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Articles

Page

- **Construing the Right of Access to Justice in Nigeria – Drawing Inspirations from the Decisions of the European Court on Human Rights** *Adekoya, C.O.* 247-270
- **Impact of Climate Change on Africa and the Challenges of the Dispute Resolution Regime under the Kyoto Protocol** *Akanbi Muhammed Mustapha; Imam-Tamim Muhammad Kamaldeen, Abdulrazak Abdulkadir Owolabi* 271-303
- **Exemptions of the Vulnerables from Capital Punishment in Nigeria: Expanding the Frontiers** *Akingbehin, E. O.* 305-322
- **Security Interests in the United Kingdom: The Significance of a Charge** *Bamgbose, Ademola J.* 323-341
- **The Crime of Genocide under the ICC Statute and the Genocide Charges against President Omar Al-Bashir of Sudan** *Garba Abubakar* 343-361
- **Aspects of the Nigerian Legal System: Customary Law (As Tradition) in a Modern Society** *Layonu, Abiodun I.* 363-402
- **Legal Issues Concerning Euthanasia in Nigeria: A Call for Law Reform** *Lokulo-Sodiye, Jadesola O.* 403-424
- **Privatisation of Prisons: Solution to Prison Congestion in Nigeria?** *Olaniyan, K.O.* 426-444
- **The Changing Face of Terrorism in Nigeria: The Boko Haram Insurgence and the Role of Domestic and International Laws** *Olukolu Yomi* 445-466
- **Light in the Midst of Obscurity: Birth of the International Criminal Court and the United States Opposition** *Omoragbon, Kevwe Mary* 467-488
- **Interests of Developing Countries and the Consensus Principle of the WTO** *Osuntogun, Abiodun Jacob* 489-519

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Contents

	Page
<i>Editorial Board/Editorial Committee</i>	vii
<i>Guide to Authors</i>	viii
<i>Editorial</i>	ix
Articles	
Construing the Right of Access to Justice in Nigeria – Drawing Inspirations from the Decisions of the European Court on Human Rights <i>Adekoya, C.O.</i>	247-270
Impact of Climate Change on Africa and the Challenges of the Dispute Resolution Regime under the Kyoto Protocol <i>Akanbi Muhammed Mustapha Imam-Tamin Muhammad Kamaldeen, Abdulrazak Abdulkadir Owolabi</i>	271-303
Exemptions of the Vulnerables from Capital Punishment in Nigeria: Expanding the Frontiers <i>Akingbehin, E. O.</i>	305-322
Security Interests in the United Kingdom: The Significance of a Charge <i>Bamgbose, Ademola J.</i>	323-341
The Crime of Genocide under the ICC Statute and the Genocide Charges against President Omar Al-Bashir of Sudan <i>Garba Abubakar</i>	343-361
Aspects of the Nigerian Legal System: Customary Law (As Tradition) in a Modern Society <i>Layonu, Abiodun I.</i>	363-402
Legal Issues Concerning Euthanasia in Nigeria: A Call for Law Reform <i>Lokulo-Sodipe, Jadesola O.</i>	403-424
Privatisation of Prisons: Solution to Prison Congestion in Nigeria? <i>Olaniyan, K.O.</i>	426-444
The Changing Face of Terrorism in Nigeria: The Boko Haram Insurgence and the Role of Domestic and International Laws <i>Olukolu 'Yomi</i>	445-466

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Omoragbon, Kevwe Mary

467-488

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Osuntogun, Abiodun Jacob

489-519

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Interests of Developing Countries and the Consensus Principle of the (WTO) World Trade Organization

Osuntogun, Abiodun Jacob *

Abstract

In this Article, I have attempted an examination of the process of decision-making in the WTO. This consideration was provoked by the attribution of the Doha Round Negotiations impasse to the way the WTO makes decision in addition with the spate of criticisms against the WTO and the multilateral Trade Regime. I have attempted to answer the question whether the problem with Doha Round Negotiations lies in the way and manner the multilateral decision is made. I consider the alternatives proposed by scholars to replace consensus and the principle of Single Undertaking. I am not persuaded that the adoption of any of the alternative is 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.

Introduction

What is the problem with Doha trade negotiations, a Round with developmental agenda to correct the imbalance in the multilateral trade regime in favor of the developing and least developed countries? It has been argued that the problem lies in the decision-making process of the World Trade Organization (WTO)¹. But the

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¹ Debra PS, "The Future of the WTO: The case for Institutional Reform" V12 [2009] *Journal of International Economic Law*, 803-833. [noting that 'lack of progress in the Doha Round of multilateral negotiations is a sign that all is not well with the decision-making and rule making machinery of the WTO'.]

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 WTO with a view to answer that question.

The 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”.² 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”.³ The last of the rounds, 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 Uruguay Round⁴. There is no doubt that the organization must have benefited from its fewer membership at the beginning by taking the advantage to reach decisions easily⁵. 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 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, textile etc are now

² Marrakesh Agreement of the WTO .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.

³ Kent J, *Who is afraid of the WTO?* (2004, Oxford University Press), 1-248.

⁴ The membership has increased to 150, see

“Understanding the WTO: Organization, Whose WTO is it anyway?”, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm [last visited 25th of August 2012].

⁵ Ibid.

covered.⁶ To reach compromise in such sensitive areas became a herculean 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.

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 not only from the protesters who are outsiders but from the members of the organization, including its officers. In addition to verbal attacks, the organization finds it difficult to overcome incessant failure that is stultifying Doha Round Negotiations since it started in 2001.

This paper consists of five parts; the first part being introduction. The second part deals with a brief comparative overview of decision-making in international organizations. The essence of that comparative appraisal is to deduce whether there could be a lesson to learn from those organizations in our attempt to suggest the best approach for the WTO in its decision-making process.

The third part which is divided into two sections attempts to look at the rules of the WTO in relation with decision-making process. To this end, I examine the procedural rules, the consensus principle, the negotiation technique and the principle of Single Undertaking in the first section while the second section critically appraises the decision-making process.

In part four, I examine whether there can be an alternative to consensus as a means of decision-making in the WTO while conclusion is in part five.

⁶ See 'Challenges before the World Trade Organization' a serial culled from BBC and published by *The Nigerian Tribune*, a newspaper in Nigeria on 17th April 2007.31.

Decision-Making in International Economic Organizations

We cannot over emphasize the importance of decision-making to an international organization. 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 past⁷, international organizations made decisions by the rule of unanimity, in order to promote the concept of state sovereignty⁸. Since the rule of unanimity promotes sovereignty, it is compatible with 'the fundamental principle of traditional international law'⁹. That decision-making process ensures three important advantages to states. One, that no states will be forced to submit to obligations without her consent¹⁰, second, it is the most suitable concept for attainment of sovereign immunity¹¹ and three, it fast tracks implementation of decisions when all have consented¹².

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.¹³ 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 war¹⁴ which opted

⁷ Between nineteenth- and early twentieth- century.

⁸ See, Woolsey TD *Introduction to the study of International Law* [Charles Scribner, NY1885] 30 noting that 'In international law ... a sovereign State is the equal of every other and is not subject to external control.'

⁹ See Dmitri V, "Vote or Lose: An Analysis of Decision- Making Alternatives for the World Trade Organization", V51 [2003] *Buffalo Law Review*, 427-481.

¹⁰ Ibid. See also Henry G S, *International Institutional Law* [UK, Sijthoff & Noordhoff 1974, 337] noting that 'many sates will participate more readily in an organization if they are sure that they will not be outvoted'.

¹¹ See Wellington K, *Voting Procedures in International Political Organizations* [New York, Columbia University Press, 1947, 8]. He said 'with respect to the doctrine of unanimity, its presence in an international organization has customarily been based ... on the theory ...that the unanimity rule is best assurance for the maintenance of equality'.

¹² Henry S supra note 10 at 327 noting that 'The implementation of decisions will be easier when they have been supported by all Members''.

¹³ Peter B V & Iveta A, "Effective *Global Economic Governance by the World Trade Organization*", V8 [2005], *Journal of International Economic Law*, 667-690-686.

¹⁴ Ibid at 670.

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 members of the organization to 'block a collective decision'¹⁵. As a result, a number of disastrous consequences might follow the adoption of unanimity rule¹⁶. First, the exercise of that power by an individual member is capable of reducing 'the efficiency of international collective action'¹⁷. Second, by giving an individual member to veto a collective decision, unanimity is regarded to be an enemy of international cooperation¹⁸ thus the traditional contention that it is the best concept to attain equality fell by the way side¹⁹ 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 member states coupled with the influence of the United States and its democratic tenets.²⁰ 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'²¹ by ensuring 'a pre-determined majority of members' to support concerted decision²² while 'considerably diminishing the risk' that an individual member could truncate the decision-making process²³. Second, the likelihood of being outvoted in decision-making

¹⁵ See Inis L C *Swords into Plowshares: The Problems and Progress of International Organization*, [New York, Random House, 1965, 111] [stating that 'no organizational decision could be reached if any member of the organization dissented'].

¹⁶ Dmitri V. supra note 9 at 434-436.

¹⁷ Ibid.

¹⁸ Ibid. See also David K, "A new Stream of International Law Scholarship", V7, [1988] *Wisconsin International Law Journal* 42, noting 'By reducing international cooperation to the lowest common denominator of sovereign accord, unanimity emasculates the institution and sabotages cooperation'.

¹⁹ Dmitri V. supra note 9 at 436.

²⁰ Peter B supra note 13 at 670.

²¹ Dmitri V. supra note 9 at 437; See also Kennedy supranote 16 at 46 [Majority voting allows for more powerful and decisive institutional action'].

²² Ibid. ['Member states- may require a higher proportion of affirmative votes to adopt a decision'].

²³ Dmitri V, supra note 9 at 438.

process could actuate a move by the 'obstinate participants' to lead a mutual process for rapprochement²⁴.

Thus persuasion becomes the universal tool of decision-making as most institutions founded after Second World War II adopted the majority rule and weighted voting formulas²⁵. A great example is the United Nations ['UN'] Charter²⁶ which jettisoned the rule of unanimity²⁷ in total embrace of majority vote²⁸ while simultaneously retaining the 'one nation –one vote system'.²⁹

The recent practice by some international organizations shows a departure from decision-making by majority vote to decision-making by consensus³⁰. 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

²⁴ Ibid.

²⁵ Ibid at 437.

²⁶ U. N. CHARTER, available at

<http://www.un.org/Overview/Charter/contents.html> [last visited 22nd of October 2012.]

²⁷ See, Clyde E, *International Government*, 3rd ed, [Ronald Press, UK, 1957, 192]. Noting that 'The rule of unanimity was abandoned for all organs of the United Nations'.

²⁸ U.N. Charter art. 18, para. 3 ['Decisions of the General Assembly]... shall [generally] be made by an affirmative vote of nine members] See also Henry Schemers, supra note 12 at 327 noting that 'With only a partial exception for the Security Council...all U.N decisions are taken by majority vote'.

²⁹ U.N. Charter art. 18, para. 1 ["Each member of the General Assembly shall have one vote"] Id. Art.27, para.1 ["each member of the Security Council shall have one vote"].

³⁰ For the problems with the majority rule, see Frederic L K, *International Organisations in their Legal Setting: Documents, Comments and Questions 2nd*, [St Paul, MN, 1977, 154]. Noting that

"the tyranny of the majority [occurs when] the vital interests of the minority ... are given little consideration before a decision by the majority vote is taken". See also Dmitri V, supra note 9 at 438 ["It leads to abuse by the majority. First, by empowering a majority to hold the rest of the membership to its decisions, it produces a tyranny of the majority and alienates minorities which may include members that are essential to successful implementation of these decisions".]

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 system³¹. 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.³² 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 considers a number of factors such as population, political reality, historical precedent and economic strength.³³

While it can be argued that weighted voting breeds inequality among member states, the argument in its favour lies in the equilibrium between 'equality before the law' and 'equality of participation and responsibilities'³⁴. 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

³¹ See Stephen Z "Voting in International Economic Organizations" V74, [1980] *American Journal of International Law* 566.

³² Edward SM & Robert EA, *The World Bank since Breton Woods*, [the Broking Institution, Washington, D.C 1973, 645.

³³ William NG, "Weighted Voting in the International Monetary Fund and the World Bank", V14[1990]*Fordham International Law Journal*,910-945.

³⁴ See Zamora Z, *supra* note 31, 566-608.

International Monetary Fund demanded for a strong voice in the decision-making process so as to safeguard their investment in the system³⁵.

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 resolves 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".

(A) The rules for decision-making

The Marrakesh Agreement³⁶ 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]³⁷ 1947. Article IX of the WTO makes it clear that the process of decision-making is by consensus.

The term consensus is defined as the absence of objection by any member present to the "proposed decision".³⁸ This definition

³⁵ Ibid.

³⁶ The World Trade Organization is responsible for development of an integrated multilateral trading system in the world. It came into existence officially on Jan 1 1995 under the Marrakesh Agreement which replaced the General Agreement on Tariffs and Trades [GATT]. Can be down loaded at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf [last visited 22nd of October 2012].

See Article XI.

³⁷ 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.

³⁸ Marrakesh Agreement supra note2. Article XI. See also Alex A, 'The WTO Decision-Making Process: Problems and Possible Solutions' Working Paper available at: http://works.bepress.com/alex_ansong/4 [last visited 29th December 2012].

has been described as “obstruction principle”³⁹ 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.⁴⁰ 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 voting⁴¹ 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.⁴²

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.⁴³

When a proposal to amend the provisions of the Marrakesh Agreement or the Multilateral Trade Agreement is submitted to the Ministerial Conference, the members of the conference shall decide by consensus whether or not to refer the proposed amendment to the whole members for acceptance.⁴⁴ That is a

³⁹ Gary C, “Inconsistency between Diagnosis and Treatment”, *V8* [2005], *Journal of International Economic Law* 291, 295.

⁴⁰ Jiaying H, “The Role of International Law in the Development WTO Law”, *V14* [2004], *Journal of International Economic Law* 143, 150.

⁴¹ Marrakesh Agreement *supra* note 2. Article IX.

⁴² See Debra P, *supra* note 1 at 810 [noting that ‘in the history of the WTO, with the exception of the accession of Ecuador in 1996, no decision has been made by voting’].

⁴³ Marrakesh Agreement, *supra* note 2, Article IX.

⁴⁴ *Ibid.* Article X: 1.

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-thirds majority of the members.⁴⁵

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 members⁴⁶ while the Ministerial Conference approves the accession agreement by a two-thirds majority of the members.⁴⁷

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. 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.

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-thirds of the whole members of the WTO.⁴⁸ The consequence of that provision is that enforcement of an amendment on any member will depend upon the 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.

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

⁴⁵ *Ibid.* Article X: 1.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.* Article XII:2.

⁴⁸ Marrakesh Agreement, *supra* note 2, Article X: 3.

to the Ministerial Conference to look into 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.⁴⁹ In any case, [either to withdraw or to remain] the Ministerial Member shall take decision by a three-fourths majority of the members.⁵⁰

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.⁵¹

This is also because the issue of WTO interpretations is not designed to be taken regularly⁵². 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 interpretation⁵³.

(B) "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 Council⁵⁴. However to ease the burden of decision-making process among members, various techniques have been devised to reduce the number of participants in the deliberation⁵⁵. 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

⁴⁹ Ibid.

⁵⁰ Ibid at Article X.

⁵¹ Ibid at Article 11.

⁵² Ibid. Article 11.

⁵³ Ibid.

⁵⁴ See Doha Ministerial Declaration para 46 at

http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

[last visited 22nd of October 2012.]

⁵⁵ Peter B, supra note 13 at 675.

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 agreement⁵⁶ 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 consideration⁵⁷.

(C) 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 agreement⁵⁸. Its use in the global trade dates back to the launch of the Kennedy Round in the 1960s⁵⁹ and reverberates in the Tokyo Round⁶⁰ and the Uruguay Round negotiations⁶¹.

In fact, the principle of Single Undertaking was explicitly enunciated in the ministerial declarations that launched both Uruguay and Doha Rounds⁶². The consequence is that 'a

⁵⁶ They have few signatories and members of the WTO who are not its signatories are not bound by its provisions.

⁵⁷ Article XXVIII of GATT.

⁵⁸ See how the negotiations are organized from the WTO website http://www.wto.org/english/tratop_e/dda_e/work_organ_e.htm [last visited 19th of October 2012] "Virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately. Nothing is agreed until everything is agreed".

⁵⁹ See Robert W, "The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor", V12, [2009] *Journal of International Economic Law*, 835-858. He traced the evolution of Single Undertaking in the WTO.

⁶⁰ See Craig V and Pierre S, "The Consistency of WTO Rules: Can the Single Undertaking be Squared with variable Geometry?", V9, [2006] *Journal of International Economic Law*, 837-864; See also Anna L, "The Promises of Multilateralism and the Hazards of Single Undertaking: The Breakdown of Decision-making within the WTO", V16 [2007-2008], *Michigan State Journal of International Law*, 655-675.

⁶¹ See Robert W, "Global trade as a Single Undertaking: the role of ministers in the WTO", L1 Autumn [1996] *International Journal* 691-711.

⁶² The 1986 Punta del Este Declaration that launched Uruguay Round provides that 'The launching, the conduct and the implementation of the outcome of the

seemingly inconsequential issue of value to only a few countries' could stultify the whole decision-making process and 'prevent subsequent negotiations to go forward'⁶³.

Critiques of 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 same⁶⁴. The Cancun conference of 2003 followed the same pattern but with a bizarre tragedy when a Southern Korean farmer, Kun Hai Lee, took his life in protest of the WTO policies⁶⁵. 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 conference⁶⁶. Furthermore, there was huge protest in front of the WTO headquarters on the 1st of October 2005⁶⁷ and on the 17th of

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'.

⁶³ Anna Lanoszka, *supra* note 60 at 670.

⁶⁴ BBC News Trying to protest in Doha

<http://www.news.bbc.co.uk/2/hibusiness/1648930.stm>

[last visited 22nd of October 2012].

⁶⁵ Alternet, Cancun Files: WTO Opens to Tragedy and Protest.

<http://www.alternet.org/story/16755>, [last visited 22nd of October 2012].

⁶⁶ Indy media WTO Protest Action Hong Kong

http://www.indymedia.ie/newswire.php?story_id=73444 [last visited 22nd of October 2012].

⁶⁷ Rural Women Speak Against WTO in Hong Kong

April 2007; the Pakistan farmers could not but carried placards against the WTO.⁶⁸ 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,⁶⁹ 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 failures to a round that was scheduled to conclude in 2005!

The relevant question one may ask is: what is the cause of this persistent acrimony against the WTO? In addition to that, an examination of the cause of this state of impasse in the global trade regime is essential. Therefore this section will discuss the criticism against the WTO as it relates to decision-making process. Our aim is to find out whether those criticisms are justified.

Before that, it is important to hear the critics speaking for themselves: A delegate of Uganda was furious against the exclusion of developing countries from the Green room meeting that he commented thus: "no one combs our hair in our absence"⁷⁰. Another Kenyan delegate queried the basis for the Green rooms when he asked rhetorically "Green rooms are not in the WTO Glossary. Which clause is it in? Which article?"⁷¹ Though not a critic of the WTO, the then president of America, Clinton could not but agree with the critics when he said that the WTO process

<http://www.dontglobalisehunger.org/huge-protest.php> [last visited 22nd of October of 2012]

⁶⁸ See Anna Lanoszka supra note 60 at 672.

⁶⁹ Ibid.

⁷⁰ The observer, [1999-12-5].

⁷¹ Wall street Journal Europe [1999 - 06]

“was too closed” and that something must be done to make it transparent and democratic⁷².

Criticism against the WTO which affects decision-making process could therefore be categorized under the following:

- (1) Absence of participation by members.
- (2) Issue of sovereignty.
- (3) Non- participation of Non-governmental organizations and lack of accountability.
- (4) Transparency.
- (5) The question of legitimacy.

A brief discussion of each criticism follows:

(1) Absence of participation by members

‘Ownership’ of rules is an essential element ‘in the functioning of any system of rules’⁷³. The same applies with the rules of the WTO because of the limited power of the central organization to enforce its decisions⁷⁴. Therefore participation of all members should be encouraged to create a sense of belonging or ‘ownership’ in the WTO negotiations⁷⁵. In contrast the manner of the WTO negotiations proves contrary to that fruitful and efficient path⁷⁶. In fact, the WTO legal structure has been criticized as the handiwork of the developed countries because of the issue of minimal participation of the least developed and developing countries⁷⁷.

As a matter of fact, notable authors have argued rightly that the introduction of ‘the non reciprocity principle’⁷⁸ between the

⁷² Seattle P-1.com <http://www.seattle.pi.com/national/transol.sthm1> [last visited 23 of October 2012]

⁷³ See Michael F & Philip S, “Implementation of Uruguay Round Commitments: The Development Challenge”, V23 [2000]. *The World Economy* 511-525.

⁷⁴ Ibid.

⁷⁵ See Gabrielle M. & Mikeilla H, “Transparency and Public Participation in the WTO: A Report Card on WTO Transparency Mechanisms”, V4 [2012], *Trade Law and Development* 19.

⁷⁶ For example it was revealed by the African Economic Research Consortium’s [AERC [that quantum of participation of sub Saharan African countries in Uruguay Round Negotiation has been minimal.

⁷⁷ See J. Michael F, supra note 73 at 200. [noting that ‘...developing countries and their advocates sometimes argue that the GATT/WTO law is not fair because only the powerful states negotiated the treaties’ contents’.

⁷⁸ See Art.XXXVI.8 in Part IV.

developed countries and the developing countries in the WTO has had a negative impact on the developing countries⁷⁹

In addition, the use of "Green Room" where only few countries, usually developed countries, are invited to participate in the negotiation, in spite of the fact that the outcome of the negotiation will affect all members has been criticized as undemocratic.⁸⁰

For example, trade ministers of four countries known as "G4" (the European Union, the United States, Brazil and India) met in Potsdam, Germany in June 2007 to "Stitch together a trade deal" on Doha Development Round.

Even though, the meeting was unsuccessful, a plethora of criticisms that followed its undemocratic nature could not be discarded.

A group of organizations said:

The undersigning organizations denounce the illegitimacy of G4. Indeed the great majority of the countries members of the WTO are excluded from negotiations which could have dramatic impacts on their economies and societies --- four countries now try to impose to the rest of the world an agreement in order to go further into trade liberalization and market opening. Such an agreement would have catastrophic impacts on rural development.⁸¹

One critic also observed:

... the failure of Potsdam has cast a long dark shadow over the whole WTO process. Even as the differences between the four remained and the talks are in limbo,

⁷⁹ See Ibrahim T E, "Developing Countries and the Tokyo Round", V 12 [1978] *Journal of the World Trade Law*, 2; See also Michalopoulos C, "Developing Countries Strategies for the Millennium Round", V33 [1999] *Journal of World Trade*, 1; Balassa B & Constantine M, "Liberalizing Trade between Developed and Developing Countries", V20[] *Journal of the World Trade Law*, 3.

⁸⁰ Kent Jones, supra note 2 at 67.

⁸¹ The nadir,

<http://www.nadir.org/nadir/initiativ/agp/wto/news/2007/0619wto-spreads-hunger.htm/> accessed on the 22nd of October 2012].

other developing nations said they have been left out of the negotiations. The G-90-the African, Caribbean and Pacific group of states (ACP), the African Group, and Least Developed Countries (LDCS) argue that "the recent WTO negotiating process has been less than transparent and participatory". The majority of members have little or no knowledge of the progress and content of the G4 process.⁸²

Democracy is not just one of the concepts of governance but is the most important element of good governance⁸³ Therefore, if it is proved that WTO's process is undemocratic; the result is that the WTO governance is bad.

Democracy does not mean the same thing as participation. What it means is representation. If members of the Green Room are appointed or elected by all members to deliberate on their behalf, the outcome could have been different. The reason for criticism is non participation not only in taking part in the meetings but in manner of selection of those who take part.⁸⁴

It is therefore not a surprise that criticism concerning 'Green room' is numerous; Developing country members complained of non participation as they were not invited to the meetings, they complained that the criteria for selection were unknown and that there is no written record of their discussion at the meetings. The Chairperson of each meeting was said to be the chief executive with tremendous power. He is the "facilitator", "Mediator" and the "Broker" of the negotiation.⁸⁵ He enjoys unquestionable freedom in setting the "parameters" of the agenda and in deciding the invitations to the informal meetings.⁸⁶ No doubt, the objection of the developing countries could not be dismissed with a wave of hands.

⁸² The current news,

[http://www.nst.com.my/currentNews/NST/Friday 1 columns/20070629074329/Article/pp](http://www.nst.com.my/currentNews/NST/Friday%20columns/20070629074329/Article/pp) [last visited 22nd November 2012].

⁸³ Francis B, "Good Governance: The old, the new, the Principle and the elements", *V13 [2001] Florida Journal of International Law*, 169- 171.

⁸⁴ Amrita N, "WTO Decision-making and Developing Countries", (Working paper No. 11, Trade Related Agenda, Development and Equity, 1-29.

⁸⁵ Ibid.

⁸⁶ Ibid.

(2) Issue of sovereignty

For the purpose of definition, sovereignty can be divided into two. The first is legal sovereignty and the second is Westphalia sovereignty. Legal sovereignty means 'juridical independence and equality of states'⁸⁷ while Westphalia sovereignty refers to a situation where a country is not subject to any external control. It therefore means that if any country subjects her self to external control, Westphalia sovereignty is affected.⁸⁸

If a country is to be bound by any international treaty, the consent of such a country is a requirement. In addition, the consent must not be obtained by force, threat or coercion; if it is, such consent is vitiated, and the legal sovereignty is affected.⁸⁹

WTO has been criticized for promoting inequality among states and thereby undermining sovereignty in the manner it makes decisions. This can be seen in the fact that some members are excluded from the "Green room" negotiations while few members are invited. And yet, decisions which emanate from the Green rooms are to be implemented by all members⁹⁰. Another criticism is that WTO Dispute Settlement undermines the legal sovereignty of the members particularly in areas where trade can have an environmental impact.⁹¹

The first criticism is within the purview of this article and attempt shall be made to determine the justification or otherwise of it. The second, which is on dispute settlement, shall not be addressed because it is not within the subject matter of this article. It must be stressed that the one member one vote of the WTO promotes equality and ought to satisfy the requirement of legal

⁸⁷ Joshua M, "State Sovereignty and the legitimacy of the WTO", *V26 [2005] University of Pennsylvania Journal of International Economic Law*, 693-734 at 695.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ See Ogunkola, E.O "African Capacity for Compliance and Defense of WTO Rights" Conference Paper for AERC Sponsored Africa and the World Trading System [Yaoundé, Cameroon, 17-18 April, 1999]. Noting that '[though] the participation of Africa has been limited by the capacity to negotiate, the ratification of the agreement and the Single Undertaking clause made the implementation of the agreement almost non-negotiable'.

⁹¹ Gary S, *The Role of World Trade Organization in Global Governance* [2001 United Nations University Press].1-306 at 265-266.

sovereignty though it may not satisfy the Westphalia concept of sovereignty. It will satisfy the legal concept since members voluntarily joined the organization and takes decision by equal vote but Westphalia concept will not be satisfied because WTO has the capability of encroaching on their sovereignty. A mere entry into any arrangement which recognizes external control is a violation of Westphalia concept.⁹²

The problem with legal sovereignty also comes from authoritarian use of the "Green room". Developing countries are not invited for negotiation yet decisions that come from the meetings will affect them. In addition, it has been said that developing countries are forced not to oppose the outcome of the Green room meetings and they are coerced to ratify treaties. Example is given of the Trade Related Aspects of Intellectual Property Rights (TRIPS) which was entered into by developing countries under a backdrop of coercion and threats by developed countries.⁹³

One thing we must note is that Westphalia concept of sovereignty is unattainable in this modern age of inter dependence and globalization. Countries must come together and submit part of their sovereignty for the common good of the world. In addition, I support the view that equality of nations could not be totally attained. Though that may violate legal concept of sovereignty but it is inevitable. Even, the United Nations who makes equality of nations a sacrosanct principle⁹⁴ is not perfect on the issue as five permanent members can over-ride other members by making use of veto⁹⁵.

Despite the practice of the "Green room", developing countries who complained most can still exert their sovereignty, if they speak together with one voice as they did in Seattle and as they are doing now in the present Doha negotiation. But that does not mean that it is not true that WTO's decision-making process can undermine sovereignty, but hardly can we find international organization that cannot affect sovereignty unless it is not supranational.

⁹² See Joshua M, *supra* note 87 at 698.

⁹³ Gary S, *supra* note 91, 200-201.

⁹⁴ Article 2.1 of UN Charter of 1945.

⁹⁵ *Ibid.* chapter 5

(3) Non-participation of Non-Governmental Organizations [NGO's] and lack of accountability

There have been some reservations as to the sincerity and adequacy of national governments⁹⁶ to represent their people at the WTO. Daniel Esty, condemned the states as "imperfect representatives of public opinion" and advised the WTO to involve non-governmental organizations in its decision-making process.

'Public support cannot be founded on government authority. Individual acceptance is what matters. The organization must therefore demonstrate that it has genuine connections to the citizens of the world and that its decisions reflect the will of the people across the planet. Non-governmental organizations represent an important mechanism by which the WTO can reach out to citizens and build the requisite bridge to global civil society.'⁹⁷

Consequentially, the NGO's are of the opinion that they are the authentic representatives of the people and therefore argued that they should be involved in the decision-making of the WTO, so that the organization can be accountable to the people.⁹⁸

As a matter of right, the agreement provides a role for the NGO's that they should be consulted by the General Council "on

⁹⁶ It has been argued that there is democratic 'deficit' in international governance which makes 'international economic governance seem very far removed from representative and accountable government'. See Ngaire W and Amrita N, "Governance and the limits of accountability: the WTO, the IMF and the World Bank" available at <http://www.globaleconomicgovernance.org/wp-content/uploads/governance%20and%20wto.PDF> [last visited 25th of October 2012].

⁹⁷ Esty, D "Environmental Governance at the WTO: Outreach to Civil Society", in G.P. Sampson and W.B. Chambers [eds]. *Trade, Environment and Millennium*, [Tokyo, United Nations University Press, ch.4]; Philip M, "Realism, Liberalism, Values; the World Trade Organization", V17 [1996] *U. PA. J. INT'L ECON. L.* 851 (; Daniel E, "Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion", VI [1998], *J. INT'L ECON. L.* 123, 136-37.

⁹⁸ Ngaire W and Amrita N, supra note 96. [noting that 'the institutions now face grassroots NGOs claiming to represent people whose lives and livelihoods are being directly affected by the actions and policies of the IMF, the World Bank and the WTO. The argument here is that representation in the international institutions is imperfect. The emissaries of existing governments fail to represent many groups' rights or predicament. NGOs acting in international fora are necessary to fill the gap in representation and accountability that results'.

matters of the WTO” and that their cooperation should be sought.⁹⁹ Though the role is merely consultative rather than the one being demanded¹⁰⁰, the relationship between NGO’s and the WTO has increased considerably and yielded some fruitful results as of recent time¹⁰¹ that demand should be shifted from the clamour for direct involvement of NGO’s in decision-making of the WTO to the issue of facilitation of ‘the role of actors in domestic trade policy-making’¹⁰². To limit the issue of accountability of the WTO process to participation of NGO’s at the international level without regard for what operates at the domestic level is to dig the grave for squabbles and discords that will not promote consensus at the WTO. In this area, the developing and least developed countries are the worst culprits. Most of them do not have open and transparent process that gives room for non trade actors on issues and affairs that relate to the WTO. A close examination of how some governments of developing and least developed countries conduct the affairs of the WTO (particularly trade talks and negotiations) in secrecy without asking for the opinion of their citizens makes one to shudder and reconsider the issue of non state

⁹⁹ Marrakesh, Agreement, supra note 2, at Article V: 2.

¹⁰⁰ They demanded actual participation in decision-making process. See Steve C, “Non-governmental Organizations and International Law”, V100 [2006], *American Journal of International Law*, 348-372.

¹⁰¹ See Seema S, “The WTO System of Trade Governance: The stale NGO Debate and the Appropriate Role for Non- State Actors”, V11 [2009], *Oregon Review of International Law*, 71-108 at 90. [Noting that ‘... Several case studies of NGO influence in trade negotiations demonstrate that since the Doha Ministerial Meeting, large international NGOs have moved from the periphery of the WTO system to almost mainstream insiders. By engaging in trade diplomacy alongside states, NGOs have in some instances significantly influenced the agenda and outcomes of trade negotiations. NGO participation in the Doha Round involved NGO representatives being present “at the table” as part of member state delegations. NGO experts assisted developing country negotiators in drafting negotiating texts in the Doha Round. The success in getting cotton into the Doha agenda and the inclusion of the ambition on elimination of cotton subsidies in the Hong Kong Ministerial Declaration, were all the result of the efforts of a transnational alliance between developed country NGOs, African NGOs, and African member states”.

¹⁰² Id. See also Jeffrey LD, “The Misguided Debate over NGO Participation at the WTO”, V1 [1998] *J. INT’L ECON. L.* 433. Noting that ‘the relevant question is not whether NGO’s should participate, but how. What are the appropriate roles for non- state actors at the WTO?’

actors at the domestic level. In Nigeria for example, a lawyer lamented on this issue of closed domestic process and its attendant dangers when she said:

The antecedents of the advanced industrial countries demonstrate clearly that it behoves us to guard our national interests jealously. To this end, a root and branch reform is needed in the manner in which WTO negotiations are carried out by Nigeria. The architecture of the whole process must be reconstructed to allow for an open, transparent, participatory and democratic process. We have the talent and the knowledge that we can tap into within Nigeria and in the Diaspora, to ensure that we do not sell our children's birthright for a bowl of potage.¹⁰³

There is no doubt that the NGO's played a significant role in representing the society because they cut across political boundaries and define "communities of interests". Often, they are adequate gauge of the minds of people that are affected by the WTO multilateral decision. Therefore I support the view that WTO must encourage trade rules and processes that involve the NGO's and actors' at both domestic and international level of multilateral governance.

(4) Transparency

The issue of transparency¹⁰⁴ as it affects WTO is a bi-partite one touching both internal and external aspects of global trade structure. As for the inside, there must be transparency in the internal process of the organization that members could be

¹⁰³ Olajumoke Akinjide, "Globalisation of Legal Services – Fears of African Countries", A published paper delivered at the Annual General Conference of the Nigerian Bar Association, at Ilorin, Nigeria. Aug. 26-31, 2007.

¹⁰⁴ See William M, "On the Centrality of Information Law: A Rational Choice Discussion of Information Law and Transparency", V17 [1999], *John Marshall Journal of Computer and Information Law*, 1082. Defining Transparency as 'sharing information or acting in an open manner,' or 'a measure of the degree of which information about official activity is made available to an interested party.'

adjudged as fair while for its outside part, those who are affected by its decisions must see its process as being transparent.

No doubt, WTO has made efforts to be transparent in its process. The General Council in July 1996 adopted the decision on De-restriction which introduces the principle of immediate, unrestricted, circulation of WTO documents.¹⁰⁵ Again, on 14 May 2002, the General Council reformed the principle of De-restriction to make WTO documents available to the public within a very short time [six to twelve weeks]¹⁰⁶. In addition, the WTO website gives accurate information on the WTO activities on line that a British NGO acclaimed its public disclosure through that medium as 'excellent'.¹⁰⁷

Despite all those efforts on the part of the WTO, the battle for transparency is far from being won. Certain hurdles still exist in the WTO framework which could be a clog on its wheel to attain full transparency. First, some documents are not regarded as official documents and therefore excluded from the De-restriction rule.¹⁰⁸

Second, the proceedings of the WTO are not open to the public¹⁰⁹, the dispute settlement does not accept Amicus briefs from the public and neither could the NGO's submit documents. Third is the issue of Green rooms meetings. Some members as it has been discussed are usually excluded from the meetings though they are bound by decisions reached in those nocturnal meetings under the principle of Single undertaking.

In addition, while the WTO at international level is shedding its secrecy in order to attract NGO's and the world in its entirety, there seems to be slow move in this direction at the domestic level. Some national governments, particularly the developing countries shrouded their activities germane to the organization (the WTO) in secrecy to the extent that their citizens even the elitist class grope in darkness as to concessions that must have been made on their behalf. In Nigeria, a lawyer lamented the closet approach of the government to the affairs of the WTO which excluded the domestic NGO's and the actors:

¹⁰⁵ Peter Bossche V, supra note 13 at 678.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Peter Bossche V, note 13 at 670.

¹⁰⁹ Gary Sampson, supra note 91 at 200.

It is symptomatic of the closeted approach to WTO negotiations in Nigeria that we do not know for sure if Nigeria has made any "offers" in this regard in the ongoing Doha Round. Even if so, "nothing spoilt" as we say in Nigeria! Offers are mere negotiating positions and can be withdrawn while we get our house in proper orders¹¹⁰

WTO must ensure transparency in the domestic and international plane and it must touch every nook and cranny of its structure both internal and external.

(5) The question of legitimacy

The legitimacy of WTO has been attacked by many scholars¹¹¹. The criticism on this issue is universal and worldwide. An American citizen queries the effrontery of the WTO law to supersede domestic law of America when he wrote:

U.S. citizens have not voted to abdicate their sovereignty. Americans were not asked if they wanted local, state and federal laws to be preempted or repealed by unaccountable World Trade Organization tribunals representing the interests of global corporations. The WTO and trade pacts that Mr. Mallaby promotes under the guise of "free trade" have failed precisely because they lack legitimacy and undermine our constitutional right to self-governance¹¹².

¹¹⁰ Olajumoke, supra note 103 at 17.

¹¹¹ See Robert H, *The WTO System: Law Politics and Legitimacy*, [UK, Cameron, May2007 1- 320; Esty D, "The World Trade Organization's Legitimacy Crisis", VI[2002] 1 *World Trade Review* 1, 7-22; Howse R, "The Legitimacy of the World Trade Organization", in Jean-Marc Coicaud and Veijo Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo/New York/Paris: United Nations University Press 2001, 355-407. Weiler J, "The Rule of Lawyers and the Ethos of Diplomats: Reflections on WTO Dispute Settlement", in Roger B. Porter et al. (eds.), *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium* (Washington, D.C.: Brookings Institution 2001, 334-350.

¹¹² Jeff M, "No Legitimacy to the WTO", *The Washington Post* 4/18/2007

To determine legitimacy of an organization, two areas must be examined. The first issue to be examined is a narrow one which is the formal rules of the organization and how they make such rules¹¹³ and the second is broad being the determination of acceptability of the organization to the society¹¹⁴. If decisions are made by all members without exclusion of any and no member is hoodwinked to abide with all matter on the table under the principle of single Undertaking, then there could have been an improved transparency in the WTO.

However, as it has been discussed in this paper, the existence of Green rooms meetings and Single Undertaking put a question mark on the legitimacy of the WTO because members of the organization themselves are dissatisfied with most of the rules and the manner of reaching them. In addition, it is obvious that the organization does not receive wide acceptability from the public at the domestic or international level. Therefore, exclusive feature of the Green room meetings, the principle of Single Undertaking and the WTO dispute settlement process¹¹⁵ question its legitimacy. A situation in which some countries will be implementing decisions in which they were excluded from their making is not only unfair but illegitimate.

Any 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 deadlock¹¹⁶. In addition, the consensus rule and the principle

available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/17/AR2007041701701.html> [last visited 26th of October 2011].

¹¹³ See Weiler H H, "The Transformation of Europe", V 100[1991] *Yale Law Journal*, 2403, 2468-2469; Thomas M F, *The Power of Legitimacy among Nations* [New York/Oxford: Oxford University Press, 49.

¹¹⁴ See Sungjoon C A, "A quest for WTO'S Legitimacy", V4 [2005], *World Trade Review*, 391-399.

¹¹⁵ See Marco CEJ Bronckers, "Better Rules for a New Millennium: A Warning against Undemocratic Developments in the WTO", V2 [1999] 2 *Journal of International Economic Law*, 547.

¹¹⁶ John H J, "The WTO "Constitution" and Proposed Reforms: Seven "Mantras" "Revisited", V4 [2001] *Journal of International Economic Law*, 67 at 74. [noting 'one of the problems with the consensus process is that... any country can block a proposed change'].

of Single Undertaking have been fingered as the major cause of the Doha stalemate¹¹⁷. 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 itself is a mirage due to this principle of consensus.¹¹⁸

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 constraint 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.

Consequently, 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 members¹¹⁹.

¹¹⁷ See Anna Lanoszka *supra* note 60 at [noting that ‘...the vast scope of the new WTO agreements was not well matched with the obsolete institutional structure of the WTO. Its decision-making process, based on the GATT-inherited tradition by consensus, became difficult to manage given the large number of new Members, their diverse needs, and the principle of Single Undertaking, which demands, in the case of new negotiations, an acceptance of all negotiating outcome as a single package’].

¹¹⁸ Marrakesh Agreement, *supra* note 2. Article IX.

¹¹⁹ See Memory D, “The way forward for the WTO: Reforming the decision-making process”, an occasional paper delivered on 25th July 2012 at the South African Institute of International Affairs available at

Indeed, this study has revealed that consensus-based decision-making system could not be said to be democratic or transparent or fair; meetings are held in the green rooms without the participation of developing member countries who are longing to be involved in such meetings.¹²⁰ 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"¹²¹ 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 silent¹²². 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 archived through compromise. If members are divided into 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 Thomas Cottier and Satoko Takenoshita that the adoption of weighted voting could be antidote

<http://www.gegafrika.org/blogs/2012-09-06-18-37-12/item/32-the-way-forward-for-the-wto-reforming-the-decision-making-process> [last visited 18th January 2012].

¹²⁰ Fatoumata J & Aileen L, *Behind the scenes at the WTO the real World of internal negotiations the lesson of Cancun* [UK, Zed Books 2003, 1-319.

¹²¹ *Ibid* at 273.

¹²² Amrita, *supra* note 84 at 18.

to the problem of reaching consensus in the WTO negotiations¹²³. Gary Hufbauer explained further that the adoption of a weighted formula is inevitable if obstacle to decision-making placed by the majority of members who have not more than 10% of the world trade will be checked¹²⁴.

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"¹²⁵. Decisions that emanate from such system tend to be of wide acceptance and are mutually satisfactory.¹²⁶

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.¹²⁷ 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.¹²⁸

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.

What amuses one is that despite the opposition against consensus, proposal for its replacement only comes from the

¹²³ Thomas C & Satoko T, 'Decision-Making and the Balance of Powers in WTO Negotiations: Towards Supplementary Weighted Voting' in Stefan Griller (ed), *At the Crossroads: The World Trading System and the Doha Round* [Springer, Vienna 2008, 181].

¹²⁴ Gary C, "Inconsistency Between Diagnosis and Treatment", V8 [2005] *Journal of International Economic Law*, 291, 296.

¹²⁵ Dmitri V, *supra* note 9 at 13.

¹²⁶ Clause - D & Lothar E, "Is the consensus Practice of the WTO Adequate for making, Revising and Implementing International Trade?", V8 [2005] *Journal of International Economic Law* 51, 62-75.

¹²⁷ Joost P, 'The Transformation of World Trade' (Working paper No. 66, Duke Law School Legal Studies Research paper October, 2005, 60-67 available at <http://ssm.com/abstract=696252>).

¹²⁸ *Ibid.*

academics while majority of developing and developed countries still want it to be retained.¹²⁹

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 capitals¹³⁰, 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."¹³¹

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 policies¹³², 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"¹³³. 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 consensus¹³⁴ but opposition also came from the developing countries who argued that 'decision-making needs to be 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- inter governmental entity.'¹³⁵

Another suggestion was made by John Jackson who advocated a critical mass decision-making, an idea which could prevent members from blocking consensus 'when a critical mass' of

¹²⁹ Clause-D, supra note 126 at 684.

¹³⁰ Gregory S, "Parliamentary Oversight of WTO Rule-making; the Political, Normative, and Practical Contexts", V7. [2004] *Journal of International Economic Law*, 629- 654.

¹³¹ Ibid at 650.

¹³² Ibid at 653-654.

¹³³ Amrita, supra note 84 at 16.

¹³⁴ Ibid.

¹³⁵ Ibid at 15.

countries supports a proposed change'¹³⁶. 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, I am of the opinion 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.¹³⁷

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 development¹³⁸ but how the negative impacts of global trade could be cushioned is the challenge that

¹³⁶ John H J, *supra* note 116 at 74. He explained that 'the critical mass of countries could be expressed as an overwhelming majority of countries and an overwhelming amount of trade weight in the world, such as 90 per cent of both of these factors'.

¹³⁷ Clause - Dieter, *supra* note 126 at 65. ['whom does this situation favour? Sometimes it is said that the consensus requirement favours the small Members, sometimes it is said that the developed countries benefit most, since they are a minority. Yet, each of these propositions makes the assumption that the respective group would typically find itself in a minority in which it could be outvoted. Formally speaking, consensus protects every single Member, whoever may be in a minority'].

¹³⁸ Pascal L, "Rapid Doha Conclusion will help us achieve Millennium Development Goals", a speech to the Graduate Institute of International Studies in Geneva on 29 June 2010, [last visited 27th of October 2012] at http://www.wto.org/english/news_e/sppl_e/sppl161_e.htm.

could bring lasting solution to the problem of the 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 in the words of Pascal Lamy is to create 'an enabling environment for countries to grow and develop'¹³⁹. If all members of the WTO are committed to this ideal, to arrive at consensus will not be difficult despite divergent interests.

Be that as it may, the decision-making process should be reformed to make it more open, transparent, equitable and fair to all. The green room and exclusive mini ministerial meetings should be opened to all members who are willing to attend. However, in case of meetings which could not accommodate all the members, there should be consensus among members as to the general procedure for participation in such meetings. A flexible approach should be adopted without jettisoning the principle of single undertaking.

Furthermore, WTO must take into consideration the reasonable concerns of the public in its decision-making process not only at the international level but at the domestic level. Members too must ensure that relevant private actors in their domain are carried along to enhance legitimacy of the WTO. Transparency should be integrated into the system. An international trade organization whose decisions affect all should not operate like a secret society whether at the domestic or international level.

¹³⁹ Ibid.