



Decision Making at World Trade Organization: Positive Consensus and its Impact on Developing Countries

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ABSTRACT

The most striking feature of WTO is the extent to which it preserves the laws and practices of General Agreement on Tariffs and Trades 1947. One of these features is decision making in WTO. Article IX of WTO agreement 1994 provided for voting as well as the consensus rule for decision making. It retains the voting process of GATT but practice of consensus dominates the decision making in WTO. All the decision making in WTO is based on the positive consensus rule that makes it different from other International Organizations. Positive consensus rule require that a decision will be made if all the members present are agreed and do not expressly object on it. It means that every single member State of WTO has veto power and can limit the decision making by raising objection. Although the consensus practice generally works well but there is always a risk of deadlock and in particular the inability of members to respond legislatively where it disagrees with other member States. Consensus rule has many advantages but it is questionable that whether it is more democratic and effective than the majority rule. This doctrinal study analyzes the impact of this rule on developing member states. This paper discusses that whether the consensus practice of WTO benefits the developing states and adequate for making, revising and implementing rules on International Trade. It discusses as how the decision making in WTO can be more effective and inclusive by reviving and incorporating the practice of voting and other reforms.

Introduction

The most striking feature of World Trade Organization (WTO) is the extent to which it preserves the laws and practices of General Agreement on Tariffs and Trade (GATT) 1947. One of these features is decision making process. Since the inception of WTO in 1995, the consensus practice

has dominated the decision making process of organization. The decision making process in WTO includes political decision making and legislative negotiations. The consensus rule is applicable on both. This study focuses on legislative decision making and analyses the relevant rules of WTO agreement. Article IX of WTO agreement provides that WTO shall continue the consensus practice of GATT except provided otherwise. Article IX provides for a two- step approach that is consensus if possible and voting if consensus cannot be reached. Though it retains the voting option where consensus can't be arrived but this option has never been used. Practice of consensus dominates the decision making in WTO. WTO generates hard law through trade negotiations. The existing legal framework of WTO is result of Uruguay round of negotiations 1994. Consensus among all member states is required at all stages of trade negotiations. Article X of this agreement further mentions that any amendment in the existing trade agreements of WTO will be made through consensus. All the decision making in WTO is based on the positive consensus rule that makes it different from other International Organizations. Positive consensus rule require that a decision will be made if all the members present are agreed and do not expressly object on it. It means that every single member State of WTO has veto power and can block the decision making by raising objection. A significant point is that in order to block a decision, presence of member state is compulsory.

Most of the time it is argued by the supporters of this practice that consensus rule benefits the developing countries by providing them the equal opportunity of participation in decision making. They can block any decision by raising objection and they can veto any decision (Matsushita, 2015). Another problem with consensus rule is that a state can only block a decision if she is present in the meeting. A lot of developing countries do not have permanent mission in WTO and they can't bear the cost to attend all the meetings of WTO so it difficult for them to get the benefit of this veto power. The developed States misuse the veto power and controls the policies of WTO. This practice favors the influential member States and developing countries, despite being in majority could not effectively participate the negotiations. The developing countries, which comprises the overwhelming majority of WTO are deeply dissatisfied with the decision making practices of the organization. They perceive it to be a selective and exclusionary system of decision making and claim that it is inherently biased against their interest and produces asymmetrical agreements. These challenges make it questionable that whether the consensus practice is more democratic and effective than the majority rule. This study analyzes the article IX of WTO agreement and take a closer look at the rules on decision making. This research will discuss that whether the consensus practice of WTO adequate for making, revising and implementing rules on International Trade. And how the consensus decision making impacts the developing countries. It discusses as how the decision making in WTO can be more effective and inclusive, transparent and legitimate by reviving and incorporating the practice of voting and bringing other reforms.

Literature Review

Law making through negotiation is a very significant function of WTO. The organization has negotiated several binding agreements for its member States. The legislative process requires consensus among all the members throughout the process which is resulting in failure of recent trade negotiation and legislative inertia. This section has explored the existing literature and contribution of researchers on the topic. A lot of literature is available on the decision making of WTO but a focus on legislative process and impact of consensus on developing countries like Pakistan is required.

The author **Patrick Low** in his research paper titled “*WTO decision making for the future*” has discussed the consensus practice in decision making of WTO. He put forward his opinion that why the decision making rules should be changed in the organization. He discussed three main considerations in this regard. The first one relates to efficiency and notion that the veto implicit in consensus decision making imparts a bias towards lowest – common- denominator outcomes. This practice makes the decision making process slow and cumbersome. The second reason is that WTO has a diverse membership and it has to accommodate the interest of all its member states. For this purpose, it needs to modify and expands its agenda from time to time but the consensus practice did not make this decision making process any easier. The third reason is that the process of decision making is not democratic as it provides opportunity to a small minority to block any decision. The author suggests that the decision making in WTO requires a relaxation of consensus rule that could make for a more effective, vibrant and flexible multilateral trading system.

In her book “*Deadlock in multilateral negotiations: Causes and solutions*”, the author **Amrita Narlikar** examined the decision making process of WTO in detail. She discussed that the supporters of consensus principle argue that the consensus practice and requirement of unanimity is a critical requirement through which to ensure the legitimacy of the organization participation of all members states in decision making regardless of their contribution, population size or per capita incomes. The author claims that a necessary condition for consensus to have the purported benefits is that there is informed participation. However, in practice small and developing countries have serious information and resource constraints that impede their active and effective participation in decision making. The author put forward some proposals for decision making to be more effective in WTO. The first is to stick with consensus practice but to introduce some procedural changes that would require those States blocking any decision to explain why they are doing so if the majority of members are in favor of adoption.

Claus-Dieter Ehlermann and Lothar Ehring wrote a chapter titled “*Are WTO decision making procedures adequate for making, revising and implementing worldwide and plurilateral rules?*” in a book “*Reforming the world trading system: Legitimacy, efficiency and democratic governance.*” The authors criticized the political paralysis and imbalance resulting from the burdensome consensus practice in WTO. Although it is a voluntary choice of members but now it has become a problem for negotiating and implementing new trade rules. Authors suggest that the solution of this problem should be found within the existing framework of WTO. Article ix gives the option of voting in case consensus cannot be reached. Moreover, a steering group with rotating membership could further promote more effective decision making in WTO.

The author **Mitsuo Matsushita** in his book “*The WTO: Law, practice and policy*” analyzed the strengths and weaknesses of general decision making WTO through consensus. He wrote that consensus may be justified on the grounds that it preserves the legal equality and national sovereignty of all member States. The decision made by consensus have more legitimacy and smooth implementation. However, the consensus practice has the drawback of relegating the WTO to perpetual deadlock because it has almost become impossible to achieve consensus in every decision among more than 160 members. He suggests that consensus practice may be retained by WTO but reforms are inevitable to overcome the consensus- deadlock problem.

Positive Consensus based decision making

Article ix of Marrakesh Agreement establishing the WTO outlined the procedure for decision making in WTO. It states that decisions in WTO will generally be made by consensus. This article defines consensus as a situation where no member formally objects to the proposed decision. If consensus can't be reached then it allows that decisions can be made through voting but the voting

procedure has never been used by WTO since its establishment. The rule is called positive consensus because it requires affirmative agreement by all members present (Elsig,2013). So it requires lack of objection by any of the member states for adoption of any legislative or political decision. This procedure is different from the one in used in former GATT system. It is argued that the consensus rule was adopted to ensure inclusiveness and member driven governance in WTO. While practice has showed that this rule has slow down the decision making process and led to legislative paralysis as it is difficult to achieve unanimity among all members of organization. The Doha Development round was failed because consensus could not be achieved in negotiations. Hence the principle aims to promote legitimacy in decision making and sense of equality among member states but it also poses challenges to the efficiency and responsiveness of WTO's institutional framework.

Effectiveness of Rule of Positive Consensus for Decision Making at WTO

The GATT 1947 provided the mechanism of voting for decision making and did not mention the word 'consensus' but in practice decisions were made through consensus. In GATT (1947), the practice of decision making by consensus rule was workable because there were fewer and less diverse member and the issues were less complex. On the other hand, WTO has more diverse membership with different trade and economic interests of States. In this situation consensus among all member states is nearly impossible and it potentially threatens the effectiveness of the decision making process. Consensus practice resulting in constant deadlock and paralysis in the organization (Ehlermann, 2005). In December 2019, this practice enabled USA to destroy the WTO's judicial branch by blocking appointments to the appellate body of WTO against the will of other 163 members. There are several other examples where consensus could not be reached due to this consensus practice. The Doha development agenda commenced in 2001. The purpose of this round was to achieve major reforms in International Trading through introducing lower trade barriers and revised trade rules to improve the trading prospects of developing countries. The Doha Development negotiations were failed because consensus could not be reached among member States. The Doha round failure undermined WTO credibility and ferment distrust in developing countries. Another consequence of consensus rule is single undertaking principle. It states that "nothing is agreed until everything is agreed". This principle requires all the member states of WTO to undertake all the obligations and adopts the agreements negotiated in a single round as a whole package. This principle also contributed in failure of Doha Development Round.

Although the consensus practice generally works well and it is argued that it benefits the developing countries. Consensus principle provides equality to all the member States by providing one member one vote strategy (Hoekman, 2020). This practice is different from other financial organizations like International Monetary Fund (IMF), where decision making is through weighted votes. The decisions made by consensus provide increased legitimacy and are easy to implement. However, the drawback is that even an overwhelming majority of members are not able to reach a decision if only one member objects on it. There is always a risk of deadlock and in particular the inability of members to respond legislatively where it disagrees with other member States (Narlikar, 2010). This practice allows a theoretical equality to developing countries against their developed counterparts.

Positive Consensus and Developing Member States

Theoretically, the positive consensus rule of article IX aims to strengthen the cooperation, legitimacy and equality among members but it is questionable that whether it truly benefits the developing states or not. On paper, principle of consensus intends to prevent powerful member states to unilaterally make decisions and this process ensures participation of all member states in

decision making (Wilkinson, 2006). It provides veto power to all the countries and decision can be blocked if any single member raise any objection. However, in practice the consensus principle often disadvantages the developing member states. There are several challenges faced by the developing countries that undermines the effectiveness of consensus rule in practice.

Informal pressure by bigger economies

Though the principle of positive consensus allows all member states to participate in decision making by providing them equality and power to raise objection. However in practice the developing member states face informal pressure by strong economies and developed member states to agree on agendas and proposals. Developing member states can't raise objections because they need bigger economies for trade and other economic benefits. Hence most of the time developing states agrees to the agendas presented by stronger nations. On the other hand there are many examples where developed nations have blocked the legislative measures by raising objections that were for the benefit of developing and least developing states. So this principle of consensus impact negatively to developing nations through legislative deadlock on issues critical to their interests like in "Agricultural Subsidies Negotiations, access to market and special and differential treatment (John, 2010).".

Less resources and technical support

The requirement of positive consensus was adopted to protect the weaker member states but the complexity of WTO negotiations and less technical capacity of developing states has further weaken their ability to effectively participate and benefit from the process. Most of the developing states don't have resources to appoint a permanent mission for WTO so they cant be present at all decision making meetings. The rule requires unanimity and consensus of all members present so it can prevent the developing states to protect their interest if they are not present in the meeting to formally raise any objection. Moreover limited resources, less technical support and expertise also prevent developing states to effectively participate in negotiations at WTO.

Legislative Paralysis

In recent years WTO has witnessed legislative deadlock and decision making paralysis because of consensus requirement. This raised questions on effectiveness of WTO as a forum to regulate trade according to the requirement of modern times. The legislative process has become increasingly stagnant as seen in the failure of Doha Development Round that was launched in 2001 with the objective of addressing trade related concerns of developing states. Because of major disagreement between developed countries like USA and developing coalition over agricultural subsidies and industrial tariffs led to persistent deadlock till date (Hopewell, 2016). Other examples include deadlock over reforms of WTO appellate body. USA has blocked the appointment of new judges by using consensus rule and raising objections. This has paralyzed the WTO dispute settlement system that is one of the most significant and striking features of WTO. There is need of new trade rules according to the changing scenario, rise of artificial intelligence and climate concerns. There is a need for institutional and legislative reforms to break this deadlock and to make decision making process more democratic and effective for all member states.

Recommendations

Revival of voting practice

Article ix of Marrakesh Agreement also allows for voting mechanism if consensus could not be achieved but voting has been rarely used since the establishment of WTO. The revival of voting

process is more democratic and it can help to break the legislative deadlock as it is not possible to achieve unanimity in every case. In order to make the process more legitimate, inclusive and transparent absolute majority requirement can be introduced so the decision can be adopted if an overwhelming majority agree to it.

Flexible consensus mechanism

A flexible or qualified consensus practice can be adopted instead of a full unanimity requirement. This will prevent a few members to block the progress on critical issues if majority of members support the decision. A modified consensus approach can be adopted where the consensus of those members directly affected by a proposed decision or rule would be mandatory instead of requiring consensus among all members. This model would make decision making more dynamic and responsive while maintaining the spirit of consensus rule.

Capacity building of developing members

Many developing and least developed member states have limited resources, expertise, negotiation capacity and technical support. It prevents them to effectively participate in decision making process. Training, funding and advisory support can enhance their capacity to effectively engage in legislative and negotiation process. It will make these discussions more open, transparent and inclusive for developing countries.

Conclusion

The rule of positive consensus provided by article ix of the Marrakesh Agreement 1994, embodies the democratic and inclusive ethos of the World Trade Organization. The principle aims to ensure equal participation of all members in decision making process regardless of economic strength of any member state. However, in practice the requirement of consensus has raised concerns over transparency, efficiency and inclusiveness of decision making process. The consensus requirement has led to legislative and institutional deadlock, delaying the progress on key developmental issues like agriculture, climate concerns and market access. This has resulted in disadvantaging the developing member states whose economic challenges require timely and responsive decision making.

To restore the institutional credibility and responsiveness of WTO, reforms in decision making process are imperative. A modified consensus mechanism and revival of voting practice can effectively address these concerns. Capacity building and providing technical support to developing countries can enable them to effectively participate in decision making process. Reforms in decision making and legislative process of WTO can make it more responsive, transparent to compete the challenges of contemporary global trade governance.

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