



Trade Hot Topics

Sequencing the Implementation of Obligations in WTO Negotiations

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Background

The 2001 WTO Doha Development Agenda commenced negotiations on a range of different issues. With the exception of negotiations on dispute settlement, these different negotiations are to be finalised simultaneously as part of a 'single undertaking'. However, World Trade Organization (WTO) members have also foreseen – and in some cases implemented – 'early agreements' on selected topics that can be carved out of the main negotiations. This should be unproblematic if these agreements are equally beneficial to all WTO members. It is for this reason that negotiations on WTO dispute settlement, which are perceived to be of equal benefit to all WTO members, are treated separately from other negotiations. However, the question arises whether unbalanced 'early agreement' can ever be balanced in later negotiations.

This question has arisen with particular force in recent months with some WTO members' decision to withhold their consent to the entry into force of the Trade Facilitation Agreement, an 'early agreement' negotiated in Bali in December 2013, pending another 'early agreement' on food security. On the assumption that the Trade Facilitation Agreement is indeed unbalanced (which may or may not be the case), the concrete question is whether this demand for simultaneous linkage of two 'early agreements' is justifiable, or, alternatively, whether

it is technically possible to conclude an unbalanced 'early agreement' on condition that a balance will be restored by means of a later 'early agreement' or final negotiations in the form of a single undertaking.

This issue of *Commonwealth Trade Hot Topics* examines several aspects of the so-called 'single undertaking' principle of WTO negotiations subject to possible 'early agreements'. The first section of this article analyses this principle in detail, focusing in particular on the nature of these 'early agreements' and the ways that these agreements can be implemented. It also considers whether it is possible, as mandated by paragraph 47, to take account of such agreements in later negotiations. After identifying some difficulties with this proposition, the next section looks at an alternative means to ensure internal balance within such an agreement, which is by sequencing the implementation of the obligations of one party such that they take effect only after certain acts are performed by another party. This is done, for example, in Article 13 of the newly agreed WTO Trade Facilitation Agreement. The paper concludes with a consideration of the implications of these matters for developing countries in WTO negotiations.

Paragraph 47 of the Doha Ministerial Declaration

Paragraph 47 of the Doha Declaration reads as follows:

With the exception of the improvements and clarifications of the Dispute Settlement

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*Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis. Early agreements shall be taken into account in assessing the overall balance of the negotiations.*¹

The following analyses the different parts of this paragraph.

(a) The single undertaking and 'early agreements'

Paragraph 47 begins by reaffirming the basic principle that Doha negotiations are to be conducted as a 'single undertaking'. This concept originates in the negotiating modalities of the Kennedy Round, was first formulated in these terms in the Tokyo Round and was first implemented in the Uruguay Round. It means simply that nothing is agreed until everything is agreed, and in practice it involves simultaneous negotiations on a range of issues. The single undertaking model of negotiations has the merit of allowing for a greater range of trade-offs between different negotiation topics, thereby giving WTO members more scope for coming to a final agreement that offers something for all members. On the other hand, it has the disadvantage that any WTO member veto on any given subject of negotiations holds up agreement on other topics on which there is consensus. It is for this reason that paragraph 47 encourages WTO members to siphon from the overall process any 'early agreements' on which consensus can be reached.

Ideally such 'early agreements' would be balanced. However, the final sentence of paragraph 47 acknowledges the possibility that an 'early agreement' may be unbalanced, and requiring that in such an event it be taken into account in the final single undertaking. Theoretically, this could be done either in the final negotiations, or by means of another 'early agreement' that, together with the first, achieves an overall balance for all WTO members.

It is doubtful however that such later rebalancing is realistic. It is true that this sentence is written as a binding obligation. Its weakness, however, is that it

depends upon a quantification of the first obligation and of the later obligation not as it comes to exist but rather as it would have been negotiated in the absence of the first obligation. Quantifying the first obligation might just be possible; quantifying the latter is by definition entirely hypothetical. In short, the only certain way of ensuring a proper balance in trade negotiations is to conclude agreements that (singly or together with another agreement) are themselves balanced. Seen in this light, and on the assumption that India has correctly assessed the respective balances of the Trade Facilitation Agreement and the food stockpiling agreement, India's insistence on linkage at this stage is justifiable. This of course depends upon the correctness of the governing assumption.

One might wonder at the origins of this final sentence of paragraph 47, given that it assumes that WTO members will undertake unbalanced commitments without any guarantee that reciprocity will be restored in later negotiations. The answer is that this was originally a form of special and differential treatment, in the sense that these 'early agreements' were supposed to benefit developing countries.² This is not however reflected in the text of paragraph 47, and events have shown that this original intention is not necessarily being realised in practice. To date, there has been one 'early agreement' that has expressly referred to paragraph 47, namely the decision on a transparency mechanism for regional trade agreements, which is applied on a provisional basis.³ There are also several other agreements that could be considered such 'early agreements' even though they do not refer expressly to paragraph 47, such as the equivalent decision on a transparency mechanism for preferential trade agreements, which is also applied on a provisional basis,⁴ and the TRIPS decision on essential medicines, which could be considered an 'early agreement' that is applied on a definitive basis.⁵

(b) Implementation of 'early agreements' on a provisional basis

The reference in paragraph 47 to agreements implemented on a provisional basis is reminiscent of

¹ WTO Ministerial Declaration, WT/MIN(01)/DEC/1, adopted 14 November 2001.

² Cf. paragraph 12 of the Doha Declaration, referring to paragraph 47 in the context of 'implementation-related issues'.

³ General Council, Decision on a Transparency Mechanism for Regional Trade Agreements, 14 December 2006, WT/L/671, 18 December 2006.

⁴ General Council, Decision on a Transparency Mechanism for Preferential Trade Agreements, 14 December 2010, WT/L/806, 16 December 2010.

⁵ General Council, Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, 30 August 2003, WT/L/540, 1 September 2003. A proposed amendment in equivalent terms under Article X of the WTO Agreement is not yet in force.

the 'provisional application' of treaties under Article 25 of the Vienna Convention on the Law of Treaties (VCLT). However, there are differences between the two concepts. Article 25 VCLT is designed to permit parties to apply treaties pending their formal entry into force. The reason for the delay in their entry into force is typically the need for domestic approval of the treaty. Traditionally, this was because of the need to have a negotiated treaty approved by the sovereign, but in modern times it is due to the need in many legal systems to have the negotiated treaty approved by a domestic parliament. The situation referred to in the Doha Declaration is different, as the delay in entry into force of the single undertaking is due to the fact that further negotiations need to be undertaken and completed.

Probably the most important difference is that provisionally applied treaties under Article 25 VCLT are fully binding and subject to dispute settlement, whereas provisionally implemented 'early agreements' are not only unlikely to be binding (this is unclear) but, more importantly, they are not subject to dispute settlement. This is because the WTO Dispute Settlement Understanding only grants jurisdiction to panels and the Appellate Body in relation to matters arising under the 'covered agreements'.⁶ It would be necessary to add the new agreement to an agreement in that list,⁷ or independently amend that list, for it to be capable of being enforced.⁸ On the other hand, it is possible that a provisionally implemented 'early agreement' may have relevance in dispute settlement either as interpretive context⁹ or, conceivably, as a defence to any claim enforcing another WTO provision.

(c) Implementation of 'early agreements' on a definitive basis

Paragraph 47 refers also to the definitive implementation of 'early agreements'. It is not

entirely clear how such a 'definitive implementation' of an 'early agreement' relates to the conclusion of final negotiations in the form of a single undertaking. If a 'definitive implementation' does not have ordinary binding legal force, it is essentially the same as 'provisional implementation'. On the other hand, if 'definitive implementation' does have ordinary binding legal force, it constitutes an alternative to the principle of the single undertaking that is also mentioned in paragraph 47. On balance, this second interpretation is more likely to be correct. That is to say, the definitive implementation of an early agreement is to be considered as an alternative to the single undertaking, and is to take ordinary legal effect. How this is done can vary from tariff bindings to ministerial decisions to amendments to existing WTO agreements.¹⁰ In the case of the Trade Facilitation Agreement, it is foreseen that, upon ratification, this 'early agreement' will take the form of an amendment to the General Agreement on Tariffs and Trade (GATT) 1994, by inserting it into Annex 1A of the GATT.¹¹ The amendment will take effect under Article X of the WTO Agreement.¹²

(d) Whether to implement an 'early agreement' on a provisional or definitive basis

There are three main considerations involved in deciding whether to implement an 'early agreement' on a provisional or a definitive basis. The first is whether it is desirable that the 'early agreement' be enforceable by means of WTO dispute settlement. As mentioned above, this would require amendment of a WTO covered agreement and would therefore require adoption on a definitive basis. Related to this is the second consideration, which is whether it is desirable that the 'early agreement' have binding legal force, in the sense that certain procedures must be followed to amend or revoke it. Again, if this is desirable the agreement should be adopted on a definitive basis.

⁶ Article 1 and Appendix 1 of the WTO Dispute Settlement Understanding.

⁷ This is the mechanism adopted for the Trade Facilitation Agreement. See below at n 12.

⁸ This would be done via the amendment procedure set out in Article X of the WTO Agreement.

⁹ See WTO Appellate Body Report, *US – Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, at paragraph 298, where the Appellate Body held that 'paragraph 5.2 of the Doha Ministerial Decision constitutes a subsequent agreement between the parties, within the meaning of Article 31(3)(a) of the Vienna Convention, on the interpretation of the term "reasonable interval" in Article 2.12 of the TBT Agreement'. The Doha Ministerial Decision was not formally adopted under the WTO Agreement.

¹⁰ See Hunter Nottage and Thomas Sebastian, 'Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods of Changing WTO Law', *Journal of International Economic Law*, 2006, 9(4): 989; and Matthew Kennedy, 'Two Single Undertakings: Can the WTO Implement the Results of a Round?', *Journal of International Economic Law*, 2011, 14(1): 77 at 83-85.

¹¹ Draft Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, above at n 7, paragraph 1.

¹² WTO Preparatory Committee on Trade Facilitation, Draft Decision on the Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, WT/PCTF/W/28, 24 November 2014 paragraph 3, and attached Draft Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, *ibid*, paragraph 4.

The third consideration concerns the nature of the 'early agreement'. As noted, it can only amend a WTO covered agreement if it is adopted as a definitive agreement. But an early agreement that purports to amend a covered agreement, except that it is not definitive and therefore not formally binding, might be seen as undermining the formal amendment procedures in Article X of the WTO Agreement if WTO members treated this agreement as operative in fact, even if not in law. It would be prudent to adopt any agreement that purports to amend a covered agreement on a definitive basis.

How to guarantee the implementation of a reciprocal obligation

The discussion above concluded that it is very difficult in practice to ensure that an unbalanced 'early agreement' will be balanced in later negotiations. This means that it is all the more important to ensure that any 'early agreement' is itself balanced, whether internally or by the simultaneous adoption of another 'early agreement'. This section elaborates on one technique that can be used to achieve internal balance in an 'early agreement'. The technique can, however, be used in relation to any agreement in any negotiation, depending on the type of obligations at issue (as discussed below).

Before turning to this technique, a word should be said on the usual means of enforcing WTO obligations. This is done by requiring a party that does not wish to comply with its obligations either to compensate the affected innocent party, or alternatively to suffer the loss of market access (or royalties) owed by that innocent party. In these cases, the value of compensation or retaliation is assessed by reference to the current value of the obligations that are not being complied with. This means that the WTO respects reciprocity insofar as lost market access (or unpaid royalties) is answered by lost market access (or unpaid royalties) of equivalent value. However, the WTO is not reciprocal in the sense that any effort is undertaken to identify the obligations that the injured party actually undertook in order to obtain its now lost market access, assuming that such obligations could even be identified. This makes sense, because WTO members are interested in the current value of the obligation at issue, not its historical value (for which a reciprocal obligation might be a rough proxy).

In relation to obligations that are quantifiable in these terms, this method of enforcement should be sufficient to protect a WTO member's interests (albeit subject to the usual flaws of the WTO dispute settlement system). But not all obligations are of this type. For example, obligations to notify new technical regulations or to provide development aid are essentially unenforceable, given that it is virtually impossible to connect violations of these obligations to injury of the type cognisable under WTO law. In these cases, it makes sense to look to other possibilities of enforcing these obligations.

One such possibility is to link an obligation to prior conduct by another party. In other words, an express reciprocity of obligations, or at least of conduct, can be useful when the ordinary means of enforcement fail. Article 13.2 of the Trade Facilitation Agreement offers an example of how this can be done. It states that:

Assistance and support for capacity building should be provided to help developing and least-developed country Members implement the provisions of this agreement, in accordance with their nature and scope. The extent and the timing of implementing the provisions of this Agreement shall be related to the implementation capacities of developing and least developed country Members. Where a developing or least developed country Member continues to lack the necessary capacity, implementation of the provision(s) concerned will not be required until implementation capacity has been acquired.¹³

This paragraph makes any developing country obligation to implement the relevant provisions of the Trade Facilitation Agreement conditional upon the provision of sufficient assistance and support to that country by developed countries. This provides a practical incentive for developed countries to grant such assistance and support. Indeed, it is not even necessary to specify that developed countries have an obligation to provide that support (albeit such an obligation is partly set out in Article 21.1).

There is also a procedural variation of this technique according to which a WTO member is precluded from enforcing its rights under an agreement until it has performed certain acts.

However, while attractive, this form of linkage is only possible when two conditions are satisfied.

¹³ WTO Agreement on Trade Facilitation, WT/L/931, 15 July 2014.

First, there must be a temporal sequence between the conduct of the parties at issue (a thematic connection between the two types of conduct may be desirable but is not mandatory). Second, in practice, the party that implements its conduct first must have a guarantee that the second party will then implement its own conduct. It may be that recourse to dispute settlement proceedings is sufficient. It is probably sufficient in the case of the Trade Facilitation Agreement, where developed countries have no other guarantee that developing countries having received their support will actually implement their own obligations. But this depends on the obligation of the second party being quantifiable, and therefore enforceable, in WTO dispute settlement proceedings. In other cases it may be difficult to guarantee performance of the obligation of the second party, in which case this form of linkage may be unattractive to the party that is supposed to perform its conduct first.

Key issues for developing countries

These considerations have a number of practical consequences for developing countries in Doha negotiations.

Most importantly, developing countries should be wary of agreeing to any 'early agreements' that are not internally balanced. This is because it is virtually impossible to ensure that any unbalanced commitments undertaken by developing countries can be balanced in later negotiations. This is not because of any bad faith on the part of the negotiating partners of these developing countries. It is simply because any such rebalancing in later negotiations is predicated on two assumptions that are unlikely to be realised. The first is that the benefits of the early agreement can be quantified; the second is that a later hypothetical agreement that would be reached in the absence of the (real and agreed) early agreement can be quantified. The first may be possible; the second is almost certainly not.

As for the 'early agreements' themselves, these include agreements of any type. They may be adopted on a provisional basis, at which stage they are not directly enforceable in WTO dispute settlement, or they may be adopted on a definitive basis, at which point they will take an ordinary form, whether this be a bound concession, a WTO

decision, or even an amendment to the WTO agreements. To the extent that the 'early agreement' entails the amendment of existing WTO agreements, it is doubtful whether they could be adopted as 'provisional agreements'. This is because this would undermine the amendment procedures of the WTO Agreement.

Developing countries should also be conscious of the possibility of conditioning the implementation of certain obligations on prior conduct of their negotiating partners. Where this can be done, this is a useful self-regulating means of limiting the scope of their own obligations. Developing countries might also consider a procedural variation on this technique according to which their partners may not enforce their rights under an agreement until they have performed certain acts. However, this will not always be able to be done. First of all, it will, as a practical matter, only be a possibility when the party whose conduct is the condition of the obligation itself has a guarantee that the obligation will be implemented. That depends upon that obligation being enforceable, in practical terms, in the WTO dispute settlement system. Market access and intellectual property obligations are enforceable; others are probably not.¹⁴

Putting this together, the conclusion is that developing countries should not enter into any unbalanced 'early agreements' unless the obligations in those agreements are contingent on prior performance by other parties. But they may enter into 'early agreements' that are balanced or that favour them which was, after all, the original intention of paragraph 47.

However, it should also be noted that this conclusion is predicated upon the continuation of WTO negotiations along the lines envisaged in paragraph 47. Realistically, intransigence by some WTO members may lead to frustration with multilateral negotiations by others and may encourage them to pursue alternative non-multilateral negotiation strategies in the form of regional and plurilateral agreements. If this possibility is also taken into account, it may well be that an 'early agreement' that appears unbalanced in the narrow sense could be considered as balanced in the wider sense that it protects a multilateral negotiation process – even one that is less than perfect.

¹⁴ It is also appropriate to recall that even for enforceable obligations WTO dispute settlement is often ineffective to protect innocent parties. This is for several reasons, including the fact that remedies are only prospective and that the implementation of retaliation can be both impractical (in that it harms the retaliating country) and ineffective (in that it fails to induce compliance or to put the developing country in the position it would have been in the absence of the violation).

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This Trade Hot Topic is brought out by the International Trade Policy (ITP) Section of the Economic Policy Division of the Commonwealth Secretariat, which is the main intergovernmental agency of the Commonwealth – an association of 53 independent states, comprising large and small, developed and developing, landlocked and island economies – facilitating consultation and co-operation among member governments and countries in the common interest of their peoples and in the promotion of international consensus-building.

ITP is entrusted with the responsibilities of undertaking policy-oriented research and advocacy on trade and development issues and providing informed inputs into the related discourses involving Commonwealth members. The ITP approach is to scan the trade and development landscape for areas where orthodox approaches are ineffective or where there are public policy failures or gaps, and to seek heterodox approaches to address those. Its work plan is flexible to enable quick response to emerging issues in the international trading environment that impact particularly on highly vulnerable Commonwealth constituencies – least developed countries (LDCs), small states and sub-Saharan Africa.

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