

Joint Statement Initiatives: A Legitimate End to ‘Until Everything is Agreed’?

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At World Trade Organization (WTO), nothing is agreed until everything is agreed and until everyone agrees at the negotiating tables, and that ‘magic’ moment has been difficult to arrive at. Some WTO Members have argued that if all Members cannot move ahead together with the acceptance of new rules, the Members who are able and willing to move ahead should be provided with the required space to do so. Some Members have indeed chosen to push ahead as they have recently sought progress in negotiations through the Joint Statement Initiatives (JSIs). The JSI proponents claim that JSIs can contribute to building a more responsive and relevant WTO – which will be critical to restoring global trade and economic growth in the wake of the COVID-19 crisis. Others have staunchly opposed such plurilateral attempts at trade liberalization on various grounds, often labelling them as attempts to circumvent the WTO’s core tenets of multilateralism. The article contributes to this debate, as the authors assess different routes through which JSIs can be added to the WTO acquis and the WTO-compatibility of each of these routes. It then assesses the possible detrimental impact that JSIs can have on the essence and fabric of the multilateral trading system (MTS).

Keywords: Joint Statement Initiatives, Negotiations, Plurilateral Agreements, Multilateral Trading System, World Trade Organization, Trade Negotiations, Single Undertaking, Decision-making

1 INTRODUCTION

The World Trade Organization (WTO) 12th Ministerial Conference (MC12) has to a large extent broken the negotiating slump the multilateral trading framework has been facing. With a package of decisions taken and the conclusion of the much-awaited Agreement on Fisheries Subsidies (AFS), the WTO has put itself back in the negotiating game. This progress breathes new life into the moribund organization, which pre-MC12 had produced only one multilateral agreement in

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its twenty-seven-year-long existence.¹ With the new AFS accepted by consensus, the number of multilateral trade agreements accepted by consensus since 1995 has gone up to two in 2022.² While Members at MC12 have delivered decisions on food security, e-commerce, fisheries subsidies, Trade Related Aspects of Intellectual Property Rights (TRIPS), and Sanitary and Phytosanitary Measures, critiques are questioning their effectiveness and worth. One of the many critiques is directed towards the much celebrated AFS itself, wherein Members have included a ‘self-destruction’ clause in Article 12 which states that the agreement shall be terminated if ‘comprehensive disciplines’ are not adopted under it. This insertion is probably not surprising, especially given the dissent the agreement has faced from several developing countries.³ Another critique is directed towards the glaring lack of concrete discussions on WTO reform which finds mention only once in the Outcome Document that contains a vaguely drafted commitment to discuss reform issues in appropriate forums within the WTO.⁴

The wait for a ‘Bretton Woods’ moment is far from over even after the much-celebrated MC12.⁵ Many have blamed the WTO’s culture of consensus-based decision-making as the key culprit behind its stalling negotiating function.⁶ However if the current circumstances have impeded the Members from arriving at an agreement together, should it also prevent other willing Members from proceeding with an agreement if they choose to do so? The rule of ‘consensus’ should not prevent all WTO members from agreeing on new rules that are needed to respond to the current realities of international trade.⁷ The continued dissatisfaction of certain Members with the multilateral trading system (MTS) can prove fatal to the Organization, and therefore its Members should be encouraged to respond with creative solutions to the challenges of

¹ To access the outcome documents, see WTO, *WTO Members Secure Unprecedented Package of Trade Outcomes at MC12* (17 Jun. 2022), https://www.wto.org/english/news_e/news22_e/mc12_17jun22_e.htm (accessed 29 Nov. 2022).

² To access the text of the Agreement on Fisheries Subsidies (22 Jun. 2022), see WTO, *Agreement on Fisheries Subsidies*, https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm (accessed 10 Nov. 2022).

³ Agreement on Fisheries Subsidies, WT/MIN(22)/33; WT/L/1144, 22 Jun. 2022. Article 12 reads as follows: ‘If comprehensive disciplines are not adopted within four years of the entry into force of this Agreement, and unless otherwise decided by the General Council, this Agreement shall stand immediately terminated’.

⁴ *MC12 Outcome Document*, WT/MIN(22)/24; WT/L/1135 (17 Jun. 2022).

⁵ Deborah James, *The World Trade Organization After the 12th Ministerial Conference*, Centre for Economic and Policy Research (22 Jun. 2022), <https://cepr.net/the-world-trade-organization-after-the-12th-ministerial-conference/> (accessed 29 Nov. 2022).

⁶ For problems with consensus-based decision-making see Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 Am. J. Int’l L. 54 (2001); Daria Boklan & Amrita Bahri, *The WTO’s Collapsing Judicial and Legislative Wings: Is ‘Consensus’ the Real Elephant in the Room?*, 17(2) Glob. Trade Cust. J. 81 (2022); Wenwei Guan, *Consensus Yet Not Consented: A Critique of the WTO Decision-Making by Consensus*, 17(1) J. Int’l Econ. L. 77 (2014).

⁷ Nicolas Lockhart & Elizabeth Sheargold, *In Search of Relevant Discretion: The Role of the Mandatory/Discretionary Distinction in WTO Law*, 13(2) J. Int’l Econ. L. 379 (2010).

current times.⁸ Moreover, WTO Members have a fundamental right to continue negotiating new rules and changes in the existing rules as per Article 3.2 of the Marrakesh Agreement (MA) which clearly states that the WTO is a permanent forum for negotiations.⁹

Even if all WTO Members are not prepared to move ahead with the negotiations and acceptance of new rules, at the same time, it may still be possible to provide the required space for those who are able to move ahead as long as certain conditions are satisfied. Maintaining the space to move ahead is important to ensure the credibility and relevance of the WTO system and to ensure that it continues to respond to the reality of economies in the twenty-first century. If the Members are not able to find alternative ways to develop new rules, rules will still be developed but only outside the WTO framework, leading to further fragmentation of trade regulations.

Plurilaterals could be the path to the much-needed revival of the WTO's negotiating function.¹⁰ Moreover, plurilateral cooperation is not new for the WTO. During the years of General Agreement on Tariffs and Trade (GATT) 1947, several agreements were signed by a group of countries that exclusively bound the signatories. Almost all of these agreements were subsequently converted into multilateral agreements when the WTO was created in 1995.¹¹ Hence if we look at the WTO history, the formation of which was the result of the 'club approach', plurilateral agreements were seen as a significant driving force and the only way during the time of GATT to develop new rules and disciplines which were subsequently incorporated into the WTO architecture.¹² More recently, in an attempt to navigate the decision-making deadlock, some Members have sought progress in negotiations through Joint Statement Initiatives (JSIs).¹³

⁸ Gabrielle Marceau, *Never Waste a Good Crisis. The End of the WTO Dream, or Beginning of Something Greater?*, 17 Int'l Org. L. Rev. 345–349 (2020).

⁹ This argument is inspired by Gabriel Marceau's comments at the virtual roundtable 'Until Everything's Agreed' – *Plurilaterals and WTO Reform* (2021), <https://www.youtube.com/watch?v=CuAE45nWO-I> (accessed 29 Nov. 2022).

¹⁰ Plurilateralism can be defined as 'the common interest of a limited number of governments that brings them together in a relationship'. Philip G. Cerny, *Plurilateralism: Structural Differentiation and Functional Conflict in the Post-Cold War Order*, 22(1) *Millenn. J. Int'l Stud.* 27, 29 (1993). On advantages of plurilateralism, see Rudolf Adlung & Hamid Mamdouh, *Plurilateral Trade Agreements: An Escape Route for the WTO?*, 52(1) *J. World Trade* 85 (2018); Bernard Hoekman & Petros Mavroidis, *MFN Clubs and Scheduling Additional Commitments in the GATT: Learning from the GATS*, 28(2) *Eur. J. Int'l L.* 387 (2017); Bernard Hoekman & Petros Mavroidis, *WTO Reform: Back to the Past to Build for the Future*, 2 (3) *Glob. Pol'y* 5 (2021); Bernard Hoekman & Charles Sabel, *Plurilateral Cooperation as an Alternative to Trade Agreements; Innovating One Domain at a Time*, 12(3) *Glob. Pol'y* 49 (2021).

¹¹ For example, during the 1979 Tokyo round, the following agreements were accepted by some members: Agreement on Technical Barriers to Trade (accepted by thirty members) and Agreement on Import Licensing Procedures (accepted by twenty-one members). *Status of Acceptances as of 17 December 1979*, L/4914 (18 Dec. 1979).

¹² Hoekman & Sabel, *Plurilateral Cooperation as an Alternative*, *supra* n. 10.

¹³ Fiama Angeles, Riya Roy & Yulia Yarina, *Are Joint Statement Initiatives the World Trade Organization's Future?*, TradeExperettes, <https://www.tradeexperettes.org/blog/articles/are-joint->

The JSIs could be regarded as a plurilateral option to achieve negotiating outcomes between selected WTO Members.¹⁴ They are currently viewed as a negotiating tool, without a clear definition of or discussion on their final form.¹⁵ These plurilateral instruments are the results of coalitions between like-minded WTO Members that are able to agree on new rules on trade. Plurilaterals that were initiated in the form of the JSIs at the WTO's 11th MC in 2017 are on the following areas: services domestic regulation,¹⁶ e-commerce,¹⁷ investment facilitation for development,¹⁸ and micro, small, and medium-sized enterprises.¹⁹

Though no major breakthroughs were made at MC12 in respect of JSIs, some support for these instruments was clearly visible. At the MC12, the WTO's Director General blamed the consensus-based decision-making for the negotiating failures so far and urged the members to reflect on how the negotiating function can be modernized with innovative approaches.²⁰ Moreover, several members voiced their support in favour of flexible rule-making through plurilateral approaches including, in particular, the use of JSIs.²¹

One thing is clear – 'back-tracking' from the progress made in plurilateral negotiations will no longer be an option, as JSIs have succeeded in advancing stalled trade negotiations, including in new sectors such as e-commerce and investment facilitation.²² However, these plurilateral attempts at trade liberalization have been staunchly criticized – with well-reasoned arguments – by a selected group of WTO Members. For example, India and South Africa have argued that any negotiations outside the mandate of the Doha Round Agenda (DRA) are contrary to the multilateral mandate and should not be carried out within the

statement-initiatives-the-world-trade-organizations-future (accessed 14 Feb. 2022); *The 12th WTO Ministerial Conference (MC12)*, Ministério das Relações Exteriores (14 May 2021), <https://www.gov.br/mre/en/subjects/economic-and-commercial-foreign-policy/international-economic-organizations/the-12th-wto-ministerial-conference-mc12> (accessed 29 Nov. 2022).

¹⁴ Fiama Angeles, Riya Roy & Yulia Yarina, *Shifting from Consensus Decision-Making to Joint Statement Initiatives: Opportunities and Challenges*, Graduate Institute of International and Development Studies, 4 (2020), <https://repository.graduateinstitute.ch/record/299033> (accessed 29 Nov. 2022).

¹⁵ *Ibid.*, at 8.

¹⁶ Joint Initiative on Services Domestic Regulation, *Reference Paper on Services Domestic Regulation*, INF/SDR/1 (27 Sep. 2021).

¹⁷ Joint Statement Initiative on Electronic Commerce (*Geneva Trade Platform*), https://wtoplurilaterals.info/plural_initiative/e-commerce/ (accessed 14 Feb. 2022).

¹⁸ WTO General Council, *Joint Ministerial Statement on Investment Facilitation for Development*, WT/MIN(17)/59 (13 Dec. 2017).

¹⁹ Joint Ministerial Statement, *Declaration on the Establishment of a WTO Informal Work Programme for MSMEs*, WT/MIN(17)/58 (13 Dec. 2017).

²⁰ *Statement by Dr Ngozi Okonjo-Iweala WTO Director-General*, WT/MIN(22)/19 (14 Jun. 2022).

²¹ See e.g., the statement by Japan, *Statement by H.E. Mr Hayashi Yoshimasa Minister for Foreign Affairs*, WT/MIN(22)/ST/89/Add.1 (12 Jun. 2022); see the statement by Costa Rica, *Statement by H.E. Mr Manuel Tovar Minister of Foreign Trade*, WT/MIN(22)/ST/5 (12 Jun. 2022).

²² Marceau, *supra* n. 8, at 345–349.

WTO framework.²³ They submit that the only legitimate negotiations are those that the General Council approves. Their concern is that instead of tracks that were agreed to be negotiated as part of the DRA, which faces a deadlock at the moment (such as the negotiations on agriculture²⁴), WTO members are switching to new issues under the umbrella of the JSIs negotiations.²⁵ These arguments find support in a recent scholarship²⁶ wherein the author argues that JSIs ‘lack legal legitimacy’ and they allow their ‘participants to circumvent the WTO’s core tenets of multilateralism’.²⁷

This article contributes to this debate as it provides arguments from both sides of the table. Section 1 discusses whether the JSIs are contrary to the multilateral underpinnings of the WTO. Sections 2 and 3 explore different options to incorporate JSIs into the WTO *acquis* and discuss whether these options are consistent with the WTO. Section 4 provides counterarguments, as it assesses the possible detrimental impact of the JSIs on the MTS.

2 ARE JSIs COMPATIBLE WITH THE WTO’S MULTILATERAL UNDERPINNINGS?

The majority of WTO Members have extended their support to JSIs as a tool to achieve progress in trade negotiations. However, some countries have challenged the legality of JSIs within the multilateral system of the WTO. These challenges mainly assert that JSIs can violate Article II.1 and Article III.2 of the MA. These arguments are assessed in the following two subsections.

2.1 CONSISTENCY WITH MA’S ARTICLE II.1?

Article II:1 of the MA provides that ‘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’. The JSIs create a new set of legal instruments applicable among a limited number of WTO members and even if they are offered on Most-Favoured-Nation (MFN) basis, compliance with Article II:1 may be

²³ Communication of delegations of India and South Africa, *The Legal Status of ‘Joint Statement Initiatives’ and Their Negotiated Outcomes*, WT/GC/W/819 (19 Feb. 2021), paras 3 and 38.

²⁴ *Text of the ‘July Package’ – The General Council’s Post-Cancún Decision*, WT/L/579 (2 Aug. 2004).

²⁵ *Ibid.*; *Statement by Ambassador Narayanan of India, 4th Session of the Seminar on Special and Differential Treatment for Developing Countries* (7 Mar. 2000), https://www.wto.org/english/tratop_e/devel_e/sem01_e/sdtind_e.htm (accessed 29 Nov. 2022).

²⁶ Jane Kelsey, *The Illegitimacy of Joint Statement Initiatives and Their Systemic Implications for the WTO*, 25(1) *J. Int’l Econ. L.* 2, 22 (2022).

²⁷ *Ibid.*, at 2. Contradictory arguments presented in Angeles, Roy & Yarina, *supra* n. 14, at 10.

questioned, as such initiatives can take WTO members away from the much-promised common institutional framework.²⁸ One of the main concerns of the JSIs opponents is that all WTO Members have subscribed to all rules embodied in the WTO Agreements as an inseparable package, following the principle of Single Undertaking. However, the MA together with its Annexes is not the only source of the WTO law.²⁹ The ‘common institutional framework for the conduct of trade relations’ under Article II:1 of the MA should be provided also for matters ‘related to’ the MA and set forth in other sources of the WTO law. Thus, taking into account that JSIs are open for all WTO members, and if in case they would be formalized into the WTO as the ‘matters related to the agreements and associated legal instruments included in the Annexes to the MA, they can be considered as consistent with Article II:1 of the MA as JSIs in this case will fit within ‘the common institutional framework’ of the WTO.

Moreover, such an interpretation is crucial for the WTO’s continued relevance.³⁰ There is now an increasing need to bring the WTO rules in line with the rapidly evolving economic and trade realities.³¹ New challenges posed by trade digitalization, climate change, global health pandemic, and widening inequality between countries, people and genders require an adequate response from the WTO system. The JSIs could be a way to make the WTO institutional framework more inclusive and responsive to the trade realities of the twenty-first century. Their innovative approach to cooperation and negotiation – can provide a valuable illustration of the WTO reform in action.³²

2.2 CONSISTENCY WITH MA’S ARTICLE III.2?

The first sentence of Article III.2 of the MA reads as follows: ‘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’.³³ The literal meaning of the term ‘multilateral trade relations’ in

²⁸ General Council, *Minutes of Meeting Held in Virtual Format on 1-2 and 4 March 2021*, WT/GC/M/190 (23 Apr. 2021), para. 10.13.

²⁹ Peter Van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization* 139 (Cambridge University Press 2022).

³⁰ Jones Kent Albert, *Reconstructing the World Trade Organization for the 21st Century: An Institutional Approach* 58 (Oxford University Press 2015).

³¹ Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, COM(2021) 66 final (18 Feb. 2021), at 8.

³² WTO, *Progress on the JSIs: Communication by the Co-coordinators of the JSIs* (18 Dec. 2020), https://www.wto.org/english/news_e/news20_e/jsec_18dec20_e.pdf (accessed 29 Nov. 2022).

³³ Marrakesh Agreement Establishing the World Trade Organization (Marrakesh, 15 Apr. 1994) 1867 U.N.T.S. 154 (MA).

this sentence may be read as covering trade relations among *all* WTO Members. Such an interpretation would imply that the negotiation of new WTO rules requires the consent of *all* WTO members, and hence negotiation of JSIs by a selected group of members is incompatible with Article III.2 of the MA. This approach finds support in the WTO jurisprudence, according to which negotiations shall be carried out ‘among its Members’, and not among ‘some of its Members’.³⁴

However, according to paragraph 1 of Article 31 of the Vienna Convention on the Law of Treaties (VCLT), a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty. The International Court of Justice has highlighted that the limits of this means of interpretation lie ‘in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained’.³⁵ The ordinary meaning shall be given to the terms of the treaty in their context. Treaty terms are not drafted in isolation, and their meaning can only be determined by considering the entire treaty text, including its annexes.³⁶ Therefore, if we interpret the term ‘multilateral trade relations’ giving due regard to the context of Article III.2 of the MA as per Article 31 of the VCLT, we can see that the first sentence specifically refers to the ‘Annexes to this Agreement’. Annexes to MA include not only multilateral agreements but plurilateral agreements as well. Thus, interpreting the term ‘multilateral trade relations’ as covering only negotiations with the participation of the entire WTO membership would be contrary to the context of the MA. The second sentence of the said provision further specifies that ‘[t]he 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’. Thus, further development of rules governing the WTO Members’ trade relations (including via negotiations of the JSIs) and their implementation (by any means) is directly provided for in the MA.

Furthermore, ‘[w]hen a treaty is open to two interpretations, one of which does and the other does not enable the treaty to have appropriate effects, good faith and the object and purpose of the treaty demand that the former interpretation should be adopted’.³⁷ From a practical perspective, the effectiveness of the whole negotiation process would be impeded if this provision would require all 164 WTO Members to participate in each and every WTO negotiations’ track. Even

³⁴ Angeles, Roy & Yarina, *supra* n. 14, at 6–7.

³⁵ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)* (Preliminary Objections) ICJ Reports (1962), at 335.

³⁶ Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* 427, 574 (Martinus Nijhoff Publishers 2009).

³⁷ Yearbook of the International Law Commission 1966 Volume II, A/CN.4/SER.A/1966/Add.1, at 219, para. 6.

the negotiation on the process of accession of a new member to the WTO envisages the participation only of the interested Members who join the working party. At the same time, membership in the working party is open to all interested Members.³⁸ The same is true about JSIs which are open to all interested WTO Members. Another example is the Information Technology Agreement (ITA, which was negotiated and subsequently subscribed to by twenty-nine members in 1997). Now ITA is implemented in the goods schedules of eighty-two WTO members, including India, which is one of the most active opponents of the JSI negotiations.³⁹ However, a contrary view suggests that the case of ITA is misleading insofar as it deals with left-over from the Uruguay Round and, thus, it does not affect the overall balance of obligations.⁴⁰

Multi-Party Interim Appeal Arbitration Arrangement (MPIA) may be regarded as another recent example of new rules negotiated and applied by a limited number of WTO members. MPIA was negotiated by sixteen WTO Members in response to the Appellate Body (AB) crisis. In fact, it serves as an interim substitution of the AB, which is currently unable to fulfil its functions. MPIA provides the participating WTO Members with the ability to preserve the two-tier dispute settlement system. Paragraph 12 of MPIA stipulates that: '[a]ny WTO Member is welcome to join the MPIA at any time'.⁴¹ Currently, there are twenty-five WTO Members who have joined MPIA.⁴² While the legal nature of the MPIA remains uncertain,⁴³ it is another example of an arrangement negotiated by a limited number of WTO Members to address the ongoing AB crisis. It is important to highlight that despite the limited membership, MPIA works within the WTO framework. For instance, with reference to the MPIA, the parties to the dispute *Colombia – Anti-Dumping Duties on Frozen Fries from Belgium, Germany and the Netherlands*⁴⁴ agreed that any appeal will be decided on the basis of Article 25 of the Dispute Settlement Understanding (DSU), and the arbitration proceeding is currently ongoing.

³⁸ *Accession to the World Trade Organization, Procedures for Negotiations Under Article XII*, Note by the Secretariat, WT/ACC/1 (24 Mar. 1995), para. 5.

³⁹ WTO, *Information Technology Agreement*, https://www.wto.org/english/tratop_e/inftec_e/inftec_e.htm (accessed 12 Nov. 2022).

⁴⁰ Robert Wolfe, *The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor*, 12 J. Int'l Econ. L. 835, 850 (2009).

⁴¹ Communication from Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, the European Union, Guatemala, Hong Kong, China, Iceland, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Ukraine and Uruguay, *Statement on a mechanism for developing, documenting and sharing practices and procedures in the conduct of WTO disputes*, JOB/DSB/1/Add.12 (30 Apr. 2020) (MPIA).

⁴² *Multi-Party Interim Appeal Arbitration Arrangement (MPIA) (Geneva Trade Platform)*, https://wto.plurilaterals.info/plural_initiative/the-mpia/ (accessed 14 Feb. 2022).

⁴³ Olga Starshinova, *Is the MPIA a Solution to the WTO Appellate Body Crisis?*, 55(5) J. World Trade 787, 797 (2021).

⁴⁴ *Agreed Procedures for Arbitration Under Article 25 of the DSU*, WT/DS591/3/Rev.1 (22 Apr. 2021).

This discussion shows that there are arguments supporting the view that Article III:2 of the MA does not preclude a group of interested WTO members from ‘negotiating’ new rules; therefore, the JSIs negotiating process in itself should not be considered contrary to multilateral underpinnings of the WTO. The outcome document of the recent MC12 lends support to this argument, as some mentions in this document (such as of women’s economic empowerment) are also clearly outside the scope of DRA and are initiatives that are only supported by a few members.⁴⁵

The attraction of plurilaterals lies partly in their long history within the GATT, which suggests their feasibility, and mainly in the fact that currently, the alternatives seem worse. Once we recognize that countries genuinely have different preferences for and capacities to implement specific regulations, allowing for differentiation could well be the first-best.⁴⁶ Therefore, interpreting Article’s III:2 ‘negotiations among its Members concerning their multilateral trade relations’ as including all 164 WTO members and addressing exclusively issues set forth more than twenty years ago in the DRA will contradict the objective of the MA, which is ‘to develop an integrated, more viable and durable multilateral trading system’.

Moreover, the aim of JSIs is not merely to ‘negotiate’ new rules; they also seek to ‘create’ new rules.⁴⁷ It is the ‘creation’ and ‘acceptance’ of new rules via JSIs by WTO Members which is indeed a more controversial issue. Hence, the authors in the subsequent two sections attempt to suggest two WTO-consistent ways to create and accept new rules via the JSI route.

3 CAN JSIs BE ADDED TO THE WTO ACQUIS THROUGH AMENDMENTS TO THE WTO AGREEMENTS?

Some WTO members are concerned about the JSIs’ proponents’ attempt to bypass the requirements of Article X of the MA on amendments.⁴⁸ Therefore, the question for us to determine in this section is whether JSIs remain WTO-compatible if they lead to amendments in the WTO Agreements. Article X:1 of the MA provides the right to initiate a proposal to amend the provisions of the WTO

⁴⁵ WTO, *Twelfth WTO Ministerial Conference*, https://www.wto.org/english/thewto_e/minist_e/mc12_e/mc12_e.htm#outcomes (accessed 12 Nov. 2022). The fact that there is a footnote in this document stating that these are general messages on cross-cutting issues that do not change the rights or obligations of WTO doesn’t change the fact that these issues are outside of the DRA.

⁴⁶ *Delivering Plurilateral Trade Agreements Within the World Trade Organization*, UK Department for International Trade, 2 (Dec. 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1041625/dit-research-delivering-plurilateral-trade-agreements-within-world-trade-organization-wto.pdf (accessed 29 Nov. 2022).

⁴⁷ Angeles, Roy & Yarina, *supra* n. 14, at 21; *Ministerial Conference – Eighth Session, Chairman’s Concluding Statement*, WT/MIN(11)/11, 3 (17 Dec. 2011).

⁴⁸ *The Legal Status of ‘Joint Statement Initiatives’ and Their Negotiated Outcomes*, *supra* n. 23, para. 8.

Agreement to every WTO Member. All proposals for amendments have to be submitted to the MC. The decision on submitting the proposal to the Members for acceptance is subject to the consensus rule. If, however, no consensus is reached, a two-thirds majority of the overall WTO Membership can adopt this decision.

Should proposals for amendments go for voting, different thresholds apply depending on the provisions being considered for an amendment. Article X of the MA establishes a fundamental distinction between the core institutional and substantive principles of trade law which can only be changed if all parties agree, and the other rules and provisions of a 'non-constitutional' character which can be amended with varying degrees of flexibility.⁴⁹ According to Article X:2 of the MA, amendments concerning the provisions on fundamental issues, namely decision-making (Article IX of the MA), amendments (Article X of the MA), MFN principle enshrined in the GATT (Article I), General Agreement on Trade in Services (GATS) (Article II:1), TRIPS (Article 4) and provision on Schedules of the GATT (Article II), become effective only once they have been accepted by all Members. Hence, if a JSI requires an amendment in these provisions, it would need to be approved by all WTO members; though from the initially available texts and documents, it seems that the existing JSIs may not call for an amendment in any of these provisions. However, they may require amending the schedules on services, and there is no requirement of arriving at a consensus to amend these schedules.

The other requirement to be considered under Article X of the MA is whether such amendments alter the rights and obligations of the WTO Members. The AB has provided that 'special rules on acceptance and entry into force apply, depending on the provisions that are being amended and on whether the amendment "would alter the rights and obligations of the Members"'.⁵⁰ The determination of whether an amendment belongs to one category or the other has to be made by the MC once it decides to submit a proposal to the Members for their acceptance. In case the MC regards by a three-fourth majority of Members that a proposed amendment is not altering the rights and obligations of WTO Members, a simplified decision-making procedure for that amendment applies under Article X:4.⁵¹ This means that acceptance by a two-thirds of the WTO Members will be enough for such an amendment to take effect for all Members, including those which have previously objected to the amendment and continue

⁴⁹ Daria Boklan, *Article X WTO Agreement: Amendments*, in *Commentaries on World Trade Law Online* (Peter-Tobias Stoll & Holger Hestermeyer eds), https://referenceworks.brillonline.com/entries/commentaries-on-world-trade-law-online/article-x-wto-agreement-amendments-COM_1011?s.num=33&s.rows=50 (accessed 9 Nov. 2022).

⁵⁰ *WTO Appellate Body Report, EC – Bananas III (Art. 21.5–Ecuador II)*, adopted 25 Sep. 1997, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW2/ECU/Corr.1, para. 384.

⁵¹ Boklan, *supra* n. 49.

to oppose it. Therefore, in case JSIs do not alter the rights and obligations of the WTO Members, they may be adopted by a two-thirds majority of the WTO members.

On the other hand, Article X:3 of the MA provides that amendments of a nature that would alter the rights and obligations of the WTO Members shall take effect only upon acceptance by a two-thirds of the Members, and only for those Members who accepted the relevant amendment. Members who oppose the amendment continue to be bound by the unamended provisions. This means that even if the MC finds that a particular provision of the JSI alters rights and obligations of the WTO members, it may still be added to the WTO Agreements as an amendment accepted by a two-thirds majority and will be binding in this case only to those WTO Members that accept such an amendment. Moreover, other WTO Members would have the right to accept such an amendment within the period specified by the MC. The Protocol Amending the TRIPS Agreement could be the relevant example here. It entered into force upon acceptance by a two-thirds of the Members in accordance with Article X:3 of the MA. The period for acceptance for other WTO members was extended several times, most recently until 31 December 2023.⁵²

It is worth noting that most of the JSIs relate to the GATS. For instance, under the JSI on e-commerce, the participants discuss the disciplines on services in sectors where electronic trade in services is well-developed, such as telecommunications services.⁵³ The JSI on the Investment Facilitation for Development (IFD) is also relevant to the supply of services via the third mode of supply. Finally, the objective of JSI on Services Domestic Regulation (SDR) is to elaborate upon the provisions of the GATS dealing with domestic regulation. Article X:5 of the MA provides for a simplified procedure for the amendments to the GATS. As per this provision, if the proposed amendment concerns Part I, II or III of the GATS and the respective annexes, it enters into force upon acceptance by a two-thirds majority *only* for those Members which have accepted it. If the amendment concerns Part IV, V or VI of GATS and/or the respective annexes, the amendment shall become effective for *all* Members upon acceptance by a two-thirds majority. Therefore, with respect to the GATS, a purely formal distinction is used to identify the applicable procedure for the amendments. Hence, this distinction depends on what specific part of the GATS is being amended. Therefore, in the case of GATS, the procedure of amendment does not depend upon the MC's decision on

⁵² WTO, *How to Accept the Protocol Amending the TRIPS Agreement*, https://www.wto.org/English/Tratop_E/trips_e/accept_e.htm (accessed 14 Feb. 2022).

⁵³ See e.g., *Communication by the European Union, Norway, Ukraine and the United Kingdom*, INF/ECOM/64 (13 Apr. 2021).

whether a particular provision alters the rights and obligations of WTO members. This procedure depends on what particular part of the GATS is being amended.

This discussion shows that the provisions of the JSIs that require amendments to the GATS or relevant annexes may be added to the WTO Agreements through the simplified amendment procedure under Article X of the MA, not requiring consensus of the entire WTO Membership. Moreover, due to the existing crisis in the MTS, ‘consensus is currently considered as the “least bad alternative” for decision-making in the WTO’.⁵⁴ Consensus decision-making has become a burden for Members that want to expand the WTO rules into new areas but face opposition from other Members.⁵⁵ Therefore, majority voting as a tool to incorporate JSIs into the WTO framework may not only be compatible with WTO rules on amendments, but it may also contribute to overcoming the current decision- and rule-making crisis at the WTO.⁵⁶ Nevertheless, it is not possible to ignore how deeply embedded the decision-making culture of consensus is at the WTO; hence, even where legal provisions allow for decision-making by a majority voting, the practice of decision-making by the consensus will most likely be preferred.

4 CAN JSIs BE ADDED TO THE WTO *ACQUIS* WITHOUT AMENDING THE WTO AGREEMENTS?

This section discusses two different ways in which JSIs can be added to the WTO *acquis* without the need to carry out an amendment to the WTO rulebook: modification of schedules and development of soft law.

4.1 MODIFICATION OF SCHEDULES

Gabrielle Marceau suggests that increased use of schedules of commitments, in which WTO members could add terms, conditions, and qualifications as they traditionally have done with tariff bindings, would provide more flexibility.⁵⁷ Moreover, the AB has underlined that ‘the modification of Schedules of Concessions [...] does not require a formal amendment pursuant to Article X of the WTO Agreement’.⁵⁸ Right of the WTO members to modify schedules of concessions is provided in Article XXVIII of the GATT and XXI of the GATS. However, there is another option provided in Article XVIII of the GATS, which

⁵⁴ Angeles, Roy & Yarina, *supra* n. 14, at 6.

⁵⁵ Marceau, *supra* n. 8, at 345–349.

⁵⁶ Boklan & Bahri, *supra* n. 6, at 81.

⁵⁷ Marceau, *supra* n. 8, at 345–349.

⁵⁸ Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, adopted 22 Dec. 2008, WT/DS27/AB/RW/USA, WT/DS27/AB/RW2/ECU, paras 384–385.

allows Members to make additional commitments. According to this, Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI [market-access commitments] or XVII [national treatment obligation], including those regarding qualifications, standards or licensing matters. Such commitments need to be inscribed in a Member's Schedule. The WTO panel interpreting Article XVII of the GATS underlined that the drafters of the GATS seem to have realized that there could be restrictions that would not be discriminatory and, therefore, would escape the provisions of Article XVII⁵⁹; nor would they be one of the six types of measures referred to in subparagraphs 2(a) to (f) of Article XVI.⁶⁰ Apparently, it was considered that such measures would mainly, but not exclusively, relate to qualifications, standards or licensing matters. It seems, therefore, that it was considered best to simply provide a legal framework for Members to negotiate and schedule specific commitments that they would define, on a case-by-case basis, in relation to any measure that does not fall within the scope of Article XVI or XVII. That framework appears to have been provided in Article XVIII.⁶¹

The SDR JSI participants have specifically stressed that the disciplines provided therein shall not be construed as diminishing any obligations of [WTO] Members, as they have agreed to incorporate the agreed disciplines in their GATS Schedules.⁶² The SDR JSI in particular specifies that Members shall inscribe the disciplines in section II of their Schedules as additional commitments under Article XVIII of the GATS.⁶³ These obligations, being incorporated in the services schedules, will be applied equally to services suppliers from all WTO Members, regardless of their participation in the initiative. Therefore, the SDR JSI can be added to the WTO framework by incorporating additional commitments into the GATS schedules.⁶⁴

It is also worth noting that there is a substantive overlap between the JSI on SDR and JSI on IFD.⁶⁵ Both JSIs deal with the issues of authorization procedures, treatment of incomplete applications and their rejection, fees and charges, independence of competent authorities, publication, and information available in situations where authorization is required, enquiry points, and opportunity to

⁵⁹ Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, adopted 20 Apr. 2005, WT/DS285/R, para. 6.311 (*US – Gambling*).

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Reference Paper on Services Domestic Regulation*, INF/SDR/2 (26 Nov. 2021).

⁶³ *Ibid.*, s. 1, para. 7.

⁶⁴ Hoekman & Sabel, *Plurilateral Cooperation as an Alternative*, *supra* n. 10, at 6.

⁶⁵ Nathalie Bernasconi-Osterwalder, Soledad Leal Campos & Colette van der Ven, *The Proposed Multilateral Framework on Investment Facilitation: An Analysis of Its Relationship to International Trade and Investment Agreements*, International Institute for Sustainable Development and CUTS International, 42 (3 Sep. 2020), <https://www.iisd.org/publications/report/proposed-multilateral-framework-investment-facilitation> (accessed 29 Nov. 2022).

comment. SDR JSI deals with these issues specifically with regard to trade in services, irrespective of the mode of supply. JSI on IFD also deals with these issues but with regard to the investment procedures. At the same time, one of the most common types of investment is investment through the establishment of a juridical person or a branch in a foreign state. Such a juridical person or branch may conduct activity in both services and non-services sectors. If the activity is conducted in the services sector, it will be qualified as the supply of services via commercial presence within the meaning of the GATS (mode 3, Article I:2(c)) and would be subject to its disciplines, including domestic regulation. Thus, investment activity conducted through commercial presence in services sectors would be covered by both SDR and IFD JSIs. This implies that the JSI on IFD may affect commitments provided in the schedules on market access (Article XVI of the GATS) and national treatment (Article XVII of the GATS) regarding Mode 3. This also implies that the JSI on IFD cannot fully be added to the WTO framework by incorporating additional commitments into the GATS schedules.

The question of embedding the JSI negotiation results on e-commerce is perhaps more complicated as these negotiations not only affect the trade in goods and services but also the protection of intellectual property rights (such as those relating to the scope of the TRIPS Agreement). Therefore, this potentially complicates the adoption of new rules through modification of trade in services schedules.⁶⁶ Notwithstanding this difficulty, GATS has become critically important in the e-commerce discourse after the AB upheld the Panel's notion of 'technological neutrality' of GATS which allows the incorporation of new technology as a means of delivery.⁶⁷ As another example, the EU⁶⁸ supported by Norway, Ukraine and the UK⁶⁹ has proposed to negotiate new disciplines and commitments relating to electronic commerce and telecommunications services, aiming to enhance regulatory predictability and improve market access conditions, to be incorporated in the schedules of the individual Members.

Introducing further commitments (meaning, better treatment) on an MFN-basis into the GATS schedule could only require a unilateral change and would not be subject to negotiations. This idea builds on the 'certification' procedure.⁷⁰

⁶⁶ Olga Biryukova, 'Shaken Not Stirred': *WTO as a Ground for Plurilateral Initiatives*, 17(3) *Glob. Trade Cust. J.* 121, 128 (2022).

⁶⁷ Angeles, Roy & Yarina, *supra* n. 14, at 12; *US – Gambling*, *supra* n. 59, para. 6.285.

⁶⁸ Joint Statement on Electronic Commerce Communication from the European Union, *EU Proposal for WTO Disciplines and Commitments Relating to Electronic Commerce: Revision of Disciplines Relating to Telecommunications Services*, INF/ECOM/43 (15 Oct. 2019), para. 2.

⁶⁹ Joint Statement on Electronic Commerce Communication by the European Union, Norway, Ukraine and the United Kingdom, *Joint Text Proposal for the Disciplines Relating to Telecommunications Services*, INF/ECOM/64 (13 Apr. 2021).

⁷⁰ On 14 Apr. 2000, upon a recommendation of the Committee on Specific Commitments, the Council for Trade in Services adopted the Procedures for the Certification of Rectifications or Improvements

Even if other Members are allowed to ‘raise objections’ to the amendment of the respective schedule, in practice, WTO Members can change their schedules unilaterally irrespective of possible objections. Departing from the purely legalistic approach to the amendment or certification process, it therefore seems unrealistic that an opposing Member would be able to stop the insertion of JSI commitments via schedules.⁷¹ On the other hand, developing countries and Least Developed Countries (LDCs) perceive this option as a ‘dishonest and unfair practice’ and a way to ‘cheat the system’.⁷² They fear that by inserting JSI commitments in schedules, which form a part of the WTO Agreements, developed Members will create a benchmark for JSIs within the WTO, depriving developing countries of their policy space.⁷³

These concerns seem reasonable, as the amendment of schedules is a way to bypass the consensus requirement provided in Article X of the MA. However, it may not work for all JSIs. This is mainly because, for instance, the existing WTO framework may not be able to deal with e-commerce.⁷⁴ Hence, the JSI on e-commerce may be viewed as a possible new agreement, which will deal horizontally with a wide range of matters dedicated to e-commerce in services, goods and Intellectual Property (IP) such as the transfer of information by electronic means, access to the internet, consumer protection, and cyber security. In addition, it may not be feasible to incorporate all the provisions of the JSI on IFD dealing with the investment process in non-services sectors in the existing schedules or even WTO Agreements. Therefore, JSIs may be adopted through modification of the schedules of commitment only to a limited extent. Alternative options of including JSIs as part of the WTO framework are discussed in the following subsections.

4.2 SOFT LAW COMMITMENTS AND GUIDELINES

The WTO Members can go ahead with soft law in the form of guidelines as an alternative to hard law. This option will allow WTO members to test the new rules without assuming any legal obligations and gain confidence in how these rules work for their benefit. Article X:4 of the MA ‘could offer opportunities for WTO members to use soft law approaches in regulating international trade. It may well be that after operating a soft law agreement for some time, WTO members

to Schedules of Specific Commitments. See Council for Trade in Services, *Report of the Meeting Held on 14 April 2000*, S/C/M/42 (9 May 2000).

⁷¹ Angeles, Roy & Yarina, *supra* n. 14, at 4.

⁷² *Ibid.*, at 25.

⁷³ *Ibid.*

⁷⁴ Yasmin Ismail, *E-commerce in the World Trade Organization: History and Latest Developments in the Negotiations (2020)*, International Institute for Sustainable Development and CUTS International, 7 (31 Jan. 2020), <https://www.iisd.org/publications/report/e-commerce-world-trade-organization-history-and-latest-developments> (accessed 29 Nov. 2022).

can come to a consensus to make it more obligatory by adopting an amendment under Article X:3 WTO Agreement'.⁷⁵ JSI on the Micro, Small and Medium-sized Enterprises (MSMEs) may be an example of implementation through the 'soft law' provisions. However, an obvious drawback of such an approach is that the 'soft law' provisions are non-binding in nature and, therefore, cannot be enforced.

The MSMEs initiative is not aimed to result in a binding agreement but is limited to 'soft law', i.e., best endeavour-type commitments that would be embodied in a Ministerial declaration signed by participating countries.⁷⁶ One of the possible ways out for this initiative could be analogous to the one taken in Joint Declaration on Trade and Women's Economic Empowerment. This Declaration is nonbinding and could be considered a 'soft law' source. Following such an approach, the WTO Informal Working Group on MSMEs issued a Declaration on MSMEs⁷⁷ which provides that, members are endorsing 'recommendations and declarations' on the collection and maintenance of MSME-related information; access to information; trade facilitation and MSMEs; promoting MSMEs' inclusion in regulatory development in the area of trade; MSMEs and the WTO Integrated Database and addressing the trade-related aspects of MSMEs' access to finance and cross-border payments. Therefore, at this stage, the JSI on MSMEs continues to develop as a soft law source.⁷⁸

5 ARE JSIs DETRIMENTAL TO THE MTS?

Three simple principles are likely to determine the level of acceptance and legitimacy of the development of JSIs in the future: first, whether the benefits derived from JSIs are offered to the entire WTO Membership on an MFN basis; second, whether future JSIs are negotiated as open agreements that can grow in membership and commitments and that they are not kept within a particular group; and third, the drafting style and language with which the JSIs are drafted as that would determine whether the negotiated outcomes can be considered as soft or hard law instruments. However, regardless of the form they take in the future, there is a general opposition towards JSIs within the WTO by a number of countries that can impede other members from moving ahead with JSI negotiations.

There is a concern that JSIs may erode the integrity of the rule-based MTS⁷⁹ India for instance has not questioned the right of WTO Members to meet and discuss any issue or concern, but it critiques JSIs for the six following reasons: (1)

⁷⁵ Alex Ansong, *Undogging WTO Decision-Making With the Provisions on Amendments in Article X of the WTO Agreement*, 26(2) Afr. J. Int'l Comp. 227, 234, 241 (2018).

⁷⁶ Hoekman & Sabel, *Plurilateral Cooperation as an Alternative*, *supra* n. 10, at 6.

⁷⁷ *Declaration on Micro, Small and Medium-Sized Enterprises (MSMEs)*, INF/MSME/4/Rev.1 (18 Mar. 2021).

⁷⁸ *Ibid.*

⁷⁹ *The Legal Status of 'Joint Statement Initiatives' and Their Negotiated Outcomes*, *supra* n. 23, para. 12.III.

JSIs could create a precedent for any group of Members to bring any issue into the WTO without the required mandate; (2) such initiatives could bypass the collective oversight of Members for bringing in any new rules or amendments to existing rules in the WTO; (3) JSI negotiations would consume the limited WTO resources available for multilateral negotiations; (4) it would result in Members disregarding existing multilateral mandates arrived at through consensus in favour of matters without multilateral mandates; (5) it would lead to the marginalization or exclusion of issues which were difficult but which remained critical for the MTS such as agriculture and development, thereby undermining the balance in agenda-setting; and (6) the negotiating processes and outcomes will further fragment the MTS and undermine the multilateral character of the WTO.⁸⁰

India and South Africa have argued that all the recent JSIs 'are 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'.⁸¹ In respect of JSI on SDR, they argue that negotiations on this issue are not in consonance with GATS Article VI.4 as they were not mandated either by the MC or the Council for Trade in Services.⁸² In respect of the JSI on e-commerce, they have argued that 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'.⁸³ Moreover, the E-Commerce JSI deals with several cross-cutting issues that are covered under various agreements such as the GATT, Agreement on Trade-Related Investment Measures (TRIMS), TRIPS and Agreement on Trade Facilitation (TFA), and so it goes beyond the GATS Agreement. Hence, the outcome of the JSI on E-Commerce discussions cannot be added to the WTO rules through GATS schedules.

Reinforcing its staunch opposition to the e-commerce JSI, Indian officials have drawn the membership's attention to how the pandemic has not only accelerated the shift to a digital economy but that has also brought out the stark digital divide between developed and developing countries. They have argued that countries should focus on building capacity in areas such as digital skills and digital infrastructure rather than negotiating binding rules on e-commerce in a plurilateral framework. They also argued that the creation of binding rules amidst this crisis which is rapidly changing the nature of global trade will

⁸⁰ *Ibid.*, para. 10.7.

⁸¹ *Ibid.*

⁸² *Ibid.*, para. 31.

⁸³ *Ibid.*, para. 34.

only worsen the impact of the digital divide in support of existing players and against the interests of developing countries.⁸⁴

In addition, countries have advanced arguments more generally against plurilateral negotiations leading to JSIs and JSIs as negotiating instruments. India has argued that when such discussions take the shape of trade negotiations and their negotiating outcomes are to be brought into the WTO framework, it becomes important to follow the fundamental rules of the WTO.⁸⁵ One such fundamental negotiating approach is that of the ‘single undertaking’, absence of which could alter the balance of interests between developed and developing countries as plurilaterals could arguably revolve around the exporting interests of the major trading nations. Shifting focus on these emerging issues could also mean that the membership’s attention would drift away from the sectors that developing countries are interested in, such as agriculture and labour-intensive manufacturing. As a result, the exporting interests of developing countries could be substantially sacrificed.⁸⁶

India also argues that any attempt to introduce new rules into the WTO framework through JSI negotiations without satisfying the decision-making requirements provided in Articles IX and X of the MA would be detrimental to the functioning of the rules-based MTS.⁸⁷ South Africa supports this contention and argues that when discussions turn into negotiations, and their outcomes need to be incorporated into the WTO framework, it could only be done in accordance with the rules of procedure for amendments as well as decision-making as set out in the MA.⁸⁸ Countries have also asserted that the MA ‘did not make provision for the so-called open plurilaterals and flexible multilateralism’.⁸⁹ Therefore, even if a JSI is offered on MFN basis, consensus may still be required for bringing new rules into the WTO framework as ‘consensus-based decision-making’ is the fundamental principle and procedure of the MA.⁹⁰ However, scholars point to the contrary

⁸⁴ General Council, *Minutes of Meeting*, WT/GC/M/187 (25 Nov. 2020), para. 82.

⁸⁵ *Minutes of Meeting Held on 1-2 and 4 March 2021*, *supra* n. 28, para. 10.2.

⁸⁶ Peter Draper & Memory Dube, *Plurilaterals and the Multilateral Trading System*, ICTSD and World Economic Forum, 2 (Dec. 2013), <https://e15initiative.org/publications/plurilaterals-and-the-multilateral-trading-system/> (accessed 29 Nov. 2022).

⁸⁷ Kelsey, *supra* n. 26, at 1.

⁸⁸ *Minutes of Meeting Held on 1-2 and 4 March 2021*, *supra* n. 28, para. 10.12.

⁸⁹ *Ibid.*, para. 10.19. Zimbabwe contends that the ‘JSI discussions were not mandated under any WTO decision or Ministerial declaration and could not be construed in any way to de facto assume any validity or recognition by the Marrakesh Agreement’.

⁹⁰ *Minutes of Meeting Held on 1-2 and 4 March 2021*, *supra* n. 28, para. 10.6. India supports these arguments as it has stated that each of the ‘JSIs was likely to pose different legal challenges to the existing WTO rules and mandates given the differences in the nature and scope of issues covered under each of those initiatives. However, any attempt to bring in the negotiated outcomes of the JSIs into the WTO by appending them to Members’ Schedules, even on MFN basis, following modification of Schedules procedures, bypassing multilateral consensus would be contrary to the provisions of the Marrakesh Agreement’.

and suggest that the progress on overcoming the challenges to the modern international trade system is now being made through the JSIs, and that this development is consistent with multilateralism.⁹¹ JSIs reflect an evolution of the WTO Members' desires for multilateralism. The newer challenges linked with trade require a deeper understanding of what multilateralism really means, which needs to be distinguished from the practice of decision-making by unanimity or consent.⁹² Multilateralism is broader than the issue of consensus, which is only one method of decision-making.⁹³

To the contrary, South Africa argues that the 'Preamble to the MA clearly articulated Members' vision for the WTO to develop an integrated, more viable and durable MTS'. Hence, any attempt to arrive at negotiated JSIs without consensus takes the WTO membership away from the much-promised 'integrated' trading system as it leads to further fragmentation of the system.⁹⁴ India contends that the reference here to an 'integrated' MTS clearly highlights the concern of WTO members arising from the fragmentation of the MTS following the Tokyo Round plurilateral codes.⁹⁵ This concern is reflected in the very Preamble of the WTO Agreement⁹⁶:

If a subset of WTO members negotiates an agreement that would modify rules and then want to "add that agreement to Annex 4" or formalize the agreement "into the WTO framework of rules" or bring the results of their agreement "under the umbrella of the WTO", this cannot be done outside of the accepted framework of WTO rules and decision-making procedures.⁹⁷

Many countries, even the ones which are proponents of JSIs, have observed that 'Plurilateral Agreements' need to be drafted with consensus among members and the basic principles of multilateralism.⁹⁸

Some countries in the Pacific Group have employed the negotiation capacity gap argument to oppose the JSIs development. They have asserted that the proliferation of JSIs in the WTO has posed significant capacity constraints for small countries that do not have the capacity to follow all these negotiations,

⁹¹ Gabrielle Marceau & Matheus Garcia, *Trade Links: New Rules for a New World*, 25(3) J. Int'l Econ. L. 501 (2022).

⁹² James Bacchus, *Trade Links: New Rules for a New World* 147 (Cambridge University Press 2022).

⁹³ Marceau & Garcia, *supra* n. 91.

⁹⁴ *Minutes of Meeting Held on 1-2 and 4 March 2021*, *supra* n. 28, para. 10.13.

⁹⁵ *Statement by India – Delivered by Ambassador & PR to the WTO*, WTO General Council Meeting (5–6 May 2021), <https://www.pmindiaun.gov.in/statements/MjQ5Mg> (accessed 7 Apr. 2022).

⁹⁶ Preamble of MA, *supra* n. 33.

⁹⁷ Andre Stoler, *Joint Statement Initiatives and Progress in the WTO System* (Institute for International Trade, University of Adelaide 21 May 2021), <https://iit.adelaide.edu.au/news/list/2021/05/21/joint-statement-initiatives-and-progress-in-the-wto-system> (accessed 29 Nov. 2022); also see *The Legal Status of Joint Statement Initiatives and Their Negotiated Outcomes*, *supra* n. 23.

⁹⁸ Adlung & Mamdouh, *supra* n. 10.

participate in frequent meetings, and understand the rules of engagement in the JSI negotiations.⁹⁹ This gap in capacity and expertise could leave out a significant number of the Members outside the JSIs, which does not help achieve the sustainability and inclusivity related objectives of the WTO.¹⁰⁰ Leaving out the countries with less negotiating capacity and expertise would imply that developing countries and especially the LDCs do not receive a just share of benefits from the growth of international trade. Moreover, countries have argued that such negotiations may leave Members with no option other than to choose between remaining outside the discussions or participating in matters that they believe are not consistent with their economic development priorities, needs, concerns and levels of economic development.¹⁰¹ This assertion to some extent is supported by Jan Kelsey, who argues that JSIs open the possibility for the WTO's powerful member to advance their specific interests, which can allow them to unilaterally extend the 'global rule-book to new rules'.¹⁰² Yet, it is important to consider that the WTO negotiations since the 2000s have been beset by the failure of the GATT to balance the redistribution of power and in particular to meet the developing countries' expectations.¹⁰³ Hence, by using plurilateral instruments such as JSI, developing countries can advance their specific interests without being impeded by the imbalance of power they have traditionally faced as they can engage in discussions on their common interests and also make advances.¹⁰⁴

The developing countries contend that the developed countries often see JSIs as a 'stepping stone' to multilateral rules, and the apprehension on the part of developing countries is not unfounded as several agreements signed during the GATT 1947 years in a plurilateral manner were all subsequently converted into multilateral agreements at the establishment of the WTO in 1995.¹⁰⁵ These 'agreements were packaged as the "Uruguay Round Agreements" and multilateralized under the Single Undertaking whereby nothing was agreed till everything was agreed'.¹⁰⁶ However, in the current geopolitical climate and today's multi-polarized trade world, it is highly unlikely that a plurilateral trade agreement

⁹⁹ Draper & Dube, *supra* n. 86.

¹⁰⁰ *Minutes of Meeting Held on 1-2 and 4 March 2021*, *supra* n. 28, para. 10.2.

¹⁰¹ Peter Ungphakorn, *Explainer: The 18 WTO Plurilaterals and 'Joint-Statement Initiatives'*, Trade & Blog (3 Jan. 2022), <https://tradebetablog.wordpress.com/2022/01/03/17-wto-plurilaterals-joint-statement/> (accessed 29 Nov. 2022).

¹⁰² Kelsey, *supra* n. 26; also see Jane Kelsey, *How a TPP-Style E-commerce Outcome in the WTO Would Endanger the Development Dimension of the GATS Acquis (and Potentially the WTO)*, 21(1) *J. Int'l Econ. L.* 273 (2018); also see *Reference Paper on Services Domestic Regulation*, *supra* n. 62, paras 12–15.

¹⁰³ Paul Collier, *Why the WTO Is Deadlocked: And What Can Be Done About It*, 29(10) *World Econ.* 1423, 1427 (2006).

¹⁰⁴ Hoekman & Mavroidis, *WTO Reform*, *supra* n. 10.

¹⁰⁵ Draper & Dube, *supra* n. 86.

¹⁰⁶ Sanjay Notani & Rishab Raturi, *A Plurilateral E-commerce Agreement: Skirting the 'Doha' Impasse*, 12(7–8) *Glob. Trade Cust. J.* 277, 283 (2017).

negotiated by a significant number of WTO Members can be made multilateral through consensus among the entire WTO Membership. Hence, going back to the 'GATT model where plurilateral agreements were a feature, not a bug, could support cooperation on a range of policy areas without needing complex and inflexible trade agreements'.¹⁰⁷ In the absence of such developments, there could be a further proliferation of preferential trade rules in the form of agreements.¹⁰⁸

At MC12, many WTO members have reinforced the importance of JSIs as negotiating instruments.¹⁰⁹ Countries have argued that the JSI on e-commerce is an important development in providing guidance on the regulatory policy space for the digital revolution in international trade.¹¹⁰ This plurilateral approach has also been recognized for its contribution to global trade by Chinese Taipei, as it has asserted that the use of plurilateral approach can be seen as a supporting mechanism for the MTS.¹¹¹ Colombia supports this view and argues that these initiatives help uphold the interests of members on several issues and therefore they are important for strengthening the WTO as it can be a pathway for resolving priorities that have been pending for a long time.¹¹² Mexico asserts that JSIs are a means to update the WTO rulebook.¹¹³ Brazil has proposed WTO members to work on developing and reconstructing the WTO architecture which would allow to incorporate plurilaterals in its structure in pursuance with the speed at which the countries decide to advance negotiations.¹¹⁴

It is noteworthy that these assertions are made by developing countries, and that developing countries are indeed going ahead to play an important role in the further negotiations and development of JSIs. Hence, this is not one of those contentious issues that have divided WTO members as per their level of development.

6 CONCLUSION

JSIs can have various benefits for the MTS as they can make WTO more relevant and resilient to the changing times. JSIs have made it possible to breathe life once again into the negotiating function of the WTO, which is still struggling for its relevance and resilience amidst the crisis of increasing nationalism and

¹⁰⁷ Hoekman & Sabel, *Plurilateral Cooperation as an Alternative*, *supra* n. 10.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Minutes of Meeting Held on 1-2 and 4 March 2021*, *supra* n. 28, para. 4.22.

¹¹⁰ Rashmi Banga, *Joint Statement Initiative on E-commerce (JSI): Economic and Fiscal Implications for the South* (UNCTAD Research Paper No. 58 UNCTAD/SER>RP/2021/1 Feb. 2021).

¹¹¹ *Ibid.*, 10.32.

¹¹² *Ibid.*, 10.34.

¹¹³ *Ibid.*, 10.36.

¹¹⁴ General Council, *The MC-12 Package: Moving the WTO Forward*, JOB/GC/253 (29 Mar. 2021).

fragmentation of rules. However, the main challenge that the JSI supporters face is how they can incorporate their negotiating results into the WTO rulebook in a legally consistent manner. The key to the future development of JSIs lies in determining a common approach to the adoption of JSI negotiating outcomes and the most legally consistent routes for their incorporation into the WTO rulebook.

This article has provided a discussion on some of the ways to include JSIs into the WTO legal framework, ranging from amendments to the WTO Agreements to the inclusion through soft law or modification of schedules. Another legally consistent way to create new trade rules is through regional trade agreements, but such agreements must comply with the requirements set out in Article XXIV GATT and Article V GATS or be signed through an 'Enabling Clause'. However, this will lead to fragmentation of the international trade regulations and will further weaken the MTS.

The WTO benefits from an almost universal membership, which allows for the global application of the rules agreed upon and adopted as a result of JSI negotiations. Negotiating JSIs within the WTO context is also particularly beneficial for developing countries that lack the capacity to negotiate such instruments, as they can seek assistance from the WTO's skilled and experienced Secretariat. Finally, another fundamental benefit is that if JSIs are formally incorporated in the WTO *acquis*, they can be made enforceable through the WTO's dispute settlement system. This benefit still stands, even amidst the current dysfunctional state of the AB, as decisions can still be taken through panel reports and appeals using the MPIA for a dispute between the MPIA's member-participants.¹¹⁵ Alongside with that being a member-driven organization, WTO should seek to uphold a balance of interests of both proponents and opponents of the JSIs. The MC12 outcomes covering both DRA issues (like the adoption of AFS) and new challenges (such as the empowerment of MSMEs and women) are giving us hope of arriving at such a balance within the WTO framework.

¹¹⁵ These benefits were outlined by Alan Wolff in 'The Future of Multilateralism and the Role of Plurilaterals', presented at Nanyang Technological University (Singapore 16 Nov. 2021), <https://www.piie.com/sites/default/files/documents/wolff-2021-11-16.pdf> (accessed 29 Nov. 2022); though counterarguments presented in Kelsey, *supra* n. 26, at 22.