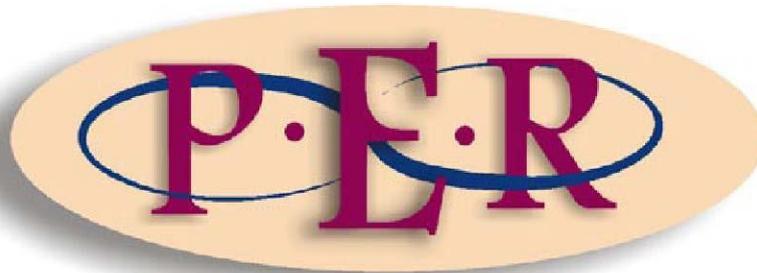


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**REFORMING THE MULTILATERAL DECISION-MAKING  
MECHANISM OF THE WTO: WHAT IS THE ROLE OF EMERGING  
ECONOMIES?**



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## REFORMING THE MULTILATERAL DECISION-MAKING MECHANISM OF THE WTO: WHAT IS THE ROLE OF EMERGING ECONOMIES?

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### 1 Introduction

The multilateral trade system especially that of the World Trade Organisation (WTO), is in a state of flux.<sup>1</sup> This is mainly because of the decade-long Doha Round of trade negotiations, which cannot be concluded. Many of its participants are frustrated<sup>2</sup> and it has been stated that there is an institutional crisis.<sup>3</sup> As a consequence, the WTO is increasingly becoming a bystander as the world's economic powers ignore the global talks and pursue their own bilateral and regional trade pacts.<sup>4</sup> Trying to reach an agreement has been very difficult.<sup>5</sup> The global economic crisis has dampened the appetite of major role players to end the impasse. The crisis has also eroded the strength of the historical superpowers, the United States of America and Europe, who are no longer considered leaders of the multilateral trading system. Instead there is a steady rise to power by emerging economies, especially those of Brazil, Russia, India, China and South Africa. These countries form the now familiar BRICS front and are now considered future economic powerhouses that can contribute to the construction of a new international architecture.

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<sup>1</sup> Dube *Way Forward for the WTO* 5.

<sup>2</sup> Odell "Growing Power" 7.

<sup>3</sup> Jones *Doha Blues* 1-21.

<sup>4</sup> Anonymous 2013 online.wsj.com.

<sup>5</sup> See generally Martin and Messerlin 2007 *Oxford Review of Economic Policy* 347-366.

Multilateral trade-related decisions continue to be made in smaller forums and not in the Doha Round, which includes all the members of the WTO. Regional trade agreements and bilateral trade agreements are accordingly referred to as chief adversaries since they continue to pose the ever-present challenge of fragmentation. Members of the WTO also continue to use other mechanisms like regional trade agreements (RTAs) to fill the trade gaps left by multilateralism. The Doha Round impasse may be said to signal a crisis in the WTO and to point to the need for broad institutional reform.<sup>6</sup> The areas that require reform are mainly those related to the decision-making processes, which are critical because they are intrinsically linked to the legitimacy of the institution.<sup>7</sup> The Doha Round had been earmarked as a 'development round' whose focus is on the developing countries.<sup>8</sup> However, its success depends on the reform called for in this contribution.<sup>9</sup> The following key areas of the WTO decision-making mechanism appear to require urgent reform:

1. Consensus decision-making
2. The WTO as "a single package"
3. The WTO as a member-driven organisation
4. Special and differential treatment for "developing countries"
5. The WTO as "hard law", subject to compulsory dispute settlement

An analysis of these areas is necessary to ascertain their current value in the decision-making processes of the WTO. Linked to this, is the question how these areas of decision-making can be reformed for the benefit of new-generation trade architecture, especially processes dictated by the current influence of the developing countries. The GATT (the General Agreement on Tariffs and Trade) has a good track record but its successor, the WTO, is failing.<sup>10</sup> And all the members of BRICS are signatories to the WTO agreement. The analysis is even more relevant when one considers that the BRICS countries have not signed a legally binding agreement to regulate their relations. The BRICS arrangement is committed to support an open

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<sup>6</sup> Ismail 2009 *World Economics* 109-146.

<sup>7</sup> Dube *Way Forward for the WTO* 2.

<sup>8</sup> Deardorff and Stern 2003 [fordschool.umich.edu](http://fordschool.umich.edu) 12.

<sup>9</sup> Steger 2009 *J Int'l Econ L* 803-833.

<sup>10</sup> Collier 2005 [users.ox.ac.uk](http://users.ox.ac.uk) 1423-1449.

and rules-based multilateral system embodied in the WTO. The BRICS arrangements will for example have to utilise the WTO dispute settlement mechanism in the event of a dispute. Thus, a successful, comprehensive and balanced conclusion of the Doha Development Agenda (the DDA) would be in the best interests of BRICS and other like-minded organisations.

## 2 Historical background

The WTO is a treaty-based organisation that is charged with the supervision and liberalisation of international trade. Its main function is to ensure and guarantee that trade flows as smoothly, predictably and freely as possible.<sup>11</sup> The creation of the WTO can be seen as one dimension of the gradual process of global liberalisation of trade.<sup>12</sup> This organisation started off as the General Agreement on Tariffs and Trade (GATT) in 1947 but was transformed into the WTO on January 1, 1995 under the Marrakech Agreement. The GATT started operating in 1948 and, at the time, negotiations primarily involved three parties: the European Community (EC), the USA and Japan.<sup>13</sup> Some have described these parties as a club for the rich only.<sup>14</sup> This may however not have been a true reflection of the world economy at the time since Japan's economy was struggling and today the organisation's membership now stands at 153. It is the mandate of the WTO to deal with the regulation of trade between participating countries, providing a framework for negotiating and formalising trade agreements, and providing a dispute resolution process aimed at enforcing participants' adherence to WTO agreements. These agreements are signed by representatives of member governments after the process of accession by each of the prospective members. The agreements also need to be ratified by these member governments' parliaments. Most of the issues that the WTO focuses on derive from previous trade negotiations, especially from the Uruguay Round (1986–1994).

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<sup>11</sup> See WTO Date Unknown [www.wto.org](http://www.wto.org).

<sup>12</sup> Hoekman 2011 [www-wds.worldbank.org](http://www-wds.worldbank.org) 2.

<sup>13</sup> Hoekman 2011 [www-wds.worldbank.org](http://www-wds.worldbank.org) 2.

<sup>14</sup> See generally Lawrence 2006 *J Int'l Econ L* 823-835.

The WTO is currently preoccupied with attempts to complete negotiations on the Doha Development Round, which was launched in 2001 with an explicit focus on addressing the needs of developing countries.<sup>15</sup> However, currently the future of the Doha Round remains uncertain with almost all the items on the agenda having missed their deadlines. The deadline for the 21 subjects listed on the work programme has been missed. The deadline was set for 1 January 2005, so the completion of the Round is long overdue. The main challenges centre on free trade in industrial goods and services. The greatest interest for the developing countries is the retention of protectionism, which takes the form of farm subsidies paid to the domestic agricultural sector by the developed nations, especially the EU. Agricultural subsidies continue to distort trade, especially for the poor countries.<sup>16</sup> These subsidies have alienated the developing countries, who are pushing for the swift move to fair trade in agricultural products. This remains a major obstacle to the conclusion of the Round. Agriculture is a key area for developing countries, since most of them are becoming increasingly competitive in the agricultural and value-added processed food products sectors. This point of contention has prevented any progress from being made to launch new WTO negotiations beyond the Doha Development Round. As a result, an increasing number of bilateral free trade agreements and cooperation arrangements have been signed as mentioned before.

There were several rounds of trade negotiation under GATT and one since the formation of the WTO. The Doha Round is the current WTO trade round. The challenge related to the time it takes to complete a round is not unique to the Doha Round. Even the Uruguay Round took nearly a decade to complete, which suggests a stagnant and outdated decision-making system in serious need of reform.<sup>17</sup> The increasing popularity of regional and bilateral trade agreements, and with these the continued erosion of the rules underpinning the multilateral trading system, are indicative of the WTO members' frustrations with the latter. However, the decision-making mechanism cannot be reviewed in the midst of a trade negotiation round, so change can happen only after the conclusion of the current round of trade

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<sup>15</sup> Deardorff and Stern 2003 [fordschool.umich.edu](http://fordschool.umich.edu) 12.

<sup>16</sup> Panagariya 2005 *World Economy* 1277-1299.

<sup>17</sup> Dube *Way Forward for the WTO* 6.

negotiation. The reform required is threefold: the rulemaking and decision-making processes need reconsideration, as do the management of day-to-day activities and the enforcement of negotiated commitments and rules.<sup>18</sup>

### 3 The global financial crisis and multilateral trade governance

The global financial crisis has had an impact on global trade.<sup>19</sup> A lot of tension was generated by the impact of exchange rate management on trade.<sup>20</sup> Even though the International Monetary Fund (the IMF) is chiefly responsible for exchange rate regimes and financial deleverages, the global trading system was affected negatively.<sup>21</sup> In this context, the WTO cannot spread its influence too far. Thus, it created an opportunity for the emerging economies, especially the BRICS countries. In this way these emerging economies have become active in decision-making at the WTO. The distribution of political and economic power still plays an integral role in shaping the agenda of trade negotiations.<sup>22</sup> The Chinese economy has, for example, helped in the economic recovery of both the USA and Europe. At the same time, the experience has helped developing countries to organise and galvanise each other into interest-based coalitions, mainly based on defensive interests that are designed to better gain market access to developed countries.<sup>23</sup> The BRICS countries, especially China, have also taken advantage of their massive markets to influence global trade flows. With all the BRICS countries being part of the WTO, it is expected that the *status quo* will have to change; no more will the developed countries in multilateral trade establishments be the only drivers of multilateral negotiations.<sup>24</sup> However, a strong presence of the developing economies' coalition in the WTO is yet to be seen and experienced. Even among the developing countries themselves, it remains to be determined how development principles can be applied effectively in

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<sup>18</sup> Hoekman 2011 [www-wds.worldbank.org](http://www-wds.worldbank.org) 1-28.

<sup>19</sup> Auboin *Restoring Trade Finance* 16.

<sup>20</sup> Draper *Whither the Multilateral Trading System?* 5-12.

<sup>21</sup> Draper *Whither the Multilateral Trading System?* 5-12.

<sup>22</sup> Baldwin 2009 [onlinelibrary.wiley.com](http://onlinelibrary.wiley.com) 29.

<sup>23</sup> Baldwin 2009 [onlinelibrary.wiley.com](http://onlinelibrary.wiley.com) 29.

<sup>24</sup> Warwick Commission *Multilateral Trade Regime*.

the WTO, in line with countries' diverse definitions of development and in a manner that would best satisfy all members' expectations.

#### **4 Current state of affairs**

At the time of our writing this contribution, the WTO had just appointed Roberto Azevêdo, the Brazilian career diplomat, as new Director-General. The incumbent Pascal Lamy's term is running out and he is not available for another term. That in itself means the organisation will be without an experienced leader to take the Doha Round forward, especially considering that Azevêdo has been accused of scuttling the Round.<sup>25</sup> He has been Brazil's Chief Negotiator for the Doha talks and many fear he will try to impose Brazil's protectionist model on world trade. Brazil's remains one of the most protected economies in the Americas.<sup>26</sup> The new Director-General will need to hit the ground running. This will not be easy under the current circumstances of the Doha Round, which has been in progress for more than a decade. The Round remains in limbo and with it, the multilateral system.<sup>27</sup> The current global economic crisis also means that the major economies of the globe are in the process of prioritising the reparation and recovery of their domestic economies. This has also freed some policy space for developing countries to determine the new course the world economy will take.

It is no wonder that developing countries, especially the emerging economies, are pushing for self-reliance through initiatives like the expected launch of the BRICS bank. The BRICS countries are on the verge of starting a development bank that seeks to wean their economies from relying on the Bretton Woods institutions like the World Bank and the IMF. The bank will also have its own currency. This bank will have a ripple effect on world trade. For instance, the currency of trade among the five BRICS countries will no longer be the American dollar. This means that the predominance of the US dollar in global trade may soon be a thing of the past. If the

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<sup>25</sup> Anonymous 2013 online.wsj.com.

<sup>26</sup> Anonymous 2013 online.wsj.com.

<sup>27</sup> Dube *Way Forward for the WTO* 7.

BRICS bank is successful, it will be logical for most developing countries to adopt the BRICS currency.<sup>28</sup>

This current state of affairs makes it very difficult for WTO members to reach decisions and the Doha Round has fallen victim to this complex new world order. Hoekman identifies three areas that require reform as a result of the *status quo*: rulemaking and decision making, the management of day-to-day activities, and the enforcement of negotiated commitments and rules.<sup>29</sup> The likelihood of the much needed reform happening in the middle of negotiating a trade round is very unlikely. However, this does not discount the strong sentiments calling for reform of the WTO. The hope is that the members of the WTO will be able to finalise the Doha Round and move forward. Reform may then be prioritised to ensure an efficient and more transparent WTO. Henceforth we focus on the priority areas that we perceive to be in need of institutional change.

## 5 Consensus decision-making

Consensus is the primary method of decision-making in the WTO. Voting is the secondary method that can be resorted to in the event of the failure of consensus.<sup>30</sup> Voting is technically possible in the WTO but in practice does not occur.<sup>31</sup> Consensus is very important in the multilateral trading system and is the key to WTO decision-making. Nothing is decided on unless there is consensus. In the history of the WTO, voting has been resorted to only once – during the accession of Ecuador in 1995.<sup>32</sup> By way of operation, and according to the Marrakesh Agreement a decision is made 'if there is no objection by member/s present at the meeting when such decision is taken'. A presumption of consensus is also created in the absence of 'formal objection when matters come up for decision'. There is a need to ascertain whether 'consensus' in its current form is applicable in the WTO of today and other forums like BRICS. It is naturally going to be easy to establish consensus in BRICS since

<sup>28</sup> Anonymous 2012 rt.com.

<sup>29</sup> Hoekman 2011 www-wds.worldbank.org 1-28.

<sup>30</sup> See Article IX:2 of the *World Trade Organisation Agreement* (1994).

<sup>31</sup> Hoekman 2011 www-wds.worldbank.org 1-28.

<sup>32</sup> Hoekman 2011 www-wds.worldbank.org 1-28.

there are only five countries involved. Consensus recorded much success under the initial GATT, where consensus succeeded mainly because of the desire for trade liberalisation. The major role players, like the USA, EU and Japan, were key liberalisers.<sup>33</sup> In total, the founders of GATT were 23 capitalist technocrats whose like-mindedness made it possible to realise a common goal. Trade liberalisation was strongly linked to reciprocity and an understanding that the reduction of tariffs by member states was for mutual benefit.<sup>34</sup> In addition, most of the developing countries had just become independent and were satisfied with their WTO membership without having any strong interest in what was going on. At most, independent African countries identified with their former colonial masters; hence decisions were taken in their support. Thus, the context of consensus under GATT was very different from its context under the WTO.

Furthermore, consensus was more appropriate to GATT than to the WTO, since GATT was characterised as a type of gentleman's club whose main purpose was to settle trade problems rather than to clarify trade law.<sup>35</sup> It has been stated also that the main intention under GATT was never to create a rigid rule book, but to adopt a flexible regime of economic and political realities that would evolve over time.<sup>36</sup>

### **5.1 What is consensus as an international norm?**

Consensus is generally a decision-making process that involves seeking to consider the views of all parties concerned.<sup>37</sup> It includes a process of reconciling any conflicting arguments. This makes consensus decision-making silent on the eventual voting or decision-making rule. Consensus can be applied by establishing unanimity, which could also be unanimity minus one or two members. It could also be either a qualified or a simple majority WTO jurisprudence. The US – Tuna II (Mexico) Case<sup>38</sup>

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<sup>33</sup> Collier 2005 users.ox.ac.uk 1423-1449.

<sup>34</sup> Baldwin 2009 onlinelibrary.wiley.com 29.

<sup>35</sup> Pauwelyn 2005 *Mich L Rev* 2-69.

<sup>36</sup> Osakwe 2011 *Minn J Int'l L* 365-436.

<sup>37</sup> Tijmes-Lhl 2009 *World Trade Review* 432.

<sup>38</sup> WT/DS381/R - *US - Tuna II (Mexico)* Appellate Body Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*.

dispute gives the impression that consensus is reached when there is the absence of sustained opposition to substantial issues by any important party to the concerned interest. This has been interpreted to mean that individual participants have veto power. However, a number of questions remain unanswered, for example:

- What amounts to absence of opposition?
- Who is an important party?
- What qualifies as 'concerned interest' and by whom?

It is important that consensus decision-making not be reinterpreted as a process that must be inclusive and conciliatory. This tempers individual countries' vetoes and leaves room for the Chair of a WTO body to declare consensus even if one member or a minority of countries formally objects. However, this interpretation of consensus works within a very limited scope applicable to the so-called secondary WTO rule-making bodies (Article IX to XII, Marrakesh Agreement). This limited scope is only for organisational matters, like those dealing with the start and conclusion of negotiations, interpretations, waivers and accessions.

This will not be applicable to new agreements or amendments to the WTO treaty, which are classified as primary rule-making. This means that the WTO should be able to conclude a new agreement by "consensus" (as defined above, without automatic vetoes). The Vienna Convention on the Law of Treaties in article 9(2) even refers to a two-thirds majority as the fallback rule for the conclusion of treaties in an international conference.

## ***5.2 What is the effect of consensus on the WTO's membership?***

The discussion above indicates that consensus was key during the GATT years but that its influence has diminished under the WTO. Caution has to be employed so that one does not discredit and blame consensus for the challenges affecting the WTO. It is also important to examine how its application can compromise the integrity of the WTO. For example, consensus may be applied in the WTO without paying attention to the geopolitical dimensions of the 153 members. However,

where there are fewer participants consensus can easily be reached. This said, it would be interesting to know how consensus will feature as a key component of this multi-sector cooperation at the WTO.

What can be gathered from this discussion is the importance of consensus in a relationship of different member states. There are areas that should not be tampered with, especially those regulating the trading system. In the case of the WTO these are the most-favoured-nation treatment principles, the binding tariffs and articles IX and X of the GATT, that form the legislative framework governing decision-making. It is prudent that unanimous consent is required.<sup>39</sup> This means the whole WTO membership needs to assent to whatever changes or amendments are proposed in relation to these provisions regulating the multilateral trading system.

## **6 The "single package" principle**

It is widely believed that all WTO rules must inherently apply to all WTO members on a take-it-or-leave-it basis. This would mean that virtually every item of the negotiation would be part of a whole and indivisible package and could not be agreed on separately.<sup>40</sup> This was applicable to the Uruguay Round, where all concessions were put in a single treaty. With the establishment of the WTO, the "Single Undertaking" also meant that countries wanting to become members of the WTO had to accept the entire agreement package in the Uruguay Round as well as the associated obligations, without exception.<sup>41</sup> However, some of the rules and concessions within the treaty are binding only on some countries' special and differential treatment (SDT) or waivers. This regime of SDT applied during the Uruguay Round is no longer relevant to some members, especially those whose economies have grown since then. Furthermore, this approach is not as clear-cut as the arrangement in BRICS, where there is a strong feeling and realisation that countries like South Africa do not match up with Brazil and India in terms of economic and trade performance. There is even talk that South Africa is trying to

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<sup>39</sup> See Article IX:2 of the *World Trade Organisation Agreement* (1994).

<sup>40</sup> See WTO Date Unknown [www.wto.org](http://www.wto.org).

<sup>41</sup> Wolfe 2009 *J Int'l Econ L* 835-858.

gate-crash the party as an imposter.<sup>42</sup> This raises many questions, such as is South Africa's recent gross domestic Product (GDP) growth and trade performance worthy of being at the party? What has the relative performance of South Africa been in recent times? How does this performance rate *vis-à-vis* BRICS?<sup>43</sup>

This "single package" approach is even more nuanced in the Doha Round, where negotiators adopted the procedural rule that 'nothing is decided until everything is decided'. The effect of this procedural rule means that a deal is closed only when all elements are agreed upon. It is not about what is in the deal or which binding rules are applicable to the specific member states. Developing countries are following a different approach, where different sectors have different levels of cooperation. This kind of flexibility is missing in the WTO's multilateral system.

A number of questions continue to be raised around the 'single package' theme. For example:

- What are the new generation agreements in the WTO going to be?
- Is variable geometry or flexible multilateral integration applicable?

These questions are relevant in that they seek important answers. Even though arrangements like BRICS are a creation outside the WTO, the fact that its members are key drivers in multilateral trade is enough to qualify them as creators of a new generation of trade regimes. It is inevitable that the BRICS countries will venture into agreements that will seek to legitimise their trade relations. In the absence of such agreements, these countries will continue to utilise the WTO dispute settlement mechanism when they face conflict. This has already been experienced when Brazil signalled its unhappiness at poultry tariffs imposed by South Africa.<sup>44</sup> Brazil had threatened to take South Africa to the WTO Dispute Settlement Body to contest the anti-dumping duties that have been levied on its poultry exports.

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<sup>42</sup> Sandrey "South Africa's Way Ahead" 33-37.

<sup>43</sup> Sandrey "South Africa's Way Ahead" 33-37.

<sup>44</sup> See Khuzwayo W and Ginindza B, *Business Report* 'Brazil-SA trade spat avoided'. Available at: <http://www.iol.co.za/business/news/brazil-sa-trade-spat-avoided-1.1586850> Accessed 20/01/14.

The "single undertaking" approach now threatens the ever-increasing membership of the WTO. It forces members to sign up to agreements in areas in which they have no capacity to implement their obligations. The 'single undertaking' approach resulted in the WTO's falling short of recognising that there was no parity among the countries signing up to the Uruguay Round agreements.<sup>45</sup> This approach makes it impossible to reach agreement because countries are at different levels of economic development and follow different approaches in implementing their agendas. The diversity of membership demands that a variable geometry or a measure of flexibility be employed when dealing with member states as individuals and as a collective. Ultimately, the "single package" undertaking at the WTO has created a favourable environment for developing countries to create alternative avenues for conducting trade. It remains to be seen if the BRICS countries are ready to slow down and give up on the gains made during the time of multilateral deadlocks.

## **7 The WTO as a member-driven organisation**

The WTO is typically very distant from the real world. It does not engage actively with other actors. The WTO faces heavy criticism from civil society, academics and industry.<sup>46</sup> This criticism is not just about reaching out to non-governmental organisations (NGOs), it is more about letting NGOs be formidable partners in shaping the discourse pertaining to issues that affect trade as well as in shaping multilateral trade policy going forward.<sup>47</sup> It is important to emphasise that the WTO engages the NGOs and reaches out to them very well. The WTO's annual Open Forum, for example, includes many NGOs. However, it is necessary to ask what role such NGOs play in determining the future of the organisation and its activities. Both the WTO's members and the WTO as an organisation should establish better and more direct lines of communication with the private sector, consumer organisations and sector-specific regulators, agencies and administrators (part of the so-called 'disaggregated' regulatory state). Regional Trade Agreements seem to have

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<sup>45</sup> Oxfam 2000 [policy-practice.oxfam.org.uk](http://policy-practice.oxfam.org.uk).

<sup>46</sup> Hoekman 2011 [www-wds.worldbank.org](http://www-wds.worldbank.org) 1-28.

<sup>47</sup> Piewitt 2010 *Journal of World Trade* 467-488.

successfully addressed this challenge. There is also a high degree of private sector involvement in the sectoral cooperation and working groups.

Realigning the diplomacy of trade negotiation by interacting with other actors like banks, regulators and international organisations would be ideal, especially after the global economic crisis, which has affected global trade flows negatively. The WTO has often been blamed for being full of technocrats that know little about rule-making and how business operates. Examples can be drawn from the complexities of legal line-drawing or classifications by technocrats. In this environment, non-state actors have a role to play in multilateralism. Their involvement will make deal-making easy. It is important to have a better appreciation of the role non-state actors play in the promotion of trade and other related activities.

## **8 Special and differential treatment (SDT) for 'developing countries'**

Special and differential treatment operates on the basis of lumping all emerging and developing economies together into one supposedly homogenous group of 'developing countries' that need the same kind of treatment because they share characteristics, especially in economic development. This is an unfair practice.<sup>48</sup> The rationale behind the system of SDT is to enable trade-offs through issue linkages and to facilitate leverage in negotiations, where such leverage might otherwise not exist.<sup>49</sup> SDT enables developing countries to apply protectionist trade strategies, such as the use of import substitution to promote industrialisation; export subsidies to promote exports; and trade controls for balance of payment purposes.<sup>50</sup> More than 80% of WTO members are "developing countries". Currently the WTO has agreed to more than 155 SDT provisions, which form the "development" element of the WTO.<sup>51</sup> However, one of the major complaints made by developing countries has been that SDT is ineffective in its current form.<sup>52</sup> This is evident in the language

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<sup>48</sup> See generally Ghosh 2010 *World Trade Review* 419-455.

<sup>49</sup> Low 2011 [www.wto.org](http://www.wto.org) 71.

<sup>50</sup> Michalapoulos 2000 [siteresources.worldbank.org](http://siteresources.worldbank.org) 3.

<sup>51</sup> See International Centre for Trade and Sustainable Development and International Institute for Sustainable Development 2003 [www.wto.org](http://www.wto.org).

<sup>52</sup> Hoekman *Operationalizing the Concept of Policy Space* 405-424.

employed in the provisions and the lack of effective sanctions for failure to adhere to the provisions.<sup>53</sup> The language is vague and fails to give firm direction on how SDT should be applied. Rather, it merely encourages the granting of preferences by developed countries to developing partners.<sup>54</sup> The Doha Development Agenda had given hope to poor countries that they would make strides in eliminating poverty.<sup>55</sup>

SDT may have been relevant during the formation of the WTO but things have changed since then. It was employed as a response to the prevailing development orthodoxy among developing countries at the time, where the import-substitution industrialisation model was being actively pursued.<sup>56</sup> In addition, the status of 'developing country' is obtained in the WTO by self-selection. This status cannot be challenged legally or in any form at the WTO's Dispute Settlement Body.

Many WTO members have claimed the "developing country" status. This is despite the increase of diversity among members since the formation of the WTO. However, can the rest of the developing world be put in the same boat as the BRICS countries? It is in the BRICS countries' interest to keep their status as developing countries. Furthermore, this position is detrimental to countries that are really developing and to least-developed countries (LDCs). Remaining in the developing countries group appeals not only to the BRICS countries; small LDCs, too, fear a break-up will risk their collective bargaining power. Thus, they cling together in coalitions that increase their bargaining power.<sup>57</sup> Working together has proved to be valuable to these countries, especially in pushing for the removal of agricultural subsidies by the developed countries.<sup>58</sup>

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<sup>53</sup> Dube *Way Forward for the WTO* 5

<sup>54</sup> Lichtenbaum 2002 *Am U Int'l L Rev* 1004-1032.

<sup>55</sup> Zedillo "Surviving the Doha Round".

<sup>56</sup> Draper and Khumalo *Smoke and Mirrors?* 1-4.

<sup>57</sup> Narlikar *International Trade* 48.

<sup>58</sup> Kwa WTO Members Fight over Developing Countries' Agriculture Markets: An Ominous Outcome for the South? Available at: [http://www.iatp.org/files/WTO\\_Members\\_Fight\\_over\\_Developing\\_Countries\\_2.htm](http://www.iatp.org/files/WTO_Members_Fight_over_Developing_Countries_2.htm). Accessed 20/01/14.

However, it is important to also look at the rationale behind the need to relinquish the SDT arrangement. To do so would be to spread responsibilities equitably, taking differences between countries into account. Discrimination is not only treating similar countries differently; it includes treating different countries in the same way.<sup>59</sup> A similar challenge faces the UN's climate change negotiations. The WTO is not sure about whether it should venture into the area of regulating climate change or whether the problem should rather be left to the United Nations Framework Convention on Climate Change.

The domination of the developed countries has been ameliorated recently, with the developing countries no longer allowing the developed countries to make all key decisions. It is not enough to just provide developing countries with leverage to be able to protect their economies through the special and differential treatment tool.<sup>60</sup> Developing countries were for example at the forefront of the campaign against the inclusion of the Singapore issues in the WTO agenda, successfully arguing that to do so would be to intrude into domestic policy.

## **9 The WTO as "hard law" subject to compulsory dispute settlement**

The creation of the WTO under the General Agreement on Tariffs and Trade (GATT 1947) came at the height of the move towards the legalisation of world politics. This was an age that believed that 'hard law' enforced by binding dispute settlement processes was necessarily "better" law.<sup>61</sup> At the time the world had emerged from two very destructive world wars and the need for a rules-based multilateral system was recognised by many. Under GATT, provision was made for rules to ensure that states did not renege on their tariff liberalisation commitments.<sup>62</sup> However, tariffs are no longer a major impediment to international trade. In addition, the current environment has proven that 'hard law' administered by dispute settlement can actually threaten the flexibility of multilateralism. The hard law characteristic of the

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<sup>59</sup> Pauwelyn 2005 *Mich L Rev* 2-69.

<sup>60</sup> Baldwin 2010 [www.cepr.org](http://www.cepr.org) 1-12.

<sup>61</sup> Abbott and Snidal 2000 *International Organization* 421-456.

<sup>62</sup> Pauwelyn 2005 *Mich L Rev* 2-69.

WTO has made it favourable for loose arrangements like BRICS to prosper. These are flexible arrangements that promote intra-regional or bilateral trade where economic and political desire drives the process. The BRICS arrangement can easily be described as a type of gentlemen's club of emerging economies, where hard law scarcely plays a role. There are no rules and no treaty has been signed. Under Article XXIV of GATT, the WTO requires that countries that enter into preferential arrangements do so using the exceptions provided for under this legal instrument.

It has been stated that the Doha Round requires flexibility in order for it to be resuscitated.<sup>63</sup> The WTO should therefore consider creating some agreements that are not subject to WTO dispute settlement, or even mere guidelines with flexibility for domestic implementation and future adaptation subject to peer review and less adversarial monitoring mechanisms.

There are merits to employing soft or informal law in certain circumstances. The advantages may be greater and more effective than those that come as a result of enforcing compliance with hard law. Many problems in today's networked knowledge society, where technologies change rapidly and uncertainty prevails, are increasingly difficult to address through the rigidity of traditional treaties and formal dispute settlement. Developing countries are well placed to utilise the new capabilities that are made possible by modernisation and technological advancements.

Although violations of these norms are not enforceable in WTO dispute settlement, WTO panels and the Appellate Body can and have referred to them in the interpretation of the WTO treaty. They could also be backed up by Trade Policy Review Mechanism-style monitoring with the possible inclusion of the non-state actors discussed above. Thus, it is important to note that the consideration and use of soft law in multilateralism could bring about changes that could revitalise the Doha Round of trade negotiations.

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<sup>63</sup> Das *Evolving Global Trade Architecture* 3-8.

## **10 Challenges facing emerging economies in reforming the multilateral system**

One of the major findings of this paper is that the multilateral system among developing countries, especially in the BRICS coalition, is just a loose arrangement whose effect on the multilateral system still need to be established. Are developing countries really political and economic powerhouses that can lead the global economy out of a recession and guarantee genuine reform? The BRICS coalition has often been accused of having conflicting interests and of assuming incoherent positions. Are these leading emerging economies ready to share the platform they occupy with other, poorer developing economies that make up part of the group of developing countries in the WTO? An example could be drawn from agriculture, where the interests of food-exporting developing countries such as Brazil are inimical to those of net food-importing developing countries; that is, their positions on agricultural trade are diametrically opposed.<sup>64</sup> African countries, except for South Africa, remain commodity suppliers and import value-added products. Thus, it will be interesting to see if the BRICS countries have what it takes to compromise in the service of the interests of other developing countries.

## **11 Conclusion**

The challenges being experienced by the Doha Round as well as the current global economic challenges have led to start questioning the relevance of some of the founding principles of the WTO. However, this situation presents an opportunity to strengthen the WTO as a trading body.<sup>65</sup> All of the principles discussed are intrinsically linked to one another. For example "single undertaking" and "consensus" require the bundling of agreements and the participation of all parties. SDT and the understanding that the WTO is a member-driven institution recognise that all members need to make a contribution to the multilateral decision-making process, even if they are poor. However, this note attempted to introduce the magnitude of

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<sup>64</sup> Baldwin 2010 [www.cepr.org](http://www.cepr.org) 1-12.

<sup>65</sup> Lamy 2009 [www.wto.org](http://www.wto.org).

this challenge. The realisation of the usefulness of 'soft law' as against hard law' is critical in bringing obligations, legitimacy and certainty to the multilateral trading system. This paper concludes that in as much as these principles were instrumental in shaping the past and present paradigm of the multilateral trade system, new challenges and new environments demand novel ways of dealing with them. This new environment has created a breeding ground conducive to the emergence of new, informal bilateral arrangements in which emerging economies can find common ground in the pursuit of multifaceted cooperation for mutual benefit. As developing countries build momentum, especially those making up the BRICS configuration, and as they become more and more integrated, it is important that the relationship they share should be defined by firm principles. Whether they use the entrenched principles of consensus, single undertaking, SDT, member-driven and a "hard law" or a "soft law" approach is a matter that requires special consideration. However, even though these principles require contextual reform, they are undoubtedly important to the multilateral trading system.

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### List of abbreviations

Am U Int'l L Rev	American University International Law Review
BRICS	Brazil, Russia, India, China, South Africa
DDA	Doha Development Agenda
EU	European Union
GATT	General Agreement on Tariffs and Trade
IMF	International Monetary Fund
J Int'l Econ L	Journal of International Economic Law
LDCs	Least Developed Countries
Mich L Rev	Michigan Law Review
Minn J Int'l L	Minnesota Journal of International Law
NGOs	Non-Governmental Organisation
SDT	Special and Differential Treatment
WTO	World Trade Organisation