

The World Trade Organization (WTO) Decision – Making Process: A Critique

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1.1 INTRODUCTION

The World Trade Organization (WTO) came into existence in 1995 as the successor of the General Agreement on Tariff and Trade (GATT), which has operated provisionally since 1947. It is concerned with international economic policy co-operation. Hence, it provides a common institutional framework for the conduct of trade relations among its member states.¹

The agreement establishing the WTO created a permanent forum for member governments to address issues affecting their multilateral trade relations as well as to supervise the implementation of the trade agreements negotiated in the Uruguay Round. Consequently, the WTO apart from being a permanent trade policy formulator that creates rules for world trade which are binding under International law, is also a guardian of the agreements. Thus, the WTO oversees the implementation, administration and operation of the multilateral trade agreements (i.e. GATT, General Agreement on Trade in Services (GATS) and Agreement on Trade – Related Aspects of Intellectual Property Rights (TRIPS) which are legally binding on the members and the plurilateral Trade Agreements which are effective at the plurilateral level for those WTO members that have signed the agreements.

Decision making in the GATT and WTO has been criticized over the years as lacking both internal and external transparency, as well as favouring the larger members². These critics have also attributed lack of progress in negotiation within the WTO in recent years to the absence of transparency in the WTO decision making process. The objective of this paper is to critically examine the WTO decision making process against the background of these fierce criticisms. This paper is divided into 2 parts; Part one examines the WTO as an institution (i.e. its establishment, scope, status, functions, structures and governments). The second part examines the decision making process in the WTO and a critique of the process.

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¹ Article II of the 1994 Marakesh Agreement Establishing the World Trade Organisation

² See J. Schott and J. Watal, Decision-making in the WTO (Institutre for International Economics, Washington DC, March 2000).

1.2. Establishment, Scope and Structure of the WTO

1.2.1 Establishment

The WTO was established in 1995 at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) which started in September 1986 at Punta del este and ended in Marrakesh in December 1994. It was a follow-up to the Kennedy and Tokyo Rounds of GATT negotiations that had ended in 1973.³

However, the journey which led to the establishment of the WTO was a long and tortuous one. It started way back in 1944, when representative countries attending the Bretton Woods Conference established the basic organizational setting for post war economy designed to further macroeconomic stability. Specifically, the framework that arose created three organizations – The International Trade Organization (ITO) the World Bank and the International Monetary Fund (IMF).⁴

Furthermore, in 1946 at the February meeting of the United Nations Economic and Social Council (ECOSOC) a resolution was passed to prepare a convention to establish a world organization whereby signatory countries would join in an effort to establish ground rules for trade among them. This effort was to be embodied in the International Trade Organization. Consequent upon this resolution, the Havana Conference was held between November 1947 and March 1948 where the charter for the International Trade Organisation (the Havana Charter) was drafted. At an earlier meeting of the Havana Conference held in Geneva from April to October 1947, multilateral tariff negotiations took place and with unusual foresight the General Agreement on Tariffs and Trade (GATT) was drafted concurrently with the ITO Charter.⁵ However, as the Havana Charter, which would have established the ITO was never ratified, the GATT Agreement⁶ remained the only multilateral instrument governing International Trade.

³ See Oluwagbemi D.A, *Nigeria and the world Trade Organization (WTO). The Crisis of binding multilateral organization vs. Local Realities* in Guabadia DA, and Akper, P.T. Foreign Investment. Promotion in a Globalised World, NIALS, 2006 Lagos.

⁴ Malonis Jane, E. Encyclopedia of Business, 2nd Ed. London Gate Group 2000) p. 1033

⁵ Moens, Gabriel/Gilles Peter *International Trade and Business Law, Policy and Ethics* (London: Cavendish Publishing Pty Ltd, 2000) at 443

⁶ Twenty-Three countries signed what was called a Final Act authenticating the text of the GATT (55 UNTS: TIAS 1700, See also Jackson J.H, *World Trade and the Law of GATT* (Virginia, USA: The Dobbs) Merryl Co. Inc 1969 Chaps. 3 and 4

An informal organization was built around the GATT to discuss trade-related issues and negotiate further liberalization. Eight rounds of talks were held of rising complexity and difficulty, but each at advancing tariff reduction.⁷ At the eight trade round – (the Uruguay Round), which was the most extensive of all, 116 nations decided its final Act would further liberalise trade measures and establish a permanent structure – the WTO to manage international trading procedure and protocols. Ministers meeting in Marrakesh, Morocco in 1994 agreed to the final Act. Concurrently, in Marrakesh, a majority of GATT countries approved the establishment of the WTO as permanent organization with permanent enforceable rules.⁸

The WTO was established to regulate international trade. Its key principle is non-discrimination; and ensuring that similar products from different countries are to be treated the same way. As an international organization, the WTO has a sound and accountable legal basis because all WTO members have ratified the WTO Agreements. Currently, the WTO has nearly 153 members including China, the European Community, Japan, USA together with many developing countries, accounting for over 97% of World Trade⁹

1.2.2 Scope

Article II of the WTO Agreement makes provision for the scope of the WTO. It provides:

“The WTO shall provide the common institutional framework for the conduct of trade relation among its members in matters related to the agreements and associated legal instruments included in the Annexes to the main agreements”.

Article II (2) provides that the WTO Agreements and Annexes thereto are binding, on all members of the organization.¹⁰

⁷ Nolan, C.J. *The Greenwood Encyclopedia of International Relation* (London: Greenwood Publishing, 2002) Vol. 4 at 610-11

⁸ Ibid.

⁹ See the WTO Website www.wto.org

¹⁰ See Article II, WTO Agreement 1994.

1.2.3 Status

Article VII provides for the legal status of the organization. The WTO is a legal person with legal capacity as may be necessary for the exercise of its functions. Its officials are accorded privileges and immunities similar to those stipulated in the convention and privileges of the Specialized Agencies approved by the General Assembly of the United Nation on 21 November 1947¹¹

1.3 Functions of the WTO

The functions of the WTO are clearly spelt out under Article III of the WTO Agreement.

1. The WTO shall facilitate the implementation, administration and operation, and further the objectives of the WTO Agreement and of multilateral Trade Agreements and shall provide the framework for implementation, administration and operation of the plurilateral Trade Agreements.
2. The WTO shall provide the forum for negotiation among the members concerning their multilateral trade relations in matters dealt with under the Agreements in the Annexes to the WTO Agreement. The WTO may also provide a forum for further negotiations among its members concerning their multilateral trade relations and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.
3. The WTO shall administer the understanding and rules and procedures governing the settlement of disputes (hereafter referred to as the “Dispute Settlement Understanding” or “DSU”) in Annex 2 to the WTO Agreement.
4. The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the “TPRM”) provided for in Annex 3 to the WTO Agreement.
5. With a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate as appropriate with the International Monetary Fund and the International Bank for Reconstruction and Development and its associated agencies.¹²

¹¹ See Article VII, WTO Agreement 1994

¹² See Article III, WTO Agreement, 1994.

In summary the primary functions of the WTO that can be distilled from the foregoing are to implement the final Act of the Uruguay Round, carry out the administrative functions required thereunder; administer the Dispute Settlement Process established under the WTO; provide a forum for the negotiation of trade relations among members; periodically assess the trade policies of member states under the Trade Policy Review Mechanism and Cooperate, as necessary with the IMF and the World Bank.¹³

1.4 Structure of the WTO

Article IV of the WTO Agreement makes comprehensive provisions for the establishment of the structure of the organization. The organs established included the Ministerial Conference, the General Council; the Dispute Settlement Body; the Trade Policy Review Body, Specialized Councils, subsidiary bodies, standing committees and a fairly elaborate secretariat. These organs are considered briefly below;

1.4.1 Ministerial Conference

There shall be a ministerial conference composed of representatives of all the members, which shall meet at least once every two years. The ministerial conference shall have authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a member in accordance with the specific requirements for decision – making in the Agreement and in the relevant Multilateral Trade Agreements.¹⁴

1.4.2 General Council

There shall be a General Council composed of representatives of all the members which shall meet as appropriate at intervals between meetings of the Ministerial Conference. The General Council shall also carry out the function assigned to it by the Agreement. The General Council shall establish its rules of procedure and approve the rules of procedure for the committees.¹⁵

¹³ See Ekpo, E.O: The World Trade Organisation Telecommunications Agreement: Progress and Implications for Africa, *Modus International Law and Business Review*, June 1999 pages 62-63.

¹⁴ Article IV(1)

¹⁵ Article IV (2)

1.4.3 Dispute Settlement Body

The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement body, provided for in the Dispute Settlement Understanding. The Dispute Settlement Body may have its own chairman and shall establish such rules of procedure, as it deem necessary for the fulfillment of those responsibilities.¹⁶

1.4.4 Trade Policy Review Body

The General Council shall convene as appropriate to discharge the responsibilities of the Trade Policy Review Body provided for in the TPRM. The Trade Policy Review Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfillment of those responsibilities.¹⁷

1.4.5 Specialized Councils

There shall be a council for trade in goods, a council for trade in services, and a council for trade-related aspects of intellectual property rights (hereinafter referred to as the “Council for TRIPS”), which shall operate under the general guidance of the General Council. The Council for Trade in Goods shall oversee the functions of the General Agreement on Trade in Services (hereinafter referred to as “GATS”). The council for TRIPS shall oversee the functioning of the Agreement or Trade Related Aspects of Intellectual Property Rights (hereinafter referred to as the ‘Agreement on TRIPS’). These councils shall carry out the functions assigned to them by their respective agreements and by the General Council. They shall establish their respective rules of procedure subject to the approval of the General Council. Membership in these councils shall be open to representatives of all members. These councils shall meet as necessary to carry out their functions.¹⁸

1.4.6 Subsidiary Bodies

The councils for Trade in Goods, Trade in Services and for TRIPS shall establish subsidiary bodies as required. These subsidiary bodies shall

¹⁶ Article IV(3)

¹⁷ Article IV (4)

¹⁸ Article IV(5)

establish their respective rules of procedure subject to the approval of their respective councils.¹⁹

1.4.7 Standing Committees

The Ministerial Conference shall establish a Committee on Trade and Development, on balance of payments restrictions and on budget, finance and administration, which shall carry out the functions assigned to them by the WTO Agreement and by the Multilateral Trade Agreements, and any additional functions assigned to them by the General Council, and may establish such additional Committees with such functions as it may deem appropriate. As part of its functions, the Committee on Trade and Development shall periodically review the special provisions in the Multilateral Trade Agreements, in favour of the least developed member countries and report to the General Council for appropriate action. Membership of these committees shall be open to representatives of all members.²⁰

The bodies provided for under the Plurilateral Trade Agreement shall carry out the functions assigned to them under these Agreements and shall operate within the institutional framework of the WTO. These bodies shall keep the General Council informed of their activities on a regular basis.

1.4.8 The Secretariat of the WTO

The WTO Agreement provides for its governance by a Secretariat established under Article VI, which provides inter alia that:

- (1) There shall be a secretariat of the WTO (hereinafter referred to as “the secretariat”) headed by a Director – General.
- (2) The Ministerial Conference shall appoint the Director General and adopt regulations setting out the powers, duties and condition of service and term of office of the Director General.
- (3) The Director-General shall appoint the members of staff of the Secretariat and determine their duties and conditions of service in accordance with regulations adopted by the Ministerial Conference.
- (4) The responsibilities of the Director General and of the staff of the Secretariat shall be exclusively international in Character. In the discharge of their duties, the Director General and the Staff of the

¹⁹ Article IV(6)

²⁰ Article IV(7)

Secretariat shall not seek or accept instructions from any government or any other authority external to the WTO. They shall refrain from any action, which might adversely reflect on their position as international officials. The members of the WTO shall respect the international character of the responsibilities of the Director – General and of the staff of the secretariat and shall not seek to influence them in the discharge of their duties.²¹

1.5 Decision – Making in the WTO

Ordinary Decisions

Decision making in the WTO is normally done by consensus. Article. IX: 1 states “*the WTO shall continue the practice of decision making by consensus followed under GATT 1947*” Following GATT custom, consensus is deemed to exist if no member present at the meeting when the decision is taken formally objects to the proposed decision, for instance, when adopting a Ministerial Declaration, the chair will ask if there are any objections to the adoption of the Declaration and if there are none, will announce that the Declaration has been adopted. Therefore, any member, no matter how large or small an economy, has the ability to block any decision by explicitly objecting to a proposed decision²²

However, consensus is not the only option for decision – making. If consensus cannot be reached, Art IX:1 provides for majority voting on the basis of one member one vote. Therefore, unlike in the World Bank System of weighted voting, all members of the WTO vote in equal proportion”.²³ In addition to the normal decision making process, the WTO also provides for special procedures in certain situations including interpretations, waivers and amendments which are discussed below:

1.5.1 Interpretations;

The Ministerial Conference and the General Council are the sole WTO bodies empowered to issue authoritative binding interpretations of the WTO Agreement and Multilateral Trade Agreement. The Conference and the

²¹ Article VI WTO Agreement, 1994.

²² Lester S. and Mercurio B. et al, *World Trade Law; Texts Material and Commentary*, 2008 (Hart Publishing), Oxford & Portland, Oregon, p.86

²³ During such votes, the EU is entitled to have a number of votes equal to the number of member states which are members of the WTO.

Council may not, however use their authority to issue interpretations that would undermine the amendment provisions set out in Article X.²⁴

Interpretation may be adopted by a vote of three-quarters of WTO members and must be based on a recommendation from the Council charged with overseeing the relevant agreement.²⁵ Interpretations of the Agreements are binding on the entire WTO members and may affect the right and obligations of the members.

1.5.2 Waivers

A member government seeking a waiver of a Multilateral Trade Agreement Provision must first submit the request to the council in charge of the agreement in question. The council has up to 90 days to consider the request and submit a report to the General Council.²⁶

If a member seeks the waiver of an obligation that is subject to a transition period, such as most of the obligations in the TRIPS Agreement or is subject to stage implementation such as certain tariff cuts, there must be a consensus to grant the waiver. Waivers for other types of obligation must be agreed to by three quarters of the members if a consensus is not reached within 90 days after the request is received.

A decision granting a waiver must include a statement of exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver and the termination date of the waiver. If a waiver is granted for more than one year, the General Council will conduct an annual review to determine whether the exceptional circumstances continue to apply and whether the country granted the waiver has met any terms and conditions for which the General Council may extend, modify or terminate the waiver.²⁷

1.5.3 Amendments

The process of amending one of the WTO Agreement is complicated and difficult. Under Article X, any member may propose that the Ministerial

²⁴ Article IX:2 of the WTO Agreements

²⁵ For example, the *General Council may issue an interpretation of the Agreements* on safeguards only on the basis of a recommendation from the council on Trade in goods.

²⁶ Article IX:3

²⁷ Article IX:4

Conference considers amending the WTO Agreement or a Multilateral Trade Agreement. In addition, each of the three subordinate council for trade in goods, services and TRIPS may submit proposals to amend the multilateral trade agreement it oversees.

During the first 90 days that the Ministerial Conference considers a proposed amendment or any extended period, the Conference decides, any decision by the conference to submit the proposed amendment to the members for acceptance shall be taken by consensus. If the conference cannot reach a consensus during this period, two-thirds of the members may vote to submit the proposed amendment to the members for possible ratification.²⁸

The Article also sets out rules concerning the manner in which certain types of amendments may enter into force and which members would be bound by those amendments.²⁹

A Critique of Decision Making Process in the WTO

Generally, decision making in the GATT and WTO has been criticized over the years as lacking both internal and external transparency; as well as favouring the larger members.³⁰

The first problem has to do with 'consensus building' which has increasingly become more difficult and often broken down easily. By its very simplistic nature, consensus decision making engenders so many bottlenecks. In addition, progress is slow and sometimes stalls due to the necessity of getting all members to agree on the proposed decision. It is also not hard to imagine that pressure is sometimes applied to recalcitrant members not to block 'progress'. As a result, consensus decision making has sometimes proven controversial in practice.

Drawing conclusion from the above, trade experts³¹ claim that the consensus - decision making process has 'broken-down' in recent years.³²

²⁸ Article X:1

²⁹ See General Article X:2-7

³⁰ i.e. the rich Industrial Nations

³¹ Schott J and Wattal J, *Decision - Making in the WTO* (Institute for International Economics, Washington D C March, 2000).

According to them, the two main causes are expansion in WTO membership which makes consensus building difficult and more participation by developing countries in all of the negotiated agreements as a part of a 'single undertaking'. This requirement means that developing countries have to be committed to substantial reforms of their trade barriers and trade practices than they did in the past. In sum, more active participants, representing more diverse interests and objectives have complicated WTO decision making.

Pedersen³³ offers some insight into the decision – making process, details recent changes to the process made in light of criticisms and evaluates the potential effectiveness and impact of alternative forms of decision – making. Ultimately, the author concludes that while the WTO process needs to continue to improve, the alternatives either are not well supported by the members or will not bring additional benefits or transparency. He noted;

“The WTO decision making process remains imperfect and will certainly require further improvement in the future. However with internal transparency and decision making now important systemic issues on their own right, there is little doubt that they will continue to be scrutinized by the membership as well as by observers of the WTO”.

And challenging critics of the WTO decision making process he opined:

Experience at the WTO shows that the legitimacy of the decision making process requires that there is an adequate degree of open-ended and inclusive activity to balance other more restrictive consultative processes, critics of the WTO often appear to single out the decision making process of the organization as uniquely exclusive in comparison with other international

³² Ibid, According to them this problem emerged long before the WTO ministered in _____. Indeed, it was evident. Of the birth of the WTO itself

³³ Pedersen P. Norgood (a WTO secretariat employee): 'The WTO Decision Making Process and internal Transparency' (2006) 5(1) World Trade Review 103-31

*institutions. All international
intergovernmental organizations face
challenges when it comes to finding the right
balance between efficiency and inclusiveness.*

The views expressed by the authors mentioned above sums up the precarious nature of the decision making process in the WTO as presently constituted.

CONCLUSION

This article examined the decision making process in the WTO. Under GATT the principle of consensus worked very well because it was not abused. Developed countries, particularly the United States and the European Community drove the GATT agenda and negotiations but did not insist on full participation by all countries. In turn, developing countries did not block progress in trade talks – both because the accords posed few demands on them and because they made huge gains from the commitments of the developed countries extended to them on a most-favoured nations basis.

However, the WTO which still maintained the consensus principle of GATT encountered serious problems because of increase in membership and increased participation in negotiations of developing countries. And most importantly, because of lack of commitment on the part of developed countries to faithfully implement agreements earlier negotiated.

We conclude that the widespread discontent among the developing countries which scuttled the Seattle Ministerial Conference and which is already threatening the Doha Development Agenda (DDA) will persist, except serious efforts are made at reforming the decision making process in the WTO.