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THE LEGAL STATUS OF 'JOINT STATEMENT INITIATIVES' AND THEIR NEGOTIATED OUTCOMES

The following communication, dated 18 February 2021, is being circulated at the request of the delegations of India and South Africa.

Introduction

1. The WTO was established as forum concerning multilateral trade relations in matters dealt with under the agreements in the Annexes to the Marrakesh Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference. The Joint Statement Initiatives (e.g. e-commerce¹, domestic regulation², investment facilitation³ etc.) have to be assessed on the basis of the provisions of the Marrakesh Agreement establishing the WTO.

2. The Marrakesh Agreement defines 'Plurilateral Agreements' as the agreements and associated legal instruments that are included in Annex 4 to the Agreement. The Ministerial Conference, upon the request of the Members party to a trade agreement, decides exclusively by consensus to add that agreement to the said Annex 4.

3. Any group of Members may discuss any issue informally. However, when discussions under Joint Statement Initiatives turn into negotiations, and their outcomes are sought to be formalized into the WTO framework of rules, it can only be done in accordance with the rules of procedure for amendments as well as decision-making as set out in the Marrakesh Agreement.

Contradiction Between JSIs and the Fundamental Principles at the WTO

4. There have been suggestions that, if the negotiated JSI outcomes are offered on an MFN basis, no multilateral consensus is required for bringing in such results under the umbrella of the WTO, especially if these new rules are appended to schedules.⁴ According to this proposition, this would require only a modification of schedules procedure.

5. Such a proposition would be contrary to the following fundamental principles and objectives of the multilateral system, enshrined in the Marrakesh Agreement:

- The **multilateral** underpinnings of the WTO, including,

¹ WTO, Joint Statement on Electronic Commerce, Ministerial Conference, Eleventh Session, WT/MIN(17)/60 (dated Dec. 13, 2017).

² WTO, Joint Statement on Services Domestic Regulations, Ministerial Conference, Eleventh Session, WT/MIN(17)/61 (dated Dec. 13, 2017).

³ WTO, Joint Statement on Investment Facilitation For Development, Ministerial Conference, Eleventh Session, WT/MIN(17)/59 (dated Dec. 13, 2017).

⁴ INF/SDR/W/1/Rev.2 'Members shall inscribe the disciplines in Section II in their Schedules as additional commitments under Article XVIII of the Agreement', Section I, para. 7 (dated Dec.18, 2020).

- Art. II.1: 'The WTO shall provide the common institutional framework for the conduct of trade relations among its Members ...';
- Art. III.2 'The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations'.
- **Consensus based decision-making**, as enshrined in Arts. III.2, IX, X, and also X.9.
- The procedures for **Amendments** of rules as articulated in Art. X.

New Form of 'Plurilaterals' or 'Open Agreements' are WTO Inconsistent

6. As stated above, the Marrakesh Agreement provides that the agreements and associated legal instruments included in Annex 4 to the Agreement are "Plurilateral Trade Agreements". The Ministerial Conference, upon the request of the Members party to a trade agreement, decides exclusively by consensus to add that agreement to Annex 4.

7. The JSI proponents intend to create a new set of Agreements, which are neither multilateral agreements nor Plurilateral Agreements [as defined in Article II.3 of the Marrakesh Agreement]. The proponents appear to suggest that when offered on MFN basis, no consensus is required for bringing in these new rules into the WTO. This approach, however, is legally inconsistent with the fundamental principles and procedures of Marrakesh Agreement as outlined in para. 4 above.

Procedures for Amending Rules

8. As stated above, a procedure for amending rules is enshrined in Article X of the Marrakesh Agreement. On the other hand, the GATT and GATS contain specific provisions for modifications of Schedules. Proponents of JSIs have confused amendment to rules and modifications to schedules, and the proposed introduction of new agreements into the WTO to bypass the requirements of Article X of the Marrakesh Agreement. However, new agreements are not amendments to schedules.

Overriding Effect of the Marrakesh Agreement

9. Art. XVI.3 of the Marrakesh Agreement provides that in the event of a conflict between a provision of the Marrakesh Agreement and a provision of any of the Multilateral Trade Agreements, the provision of Marrakesh Agreement shall prevail to the extent of the conflict.

Different Challenges Posed by Individual JSIs

10. Each of the recent Joint Statement Initiatives is likely to pose different legal challenges to existing WTO rules and mandates, given the differences in the nature and scope of issues covered under each of these initiatives.

Systemic and Development Implications of JSIs

11. Any attempt to introduce new rules resulting from the JSI negotiations into the WTO without fulfilling the requirements of Articles IX and X of the Marrakesh Agreement, will be detrimental to the functioning of rule based multilateral trading system. Such a step will:

- erode the integrity of the rule-based multilateral trading system by subverting established rules and foundational principles of the Marrakesh Agreement;
- create a precedent for any group of Members to bring any issue into the WTO without the required consensus;
- bypass the collective oversight of Members for bringing in any new rules or amendments to existing rules in the WTO;
- usurp limited WTO resources available for multilateral negotiations;

- result in Members disregarding existing multilateral mandates arrived at through consensus in favour of matters without multilateral mandates;⁵
- lead to the marginalization or exclusion of issues which are difficult but which remain critical for the multilateral trading system, such as agriculture, development, thereby undermining balance in agenda setting, negotiating processes and outcomes;
- leave Members with no option other than to choose between remaining outside the discussions or participating on matters that are inconsistent with their economic development priorities, needs, concerns and levels of economic development.
- fragment the multilateral trading system and undermine the multilateral character of the WTO.

Options for the JSI Proponents

12. As per the provisions of the Marrakesh Agreement, JSI Members have the following options for their negotiated outcomes:

Within the WTO Framework:

- i. Seek consensus amongst the whole WTO Membership, followed by acceptance by the required proportion of Members according to Art. X of the Marrakesh Agreement.
- ii. Get new agreements included in Annex 4 following Art. X.9 of the Marrakesh Agreement.

Outside the WTO Framework:

- iii. Pursue an agreement outside the WTO Framework as was envisaged in the Trade in Services Agreement (TISA), or as has been done in multiple bilateral or plurilateral Free Trade Agreements (FTAs) or Regional Trade Agreements (RTAs).

Amendment to Article X of the Marrakesh Agreement to allow for 'Flexible Multilateral Trading System'

- iv. Seek amendments to the provisions of Article X to provide for the so called 'Flexible Multilateral Trading System'.
13. An Explanatory note to this paper is attached as Annex.

⁵ For example, the GATS Art. VI.4 negotiations mandate as a result of the JSI Domestic Regulation negotiations and the mandates for multilateral bodies entrusted to carry out these VI.4 negotiations (the Council for Trade in Services and the Working Party on Domestic Regulations).

ANNEX

Explanatory notes to the document on the 'Legal statement of Joint Statement Initiatives and their negotiated outcomes'.

The Rules in the WTO Agreement

Scope and Functions of the WTO – Centrality of Multilateralism

1. The multilateral character of the WTO and its scope is articulated in the following: 'The 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 this Agreement.' (Art. II.1).

2. And in Article III.2 which provides 'The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations.....'.

Multilateralism and Consensus Based Decision-Making

3. The fundamental requirement for multilateralism / consensus-based decision-making is enshrined and reiterated at several places in the Marrakesh Agreement.

4. Article III.2 on further negotiations states that matters other than those contained in the Annexes may be pursued 'The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference'.

5. Article IX.1 on Decision-Making says that 'The WTO shall continue the practice of decision-making by consensus.....'.

6. Article X.1 on Amendments states that any decision by the Ministerial Conference to submit the proposed amendment to the Members for acceptance shall be taken by consensus or voting.

7. Even for addition for a trade agreement into Annex 4 of the Marrakesh Agreement [to be treated as Plurilateral Agreement], Article X.9 of the Agreement provides 'The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4.'

Amendments – Changes to Rules Require an Amendment Procedure i.e. Consensus and Acceptance

8. Amendments include dilution, elaboration of existing rules, or addition of new rules that may or may not alter the rights and obligations of Members. Article X of Marrakesh Agreement sets out the procedures for amendments: (i) the requirement for consensus (or voting) (Art. X.1); (ii) a formal acceptance process of depositing an instrument of acceptance (Art. X.7); and (iii) attainment of the quorum required before the amendment enters into force (various Art. X provisions).

Certification Procedures for Modification or Improvements to Schedules

9. In contrast to amendments of Agreements, the modification of Schedules of Concessions do not require a formal amendment procedure. The provisions in the GATT and GATS allowing Members to modify schedules are GATT Art. XXVIII (using the '1980 Certification Procedure', L/4962) and GATS Art. XXI (using procedures as per S/L/80 or S/L/84). Other Members may object to such modifications, thereby exercise the right to maintain the integrity of the originally negotiated outcomes.

The Difference between Changes to Rules and Changes to Schedules

10. Amendments or additions to the rules are governed by multilateral consensus based decision-making [or voting] from the outset when a new proposal for an amendment is made. Negotiations on modifications or improvements to schedules are expected to arise either as the outcomes of consensual multilateral negotiations pursuant to Article XXVIII of GATT or Article XXI of GATS or reached through a bilateral request and offer process, or as a result of a dispute. In contrast, changes to rules and the amendment procedures are not premised on agreements amongst a subset of interested or affected Members. In fact, even changes to schedules cannot be made unilaterally, as other Members have the right to protect the existing balance of rights and obligations.

Provisions of General Rules Vs Provisions on Specific Commitments Inscribed in Schedules

11. The GATS agreement read in concert with the Marrakesh Agreement provides for different rules and procedures pertaining to the amendment of rules versus the modification of schedules.

12. This is important to the question of how results from the JSIs, such as in Domestic Regulation, investment facilitation and also E-commerce, are being considered by the Proponents of concerned JSIs to be potentially integrated under the WTO body of law.

13. GATS rules are governed by **GATS Part II, 'General Obligations and Disciplines'**. **Part III** of the GATS contains provisions concerning Members individual **'Specific Commitments'** pertaining to distinctly identified services sectors, which are inscribed in schedules. The demarcation is an important one and was clearly enumerated in the GATS negotiating guidelines in 1993.

Box: The Two Sorts of Provisions in the GATS

- 'The GATS contains two sorts of provisions. The first are general obligations, some of which apply to all service sectors (e.g. MFN, transparency) and some only to scheduled commitments (e.g. Article XI: Payments and Transfers). The second are specific commitments which are negotiated undertakings particular to each GATS signatory. Specific commitments, upon the conclusion of negotiations, are to be recorded in national schedules which will be attached to, and form an integral part of the GATS...'. (from MTN.GNS/W/164, 3 Sept 1993, para. 2)

14. WTO jurisprudence recognizes the 'Principle of Effectiveness' - the 'interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility...'.⁶ Taking the example of the JSI on Domestic Regulation, the GATS Art. XVIII, therefore, cannot be used to undermine the objectives and processes established by GATS Article VI:4 and Art. X of the Marrakesh Agreement, and effectively amend GATS Article VI:5⁷ for a number of Members, bypassing Art. X.

Overriding effect of the Marrakesh Agreement in the event of a conflict

15. If there is any conflict between Article X of the Marrakesh Agreement and provisions of any of the Multilateral Trade Agreements as listed in Annexes of the Marrakesh Agreement Article XVI.3 of the Marrakesh Agreement would be applicable. Article XVI.3 provides, "[i]n the event of a conflict

⁶ In US – Gasoline (WT/DS2/AB/R, page 23, DSR 1996:I, page 3 at 2), the WTO Appellate Body (AB) stated that "... One of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility...".

⁷ The language used in the GATS Art. VI:4 and VI:5 is that domestic regulatory requirements are 'based on objective and transparent criteria, such as competence and the ability to supply the service'. The JSI DR text has added to this language: 'including to do so in a manner consistent with a Member's regulatory requirements. Competent authorities may assess the weight to be given to each criterion.' (See INF/SDR/W/1/Rev.2, para. 19a and footnote 32).

between provisions of this Agreement and a provision of any of the Multilateral Trade Agreements the provision of the Marrakesh Agreement shall prevail to the extent of the conflict".⁸

Plurilateral Agreements in the WTO

16. As per the Art. II.3 of the Marrakesh Agreement 'The agreements and associated legal instruments included in Annex 4 are referred to as "Plurilateral Trade Agreements". Proponents of JSIs are, however, using the phrase 'Plurilateral Agreements' not as per these provisions. For example, the JSI on E-Commerce discussions are being referred to as a Plurilateral Agreement being negotiated at the WTO, and even the consolidated negotiating text of these discussions is titled as 'WTO E-Commerce negotiations' to mislead the policy makers.

17. Art. III.1 of the Marrakesh Agreement provides that the WTO shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements [i.e. trade agreements included in Annex. 4 of the Marrakesh Agreement]' Article III.2 of the Marrakesh Agreement provides that the WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference. The Marrakesh Agreement does not provide for the WTO to provide any forum for negotiations other than such multilateral negotiations.

18. Art. X.9 of the Marrakesh Agreement provides that trade agreements [other than multilateral trade agreements] upon requests of Member parties to the agreement can be added to Annex 4 of the Marrakesh Agreement only by Ministerial Conference exclusively by consensus.

WTO Inconsistency of 'Open Agreements' Containing New Rules Offered on MFN Basis Bypassing Consensus

19. In line with the desire to bring in the negotiated outcomes of JSIs into the WTO framework of rules, there have been suggestions that there should be a more 'flexible multilateral trading system'⁹ or 'open agreements' where the benefits are extended on an MFN basis if critical mass coverage is achieved¹⁰.

20. Use of such terminology deliberately confuses two different categories of negotiations and their outcomes: Sectoral negotiations changing schedules vs rules negotiations. An example of the former, the Information Technology Agreement [ITA] which did not amend GATT rules. Hence, ITA was given legal effect by amendment to Schedules through a certification procedure, after negotiations with Members, and offered on an MFN basis.

21. However, amendment to rules must follow Art. X of Marrakesh Agreement on amendments.

22. It has also been suggested that consensus to formalize legal outcomes of these open agreements under the WTO framework is not required.¹¹ However, when it comes to rule-making or rules amendment, such an approach is not in accordance with the provisions of the Marrakesh Agreement.

⁸ Also See, Claude Chase, Norm Conflict Between WTO Covered Agreement - Real, Apparent or Avoided?, The International and Comparative Law Quarterly, OCTOBER 2012, Vol. 61, No. 4 (OCTOBER 2012), pp. 791-821 at 792.

⁹ IMF, World Bank, WTO 2018 'Reinvigorating Trade and Inclusive Growth'.

¹⁰ See Canada's paper 'Strengthening and Modernizing the WTO: Discussion Paper', JOB/GC/201, 24 September 2018 (for short "Canada 2018").

¹¹ Canada's submission to the WTO states that such 'open agreements' 'do not require agreement of all Members' ('Strengthening and Modernizing the WTO: Discussion Paper', JOB/GC/201, 24 September 2018).

Telecommunications Reference Paper

23. It has also been suggested that the Telecommunications Reference Paper justifies why the consensus principle can be bypassed. However, the negotiations on Basic Telecommunications have an underpinning in the consensus-based principle.

24. Telecommunications negotiations were envisaged as part of the package of the Uruguay Round outcome. i.e. they have a legal underpinning within the Uruguay Round and its ratification, even though Members decided that the negotiations would be concluded after the rest of the Round had been completed.¹²

25. The Telecoms Reference Paper, thus, arose under the very unique circumstances of the consensually concluded UR, which is not the situation of current JSIs. While, in the case of Telecoms Reference Paper there was a multilateral consensus and a formal mandate for the negotiations, including agreement on inscribing outcomes into schedules without an amendment procedure, there exists no such mandate in the case of current JSIs.

26. The Decision on Negotiations on Basic Telecommunications expressly recognized that "[n]egotiations shall be entered into on a voluntary basis with a view to the progressive liberalization of trade in telecommunications transport networks and services within the framework of the General Agreement on Trade in Services".¹³

27. The multilateral Decision also established that outcomes adopted be inscribed into the relevant Members' schedules: "[a]ny commitments resulting from the negotiations, including the date of their entry into force, shall be inscribed in the Schedules annexed to the General Agreement on Trade in Services and shall be subject to all the provisions of the Agreement".¹⁴

28. Importantly, these negotiations and the implementation date of the results were reinforced in the Annex on Negotiations on Basic Telecommunications which forms an integral part of the GATS.

How JSIs are working against multilateral mandates

JSI on Domestic Regulation in Services (INF/SDR/W/1/Rev.2)

29. The Council for Trade in Services under GATS Art. VI.4 has been entrusted with the task of developing 'any necessary disciplines' regarding domestic regulation. The WTO's Working Party on Domestic Regulation (WPDR) was multilaterally mandated to undertake this work.¹⁵ At no time has there been a multilateral agreement to discontinue the mandate of the WPDR, or the mandate in Art. VI.4.

30. The JSI proponents have subverted the WPDR's multilateral mandate by not just undertaking exploratory discussions, but actually negotiating, such disciplines through a parallel discussion format designed to bypass the multilateral process.

¹² Decision on Negotiations on Basic Telecommunications, Uruguay Round Agreement, para. 1, 15 April 1994.

¹³ Decision on Negotiations on Basic Telecommunications, Uruguay Round Agreement, para. 1, 15 April 1994.

¹⁴ Decision on Negotiations on Basic Telecommunications, Uruguay Round Agreement, para. 1, 15 April 1994.

See also Laura B Sherman, Introductory Note to "World Trade Organization: Agreement On Telecommunications Services (Fourth Protocol To General Agreement On Trade In Services)" 36 ILM 354 (1997), at 355-356.

¹⁵ The Council for Trade in Services had, on 26 April 1999 adopted a 'Decision on Domestic Regulation' (S/L/70). This Decision said that:

'The Working Party on Domestic Regulation shall be established and the Working Party on Professional Services shall cease to exist.

'In accordance with paragraph 4 of Article VI of the GATS, the Working Party shall develop any necessary disciplines to ensure that measures relating to licensing requirements and procedures, technical standards and qualification requirements and procedures do not constitute unnecessary barriers to trade in services. This shall also encompass the tasks assigned to the Working Party on Professional Services, including the development of general disciplines for professional services as required by paragraph 2 of the Decision on Disciplines Relating to the Accountancy Sector (S/L/63).'

31. The JSI on Domestic Regulation, not having been mandated to do so either by the Ministerial Conference or the Council for Trade in Services, cannot legitimately purport to be pursuant to GATS Art. VI.4. Outcomes of these discussions cannot also directly or indirectly amount to a variation of any of the provisions of the GATS, including Article VI.5,¹⁶ Doing so will have serious implications for the rights and obligations of all Members agreed by consensus in the Uruguay Round.

32. Art. VI.4 of the GATS on 'Domestic Regulation' belongs to Part II of the GATS on general obligations (or rules), whilst Art XVIII on 'Additional Commitments' is in Part III pertaining to specific commitments in schedules.¹⁷ Whilst there are some similarities between the issues covered under Art. VI.4 and Art XVIII, the differences between generalised rules (Art. VI.4) and specific commitments (Art XVIII) also cannot be overlooked. The Principle of Effectiveness must be observed in this regard.

33. The only disciplines that have thus far been concluded pursuant to Art. VI.4 are the Accountancy disciplines. The results have not entered into force, but the final decision on how to bring these disciplines into legal effect was taken by consensus.¹⁸

JSI on E-Commerce and JSI on Investment Facilitation

34. By negotiating rules on e-commerce outside the multilateral framework, the proponents of JSI on E-Commerce are subverting the exploratory and non-negotiating multilateral mandate of the 1998 Work Programme on E-Commerce which has regularly been re-affirmed by all WTO Members.

35. It is not clear how proponents intend to bring new disciplines on ecommerce or investment facilitation into the WTO framework.

36. As discussions under both these JSIs contain new disciplines, these 'further negotiations' would require agreement by all WTO Members, as per the provisions of Art. III.2 and Art. X of the Marrakesh Agreement.

37. Further, in the E-Commerce JSI, there are cross cutting issues, covered under GATT, TRIMS, TRIPS and TFA going beyond the GATS Agreement. On this count also, outcomes of the JSI on E-Commerce discussions cannot be inscribed into WTO rules through GATS schedules.

38. In the area of Investment Facilitation, trade-related aspects have already been inserted into the WTO rules through the GATS and TRIMS. In the broadest sense of the word, investment goes much beyond trade, and thus it is questionable whether investment is part of 'multilateral trade relations' (Marrakesh Agreement Art. III.2). Further, July Framework of 2004, as adopted by the General Council, also mandates that 'no work towards negotiations on any of these issues (including investment) will take place within the WTO during the Doha Round'. The Doha Round to date has not been concluded.¹⁹ Discussions regarding investment facilitation under the JSI are thus contrary to such multilateral mandate.

39. Negating the decisions of the Ministerial Conference or the General Council by the decision of a group of Ministers taken on the side-lines of Ministerial Conference or any other event²⁰ would be detrimental to the very existence of rule-based multilateral trading system under the WTO.

¹⁶ See footnote 7.

¹⁷ It is important to note that in the GATS, not all general disciplines in Part II apply to all services sectors. Some apply to scheduled commitments, nevertheless, these are categorized as generalized rules.

¹⁸ WTO 1998 'Decisions on Disciplines Relating to the Accountancy Sector', S/L/63, 15 December. Members in this Decision also chose to wait until the conclusion of multilateral negotiations under GATS Art. XIX to bring these disciplines into legal effect.

¹⁹ WTO 2004 'Decision Adopted by the General Council', WT/L/579, para. 1(g), (dated August 2 2004).

²⁰ Commencement of negotiations under JSI on E-Commerce were initiated based on a decision taken by a group of countries on the side lines of the event at the Davos in January 2019.