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## BACKGROUND NOTE ON WTO DECISION MAKING

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### Relevance and utility of decision-making by consensus

- i. Multilateral trade agreements, including the Marrakesh Agreement, articulate the common will of the contracting parties and, therefore, require their common will to amend it.<sup>1</sup> Decision-making by consensus is grounded in the experience of 75 years of functioning of the multilateral trading system (MTS). The former WTO Director-General Mike Moore had said that *“the consensus principle which is at the heart of the WTO system and ... is a fundamental democratic guarantee is not negotiable”*<sup>2</sup>.
- ii. Decision-making by consensus:
  - upholds the doctrine of sovereign equality and the principle that no international decision should be imposed against the will of any State.
  - is a technique that helps in the elimination of controversial points and fosters outcomes through the use of negotiation, instead of the outcomes being dictated by a handful of powerful countries. It is an effective bulwark against negotiated outcomes being based on a ‘power-oriented’ system.
  - helps to secure a compromise solution acceptable to all parties. In its absence, opponents of certain decisions would be forced to acquiesce in to the decision.
  - it supports the efforts to ensure representation, drives participation, incentivizes compromise, and contributes to trust-building and to advancing an integrated MTS.
  - accords legitimacy to outcomes of the WTO, as these are based on consent of the entire Membership.
  - is a powerful instrument available to WTO Members to ensure the credibility and acceptability of outcomes of the GATT/WTO. It also signals to the interested stakeholders and public at large that each country has an equal voice in decision-making. The importance of this should not be underestimated. Given the stark difference in economic and political clout within the WTO Membership, consensus decision-making provides a reassurance that

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<sup>1</sup> Overall, it has been acknowledged that the rule in ordinary trade agreements is that they can only be modified with the unanimous consent of the parties taking part in them. See Report of the Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment: Tariff Committee (Geneva, Apr.-Oct. 1947).

<sup>2</sup> Speech available at: [https://www.wto.org/english/news\\_e/spmm\\_e/spmm26\\_e.htm](https://www.wto.org/english/news_e/spmm_e/spmm26_e.htm)

even the weakest of the Member will have the same say in decision-making, as the most powerful Member.

- iii. Under the consensus rule, diplomats from powerful Members have incentives to obtain accurate information of the preferences of weaker Members: they need to understand those preferences if they are to fashion a substantive package that will lead to outcomes acceptable to all. In contrast, by abandoning consensus decision-making and adopting other procedures, a handful of powerful Members could come to routinely determine outcomes without considering the interests of weaker Members.<sup>3</sup> At a time when we are witnessing strong voices against globalization in all our countries, circumventing the tradition of decision-making by consensus would raise further questions against the manner of functioning of the WTO.
- iv. Given the diversity of interests among the WTO Members, who are at different stages of development, any other process/requirement for decision-making is likely to have unfair outcomes lacking in credibility. At a time when globalisation is being viewed with suspicion, departing from decision-making by consensus would further erode the credibility, and diminish the stature, of the WTO.
- v. Abandoning decision-making by consensus is likely to:
  - result in exclusionary decision-making and outcomes that disregard weaker country interests.
  - create disaffected Members within the WTO. Consequently, the stake and interest of these countries in the MTS would diminish. This could eventually destabilise the MTS.
- vi. The most important way of building trust is by WTO Members abiding by the rules of the organisation. Attempts at circumventing rules to push narrow national interests in negotiations and some Members not abiding by commitments made in the past during Ministerial Conferences are two important factors responsible for creating distrust and stalemates.

### **Three main thresholds for decision making under the Marrakesh Agreement rules**

- i. There are three main thresholds for decision making under the Marrakesh Agreement rules. The highest threshold for decision making is “*acceptance by all Members*” which applies in certain cases of amendments, such as amendment of the Marrakesh Agreement and core provisions of its annexed Agreements.
- ii. For example, Article X.2 of the Marrakesh Agreement provides “Amendments to the provisions of this Article and to the provisions of the following Articles shall take effect only upon acceptance by all Members:  
Article IX of this Agreement;  
Articles I and II of GATT 1994;  
Article II:1 of GATS;  
Article 4 of the Agreement on TRIPS”
- iii. “Exclusive consensus” is another threshold required in certain instances, such as in relation to adding a new plurilateral agreement under Annex 4 (See Article X.9 of the Marrakesh Agreement).

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<sup>3</sup> Richard H. Steinberg. 2002. In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO. *International Organization* Vol. 56, No. 2 (Spring, 2002), pp. 339-374.

- iv. Besides, the general rule of decision making refers to decision by consensus (such as Articles IX<sup>4</sup> and XII<sup>5</sup> of the WTO Agreement), while also allowing voting as a fall back option, providing that “where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting”.
- v. Thus, the rules of the Marrakesh Agreement already incorporate a multi-layered system of decision making rules that interact with the nature of the issues being decided. Also, in spite of the availability of the vote option in regard to most of the WTO decisions, majority voting has not been exercised in the WTO.
- vi. Consensus is understood under the Marrakesh Agreement to mean lack of a formal objection. Footnote 1 to Article IX.1 of the WTO Agreement provides that: “The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision”.<sup>6</sup>
- vii. In the context of such practice, there is often a silent group (or invisible voices) of Members that might not actively express their positions (especially where political pressure is high and joining in objecting to a decision might be assessed as a move that carries heavy political and economic costs, especially for smaller economies).

**Stalemates in negotiations are not due to decision-making by consensus, but related to other factors**

- i. Projecting consensus decision-making as the main source of the problem might be a misdiagnosis of the problem. Such a misdiagnosis might lead the Membership into decisions that would be potentially harmful for the future of the MTS. Members ought to address the root cause of the stalemate in negotiations at the WTO.
- ii. If the outcome of the negotiations were viewed by all the Members to be aligned with their national interest, stalemate would not have arisen. Persistence of stalemate in negotiations is an indicator of the reality that the outcome is not yet mature for being harvested and that further compromises are required to be made.
- iii. The questioning of the consensus principle and decision-making practice has been coupled with prolonged push back against special and differential treatment (S&DT) and the lack of a meaningful outcome on any of the long-standing mandated asks of developing countries in major areas such as strengthening S&DT and agriculture.
- iv. There is a substantive angle to why outcomes are not achieved and stalemates persist in many areas of negotiations. Blaming decision-making by consensus for deadlocks at the negotiating table fails to recognize this reality.
- v. **The issues underlying the achievement of timely and effective results are closely intertwined with the substance of the law being made rather than a mere issue about decision-making.** For example, providing suitable S&DT provisions in various negotiations would be an effective way to balance national interests and conclude

<sup>4</sup> Article IX on Decision-Making provides that: “The WTO shall continue the practice of decision-making by consensus followed under GATT 1947”. Article IX:1 of the Marrakesh Agreement also establishes that: “[d]ecisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement”. In other words, majority voting was intended to be the default means of decision-making for the Ministerial Conference (MC) and the General Council (GC).

<sup>5</sup> Article XII on accessions. See also: document WT/L/93 (statement by chairman on Decision Making Procedures under Articles IX and XII of the WTO Agreement on occasions when the General Council deals with matters related to requests for waivers or accessions to the WTO)

<sup>6</sup> See also: Article 2.4 of the Dispute Settlement Understanding and its related footnote.

trade negotiations. Besides, rules should be balanced through recognizing and addressing differentiated responsibilities, in the context of the historical and current position of Members in relation to the issues under discussion.

- vi. In the recent past, there has been a lack of constructive engagement from some Members to take forward decisions mandating negotiations on certain issues. If past commitments are not respected, it would undermine the confidence of the weaker players that the MTS is responsive to their needs. A consensus-based mandate was part of a trade-off that already existed when the mandates were decided. Delivering on agreed trade-offs could unlock the stalemate.
- vii. Some of the past commitments provide the foundation on which the entire edifice of the MTS is based — consensus decision-making and S&DT being two of them. Attempting to make far reaching changes to some of these commitments can have far-reaching and damaging consequences for the MTS.
- viii. If it is the view of some Members that in respect of some agreements the past commitments may be required to be modified, this should be attempted exclusively in accordance with the existing rules of the WTO. The temptation to circumvent the rules by creating false narratives must be avoided.
- ix. Existing mandates are collective decisions of the highest legal standing in the WTO. They cannot be set aside due to the unwillingness of some Members to engage because their calculations had changed or the mandate is irrelevant to them anymore.
- x. The only way they may be set aside is by a collective decision by the Members, either where Members decide by consensus that the mandate is of no value anymore or if the mandate has been fulfilled.

### **Risks in adopting ‘responsible consensus’ and potential implications of the related submission**

- i. A narrative is sought to be created arguing that countries not affected by outcomes of certain negotiations must behave responsibly by not blocking consensus.
  - o This idea seems to assume that the ‘objecting voices’ are generally consistent and could be isolated. This approach does not account for the reality that ‘objecting voices’ differ depending on the issue area being negotiated.
- ii. Why might some Members be interested in such an approach? It might be that isolating ‘dissenting voices’, behind which there might be a silent number of voices, might be less threatening to larger powers in comparison to normalizing a vote where all Members are expected to take an active stand and then the silent voices might not remain silent, and the numbers might tilt against the larger powers. In effect, larger powers can manage the politics of isolating dissent rather than managing the dynamics where each and every Member of the WTO is to exercise their vote actively.
- iii. The eventual effect of such an approach, if adopted, would:
  - sideline the sovereignty of one or few countries and their right to full participation, in contradiction to the doctrine of sovereign equality and the principle that no international decision should be imposed against the will of any State;
  - be an anti-thesis to trust-building and thus not cohesive with the objective of building an integrated MTS;
  - result in important number of isolated and disaffected Members, leading to fragmentation in the organization, especially over the medium to long term;

- go completely against the letter and spirit of what is contained in the rules at the WTO. It is relevant to recall that Article X.9 of the Marrakesh Agreement gives a right even to Members who are not parties to an Annex 4 agreement to decide whether that plurilateral agreement should be included within the WTO *aquis*. This right would be undermined if Members are required to abide by the so-called notion of responsible consensus;
- moreover, negotiated outcomes, which may not protect the interests of a large number of developing countries, could be sought to be bulldozed through the artifice of responsible consensus. This would substantially undermine the ability of developing countries to protect their interests at the negotiating table.

***The potential effect of a General Council/Ministerial decision on ‘responsible consensus’***

- Legal status of General Council/ Ministerial decisions:
  - o The WTO Appellate Body (case US- Clove Cigarettes) have noted that a decision adopted by Members, other than a decision adopted pursuant to Article IX:2 of the WTO Agreement (i.e. authoritative interpretation), may constitute a "subsequent agreement" on the interpretation of a provision of a covered agreement under Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT)<sup>7</sup>.
- In treaty interpretation, ‘Subsequent Agreements’ are taken into account, together with the context of the treaty.
  - o This means that is a decision on ‘responsible consensus’ is to be adopted by the GC, it would be taken into account when putting into practice any of the rules on decision-making that are part of the Marrakesh Agreement or any of its annexed Agreements.
- The notion of ‘responsible consensus’ is unclear and is often associated with unclear, open concepts and terminologies that are either not rooted in WTO law or have not been previously used in official documents of the WTO (for example, see terminology such as ‘responsible manner’, ‘win-win approach’, ‘systemic interests of the WTO’ in the WT/GC/W/933, of 7 May 2024). Members might have very different understandings of such terminology and how they are to apply to the decision-making practice at the WTO. If adopted by the Ministerial Conference or General Council, such terminology would add to the complexity in relation to the decision-making practice at the WTO rather than bring more clarity.

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<sup>7</sup> See AB report US- Clove Cigarettes paras 256-260.