

The Consensus Principle of the World Trade Organization and the Interests of Developing Countries: A Legal Evaluation

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Abstract

The article examines the process of decision-making in the WTO. This consideration was provoked by the attribution of the Doha Round Negotiation impasse to the way the WTO makes decision in addition with the spate of criticism against the WTO and the multilateral Trade Regime. The article attempts to answer the question whether the problem with Doha Round Negotiations lies in the way and manner the multilateral decision is made. The alternatives proposed by scholars to replace consensus and the principle of Single Undertaking were considered. The adoption of any of the alternative may not be the lasting solution to the problem of the WTO. A change of decision making process of the WTO particularly a replacement of consensus rule and the principle of single undertaking is not an antidote to the problem of WTO. The emerging issue in the multilateral trade is that of development particularly in the developing and least developed countries. Economic growth of multilateral trade may not mean the same thing as development but how the negative impacts of global trade could be cushioned is the challenge that could bring lasting solution to the problem of the organization.

Keywords: International Law, WTO, Multilateral Trade, Consensus Principle.

Introduction

What is the problem with Doha trade negotiation, a Round with developmental agenda to correct the imbalance in the multilateral trade

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regime in favour of the developing and least developed countries? It has been argued that the problem lies in the decision-making- process of the WTO.³ But the question still remains unanswered. Can the problem be solved if decision making process is changed or reformed? This article therefore seeks to examine the decision making process of the World Trade Organization with a view to answering that question.

WTO adopts consensus principle as a decision-making mechanism from the GATT 1947. Consensus means that, 'no member, present at the meeting when decision is taken, formally objects to the proposed decision'.⁴ It means therefore that before decision can be taken every member present must support such decision since objection from one member can truncate the whole exercise unless compromise is reached between members.

Consensus principle was successful under the GATT. For over forty- seven years, the GATT sponsored eight rounds of trade negotiations that reduced 'average industrial tariffs among its members from 40 percent to just 3 percent'.⁵ The last of the round, Uruguay Round 'drafted the far more ambitious WTO agreement'.

The success of consensus principle under the GATT could be traced to three major reasons. The first one is less membership; the GATT began with just twenty-nine contracting members though its membership increased later to 131 countries at the end of the Uruguay

Round. There is no doubt that the organization must have benefited from its fewer membership at the beginning by taking the advantage to reach decisions easily. When members are not many, consensus is easier to reach but when members are many, objection is common; ally and compromise is difficult to come by. The second reason is as a result of the wide scope of WTO rules. After the Uruguay Round of trade negotiation in 1994 and the establishment of WTO in 1995, the rules of WTO extended into so many areas 'that had been outside' the GATT system. Sensitive areas like intellectual property rights, agriculture, textiles and so on are

³ J Alvarez, *International Organizations as Law Makers* (Oxford University Press 2010) 14.

⁴ Marrakesh Agreement. Article IX. This agreement which was signed in Morocco in 1994 established the World Trade Organization and came to force on first of January 1995.

⁵ K Jones, *Who is afraid of the WTO?* (Oxford University Press 2004) 1-18.

now covered.⁶ To reach compromise in such sensitive areas became a daunting task.

The result is that, the members now have a greater stake in the outcome of the WTO's negotiation, the aftermath of which decision can no longer be reached easily. The incessant failure of Doha Round negotiations since 2001 could be attributed to that factor. The final reason is that the membership of WTO unlike the GATT now consists of members with different needs and interests. Members with competing interests are desirous to have their respective interests protected, thus making decision by consensus difficult.⁷

The result is catastrophic as a wide spread criticism is hurled not only at the decision-making mechanism but to the entire policies of the WTO. The criticism comes from the protesters who are outsiders, as well as as from the members of the organisation, including its officers. In addition to verbal attacks, the organisation finds it difficult to overcome incessant failure that is stultifying Doha Round Negotiations since it began in 2001.

Decision-Making in International Economic Organizations.

The importance of decision-making by an international organisation cannot be over-emphasised. Decision determines not only the path to which an organization must take, but when and how to attain her objectives. Decision-making is therefore of a great benefit to every international organization. In the past,⁸ international organizations made decisions by the rule of unanimity, in order to promote the concept of state sovereignty.⁹ The rule of unanimity promotes 'the fundamental principle of traditional international law'¹⁰ and has three important advantages which are the fact that no states will be forced to submit to obligations without her

⁶ D Acemoglu and J A Robinson, *Why Nations Fail: The Origin of Power, Prosperity?* (Crown Publishers 2012) 12.

⁷ G T Abed and H R Davoodi, *Challenges of Growth and Globalization in the Middle East and North Africa* (IMF 2003) 7.

⁸ Between nineteenth- and early twentieth- century.

⁹ M Bacchetta and M Jansen, *Adjusting to Trade Liberalization: The Role of Policy, Institutions and WTO Disciplines* (WTO Publications, 2003) 10.

¹⁰ D V Verenyov, 'An Analysis of Decision- Making Alternatives for the World Trade Organization' [2010] (51) *Buffalo Law Review*, 427-481.

consent,¹¹ second being the most suitable concept for attainment of sovereign immunity¹² and fast track implementation of decisions when all have consented.¹³

The only exception to the requirement of decision-making by unanimity during that early period was the International Labour Organization (ILO) which used to take decision by majority vote.¹⁴

The method of reaching a decision by majority vote was popular after the Second World War because it was embraced by the new international organizations established after the war¹⁵ which opted to avoid defects that might be encountered by the rule of unanimity. It was discovered that the rule could lead to a state of 'liberum veto' which could make individual member of the organization to 'block a collective decision'.¹⁶ As a result, a number of disastrous consequences might follow the adoption of unanimity rule.¹⁷ First, the exercise of that power by an individual member is capable of reducing 'the efficiency of international collective action'.¹⁸ Second, by giving an individual member to veto a collective decision, unanimity is regarded to be an enemy of international cooperation¹⁹ thus the traditional contention that it is the best concept to attain equality fell by the way side²⁰ to the advantage of the majority rule.

However, the popularity of majority rule itself in decision making was possible at the time because of the spirit of fraternity prevailing among

¹¹ *Ibid.*

¹² *Ibid.*

¹³ D Bhattasali and Others (eds), *China and the WTO: Accession, Policy Reform and Poverty Reduction Strategies* (Oxford University Press 2004) 31.

¹⁴ P V Bossche and I Alexovijc, 'Effective Global Economic Governance by the World Trade Organisation' [2005] (8) *Journal of International Economic Law*, 667-686.

¹⁵ *Ibid.*, 670.

¹⁶ A Boyle and C Chinkin, *The Making of International Law* (Oxford University Press, 2007) 26.

¹⁷ Verenyov (n 8).

¹⁸ A D Grant, 'The World Trade Organisation: Revolution in International Dispute Settlement' [1995] (50) *Dispute Resolution Journal*, 73.

¹⁹ *Ibid.*

²⁰ S Peter and H Van Houte, *Legal Issues in International Trade* (Kluwer Academic Publishers Group 1990).

member states coupled with the influence of the United States and its democratic tenets.²¹ That notwithstanding, the majority rule based system endeavors to address the weaknesses inherent in the rule of unanimity. First, it increases ‘the institutional efficiency of international collective action’²² by ensuring ‘a pre-determined majority of members’ to support concerted decision²³ while ‘considerably diminishing the risk’ that an individual member could truncate the decision making process.²⁴ Second, the likelihood of being outvoted in decision making process could actuate a move by the ‘obstinate participants’ to lead a mutual process for rapprochement.²⁵

Thus persuasion becomes the universal tool of decision making as most institutions founded after Second World War 11 adopted the majority rule and weighted voting formulas.²⁶ A great example is the United Nations [‘UN’] Charter²⁷ which jettisoned the rule of unanimity²⁸ in total embrace of majority vote²⁹ while simultaneously retaining the ‘one nation –one vote system’.³⁰

The recent practice by some international organizations shows a departure from decision-making by majority vote to decision-making by consensus.³¹

²¹ P Collier, *The Bottom Billion: Why the Poorest Countries are Failing and what can be done about it* (Oxford University Press, 2007) 28.

²² Grant (n 16).

²³ L D Bhagirath, *The Current Negotiations in the WTO: Options, Opportunities and Risks for Developing Countries* (Zed Books, 2005).

²⁴ S Charnovitz, ‘Should the Teeth Be Pulled? An Analysis of WTO Sanctions’ in D L M Kennedy and J D Southwick, *Political Economy of International Trade Law: Essays in Honor of Robert E Hudec* (Cambridge University Press, 2002).

²⁵ *Ibid.*

²⁶ E Perez, ‘Making WTO’s Dispute Settlement practicable for Developing Countries’ (2003) Paper presented at the Graduate Institute of International Studies, Geneva, 7th March.

²⁷ U N CHARTER, <<http://www.un.org/Overview/Charter/contents.html>> accessed 15 May 2023.

²⁸ B L Das, *The WTO Agreements: Deficiencies, Imbalances and Required Changes* (Zed Books, 1998).

²⁹ UN Charter 1945, art 18 para. 3 [‘Decisions [of the General Assembly] . . . shall [generally] be made by an affirmative vote of nine members . . .

³⁰ UN Charter 1945, art. 18 para. 1 [Each member of the General Assembly shall have one vote”]; Art.27,para 1 [‘ Each member of the Security Council shall have one vote”].

³¹ P Gallagher and Others, *Managing the Challenges of WTO Participation: 45 Case Studies* (Cambridge University Press, 2005).

Despite the preference for decision-making by consensus, decision-making by majority rule is not in extinction in the international plane, one can then say with certitudes that both mechanisms [decision-making by consensus and by majority vote] are the means by which international organizations do reach decisions today.

However, decision-making process differs from one international organization to another. Even where the same procedure is employed by two organizations, there is great likelihood that the approach to attain the procedure might differ. For example, decision-making by majority vote can be reached through one nation-one vote and can also be achieved through weighted voting system.³² The difference in decision-making process is because each organization adopts the best method suitable to achieve her objectives. With difference in objectives, there could be no uniformity in decision-making process.

Some of the international organizations with weighted voting system are the World Bank, the International Monetary Fund (IMF) and the European Economic Community (EEC). All those organizations give voting power to member countries, according to the size of their respective quotas. Each member country of the International Monetary Fund has 250 basic votes, with a weighted voting of one additional vote for each part of a country's quota, equivalent to US\$100,000.

The World Bank's voting system is similar to that of the International Monetary Fund; each member has 250 basic votes, plus one additional vote for each share of capital equivalent to US\$100,000 subscribed.³³

The EEC's weighted voting is different from that of the International Monetary Fund and the World Bank in the sense that it does not set forth the specific standards by which it can determine the voting strength of its members but instead consider a number of factors such as population, political reality, historical precedent and economic strength.³⁴

³² S Zamora, 'Voting in International Economic Organisations' [2000] (74) *American Journal of International Law*, 566.

³³ E S Mason and Robert E Ansher, *The World Bank since Breton Woods* (The Broking Institution, 1974) 17.

³⁴ W N Gianaris, 'Weighted Voting in the International Monetary Fund and the World Bank' [1990-1991] (14) (4) *Fordham International Law Journal*, 910-945.

While it can be argued that weighted voting breed's inequality among member states, the argument in its favour lies in the equilibrium between 'equality before the law' and 'equality of participation and responsibilities'.³⁵ The maxim is he who pays the piper dictates the tune. Consequentially, members who contribute more by acquiring more shares should have more voting power. In addition, the major contributors to the World Bank and International Monetary Fund demanded for a strong voice in the decision making process so as to safeguard their investment in the system.³⁶

Decision-Making Process in the WTO

It is important at this juncture, to explain the meaning of decision-making in order to avoid misconception, because words have different meanings depending on the context in which they are used. Decision-making here means the process by which WTO reaches decision or resolve issues concerning the conduct of trade negotiations and the management of the trading system. It does not include dispute settlement since that is judicial and not managerial. Therefore, the issues to be discussed here are the Consensus principle, the Single Undertaking and the "Green room".

The Rules for Decision-making

The Marrakesh Agreement³⁷ establishing the WTO provides that the WTO shall continue the practice of decision-making by consensus, which was the usual practice under the General Agreement on Tariffs and Trade [GATT]³⁸ 1947. Article IX of the WTO makes it clear that the process of decision-making is by consensus.

³⁵ Z Stephen, 'Voting Rule in International Economic Organizations' [1999] (74) (3) *American Journal of International Law*, 566-608.

³⁶ Stephen (n 33).

³⁷ The World Trade Organization is responsible for development of an integrated multilateral trading system in the world. It came in to existence officially on Jan 1 1995 under the Marrakesh Agreement which replaced the General Agreement on Tariffs and Trades [GATT] <http://www.wto.org/english/docs_e/legal_e/04-wto.pdf> accessed 15 May 2023.

³⁸ General Agreement on Tariffs and Trade is a set of multilateral trade agreements negotiated under the UN Conference on Trade and Employment by 23 countries at Geneva in 1947 [to take effect on Jan1 1948] It was later replaced by the WTO in 1995.

The term consensus is defined as the absence of objection by any member present to the 'proposed decision'.³⁹ This definition has been described as 'obstruction principle'⁴⁰ this is because it suggests the likelihood of no decision, if there is objection, whether the objection is meaningful or not. It creates a room in which one member can veto or block the proposed decision by its objection.

One must note that consensus is not the same as unanimity since consensus does not take in to consideration the views of those who are absent at the meeting.⁴¹ Presence at the meeting is essential for a member of the WTO to be involved in the decision-making process. If there is no consensus because there is objection to the proposed decision, an alternative provision is made for voting⁴² as recourse to settle the stalemate and determine what would be the decision of the organization. In spite of the statutory provision for recourse to voting as antidote to resolve objection and determine the fate of proposed decision, WTO decisions are taken by consensus and not by voting.⁴³

Decision-making by the Ministerial Conference and the General Council shall be taken by majority of the votes cast. For that purpose, each member of the WTO shall have one vote. This gives equality to each state without favoritism to anyone. To prevent a situation by which EU can take advantage of other members who are not members of the Union in decision making process of the WTO, the agreement provides that in circumstances where the European Communities use their right to vote, they shall be entitled to "a number of votes equal to the number of their member states" in the WTO.⁴⁴

When a proposal to amend the provisions of the Marrakesh Agreement or the Multilateral Trade Agreement is submitted to the Ministerial

³⁹ Marrakesh Agreement, art XI.

⁴⁰ G Claude, 'Inconsistency between Diagnosis and Treatment' [2005] *Journal of International Economic Law* 291, 295.

⁴¹ H Jiaying, 'The Role of International Law in the Development WTO Law' [2004] *Journal of International Economic Law*, 143.

⁴² Marrakesh Agreement, art IX.

⁴³ A Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO: Procedures and Practices* (Cambridge University Press, 2001) 10.

⁴⁴ Marrakesh Agreement, art IX.

Conference, the members of the conference shall decide by consensus whether or not to refer the proposed amendment to the whole members for acceptance.⁴⁵ That is a preliminary decision that must be made first before anything else is done. If consensus is not reached on the issue within 90 days after the proposal has been formally received by the Ministerial Conference, then, the Ministerial Conference will resort to voting and decision shall be made by a two- third majority of the members.⁴⁶

Decisions to adopt interpretations of the WTO Agreement including those multilateral trade agreements and decisions to grant a waiver to a WTO member shall be taken by three-fourths of the members⁴⁷ while the Ministerial Conference approves the accession agreement by a two-third majority of the members.⁴⁸

Amendment is important in any organization. It corrects the existing past rules to meet the standard of the present but despite the usefulness of amendment it should be done with caution.⁴⁹ This is because amendment can be categorized into two. Some are fundamental, some are minor. The fundamental amendment can affect the existing rights and obligations of the members while the minor one does not have such effect. It is understandable and reasonable that the WTO agreement takes note of that fact in deciding when and how the amendment accepted by the members will take effect.⁵⁰

The agreement provides that any amendment that is of nature that would alter the rights and obligations of members shall become effective to only members who have accepted them notwithstanding the fact that such amendment has been accepted by the two-third of the whole members of the WTO.⁵¹ The consequence of that provision is that enforcement of an amendment on any member will depend upon the

⁴⁵ *Ibid*, art X: 1.

⁴⁶ *Ibid*.

⁴⁷ *Ibid*.

⁴⁸ *Ibid*, art XII:2.

⁴⁹ B M Hoekman, *Development, Trade, and the WTO* (World Bank, 2002).

⁵⁰ S Lester and Others, *World Trade Law; Text, Materials and Commentary* (Hart Publishing, 2008) 22.

⁵¹ Marrakesh Agreement, art X:3.

member's consent and the consent of such member will be determined by its acceptance of the amendment. It also means that there is no uniformity as to when an amendment is binding on all members of the organization.⁵²

A situation in which the effect of an amendment to members will not take place at the same time, if some members have not accepted them may not augur well for the organization if such an amendment touches the fundamental objectives of the organization. As a result of that consciousness, the agreement gives power to the Ministerial Conference to look in to the nature of the amendment and decide whether any member who has refused to accept the amendment within the time specified should be allowed to withdraw or still remain a member. In such instance, to remain as a member, the consent of the Ministerial Conference is needed.⁵³ In any case, [either to withdraw or to remain] the Ministerial Member shall take decision by a three-fourths majority of the members.⁵⁴

That power given to the Ministerial Conference to determine the fate of members who have not accepted the amendment is 'extraordinary' and it is capable of influencing the decision of the WTO members, although the Ministerial Conference may not likely be disposed to exercise such power regularly.⁵⁵

This is also because the issue of WTO interpretations is not designed to be taken regularly.⁵⁶ It must be taken with utmost caution. In fact, for forty-eight years of GATT, there were only six amendments and since 1995 when the WTO came into existence, there has not been any amendment or a single interpretation.⁵⁷

⁵² M J Schoenbanum and C. Mavroidisr, *The World Trade Organization-law, Practice and Policy* (Oxford University Press, 2004) 34.

⁵³ Marrakesh Agreement, art X.

⁵⁴ *Ibid.*

⁵⁵ *Ibid*, art 11.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

‘Green Room’, as a Path to Trade Negotiations

The Trade Negotiations Committee oversees the conduct of the WTO negotiation under the authority of the General Council.⁵⁸ However to ease the burden of decision making process among members, various techniques have been devised to reduce the number of participants in the deliberation.⁵⁹ One of such devices is an informal negotiation called Green Room negotiation which is adopted to ensure speedy decision-making. By this system, small group of members meet in an unofficial atmosphere to decide on contentious issues and once agreement is reached among them, they attempt to forge consensus by selling the outcome to the whole members as if the decision was made by all. There shall be a full discussion on the criticism and justification of this system in the next part.

Another means by which WTO facilitates decision making is by resorting to a plurilateral agreement⁶⁰ instead of a multilateral agreement which is a better strategy to compromise decision making when consensus could not be reached. In addition, members can negotiate to reduce their binding duties or their commitments in the WTO Agreement provided that the diversity of individual participating countries is taken in to consideration.⁶¹

The Single Undertaking as Mechanism of Negotiations

Single Undertaking is a principle of decision making in the WTO which endeavors to treat all separate items of negotiation as a whole to the extent that consensus must be reached on all items for there to be an agreement.⁶² Its use in the global trade dates back to the launch of the Kennedy Round in the 1960s⁶³ and reverberates in the Tokyo Round⁶⁴

⁵⁸ Doha Ministerial Declaration, para 46. <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm> accessed 15 May 2023.

⁵⁹ B M Hoekman and Others, *The Political Economy of the World Trading System* (Oxford University Press, 1995) 11

⁶⁰ They have few signatories and members of the WTO who are not its signatories and are not bound by its provisions.

⁶¹ GATT, art XXVIII.

⁶² P Gallagher, *Guide to Dispute Settlement* (Kulwar Law International, 2002) 19.

⁶³ R Wolfe, ‘The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor’ [2000] (12) (4) *Journal of International Economic Law*, 835-858.

⁶⁴ C Grastek and P Sauve, ‘The Consistency of WTO Rules: Can the Single Undertaking be squared with variable Geometry?’ [1997] (9) (4) *Journal of International Economic*

and the Uruguay Round negotiations.⁶⁵ In fact, the principle of Single Undertaking was explicitly enunciated in the ministerial declarations that launched both Uruguay and Doha Rounds.⁶⁶ The consequence is that ‘a seemingly inconsequential issue of value to only a few countries’ could stultify the whole decision making process and ‘prevent subsequent negotiations to go forward’.⁶⁷

Critiquing the Decision-Making Process

WTO has attracted a lot of criticism not only on how its decisions are reached but for its decisions and what it stands for. The criticism comes not only from the outsiders but also from the insiders; the academicians, the non-governmental organizations, the developing country members and the protestors who used to carry placards and protest outside at every trade meeting.

Criticism of such magnitude should not be treated with levity. There is hardly any trade meeting of the WTO without a protest from the public: The 1998 Geneva and 1999 Seattle Conferences were disrupted by massive street protests staged by a non-ranged of non- governmental groups .In 2001, the organization sought for refuge at Qatari capital of Doha [as the venue of the meeting] where protest is not usually allowed but the result was the same.⁶⁸ The Cancun conference of 2003 followed the same pattern

Law, 837-864; A Lanoszka, ‘The Promises of Multilateralism and the Hazards of Single Undertaking: The Breakdown of Decision Making within the WTO’ [2012] (16) *Michigan State Journal of International Law* 655-675 – the author notes that ‘the principle of Single Undertaking was first adopted in the attempt to clean up the muddled post-Tokyo Round set of Codes that GATT Contracting Parties could pick and choose to sign in’.

⁶⁵ R Wolfe, ‘Global trade as a Single Undertaking: The role of ministers in the WTO’ [1996] (6) *International Journal of Trade*, 691-711.

⁶⁶ The 1986 Punta del Este Declaration that launched Uruguay Round provides that ‘The launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a Single Undertaking’ while paragraph 47 of the Doha Ministerial Declaration states: ‘the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking’.

⁶⁷ Taniguchi, ‘The WTO Dispute Settlement as Seen by a Proceduralist’ [2009] (6) *Cornel International Law Journal*, 1.

⁶⁸ J Lacarte-Muro and G Pettina, ‘Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench’ [2015] (9)(1) *Journal of International Economic Law*, 89.

but with a bizarre tragedy when a Southern Korean farmer, Kun Hai Lee, took his life in protest of the WTO policies.⁶⁹

Similarly, the WTO meeting in Hong Kong in December 2005 witnessed what could be described as the closest protest to the venue of the WTO conference as protesters forced themselves to the venue of the conference.⁷⁰ Furthermore, there was huge protest in front of the WTO headquarters on the 1st of October 2005⁷¹ and on the 17th of April 2007; the Pakistan farmers could not but carried placards against the WTO.⁷² From Quarter in 2001 to Potsdam in 2007, it is protest galore against the WTO by the people.

But protest could have been ignored as unavoidable if there is progress in the organization; at least, on the pretext that wide acceptability without any opposition from some quarter is a mirage. However, this is not so for the WTO, decision becomes difficult to reach as every negotiation turns to deadlock and the organization could not forge ahead.

The Doha Round negotiations in November 2001 could not produce result, the 2003 Cancun negotiation which was “intended to forge concrete agreement on the Doha Round objectives collapsed after four days” because there was no agreement on farm subsidies and access to markets,⁷³ the Geneva negotiation in 2004, Paris and Hong Kong trade talks in 2005, Geneva in 2006 and Potsdam in 2007 all ended in failure and consensus could not be reached on Doha “Development” Agenda till 2010. What a catalogue of failure to a round that was scheduled to conclude in 2005!

Alternative to Consensus

Many scholars have posited that the greatest problem of the WTO is the consensus rule in Article IX which could lead to paralysis and deadlock.⁷⁴

⁶⁹ Q Asif, ‘Interpreting WTO Agreements for the Development Objective’ (2016) paper presented at ICTSD conference <http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf> accessed 16 May, 2023.

⁷⁰ *Ibid.*

⁷¹ M E Footer, ‘Developing Country Practice in the Matter of WTO Dispute Settlement’ [2001] (35)(1) *Journal of World Trade*, 55-98.

⁷² *Ibid.*

⁷³ Footer (n 69).

⁷⁴ John H Jackson, ‘The WTO “Constitution” and Proposed Reforms: Seven “Mantras” Revisited’ [2001] (4) *JIEL*, 67.

In addition, the consensus rule and the principle of Single Undertaking have been fingered as the major cause of the Doha stalemate.⁷⁵ But consensus is not without an alternative in the WTO; if consensus could not be reached, the members should resort to voting but the likelihood of voting its self is a mirage due to this principle of consensus.⁷⁶

Effort is made to facilitate consensus by using the Green room meetings where only few members could participate. Unfortunately, developing countries which could have benefited greatly from the voting system because of their number become the victims of consensus principle as many of them are excluded from the Green room meetings.

Apart from the fact that the exclusion of developing countries is a constrain to participation in decision making, the working pattern of the WTO contributed immensely in alienating developing countries from decision making of the organization. The ignorance of the working rules of the WTO and lack of financial capacity to meet obligations and commitments in the organization are problems that put developing countries at the backside of decision making.⁷⁷

Consequentially, the decision making of the WTO through consensus attracts a lot of criticism from all and sundry as it has been discussed in this article. Perusing the criticism hurled against the WTO, it is obvious that the standard for assessing the organization on the issue of decision making is concepts of governance. The decision making process is said to be undemocratic, not transparent and unfair. It is alleged that WTO is not accountable to the people and the organization violates sovereignty of the members.⁷⁸

Indeed, this study has article that consensus- based decision- making system could not be said to be democratic nor transparent or fair; meetings

⁷⁵ C Ehlermann and L Ehring, 'Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organisation Adequate for Making, Revising and Implementing Rules on International Trade?' [2005] (8) *JIEL*, 51.

⁷⁶ Marrakesh Agreement, art IX.

⁷⁷ U H Manni and M N Ibn-Afzal, 'Effect of Trade Liberalization on Economic Growth of Developing Countries: A Case of Bangladesh Economy' [2012] (1) (2) *Journal of Business, Economics and Finance*, 22.

⁷⁸ H M Herath, *Impact of Trade Liberalization on Economic Growth of Sri Lanka: An Econometric Investigation* (Wayamba University Press of Sri Lanka 2010) 34.

are held in the green rooms without the participation of developing member countries who are longing to be involved in such meetings.⁷⁹ Everything about the meeting from invitation to agenda and proceedings remains mysterious to majority of the members and yet once decisions are made from such meetings, the next thing is to sell the outcome to the whole members through consensus and “peer pressure”⁸⁰ in form of proposal and all agenda must be taken as Single Undertaking.

Though the developing members could oppose such proposal, the fear of open confrontation to policies supported by developed countries makes them to remain silent.⁸¹ The outcome of silence means there is no objection and therefore consensus is reached but it is doubtful if that process is democratic.

That is not to say the system is of no value. To reach an agreement between many members with diverse interests in an organization like the WTO may be a difficult task if not impossible. Consensus is essential as a ploy to reach agreement and that can be achieved through compromise. If members are divided in to smaller units, it will be easier for them to reach an agreement. That is the idea of the Green room meetings but the criteria for selection of participants for the meetings and the secrecy which used to attend the meeting leave much to be desired. Furthermore, if the principle of single undertaking is not employed, the whole idea of a unified multilateral rule may give way to plurilateral rule as members indulge in ‘cherry-picking’ as to which agreements to adopt and the one to shun.

It has been suggested by Cottier and Takenoshita that the adoption of weighted voting could be antidote to the problem of reaching consensus in the WTO negotiations.⁸² Hufbauer explains further that the adoption of a weighted formula is inevitable if obstacle to decision making placed

⁷⁹ F Jawara and A Iawa, *Behind the scenes at the WTO the real World of internal negotiations the lesson of Cancun* (Zed Books .2003) 201.

⁸⁰ For example, peer pressure was a key element in forging agreement in Doha.

⁸¹ A H Khan, ‘The Impact of Trade Liberalization on Economic Growth in Pakistan’ [2012] (3) (1) *Interdisciplinary Journal of Contemporary Research in Business*, 13.

⁸² T Cottier and S Takenoshita, ‘Decision-Making and the Balance of Powers in WTO Negotiations: Towards Supplementary Weighted Voting’ in S Griller (ed) *At the Crossroads: The World Trading System and the Doha Round* (Springer 2008) 181.

by the majority of members who have not more than 10% of the world trade will be checked.⁸³

The truth of the matter is that voting whether weighted or not will produce result but the outcome of the result is widely a “win-or-lose” situation which is not the best for an international organization like WTO where all members are supposed to be equal. Consensus is preferable because there is no “losers who lose face”.⁸⁴ Decisions that emanate from such system tends to be of wide acceptance and mutually satisfactory.⁸⁵

In addition, the criticism that consensus system allows developed countries to control the process could be mitigated by the developing countries making use of the power they have to block any proposal which is inimical to their interests.⁸⁶ In this respect, findings have shown that the developing countries have changed their lukewarm attitude during the early years of the WTO and are now participating very well at the General Council meetings.⁸⁷

However, in order to improve the quality and legitimacy of their participation, the developing countries must carry their citizens along through effective consultation and periodic feedback. The approach of India on this issue calls for attention of all developing countries:

. . . the rights and obligations arising from the WTO agreements and to evolve the position of India in negotiations under the Doha Work Programme, . . . Periodically, seminars, workshops and symposia are held with interested parties with the cooperation of the WTO secretariat, the UNCTAD, ESCAP and other multilateral bodies, universities and industry associations. The Department of Commerce website has a separate web page on “India and WTO”, which explains provisions of the agreements and updates the stakeholders on the status of the negotiations . . . India has been engaged in

⁸³ G C Hufbauer, ‘Inconsistency Between Diagnosis and Treatment’ [2005] (8) *Journal of International Economic Law*, 291, 296.

⁸⁴ Dmitri Vereyou, ‘Vote or Lose; an analysis of decision-making Alternatives for the WTO’ [2003] (17) *Buffalo Law Review*, 13.

⁸⁵ C Dieter and L Ehring. ‘Is the consensus Practice of the WTO Adequate for making, Revising and Implementing International Trade?’ [2005] *Journal of International Economic Law*, 51.

⁸⁶ A H Khan, ‘The Impact of Trade Liberalization on Economic Growth in Pakistan’ [2012] (3) (1) *Interdisciplinary Journal of Contemporary Research in Business*, 13.

⁸⁷ *Ibid.*

the WTO negotiations to ensure that its core concerns and interest continue to be adequately addressed at each stage of the negotiations.”⁸⁸

What amuses one is that despite the opposition against consensus, proposal for its replacement only comes from the academics while majority of developing and developed countries still want it to be retained.⁸⁹ When a proposal was made for the establishment of a WTO parliamentary body to be a decision making organ which will include representatives from parliaments of all WTO members as well as WTO delegates, the WTO Secretariat and political representatives in national capitals,⁹⁰ developing countries went against it contending that addition of a parliamentary dimension would add to their burden, exacerbating the disadvantages that they already face in WTO negotiations on account of resource asymmetries.⁹¹

Though the parliamentary body is expected to foster deliberation among parliamentary representatives at the international level so that they can better understand the constituencies of the WTO and national trade related policies,⁹² there is no doubt that the proposal is not the most appropriate means of resolving the issue of transparency. Another proposal was made for an Executive Board like that of International Monetary Fund to facilitate consensus among members and be a substitute to the most dreaded green room meetings.⁹³ It was argued in support of the proposal that it could be the most promising mechanism for balancing decision-making efficiency and the requirement of consensus⁹⁴ but opposition also came from the developing countries who argued that ‘decision- making needs to be

⁸⁸ D Greenaway and Others, ‘Trade Liberalisation and Growth in Developing Countries’ [2002] (67) *Journal of Development Economics*, 229-244.

⁸⁹ *Ibid.*

⁹⁰ G Shafer, ‘Parliamentary Oversight of WTO Rule-making; the Political, Normative, and Practical Contexts’ [2004] (7) *Journal of International Economic Law*, 629.

⁹¹ C C Wigwe and I F George, ‘Developing Trade Liberalisation and Removal of Inequalities in the West African Market: An International Economic Law Dimension’ [2018] (4) (1) *Port Harcourt Journal of Business Law*, 1-10.

⁹² Loayza and Others, ‘Macroeconomic Volatility and Welfare in Developing Countries: An Introduction’ [2010] (21) (3) *World Bank Economic Review*, 343-357.

⁹³ D Irwin, ‘Comparative Advantage in International Trade: A Historical Perspective’ [2000] (22) (4) *Journal of the History of Economic Thought*, 515-516.

⁹⁴ G Feketekuty, *International Trade in Services: An Overview and Blueprint for Negotiations* (The American Enterprise Institute, 2000).

member-driven rather than board-led, and that the full participation of members is fundamental to trust and confidence in the functioning of the organization as a member-driven-intergovernmental entity.⁹⁵

Another suggestion was made by Jackson, who advocated a critical mass decision making, an idea which could prevent members from blocking consensus 'when a critical mass of countries supports a proposed change',⁹⁶ The corollary is that the outcome of decision making emanating from critical mass action can hardly be different from that of the weighted voting because some members shall loose face though unlike weighted voting the ground of being discarded will not be on trade strength.

In the light of all this, it can be opined that the position of members to retain consensus is reasonable in the sense that it could stabilize the competing interests in the WTO; Developing countries will be protected from the possible block vote from developing countries and the developing countries will not be presented with irreversible accomplishment as it is presently being done. The fact is that consensus protects all members depending on the situation and the status they find themselves.⁹⁷

Conclusion

A change of decision making process of the WTO particularly a replacement of consensus rule and the principle of single undertaking is not an antidote to the problem of WTO. No doubt, the present decision making process needs to be reformed; total replacement is not a guarantee of public acceptability or an easy ride to consensus in the present or future WTO negotiations.

The emerging issue in the multilateral trade is that of development particularly in the developing and least developed countries. Economic growth of multilateral trade may not mean the same thing as development but how the negative impacts of global trade could be cushioned is the challenge that could bring lasting solution to the problem of the

⁹⁵ *Ibid.*

⁹⁶ S P Anderson and N Schmitt, 'Non-tariff Barriers and Trade Liberalization' [2003](41) (1) *Economic Inquiry*, 80-97.

⁹⁷ P Auerbach, 'Firms, Competitiveness and the Global Economy' in M Mackintosh and Others (eds) *Economics and Changing Economies* (London Open University) 393-425.

organization. Reaching agreements through weighted voting will not solve the problem. The Doha Round launched in November 2001 is capable of transforming the organization if the aspects of the negotiations that touch development to the developing and less developed countries are not distorted. The essence of global trade governance is to create an enabling environment for countries to grow and develop. If all members of the WTO are committed to this ideal, to arrive at consensus will not be difficult despite divergent interests.