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Trade, Labor and EU Law Perspectives

The Crisis of the ‘Consensus Principle’ and the Joint Initiative Approach

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In the aftermath of the Eleventh WTO Ministerial Conference held at Buenos Aires in December 2017, four groups of WTO Members launched negotiations, agreeing to advance discussions on four vital trade issues – investment facilitation, domestic regulations in services, electronic-commerce (E-Commerce), and micro, small and medium-sized enterprises (MSMEs). These joint initiatives were launched through independent statements made by select WTO Members, in different groups, and have been taking place at the WTO since then.

While these joint plurilateral initiatives have gathered momentum, and a few of them have reached an advanced stage, certain systemic concerns have surfaced. These systemic concerns pertain to the modality that these negotiations have adopted, and the potential legality of their outcomes. The larger question is – to what extent do these initiatives undermine (or risk undermining) the fundamental consensus principle of decision-making at the WTO. Examining this concern requires a relook at the key provisions of the Marrakesh Agreement establishing the WTO (“WTO Agreement”). In this backdrop, this piece examines the scope of the joint initiatives including the specified modalities for decision-making, and whether the Joint Initiative-outcomes can be formalized within the WTO framework.

WTO as a multilateral trade forum: scope and decision-making

The WTO is essentially an institution with the mandate to establish binding multilateral trade disciplines.^[i] Interestingly, for some of the substantive issues addressed by certain select groups of WTO Members, there is a view that there is some flexibility within the WTO for initiatives of this kind, although this view is heavily contested. Importantly, Article II of the WTO Agreement sets out the scope of the WTO – “[t]he WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to the Agreement”.^[ii] Clearly, the WTO can be a forum for negotiations that are initiated under and pivoted within the WTO Agreement itself, or one of the covered agreements. But, what about the Joint Initiatives?

The key question is how and to what extent can WTO Members initiate negotiations on a plurilateral basis? To answer this question, we examine the procedural mechanisms provided by the WTO Agreement and/or the covered agreements. First, Article IV of the WTO Agreement provides for the structure of the WTO Agreement and clearly confers the authority to take “decisions” on any matters pertaining to the multilateral trade agreements on the Ministerial Council (which is composed of all the WTO Members). Article IV also clearly states that such decisions are to be taken by the Ministerial Council in accordance with the specific requirements for “decision-making” in the WTO Agreement, or in any of the covered multilateral trade agreements. The procedures and requirements for decision-making are provided in Article IX of the WTO Agreement. The procedures for bringing about amendments into any of the multilateral trade agreements or to the WTO Agreement itself have been provided in Article X of the WTO Agreement.

Second, Article III of the WTO Agreement provides for the functions of the WTO. The main function of the WTO is to “facilitate the implementation, administration, and operation, and further the objectives” of the WTO Agreement and the multilateral trade agreements. Insofar as the Plurilateral trade agreements are concerned, Article III:1 provides that the WTO shall provide the “framework” for the “implementation, administration and operation of the Plurilateral Trade Agreements”. Thus, the WTO Agreement envisages specific procedures (in terms of providing a framework but not facilitating) for only the implementation of the Plurilateral Trade Agreements that were included in Annex 4 to the WTO Agreement, based on the consensus reached during the Uruguay Round of trade negotiations, and not any other agreements.

The Joint Initiative Approaches

Insofar as the Joint Initiative approach is concerned, it broadly envisages newer and improved disciplines of a substantive nature on sensitive and critical trade issues, some of which are not explicitly covered by the WTO Agreement or envisaged by any of the covered agreements. One example would be that of the Joint Initiative on the Micro, Small and Medium-sized Enterprises (JI on MSMEs). The JI on MSMEs *inter alia* covers issues pertaining to “improvement of access to information for MSMEs, ways to foster a more predictable regulatory environment, reducing trade costs, improving access to trade finance for MSMEs, trade costs and trade facilitation affecting MSMEs”, etc.

While these issues are of vital trade interests, neither the WTO Agreement nor any of the covered agreements have explicitly included any enabling provision to pursue future discussions on them.^[iii] Given the potential of the structured discussions on Joint Initiatives to result in newer disciplines with trade consequences (given the breadth of the issues targeted), any negotiation on such disciplines must follow the modality specified in the WTO Agreement. That is, any proposal seeking to introduce any addition to, or improvement or interpretation of, any of the covered agreement(s) would require compliance with Articles IX and X, and/or the relevant provisions of the covered agreement(s).

Another issue pertains to the situation where a covered agreement explicitly provides the modality for formulation of multilateral disciplines. This is the case with the Joint

Initiative on Services Domestic Regulation (JI on Services DR). The WTO Members part of the JI on Services DR have negotiated the plurilateral disciplines on domestic regulation in services, envisaged under Article VI:4 of the GATS. The JI on Services DR includes a modality specified within Article XVIII of the GATS, i.e. by inscribing additional commitments to Members' schedules of commitments. These disciplines would be applied on an MFN basis, given that they will be part of the Members' schedules of specific commitments, after each Member completes the procedure for modification of the schedule of its GATS commitments.

Interestingly, the text of the JI on Services DR mentions that the disciplines have been developed pursuant to Article VI:4 of the GATS. However, Article VI:4 of the GATS clearly entrusts the Council for Trade in Services (CTS) with the function of developing "any necessary disciplines" on domestic regulation. Importantly, pursuant to Article VI:4 of the GATS, and Article IV of the WTO Agreement, the Council for Trade in Services (CTS) first created the Working Party on Professional Services (WPPS) in 1998 and replaced it later by the Working Party on Domestic Regulation (WPDR), by adoption of the "Decision on Domestic Regulation".^[iv]

The explicit reference to Article IV of the WTO Agreement^[v], Article XXIV of GATS^[vi] and Article VI:4 of GATS in the recitals to the Decision on Domestic Regulation makes clear the mandate of the CTS - to formulate the necessary disciplines on domestic regulation.^[vii]

Given a clear mandate to develop multilateral disciplines, any kind of group-based negotiations and adoption of such disciplines - even if applied by a GATS-based modality of inscribing additional commitments, on a most-favoured nation basis - is a circumvention of the consensus-based principle.

Conclusion

The plurilateral approaches taken recently by a few WTO Members to launch structured discussions in the form of Joint Initiatives run the serious risk of subverting the consensus principle. The fact that Article III of the WTO Agreement very clearly delineates the kinds of multilateral trade negotiations for which the WTO may act as a forum also implies that any procedures not envisaged under the WTO Agreement would not be justified in formalizing the outcomes (in an alternative or disguised manner) within the WTO.

Taking the examples of two specific JIs (MSMEs and DR), the above discussion has sought to highlight the concerns that arise from the approaches of launching plurilateral discussions on critical trade issues by WTO Members, following the Buenos Aires Ministerial Conference in December 2017. However, the concerns, especially the subversion of the consensus approach, largely remain relevant with respect to the other JIs as well. The intent and object behind such approaches is evident. Failing a consensus, interested Members are unlikely to refrain from advancing negotiations on vital issues. However, such an approach not only raises the issue of eroding the rule-making powers of the entire Membership, but could lead to the resurgence of GATT *a la carte* approach which was the hallmark of the Tokyo Round (1974-1979). This is a matter that calls for proactive engagement by the WTO

Members, particular those that staunchly advocate the multilateral approach.

Before considering any of the innovative and sometimes alternate approaches to multilateral trade negotiations, Members must recall that the primary objective behind establishing the multilateral trading system was twofold, viz., maximizing global economic development and achieving the greatest measure of equity.^[viii] While maximizing the one, the other cannot be discarded. These are two integral components of the multilateral trading system, which if compromised even for seemingly benign and tangible economic outcomes, may push the WTO to the point of no-return.

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[i] See, for example, Preamble to the Marrakesh Agreement establishing the WTO [“WTO Agreement”], Recital 5.

[ii] WTO Agreement, Art. II.

[iii] The closest are the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Measures which provide for certain limited flexibilities in terms of ease of information submission, financial assistance, etc. The Anti-Dumping Agreement includes provisions that reduce the burden on MSMEs with respect to information requirements or provide certain flexibilities to Members when acting on behalf of SMEs. The SCM Agreement permits WTO Members to provide certain financial contributions to MSMEs.

[iv] Council for Trade in Services, Decision on Domestic Regulation, S/L/70, 27 April 1999.

[v] Article IV:5 of the WTO Agreement provides that “[t]he Council for Trade in Services shall oversee the functioning of the General Agreement on Trade in Services” and Article IV:6 of the WTO Agreement provides that the Council for Trade in Services shall establish subsidiary bodies as required.

[vi] Article XXIV:1 of the GATS clearly states that “[t]he Council for Trade in Services shall carry out such functions as may be assigned to it to facilitate the operation of this Agreement and further its objectives”.

[vii] The multilateral nature of the envisaged disciplines is further underlined by the requirement under paragraph 4 of the Decision to report its recommendations to the CTS. Paragraph 3 of the Decision on Domestic Regulation also recognises that “[i]n fulfilling its tasks, the Working Party shall develop generally applicable disciplines”.

[viii] Peter Sutherland et. al., *The Future of the WTO, Addressing institutional challenges in the new millennium*, Report by the Consultative Board to the Director General Supachai Panitchpakdi.

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