Leaving the task of carrying out the surveillance of individual members, mostly to the IMF management, while insisting on greater accountability on its part. This proposal clearly seeks to address the concern that some members, especially the G7, meddle too much in IMF affairs.

- Relieving the Executive Board of the responsibility of making day-to-day operational decisions and, instead, involving it only in an advisory and supervisory capacity. In this regard, a suggestion is made that the Council's role be limited to giving advice on strategic issues and to overseeing and reviewing surveillance. The Board would, however, continue to make decisions on issues relating to lending and finance. This recommendation is aimed at further improving efficiency and effectiveness in the IMF, by shifting most of the decision-making responsibilities to the Council.

- Setting the minimum votes required for taking important decisions at 70-75 percent, instead of the current 85 percent, and broadening the application of double majorities[323] to cover a wider variety of decisions. The first part of this proposal would make it easier for the IMF to implement the necessary changes as the organisation evolves and the circumstances of its members change, while the second part would allow the poorer members to have a greater say in decision-making by ensuring consideration of a variety of factors, including those favourable to these members.

- Lastly, devising "an open, transparent and merit-based" system for appointing the managing director and deputy managing director. Such a system would not only ensure that the IMF has competent individuals at its helm, but would also help address the legitimacy problem affecting the organisation.

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323 This is a vote which requires a majority of votes according to two separate criteria. For example, proposals have been made that in the IMF, these voting majorities should be based on a system of one-country one-vote, combined with economically weighted quotas for any decisions to be made.

It is worth mentioning that the Manuel Report concludes by conceding that the recommendations discussed above alone are inadequate to rid the IMF of its problems of ineffectiveness and lack of legitimacy and accountability.

Although critics of the Manuel Report are already faulting it for doing nothing "except to 'bring forward' the current timid reform proposal giving more votes to China and few other emerging markets...",[324] comparatively speaking, it actually has a number of notable accomplishments. To start with, it acknowledges the fact that there are deep-rooted flaws in the IMF's system of governance and decision-making, which need to be dealt with as a matter of urgency. In this regard, the report highlights issues such as unfair representation of some members, unrealistic voting thresholds in decision-making, questionable criteria for appointment of top management, and so on. Admittedly, the report could have made bolder proposals regarding the representation of poor members. However, it is fair to say that what it does contain constitutes a step in the right direction.

The report is also daring, in so far as it does not shy away from highlighting the role of rich and powerful countries in the current state of affairs in IMF governance. The drafters of the report deserve some credit, considering the fact that similar reports have left one with an impression that their compilers were at pains to avoid offending the rich countries in their recommendations. This is often the case, even if it comes at the cost of jeopardising efforts to find a solution to the problems at hand.

Having examined the contents of the Manuel Report, the contents of the Sutherland Report are also scrutinised below. The primary aim of this exercise is to facilitate a comparison of the two reports, in order to be able to assess the seriousness with which the two institutions that commissioned these reports view the challenges they are facing, and how far they are willing to go to confront them.

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[324] Birdsall. 2009: http://www.imf.org/external/np/exr/key/quotav.htm

4.3.5.2 The Sutherland Report

The WTO's Consultative Board was set up primarily to look into the institutional problems facing the organisation and to determine how best the organisation could be strengthened in order to tackle them.[325] While the Board and the report it eventually produced were well-received in some quarters,[326] others have raised questions about the Board's composition, arguing that the close ties the members had with the WTO might have caused them to hold a sympathetic view of the organisation that was not based on objective facts. Hence, the remarks by von Bogdandy and Wagner that "[t]he group selected is particularly close to the [WTO]; it includes no scholar, intellectual, or politician who has voiced substantial and serious criticism".[327]

The Sutherland Report itself is divided into nine chapters, although only the chapters most relevant to this study are discussed here:

- Chapter I, entitled "The case for liberalising trade", is, among other things, a justification for the continued existence of the WTO as an organisation. This part of the report has been criticised for disregarding the negative effects of the WTO's liberalisation efforts, such as the impact of the TRIPS Agreement on developing countries and the deterioration of public services globally.[328]

- Chapter IV on "Coherence and coordination with intergovernmental organisations", looks at the relationship that the WTO has with other organisations operating in the international sphere. The chapter focuses mostly on organisations such as the World Intellectual Property Organization (WIPO), International Telecommunication Union (ITU) and World Customs Organisation (WCO), which have tended to maintain cordial relationships with the WTO, either due to their related work or some other

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325 Davey 2005: 287.

326 Phrases such as "highly commendable" and "makes several important recommendations" were used to describe the report by some commentators. See Alexovicova and van den Bossche 2005: 7; Ching-chang Yen 2006: 13 – 26.

327 Von Bogdandy and Wagner 2005: 439. A further criticism levelled against the Sutherland report is that "[o]n some issues, the proposed solutions do not solve the problems identified...On other issues, the proposals are unrealistic or impracticable". See Yen 2006: 16.

328 Von Bogdandy and Wagner 2005: 439.

association. Regrettably, no mention is made of other international organisations or agreements that have had tense or problematic relationships with the WTO, even though they do exist. For example, many international environmental organisations and groups hold markedly different views to the WTO regarding the role that the organisation can play in minimising the adverse impact of trade liberalisation on the environment. One would have expected the report to come up with a proposal on how to reconcile the conflicting positions, given the importance of the issue.

- In Chapter V, the report deals with "Transparency and dialogue with civil society". Following a discussion regarding the circumstances that have led to the legitimacy problem confronting the WTO, the report proceeds to praise the organisation for the corrective measures it has already implemented. In this regard, the report mentions the availability of documents on the WTO website and greater access of NGOs to WTO meetings. However, this chapter has been criticised for seeking to shift the responsibility for engaging civil society from the WTO to member states, and for saying that practical realities and the sensitive nature of the WTO necessitate its secretive methods. The critics argue that even though a measure of confidentiality is essential in trade negotiations, there is still room for improving transparency levels without compromising sensitive information.[329]

- Chapter VI discusses "The WTO dispute settlement system" and speaks very highly of the rules regulating it. The report warns against implementing changes that might "harm" the system, and makes specific mention of not allowing the principles of public international law to have too much influence on WTO jurisprudence. This desire to protect the system is, it is submitted, stretched too far when the dispute settlement understanding is described in the report as "self-contained". Indeed, Wolfe is correct in his observation that the report seems to assume that the dispute settlement system is the only means by which disagreements between members can be resolved.[330] Furthermore, by proposing the marginalisation of national parliaments in amending domestic legislation not in line with WTO rules, the report encourages the further isolation of civil society.

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329 Von Bogdandy and Wagner 2005: 441.
330 Wolfe 2005: 633.

- Chapter VII, entitled "A result-oriented institution - decision-making and variable geometry", focuses on the question as to whether or not consensus continues to be the best method for taking decisions in the WTO. Although for a very long time the appropriate procedure for decision-making has been and remains one of the most contentious issues in the multilateral system, the report's proposals for resolving the problems are modest at best. They entail suggestions for minor alterations to the rule that all members are equally bound by new agreements. Strangely, the report does not make mention of voting, let alone consider it as an option that might be used in the place of consensus, even though it is provided for under the present rules and would not necessitate a formal amendment of those rules.

- Chapter VIII is entitled "A result-oriented institution – political reinforcement of an efficient process", and advocates increased involvement and support by political actors for the WTO. In addition, it proposes the creation of a 30-member consultative body comprising senior officials who would not exercise executive or negotiating power, but only deliberate on political and economic matters and give political guidance whenever the need arises, especially ahead of Ministerial meetings. While this body would most likely help avoid the deadlocks that have come to be associated with WTO meetings, the biggest challenge it would face would be overcoming the likely perception that it is just another tool created by the rich to advance their own interests. The suggestion that the major trading countries should hold permanent seats in this body will only serve to strengthen this perception.

- Lastly, in chapter IX, the report recommends some improvements to the "Role of the Director General and the Secretariat". To this end, a call is made for a clearer mandate for the Secretariat, as well as for its greater involvement in negotiations. While the report seems to envisage a Secretariat modelled on the EU Commission, it stops short of recommending, for it, the power to take legal action against members that violate the rules, a tool that has enabled the EU Commission to successfully execute its mandate of being "the guardian of the treaties".[331]

[331] Von Bogdandy and Wagner 2005: 446.

While the Sutherland report clearly enjoys some support, judging by some of the positive reviews it has received, it is disconcerting that it hardly pays attention to or simply dismisses[332] the concerns raised by millions around the world who have expressed dissatisfaction with the way in which the WTO is run. On the contrary, it seems that the drafters of the report were determined to preserve the *status quo* and cared very little about the impact of the current procedures on the majority of WTO members. As von Bogdandy and Wagner rightly point out, "[p]erhaps the report would have been...useful if it had been drafted by a bolder, more representative and more critical board." Compared to the Committee on IMF Governance, the WTO's Consultative Board lacked objectivity and could hardly hide its desire to have the WTO remain in its current form.

4.4 EU DECISION-MAKING PROCESS

4.4.1 Background

Generally speaking, decisions in the EU are taken by the three main political institutions, namely the Commission, the European Parliament (EP) and the Council of Ministers (the Council). Such decisions normally involve the implementation of a specific policy or giving effect to a variety of legislative provisions.[333] The procedures to be followed are set out in various EU treaties and depend on the issues to be decided. They vary from simple majority voting to qualified majority voting (QMV) and assent. The extent to which any one of the three political institutions is involved in a particular decision also depends on which method, between consultation, assent and co-decision, is prescribed for the specific measure.[334]

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332 For example, the report concluded that factors such as enhanced training, capacity building programmes and initiatives by NGOs have significantly improved the negotiating capacity of developing countries, even though others have found that these countries continue to struggle in trade negotiations. See Yen 2006: 19. See also Gordon 2006: 116.

333 Fairhurst 2007: 125.

334 The consultation procedure compels the Council to consult with the EP before voting on a proposal initiated by the Commission, and to take the EP's opinion into consideration, although the Council is under no obligation to adopt the EP's position; the assent procedure requires the Council to obtain the EP's assent before taking some critical decisions, failing which the decision cannot be adopted; and the co-decision procedure requires the Council to adopt legislation jointly with the EP and to agree on a common text before a proposal can become law. See articles 225 and 294 of the EU Treaty.

4.4.2 The Commission

4.4.2.1 Composition

The composition of the Commission and the member states' representation in it have been altered several times over the years, mainly for practical reasons. Initially, the large states (France, Germany, Italy, Spain and the UK) had two commissioners each. However, when the number of commissioners reached 20 after the 1995 expansion, it became clear that further increases in membership would make effective management difficult.[335] It was also realised that not enough Commission work was available to divide between the twenty or more portfolios.[336] Accordingly, during the negotiations that preceded the Amsterdam Treaty, an agreement was reached in principle, although no final decision was taken, that the representation of member states in the Commission must not exceed one Commissioner each, and that the overall number of Commissioners should not be more than twenty.[337]

The eventual decision limiting the member states' representation to one commissioner each was incorporated into the Treaty of Nice. Moreover, in anticipation of further growth in EU membership, an agreement was reached during the Intergovernmental Conference held in preparation for the Constitutional Treaty,[338] which provided that, as from 2014, the number of Commissioners would be restricted to two-thirds of the number of member states.[339]

The Commission also has a staff of about 25 000 who assist it in carrying out its functions.

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335 Forster 2006: 53.
336 Hanlon 2003: 43.
337 Hanlon 2003: 43.
338 The Constitutional treaty was, however, eventually rejected by the EU membership in a referendum.
339 Nugent 2006: 150.

4.4.2.2 Decision-making

The Commission participates at every level of EU decision-making. It enjoys some decision-making powers in relation to the specific functions it has been charged with. These include ensuring that the provisions of the EC Treaty and the Commission's own efforts to give effect to these provisions are implemented; producing policy proposals on issues covered by the EC Treaty; independent involvement in shaping the activities of the Council and the EP; exercising some legislative powers delegated to it by the Council to implement some of the latter's rules; managing the EU's annual budget; representing the EU in international organisations; concluding international agreements on behalf of the EU; and performing a judicial role in competition law matters.

Even though the initiative for taking particular measures in the EU generally starts with the relevant Directorate General within the portfolio of a particular Commissioner, the Commission itself must decide whether or not to adopt a specific proposal. It may not delegate this responsibility to an individual commissioner. In taking this decision, the Commission must do so by a simple majority of the Commissioners.[340]

4.4.3 The Council

4.4.3.1 Composition

The Council consists of representative ministers from all EU member states, and its composition varies according to the issues to be discussed at a particular meeting. Thus, for example, the Council may comprise agriculture or trade ministers, depending on whether the subject matter to be discussed is agriculture- or trade-related.[341] A committee is also established comprising permanent representatives of

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340 Article 250 EU Treaty.

341 At the moment, there are nine Council configurations representing nine different subject matters covered by the Council. See Foster 2006:56 and Hanlon 2003: 36.

member governments, which assists the Council in preparing its work and undertaking other responsibilities assigned to it by the former.[342]

4.4.3.2 Decision-making

As in the case of the Commission, the Council also exercises some decision-making powers in the course of performing its duties. The duties in question include overseeing the coordination of the general economic policies of member states and delegating some responsibilities to the Commission.[343] In addition, despite numerous changes to the legislative process that have conceded considerable power to the EP, the Council continues to be the primary legislative organ of the EU.

In terms of Article 238 of the EU Treaty, unless otherwise stated, voting in the Council is by simple majority. However, in practice, most of the voting is conducted by qualified majority voting and, in some rare instances, by unanimity.[344] Only qualified majority voting is examined in detail in the next section, due to its relative complexity and because, as it will be shown later, it is the only EU decision-making procedure that can realistically be considered for application in the WTO.

4.4.3.3 Qualified Majority Voting

QMV in the EU context has been described as "a system of voting, weighted according to the population size of the Member State."[345] Thus, the more populous the country, the greater the weight attached to its votes.[346] This mainly serves to ensure that the Council's decisions reflect the demographic make-up of the EU. The number of votes exercisable by member states has also been re-weighted several times over the EU's existence, in order to give the smaller countries an equitable say

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342 Article 240 (1) of the EU Treaty.
343 Article 241 of the EU Treaty.
344 Foster 2006 57; Hanlon 2003: 36.
345 Fairhurst 2007: 130.
346 The QMV vote allocation among the EU member states as from 1 January 2007 is as follows: France 29, Germany 29, Italy 29, UK 29, Poland 27, Spain 27, Romania 14, Netherlands 13, Belgium 12, Czech Republic 12, Greece 12, Hungary12, Portugal 12, Austria 10, Bulgaria 10, Sweden 10, Denmark 7, Finland 7, Ireland 7, Lithuania 7, Slovakia 7, Cyprus 4, Estonia 4, Latvia 4, Luxembourg 4, Slovenia 4, Malta 3.

in decision-making[347] and to take into account increases in the number of members. After the 1 January 2007 enlargement, the qualified majority stands at 255 votes out of a total of 345.

A further requirement under the system is that the qualified majority votes attained must represent a minimum of 62 per cent of the EU population. Any EU member state is entitled to insist on verifying that this requirement is met before a decision can be considered valid.

An important feature of the QMV as applied in the EU is that, in all the instances where it is used, the allocation of votes is purposefully made more favourable to the smaller member states, in order to give them a larger measure of protection than they would be entitled to if the calculations were done strictly according to population size. This is the case even as greater weight is attached to the votes of the bigger member states in recognition of their superior population size.[348] In terms of institutional accountability towards the entirety of membership, this example of the EU is hard to match. It contrasts with the consensus rule applied in the WTO which, as mentioned before, treats all members alike, irrespective of the fact that strict application of certain rules or practices impacts on them differently.

4.4.4 The European Parliament

The EP is regulated by Articles 223 - 234 of the EU Treaty. Notwithstanding its name, it does not fit the conventional description of a parliament in the European sense, as it comprises only one chamber and the heads of state of members do not form part of parliament.[349] The formal powers exercisable by the EP are also much smaller compared to those of most national parliaments.[350]

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347 This safeguards the legitimacy of the Council's decisions.

348 For example, before the Nice Treaty, Germany, the most populous EU member state with about 81 million citizens, had 10 votes, while Luxembourg, the least populous member state at 600 000 citizens, had two votes.

349 Hanlon 2003:30.

350 Nugent 2006: 240.

4.4.4.1 Composition

As with the allocation of votes in the Council, the distribution of parliamentary seats among the EU member states is, broadly speaking, according to population size. Thus, the countries with the largest populations receive the greatest number of seats. At present, there are a total of 750 seats distributed among 27 member states.[351]

The election of Members of the European Parliament (MEPs) is on the basis of different variants of proportional representation according to the preference of individual member states. In the case of the United Kingdom, for example, prior to the EU parliamentary elections of June 1999, the first-past-the-post system was used. However, following the victory of the UK Labour Party in the May 1997 domestic general elections, this system was abandoned and replaced with a proportional voting system.[352]

4.4.4.2 Decision-making

In terms of Article 231 of the EU Treaty, decisions of the EP are to be taken by an absolute majority, except where it is otherwise provided. MEPs who abstain or are absent are not taken into consideration in determining whether or not the required majority has been met.[353]

The EP's decision-making powers find application in the performance of its many functions, including: exercising control over the Commission;[354] deciding on the EU's budget along with the Council; participating in the legislative process through the co-decision procedure; and exercising the power of assent in relation to accession of new member states and conclusion of international and association agreements by the EU.[355]

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351 The current distribution of seats in the EP is as follows: Germany 99, France 72, Italy 72, UK 72, Poland 50, Spain 50, Netherlands 25, Belgium 22, Czech Republic 22, Greece 22, Hungary 22, Portugal 22, Sweden 18, Austria 17, Denmark 13, Finland 13, Slovakia 13, Ireland 12, Lithuania 12, Latvia 8, Estonia 6, Slovenia 7, Cyprus 6, Luxembourg 6, Malta 5.

352 Fairhurst 2007:107.

353 Fairhurst 2007:129.

354 E.g. the EP is entitled to challenge proposals for legislation made by the Commission, and has the power to appoint and remove the Commission.

355 Article 49 of the Maastricht Treaty and Article 300 of the EC Treaty. See also Chen 2008: 37.

4.4.5 Lessons for the WTO

Having examined the mechanisms for taking decisions in the EU, the big question is whether or not there are any lessons for the WTO. The EU model certainly offers an example of the critical role that political institutions such as the European Commission and the European Parliament can play in ensuring that trade and economic rules are responsive to the social needs of members' citizens.[356]

The qualified majority voting applied in the EU, which is the organisation's most commonly used decision-making procedure, is instructive in a number of ways. As already indicated, unlike the form of "consensus" employed in the WTO, which has the effect of sidelining certain member states, the QMV seeks to strike a balance between giving recognition to the relative importance of the larger member states and protecting the interests of the smaller ones. This is achieved by conforming to "the idea that the number of Council votes per country should in some way, even if very crudely, represent the population size ...", while also ensuring that "the votes for each country for a qualified majority [are] deliberately biased for the protection of smaller states...".[357] Maintaining this balance has been critical to preserving the legitimacy of EU decisions. In view of the legitimacy deficit presently plaguing the WTO decision-making process, the organisation can learn a thing or two from the EU.

In addition, by employing QMV in taking most of its decisions, the EU recognises the fact that adopting traditional procedures such as simple majority and unanimity is not always a realistic option, as they may not be politically acceptable to some member states in certain instances. A good example is the fact that, at the time when the EU comprised 25 member states, the four most populous countries (Germany, France, the UK and Italy) accounted for 57 per cent of the entire EU population, and applying simple majority based on population would have allowed them to dictate terms to the rest of the membership.[358] The other countries would simply have found such a situation intolerable.

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356 Shell 1994: 829.
357 Foster 2006:60.
358 Foster 2006:59.

However, even as the EU makes clear its preference for QMV, it is not in denial about the fact that some issues are so sensitive and contentious that only the use of unanimity and simple majority procedures are appropriate in deciding them. The lesson for the WTO in all this is that it is not always necessary or helpful to adopt an all-or-nothing approach in selecting the type of procedure for taking decisions. Employing a mixture of different procedures might, as demonstrated by the EU, work better. Furthermore, the EU has shown that through co-operation and understanding, it is possible to protect the interests of the small countries and recognise the importance of the larger members at the same time. Achieving this balance, as said before, is essential for an organisation to function effectively and to take decisions that are acceptable to all member states.

The question that remains is the following: How easy would it be to implement the EU's decision-making practices in the WTO context, considering that the latter operates on a global scale, with a much larger number of member states and diversity of interests? Some commentators have answered this question in the negative. According to Ehlermann and Ehring, for instance, "[t]he fact that organisations of regional integration sometimes have more advanced decision-making mechanisms is due to their higher level of ambition in terms of integration. Therefore, and also because of the more limited diversity in their membership, these organisations do not lend themselves to a comparison with the WTO."[359] Notwithstanding the opinion of these authors, there is clearly room for improvement in the way that the WTO takes its decisions, and it can certainly borrow a few pages from the EU's book.

4.5 ACCOUNTABILITY AND TRANSPARENCY IN THE VARIOUS INSTITUTIONS

In recent years, the twin concepts of accountability and transparency have come under scrutiny in all the organisations discussed in this chapter. With each organisation assuming ever-greater responsibilities, there have been growing calls for

[359] Ehlermann and Ehring 2005: 509.

them to be more open and answerable to those affected by their activities.[360] In this section, the levels of transparency and accountability in the various organisations are examined, with a view to determining to what extent each organisation has embraced the two concepts.

4.5.1 Accountability

4.5.1.1 The IMF and the WTO

In the case of the IMF and the WTO, they have both experienced an increase in the number of new stakeholders impacted by their activities and who are now demanding that the two organisations account to them. This comes in the wake of the expansion in the roles of the two organisations over the years, which in some instances was not even contemplated in the agreements governing the organisations. In the IMF, for example, while there was an understanding at its inception that its activities would not infringe on the domestic politics of members, the opposite is now true.[361] Instead of limiting its lending conditionalities[362] to macro-economic indicators, as was initially the case, at present, these conditionalities cover areas such as good governance, the rule of law, judicial reform, corruption and corporate governance.[363]

Likewise, the creation of the WTO has brought about some important changes which now allow the multilateral trading system to exercise more influence within member states.[364] Firstly, the notion of a "single undertaking" applicable to its agreements means that states wishing to gain WTO membership have to accept all the agreements concluded under its auspices as a package. Thus, members can no longer pick and choose which of the numerous agreements they want to bind themselves to. Secondly, withdrawing from any WTO undertakings is very difficult,

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360 Elsig 2007: 21.

361 Woods and Narlikar 2001: 569 – 570. Among the reasons given for the IMF reneging on the undertaking not to intervene in the domestic affairs of members are the pressures of the Cold War, during which influential members ensured that lending decisions were based on calculations of political stability and geo-strategic containment, as well as the debt crises of the early 1980s.

362 Conditionality has been defined as "the linking of the disbursement of a loan to understandings concerning the economic policy which the government of a country intends to pursue." See Mosely, quoted in Tsai 2000: 1321.

363 Woods and Narlikar 2001: 570.

364 Woods and Narlikar 2001: 569 – 570.

and a breach thereof may result in authorisation of retaliation against the relevant member. Thirdly, under the WTO, the capacity of members to enforce the rules has been strengthened significantly. The result of all these changes is that the WTO is now able to penetrate even deeper into the domestic affairs of members, and the impact of its activities are being felt by more individuals and businesses in a more permanent way.

The general presumption regarding accountability in the IMF is that it is taken care of through the executive board monitoring senior management and ensuring that the latter do their work properly. Another presumption is that senior management in turn supervises the work of junior staff.[365] However, in reality, it does not always work that way. Factors such as inadequate representation of some member states on the board, improper supervision of work within the organisation, and the degree to which certain members are able to influence management and staff have tended to compromise the IMF's ability to account to all its members equally and effectively.[366]

In the WTO, accountability to all stakeholders is made difficult mostly by the informal processes existing alongside the formal ones. As indicated previously, even though in theory all WTO members are represented at all levels of decision-making and are supposed to have a veto power over any decision, in practice the agenda for meetings and decisions thereon are generally finalised in informal meetings.[367]

4.5.1.2 The UN

With regard to the UN, the growing litany of global problems it is expected to help resolve have led to questions being asked about what it can do to improve its efficiency and effectiveness. This, in turn, has focused the attention on the issue of accountability.[368] Fowler and Kuyama have made an effort to define accountability in

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365 Woods and Narlikar 2001: 573.

366 Woods and Narlikar 2001: 573. This is reiterated by Burall and Neligan, who contend that "...the reality is that many [intergovernmental organisations] are more answerable to some members than to others; the accountability mechanisms in place to ensure formal accountability do not work. This leads to one type of accountability gap." See Burall and Neligan 2004: 9. See also Camdessus 2001: 365.

367 Burall and Neligan 2004: 10.

368 Fowler and Kuyama 2007: 1; Burall and Neligan 2004: 7.

the context of the UN from both political and managerial standpoints. On the one hand, they define political accountability as "accountability of both legislative organs (Member States) and Secretariat to any stakeholders, that is, to any groups, and ultimately to the 'Peoples of the United Nations', affected by the UN decisions, actions or inactions, 'by what it chooses to do or not to do as well as by how well it does it."[369] Based on this definition, it seems that accountability in the UN requires meaningful participation of relevant stakeholders in the organisation's decision-making and other processes. Unfortunately, a lot of the time, those most affected by particular UN decisions or policies are not consulted or otherwise involved in arriving at those decisions or policies.[370]

On the other hand, managerial accountability is said to involve "holding those with delegated authority (i.e. secretariats, including executive heads such as the Secretary General) accountable for the agreed actions taken in accordance with respective responsibilities, as well as for the performance and the manner in which the related programme was managed."[371] As in the case of political accountability, the UN has been found to have serious deficiencies in this area. The following remarks by the former UN Under-Secretary General for Management, Patricio Ruedas, sum up the state of managerial accountability in the UN: "Member States have...stressed the need to be told, more clearly and more extensively...what has been the programmatic performance of the secretariat, which outputs have been delivered, and with which results..."[372]

4.5.1.3 The EU

As far as the EU is concerned, there is some merit in the view that it maintains a measure of accountability, to the extent that the Council of Ministers and the European Parliament are directly elected and ministers of member states are answerable to their national parliaments for their activities in the Council of Ministers.

369 Fowler and Kuyama 2007: 3.
370 Fowler and Kuyama 2007: 4; Burall and Neligan 2004: 9.
371 Fowler and Kuyama 2007: 3.
372 Ruedas, quoted in Joint Inspection Unit 1988: 5.

This view is further supported by the fact that the European Parliament exercises oversight over the activities of the Commission.[373]

However, in real life, the existence of these mechanisms does not always guarantee that the EU voters are able to hold the organisation and its institutions accountable. For example, following the enactment of the Single European Act in 1986 and the introduction of majority voting, Parliamentary representatives can now outvote each other during decision-making.[374] This means that the representatives cannot always be made to account for the decisions of the European Parliament, since they would sometimes have actually opposed such decisions. Concern has also been raised that the increase in the powers given to the European Parliament has not been complemented by corresponding efforts to raise the level of its accountability.[375]

In conclusion, from the foregoing discussion it can be seen that all the institutions examined fall short in some way when it comes to accounting to their stakeholders, and that there is generally room for improvement. It is also clear that the improvements needed vary from institution to institution, depending on the measures it has implemented up to now. In the particular case of the WTO, its apparent level of accountability to members is deceptive, in that theoretically, it is supposed to be more representative than the other institutions, since its decision-making procedures provide for one-member-one-vote. However, as indicated previously, in practice the WTO uses the consensus rule, in terms of which the outcome of a decision is generally determined in informal meetings dominated by a few privileged countries. Thus, while appearing to be the institution that is more accountable to all its members, in reality the WTO is arguably the least accountable institution.

373 Bogdanor 2007: 6.
374 Bogdanor 2007: 6.
375 Hayes-Renshaw and Wallace 1997: 297.

4.5.2 Transparency

4.5.2.1 The IMF

When it comes to transparency, the IMF has had a long history of non-observance. For 50 years after its establishment, it had no clear policy on the subject and operated on the basis of near absolute secrecy.[376] This was the case notwithstanding the IMF regularly receiving highly sensitive economic information from member states and having tremendous influence on the economic policies of the countries that borrowed money from it by virtue of the conditionalities that it imposes.[377] It was only in the mid-1990s that the IMF started to permit the publication of certain of its internal documents, mostly as a result of advocacy by civil society groups and some of its member governments.[378] Today, the IMF has a transparency policy that allows for publication of a wide range of information, which is grouped into three types of documents, namely country documents, country policy intentions documents and Fund policy documents.[379]

It is, however, worth noting that two other types of documents are excluded from the three categories mentioned above. These are the following: statements on IMF decisions on the waiver of non-observance or applicability for performance, as well as statements dealing with assessment criteria.[380] Furthermore, the transparency policy makes no provision for automatic disclosure regarding country policy and country policy intentions documents.[381] Instead, it creates four publication regimes to which the various documents may belong, depending on their type, namely (i) voluntary but presumed publication; (ii) voluntary publication; (iii) presumed publication; and (iv)

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376 GTI Secretariat 2008: 2.

377 GTI Secretariat 2008: 2. See also Anjaria. 2002: www.globalpolicy.org/component/content/article/209/43013.html

378 IMF. 2005: http://www.imf.org/external/np/pp/eng/2005/052405.pdf The advocacy by civil society groups came in the wake of the Mexican and Asian economic crises in the mid and late 1990s respectively. See also Anjaria. 2002: www.globalpolicy.org/component/content/article/209/43013.html

379 GTI Secretariat 2008: 2. Country documents cover specific member countries' economic health and lending decisions reports, debt relief program reports, and use of Fund resource reports; while country policy intentions documents comprise economic plans of member governments, including poverty reduction strategy papers, letters of intent and memorandum of economic and financial policies.

380 GTI Secretariat 2008: 3.

381 This is so in spite of the two falling within the three categories covered by the IMF transparency policy.

case-by-case publication. Where the term "presumed" is used in the descriptions above, a member's explicit consent for the publication of any documents is still required, while for the rest publication is entirely voluntary.[382] Thus, even for the documents covered by the IMF transparency policy, whether or not a particular document becomes publicly available still largely depends on the will of the country concerned.

In addition, the IMF's transparency policy excludes information relating to the structure, finances and decision-making processes of the organisation. The policy also permits members to use what are called "side letters" in dealing with controversial information pertaining to IMF financial assistance they received. This procedure allows members to exclude this information from their reports by putting it inside letters submitted to the IMF, but which are deemed to be strictly confidential communication between the latter and the country concerned.[383]

As mentioned before, the measures implemented since the mid-1990s represent something of an improvement in transparency in the IMF considering that, for a long time before then, transparency was virtually non-existent in the organisation. However, it is fair to say that the improvements are superficial at best, especially when one considers that they exclude important aspects such as making the organisation's finances and decision-making processes public. To use the GTI Secretariat's words, "[t]here are [still] serious deficits in the IMF's transparency, even allowing for some secrecy given the sensitive nature of the IMF's work."[384]

4.5.2.2 The WTO

Following the eruption of chaos at the Seattle Ministerial Conference in 1999, WTO members engaged in rigorous consultations with the object of addressing the issue of the effective participation of developing countries in decision-making.[385] While these "internal transparency" consultations did not lead to changes in the institutional

382 GTI Secretariat 2008: 3.
383 GTI Secretariat 2008: 3.
384 GTI Secretariat 2008: 1. See also IMF. 2005: http://www.imf.org/external/np/pp/eng/2005/052405.pdf
385 Van den Bossche 2005: 152.

structure of the WTO or its decision-making process, they did result in an acknowledgement of the need for some adjustments, especially in the following respects: allowing all interested members to make their views known during the consultations; not to make any assumptions on the representation of members by other members in such consultations; reporting back promptly on the results of the consultations to all members; scheduling WTO meetings carefully to avoid overlapping of meetings as much as possible; and ensuring prompt and efficient dissemination of information to members, particularly non-resident members and members with small missions.[386]

As of today, a substantial amount of information about the WTO is made publicly available.[387] This includes documents submitted to Ministerial Meetings, which are now posted on the WTO website; records of the minutes of all the formal and selected informal meetings; most documents, with the exception of the records of tariff negotiations; and panel findings.[388] The WTO also has an information disclosure policy now.[389]

These improvements notwithstanding, as in the case of the IMF, the WTO still has a long way to go, given the fact that it is only the minutes of the formal meetings that are published, and yet the majority of critical decisions are taken or take form in informal consultations.[390] Hence, the calls for the WTO to be more transparent and accessible have not ceased.[391] Those demanding greater change also argue that the availed information cannot be a substitute for actual involvement in meetings held at various levels of the WTO.[392]

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386 Van den Bossche 2005: 152-153.
387 Alexovicova and van den Bossche 2005: 15.
388 Woods and Narlikar 2001: 11.
389 Burall and Neligan 2004: 15.
390 See par 3.2 above.
391 Alexovicova and van den Bossche 2005: 15.
392 Woods and Narlikar 2001: 11.

4.5.2.3 The UN

When it comes to the UN, the debate around transparency has largely focused on the Security Council, mainly because it is the most powerful and influential organ of the organisation. The Security Council has been described as functioning "largely behind closed doors and with very little accountability to the organisation's general membership or to the larger public."[393] Prompted by this perception, many have demanded that the Security Council should change how it interacts with the General Assembly, the manner and circumstances of its meetings, and its responsiveness to the international community.[394]

As in the case of the WTO's "green room" meetings, the Security Council has developed informal decision-making procedures outside of the official Council structures called "consultations of the whole". These informal procedures, in which no written records of the deliberations are kept, have been criticised for making the Security Council less transparent than before, with the result that the gap between the latter and the General Assembly has grown even wider.[395] Commenting on the role of the "consultations of the whole", Monteiro says the "[i]nformal consultations can and should take place whenever necessary to assist members in the consideration of certain matters, as occurs in any other UN body. But they should not systematically replace regular formal sessions of the Council at which members should state their views on the matter under consideration and hear other UN members, if the Council decides."[396]

4.5.2.4 The EU

Although the discussions on openness in the EU at first revolved around the specific question of access to information, they tend to now deal with transparency in the

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393 Global Policy Forum and the World Federalist Movement. 1996: http://www.globalpolicy.org/security-council/40399.html

394 Global Policy Forum. 2005: http://www.globalpolicy.org/security-council/security-council-as-institution/security-council-reform/transparency-including-working-methods-and-decision-making-process.pdf

395 Monteiro. 1997: http://www.globalpolicy.org/component/content/article/188/32940.html

396 Monteiro. 1997: http://www.globalpolicy.org/component/content/article/188/32940.html

broader sense.[397] A number of provisions are now found in various EU statutes, which deal with the issue of access to information and transparency. For instance, declaration 17 of the Final Act of the Treaty of Maastricht proposed measures to increase public access to information, with the aim of promoting institutional transparency and public confidence in EU administration; Article 1 of the Treaty of Amsterdam also provided that the three pillars of the EU must take decisions as openly as possible; and a commitment to openness and access to information was incorporated into the proposed Constitutional Treaty for the EU,, although the treaty was ultimately not adopted.[398]

The Constitutional Treaty also established the office of the European Ombudsman.[399] Although the office was specifically created to promote good relations between citizens and the EU administration, the effect of its activities has been to bring about greater transparency in the EU.[400] For example, the European Ombudsman is credited with playing a major role in setting standards when it comes to access to information and improving administrative transparency.[401] It also helped to define the requirements of "openness" in decision-making, as well as to carry out investigations into the practices of other EU bodies besides the Council, the Commission and the European Parliament.[402]

There are a number of other measures that have been adopted in an effort to further promote good and open governance. These include the adoption of a European code of good administrative behaviour, the possibility of submitting petitions to the European Parliament by citizens, and a code of conduct for Commissioners.[403]

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397 Bijsterveld 2004: 3.

398 Bijsterveld 2004: 3 – 4.

399 Pohl 2006: 15. Commonly used at the national level, the ombudsman operates independently in order to scrutinise the actions of public officials or complaints by individual citizens, in order to prevent maladministration.

400 European Ombudsman. 1999: http://www.ombudsman.europa.eu/speeches/en/ljub1.htm

401 However, the European code of good administrative behaviour (first published by the European Ombudsman in March 2002) has been criticised for not being binding on EU institutions, despite providing good guidelines for how the institution must behave towards citizens. See Pohl 2006: 14.

402 Bijsterveld 2004: 5.

403 Pohl 2006: 14, 16 – 17.

Even with all the above measures in place, however, there are still people who think that the EU is not sufficiently transparent. One of them is the former European Commissioner for Administrative Affairs, Audit and Anti-fraud, Siim Kallas. Speaking in 2005, he remarked that "Brussels is regarded...as a faraway place, as an inaccessible political 'black box' where all sorts of obscure measures are taken."[404] Kallas went on to establish the European Transparency Initiative (ETI), whose aim was to increase the "openness and accessibility of EU institutions, raise awareness over the use of the EU budget and make the Union's institutions more accountable to the public."[405] He was particularly concerned about the failure to look into the personal integrity of EU decision-makers and officials, as well as the failure to scrutinize the activities of lobbyists active within the EU.

Yet more people have opined that the existing measures aimed at increasing transparency can be improved. One view is that the possibility of lodging complaints and petitions with the European Ombudsman should be extended beyond cases of maladministration. Another view is that there should be a formal complaints procedure as well as sanctions for breaches of the code of conduct by Commissioners.[406]

To conclude, the above discussion shows that there is a growing acceptance in different institutions that transparency is a critical component of sound and effective governance. However, it is also clear from the discussion that there is room for improvement in a number of important areas, be it with regard to publication of decisions on the waiver of non-observance in the IMF or Security Council responsiveness to the concerns of the international community, or creating a formal complaints procedure for breach of the code of conduct by EU Commissioners. In the case of the WTO in particular, despite making a growing number of documents publicly available, the fact that discussions held during the critical informal meetings are kept a secret makes the attempts at improving transparency largely meaningless.

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404 Kallas, quoted in Pohl 2006: 4.
405 Kallas, quoted in Pohl 2006: 4.
406 Pohl 2006: 17.

4.6 SUMMARY AND CONCLUSION

In this chapter the decision-making practices followed in the WTO were contrasted with those of the UN, IMF and EU. In the UN, all the three main decision-making bodies[407] give first preference to consensus, failing which consideration is given to voting and entering reservations. Unlike in the WTO, voting is actually employed and where this happens, member states have one vote each. However, some additional requirements are also imposed in taking certain important decisions, e.g. decisions on substantive matters in the Security Council require affirmative votes of all the permanent members.

It was seen that, much like the WTO, the UN has an informal process of decision-making operating alongside the formal one. However, unlike in the WTO's informal process, participation in the UN informal process is determined more on the basis of which countries have the most interest in the issues to be discussed and are best positioned to resolve the problems at hand, as opposed to the identity and might of a particular country.

It was also noted that the UN Security Council, which is often labelled undemocratic, offers particular lessons for the WTO. Firstly, it serves as a reminder that, although large decision-making bodies tend to be ineffective and unwieldy, it does not follow that any small structure will result in efficiency and responsiveness to the concerns of all members. Considerations such as the representivity and accountability of the structure created are also important. Secondly, the UN Security Council also reminds us that actions of organisations like the UN and WTO will always by-and-large reflect the will of the most dominant members.

It was further seen that in the IMF, day-to-day decisions are taken by an executive board. A system of quotas based on variables such as GDP, openness, variability and reserves determines the degree of each member's representation on the board, as well as their eligibility to vote and borrow from the organisation, among other things.

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[407] i.e. the General Assembly, ECOSOC and the Security Council.

In addition, even though the IMF's procedures for decision-making are dominated by power politics and are largely devoid of transparency and accountability, the WTO can learn something from the institution. In particular, the IMF's mechanism for reviewing members' quotas every five years offers an example of how the WTO can utilise a similar mechanism to regularly monitor the effectiveness of its decision-making and other processes, in order to help it achieve its objectives.

A comparison was also drawn between the Manuel and Sutherland reports, both of which contain the findings of panels of experts tasked with investigating the challenges facing the IMF and the WTO respectively. On the one hand, while it was found that there is room for improvement in both reports, the Manuel report was deemed to be the more objective of the two. It acknowledges as serious the governance and decision-making problems facing the IMF and readily admits the role of rich countries in bringing about the organisation's present challenges. On the other hand, the Sutherland report was found to be less objective, as it overlooks the concerns of the majority of WTO members and creates the impression that all is well in the WTO, despite clear indications to the contrary.

It was further seen that the Commission, the EP and the Council are responsible for taking decisions in the EU and that the QMV is the procedure that offers the most important lessons for the WTO. Firstly, it seeks to maintain a balance between the relative importance of the larger states and protecting the interests of the smaller ones. Secondly, by its very nature, it acknowledges the fact that traditional procedures such as simple majority voting and unanimity can be unsuitable in certain situations.

It was also noted, however, that QMV might not be suitable for the WTO due to its being a multilateral institution. Unlike regional bodies, which often harbour ambitions of close integration and view QMV as bringing them closer to that goal, the WTO has no such ambitions. Consequently, its members might regard QMV to be too liberal.

Lastly, it was seen that, of late, there has been increasing pressure for the various organisations considered in this chapter to be more accountable and transparent to

all those impacted by their activities and spheres of influence. While all the organisations have responded to this pressure by taking some steps towards becoming more open and answerable, they have had varying degrees of success. With specific reference to the WTO, it was seen that the practice of discussing and taking all the important decisions in informal meetings that exclude a majority of the members continues to render efforts to improve accountability and transparency largely ineffective.

Based on the preceding discussion, some important conclusions can be drawn. As demonstrated by the example of the UN Security Council, despite the problems inherent to a large decision-making body, it does not follow that such problems will be solved by the creation of any smaller body. The UN Security Council example highlights the fact that issues of representivity and accountability have to be properly addressed in a small body, as failure to do so might lead to countries represented therein only acting to serve their own interests. Another lesson offered by the UN is that the decision regarding which countries participate in the representative smaller structure should be based more on practical considerations, as opposed to power politics.

The WTO can also borrow from the review mechanism used by the IMF, and introduce a procedure for regular reviews of its processes, such as the dispute settlement mechanism and "green room" meetings. Such a step would enable the WTO to keep track of these processes and continually assess how effective they are in terms of advancing its objectives. The regular reviews would also enable the organisation to detect potential problems before they materialise and to implement corrective measures ahead of any lasting damage.

Furthermore, a comparison of the Manuel and Sutherland Reports has revealed the extent to which the WTO is in denial regarding the challenges that it is facing and the measures that need to be taken to address these challenges. If the WTO is to overcome its current problems, it needs to be realistic about the nature and extent of these problems.

In addition, even though QMV as a method of decision-making is not exactly suited to the WTO for reasons explained earlier on, the manner and spirit in which it is applied in the EU offers something that the WTO can learn from. Although the criterion for allocation of votes under QMV as used in the EU is population size, in practice, more votes are allocated to the smaller, weaker countries than would be the case if strict adherence to the population size criterion was maintained. This is deemed necessary in order to give the smaller members an adequate say in the organisation, and to ensure that they continue to feel that membership of the organisation is worthwhile. The lesson for the WTO is that, whatever decision-making procedure it adopts in future, it is essential that it gives even the weakest members a voice in the organisation and its decision-making. Any other procedure risks further damage to the credibility of the WTO, and the possibility of developing countries leaving the organisation *en masse*.

Lastly, the EU's use of QMV also highlights the fact that traditional procedures such as simple majority and unanimity are not always realistic options, as they sometimes face political opposition. This use of the procedure also draws attention to the importance of adopting a procedure that can reasonably accommodate the interests of an organisation's members across the board.

CHAPTER 5
WTO DISPUTE SETTLEMENT SYSTEM

5.1 INTRODUCTION AND BACKGROUND

Alongside the decision-making function of the WTO, which was examined in detail in Chapter 3, there is also the judicial function. The task of overseeing the judicial function lies with the dispute settlement system, as set out in the Dispute Settlement Understanding (DSU).[408] Although the two functions differ significantly,[409] the political features underlying both are quite similar,[410] and it makes sense to deal with them together for the purposes of this study. Discussing both functions helps to demonstrate just how widespread and entrenched the use of diplomacy and political negotiation is in the WTO. It also shows that the situation in the decision-making function is not isolated, but part of a wider pattern.

The introduction of the DSU and the dispute settlement system it established are viewed by many as being among the most important changes brought about by the adoption of the WTO Agreement in 1994.[411] Their perceived importance stems from the enhanced security and predictability that they are regarded to provide, which were believed to be lacking in the GATT dispute settlement system.[412]

The dispute settlement process under the GATT was based on a system of consensus, with every signatory government to the agreement having to consent to every action taken.[413] In practical terms, this meant that the consent of the

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408 See Iida 2004: 207.

409 For example, the judicial role of the WTO is governed by the DSU, while its legislative role is regulated by the WTO Agreement.

410 See par 2.5.3 above for a discussion of similar political processes that underpinned the dispute settlement and decision-making mechanisms under the GATT.

411 It has been referred to as being "more far-reaching than any multilateral arrangement for resolution of disputes among states in history". See Fusan 2003: 162. See also Mosoti 2001:233; Movsesian 2003-2004:2.

412 Reitz 1996: 586 – 587; Sprance 1998; 1246; Mota 1999-2000:5; Jackson 2000: 70; Fusan 2003: 162 – 163; Hudec 2002: 82. In the words of Schleyer, "the [GATT dispute settlement] system was extremely susceptible to political gamesmanship and political power struggles among nations. The outcomes of trade disputes were subject to vagaries...of international relations, instead of a fair and impartial understanding of the underlying treaties." Schleyer, quoted in Stewart 2003: 30.

413 Brewster 2009: 1136.

respondent government was required in order to form a panel to hear the dispute, select the arbitrators, and to adopt a report on the outcome of the hearing.[414] Since the respondent government could block the hearing at any of these stages, this effectively gave it a veto concerning whether or not a hearing would reach finality.

In the GATT system, more often than not disputes were resolved through negotiations between the parties, as opposed to being decided on the merits. The negotiations took the form of government-to-government bargaining, which was largely power-based. In the words of Brewster, "[t]he outcome of these negotiations could be based on many factors, including the relationship between the two states (including non-economic relations) and the relative importance of each state's home market to the other's exporters".[415]

Because the GATT system lacked an effective and unified enforcement mechanism,[416] rich countries frequently imposed their own interpretations of trade law on the other members and meted out sanctions against perceived violators.[417] The fact that unilateral enforcement of trade rules went against GATT law did little to discourage the practice, partly because the members regarded the practice to be a necessity, considering the fact that the GATT had no effective enforcement mechanism.[418]

From a transparency and accountability point of view, the GATT system was clearly deficient, which placed developing countries at a distinct disadvantage relative to their developed counterparts. By pitting poor, small countries against economic powerhouses such as the US and the EU to negotiate solutions to their conflicts in the absence of a neutral arbiter, the system made it possible for stronger countries to use underhand tactics to pressure weaker countries into accepting outcomes that they did

414 Brewster 2009: 1136.
415 Brewster 2006: 255.
416 Brewster 2009: 1135.
417 This was particularly the case for the US government, which was fond of imposing unilateral sanctions when it felt that it was being subjected to unfair trading practices. See Brewster 2006: 255; Brewster 2009: 1134. See also Gathii, who remarked that "multilateralism within the GATT was for the most part limited to what the United States regarded as its core values". Gathii 2008: 1363.
418 Brewster 2006: 255.

not necessarily agree with. One of the often cited examples of such tactics was the threat of withdrawal of aid by stronger countries towards weaker ones.[419]

Under the WTO dispute settlement system, things are done somewhat differently. States have undertaken to give up the right to decide on their own whether or not a violation of the WTO agreement has occurred. More say in this regard has now been given to the dispute settlement panels and the Appellate Body, which has resulted in quicker hearings and more certain outcomes.[420] Notwithstanding this, many of the problems that gave rise to concerns about the lack of transparency and accountability in the GATT dispute settlement system remain under the WTO system.[421] The primary question asked in this chapter is: how far does the dispute settlement regime under the WTO go towards addressing these problems particularly in terms of the extent to which they affect developing countries? Particular attention is given to the issue of the accessibility of dispute settlement panels and the Appellate Body. One section is specifically devoted to examining South Africa's involvement in the system and the impact, if any, that its shortcomings have had on the country.

5.2 PROCEDURE FOR INSTITUTING PROCEEDINGS

The WTO agreements negotiated as part of the Uruguay Round and subsequent trade negotiations make provision for resolving disputes between members concerning their rights and obligations arising from these agreements.[422] The

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419 See par 3.8 above.

420 See Granger 2006: 523 for the view that problems such as lack of binding timelines and appellate procedures found in the GATT dispute settlement system have been addressed under the WTO.

421 Some of the persisting problems include the following: shortage of qualified judges, politicisation of the process of selecting judges, shortage of qualified support staff, being ill-equipped to address complex issues speedily, the likelihood of conflicting panel and Appellate Body rulings due to non-application of the doctrine of *stare decisis* (However, see Bhala's views on *stare decisis* and what he perceives to be the disparity between beliefs regarding the way in which the WTO panels adjudicate and how they actually go about finding and interpreting the law Bhala,1999: 849), and the secrecy of panel and appellate procedures - see Sprance 1998: 1251. Stostad also contends that the WTO system is costlier, more complex and more mechanical compared to the GATT system - see Stostad 2006: 834.

422 The relevant agreements are GATT 1994, other agreements on goods, the General Agreement on Trade in Services, the Agreement on TRIPS, the Plurilateral Agreements, in so far as they prescribe the dispute settlement process, the Dispute Settlement Understanding and the WTO Agreement itself.

procedure to be followed is contained in the DSU.[423] This procedure is initiated when an aggrieved member country gives notice of its intention to hold consultations, which must be issued to the member in question, the Dispute Settlement Body (DSB), as well as the concerned councils and committees. In the notice, a short summary of the grievance, along with the legal basis for it, must be set out.[424] Other WTO member countries having considerable interest in the contested issues may also request to be part of the consultations. Interestingly, quite a lot of disputes are resolved at the consultation stage.[425]

If, after the notification sixty days go by without the consultations resulting in a settlement, the aggrieved party is entitled to request the establishment of a panel.[426] Although at any stage during the proceedings the disputants may refer their dispute to a negotiation-based alternative procedure involving conciliation and mediation,[427] in practice this seldom happens once a panel has been established.

5.3 PANELS AND THE APPELLATE BODY

5.3.1 PANELS

In theory, the request for a panel to be set up can be rejected by a formal objection of all the members in attendance at the meeting where the request is made.[428] However, in reality such a rejection is almost impossible, since it is highly unlikely that the party that requested a panel hearing will ever vote against its establishment.[429] Thus, once requested, the establishment of a panel is effectively automatic.

The next step, after the decision to set up a panel has been taken, is to appoint panel members. While provision is made for selecting up to five panelists, in most cases

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423 The DSB, which is responsible for administering the Dispute Settlement Understanding, comprises representatives from all WTO members and has the authority to set up panels, adopt their reports and those of the Appellate Body, maintain surveillance of the implementation of rulings and recommendations, as well as other obligations under the WTO agreements.

424 Article 4 (3) and (4).

425 About 46 percent of the disputes are resolved at this stage. See Busch and Reinhard (2004: 2).

426 Article 4 (7). Provision is made for a panel to be established sooner in urgent cases. See Article 4 (8).

427 Article 5.

428 This is known as negative consensus.

429 See Stewart 2003: 31.

only three are chosen.[430] The choice of panelists, which is made on a case-by-case basis, must be based on a variety of considerations related to a candidate's experience and expertise in trade and WTO matters, as well as his or her capacity to act independently.[431] In a measure clearly designed to allay developing country concerns about the representivity of WTO panels, if a dispute involves a developing country, such a country is entitled to request that one of the panelists comes from a developing country.[432]

A panel has six months in which to work on a case, although allowance is made for urgent cases to be completed in three months.[433] During the proceedings, deliberations are treated as confidential and the views of individual panelists expressed in the panel reports are published anonymously.[434] The work of a panel is completed once it has submitted a report and circulated it among the WTO members.

The report must be adopted by the DSB within 60 days from the time it was circulated, unless one of the disputants decides to appeal the ruling or the DSB decides by negative consensus to reject the report.[435] As in the case of a request for the establishment of a panel, rejection of a panel report is highly improbable, since the winning party would have to vote against it in order for this to happen.[436]

5.3.2 Appellate Body

The Appellate Body is a permanent tribunal comprising seven members, although only three actually participate in any one hearing.[437] Confined to considering issues of law and legal interpretations developed by panels, the Appellate Body can only

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430 Delich 2002: 71.

431 The factors considered include having previously served on or presented a case before a WTO panel, previously represented a contracting party to GATT 1947, been a representative to the Council or Committee of any covered WTO agreement or its predecessor agreement, or in the Secretariat, previous involvement with international trade law or policy as an academic, or having served as a senior trade policy official of a member.

432 Article 8 (10).

433 Article 12 (8).

434 Article 14 (1) and (3).

435 Article 16 (4).

436 Brewster 2006: 256.

437 Article 17 (1).

confirm or reject panel rulings in part or whole, and its decisions are final.[438] It is allowed a maximum of sixty days after the notification of intent to appeal to consider a case and give its decision.[439] In the event that the Appellate Body rules that a measure is inconsistent with a covered agreement, it has to recommend that the offending member bring its actions into conformity with the particular agreement.[440]

The report compiled by the Appellate Body has to be adopted by the DSB, except where the latter rejects it by negative consensus.[441] As mentioned previously, this effectively amounts to the report being automatically adopted.[442]

5.3.3 The Reality with regard to Developing Countries and Dispute Settlement Hearings

Despite the efforts made to accommodate the interests of developing countries in Article 8 (10) of the DSU, the perception persists that the WTO panels and Appellate Body are partial and tend to favour developed countries over their developing counterparts in their rulings. While Iida is correct in highlighting the difficulty involved in making a statistical determination as to whether or not WTO decisions are biased against developing countries,[443] there are sound reasons for questioning the neutrality of WTO panel rulings. Most, if not all, of these reasons point to or are somehow connected to lack of transparency and accountability in the WTO dispute settlement system.

To start with, there have been a few occasions on which the WTO panels and Appellate Body have handed down controversial decisions against developing countries.[444] Since the records of proceedings during the hearings are not publicly available, the reasoning behind these decisions always remains unknown. This, it is

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438 Article 17 (6) and (13).
439 Article 17 (5).
440 Article 19 (1).
441 Article 17 (14).
442 Stein 2001: 501.
443 Iida 2004: 21. This, he says, is because it is rare for the WTO panels to find no violations once the dispute reaches the ruling stage.
444 See Iida 2004: 18.

submitted, only serves to further exacerbate the perception of bias in favour of developed countries.

There is also the fact that the majority of panelists in both the panel and Appellate Body hearings are often from developed countries. This inevitably affects the extent to which views from developing countries are aired and considered during the hearings. In the words of Bergstrom, "[a] panel system that includes significantly fewer panelists from developing countries may not adequately reflect the variety of perspectives and methods of addressing the issues that are raised in trade disputes."[445]

Lastly, the conflict of interest provisions contained in the DSU are too simplistic and have a very narrow scope, which leaves room for abuse of their position by the panelists. To illustrate this point, Article 8.3 prohibits citizens of one of the parties to a dispute from being panelists, and also bars governments from instructing or influencing panel members on issues relating to a dispute. There are at least two weaknesses inherent in these provisions. Firstly, in reality, there is no way of ensuring the protection of panelists against the economic and political influences of their governments.[446] Secondly, conflict of interest situations may arise from other factors not related to a panelist's nationality or citizenship.[447]

5.4 IMPLEMENTATION OF RULINGS

The member against whom a panel or Appellate Body ruling has been made is required to communicate its plans for implementing the ruling to the DSB within 30 days of the panel or Appellate Body report being adopted. The plans, which must include an indication of the time frame within which the recommendations will be put into effect, must first be approved by the DSB before the member can implement them. If the plans are not approved, the parties have a further 45 days in which to work out a mutually acceptable time frame. If they fail to reach an agreement

445 Bergstrom 2010: 21. Sprance also talks about the continuing problem of politicisation of the process of selecting WTO dispute settlement panelists. See Sprance 1998: 1251.
446 Schwarz 1995: 970.
447 Schwarz 1995: 970 – 971.

regarding the time frame within 90 days of the adoption of the report, the matter has to be decided by arbitration.[448]

If it happens that the deadline for implementing a panel or Appellate Body recommendation is not met, the winning complainant has the option of either seeking compensation[449] or authorisation to withdraw or suspend concessions to the offending party.[450]

From the above outline, it is clear that the procedure followed by WTO panels is intended to facilitate faster settlement of disputes, while also providing for more predictable outcomes.[451] Speaking about the changes introduced under the WTO, Stewart says, "[t]he rule of law has replaced reciprocity as the essential underlying value."[452]

5.5 TRANSPARENCY AND ACCOUNTABILITY OF THE SYSTEM

5.5.1 Transparency

Although the DSU has introduced some important improvements not found under the GATT system,[453] the issue of transparency remains a concern. Unlike numerous other international tribunals that have adopted the judicial model of proceedings in terms of which hearings are open to the public and both the pleadings and judgments are publicly available, the WTO dispute settlement system has not embraced such openness of information.[454] Of course, the approach followed by the WTO dispute

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448 Article 21 (21) (3) (a), (b) and (c).

449 Although the term "compensation" suggests that money is payable to make up for the loss suffered by a complainant, in practice it merely entails the removal of trade barriers by the losing party. See Qasim 2009: 168. It is also worth noting that "payment" of compensation on the part of the offending party is voluntary.

450 Article 22 (1).

451 Schwarz 1995: 957; Sprance 1998: 1244; Stostad 2006: 812. For example, under the GATT, any contracting party, including the defendant, could frustrate a panel decision by blocking the formation of a panel, the adoption of its report, or the enforcement of the ruling.

452 See Stewart 2003: 29. See also Sacerdoti 2006: 51.

453 For example, under the DSU, members of the WTO have agreed to forego their right to retaliate against conduct they perceive to be a breach of the WTO Agreement, unless so authorised by a WTO panel or Appellate Body; and the finding of a breach is based more on the legal merits of the case than the economic power of the parties, as was the case under the GATT. See Brewster 2009: 1141.

454 See Van der Borght 2007: 9. The other international tribunals referred to include, among others,

settlement system has a lot to do with the legacy of the GATT, whose dispute settlement procedure was more diplomatic than judicial, and was shrouded in secrecy from start to finish.[455]

Even where the WTO dispute settlement system has introduced measures meant to make it more transparent,[456] they are quite limited in scope. For example, the measures taken to declassify documents previously deemed to be confidential apply only to panel and Appellate Body reports, and not to documents used during the actual dispute settlement procedures.[457] As mentioned previously, in situations where there is lack of openness regarding the functioning of the dispute settlement system and the negotiations that take place between the disputing parties behind the scenes, it is mostly developing countries that are likely to suffer prejudice.[458]

5.5.2 Accountability

While WTO members, especially the rich countries, can no longer rely on the lack of an effective enforcement procedure for taking unilateral action, the practice is still very much alive.[459] What is worse, the DSU effectively supports it by not allowing retrospective action against violations and illegal retaliations that occur before litigation has been finalised. Brewster explains this in the following terms: "...the failure of the DSU design to provide a remedy during the litigation process arguably creates an incentive for governments to use enforcement strategies that are formally prohibited by the WTO framework."[460] To the extent that the WTO dispute settlement system allows members of the WTO to act outside the rules without answering to anyone for such behaviour, it is clearly compromising the accountability of the system and this, in the end, is likely to deter developing countries in particular from bringing forward their complaints.

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the International Court of Justice, the International Tribunal for the Law of the Sea and the International Criminal Tribunal for Rwanda.

455 See Van der Borght 2007: 9.

456 E.g. in 2002, steps were taken to improve transparency through the de-restriction of some documents.

457 Van der Borght 2007: 10.

458 See par 5.1 above.

459 Brewster 2009: 1143.

460 Brewster 2009: 1143.

An illustration of how the WTO dispute settlement system responds more favourably to developed countries than to developing countries is provided in two separate disputes involving Canada and Brazil: *Brazil – Export Financing Programme for Air Craft – Recourse by Canada to Article 21.5 of the DSU*[461] and *Canada – Export Credits and Loans Guarantees for Regional Aircraft.*[462] The first dispute involved a complaint by Canada concerning Brazil's provision of subsidies in support of exports by its regional aircraft industry. In an ensuing hearing, a WTO panel and the Appellate Body ruled against Brazil, finding that its use of export subsidies violated the provisions of the WTO Agreement on Subsidies and Countervailing Measures. Brazil was given 90 days to take steps to put an end to the violation. When the 90 days went by without Brazil complying with the ruling, Canada was granted authorisation to retaliate by suspending tariff concessions to Brazil in the amount of C$344 million.

However, before Canada could retaliate, Brazil implemented measures to rectify the violation. The adequacy of the measures was verified by a second compliance panel appointed with the approval of Canada. What is significant about this case is that compliance on the part of Brazil was induced by the threat of impending sanctions after Canada was authorised to retaliate.

The second dispute involved very similar facts and the same countries, but with the positions of the countries being reversed. Brazil was authorised to suspend concessions against Canada totaling US$247 797 000. However, the authorisation failed to induce Canada to comply with the panel ruling.

What is significant about the shortcomings of the WTO dispute settlement system discussed above is that they constitute another example of what is clearly a pattern of behaviour in terms of which developed countries simply ignore the rules when it suits them and the system either tolerates it or, in some instances, actually encourages it. This behaviour existed during the GATT era[463] and continues today in the WTO.[464] It not only affects the normal day to day decision-making processes, but also the panel and Appellate Body rulings and how they are implemented.

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461 AB-2000-3 – *Report of the Appellate Body* WTO Dec WT/DS46/AB/RW (21 July 2000).
462 *Report of the Panel* WTO Dec WT/DS222/R (28 January 2002).
463 See par 2.4.2 above.
464 See par 3.2 above.

5.5.3 Other related Problems

One of the failings of the WTO dispute settlement system that serves to perpetuate disregard for the rules on the part of developed countries is the fact that the remedies available to the winning party are too weak to act as a deterrent.[465] If, for example, a small developing African country were to seek to impose trade sanctions against big countries such as the US or EU, the measure would be ineffective, since trade with a smaller country is not worth that much to bigger countries, and they can afford to ignore the sanctions that are imposed. On the contrary, if bigger countries were to threaten sanctions against smaller ones, the potential for harm would be so great that the latter countries would rush to comply.[466] The result of this imbalance is that the big countries sometimes violate WTO rules deliberately, in the knowledge that if their conduct is challenged in the dispute settlement system and they eventually lose the case, the weaker countries will find it difficult to enforce the ruling against them.[467]

The length of the implementation phase is also often too long,[468] with the result that it tends to encourage and reward failure by the defendant state to comply with panel and Appellate Body rulings. Furthermore, the problem impacts negatively on the effectiveness of the dispute settlement system, especially in cases where temporary protective measures such as anti-dumping and safeguards are in dispute.[469]

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465 Qasim 2009: 155.

466 See Qasim 2009: 170.

467 Horlick and Coleman 2007: 141. According to Zhang, " ...all remedy cases have shown that WTO Members have not yet found the way to compel Members concerned, in particular, the EC and the US, to fully implement the DSB recommendations and rulings. It is the most serious problem of implementation of WTO dispute settlement" Zhang 2008: 123.

468 It is not uncommon for the period between the establishment of a panel and the adoption of an Appellate Body report to last for two and a half years. See Sacerdoti 2006: 54 – 55.

469 Sacerdoti 2006: 54 – 55.

5.6 THE SITUATION OF DEVELOPING COUNTRIES IN TERMS OF THE WTO DISPUTE SETTLEMENT SYSTEM

5.6.1 General

In view of their poor track record of participation and the overall challenges they have to deal with in the GATT/WTO dispute settlement processes,[470] developing countries may start to wonder whether it is worth it to continue to try to be involved. There are, however, strong arguments supporting greater involvement of these countries in the system. However, before exploring the pros and cons of developing country participation, an analysis of the general situation of these countries in terms of the WTO dispute settlement system will first be made.

From the earlier outline of the procedure followed in the WTO dispute resolution process,[471] it is clear that the approach adopted by the WTO is more legalistic than that followed under the GATT. This is seen, for example, in the fact that the failure to reach a timely political or diplomatic settlement automatically leads to a legal process. Commenting on the legalistic nature of the WTO dispute settlement process, Jackson has observed that "...diplomats find themselves in new territory. Rather than operating in what is thoroughly a 'negotiating atmosphere [they] find themselves acting as lawyers, or relying on lawyers, much more than before..."[472]

However, as pointed out above, it would not be entirely accurate to maintain, as some have done,[473] that with the adoption of the DSU came the complete substitution of the diplomatic approach with a judicial one. In reality, the WTO dispute settlement system continues to employ diplomatic mechanisms traditionally used by the GATT, such as consultation, negotiation and compromise.[474] From the perspective of developing

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470 Insufficient resources in the form of technical capacity and finance, as well as lack of political clout, have been cited as some of the obstacles to these countries' participation in the partially power-based processes. See Gordon 2006: 103 – 104.

471 See par 5.2 - 5.4 above.

472 Jackson 2000: 72.

473 See Young 1994: 397, quoted in Lawson 1997: 321.

474 Lawson 1997: 321; Zhang 2008: 112; Wolfe 1996: 697.

countries, this means that they continue to be vulnerable to some of the problems they faced under the GATT, which were associated with the diplomatic approach.[475]

All the same, the dispute settlement system under the WTO brought with it important new implications for developing countries. On the positive side, the fact that the legalistic procedure kicks in automatically when diplomacy fails offers more protection to developing countries by making it more difficult for big countries to force the former to abandon their legitimate claims.[476] The relative increase in the number of claims brought forward by developing countries under the WTO, compared to the GATT era, has been attributed to this new protection.[477]

On the negative side, the technical and legal complexities that plagued the GATT system continue to be an impediment to the participation of small developing countries. One needs only look at the cases where developing countries initiated complaints in order to appreciate this. A vast majority of them involved only a handful of countries, including Brazil, India, Thailand, South Korea, Chile, Mexico and Argentina.[478] Hardly any of the other developing members have lodged a WTO dispute, even though, on numerous occasions, they have had good reasons to do so. Fusan aptly explains this by pointing out that "...the system is better suited for governments that have adequate resources to investigate complaints prior to the WTO process, that have experience and knowledge of WTO law and the functioning of the dispute settlement system, and that can afford permanent representation in Geneva."[479] Developing countries are simply no match for developed countries when it comes to meeting these criteria.[480]

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475 These include the tendency of rich, powerful countries to want to interpret and implement multilateral agreements in a manner that serves their particular interests, and to breach the provisions of these agreements with impunity. See par 2.4.1 above.

476 See Hudec 2002: 83. In the words of Gordon, "[a] rule-based system favours smaller, less powerful nations since they ostensibly have a greater chance to vindicate their rights." Gordon 2006: 103.

477 Some commentators have, however, argued that empirical evidence shows developing countries to be worse off under the WTO dispute settlement, and that the real reason that a greater percentage of developing country disputes reach the panel stage than developed country disputes (a vast majority of these are resolved or abandoned during the consultation stage) is because the latter countries lack the resources and capacity to push for an early settlement. See Busch and Reinhart 2003: 4-6.

478 Abbot 2007:9; Yen 2006: 23; Granger 2006: 526.

479 Fusan 2003: 163.

480 Gordon 2006: 116.

Even the interpretative methods used by the WTO panels tend to favour stronger countries more than weaker ones. One of the methods preferred by the panels when interpreting legal instruments is to look for the "ordinary meaning" of the words used, which is often done by consulting a dictionary.[481] This method, referred to as contextualism,[482] is seemingly inconsequential. However, it has been argued that it has the effect of causing WTO panels to give superficial meaning to the text of legal instruments. According to Zang, "...it tends to hide substantive or strategic policy issues in reading into or out of the text, without acknowledging that a position in those issues may have predetermined the way the text is read or interpreted. Thus, the textual analysis only shows the surface, the phenomenon, and consequently, the results, not the beginning, of the legal reasoning."[483]

Considering the fact that developing countries have up to now had very little influence on what goes into the text of WTO agreements, it means that much of the content or text of these instruments is attributable to developed countries. The application of contextualism inhibits a more thorough investigation into the reasoning behind the text, which might be disguised by the manner in which the provisions are phrased. This is likely to be to the detriment of weaker countries, since they are absent most of the time from dispute resolution proceedings, and also because the overlooked but intended meaning is often the one meant to benefit them.[484]

Furthermore, the enforcement mechanisms provided for in cases where a violation has been committed do not make it worthwhile for most developing countries to invoke the dispute settlement procedure against developed countries. Since the only sanction available to the winning party is trade retaliation, this means that the smaller developing countries, which are incapable of imposing significant political-economic welfare losses against developed countries, have no effective means of enforcing

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481 Jackson 2004: 111 – 112.

482 Zang defines contextualism as "a way of reading and interpreting legal instruments, the core of which is that privilege is given to the text, based upon a perception that the textual approach provides adequate legitimacy for adjudication." Zang 2006: 394. The WTO Appellate Body is quoted as having declared that "[t]he proper interpretation of [an Agreement's article] is, first of all, a textual interpretation." See Palmeter and Mavroidis 1998: 398.

483 Zang 2006: 396.

484 Zang 2006: 396.

panel or Appellate Body decisions made in their favour.[485] Rather than harm the developed country it is supposed to punish, retaliation by developing countries tends to harm the latter countries themselves. It is not surprising, therefore, that in most cases these countries elect to conclude bilateral agreements with developed countries in order to settle their differences, rather than take them before the WTO dispute settlement authority.[486]

In addition, the emphasis placed on retaliation under the DSU has led to the dispute settlement system being even more skewed in favour of larger countries than under the GATT. This is because retaliation as a remedy works best against smaller countries. In most cases, the developing country whose trade rights are violated by a developed country is heavily dependent on trade with the offending country, but not the other way round.[487] Thus, the effect of making retaliation the primary enforcement tool has been to give even more power to developed countries and to render developing countries even more helpless and vulnerable.

To make matters worse, it would be very difficult to address the problems highlighted above by adopting alternative procedures, as this would require amending the existing rules. The provisions of the WTO Charter dealing with amendments happen to be very inflexible, and effecting an amendment would be nearly impossible.[488] In addition, WTO panels and the Appellate Body are severely restricted in terms of how far they can go in giving their own interpretation to ambiguous provisions of WTO agreements.

In the past, WTO panels and the Appellate Body have received harsh criticism where they were deemed to have exceeded the limitations of their authority. This was seen in the reaction to the ruling of the Appellate Body in *US – Laws, Regulations and*

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485 See Bown and Hoekman (2005: 863); Mosoti (2001: 245); Palmeter (2000-2001: 473). See also Lim (2002: 436).

486 See Fusan (2003: 164).

487 See Hudec (2002: 84).

488 Jackson (1999: 103). However, WTO panels and the Appellate Body, like all judicial bodies, do (whether advertently or inadvertently) alter the terms of the original WTO agreements through claims of independence, and later through reliance on earlier rulings as precedents. See Ghias (2006:535). Of course, the problem is that the evolution of the law in this way is too slow and the interpretation given to the agreements would still be open to challenges by members on the grounds of it being *ultra vires*.

Methodology for Calculating Dumping Margins ("US – Zeroing").[489] The ruling was condemned as "[portraying a vision of] a WTO Dispute Settlement Body that arrogates power from the Member states notwithstanding textual limitations on the Appellate Body's role, and that curtails the discretionary authority of executive branch agencies to exercise their delegated authority."[490]

A suggestion has been made that developing countries should engage private lawyers in order to improve their participation and chances of success in the WTO dispute settlement system.[491] While such a step may help in the short-term,[492] it cannot be a long-term solution to the problems confronting developing countries. To start with, engaging legal counsel would not assist these countries in building the capacity to bring forward claims.[493] There is also a series of preliminary steps that must be undergone before engaging in actual litigation, but which developing countries lack the capacity to undertake. As Shaffer rightly points out, "[i]n the WTO context, a member's participation in the system will be, in part, a function of its ability to process knowledge of trade injuries, their causes, and their relation to WTO rights. Hiring lawyers to defend WTO claims would be of little help if countries lack cost effective mechanisms to identify and prioritize their claims in the first place."[494]

There are also substantial costs involved in hiring private attorneys. In 2005, Bown and Hoekman reported attorneys' fees in WTO cases to be US$350 per hour, which translated into an average of about US$89 950 for a "low" complexity case and US$247 100 for a "high" complexity case.[495] These figures excluded other expenses such as the costs of litigation support, which encompasses data collection, economic analysis, hiring of expert witnesses, travel and accommodation, etc.

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489 WT/DS294/AB/R (Apr. 18, 2006).
490 See Alford 2007: 197.
491 Jackson 2000: 73.
492 For example, developing country firms / industries contributed financially to Guatemala's defence of the *Cement* dispute (Guatemala – Anti-dumping Investigation Regarding Portland Cement from Mexico, WTO Doc.WT/DS60/AB/R (Nov. 2, 1998)) as well as to Antigua and Barbuda's representation in the *Online Gambling* dispute (United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services, WTO Doc.WT/DS285/AB/R (Apr. 7, 2005)), which in both cases facilitated the engagement of private lawyers in defending the firms' interests in the WTO dispute settlement system. See Horlick 2006: 221.
493 Gordon 2006: 103.
494 Shaffer 2006: 2; see also Delich 2002: 74.
495 Bown and Hoekman 2005: 870.

Those who back the current rules under the DSU have argued that the rules are impartial, since they do not extend any special rights or favours to any one group of countries.[496] While there may be some truth to this contention, it does not follow, however, that developing countries enjoy an even playing field. As stated previously, the fact that developing countries have a shortage of people with appropriate training and experience in dealing with the intricate WTO issues, and are inadequately resourced to bear the exorbitant costs of litigation, puts these countries at a huge disadvantage vis-à-vis developed countries. The question is the following: what good is the impartiality of the rules if the dispute settlement system that they regulate effectively sidelines the majority of members by ensuring that they will lose almost every case they attempt to launch or defend?

A further problem for developing countries is that, because of fears of reprisals and unilateral action on the part of developed countries, they might hesitate to lodge complaints against the latter countries. In Bown and Hoekman's words, "...[D]eveloping countries could face a bad economic outcome even if they legally win a case, if the respondent engages in retribution outside of the WTO system, for example, through the reduction of bilateral assistance or reductions in preferential access under the General System of Preferences (GSP) or another preferential trade agreement. Together, these factors may contribute to an unwillingness of developing countries to invoke the DSU against larger and richer trading partners."[497]

Lastly, some commentators have cautioned that the growing tendency among WTO members to resolve difficult issues through the quicker and less burdensome WTO dispute settlement system, as opposed to negotiations, threatens international co-operation in terms of rule-making.[498] The practice, they warn, also impedes the participation of all stakeholders in the creation of international rules.

To sum up, to the extent that the obstacles highlighted above, some of which emanate from the WTO's own rules and practices, prevent developing countries from having a fair shot at instituting and winning cases before WTO panels, and no

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496 Jackson 2000: 71.
497 Bown and Hoekman 2005: 866. See also Hudec 2002: 4 and Shaffer 2006: 1.
498 Bronckers 1999:550.

remedial action is taken, the WTO is failing to account to these countries. This is particularly so in view of the organisation's expressed goal of advancing members' economic development.[499]

5.6.2 The Role of Concessions

As with most GATT/WTO agreements, the DSU contains several provisions prescribing preferential treatment and concessions in favour of developing countries. For example, Article 4 (10) requires WTO members to give special attention to the problems and interests of developing countries during consultations, and Article 12 (10) provides for the possibility of extending the consultation period in cases involving measures taken by developing countries, provided the parties agree to it. These provisions are meant to give recognition to the unique circumstances of developing countries in the WTO dispute settlement system. The question is whether or not these gestures really make much of a difference.

One of the main problems with many of these provisions is that they are only declaratory in character and stop short of providing an operative content. In practice, this means that there is very little that developing countries can do to enforce the provisions if developed countries choose not to abide by them.[500]

In 2001, the Advisory Centre on WTO Law (ACWL) was established with the aim of providing affordable legal advice and support on WTO-related matters to poor countries appearing in the dispute settlement system.[501] From the standpoint of developing countries, the creation of the ACWL is generally seen as a positive development, and some of these countries are already reaping the benefits of the assistance provided by the agency.[502] Furthermore, because its funding is not sourced from any particular interest group, it is thought that this allows the ACWL to remain objective in setting its agenda and deciding which cases to take on.[503]

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499 See par 3.8 above.

500 See Gordon 2006: 90 – 91 for the impact of the generalised system of preferences on developing countries.

501 Poor countries can appear either as complainants, respondents or third parties. See Bown and Hoekman 2005: 874.

502 See Fusan 2003: 165; Moore 2005: 364; Horlick 2006: 221.

503 Bown and Hoekman 2005: 875.

However, the ACWL faces several challenges that could limit its ability to function optimally. One is that the WTO Secretariat, which is charged with administering the ACWL, is also required to act impartially towards all WTO members.[504] Being expected to give legal advice and support to poor countries, while also having to appear unbiased towards the rest of the membership clearly present conflict of interest challenges for the ACWL and WTO Secretariat. It is difficult to see how the two responsibilities can be reconciled.

Another challenge is that even though the absence of private or interest group funding is considered to be good for the impartiality and independence of the ACWL, the agency's continued reliance on members' contributions alone poses a number of risks. Firstly, this may not be sustainable as demand for the ACWL's services increases and its resources become stretched. Secondly, members may deem it self-defeating to finance the ACWL's operations when its services are to be used to challenge their own activities and, as a consequence, can decide to withdraw their support. As Bown and Hoekman explain, "[u]nlike the funding of legal assistance centres by governments in the context of domestic employment law where the government does not consider itself to be a likely substantial target of litigation, in the trade litigation context there is a funding conflict of interest. For political reasons, a rich country government may be hesitant to sufficiently fund a legal assistance centre that ultimately provides litigation assistance directly challenging its own actions."[505]

The ACWL also has neither the authorisation nor the capacity to render assistance to clients during the critical investigations leading up to the actual dispute settlement hearing. Thus, any member hoping to make use of the agency's services must have already established that there is a valid WTO claim before approaching it. These pre-litigation investigations, unfortunately, require specialised skills, which most poor countries do not have.

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504 Article VI (4) of the WTO Agreement.
505 Bown and Hoekman 2005: 875.

The usefulness of the ACWL to developing countries is further constrained by the fact that it cannot perform the day-to-day tasks of a WTO mission.[506] As pointed out earlier, its role is restricted to giving legal advice and support to poor countries appearing in the dispute settlement system.

In the end, even though the concessional measures meant to make up for the challenges encountered by developing countries provide a measure of relief, they are clearly inadequate. Because they are largely superficial, these measures fail to address the root of the problem, which, among other things, includes procedures that are skewed in favour of some members and overlook the importance of principles such as transparency and accountability in ensuring the proper functioning of any organisation.

5.6.3 The Never Ending Review of the DSU

Interestingly, at the time the DSU was established, a decision was taken to review it within four years of the WTO Agreement coming into operation. The reason for the in-built review mechanism was to facilitate monitoring of the new dispute resolution system introduced by the DSU.[507] When the time for this review came, the mandate given to the Ministerial Conference was to decide whether to continue, modify or terminate the DSU.[508]

Different countries made proposals for improvements and clarifications on various aspects of the agreement. However, the review was never finalised and the deadline for its completion has been extended several times since 1995, due to disagreements regarding the nature and extent of the reforms to be implemented.[509] The review has no doubt also been complicated by the high level of interest shown by WTO members in being involved, and the large volume of suggestions on how to change the system. However, as explained below, the WTO's response to these challenges has been disappointing, but hardly surprising in light of past experiences.

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506 Horlick 2006: 221.
507 Weiss 2004: 100.
508 Weiss 2004: 98.
509 Weiss 2004: 98.

During discussions held in April and May 2003, the then chairman of the Special Session of the DSB, Peter Balas of Hungary, first presented a Framework Document that included all the suggestions that had been tabled by WTO members. He then presented a revised and summarised version of the document, which excluded several of the proposals that had appeared in the first draft. A majority of the excluded proposals happened to be those that had been made by developing countries.[510] The reason given for their omission was that they had failed to receive a sufficiently high level of support. In other words, the proposals had been objected to by the major developed countries. In the end, however, the revised text was not adopted, since it did not receive the approval of some of the members, who felt that the omissions were unacceptable.[511]

While the desire to narrow down the proposals on the table to a manageable number is understandable, the sidelining of the views of developing countries was unjustifiable, although hardly surprising. Yet again, this confirmed that, despite assertions to the contrary, in the WTO, the interests of developed countries come first, while those of developing countries come last or are simply ignored.

5.6.4 Is Participation Really Worth it?

The question remains whether developing countries should even aspire towards greater participation in the WTO dispute settlement system, given the circumstances currently prevailing in the system. In a rather pessimistic observation, Barral has opined that "[a] more realistic view of the world trading system notes that it may do relatively little, once we consider the institutional and political problems of its structure. ...[t]he system does not possess mechanisms to correct structural problems within developing countries: problems related to infrastructure, telecommunications, bureaucratic obstacles, and institutional deficiencies."[512] Notwithstanding views like this, in the discussion below it is argued that grounds do exist for developing countries to continue to strive for effective participation in the WTO dispute settlement system.

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510 Weiss 2004: 99.
511 Weiss 2004: 99.
512 Barral 2006: 220.

There is a view that many developing countries initially welcomed the changes brought about by the DSU because they believed that the changes would eliminate some of the challenges they faced under the GATT.[513] According to this view, to these countries, active enforcement through the WTO "seemed to be ... more attractive than being exposed to bilateral skirmishes with big players like the US and the EU, which did not shrink from imposing unilateral trade restrictions if they did not get their way".[514]

This thinking on the part of developing countries was not entirely wrong, considering the fact that in some ways, things have changed for the better, even if not to the degree that they anticipated. An example of this, which was mentioned earlier, is the fact that the automaticity of dispute resolution under the WTO makes it a little harder for rich countries to pressure poor ones into abandoning their claims.[515] It is also telling that the first WTO panel ruling – *the gasoline import standards*' case – involved two developing countries, Brazil and Venezuela, as successful applicants, and the U.S. as a losing defendant.

Moreover, without in any way suggesting that the WTO dispute settlement system is satisfactory, it would be a mistake for developing countries to disregard the possibilities for them to benefit from the system. One such possibility lies in the fact that a panel or Appellate Body ruling can be enough to persuade an offending country, including developed ones, to discontinue a violation, as has happened in the past.[516] This means that, notwithstanding the inability of poor countries to retaliate against rich countries in order to enforce their trade rights, lodging a complaint under the DSU can still be worthwhile.

Developing countries can also benefit from the fact that, unlike the GATT dispute settlement rules, the rules regulating the WTO dispute settlement procedure expressly empower the panels to make suggestions on how compliance can be

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513 Bronckers 1999: 549.
514 Bronckers 1999: 549.
515 See par 5.7.1 above. For a dispute to reach WTO panels and be heard to its finality, far less political effort and diplomatic confrontation is required than in the past. See Hudec 2002: 83.
516 See Hudec 2002: 83.

attained.[517] The same rules also prescribe the procedure for determining the time frame within which a violation must have been rectified, during which period the offending country is kept under surveillance by the DSB.[518] The effect of these measures is to put community pressure on the offending country to comply with the panel or Appellate Body ruling.[519] More importantly, this takes place without the complaining country having to invoke the retaliation option.

Making more frequent use of the WTO dispute settlement process would also help developing countries to acquire the experience and capacity in terms of handling WTO matters that they so desperately need. Only through direct involvement in the various WTO dispute settlement processes can these countries truly learn, be able to assess the extent of their shortcomings and develop a workable plan to address them. As elaborated on in the section on South Africa's involvement in the dispute settlement system, participation need not only be as a complainant or defendant, but can also be as a third party, which is less burdensome on the country concerned.

Last but not least, the dispute settlement system remains the only mechanism through which developing countries can, at least potentially, enforce their rights emanating from WTO covered agreements. The system also gives these countries an opportunity to be part of the process of shaping future international trade rules that takes place every time a panel or Appellate Body decision is handed down.[520] Even rulings on disputes between developed countries often have a direct bearing on developing country interests, making it worthwhile, and sometimes necessary, for the latter countries to join in as third parties. A good example is the Banana Case involving the EU and the US, where the panel ruling had serious market access implications for banana exports from African, Caribbean and Pacific (ACP) countries.

5.7 POSSIBLE REFORM OPTIONS

Numerous reform options have been suggested with a view to improving the functioning of the WTO dispute settlement system from the perspective of developing

517 Article 19 (1).
518 Article 21.
519 Hudec 2002: 83.
520 Mosoti 2000: 5.

countries. Indeed, the subject has been the focus of so much attention, both from inside and outside the WTO, that it is not an exaggeration to say that the organisation is spoilt for choice when it comes to ideas for addressing the problem. Some of these ideas are discussed in the next few paragraphs.

However, before discussing these ideas, it is perhaps better to consider what kind of reforms are appropriate for the existing dispute settlement system. Should, for instance, the emphasis be on introducing what have been referred to as "reactionary" reforms,[521] which entail minor changes to the system, or should the reforms be more radical and aim to bring about fundamental changes to the system? Owing to the insignificant involvement of developing countries in the evolution of the dispute settlement system since its inception, the system's regard for their interests is, as has been shown, indifferent at best.[522] The existing procedures and rules are not only unfavourable to developing countries, but it is also very difficult to amend them. In these circumstances, it is unlikely that making minor adjustments to the WTO dispute settlement system would greatly alter the situation of developing countries. Hence, more radical changes appear to be called for.

One reform suggestion is to re-negotiate the text of the DSU and other related WTO agreements. Such a measure would appear to be a good starting point for remodelling the WTO dispute settlement process, so that it is more responsive to all its members. However, achieving a renegotiation will certainly not be easy. The very restrictive clauses on amending WTO decision-making procedures included in the covered agreements, will ensure this.[523]

To complicate matters further, even WTO panels and the Appellate Body are barred from interpreting the covered agreements in a way that imposes new obligations on

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521 See Qureshi 2003: 195.

522 See par 5.4.

523 E.g. Article IX and X of the WTO Agreement place very strict limitations on the decisions and amendments that WTO members can make with regard to altering the text of the Agreement.

members.[524] Thus, there are few chances of the changes that developing countries are hoping for coming from panel or Appellate Body rulings.[525]

It also does not help that some leading WTO members have shown a lack of interest, and sometimes outright resistance, to improving the effectiveness of the rules governing the dispute settlement system. This was, for example, demonstrated by the failure in 1998 to carry out a review of the rules by the set deadline of 31 December. This review would have paved the way for the Seattle Ministerial Conference to make a decision as to whether to "continue, modify or terminate" these rules.[526] This opposition to corrective action has been attributed to the realisation by mostly rich countries that the existing shortcomings of the system work to their advantage.[527]

With specific reference to the remedies available to developing countries, a suggestion has been made to allow financial compensation up to a specified maximum amount by the offending country as an alternative to insisting on compliance or retaliation.[528] In terms of this proposal, the compensation would be offered as part of a small claims procedure meant to help reduce litigation costs for poor countries and to enable them to enforce panel and Appellate Body decisions more easily. Regrettably, both the US and the EU have long opposed the idea, and this has so far ensured that it remains just an idea.[529]

Another suggested remedy is to allow retaliation to be undertaken as a collective action, particularly among developing countries.[530] At present, only the prevailing party can mete out sanctions against the defendant country, since they are bilateral in nature.[531] Proponents of collective action argue that, in view of the WTO's quasi-judicial dispute settlement system and its expansion into new areas in ways that directly impact on individuals, the reasoning that the organisation is only concerned

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524 Article 3 (2) of the DSU. See also par 5.7.1 above. This was also an established practice during the GATT era.

525 However, in some cases the DSU's silence regarding some procedural questions has been interpreted as an invitation to the Appellate Body to introduce new procedural rules. See Steinberg 2004: 251.

526 Bronckers 1999: 552.

527 See Hudec 2002: 87.

528 Nordstrom and Shaffer 2008: 34; Horlick 2006: 223; Stostad 2006: 834.

529 Hudec 2002: 86.

530 Stostad 2006: 842; Qasim 2009: 155.

531 Qasim 2009: 169.

with maintaining the balance of concessions between governments can no longer be justified.[532] Instead, the argument goes, WTO rules must assume a more "public" identity, which would allow them to be enforced collectively for the good of both governments and economic operators in general. What is significant about this proposal is that its adoption would empower developing countries by giving them a better chance of compelling developed countries to abide by the rules.[533]

Other notable proposals for reforming the WTO dispute settlement system include:

- Clarifying and strengthening the special and differential provisions in the DSU and other WTO covered agreements, as well as establishing a monitoring mechanism to ensure their proper implementation;[534]
- Strengthening the ACWL and other technical assistance provided to developing countries through allocation of more resources;[535]
- Setting up a mechanism for providing assistance to poor members in identifying actionable WTO cases and preparing them for litigation;
- Making provision for the Appellate Body to be able to give an advisory opinion in instances where there are conflicting views between a member and the WTO;
- Creation of a small claims procedure whose availability would be restricted to poor members;[536]
- Creating the office of special "prosecutor" to act on behalf of poor members once violations against them have been identified;[537]
- Making it easier to join proceedings as third parties;
- Providing guidelines in the form of a code setting out the procedural measures to be followed in undertaking the consultation process;[538]
- Providing training for panel and Appellate Body judges on special and developmental provisions;
- Stronger monitoring and enforcement of DSB recommendations where developing countries are concerned;

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532 See Paulwelyn, referred to in Delich 2002: 78.
533 Qasim 2009: 155.
534 Qureshi 2003: 197.
535 Qureshi 2003: 197.
536 Nordstrom and Shaffer 2008: 28-32; Holick 2006: 223; Stostad 2006: 841.
537 Hoekman and Mavroidis 2000: 538; Stostad 2006: 837.
538 Qureshi 2003: 197.

- allowing the award of remedies with retrospective effect.[539]

To conclude, a combination of some or all of the above-mentioned proposals would go a long way in improving accountability in the WTO dispute settlement system, especially with regard to those members whose participation in the system is to a large extent restricted by the system's unfavourable procedural rules and practices. The proposals are, however, in danger of remaining nothing more than just proposals, unless there is greater co-operation and genuine acceptance on the part of all WTO members that their adoption is necessary and good for the whole organisation in the long-term. Not only would their adoption assist developing members to better enforce their trade rights, it would also help enhance the fledgling image of the WTO as a fair and objective organisation.

5.9 SOUTH AFRICA AND THE WTO DISPUTE SETTLEMENT SYSTEM

5.9.1 Present Situation

Since the creation of the DSU, the general trend among WTO members seems to be that the bigger a member's share in world trade, the more active its involvement in the dispute settlement system. This can be seen, for example, in the fact that the two leading participants in the DSU, the US and the EU, were respectively responsible for initiating 24 and 25 of the 96 hearings concluded between 1995 and 2005, and together account for 35 to 40 percent of world trade.[540] In contrast, the two developing countries with most appearances in the DSU hearings, Brazil and India, initiated 10 and 7 hearings respectively during the same period. The latter two countries account for between 1 and 1.5 percent of world trade respectively.[541]

The link between a country's trade share and its involvement in the dispute settlement system is quite understandable, considering that with more trade comes an increased chance of disputes arising. Moreover, the income differential resulting from the

539 Horn and Mavroidis (1999: 18).
540 Abbot (2007: 13).
541 Abbot (2007: 13).

varying stakes that WTO members have in trade makes the cost of litigation more affordable to the major trading countries than the rest of the WTO members.

In so far as South Africa is concerned, however, although it is one of only two African countries, along with Egypt, to have participated in the DSU hearings since 1995, it has been far less active than one would expect, considering its standing in world trade. According to WTO figures, South Africa has been involved in only two hearings, and in both instances as a respondent.[542] It has not initiated any complaints nor participated as a third party. This is the case despite South Africa, as of 2006, being among the 24 leading exporters and importers in global merchandise trade (ranked 21 for exports and 24 for imports), not far behind Brazil (ranked 19 for exports and 15 for imports) and India (ranked 20 for exports and 20 for imports).[543] As indicated before, considering the fact that South Africa engages in a substantial amount of cross-border trade annually, trade disputes would be expected to arise every now and then.[544]

The reasons behind South Africa's low-key involvement are not easy to pinpoint. Abbot clearly also found the situation difficult to explain when he declared that "others such as...South Africa have been entirely inactive...There is no easy explanation for such matters."[545] This is more so in view of the active involvement of countries like Brazil and India, which are not too far ahead of South Africa in terms of their standing in world trade. One explanation could be that, following the demise of apartheid and the end of South Africa's economic isolation in 1994, the new regime has been preoccupied with domestic socio-economic and political issues, and has neglected to pay sufficient regard to pursuing trade disputes.

Officials at the DTI attribute South Africa's relative absence from dispute settlement to at least three main causes, namely preference by the country to resolve disputes through diplomacy, the exorbitant costs involved and the failure by private businesses

542 See www.wto.org/english/news_e/pres03_e/pr353_e.htm (Accessed on 14/09/10).
543 See www.wto.org/english/news_e/pres97_e/pr71_e.htm (Accessed on 14/09/10).
544 See par 2.5.3.
545 Abbot 2007: 14.

to bring violations to the attention of the government.[546] The preference for diplomacy might have to do with the realisation that winning or enforcing compliance against powerhouses such as the US and the EC is extremely difficult under the current rules and procedures.[547] Furthermore, it also tends to preserve good relations with the violating country after the dispute is settled. The issue of costs as a limiting factor for poor countries has been discussed at length in the preceding pages, and will not be elaborated on further. On the question of the failure by businesses to report violations to the DTI, the reasons cited range from the view among those involved in international trade that WTO cases take too long before they are finalised the same people or businesses not being fully aware of the extent of their rights within the WTO system, to sheer complacency on the part of traders in terms of exercising their rights.

Another, perhaps less obvious, reason mentioned by the officials is that, due to South Africa's unfortunate history of racial conflict and tensions, there is still mistrust between businesses, which are predominantly owned by white South Africans, and the current black government. Their opinion is that the business community feels that their interests are better served and protected when they resolve disputes with their trading partners privately, rather than if they were to be represented by the government in the WTO dispute settlement system.

5.9.2 Why Participation is Important

Whatever the reasons behind South Africa's non-participation in the WTO dispute settlement system, the country must realise that it has little choice but to take an active part if it is to become competitive. As indicated previously, the system represents the only constitutional mechanism through which WTO members can enforce and defend their rights. Being a relatively significant player in cross-border trade, South Africa is certain to be dragged before the WTO dispute settlement system every now and then to defend complaints by other members, as shown in the two occassions on which it appeared before WTO panels.[548] Therefore, it has to use the dispute settlement system as frequently and consistently as possible, so that its

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546 These views were expressed during an interview that the author conducted with officials attached to the legal section of DTI's International Trade and Economic Development Division.

547 See par 5.5.2.

548 See par 5.9.1 above.

personnel can get accustomed to the way the system works, both in defending complaints and enforcing the country's rights.

It is clear that a more meaningful and enduring participation by South Africa in the WTO dispute settlement system will require greater investment in the training of personnel and in capacity building in general, and this should be encouraged. However, alongside this strategy, there is also no reason why South Africa should not take advantage of other, less expensive but effective ways of getting involved in the system.[549]

5.9.3 Existing Capacity Building Initiatives

To the credit of South Africa, a number of initiatives aimed at capacity building are already in existence. A majority of universities across South Africa already offer LLM and LLD programmes in international trade law, and each year produce qualified lawyers who go on to do work that, in one way or another, helps to tackle some of the problems highlighted above.[550] The graduates from these programmes are not only important because of the technical skills they possess, but also because they help bring a better understanding of the role and significance of the WTO to the firms and institutions they work for.

The LLM programme in International Trade and Investment Law in Africa offered under the auspices of the University of Pretoria's Centre for Human Rights deserves a special mention here. The first of its kind on the African continent, what distinguishes this programme is its emphasis on the full exposure of students to international trade and investment during training, while focusing primarily on the African continent. The degree is offered as a partnership between the University of Pretoria and the University of the Western Cape in South Africa, Makerere University in Uganda, the University of Washington in the US, as well as the University of Amsterdam and Erasmus University in the Netherlands. To ensure as wide an exposure for the students as possible, the lectures are presented by an array of

549 Trying to make the best use of the services provided by the ACWL and joining disputes as third parties are, as stated earlier, good examples of inexpensive means of participating in the system.

550 These jobs can be either in government or in the private sector.

experts from diverse backgrounds, ranging from academics to experts from international organisations such as the WTO, UNCTAD and the World Bank. Furthermore, the opportunity is offered for students to spend the second half of their year of study at one of the overseas partner universities.[551] In order for the programmes alluded to above to yield tangible and lasting results, however, there is a need for further and sustained support from both the government and business.

Another important initiative involving South Africa is the Trade Law Centre for Southern Africa (TRALAC), whose stated mission is "to build trade law capacity in order to facilitate the integration of the Southern African region into the global trading system."[552] Since its inception, TRALAC has undertaken numerous projects in pursuit of this mission and in order to respond to identified capacity need areas. These include, *inter alia*, a joint project with the German Agency for Technical Co-operation (GTZ) on research and capacity building in the area of dispute settlement in the SADC region; training programmes on trade in agriculture involving Mozambique, Tanzania and the SACU countries;[553] and a trade law conference aimed at encouraging co-operation between business and government in South Africa. In its capacity building role, TRALAC's most important contribution is in terms of its focus on applied policy research, as opposed to academic studies. The latter function is already performed by many universities in South Africa and its neighbours. Clearly, these initiatives are a step in the right direction, and it is hoped that many more like them will follow.

It is particularly critical for South Africa to guard against the tendency among developing countries to always look to developed countries for legal expertise, without even establishing whether or not such skills are available locally. As Qureshi rightly notes in this regard, "developing countries...have 'internalized' the painting that has been pictured for them, or responded to 'expectations' that they have been conditioned to hold."[554] South Africa should not overlook its own nationals, who are

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551 Centre for Human Rights. 2010: www.chr.up.ac.za. It should be noted, however, that many of the participants in the University of Pretoria's programme are international students from the rest of the African continent, who return to their countries after they have completed their studies.

552 Tralac. 2007: www.tralac.org.

553 SACU stands for the Southern African Customs Union and comprises Botswana, Lesotho, Namibia, South Africa and Swaziland.

554 Qureshi 2003: 175.

capable of handling dispute settlement and other WTO matters. This is particularly important, as it is only through direct and sustained involvement in these processes that South Africa's budding trade lawyers will acquire the practical experience and confidence they need to compete successfully.

5.10 SUMMARY AND CONCLUSION

It was seen in this chapter that a typical case in the WTO dispute settlement mechanism goes from one stage to the next without experiencing many of the hurdles that were common under the GATT system. The application of negative consensus and the introduction of a more legalistic approach to hearings have helped to reduce the likelihood of the delays and deadlocks that beset the previous system. The WTO's legalistic approach to dispute settlement was also found to make it more difficult for stronger countries to put pressure on weaker ones to abandon their claims.

It was noted that, regrettably, the WTO system has retained some of the technical and legal barriers that make meaningful participation of developing countries difficult. In addition, it was seen that ineffective enforcement mechanisms continue to make it largely futile for developing countries to institute WTO claims.

It was also seen that many of the concessions in favour of developing countries that are meant to give recognition to the challenges they face are of insignificant value as they are voluntary and, in most cases, developing countries are powerless to enforce them. Furthermore, it was noted that the ACWL's ability to help developing countries is compromised by the conflicting mandates of those who administer it, as well as its dependence on financial support from members.

The discussion also focused on whether or not there is any point in developing countries seeking to improve their participation in WTO dispute settlement hearings under the present conditions. A view was expressed that, while the circumstances of developing countries in the WTO remain generally bleak, possibilities do exist for them to benefit from the system.

Numerous proposals for reforming the WTO dispute settlement process were also highlighted. It was noted, however, that while many of these are quite capable of addressing most of the challenges facing developing countries, lack of co-operation and failure by members to recognise the mutual benefit in reforming the system continue to hinder incorporation of the proposals into formal WTO rules.

With specific reference to South Africa, it was seen that its participation in DSU hearings has been surprisingly low, considering its trade volume and the performance of other comparable countries. Factors such as the government's preoccupation with socio-economic and political issues, the failure by private businesses to report trade violations, as well as the realisation that competing with the major economies is very difficult, were identified as possible causes of South Africa's poor participation.

Lastly, it was observed that, despite South Africa's poor record in the DSU hearings, initiatives such as the LLM and LLD programmes offered by many universities in South Africa and the work of the Trade Law Centre for Southern Africa offer hope for an improved future performance.

A number of conclusions can be drawn based on the issues raised above. To start with, the use of trade sanctions (retaliation) as the ultimate remedy available to a complainant in a WTO dispute settlement hearing needs to be reviewed. As stated above, this remedy encourages the major trading countries to act contrary to the WTO's main objectives and discourages developing countries from lodging WTO claims.

To the extent that the WTO dispute settlement system remains underutilised by poor countries and basic WTO principles continue to be violated with impunity in sectors such as agriculture, the system has clearly not achieved its objective of correcting the defects of the GATT system. The fact that there is increased hostility and imposition of trade sanctions among the major trading nations compared to the GATT era is also an indictment on the WTO system.

In addition, while the continued use of diplomacy in the WTO dispute settlement system may serve some purposes,[555] it is important to keep in mind that procedure is also susceptible to abuse. As seen above, because of its informal nature, diplomacy makes it easy for stronger countries to pressure weaker ones into submitting to their demands. Thus, measures need to be put in place to protect weaker countries, in order to ensure that they can lodge their complaints without fear of being intimidated.

In so far as the initiatives meant to assist developing countries in the WTO dispute settlement system are concerned, they are only half measures that offer little in the way of long-term solutions to the challenges facing developing countries. A majority of them appear to be designed only to silence complaints made by the latter countries, without any intention of dealing with the root causes.

In terms of whether or not it is worthwhile for developing countries to participate in the system, the answer is in the affirmative. Despite the many obstacles that continue to stand in the way of developing countries, it is critical that they continue to seek to participate, even if only as third parties. Increased involvement in the system will help these countries to better familiarise themselves with the inner workings of the system and to strengthen their capacity to take better advantage of the benefits that the system offers. In addition, as indicated above, failure to participate deprives developing countries of the only means of enforcing their rights as WTO members.

Even though many of the proposals for reforming the WTO dispute settlement system have the potential to address its problems, until all WTO members bring themselves to realise the mutual benefit of such an exercise, these proposals are of no benefit. Developed countries need to look beyond their immediate individual interests and consider the long-term interests of the WTO and all its members.

As far as South Africa is concerned, 15 years after returning to the international fold, it should have a clearer and better co-ordinated WTO strategy. This should include a broad-based educational campaign targeted at local businesses, especially those doing business outside the country. The aim of the campaign should be to bring to the

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555 E.g. helping to reach an amicable solution and cutting down on the costs of litigation.

attention of the businesses in South Africa the country's membership of the WTO, the rights and obligations arising from this and the role they can play in maximising the benefits of its membership. South Africa also needs to work more on efforts to build capacity to lodge and defend cases before WTO dispute settlement panels, by increasing investment in the training of personnel and ensuring that they gain the necessary experience and exposure.

CHAPTER 6
THE IMPACT OF SOUTH AFRICA'S POLICY APPROACH TOWARDS THE WTO

6.1 INTRODUCTION

Even though, as argued earlier in this study, the problems associated with the procedural shortcomings of the WTO, such as inadequate transparency and accountability, might play a role in constraining South Africa's participation in the WTO, the country's own policies and actions might also be contributing factors. The latter aspect is examined in this chapter.

South Africa was a founding member of the GATT in 1947 and participated in each of the multilateral trade negotiations held under its auspices.[556] Even though its GATT membership was never revoked, the adoption of apartheid as an official policy in the early 1950s led to escalating tensions between the country and the international community.[557] The South African government also faced growing antagonism from newly independent neighbouring states after decolonisation. Soon, South Africa found itself to be a target of political and economic sanctions from many of its trading partners, and would endure international isolation for the next three decades.[558] The effect of sanctions was to weaken the South African economy and to render the country's effective participation in international trade and multilateral trade negotiations very difficult.

In an effort to protect its economy in this hostile environment, South Africa turned its attention to import-substituting industrialisation.[559] It also adopted a distinctly cautious approach during the multilateral trade negotiations. As Draper puts it, "South Africa's conduct in the GATT could best be characterized as defensive."[560]

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556 Coetzer 1995: 1; See also Rashad 2007: 8.
557 Sandrey et al 2010: 18.
558 Sandrey et al 2010: 18.
559 Sandrey et al 2010: 20.
560 Draper 2005: 3.

It was only after the demise of apartheid in 1994 that South Africa slowly began its re-integration into the multilateral trading system. It so happened that the advent of the country's democratic order coincided with the final days of the Uruguay Round trade negotiations, which produced the Agreement Establishing the WTO. This allowed the incoming African National Congress (ANC) administration to sign the latter Agreement, thereby making South Africa an original member of the WTO, and committing the country to fundamental reform of its trade policy.[561]

Interestingly, unlike most other African countries that had implemented trade and economic reforms under pressure from the World Bank's and the IMF's structural adjustment programme or some other conditionality, South Africa's decision to liberalise its economy was mostly voluntary.[562] The government took the decision based on its assessment that the country needed to once again be part of the global economy and to strengthen the competitiveness of local businesses.

6.2 OBJECTIVES IN THE TRADE NEGOTIATIONS

Immediately after committing South Africa to WTO membership, the new government set about implementing wide-ranging trade policy reforms. These included the introduction of a five-year trade liberalisation programme consisting of, among other things, a tariff rationalisation programme,[563] enacting trade-opening measures into legislation[564] and an improved incentive scheme aimed at attracting more foreign investment.[565] Although quite broad in scope, the plan remained cautious. For example, industries such as the automobile and clothing and textiles industries were each given eight to twelve years to adjust to the new tariffs due to their perceived

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561 In the years leading up to a political settlement (late 1980s), the ANC had participated in the National Economic Forum (NEF), which was set up as a consensus-seeking forum between businesses, unions and liberation movements in South Africa, with its focus on trade and economic matters, and the organisation had familiarised itself with many of the issues dealt with during the Uruguay Round trade negotiations.

562 Rustomjee 2006: 434 – 435.

563 The Tariff Rationalisation Programme included a commitment to reduce the number of tariffs from 100 to 6. See http://www/esastap.org.za/esastap/pdfs/sa_geared_growth.pdf Accessed on 08/10/09).

564 Rustomjee 2006: 443.

565 See www.wto.org/ecolint/trp.htm (Accessed on 26/09/07).

strategic importance and sensitive nature.[566] But what exactly were South Africa's objectives on its return to active participation in the multilateral trading system?

As a starting point, the government was keen to allay concerns within the international community that the transfer of power to a new regime would lead to a return to inward-looking and export-substitution policies.[567] The implementation of trade-opening measures thus served to reassure South Africa's existing and potential trading partners about the new government's intentions going forward.

Like most other countries, South Africa was also aware that for the first time ever "behind the border" issues[568] had been included on the trade negotiations agenda during the Uruguay Round. This meant that there was now a direct connection between decisions taken in the WTO trade negotiations and the rules made at the domestic level. With the trade negotiations assuming this heightened importance, South Africa would have wanted to be part of the whole undertaking and contribute to the outcomes that emerged from it.

Lastly, South Africa wished to join the chorus of developing countries calling for the restructuring of the WTO to make it more balanced and representative of the interests of its various members. This wish is an extension of a long-standing concern among developing countries that the multilateral trading system and its current rules are skewed in favour of developed countries. South Africa's intentions in this regard can be gathered from the comments made by the former South African Minister of Trade and Industry, Mandisa Mphahlwa, that "South Africa has with others, actively pursued a policy of working to reform multilateral institutions to ensure that developing countries are able to play a more decisive role in defining priorities for effective global governance."[569]

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566 Rustomjee 2006: 442.

567 Rustomjee 2006: 443.

568 The expression is used to refer to trade restrictions that traditionally occur domestically, as opposed to those that occur at the border. See Wolfe (1996: 693).These include restrictions on international investment, competition policy, trade in services, telecommunications, financial services, export promotion, intellectual property rights, special and differential treatment, labour policy and the environment.

569 The comments were made as part of the opening speech by former Minister Mandisa Mphahlwa at a conference at Gallagher Estate, Johannesburg, on 27 Oct 2005, quoted in Rashad 2007: 10.

6.3 ALLIANCES WITH OTHER COUNTRIES

An important component of South Africa's strategy as it seeks to improve its participation in the WTO has been to form alliances with other countries or join existing ones. Conscious of the difficulties encountered by individual developing countries in trying to advance their interests in the WTO, South Africa has sought to work together with other members facing similar problems.[570] Today, it belongs to a number of groupings active in the organisation, the most notable of which are the Cairns Group and the G20 developing countries.

Although it was established in 1986, the Cairns Group only opened its doors to South Africa in 1997, making it the group's fifteenth member. All of the group's members are agricultural exporters and share the goal of bringing about greater liberalisation of agricultural trade in the context of the WTO. According to the website of the South African Department of Foreign Affairs, South Africa has benefited enormously from the group's experience in trade negotiations and research on agricultural trade policy issues, as well as from collaboration and coordination regarding the monitoring of the implementation of the Agreement on Agriculture.[571] The fact that the group's nerve centre is in Geneva has also allowed South Africa to rely on it to supplement its own capacity shortfalls there.[572]

In so far as the G20 is concerned, South Africa has been a member since the group's formation in August 2003. The G20 was created on the eve of the fifth Ministerial Meeting in Cancun and now comprises 23 members.[573] Like the Cairns Group, the primary aim of the G20 is to eradicate agricultural subsidies in developed countries. However, unlike the Cairns Group, the G20 is an all-developing-country alliance, with the consequence that its activities in the multilateral trading system tend to focus

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570 See Rolland 2007: 244 – 245.

571 See www.dfa.gov.za/foreign/Multilateral/inter/Cairns.htm Accessed on 12/11/07.

572 See www.dfa.gov.za/foreign/Multilateral/inter/Cairns.htm Accessed on 12/11/07.

573 Members of the G20 are Argentina, Bolivia, Brazil, Chile, China, Cuba, Egypt, Ecuador, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Peru, the Philippines, South Africa, Tanzania, Thailand, Uruguay, Venezuela and Zimbabwe.

more on developing country issues.[574] This is exemplified by the G20's proposal in the Doha trade negotiations calling for access to the markets of developed countries for tropical and other products.[575] The same proposal also demanded that developing countries should not be required to make commitments in terms of tariff rate quotas and in-quota tariff rate reduction.

Despite the benefits of working in co-operation with other countries to address common challenges, this also has some disadvantages. Perhaps the biggest disadvantage is that the decisions taken at the group level often focus on the popular views within the group, which do not always reflect the strategic assessments made at the individual country level. This is certainly true of many of the decisions taken within the alliances existing among developing countries, since their members are often at different stages of development and in need of different policy interventions.

6.4 THE IMPACT OF THE G20

Of the two groupings to which South Africa belongs, the G20 has attracted the most attention in the recent past. In the run-up to the Cancun Ministerial Conference in 2003, which was set to discuss comprehensive draft schedules for trade liberalisation and to take decisions on the substance of the negotiations, the G20 openly rejected a joint EU-US Paper on Agriculture. The group denounced the proposals made in the paper as inadequate and failing to meet the targets set out in the Doha Development Agenda.[576] According to the G20, the proposals served only to preserve much of the protection currently extended to agricultural products in both the US and Europe, while neglecting to address issues of interest to developing countries.

The G20's own proposals were in stark contrast to the position taken by the EU and the US in their joint paper.[577] They entailed extensive but clear demands pertaining to three key elements of the agricultural negotiations: market access, export competition and domestic support. For example, the G20 demanded the repeal of Article 6.5 of

574 Agriculture accounts for a significant part of the income and employment in all the G20 members, and is seen as having the strong potential to alleviate poverty in these countries. See Battisti et al 2006:105.
575 Battisti et al 2006: 107.
576 Battisti et al 2006: 104.
577 Document WT/MIN(03)/W/6.

the Agreement on Agriculture, which exempts from the application of WTO rules domestic support programmes linked to production-limiting programmes in instances where the level of payment is based on fixed areas and yields, or per head of livestock.[578] On the contrary, the EU-US paper only suggested minor alterations to the article. The G20 also demanded access to developed country markets for all agricultural products and insisted on a method that is both effective and measurable.[579]

Perhaps the most remarkable aspect of the confrontation between the G20 and developed countries at Cancun was the fact that the G20 stood their ground to the very end, even as the failure to find a solution led to the collapse of the negotiations. In the past, developing countries had allowed threats of aid withdrawal and other forms of intimidation from developed countries to cause them to abandon their original negotiating stance. Jawara and Kwa describe the significance of the events that unfolded at Cancun as follows: "[f]or the first time, the G20 allowed the developing countries to exert some degree of influence on the negotiations – if only by preventing another unfavourable outcome."[580]

The G20's defiance of developed countries at Cancun came in the wake of many years during which the latter countries had resisted the inclusion of the agricultural sector in the GATT/WTO disciplines. Developing members have consistently protested the arrangement, contending that it not only goes against core GATT/WTO principles, but that it also benefits developed countries at their expense. Messerlin sums up the argument advanced by developing countries well in contending that "...the current farm policies that support prices and subsidize agricultural production in Organization for Economic Co-operation and Development (OECD) countries distort trade and investment incentives by depressing world prices and preventing developing countries from exploiting their comparative advantage."[581] However, the complaints by developing countries had fallen on deaf ears.

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578 Only a few developing countries qualify for benefits under the article 6.5 exemption.
579 Document WT/MIN(03)/W/6.
580 Jawara and Kwa 2003: xxxviii.
581 Messerlin 2006: 3.

6.5 REVIEW OF SOUTH AFRICA'S APPROACH TO INTERNATIONAL TRADE

6.5.1 The Role of the DTI and the DDE

In any country, the success of trade policy initiatives depends to a large extent on what the role of the government department charged with trade matters is understood to be, the level of skill among the department's personnel and how effectively it communicates with and responds to inputs from other government departments and the private sector.[582] The existence in civil society of independent structures capable of questioning and challenging policy proposals from both government and business is also critical.[583]

In South Africa, until recently, the task of formulating and implementing trade policy was the sole responsibility of the DTI. The department has in the past used several specially created institutions to execute this mandate, namely the Trade and Economic Division (ITED), the International Trade Administration Commission (ITAC) and the Trade and Investment Board. ITED has been responsible for the trade negotiations, while ITAC has been charged with administering trade policy, and the Trade and Investment Board (previously the Board of Trade and Tariffs) with promoting exports and investments. Although the thinking behind the creation of these institutions is praiseworthy, their ability to do their work effectively has been seriously hampered by inadequate staffing and, in the case of ITED, lack of negotiating experience relative to its negotiating partners.[584]

As of 1 April 2010, the newly-established Department of Economic Development (EED) officially came into operation and inherited some of the duties previously assigned to the DTI. According to the South African president, Jacob Zuma, one of the reasons behind the creation of the new department was to release the DTI from its current role of formulating economic policy and to allow it to focus more on

582 Rashad 2007: 17.
583 Rashad 2007: 17.
584 Draper 2007: 7.

implementing such a policy.[585] The EED has also assumed the responsibility of searching for trade opportunities in major industrialised countries and overseeing tariff investigations, trade remedies and import and export control, leaving the DTI to carry on with the role of negotiating and administering international trade agreements.[586] A number of economic bodies, including ITAC, are also now answerable to the EED.

There is no doubt the establishment of the EED is a positive step that will help to improve South Africa's effective and meaningful participation in the WTO. However, the true measure of the new department's value will be the extent to which it is able to execute its mandate and to make up for the shortcomings of the DTI. This will largely depend on the government's success in recruiting and grooming the required calibre of people who are equipped with the necessary skills to undertake the responsibilities assigned to the two departments.

It is also quite clear that there is a significant overlap between the roles of the DTI and the EED in so far as administering international trade issues is concerned. In view of past instances involving poor co-ordination of overlapping functions between various government departments,[587] it is critical to put appropriate measures in place to ensure co-operation between the DTI and the EED in carrying out their respective responsibilities.

6.5.2 The Role of NEDLAC

Outside of government, the National Economic Development and Labour Council (NEDLAC) is one of the agencies that play a critical role in shaping South Africa's trade policy. NEDLAC was set up as a permanent body to represent the interests of government, labour, business and the "community", and is dedicated to building consensus on economic issues among these stakeholders.[588] Its work is divided between four chambers,[589] which in turn have created various sub-committees and

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585 Cronje. 2010: www.tralac.org

586 Cronje. 2010: www.tralac.org

587 E.g. the DTI and the Department of Home Affairs have a history of failing to co-operate when it comes to tackling international trade matters. See Draper op cit note 5 at 8 - 9.

588 Rustomjee 2006: 444.

589 The four chambers are the labour market chamber; the trade and industry chamber; the development chamber; and the public finance chamber.

task groups to address specific issues falling within their particular mandate. NEDLAC holds four annual meetings, including an annual summit, whose aim is to review the agency's work and chart its strategic direction going forward.[590]

Many of the outcomes that emerge from discussions held at NEDLAC end up forming part of South Africa's trade policy. For instance, ideas for the establishment of a regional Industrial Development Programme and a South Africa - European Union Trade Agreement were conceived within NEDLAC.[591]

However, there are doubts about NEDLAC's suitability as the provider of the kind of commercial intelligence needed to formulate South Africa's trade policy and to support negotiations in the context of the WTO. To start with, trade unions wield too much power within NEDLAC and, given their primary responsibility to look out for the interests of their members, they are unlikely to look favourably upon any suggestions for liberalisation of trade in South Africa. Irrespective of how beneficial liberalisation might be to the country as a whole in the long-term, trade unions will in all likelihood always be inclined to want to protect the few jobs that might be lost to foreign competition in the short-term.

In addition, unlike the business sector, which has direct access to trade information, including cross-border trade information, and determines corporate strategy, trade unions are not well-placed to implement strategic measures outside of NEDLAC in order to try to influence the course of trade negotiations. Thus, even though the input of trade unions is certainly important in formulating negotiating positions for South Africa in the WTO, it is business that should be in the forefront and guiding the process.

Questions have also been raised about the extent to which the parties who purport to represent specific constituencies in NEDLAC have the requisite mandate from such constituencies.[592]

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590 Rustomjee 2006: 444.
591 Rustomjee 2006: 445.
592 Rashad 2007: 18.

In possible recognition of the need to provoke more productive discussions inside NEDLAC and perhaps to try to alter the power dynamics within the agency, one of the envisaged roles for the EED is to take over as the voice of government within NEDLAC. In this role, the EED will be required to promote social dialogue, with the aim of advancing social and economic development.[593] Considering the fact that the EED has only recently been established, it remains to be seen whether its involvement will bring about the desired shift in NEDLAC's focus and improvements to its work in general.

6.5.3 The Role of Parliament

Parliament also plays an important part in the development of trade policy in South Africa. International trade agreements first have to receive its formal assent before they can become part of South African law. The significance of this function, which involves tabling policy initiatives before the Portfolio Committee on Trade and Industry for scrutiny and contestation, lies in the fact that the refusal to ratify an international trade agreement could frustrate its implementation and lay to waste the hard work that goes into negotiating and putting together this kind of agreement. It is critical, therefore, that consultations regarding a proposed trade agreement involve as many stakeholders as possible, so that the final product is acceptable to Parliament.

6.5.4 Lack of Leadership in Collecting Trade Information

As already mentioned, a major challenge facing South Africa when it comes to formulating trade policy is that not all the sectors of the economy provide trade information relating to their particular sector. This obviously casts doubts on the reliability of the overall data that informs the process, since such data is incomplete and does not represent South African businesses across the board. In describing the situation the government finds itself in, Setipa observes that "...the government is negotiating with blind folds on because it has no view of where its potential

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[593] Cronje. 2010: www.tralac.org

competitiveness lies. It has no real picture of what it should do to foster and let the private sector grow."[594]

An important question to ask is the following: whose duty is it to ensure that inputs are secured from all sectors of the South African economy? There seems to be no unanimity regarding the correct answer to this question. Some commentators are of the view that the responsibility lies with the private sector itself. This opinion was voiced in a recent interview with an official from the DTI, who blamed private firms involved in transnational trade for not reporting their problems to the department.[595] According to him, without firms or industry associations coming forward with the relevant information, the department's hands are tied, as it has no other way of knowing what difficulties businesses encounter.

Another view is that the duty cuts both ways, i.e. both the government and the private sector must share the responsibility and make sure that all industrial sectors contribute to the formulation of trade policy. The following statement sums up the argument advanced by the proponents of this view: "...the government has a responsibility to secure and solicit inputs from the private sector and understand what the challenges are that the private sector faces. But equally the private sector has the responsibility to mobilize itself and...its resources to engage the government, to provide not just a critique but also to guide the government on what its priorities are and on what the situation on the ground is and where they think their strategic interests lie."[596]

Considering the fact that the private sector benefits directly from successful trade negotiations, that it is mostly its interests that suffer when unfavourable agreements are concluded, and that it has direct access to trade information, it seems only fair and logical to expect the various industry associations to collate relevant inputs from their members so that they can be incorporated into the country's trade policy. At the same time, the government also has the constitutional duty to represent South Africa

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594 Setipa (2006: 15).

595 The interview was between the author and Mr. Rudolf Brits, the director for market access (trade policy and negotiations) in the International Trade and Economic Development division of the South African Department of Trade and Industry.

596 Setipa (2006: 15).

in international trade matters and is obliged to conceive and drive the trade negotiations agenda. In these circumstances, it appears that the two sides have little choice but to work together.

One of the better organised sectors in South Africa in terms of working hand-in-hand with government is agriculture. It has set up a consultative mechanism called the Agricultural Trade Forum, through which officials from the Department of Agriculture and industry representatives hold regular meetings to discuss issues pertaining to the trade negotiations. The outcomes of these discussions then feed into the negotiating positions adopted by South African representatives in the trade negotiations.[597] Further consultations in the agricultural sector are facilitated through long-standing interactions between the Department of Agriculture and university-based research organisations and individuals. Setting up similar mechanisms for other sectors under the guidance and supervision of the DTI would go a long way in providing the much-needed impetus for sourcing inputs from sectors across the board.

6.5.5 Civil Society Organisations

There are also several civil society organisations involved in the development of trade policy in South Africa. One of them is Trade and Industry Policy Strategies (TIPS). Created specifically to support the DTI through research initiatives, it carries out quantitative studies of trade flows and tariff structures ahead of each round of trade negotiations. TIPS also has links with researchers working at various universities across South Africa, which allows it to tap into their knowledge in the execution of its mandate.[598]

There is also TRALAC, which, in addition to being instrumental in capacity-building in the Southern African region, also does research for the DTI and regularly releases publications on trade-related topics.[599] Lastly, there is the South African Institute of International Affairs (SAIIA). It performs more or less the same function as TRALAC,

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597 Draper 2005: 9.
598 Draper 2005: 15.
599 Draper 2005: 15.

except that in addition to releasing publications, SAIIA also uses opinion pieces, interviews and round tables to spread the word about what it does.

In view of the skills shortage at the DTI, there is no doubt that the department can benefit from the kind of assistance that civil society organisations are offering. However, a major setback in terms of the organisations' efforts is that the DTI lacks the absorptive capacity required to assimilate the policy suggestions and strategic advice that they offer.[600] It remains doubtful, therefore, whether all of the recommendations made by the civil society organisations reach the DTI and are eventually considered for possible incorporation into South Africa's trade policy.

6.5.6 The New Industrial Policy Plan

Owing to disappointment with the overall outcomes of liberalisation over the last few years, the South African government recently decided to review its trade policy approach.[601] This decision led to the launch in February 2010 of the 2010/11 – 2012/13 Industrial Policy Action Plan, otherwise known as the IPAP2. The IPAP2 is the successor to the National Industrial Policy Framework and the Industrial Policy Action Plan of 2007/2008, which proposed fairly straightforward government interventions, including the revision and development of support programmes for strategic sectors such as the automotive and clothing and textile industries.[602]

The content of the IPAP2 is, however, more complex. It focuses on specific steps that South Africa must take to improve and diversify its economic base and to end its over-dependence on traditional commodities and non-tradable services.[603] Included among such steps is the proposal for adopting a strategic approach to the use of trade policy and import tariffs.[604] The suggested measures form the basis of the government's plan to create about 2.5 million new jobs in the next ten years.[605]

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600 Draper 2005: 15.
601 Sandrey et al 2010: 20.
602 Woolfrey. 2010: www.tralac.org
603 Woolfrey. 2010: www.tralac.org
604 The other measures are: aligning macro and micro economic policies more closely; ensuring greater concessional financing through the Industrial Development Corporation; overhauling existing public procurement processes in order to leverage more local procurement; adopting a strategic approach to trade policy and the use of import tariffs in particular; targeting anti-competitive practices; increasing skills levels

While the IPAP2 has been praised for drawing attention to South Africa's unemployment crisis and promoting labour-intensive industrialisation, it has also attracted criticism for neglecting important sectors such as information technology, engineering, legal and medical services, among others.[606] These sectors are deemed to be critical for the country's long-term development, and are seen as having the potential to facilitate economic growth. The IPAP2 has also been criticised for identifying too many sectors to benefit from government financial support, which might compromise the effectiveness of the plan and result in the government being unable to meet the eventual demands on its resources.[607]

6.5.7 Government - Private Sector Co-operation beyond NEDLAC

Attempts have been made in the past to create linkages between the government and the private sector outside NEDLAC, but with limited success. One notable example is ministers' forums with export councils and discussions with associations and groups.[608] These were created with the objective of facilitating quarterly meetings between exporters from different sectors and the Minister of Trade and Industry to talk about the problems that exporters encounter. Although the export councils are still in existence, the meetings are now rare and hardly any consultations take place.[609]

One of the obstacles to the success of some of these initiatives has been the fact that they tended to depend too much on the few individuals who facilitated their establishment. In the case of the minister's forums, they were the brainchild of the former trade and industry minister, Alec Erwin, and once he left the DTI, the structures simply fell apart. Their failure highlights the importance of creating some kind of mechanism to ensure the independence and sustainability of these structures over time.

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and innovation; and boosting production in the selection of newly targeted sectors.

605 Woolfrey. 2010: www.tralac.org

606 Woolfrey. 2010: www.tralac.org

607 Woolfrey. 2010: www.tralac.org

608 Rashad 2007: 18.

609 Rashad 2007: 18.

The need for greater involvement by other stakeholders outside of government extends beyond just providing trade information and strategic advice. The limited resources available to governments often mean that advancing particular policy positions successfully requires financial and other support from external sources. This support, for example, can take the form of helping fund the training of the country's current and future trade representatives, as well as providing financial assistance towards the maintenance of South Africa's mission in Geneva and for the lobbying of support for the country's trade interests in general. Alternative means of providing for this support infrastructure and supply-side issues have to be found and, as indicated in the next section, the private sector is ideally placed to take up this responsibility.

The private sector can also help by using its resources to educate itself about general WTO issues and how these affect it, as well as enhancing its ability to lobby the government. As Setipa has pointed out, "...they could contribute some part of their resources towards improving their understanding of the issues and improving their lobbying capacity... [I]t is a sacrifice, just as a government has to sacrifice part of its resources to send people to Geneva to negotiate – it is a decision they have to make. ...[I]t is important for them, at first, to realize their strategic interests in the process and they will then be able to come up with the resources."[610]

6.6 LESSONS FROM THE US AND EUROPE

The extent of co-operation between private enterprises and the US and European governments in pursuing shared trade interests offers a good example of how the two sides (i.e. private sector and government) can work together to achieve common goals, and South Africa can learn a lot from this. These "public-private partnerships" developed from the interdependence in terms of resources, which has evolved between the parties over the years. On the one hand, private firms rely on governments, which possess the legal mandate to represent their interests in the WTO. On the other hand, governments have come to depend on the organisational, financial, political and informational resources possessed by the private sector.[611] The

610 Setipa 2006: 15.
611 Shaffer 2006: 14 -15.

realisation by both sides that joining forces benefits them more than pursuing their own interests separately is one that ultimately brought them together.

In the US in particular, the involvement of private firms in WTO processes is so entrenched that the firms' knowledge of the system now allows them to strategically use the processes to gain advantage over their competitors. By way of example, Shaffer makes reference to a time in the 1970s when private firms in the US were concerned about the country importing more than it was exporting.[612] The firms blamed the situation on GATT rules that they deemed to be too restrictive, as well as government policies that they thought were too soft on imports. With a view to remedying the situation, they lobbied Congress to toughen some of the domestic laws that rely on US political clout to induce compliance abroad. Through these amendments, sectors in which the US had a competitive edge over other countries but which were not covered by GATT were targeted for market opening in favour of US firms.[613]

Both the US and Europe have also established specialised agencies dedicated to addressing export trade issues. Created at the instigation of private firms, these agencies have the authority to make critical decisions on trade matters. In the US, the relevant agency is the office of the United States Trade Representative (USTR), which occupies a cabinet level position. The USTR performs functions such as defending private sector interests in both multilateral and bilateral negotiations, WTO accession negotiations and WTO litigation or settlement discussions.[614]

The USTR's equivalent in Europe is the Trade Directorate General of the European Commission (hereinafter called the Directorate). The Directorate has been particularly instrumental in enabling European firms to do business more easily abroad. At the same time, it has made itself easily accessible to firms, thus allowing them to influence how their interests are represented internationally.[615] Because the relationship between the Directorate and European firms is not as well-established as that between the USTR and firms in the US, the Directorate has at times had to take

612 Shaffer 2006: 20.
613 The sectors concerned included trade in services and intellectual property protection.
614 Shaffer 2006: 26.
615 Shaffer 2006: 65.

active measures to encourage firms to make use of its services. Some of the initiatives undertaken by the Directorate in this regard include employing consultants to do sector-by-sector studies on trade barriers, holding information sessions on trade policy for business executives and other stakeholders, as well as preparing and handing out pamphlets containing information relating to its activities.[616]

The Directorate's example of actively courting the private sector to be more involved in WTO matters should be a great lesson for South Africa, which at this stage is still grappling with the question of who should take the lead in obtaining inputs from all stakeholders. Even though the EC lagged behind the US in establishing and utilising public-private partnerships to maximise their influence and other benefits in the WTO, it is today also considered to be a success story. European firms now regularly partner with the Directorate in WTO processes such as trade negotiations and dispute settlement. The critical lesson for South Africa is that the EU had to go out of its way to educate private firms about the importance of public-private partnerships. This is what South Africa must do in order to move away from the somewhat disjointed approach it is presently following in the WTO, and the DTI should take the lead in this regard.

Of course, there are dangers in a close relationship between governments and the private sector, and South Africa must watch out for these. One of them is that while both sides generally benefit from such close co-operation, they sometimes have different, and even conflicting, objectives in engaging in WTO processes. The government has the primary responsibility of promoting national interests ahead of anything else, and whatever it does in the WTO must be for the common good of all businesses across the board. On the other hand, the sole objective of a private firm is to advance its own particular interests. This divergence of goals has sometimes led to private firms putting undue pressure on governments to support their particular cause, even when it would come at a cost to the interests of others and the country as a whole. South Africa should, therefore, be careful that in its efforts to get the private sector to participate in WTO processes, it does not allow itself to be used to serve specialised interests at the expense of the majority and the country in general.

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616 Shaffer 2006: 70.

6.7 SUMMARY AND CONCLUSION

South Africa's decision to take steps towards playing a more meaningful role in WTO decision-making and other processes since the mid-1990s has without question been a positive development. The decision has contributed to helping the country exert more influence on the WTO, and in the process promote its interests within the organisation. This has been most noticeable in the activities of South Africa's international alliances, such as the G20 and the Cairns Group.

However, the country's achievements on the international front through its alliances have to a large extent been undermined by less than satisfactory progress on the domestic front. In particular, the lack of a coherent procedure for obtaining information from all the sectors involved in international trade has been a problem. This has meant that the country's policy positions in the WTO negotiations and within the alliances do not accurately reflect the country's situation on the ground.

Equally problematic has been the lack of adequate training for government negotiators and other personnel, which continues to limit their ability to do their work effectively; the excessive influence of trade unions in the formulation of trade policy through NEDLAC; as well as the lack of capacity on the part of the DTI to absorb into their policy framework the suggestions and strategic advice from civil society organisations. All of these factors have in the past contributed to South Africa's inability to derive maximum benefit from its membership of the WTO, both in terms of negotiating the best possible deals and enforcing its rights through the dispute settlement process.

It can only be hoped that the South African government and other stakeholders will realise soon enough the urgency of implementing all the measures needed to facilitate the country's more effective participation in the WTO, especially on the domestic front. The introduction of the DDE and its envisaged new role as a partner to the DTI in overseeing South Africa's international trade affairs will hopefully contribute positively towards this endeavour. The government would also do well to

emulate the example of the US and the EU by forging strong public-private partnerships aimed at advancing the common interests of both sides.

CHAPTER 7
SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

7.1 INTRODUCTION

In this final chapter, a summary of the whole discussion pertaining to the origins of the WTO decision-making process, its current state, the extent of transparency and accountability in the process, and the impact it has on developing countries is provided. Also included in this chapter are some conclusions arising from the discussions, as well as some recommendations for the way forward.

7.2 THE GATT ERA

Understanding the circumstances that surrounded the creation of the WTO's predecessor, the GATT, and its decision-making processes is critical to appreciating how the WTO and its own decision-making processes and practices work. Aspects such as the GATT's interim character,[617] the rapid increase in the number of its members after decolonisation,[618] and the growing complexity of the issues discussed in the trade negotiations[619] all influenced the decision to replace the GATT with the WTO and the shape that the WTO decision-making process eventually took.

South Africa was an early participant in the GATT trade negotiations and remained active throughout the time that the GATT was the leading regulatory authority for international trade.[620] Its involvement in the GATT dispute settlement system was, however, less prominent.[621] Although South Africa was but one of many countries not active in the system, its low participation rate was intriguing because, in relative terms, it was already a significant player in world trade, and more or less comparable countries were actively involved in the system.[622]

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617 See par 2.3.1 above.
618 See par 2.3.2 above.
619 See par 3.1 above.
620 See par 2.5.1 above.
621 See par 2.5.3 above.
622 See par 2.5.3 above.

7.3 WTO DECISION-MAKING

The WTO Agreement provides for decision-making by both consensus and voting, although voting almost never takes place, leaving consensus as the only decision-making procedure used in the WTO.[623]

The interpretation given to consensus in the WTO,[624] however, effectively ensures that many developing countries are excluded from decision-making, since they cannot attend all WTO meetings.[625] Developing countries have repeatedly called for a review. Developing countries also oppose the consensus rule because of its inherent bias against voting, which they would like to see used more frequently.[626]

Despite clear differences between developed and developing countries concerning the appropriate procedure for taking decisions in the WTO, both sides agree that the procedure adopted should give developing countries a voice in the organisation. They also accept that whatever procedure is adopted, it should not interfere with the identity and relevance of the WTO as a commercial and economic entity.[627]

The WTO can draw a few lessons from the failed CG-18. The first lesson is that despite being aware of the shortcomings of a large decision-making body in an organisation, it does not follow that the members will be prepared to delegate decision-making power to a smaller body. The second lesson is that decision-making in an organisation should not be carried out by too large a group, as this leads to the process being inefficient and ineffective.[628] Lastly, the demise of the CG-18 showed that transparency and accountability are essential to the credibility and legitimacy of any representative body, and that failure to observe these two principles can be disastrous.

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623 See par 3.2 above.

624 In terms of this interpretation, a WTO member country is regarded to be in agreement with the outcome of a meeting if such a member country was not represented in that meeting, or if represented, its representative failed to challenge the decisions taken there.

625 E.g. due to shortage of personnel. See par 3.3.

626 This is because decision-making by voting would give developing countries an advantage due to their greater numbers.

627 I.e. in adopting a new procedure, WTO members must not lose sight of the fact that the objective of the organisation is, first and foremost, to promote trade and economic activity between them. See par 3.3 above.

628 See par 3.5 above.

7.4 WTO DECISION-MAKING PROCEDURES VERSUS THOSE OF OTHER INSTITUTIONS

Much like in the WTO, the three main decision-making organs in the UN[629] give first preference to consensus in taking decisions. If consensus cannot be reached, provision is made for voting or entering reservations.[630] However, contrary to what happens in the WTO, the option of voting is regularly exercised in the UN, with each member generally entitled to one vote.[631]

The UN also has an informal process of decision-making existing parallel to the formal one. The process works pretty much along the same lines as that of the WTO, although the two differ in some respects. One of the differences seems to be in the fact that participation in the UN informal process is more flexible and based on practical considerations, such as which countries are best positioned to resolve the problem at hand or have a direct interest in the issues. The WTO process, on the other hand, seems to be less flexible, placing more emphasis on the identity of the parties before they can partake in the process.[632]

The experience of the UN Security Council highlights the fact that having a small decision-making body does not always result in the elimination of problems associated with large decision-making bodies.[633] Issues of representativity and accountability within the small structure are critical to how the small body will perform. The example of the Security Council is also a reminder that the activities of international organisations will almost always be dominated by the big powers and that they will usually not hesitate to use their dominance to advance their own interests, even at the expense of the organisation as a whole.[634]

While the IMF is facing challenges of its own, its regular review of developments within the organisation and among the members is exemplary, and can be emulated

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629 I.e. the General Assembly, ECOSOC and the Security Council.
630 See par 4.2.1 above.
631 See par 4.2.2, 4.2.3 and 4.2.4 above.
632 See par 4.2.5 above.
633 See par 4.2.7 above.
634 See par 4.2.8 above.

in the WTO by creating a review mechanism that would enable it to regularly monitor the effectiveness of its decision-making process.

A comparison of the Manuel and Sutherland reports revealed some interesting facts about the two reports. While the former readily acknowledged serious governance and decision-making challenges facing the IMF, the former generally created the impression that all was well in the WTO, even though quite the opposite is true. Thus, the Sutherland report was found to be less than objective in its findings. [635]

Although QMV may not be entirely appropriate for use in the WTO, the flexible manner of its application in the EU is something that the WTO can learn from. To start with, even though strictly speaking, the basis for determining EU members' votes under QMV is population size, in practice there are instances where exceptions are made in order to give a say to the smallest members. Thus, these countries end up obtaining more votes than they would if the criterion of population size was strictly applied. This flexible approach helps to maintain a balance between acknowledging the relative importance of larger member countries and giving a reasonable voice to smaller countries. The application of QMV also acknowledges the reality that the more traditional procedures such as simple majority voting and unanimity may not suitable for use in every situation.[636]

While all of the institutions considered above were found to have made efforts to adopt a more accountable and transparent approach to decision-making, it was also found that more still needs to be done in each case. In the particular case of the WTO, the informal "green room" meetings were found to be the biggest obstacle to accountability and transparency.

7.5 DISPUTE SETTLEMENT MECHANISM

Although a distinction is drawn between the decision-making and judicial roles of the WTO, they share the same underlying political features. Discussing the two together in this study is intended to demonstrate just how widespread the use of diplomacy

635 See par 4.3.4.2 above.
636 See par 4.4.3.3 above.

and negotiations, which in turn have the effect of compromising transparency and accountability, is in the WTO, and that it not restricted to the decision-making role.[637]

The WTO dispute settlement procedure has taken a much more legalistic form compared to the procedure under the GATT. There are positive and negative aspects to this legalistic approach. Among the positive aspects is the fact that the legal process kicks in immediately after the prescribed time for resolving the dispute through diplomatic means lapses. This in a sense limits the opportunity for stronger countries to dictate terms to weaker ones. The negative aspect of the WTO's approach is that it has failed to rectify some of the technical and legal obstacles to the effective participation of developing countries found in the GATT.

Another negative aspect relates to the concessions meant to benefit developing countries within the system. While the concessions are supposed to be in recognition of the difficulties faced by developing countries, a lot of them are either voluntary or have no operative content, which makes them practically impossible to enforce.[638] In addition, the ACWL, which is meant to increase the accessibility of the dispute settlement system to poor countries, faces some serious challenges such as lack of an independent and stable source of funding.[639]

Even though the odds are quite heavily stacked against poor countries in the WTO dispute settlement system, there are some ways in which they can benefit from the system.[640] A good example is the fact that a panel or Appellate Body ruling is sometimes enough to persuade the offending country to alter its wrongful behaviour, without the victim country having to take retaliatory measures.

While a number of very sound proposals on how to go about reforming the WTO dispute settlement process have been advanced, many of them require close co-operation among WTO members and the recognition that reform is mutually

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637 See par 5.1
638 See par 5.6.2 above.
639 See par 5.6.2 above.
640 See par 5.6.4 above.

beneficial.[641] However, there appears to be little or no desire on the part of the leading member states to see the proposals implemented.

In the case of South Africa, its involvement in the WTO dispute settlement system has been surprisingly low-key, considering its sizable trade volume and how well comparable countries have performed. The country's focus on addressing socio-economic and political problems after 1994, as well as the private sector's failure to report violations, have been mentioned as possible causes of South Africa's absence from the dispute settlement system.[642]

Notwithstanding South Africa's unimpressive record in the WTO dispute settlement system, there is hope that recent initiatives such as TRALAC and the LLM in International Trade and Investment Law offered by the University of Pretoria, in collaboration with other institutions, will in the near future help improve this situation.[643]

7.6 SOUTH AFRICA AND THE WTO

The measures taken by South Africa to increase its participation in WTO decision-making and other processes after the end of its trade and economic isolation have yielded something of a mixed result. Its membership of international groupings such as the G20 and the Cairns Group in particular has allowed the country to significantly improve the level of its influence in areas like the trade negotiations.[644] However, the progress made on the domestic front has lagged behind. Factors such as the lack of a coherent strategy for collecting critical data from the various sectors involved in cross-border trade have meant that the policy positions adopted by South Africa in the WTO and within the various groupings to which it belongs are not exactly in line with the reality on the ground.[645]

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641 See par 5.7 above.
642 See par 5.9 above.
643 See par 5.9.2 above.
644 See par 6.3 and 6.4 above.
645 See par 6.5.1 and 6.5.4 above.

Other problems that have adversely affected South Africa's successful participation in the WTO include inadequate training among its negotiators and other personnel, the strong influence of trade unions in the formulation of trade policy, as well as the DTI's inability to absorb and incorporate into policy the suggestions and strategic advice given by civil society organisations. [646]

7.7 RECOMMENDATIONS

In light of the problems associated with the application of consensus decision-making in the WTO, serious consideration should be given to finding alternative procedures that can improve or replace the existing ones. In deciding on the appropriate alternatives, priority should be given to what is in the long-term interests of the organisation and its entire membership, as opposed to what would benefit the strongest members.[647]

Experience has shown that applying simple majority voting in taking decisions in the WTO threatens to alienate the developed member countries. These countries account for over 70 percent of world trade, and without them the global economy would come to a virtual standstill. For this reason, majority voting is not a suitable procedure.

In several interviews that the author conducted with a number of WTO officials,[648] many of them seemed to be convinced that the "concentric circles" model used in the "green room" meetings is the best approach for addressing the problem of inefficiency resulting from the growing number of WTO members. Another advantage cited by the proponents of the model is that it allows for participation in the inner circle of countries that have a significant interest in the outcome.[649] However, the "concentric circles" model has been widely criticised by the majority of countries left in the outer circle on the grounds that they are not given enough time to consider the outcomes presented to them, and that when they voice their views, these views are often not taken into account.[650]

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646 See par 6.5.2 and 6.5.5 above.
647 Panitchpakdi 2001: 432.
648 The interviews were conducted in September 2008 at the WTO headquarters in Geneva.
649 Krueger 1998: 50.
650 Kahler 2001: 87.

A possible alternative is the use of weighted voting, whether in the form of QMV or double majority. As seen previously,[651] the procedure is designed to address two of the main challenges confronting the WTO at the moment – giving recognition to the stake of the major trading countries in the multilateral trading system and, at the same time, denying the same countries an opportunity to block decisions at their absolute will. Overcoming the first challenge would ensure that the major trading countries remain in the system, while addressing the second one would guarantee that all WTO members have an equitable say in the organisation's decision-making. However, as pointed out before, weighted voting has historically been favoured by regional organisations with ambitions of high levels of integration.[652] The WTO, on the contrary, has a global membership and is unlikely to become a closely integrated unit. As such, the chances of its members accepting weighted voting as a procedure for decision-making are quite slim.

Perhaps closer consideration should be given to the use of "variable geometry". Described in the Sutherland Report as "[denoting] that obligations differ for different Members of the organisation",[653] this concept would not be completely new to the WTO, in that some elements of it already exist in the organisation's practice in the form of tariff and service schedules, plurilateral agreements, and special and differential treatment.[654] The main benefit of adopting variable geometry would be the possibility of dealing with the issues presently being addressed through FTAs and RTAs in the more inclusive and transparent set-up of the multilateral trading system. At the same time, the procedure would make it possible for members wanting to proceed more quickly on certain issues to do so.[655] It would, however, also be essential for an arrangement to be made for members electing not to assume obligations in the beginning to be able to partake in the negotiations on a restricted basis, and for their accession at a later stage when they are ready.

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651 See 4.4.3.3 above.

652 See par 4.4.5.

653 WTO Consultative Board 2004: 282.

654 Yen 2006: 21. See Liang 2006: 278 – 281 for a detailed discussion of the Government Procurement Code and the WTO Agreement on Government Procurement, negotiated as plurilateral agreements during the Tokyo and Uruguay Rounds respectively.

655 See Yen 2006: 21.

It is also critical for the WTO not to ignore the reality that when the membership of an organisation goes beyond a certain size, the organisation ceases to be efficient in taking decisions.[656] An arrangement that would help address the problem is for the WTO to set up regional groupings that would operate on a semi-informal basis. The informal aspect of the arrangement would help to dispense with the need for major amendments to the existing legal regime, which would be very cumbersome and difficult to implement.[657] At the same time, however, the groupings should be organised enough to be able to provide the necessary consistency in the representation of members and to be transparent in terms of allowing access and participation.

Such groupings would also allow developing countries to utilise their meagre resources more effectively by pooling them together. As Rolland has rightly pointed out, "...only a handful [of developing countries] have the individual capacity to influence negotiations historically dominated by a few developed countries. Rather, most developing countries need to act in groups or coalitions to further their agenda in the multilateral trade negotiations."[658] Moreover, the arrangement would facilitate better harmonisation of these countries' policies.

Most importantly, the members could use the regional groupings to appoint representatives on the basis of democratic principles to serve in a smaller committee that can be created to perform the functions currently performed by the "green room" meetings. The democratic make-up of this committee and the openness with which its members would be appointed would help make the outcomes of its deliberations much more representative and acceptable to all members.

There should also be a support office or "secretariat" in Geneva for every regional grouping, whose role would be to render assistance to the countries from its specific region, especially the smaller ones. This assistance would be in the form of technical advice, training and so on. The creation of this structure would enhance the rate of participation and success by developing countries in WTO processes such as trade

656 See the case of the CG-18 in 3.4 above.
657 See Rolland 2007: 245 for a discussion on when the WTO will give recognition to groups or coalitions.
658 Rolland 2007: 244 – 245.

negotiations and dispute settlement. It would also help with keeping a record of developments in the WTO affecting the members in a particular region, thus making up for the fact that some poor members are not always able to send representatives to all WTO meetings.

It is also critical for the poorer WTO members to continue to work in solidarity in tackling common problems within the organisation. This is particularly so in view of arrangements like the Africa Growth and Opportunity Act (AGOA), which tend to create incentives that strain economic relations between former ideological allies. In Brown's words, these kinds of arrangements "test...coalitions that have historically championed the convergent interests of embattled minority groups around the globe".[659] Thus, the poorer members have to guard against being distracted and divided in their resolve to fight for fair treatment and justice.

As far as the WTO dispute settlement system is concerned, it was shown that a number of viable improvement options have been suggested.[660] What is required is for common sense to prevail, and for all WTO members to accept that the proposed changes are necessary and for everyone's benefit.

Back in 1967, Jackson made some suggestions concerning the basic elements of a procedure that would enable the GATT dispute settlement mechanism to be effective.[661] These are as relevant to the WTO today as they were to the GATT when they were first made. These include the following: that the procedure adopted must help realise other objectives of the organisation and the international community as a whole, or at least not interfere with or hinder the quest to attain these objectives; it must help foster good relations between the parties, instead of making them worse; it must reasonably safeguard the interests of both parties and non-parties to a dispute; it must deliver "justice" in the sense of fact-finding that is reasonably accurate, as well as outcomes that are based on an objective standard, not solely dependent on power

659 Brown 2006: 60 – 61.
660 See par 5.10 above.
661 Jackson 1967: 153.

or might; and it must not be too costly relative to the benefits that are derived from it.[662]

Regarding the question of transparency in the WTO, it is clear from the increasingly frequent and violent public demonstrations against the organisation that many of its stakeholders feel disconnected from and violated by a lot of what it does. While those sympathetic to the WTO have sought to defend it and its decision-making procedures, the perception that the organisation is shrouded in secrecy has persisted, along with skepticism about the motivation behind many of its activities. Today, more than at any other time, the WTO needs to be more open concerning what goes on within the organisation, including during the informal meetings between members, if it is to reverse these perceptions.

One way of helping to improve transparency in the WTO would be to introduce measures that would ensure greater public involvement in its processes. This can be achieved by the WTO forging closer ties with the parliaments of its various member countries.[663] Being directly accountable to their constituents, parliamentarians are well-placed to represent their concerns and aspirations better than anyone. As Lacarte has rightly pointed out, "[t]heir daily contact with public opinion and their constantly renewed contribution to national legislation make them ideal actors in these...issues."[664]

It is also critical that the meaning of "consensus" in the WTO context be reviewed. The current interpretation of "silence means consent" is, as mentioned previously, prejudicial to the poorer members, as it ignores their lack of capacity to attend all WTO meetings, thus further perpetuating the isolation of these countries. Serious consideration should be given to an interpretation that requires explicit consent by members regarding a decision before consensus is deemed to exist.

In addition, while there is nothing wrong with holding informal meetings in the WTO, the practice whereby such meetings replace formal ones in taking important decisions

662 Jackson 1967: 153.
663 Steger and Shpilkovskaya 2010: 15.
664 Lacarte 2004: 686.

and formulating policies has to come to an end. As a rule, only decisions taken in formal meetings ought to be regarded as legitimate.

As in the case of transparency, it is equally clear that greater accountability on the part of the WTO is essential. With the switch from the GATT to the WTO has come a new set of binding commitments previously unknown in the multilateral trading system. These commitments cover areas formerly considered the exclusive preserve of domestic law, with the result that there is now a wider range of people and activities directly affected by the policies of the WTO. The wider reach of the WTO has in turn given greater urgency to the need for the organisation to account for its actions.

Greater involvement of civil society in the WTO through NGO participation has been identified as one of the measures that can help increase accountability in the WTO.[665] Already, the WTO has some working relations with numerous NGOs representing a wide range of people and interests affected by its activities, even if only on an informal basis.[666] The advantage of NGOs as representatives of civil society is that they cover almost every area or interest affected by the WTO, and as such are able to fill the gap in representation and accountability often left by government representatives. Thus, the WTO should consider taking steps to accommodate NGO participation on a more formal basis. The main challenge for the WTO, however, will be finding a way to ascertain which of the hundreds of NGOs active in the WTO represent which interests and have the requisite mandate.

It also often happens that when the issue of accountability in an international organisation is considered, the inquiry centres around the employees in the particular organisation. However, in an institution such as the WTO, where members decide on the agenda and procedures to be followed, the real power and influence lie with representatives of the member states. As Kahler observes, any accountability deficits "are more likely the result of choices by the most influential national governments

665 Alexovicova and van den Bossche 2005: 17.

666 Woods and Narlikar 2001: 581. The WTO Secretariat, for example, organises events such as the annual NGO public forum and regular briefings with NGOs. See Elsig 2007: 20.

than a symptom of the dysfunctions of international bureaucracies."[667] Thus, the effort to improve accountability in the WTO should mostly be directed at the member states, rather than the WTO itself.

All of these suggestions will, however, mean nothing in the absence of goodwill and some assistance from developed countries. As Aldonas rightly explains, "[f]or anyone who has visited the developing world, you immediately realize that trade reform and institutional reform is not enough. It is going to take money."[668] The many proposals that have been put forward concerning how the WTO decision-making and other procedures can be improved need the technical and financial support of developed countries to actually work.[669]

The failure to act as a matter of urgency on the part of all concerned puts the very future of the WTO as an organisation in jeopardy. The following remarks by Florestal, warning against an outcome of the Doha Round of negotiations that fails to respond to the concerns of developing countries, aptly sum up the likely consequences of such an eventuality: "...the truly critical period will be the months and years immediately following the end of the round. If, in that time period, developing countries do not at last begin to derive some benefits from their WTO membership, it is doubtful that the organisation will continue to exist as presently configured. Either developing countries will leave *en mass*, and the organisation will thereby lose its representative character, or Members will have to consider the single-undertaking approach and return to the WTO's "two-speed" past – applying different rule sets to developed and developing countries and allowing them to take new commitments at a speed commensurate with their level of development."[670]

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667 Kahler, quoted in Elsig 2007: 24.

668 Aldonis 2007: 38.

669 Panitchpakdi 2001: 434. Even though a number of problems (e.g. waste and corruption) plague some of the technical assistance programmes intended to help developing countries, it would seem that there are sufficient success stories to justify the programmes' continuation. See Florestal 2007: 123.

670 Florestal 2007: 123. The emphasis placed on the question of development in the language of the Doha Round certainly had the effect of raising expectations of a development outcome. Some have gone so far as to say that the language gave rise to legal rights and obligations. See Broude 2007: 237. For further comments on the likely consequences of the failure of the Doha Round negotiations to live up to the promise of a "development round", see Lee 2006: 179. Following the resumption of the negotiations in February 2007 (after they were suspended indefinitely in July 2006) there has been a deadlock over key issues such as farm tariffs and

The likelihood of developing countries abandoning the WTO if their current situation does not improve increases even more in the face of growing doubts in these countries about the ability of the multilateral trading system to actually overcome the various structural challenges confronting it.[671] Furthermore, these countries are increasingly aware that stiffer competition from new WTO members like China, as well as protectionism in the form of non-tariff barriers, pose a serious threat to their current development strategy, which is rooted in exports to their traditional markets.[672]

With specific reference to South Africa, it would do well to copy the example of the US and the EU, which have managed to nurture very useful and successful partnerships between the state and the private sector in dealing with international trade matters. Both the government and the business community in South Africa must reach an awareness that they stand and fall together.

More specifically, the South African government must realise that it needs the financial, informational and organisational resources of the private sector if it is to succeed in representing the country in an effective and competent manner in WTO matters.[673] The private firms, on the other hand, have to understand that the decisions taken in the WTO impact on their businesses in a very direct and real way, and it is essential that they take an interest in what goes on there. At the same time, they must realise that only the government has the mandate to represent their interests in WTO matters.

The government must take the lead by creating an agency dedicated to addressing export trade matters along the lines of the ones found in the US and the EU, with some modifications included to suit the country's particular circumstances. Because the levels of communication between the government and private firms are quite

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agricultural subsidies and, in Cho's words, "[t]hese ...developments have pushed the Doha Round, as well as its development agenda, into a realm of doubt." See Cho (2007: 165).

671 Barral 2006: 219.

672 Barral 2006: 219.

673 However, Horlick cautions against government's over-reliance on industry resources on the grounds that "[t]he ability to bring cases in such situations, or defend them well, becomes more a function of local industries' particular interest in a case, rather than national interest." See Horlick 2006: 221.

rudimentary at this point, the new agency would have to take steps to establish effective and reliable channels of communication between the two sides.

The agency could also undertake regular sector-by-sector studies to familiarise itself with the challenges facing the different sectors, as well as to hold information sessions with industry leaders and other stakeholders in order to exchange ideas on trade policy. The information sessions could also be used to raise awareness about the agency, the kind of services it offers, and to conscientise the private sector about the importance of public-private partnerships in advancing the interests of both sides.

Once it is up-and-running, and with the help and support of the private sector, the proposed agency would put South Africa in a much better position to not only engage successfully in the trade negotiations, but to confidently lodge and defend complaints in the WTO dispute settlement system.

South Africa must also put in place even more intensive measures to build expertise in the various areas of WTO law and practice. One such measure would be ensuring that the same individuals work on the same WTO issues for as long as possible, in order to allow them to become experts in the particular area. A common mistake many developing countries make is to move personnel around between various government departments within very short spaces of time. This denies them the opportunity to acquire specialist knowledge in one particular field, thereby depriving the country of the chance to build up the skills it desperately needs at this time.

In conclusion, WTO members, especially developed countries, need to realise that the efforts aimed at reforming the procedure for decision-making in the WTO are as much about being practical[674] as they are about infusing fairness and justice into WTO practice. In view of the fact that the multilateral trading system controls large amounts of resources and involves the making of decisions pertaining to how those resources are distributed, questions regarding fairness in the way the system is run are legitimate.[675] In the same way that society at the domestic level will, for instance,

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674 Practicality is used here in the sense of ensuring efficiency and effectiveness.

675 See Garcia on the place of justice and fairness in the multilateral trading system. Garcia 2006: 376 – 377.

want to ensure that the income tax and healthcare systems, which involve large amounts of resources and how they are distributed, are operated fairly, there is no reason why the same should not apply to the multilateral trading system.

Last but not least, it is also critical that in undertaking the reform of the WTO and its processes, steps are taken to ensure that decisions regarding whether or not particular measures are desirable are based on the likely impact that the measures will have on a system dominated by a handful of rich countries. Those implementing the reforms must be satisfied that the measures will not, owing to the undue influence of the dominant members, undermine rather than enhance the intended goals behind the reforms.[676]

[676] See Miller's views, as referred to in Barry (2006: 524).

SUMMARY

From the time of its inception after the Bretton Woods conference in 1944, the multilateral trading system now administered by the WTO has been the subject of much controversy and uncertainty, and this has included the way in which participants take decisions. This thesis notes that the problem started with how the WTO's predecessor, the GATT, assumed the role of being the primary global trade regulating body, which was essentially accidental. The GATT was abruptly made to take over the responsibilities initially intended for another institution, the ITO, after the latter failed to come into being as planned. The impromptu manner in which the GATT was thrust into a role it was not designed for inevitably resulted in deficiencies in its ability to carry out its functions. These deficiencies included those found in the GATT decision-making process.

This thesis observes that the GATT decision-making process evolved during a period when participants in the multilateral trading system were almost entirely developed countries from the West, and when most developing countries were still under colonial rule. This resulted in the process paying hardly any attention to the concerns and interests of developing countries. At the same time, the process was lacking in both transparency and accountability, thus making the situation even more difficult for developing countries.

The thesis argues that although one of the main reasons cited for the creation of the WTO in 1994 was to correct the deficiencies found in the GATT, in reality the WTO inherited many of these deficiencies. Among these are aspects of the GATT decision-making process that many developing countries deemed to be prejudicial to their interests. Examples include the continued use of the "green room" meetings in which the majority of important decisions are taken in the absence of most developing countries, as well as the superficial responses to calls to deal with obstacles to effective participation of developing countries in the dispute settlement mechanism.

Against this background of an institution that inherited the flaws of the GATT, an analysis of the WTO and the circumstances in which it finds itself today is made.

Particular attention is given to the procedures for decision-making during the day-to-day operations of the WTO and in the dispute resolution mechanism. The thesis argues that the WTO's failure to deal decisively and effectively with the concerns of the majority of its members in the years that it has been in existence has served to further fuel their frustrations. This failure also risks the organisation becoming redundant due to members leaving it en masse as they become disillusioned about its ability to serve their interests. The thesis notes that already, the WTO is facing a serious threat to its survival, as demonstrated by the recent spate of disruptions during its meetings.

At the same time, attention is drawn to the failures of developing countries and what they need to do to improve their situation in the WTO. Furthermore, throughout the thesis special attention is given to how the problems of developing countries highlighted above have impacted on South Africa, and its responses to them.

A comparison is also drawn between the decision-making process of the WTO and those of other international organisations, in order to determine what lessons the latter can learn from these other institutions. The emphasis is not only placed on the specific methods of decision-making adopted by the various institutions, but also on the flexible manner in which some of the institutions implement the various methods, in order to ensure that ultimately, all their members have a say and are fairly represented in decision-making.

Lastly, some recommendations for the way forward are made.

OPSOMMING

Sedert die totstandkoming met die Bretton Woods konferensie in 1944 van die multilaterale handelstelsel, wat tans deur die WTO geadministreer word, is die stelsel onderworpe aan by kontroversie en onsekerheid en dit sluit in die wyse waarop deelnemers aan die stelsel besluite neem. In hierdie proefskrif word opgemerk dat die probleem reeds ontstaan het met die wyse waarop die voorganger van die WTO, die GATTT, die rol aangeneem het as reguleerder van globale handel. Die GATT moes skielik die verantwoordelikhede oorneem wat bedoel was vir 'n ander instelling, die ITO, nadat laasgenoemde nie soos beplan tot stand gekom het nie. Die onbeplande wyse waarop die GATT gedwing is om 'n rol te vervul waarvoor dit nie ontwerp was nie, het onvermydelik gebreke in die uitvoering van sy verpligtinge tot gevolg gehad. Hierdie gebreke sluit die gebreke in die GATT se besluitnemingsproses in.

In die proefskrif is bevind dat die GATT-besluitnemingsproses ontwikkel het gedurende 'n tydperk waar die deelnemers aan die multilaterale handelstelsel amper in geheel Westerse ontwikkelde lande was en waar die meeste ontwikkelende lande nog onder koloniale beheer was. Dit het tot gevolg gehad dat die proses feitelik geen aandag aan die bekommernisse of behoeftes van ontwikkelende lande gegee het nie. Terselfde tyd, het die proses gebrekkig gegaan aan deursigtigheid en aanspreeklikheid wat dit selfs nog moeiliker vir ontwikkelende lande gemaak het.

In die proefskrif word geargumenteer dat, alhoewel een van die vernaamste redes wat gebied word vir die totstandkoming van die WTO in 1994, die reg stel van die gebreke van die GATT was, die WTO in werklikheid bloot net die gebreke geërf het. Hierdie gebreke van die GATT-besluitnemingsproses sluit in dat ontwikkelende lande die stelsel as benadelend tot hul belange beskou. Voorbeelde sluit in die voortgesette gebruik van die sogenaamde "green room" vergaderings waar die belangrikste besluite in die afwesigheid van die ontwikkelende lande geneem word, sowel as die oppervlakkige wyse waarop gepoog is om struikelblokke in die weg van effektiewe deelname deur ontwikkelende lande aan die handelsgeskilbeslegtingsmeganismes uit die weg te ruim.

Teen hierdie agtergrond van 'n instelling wat die gebreke van die GATT oorgeneem het, word die WTO en die omstandighede waarbinne die instelling homself tans bevind, geanaliseer. Spesifieke aandag word gegee aan die prosedures vir besluitneming in die dag-tot-dag werksaamhede van die WTO en in die geskilbeslegtingsmeganisme. Daar word in die proefskrif geargumenteer dat die WTO se onvermoë om beslis en effektief met die vrese van die meeste van sy lede sedert sy totstandkoming te handel, bygedra het tot groter frustrasie by die ontwikkelende lande. Hierdie gebrek aan optrede dra by tot die moontlikheid dat die WTO as organisasie onnodog mag word as gevolg daarvan dat baie van sy lede die organisasie mag verlaat omdat hulle nie meer oortuig is dat die WTO hulle belange dien nie. Daar word ook in die proefskrif opgemerk dat daar reeds 'n ernstige bedreiging vir die WTO bestaan soos bewys word deur die onlangse reeks ontwrigtings van die vergaderings van die WTO.

Die aandag word terselfde tyd geplaas op ontwikkelende lande en wat hulle aan hul posisie binne die WTO behoort te doen. Daar word voortdurend in die proefskrif besondere aandag gegee aan die wyse waarop die spesifieke probleme van die ontwikkelende lande Suid-Afrika beïnvloed het en hoe Suid-Afrika daarop gereageer het.

'n Vergelyking word getref tussen die besluitnemingsproses van die WTO en ander internasionale organisasies ten einde vas te stel welke lesse die WTO van hierdie ander instellings kan leer. Klem word nie net geplaas op die spesifieke wyses van besluitneming wat deur hierdie organisasiues aangeneem is nie, maar ook op die buigsame wyse waarop sommige van hierdie instellings verskeie metodes aanwend om te verseker dat al hul lede 'n sê in hul besluite het en dat al hul lede billik verteenwoordig is die besluitneming.

Ten slotte word aanbevelings vir die pad vorentoe gemaak.

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