

DECISION-MAKING PROCESS IN THE WTO: THE INPUT LEGITIMACY QUESTION

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ABSTRACT

The establishment of the WTO has brought significant changes in the ways international trade is conducted. Because of these changes, the world trade regulation has been significantly changed both in terms of the areas regulated under this legal framework and the number of countries that are brought into this framework to reap the benefit of free global trade. With this increase, a number of opportunities and challenges have faced the WTO, but none of them has been as serious as the difficulties the organization is facing in relation to its decision-making process. This article argues that unless the WTO is ready to reform its decision-making process, by making them legitimate on the basis of transparency, inclusiveness and generally democratic, the acceptance of the decisions of the Institution will remain to be doubtful and by being so affecting the legitimacy of the Organization in general. As such, it is the position of this article that the input part of the decision-making at the WTO should be revised to gain the acceptance that is so critical for any decision to be enforced with the full force among the member states

Keyword: Membership, Decision-making, input legitimacy, transparency, participation, developing and least developing countries

1. INTRODUCTION

The establishment of the WTO has brought significant change in the ways international trade is conducted. The changes are generally considered to be positive, but some problems have also resulted particularly from the increased number of participants and the areas this Organization regulates. For instance, the WTO is severely criticized, especially by developing countries and LDCs for the decision-making procedure it upholds. This article tries to determine the problems that affect this decision-making procedure from input legitimacy point of view. For that purpose, the article starts with a brief discussion of the decision-making process under the GATT and changes introduced with the establishment of the WTO to see factors that made the use of similar procedure under the WTO very difficult. These factors will be raised in relation to the Green Room decision-making procedure that is too much contested as an unfair one by members. This complaint is pronounced by the developing and least developed countries for affecting their interests and decision-making powers negatively. It is the aim of this piece to address the concern and find out some ways forward. The article ends with some concluding remarks.

1.1 Decision Making Process in the GATT

The general decision making pattern we observe under the WTO currently is carried over from the GATT system that operated on few members and roughly on similar interest groups. Accordingly, practices like consensus decision making, the Green Room approach, and informal small groups or consultations were used in the GATT system before they were adopted into the WTO¹. In the GATT system, the consensus decision making was used in a better way; because of the few number of participant and limited areas of regulation². In this relation Jackson wrote that "...the spirit and practice of the GATT has always been to try to accommodate through consensus negotiation procedures the views of as many countries as possible, but certainly to give weight to the views of countries that have power in the trading system. *"This is not likely to change"*³ (emphasis added). Besides, the developed countries that were driving the negotiations like the United States and members of the EC used the system in a relatively beneficial ways for both the developed and developing countries interests.⁴ Which in simple terms means, "the consensus rule was not abused" and hence, there was no need for the developing countries to hinder trade negotiations that were going on and potentially can end up in beneficial outcomes.⁵ Based on the above facts, the GATT system operated very well on the basis of informal process, where smaller groups discuss the matters and reach compromise before the decision was adopted by the plenary sessions.⁶ However, this consensus decision-making process has not been as successful as it used to be under the WTO due to the factors we will raise below. Besides, it has been blamed for the various attempts made which all successively failed over the years, particularly during the past trade negotiations following the Doha Development Agenda. Pascal Lamy the then EC representative has been quoted complaining about the failure of the decision-making procedure describing it as 'medieval' in its decision- making methods, following the failures of the ministerial conferences in Seattle and Cancún, and pointed to the need for a stronger rules-based trading system⁷. This was despite the fact that the WTO praises itself as a rule based trading arrangement inviting every state to join and benefit from this 'rule based

1.2. Changes Introduced with the Establishment of the WTO

The WTO unlike the other International Financial Institutions, The International Monetary Fund and the World Bank, is a one- member-one-vote Organization⁸. Accordingly, the system does not

¹ Margaret Liang, "Notes: Evaluation of the WTO Decision- Making Process", 9 *Singapore Year Book of International Law* (2005), p. 126

² Jeffrey J Schott. and Jayashree Watal, "Decision-Making in the WTO", *Institute for International Economics Policy Brief* 00-2, (March 2000) p. 1

³ See generally John Jackson, 'Global Economics and International Economic Law', 1 *Journal of International Economic Law*, No. 1 (1998) PP 1-24

⁴ Ibid

⁵ Ibid

⁶ Supra Note 2, at p. 126

⁷ Cecilia Albin, "Using Negotiation to Promote Legitimacy: an Assessment of Proposals for Reforming the WTO", 84 *International Affairs*: vol. 4 (2008) p. 758

⁸ See Articles of Agreement of the International Monetary Fund, available at www.imf.org/external/pubs/ft/aa/, article 3(2,a), last visited on March 23, 2018, see also IBRD Articles of Agreement, available at

allow any differentiation among its members based on the contribution to international market or otherwise when it comes to voting on an issue ready to vote on. This is considered to have a significant impact on the decision making process that this Organization can adopt.⁹ That why Kapoor has argued that “The WTO's claim to being a democratic organization is based on the fact that there is sovereign equality (i.e. it has a one-country, one-vote decision- making system.”¹⁰ Based on article IX:1 of the Agreement establishing the WTO, each member is entitled to have one vote in the decision making process and each vote has equal value irrespective of the market share or economic status of a particular member.¹¹ And according to the Agreement, there are only few areas that the simple majority vote does apply in decision making, like the interpretation of the Agreement,¹² the granting of temporary waiver,¹³ and the accession of new member state or separate custom unions¹⁴ with the amendment procedure of the Agreement itself.¹⁵

The practice, however, is the otherwise; meaning on almost every decision- making, the WTO adopted a consensus decision- making process. But, this is only one of the possibilities in the Agreement.¹⁶ Furthermore, due to various changes that took place in the transition from GATT to WTO, the consensus decision- making process with its informal procedure has been problematic in adopting decisions as has been witnessed in the Seattle Ministerial Conference and the dragging of the Doha Round negotiations. The problems with the Doha Development agenda has particularly been the epicenter for the discontent of many of the developing countries since despite the logical and moral agreement among the member states could not be effected because the major groups controlling the decision-making procedure would not allow it to put it forward for consensus. The consequence of this difficulty has cost the developing countries very much prolonging the process for over two decades and still they were only able to achieve half of what they have bargained for. The Agenda, partly, was started because the developing countries complained that the export subsidies and the domestic support that the agricultural sector in the developed world received has unfairly distorted the global market in favour of the West, and as such, they contend that these countries should rescind the unfair support their producers receive.

<http://siteresources.worldbank.org/.../ibrd-articlesofagreement.pdf>. Article 5 (a, b). last visited on March 23, 2018

⁹ Amrita Narlikar, “WTO Decision-making and the Developing Countries”, *Trade- Related Agenda, Development and Equity*, Working Paper 11, (November 200), p. 1

¹⁰ Supra note 1, at p. 526

¹¹ Marrakesh Agreement establishing the WTO, Available at http://www.wto.org/english/docs_e/legal_e/13-mprot_e.htm,

¹² Ibid., at IX:2

¹³ Ibid., at IX:3

¹⁴ Ibid., at XII

¹⁵ Ibid., at X.

¹⁶ Ibid., At IX:1

The Ministerial Conference in Nairobi could only reach agreement on the removal of export subsidies by the developed countries without doing the same for domestic support, which obviously is equally market distorting if not more.¹⁷ Keeping the consequences of the above decision-making procedure for later stage, let us consider the changes that have been brought about by the establishment of the WTO and how they have rendered the consensus decision-making process very difficult if not impossible.

1.3. Membership of the WTO and its Mandate

One of the significant changes brought about by the establishment of the WTO is the number of the members, encompassing almost a global membership. Accordingly, from the 23 original members of the GATT in 1947, today WTO has a membership of 164 and 31 countries are negotiating accession into this giant Organization.¹⁸ Besides, currently because of the importance of what the Organization is doing globally, there are multitudes of organizations, governmental and non-governmental, registered for an observer status following the day-to-day activities undertaken in the WTO. What is the logical consequence of this significant increase in the WTO membership? With the increased number of participants in the WTO, there has been an immense increase of the active participants in the decision-making process, which was dominated by few hitherto.¹⁹ This is because naturally the members come from diverse political, economic and social backgrounds which makes their “interests and objectives” so diverse.²⁰ On top that we now have countries that are both economically and politically very powerful and cannot easily be pushed away as it used to be in many of the years of decision-making, who do not only want their interests taken care of but also demand and force the system to be fair and inclusive at least. The serious issue in this relation is that all the members want to have their interests and objectives included in the agenda.²¹ As such, the small group decision-making process has been under strong criticism for quite some time now.

The other most important change came about with the establishment of the WTO is the areas that finally fell under its control. As well known, the beginning of the GATT system was very restrictive in nature revolving around tariffs on trade. However, as the negotiations continue round- by -round, the areas to be regulated by this system started to expand culminating in the massive expansion at the establishment of the WTO.²² Pauwelyn explaining this idea wrote that

¹⁷ Briefing note: Agriculture issues, available at https://www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_agriculture_e.htm#exportcompetition. Accessed on April 5, 2018.

¹⁸ **UNDERSTANDING THE WTO: THE ORGANIZATION: Members and Observers**, available at http://www.wto.org/english/news_e/news09_e/tar_09jul09_e.htm, last visited no March 2018.

¹⁹ Supra note 2, at p. 126

²⁰ Ibid

²¹ Ibid

²² Joost Pauwelyn, “The Transformation of the World Trade”, 104 *Michigan Law Review*, No. 1, (2005) p. 26

“a host of new substantive agreements, GATS, TRIPS, SPS, and TBT, were adopted and became binding on all WTO members pursuant to the single-package approach.”²³ The logical consequence of this is that many states including, developing countries and LDCs, are required to liberalize most of their trading policies “unilaterally or pursuant to the GATT negotiations.”²⁴ As such, the liberalization by member states of many domestic policies based on the negotiations allowed the WTO to expand its regulatory spheres, including those areas that were not under the GATT.²⁵ Currently, the WTO has “rule making and enforcing capabilities” on issues like food safety, animal and plant health through the Sanitary and Phyto-Sanitary measures and Agreement on Technical Barriers to Trade.²⁶ This means on the one hand, many member states policies are to be scrutinized by the WTO and all members have the legitimate interest to participate in all the decisions that are to be adopted. Otherwise the decisions run the risk being taken without the necessity of involving all stakeholders in the form of members and there obviously is going to be a challenge to the implementation of these kinds of decisions, which is already the problem the WTO is facing over the last two decades.

The overall consequences of the above have led to the questioning of the WTO decision- making process. This is because given the increased number of participants and the areas regulated by the Organization; there was no way for states to receive the decisions made by few like it used to be under the GATT system. Besides, although some group experts in the international trade law still believe that the WTO can continue operating as GATT, having a very limited role and serving as a forum of negotiation, in reality, it cannot continue with minimum responsibility for it has to act in the formalization of the global trade with the view of realizing prosperity for the bulk of the citizens of its members.²⁷ This is because there are many policy issues of each member that will be at stake if the same procedure is to be maintained. As such, opposition to the system started to erupt from many angles, particularly the developing countries and LDCs.²⁸ As the matter of fact, the opposition was not limited to these groups though their position was emphatic, since the EU trade Commissioner (now the Director General of the WTO) was quoted considering the decision making process as “medieval” with an urgent need of improvement, as has been underscored in the preceding parts.²⁹ Accordingly, the Ministerial Conference at Seattle failed to come up with any meaningful outcome since the African and Caribbean Groups

²³Ibid

²⁴ Supra note 11, at p. 1

²⁵ Ibid

²⁶ Ibid

²⁷ For an elaborated and excellent discussion of the two points: maintaining the WTO with its minimalist role or reforming the organization to reflect the current situation in international and globalization of trade see generally, Debra P. Steger, *The Future Of The WTO: The Case for Institutional Reform*, 12 *Journal of International Economic Law*, No. 4, (2009)

²⁸ Supra Note 2, at p. 127

²⁹ Ibid

threatened to reject any decision making system, which Jeffrey J. Schott considered to have already broken down even before the Conference.³⁰ This is why Cecilia Albin emphatically wrote that “while the WTO stands up to these challenges better than most, the need for reform is widely accepted”, underscoring the urgent need for change and the reason behind these changes.³¹

1.4. The Green Room Decision- Making Process in the WTO

All the grievances and the oppositions from the developing countries and LDCs to the WTO decision- making process are related to this particular system. In this part we will try to look at the ways it operates and attempt will be made to relate this to the input legitimacy to evaluate the legitimacy of the decisions themselves and their repercussions on the legitimacy of WTO in turn. However, before embarking on the consideration of the decisions in terms of input legitimacy, it seems important to lay down some foundations for that purpose. Generally the principles used for the purpose of evaluating input legitimacy are derived from domestic legal systems. But the use of these principles has become quite common these days due to various factors. While one of these factors is the existence of “common zones of impact” between the national and international institutions³². By this what we mean is that because of the ever increasing nature of the powers and influences of international organizations, in many countries individuals have found it increasingly difficult to determine the agent responsible for their suffering whether it is a state or international organization in the exercise of public power.³³ In short both state because of conventional trust they have from the subject and international organization because of the trust they apparently receive from their members are exercising those powers that are traditionally the exclusive competence of the states. The other closely related factor is that “governance is shifting from national to international organizations”³⁴ What this mean is that by establishing standards that every state needs to adhere to with the view of conforming to the international organizations, the choice that national governments used to enjoy have been diminished in a profound manner.³⁵ As such, currently it is argued that the use of national legal principle is an appropriate procedure to evaluate the decision-making processes of international organizations.³⁶ This method is called a “vertical comparative method” and in this particular context it is a “vertical bottom-up” method, which refers to “the transposition of legal concepts, or the ideas

³⁰ Supra note 3, at p. 1

³¹ Supra note 8, at p. 757

³² See General Aleksandar Momirov and Andria Naudé Fourie, “Vertical Comparative Law Methods: Tools for Conceptualizing International Rule of Law”, 02 *Erasmus L. Rev.* No.03 (2009).

³³ Ibid, at p. 292

³⁴ Marcus Krajewski, “Democratic Legitimacy and Constitutional Perspectives of WTO Law”, 35 *Journal of World Trade*, No. 1 (2001), P. 171

³⁵ *Ibid*, p. 170

³⁶ *Ibid*

behind them, from national to international level”.³⁷ With this context if we consider legitimacy, it is usually defined in a normative terms- determining the “acceptability” of the decisions of an institution by those who are bound as a legitimate.³⁸ Accordingly, input legitimacy is generally about “certain procedural conditions for the law making process”, decision-making in our case, which makes the outcome acceptable to the society.³⁹ The procedural conditions for the legitimization of the decisions of an institution can be multi-faceted.⁴⁰ However, we will limit our consideration of the WTO decision-making analysis to few of them.

The consensus decision – making as we have stated above has been the practice in the WTO, and even it is claimed that the member never voted on any subject.⁴¹ The problem with this decision making process is that it remains to be quite informal and consensus is usually built behind the scene in the “corridors and lobbies outside the main meeting rooms”.⁴² The practice of Green Room decision-making was excellently explained by Bossche as “[t]his mechanism brings the major trading powers and a select group of developing-country Members together to try to reach preliminary agreements which are then presented to the rest of the membership.”⁴³ And this has been criticized for excluding the majority of the membership. The decision- making as such is regarded as an indirect way of recognizing the power differentiations that has never been envisaged by the WTO Agreements on the decision making processes.⁴⁴ This is because, as will be elaborate in the following section, it is only the powerful members of the WTO that are generally making the decisions. However, as has been discussed in the beginning parts, the voting system was supposed to work on a one-member-one–vote principle.

However, how actually are these meetings conducted? The most important decisions are made in the Green Room; a practice started in the Tokyo Round and continued to be used even today.⁴⁵ The reason behind the use of this system was to enhance “efficiency and effectiveness by limiting the number of negotiators to those key and active players...”⁴⁶ However, who determines that a member is a key and an active player in a situation where every

³⁷ Supra note 34, at p. 296

³⁸ Sungjoon Cho, “A Quest for WTO’s Legitimacy”, 4 *World Trade Review* (2005), p. 392

³⁹ Supra note 36, at p. 171

⁴⁰ For detailed account of these issues consider generally Claire R. Kelly, “Institutional Allegiances and Derivative Legitimacy”, 29 *Michigan Journal of International Law*, (2007-08)

⁴¹ Mary F. Footer, *An Institutional and Normative Analysis of the World Trade Organization* (Martinus Nijhoff Publishers, 2005), p. 156

⁴² *Ibid*, p. 159

⁴³ Peter Van Der Bossche, *The Law and Policy of the World Trade Organization Text, Cases and Materials*, Cambridge University Press, (2005), p. 151

⁴⁴ Supra note 43, at p. 159

⁴⁵ Supra note 2, at p. 126

⁴⁶ *Ibid*

state has its own interests and objectives to achieve by participating in the negotiations and decision making? Besides, how does the Green Room decision making actually operates? One of the most dubious procedures followed in the WTO is clearly portrayed in this decision making. Why? The answer is simple. Green room meeting are open only for 20-30 “self selected” generally developed countries participants with no “objective basis” for the selection and participation.⁴⁷ The Director General is given the mandate to select and invite those who are allowed to participate in these meetings, and the usual participants are members like the U.S. EU, Canada and Japan (the Quads) with Switzerland and Australia.⁴⁸ When the above members are always the participants, only five- ten developing countries and LDCs would be allowed to participate in the meetings despite being more than one hundred and fifty in the Organization.⁴⁹ Generally, all the important proposals are initiated and discussed in this Room behind the scene and the final outcome is put to the plenary sessions without any background information as to what has been discussed in the Green Room meetings.⁵⁰ At maximum, what the developing countries and the LDCs receive as the discussion proceeds is an interim report by the chairman explaining the fact that the discussion is going on without identifying the subjects being discussed and the position of the participants.⁵¹ In this system what is the fate of those objecting to the decisions taken in the Green Room since apparently the decision is supposed to be adopted by consensus? For one thing, states do not have the “courage and motivation to put a clear opposition against the final decisions when it is to be adopted.⁵² Besides, those who have the strength to oppose the final decisions would be put under a serious pressure from those powerful developed countries on the delegations in the WTO or even on the country she/he is from in the capital to accept the decisions that is made in the procedure we have mentioned above.⁵³ Underscoring the predicament the developing countries found themselves in, Bossche wrote that “[t]hese countries are frequently confronted with ‘take-it-or leave-it’ decisions agreed upon during informal meetings of a selective group of developed and developing countries”⁵⁴

One of the major problems of the decision making process in the WTO is its lack of transparency. Sungjoon Cho considers the transparency issues as”...visibility and

⁴⁷ Supra note 3, at p. 2

⁴⁸ Supra note 2, at p. 126

⁴⁹ Bhagirath Lal Das ,”Why the WTO Decision-Making System of 'Consensus' Works Against the South” available at www.twinside.org.sg/title/bgl3-cn.htm, last visited May 23, 2010

⁵⁰ Ibid

⁵¹ Ibid

⁵² Ibid

⁵³ Ibid

⁵⁴ Supra note 45, at p. 152

communicativeness of the WTO operations...⁵⁵ It is a natural and legitimate requirement that the Organization should have been transparent at least to its own member states in terms of the basis of decision making, but the truth as we have mentioned above is only those 20-30 Green Room participants know the operational dynamics of the WTO. As such, serious criticism is launched against this closed door negotiations in the Green Room.⁵⁶

To consider this from input legitimacy issue, one of the major components of an input legitimacy is the transparency with which decisions are made and since this is virtually absent from the WTO's decision making, one major component is lacking and hence legitimacy of the decisions is questioned. In support of the above idea, Marcus Krajewski wrote that "in order to generate legitimate results, informal negotiations must be based on clear and transparent rules about how and when to use the small group negotiations."⁵⁷ Cecilia Albin also argued in the same line that "[f]irst, the WTO faces a serious problem of legitimacy that derives largely from its procedures for decision-making and, especially, negotiation"⁵⁸

However, since these rules are patently absent in the WTO decision making, and the developing countries and LDCs still continue to challenge its transparency, the legitimacy of the Organization will be at issue importantly. 'Unfair processes can result in disengagement by Members and a decline in the credibility of an organization.'⁵⁹

The other major issue we need to raise in this connection is the issue of participation. As we have repeatedly mentioned in the preceding parts, the WTO law on voting clearly allowed equal participation to all members. However, due to the principle used in the Green Rooms, the exclusion of the majority of the members from decision making has already been the case. And this clearly leads to the questioning of the legitimacy of the decisions adopted at the WTO level by the developing countries and LDCs, as we have seen above, beginning particularly from the Seattle Ministerial Conference.⁶⁰

Habermas identifies three component of meaningful participation of the members that are allowed to participate in the decision-making determining the legitimacy and acceptability of the decision. The first one is inclusive, in the sense that no one is excluded from articulating topics relevant, the second being coercion free participation, meaning, the participants engage in arguments free of domination or intimidation; and the last is that the participation is open and symmetrical, i.e. each participant can initiate, continue and question the discussion on any

⁵⁵ Supra note 40, at p. 392

⁵⁶ Ibid

⁵⁷ Supra note 36 , p. 161

⁵⁸ Supra note 8, at p. 759

⁵⁹ The multilateral trade regime: which way forward?, *Report of the First Warwick Commission* (Coventry: University of Warwick, Dec. 2007).

⁶⁰ Habermas, J. *Moral Consciousness and Communicative Action*, C. Lenhardt and S. Weber Nicholzen (trans.), Cambridge: MIT Press. (1990), p. 89

relevant topic, including the very procedures that govern the discussion.⁶¹ The decision-making at the WTO suffers from the absence of these critical elements, for the decisions are not inclusive and the parties are not symmetrical in influencing the outcome of the decision, its democratic acceptability has been significantly affected.

Since participation and accommodative nature of a decision is used to evaluate the input legitimacy of a decision, we can regard these decisions as illegitimate. Besides, since not all the members of the WTO fully participate in the decision-making, the decisions obviously are not representative to all the member states. Claire R. Kelly, discussing on this matter considered the WTO decision-making as a “club model” wherein only few “enjoy meaningful representation...”⁶² This is another blow to the input legitimacy of the decisions made at the WTO since representativeness of a decision is one of the criteria to determine it. The other closely related issues to representativeness of the decision is its inclusive nature. Since the decisions are not representative, we can say that they are not inclusive of all the interests of the members and as such, this is a good ground to question the input legitimacy of the decisions

2. CONCLUDING REMARKS

To conclude, despite the significantly increased number of the membership and the coverage areas of its competence, the WTO's decision making process has not showed any important change from what had been practiced under the GATT system. Hence, the Green Room and fictitiously consensual decision making process is still the ones employed by the Organization irrespective of the persistent objection from the member states. However, the decisions lack, representativeness, transparency and do not allow the necessary participation for all the members. And because of the absence of these fundamental principles of decision making on international level, the required inputs are not properly addressed in the decisions. In other words, the WTO's decision making process patently lacks the input legitimacy. This in the long run would definitely affect the legitimacy of the Institution itself for it affects the decision-making capability thereof and by so doing preventing the Organization from achieving its stated goals. That is exactly what we have witnessed in the Doha Round negotiation and which trend does not seem to have been abated still. In the final analysis, therefore, the WTO needs to change its decision-making process to claim the desperately needed legitimacy to show to the world that it is really a global trading platform.

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⁶¹ Ibid

⁶² Supra note 42, at p. 615

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