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Shifting from Consensus Decision-Making to Joint Statement Initiatives: Opportunities and Challenges

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Contents

List of Abbreviations

AB	Appellate Body
CMAs	Critical-Mass Agreements
DDA	Doha Development Agenda
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Undertaking
EGA	Environmental Goods Agreement
EU	European Union
GATS	General Agreement of Trade and Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GPA	Government Procurement Agreement
GVCs	Global Value Chains
ICT	Information and Communication Technology
ILO	International Labour Organization
IMF	International Monetary Fund
IO	International Organization
IP	Intellectual Property
ITA	Information Technology Agreement
JSIs	Joint Statement Initiatives
LDC	Least Developed Countries
LoN	League of Nations
MC11	Eleventh Ministerial Conference (Buenos Aires 2017)
MC2	Second Ministerial Conference (Geneva 1998)
MC3	Third Ministerial Conference (Seattle 1999)
MC4	Fourth Ministerial Conference (Doha 2001)
MFN	Most-Favoured-Nation
MPIA	Multi-Party Interim Appeal Arbitration
MTS	Multilateral Trading System
PAs	Plurilateral Trade Agreements under Annex 4
PTAs	Preferential Trade Agreements
RTAs	Regional Trade Agreements
S&DT	Special and Differential Treatment
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TiSA	Trade in Services Agreement
TRIMS	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
US	United States of America
WB	World Bank
WTO	World Trade Organisation

Executive summary

The research aims to explore the possible outcomes of the Joint Statement Initiatives (JSIs) negotiations currently taking place under the aegis of the World Trade Organization (WTO). For this, the study attempts to unravel the implications of JSIs primarily on the WTO's Most-Favoured-Nation (MFN) principle and on its current consensus-based decision-making.

The study's first approach for understanding the implications of JSIs on the international trading system was based on the question of MFN compliance. However, after multiple interactions with stakeholders, an additional perspective was brought for analysing JSIs, namely through the divide between the expectations of the developed and the developing countries. While developed countries and most of the academic discussion focus on the MFN treatment in JSIs, developing countries and LDCs are fearful of these JSIs creating a baseline of rules that encroach upon their policy space.

In the current discussions, the research found that there is a general agreement of JSIs being open in membership and mainly driven by developed like-minded Members, with some developing countries participating as well. Each JSI faces its own opportunities and challenges subject to the sector it covers. However, MFN treatment and market access remain the overarching issues of controversy.

For operationalisation purposes, this study focused on 2 JSIs: (i) e-commerce and (ii) investment facilitation. The discussion around the e-commerce JSI shows that with the existing gaps in the WTO framework and with the increasing importance of the sector in international trade, new rules and regulations for governing e-commerce are imperative. This task, however, is difficult given the lack of agreement among the leading Parties on key issues – privacy, data localisation, market access, among others –as a result of the ideological divide among China, the United States and the European Union. In the case of investment facilitation for development, even if the content discussion is perceived to be light or less controversial, it is not necessarily easy as investment has historically been a hotly debated topic in the WTO.

To advance a comprehensive understanding of these innovative instruments in the context of the academic discourse around WTO reforms, the study undertakes an interdisciplinary approach to analyse the feasibility of the JSIs mainly through political and legal lenses, while also grasping their economic rationale.

From a political perspective, even if MFN-compliant JSIs are more feasible as a result of the possible circumvention of the consensus rule that schedules' modification offer, this does not mean that the option has no downsides. Indeed, one of the main findings of the study was the additional layer to JSIs discussion besides MFN compliance, namely the general dislike of JSIs within the WTO by a group of developing countries, regardless of the form they take. The discussion on economic feasibility highlights that it is preferable for JSIs to achieve critical mass to ensure an economically efficient outcome that mitigates the risks of free-riders. Thus, MFN compliance does not continue to be a key concern once the JSI ensures a

critical mass. Moreover, a country's decision to join a JSI depends on its own sectoral cost and benefit analysis influenced by the MFN-compliance of the JSI.

The legal feasibility analysis, as the most in-depth one, summarises the discussion and advances possible insertion methods of JSIs into the WTO framework. While the study also outlines more innovative approaches building from the scenario of WTO reforms, it primarily identifies two feasible options to insert JSIs into the current WTO system: (i) through PTAs/RTAs (Preferential Trading Agreements/ Regional Trade Agreements) pursuant to GATT Art. XXIV and GATS Art. V – preferred by developing countries and LDCs; or (ii) through an amendment of the Members schedules, most likely in the area of trade in services through GATS Art. XXI – preferred by developed countries. They seem to be, however, at the direct contradiction of the other group's expectation. The research hence brings to light the inherent dichotomy in approaches to dealing with sectoral issues between developed countries and the developing and least-developed countries. There is a mismatch of expectations of the WTO members where the fears of developing countries seem to be the desired goals of the developed countries.

1. Introduction

In recent years, the WTO has been subjected to severe criticisms on accounts of its inability to conclude any negotiations since the Uruguay Round concluded in 1994. The lack of consensus among its diverse membership of 164 Member States who differ considerably in terms of their economic, social and political structures and interests have contributed to the disaccord. This, along with impacting negotiations, has also manifested in the current Appellate Body (AB) crisis at the WTO. The US's persistent vetoing of the appointment of AB Members, which arises out of the nation's increasing dissatisfaction with the institution, has left the system paralysed. There is a need of a series of reforms to attend to WTO's lasting issues over the past few decades.

In an attempt to navigate the decision-making crisis, the 11th WTO Ministerial Conference (MC11) held in Buenos Aires in December 2017 provided the innovative approach of Joint Statement Initiatives (JSIs). These initiatives, in absence of any well-agreed definition, can be broadly defined as an attempt by a group of Members who start negotiations about a certain issue area without referring to the consensus decision-making that prevails in the WTO. However, the broad definition does not encompass its adoption into the WTO system nor if the commitments and benefits under a JSI will be extended to the entire Membership. This builds an aura of controversy around the initiatives and charts an ambiguous path forward.

2. Research question and methodology

Given the WTO's current scenario, the report aims to address the following principal research question: *Are JSIs a feasible option as an alternative to the consensus-based decision-making in the WTO? And if so, how?*

The study adopts an interdisciplinary lens in evaluating the feasibility of JSIs. Even if the two most prevalent disciplines in the trade arena are law and economics, the research evaluates the feasibility, within a limited scope, by also delving into political and policy-related characteristics. It builds on certain political science concepts, thus introducing a new perspective to the traditional binary dynamics of law and economics.

The methodology for answering the research questions will be mainly built on a qualitative analysis of the data collected from primary and secondary sources. Regarding primary sources, the research involved 17 interviews which included academics, general practitioners and WTO Missions. As highly requested by the interviewees, anonymity is guarded at all times. Secondary sources included literature or desktop review.

In order to operationalise our research, two case studies based on the JSIs introduced in Buenos Aires in 2017 are reviewed: (i) electronic commerce (e-commerce); and (ii) investment facilitation. When assessing the feasibility of JSIs, the analysis adopts a framework that responds to the implications on the MFN principle. Hence, the study evaluates the feasibility of JSIs following a two-cases approach, one where JSIs violate the MFN principle, and one where they do not.

The chosen methodology, however, does involve some key limitations. By adopting a qualitative and interdisciplinary approach, some trade-offs were encountered in regards with the thoroughness of the disciplinary analysis. For instance, in an ideal scenario, the economic feasibility section would include a quantitative analysis of the costs-benefits analysis of JSIs for its signatories and non-signatories. Nonetheless, that approach is beyond the scope of the present study. Additionally, the lack of response to interview invitations involves an inherent risk of not taking into direct consideration the perspective of some key WTO actors.

3. Building on WTO cornerstones: the MFN principle, consensus-decision making and the single undertaking approach

Before presenting JSIs, a revision of three historical WTO cornerstones proves pertinent since they will feed the discussion throughout the report. For a more detailed analysis on these three issues, refer to the Appendices.

3.1. The Most-Favoured-Nation principle

MFN (Most-Favoured-Nation) treatment in the current WTO scenario implies that if country A signs a treaty with country C, all benefits offered to C also have to be *unconditionally* extended to country B. Thus, the effect of a large network of similar and unconditional undertakings is that concessions – even if granted bilaterally – become effectively multilateralised (Wüstenberg 2017, 526). In this sense, since countries provide equalised treatment to all other countries, the MFN principle prevents discrimination among trading partners, and thereby minimises trade distortions. Art. I of the GATT 1947 first introduced the notion in the realm of trade in goods. With the creation of the WTO, the MFN treatment enshrined in the GATT was expanded both to trade in services via GATS Art. II, and intellectual property (IP) via TRIPS Art. 4.

One of the focal points of discussion within the different JSI negotiating groups is whether benefits will be granted on an MFN-basis or not. The interviews conducted showed that most academics, practitioners and diplomats agree on the MFN principle being a cornerstone and foundation of the Multilateral Trading System (MTS). However, almost all interviewees equally voiced concerns about the *unconditionality* of MFN and whether it makes sense to maintain this element under the growing and diverse Membership of the WTO. Hence in our analysis of case law and jurisprudence, which can be found in the Appendix 1, we focused on the interpretation of *unconditional*.

Indeed, the prevalent jurisprudence on GATT Art. I shows that "unconditionality" is a cornerstone of the MFN principle and shall be respected. However, case law also seems to give more leeway to attaching conditions to MFN, pointing to a possible way to implement JSIs. For instance, the AB in *EC – Seals* pointed out that ""***it does not follow that Article I:1 prohibits a Member from attaching any conditions*** *to the granting of an "advantage within*

the meaning of Article I:1"[1]. A similar notion was made by the Panel in *Canada – Autos*, stating that "***We therefore do not believe that, …, the word "unconditionally" in Article I:1 must be interpreted to mean that making an advantage conditional on criteria not related to the imported product itself is per se inconsistent with Article I:1, irrespective of whether and how such criteria relate to the origin of the imported products"***[2].

It is equally important to note that unlike the GATT, Art. II GATS in combination with Art. XX GATS by themselves provide for a possibility to condition market access having thus an implication on MFN treatment. This is of extreme importance when thinking of JSIs covering mostly trade in services.

3.2. Decision-making in the WTO

Consensus is the preferred decision-making option of the WTO, albeit *legally* not the only one. Articles IX and XII of the WTO Agreement, along with the document WT/L/93 reign the decision-making procedures under the WTO. Altogether they stress the importance of seeking decisions by consensus as the first-best option, while also allowing voting *by default*.

In WTO practice, consensus means the absence of dissent. Put differently, that no WTO Member present in a meeting makes a formal opposition/objection to an agreement/decision in consideration (Jones 2015, Ehlermann and Ehring 2005). Based on the notion of sovereign equality of states obtained from the natural law theory (Guan 2014, 88), consensus is currently considered as the "least bad alternative" for decision-making in the WTO[3].

As a result of the growing Membership, the different underlying dynamics and power relations, developments since WTO establishment seem to have highlighted consensus' challenges. In spite of few consensus-based successes, consensus poses as a challenging decision-making method given that it is a long and tedious process. As a consequence, consensus has become a focal point for critics when discussing the current ongoing crisis of the WTO.

3.3. The single undertaking approach

The single undertaking approach aims to cumulatively and simultaneously apply all rights and obligations to all WTO Members. Introduced in the Uruguay Round (1986-1994), it prevents free-riding from developing countries, who since then would have to abide by the

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1 *Appellate Body, EC – Seals, para.5.88:*
"This means, in our view, that any advantage granted by a Member to imported products must be made available "unconditionally", or without conditions, to like imported products from all Members. However, as Article I:1 is concerned, fundamentally, with protecting expectations of equal competitive opportunities for like imported products from all Members, it does not follow that Article I:1 prohibits a Member from attaching any conditions to the granting of an "advantage" within the meaning of Article I:1. Instead, it prohibits those conditions that have a detrimental impact on the competitive opportunities for like imported products from any Member."

2 *AppellateBody, Canada – Autos, para. 10.24.*

3 Interviews with WTO Missions of developed and developing countries, October-November 2020.

same general set of agreements that developed countries so far had. Importantly, through the single undertaking approach, several plurilateral agreements previously negotiated in the Tokyo Round (1973-1979) were multilateralised.

Draper and Dube (2013, 1)argue that the previous multilateralisation of these Tokyo Codes feeds the current fear of embarking plurilateral agreements. Some WTO Members are simply not willing to take the risk of them being eventually imposed on the whole Membership, especially if they did not participate in the negotiating process. The interviews with representatives from developing and LDCs confirmed this scenario.

In this sense, the Tokyo Round and resulting Codes set an important precedent for JSIs. They show that plurilateralism has historically been an alternative approach used to overcome negotiation deadlocks, also crystallizing concerns regarding whose participation and engagement will be considered in what could possibly later be multilateral agreements. JSIs are being negotiated among a group of like-minded Members with a special interest in a topic, hence departing from the single undertaking approach. As it is the case for every negotiation, even if they are open, latecomers would have no possibility of retroactively adding anything to the negotiating process. They too would be faced with a *fait accompli* for the already existing rules.

4. A new notion: Joint Statement Initiatives (JSIs)

The MC11 (2017) was held in Buenos Aires, Argentina. It gave birth to the notion of JSIs in order to portray the decision of several, yet not all, WTO Members to start working on different issues. It is ultimately considered as the beginning of a new era of plurilateralism within the WTO. Even if it did not result in substantial multilateral outcomes[4], the following were delivered in the form of *plurilateral* Ministerial Declarations and Joint Statements:

- Joint Ministerial Statement on *Services Domestic Regulation* (WT/MIN(17)/61): Originally signed by 32 WTO Members[5].
- Joint Statement on *Electronic Commerce* (WT/MIN(17)/60): Originally signed by 44 WTO Members[6].
- Joint Ministerial Statement on *Investment Facilitation for Development* (WT/MIN(17)/59): Originally signed by 42 WTO Members[6].
- Joint Ministerial Statement - Declaration on the establishment of a WTO informal work programme for *MSMEs* (WT/MIN(17)/58): Originally signed by 60 WTO Members[6].

[4] This should not be understood as there were not multilateral results at all. On the contrary, the following four Ministerial Decisions were adopted by the entire WTO Membership: (i) the Ministerial Decision on Fisheries Subsidies (WT/MIN(17)/64); (ii) the Work Programme on Electronic Commerce (WT/MIN(17)/65); (iii) the TRIPS non-violation and situation complaints (WT/MIN(17)/66); and (iv) the Work Programme on Small Economies (WT/MIN(17)/63).

[5] EU and its Members states included as one.

Finally, even if not labelled as JSIs, two additional MC11 documents should be mentioned as they account for plurilateral initiatives: (i) the Fossil Fuel Subsidies Reform Ministerial Statement (WT/MIN(17)/54); and (ii) the Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017 (JOB/GC/161).

Given these results, Ungphakorn (2017) highlighted the contrast between the appreciations of the EU – and most of the world – who lamented the lack of concrete multilateral outcomes, versus the US who even tagged the MC11 as the moment when the impasses at the WTO were broken.

Throughout the interviews, other issues have been brought as possible JSI territory, whilst other issues are transversally perceived as needing a multilateral result in order to be effective. Among those who possess characteristics of JSIs, there is the Multi-Party Interim Appeal Arbitration (MPIA), as well as innovative issues like trade-related climate change, Global Value Chains (GVCs), and enhanced provisions on Sanitary and Phytosanitary (SPS) measures. On the other hand, issues like subsidies, fisheries, and agriculture possess less potential.

4.1. Defining and interpreting the new phenomenon

Being a completely new notion, there seems to be no clear definition of JSIs as a concept yet. However, there are several cornerstones which actors involved in the process seem to agree upon and others where their perception differs. Since it is ultimately up to the negotiating Members to decide on the concrete form and shape of the specific JSI under negotiation, **this paper does not aim at providing a conclusive definition**. In the following section, the authors will merely map out the different elements under discussion on conceptualising JSIs.

a) Open Agreements

The aspect where all interviewed WTO Missions agreed on, is that JSIs should be understood as "open agreements" in terms of membership. In other words, that all Members are free to join them, if they wish.

b) Negotiating tool

Another important element, which came up in discussions with mostly WTO missions, is that JSIs are viewed, at the moment, as primarily a negotiating tool for certain areas, without a clear definition or discussion on its final form. A fear, especially voiced by developing countries and LDCs in this regard, is that JSIs might follow the faith of the Tokyo Codes and at one stage be multilateralised by the WTO Membership. Notably, this mirrors exactly the intention of several developed countries interviewed, who view the fate of JSIs to be similar to that of the Tokyo Codes.

c) MFN compliance

The main difference in opinion on the form of JSIs concerns the MFN treatment. Several interviewed actors are of the view that JSIs have to be MFN compliant at all costs. However,

a vast majority of the interviewed actors, especially general practitioners and developed WTO Missions, reluctantly agreed that only JSIs which would *condition* their MFN on certain assumptions would make sense or be realistically possible in terms of future negotiations. This opinion is based on the general observation of the current stalemate of negotiationsas well as the growing and the diverse Membership of the WTO. There exist differences among the Members not only in terms of their level of development but also in their perception of certain matters of trade.

In this sense, four main designs of administering *conditional MFN* have been crystallised with the help of the interviews with general practitioners, missions as well as academics:

i. The first option is that only Members within the JSI will be granted all the advantages of the JSI. In turn, such a JSI would treat non-signatories like Plurilateral Agreements under Annex 4 of the WTO and not extend its benefits to the latter. The MFN granting *condition* here would be that the Member is a part of the JSI.

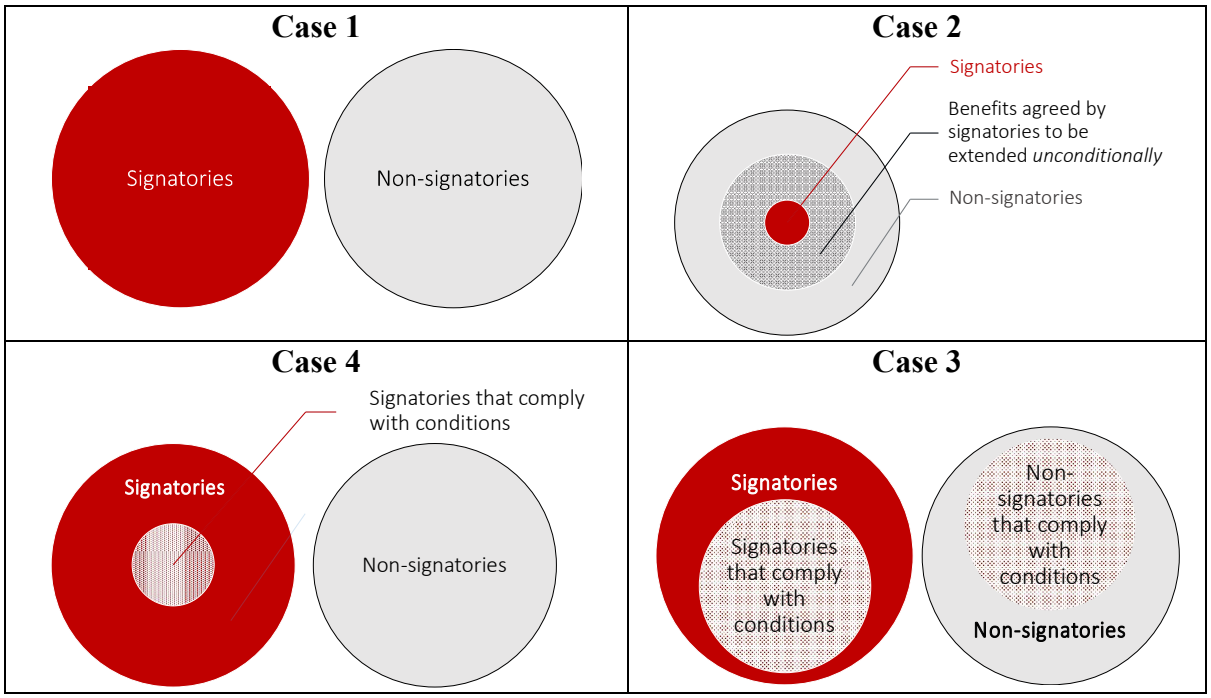
ii. The second option is that the JSI would extend some benefits to all WTO Members. But for specific provisions or sectors within that particular JSI, the benefits would be extended only to the signatories of the Agreement (i.e., MFN treatment for a sub-sector would be extended to the JSI Member only and not to the entire Membership of the WTO). Here again the MFN granting *condition* for certain sectors or provision would be that the Member is a JSI signatory.

iii. The third option would extend some benefits to the whole WTO Membership, while other benefits (again specific provisions or sectors) would be extended only to Members (either parties to the JSI or not) which would meet certain conditions. Those conditions would most likely be of a regulatory nature, i.e., free data flow or consumer protection. The MFN granting *condition* here for some benefits would be to meet certain (regulatory) requirements, non-regarding whether the Member is a JSI signatory or not.

iv. The last option is the most restrictive form of a conditional JSI and has been brought up especially in discussions surrounding e-commerce. The starting point would be that benefits under this JSI will be granted only to Members, similar to the first option. However, this option further divides the JSI in two parts: (i) the normal agreement; and (ii) something similar to a *JSI+* section.Under the normal JSI, benefits would be extended to *all* signatories of the JSI; whereas *JSI+* benefits, additional benefits, would only be available to those signatories of the JSI who meet certain, again mostly regulatory, conditions. The main difference with the third option is that those additional benefits would be available only to qualifying Members *within* the JSI. Therefore, this option has two MFN granting *conditions*: (i) to be a Member of the JSI and (ii) for further benefits, to meet certain (regulatory) criteria.

The last two options seem to be especially interesting with regard to the JSI on e-commerce since it entails plenty of regulatory differences among the negotiating Members.

Figure No. 1: Possible MFN-conditionality of JSIs



Source: Authors' own elaboration

d) Insertion

The last conceptualisation point concerns the incorporation of the JSIs into the WTO system, which will also be further discussed in the feasibility section (section 7). It seems to be apparent to all actors interviewed that, no matter which legal form the JSI would take in the end, in most cases,consensus for its adoption will be necessary. It seems also apparent that given the current negotiation crisis in the WTO, such consensus is unlikely. Lack of consensus could not only be because of the question of MFN breaching JSIs, but also because some countries pursue strategic negotiating interests with "holding JSIs hostage" to negotiate agreements of their own interest first.

Another important hindrance to introduce JSIs is that some developing countries fear the creation of a baseline on JSI-topics within the WTO, as well as the possible multilateralisation process. As such, they oppose the insertion of JSIs into the WTO. In this regard, some opinions have been voiced, as to incorporating the JSIs through Preferential Trade Agreements (PTAs) and/or Regional Trade Agreements (RTAs) provisions, viaGATT Art. XXIV and GATS Art. V. Another idea repeated throughout the interviews –especially with practitioners and academics – is to change (at least with respect to trade in services) the GATS schedules of the countries and include certain conditions and limitations on market access.

4.2. Current options for plurilateral arrangements in the WTO

WTO Members already have different methods for establishing plurilateral (two or more parties) agreements. For a detailed discussion on the current arrangements, refer to Appendix

4. The present section simply provides a comparison of the following arrangements: Preferential Trade Agreements (PTAs) or Regional Trade Agreements (RTAs); Plurilaterals under Annex 4 (PAs); and Critical-mass Agreements (CMAs).

Table No. 1: Comparison of the Plurilateral Arrangements covered by the WTO

Type of Arrangements	Scope or Coverage	Need for Consensus	Membership and Accession	MFN Compliance
PTAs/RTAs	Broad, condition of "substantial coverage"	No	Restricted, no WTO rules	No
CMAs	Unclear	Unclear*	Limited, but not restricted	Yes
PAs	Flexible, but usually domain-specific	Yes, prerequisite in order to be negotiated and added to WTO treaties	Limited, but not restricted	No

** In the case of ITA, this was done via signatories' schedules of commitments. Hence, no consensus needed.*
Own elaboration

Table No. 1 shows that, with regards to their commonalities, the three approaches involve binding commitments and enforceable provisions. On the other hand, the differences among them are more numerous, where three of which are worth highlighting. First, only CMAs are applied with proper observance of the MFN principle. Put differently, PAs and PTAs/RTAs are applied through a discriminatory MFN-violating basis. Second, as a consequence of the consensus rule, any WTO Member can reject a proposed PA when presented to them in order to be added to Annex 4. This is certainly not the case with PTAs/RTAs and it is a blurry scenario with CMAs. Third, in principle, CMAs and PAs are open to accession from any WTO Member; whilst PTAs/RTAs act as a closed club where accession decisions depend solely on internal negotiations.

The ever-growing number and depth of PTAs/RTAs has been a fundamental concern of the WTO for several years. Hoekman and Sabel (2019, 1) even categorized them as a tool for circumventing the MTS, since they undermine the WTO by rendering its foundations more fragile. Without a doubt, PTAs/RTAs are closely related to the entanglement of commitments, as well as a deterioration of the MFN principle and negotiating process within the WTO. PTAs/RTAs explicitly exclude other WTO Members who are non-signatories and thus hinder the MTS. Moreover, even if PTAs/RTAs are accounted for and may build on WTO rules, they work inherently outside its framework.

In this context, the conducted interviews with *all* WTO Missions suggest that PTAs/RTAs pose as the default and pragmatic option for framing JSIs if they are not included within the WTO framework. In fact, all interviewees strongly asserted this option as the counterfactual. Nonetheless, perceptions of how this situation would affect the WTO differ within Members.

The interviews with mostly developed countries suggested this would eventually result in higher risks of irrelevance of the WTO in the trading system, whilst the position from developing countries and LDCs was the contrary, as they prefer JSIs to be as PTAs/RTAs in the sense they represent WTO+ rules and work outside the system.

5. Assessment of JSIs

To attain an understanding of JSIs and their practical feasibility, this study analyses two prospective JSIs: (i) e-commerce and (ii) investment facilitation. With a slowdown of growth in merchandise trade and in traditional services aggravated by the current pandemic, e-commerce and its governance have become a crucial issue for the global economy. Investment facilitation, on the other hand, is a nouvelle attempt to put investments into a structured global framework. These two areas offer immense potential for global cooperation and international rulemaking.

5.1. Case study 1: E-commerce

Starting the late 20th century, the growth of the internet has transformed business and trading practices. To adapt to the changing time, WTO's MC2 in May 1998 adopted the Declaration on Global Electronic Commerce which resulted in the creation of the WTO Work Programme on E-Commerce in September 1998 (Ismail 2020, 1). The Programme defines e-commerce as "the production, distribution, marketing, sale or delivery of goods and services by electronic means" (WTO 1998, 1). Since then many other international organisations have also attempted to define e-commerce[6]. Its definition also varies from one Member State to another. Thus, the lack of an unanimously agreed-upon definition of *e-commerce* acts as a challenge.

Currently, to govern e-commerce, WTO's GATS covers the majority of the content related to an e-commerce transaction. GATS became critically important in the e-commerce discourse post the *US – Gambling* case in which the WTO Appellate Body upheld the Panel's notion of "technological neutrality" of GATS which allows the incorporation of new technology as a means of delivery[7]. However, this interpretation has been seen as a judicial overreach by the AB. In the context of digitally delivered goods, commitments made under Mode 1 (cross-over supply) of the GATS are also extremely crucial. Moreover, the Annex on Telecommunications and the Agreement on Basic Telecommunications services and the Annex on Financial Services of the GATS also govern certain aspect of e-commerce (Ismail 2020, 6).

[6] OECD defines an e-commerce transaction as "sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. The goods or services are ordered by those methods, but the payment and the ultimate delivery of the goods or services do not have to be conducted online" (OECD 2011). OECD's definition is perceived as a contracted version of the definition by the WTO Work Programme as it does not focus on transactions undertaken physically or not using networks channels.

[7] *Panel Report,United States— Measures Affecting the Cross-Border Supply of Gambling and Betting Services, para. 6.285.*

The Information Technology Agreement (ITA) also extends limited governance to trade in ICT (Information and Communication Technology) goods focussing on the elimination of tariff barriers on key ICT products on an MFN basis, but only to the participants of the agreement (Panagariya 2000, 10). The TBT Agreement also governs ICT goods by codifying the standards and measures administered by national governments (Ismail 2020, 6). The TRIPS Agreements is also relevant to e-commerce as its scope incorporates IP protection for technologies that facilitate e-commerce and copyrights and patent of digital goods (Ismail 2020, 6).

The existing WTO framework has been considered to be inadequate to deal with e-commerce. The first inadequacy stems from the lack of precision in distinguishing *goods* from *services*, and the accurate physical borders being crossed (Ismail 2020, 7). Another important inadequacy arises from the primary characteristic of a digital economy, i.e.data. As limitless amounts of data are generated, storing and access to data has become a key concern (Darsinouei 2017, 10).

E-commerce along with modern communication technologies has significantly reduced transactions costs. It has led to effective ways forGlobal Value Chains(GVCs) to operate as well as facilitated MSMEs' participation in international trade. Moreover, e-commerce has increased transparency and market competition (Darsinouei 2017, 8-10). It is also expected to foster more employment and to enhance equity in distributing the gains from trade (Al-Saleh 2020). A 2018 study conducted by McKinsey on Indonesia's e-commerce sector discovered that women trading in online commerce are able to generate greater income as compared to in other traditional forms of trade (Das, et al. 2018, 6). Moreover, the COVID-19 pandemic has further accelerated the transition towards a more digital world. New and updated rules on e-commerce are thus necessitated to harness future opportunities in trade.

However, the JSI negotiations for e-commerce face many core challenges. To begin with, the interviews with the Missions of both developing and developed countries highlighted that e-commerce is a multi-stakeholder issue. They emphasised on the overall lack of consensus and the ambiguity in the methods for governing e-commerce transactions. Many practitioners also highlighted that dissonance exists not only in what rules are to be implemented but also regarding the priority with which the issues are being dealt with. The priority given to e-commerce is, to a very large extent, influenced by each Member State's digital infrastructure and policy capacity combined with their current presence in the sector. Member States interviewed also communicated that the inability to establish common definitions of key terms also impedes narrowing down of the discourse.

Interviews with the Missions involved in the current e-commerce negotiations conveyed that a general agreement between them existed on lighter issues of e-signature, spam, etc but not on controversial issues of market access, data localisation, etc. The issues of data see a majority of discords between members (both between developing and developed countries as well as amidst developed countries). Practitioners representing the developing world and Missions of least-developed countries expressed that keys issues related to privacy, data flows and data localisation currently fall under the jurisdiction of the national government

and thus, international regulations would challenge their national sovereignty in domestic policymaking. On the other hand, Missions of the developed countries face the confusion in expressing regulations in a way that can be distinguished in an MFN or a non-MFN basis. For example, *Can 'no forced localisation of servers' be extended on an MFN-basis or not? And can non-signatories be penalised by not giving them the rights?, etc.*

Amidst the developed countries, there exists a critical divide, driven primarily by the EU, the US and China, when it comes to regulating data (Hufbauer and Zhiyao 2019). These three dominant players have stark differences in their understanding of data. The US advocates for open, interoperable communications, with minimal barriers to the global exchange of information and services. On the other end of the spectrum lies China that wants its trade and internet policies to reflect state direction, limiting the free flow of information and individual privacy and discriminate against foreign firms. In the middle lies the EU that advocates a more regulatory and prescriptive regulation of the flow of information and services as compared to the US (Congressional Research Service 2020). Moreover, a panel discussion organised by the CATO Institute with Honey, Bliss and Norberg (2020) highlighted a key difference in how privacy is understood by these three countries. The EU sees the "right to privacy*"* as a fundamental human right and thus, data privacy is non-negotiable. This is significantly different from that of the US's and China's. The panel also highlighted that consensus in how to treat data can help businesses (who are key actors in the sector) resolve the plethora of data-related rules and reduce compliance costs.

Another aspect that was brought to attention through the interviews was the discourse around market access and the MFN principle. Missions of the developed countries expressed that there exists a general belief among developed members that adoption and multilateralisation of an e-commerce agreement within the WTO would become easier if they are MFN-compliant. However, this view came in stark contrast to that of the Missions of LDCs and practitioners representing the developing world who said that they fear the multilateralisation of such an agreement especially due to its adverse impact on developing and least-developed countries' policy space and their ability to build capacity. This threat of limiting policy space has resulted in many key players like India and South Africa to strongly oppose a JSI on e-commerce. Moreover, the developing country practitioners also highlighted that the existing digital divide limits many Members' ability to participate in the current negotiations.

Our interviews also highlighted the ongoing dialogue around Special and Differential Treatment (S&DT) to developing countries and LDCs to offer them a relatively level playing field in the domain. Stakeholders representing the developing countries expressed in the interviews that the traditional S&DT would not be enough in the domain of e-commerce. They advocated for a holistic approach in which developing countries and LDCs are helped to expand e-commerce related infrastructure and services without encroaching on their policy space. According to them, the differential treatment has to go beyond the traditional tariff cuts and quotas.

5.2. Case study 2: Investment Facilitation for Development

The 2017 statement establishing this JSI calls for "beginning structured discussions with the aim of developing a multilateral framework on investment facilitation"[8]. In November 2019, a second document was released where 98 WTO Members expressed support for the 2017 initiative, reaffirming what the framework should contain (transparency, administrative streamlining and cooperation) and what it should not (market access, investment protection and Investor-State Dispute Settlement)[9].

According to the WTO(2020), investment facilitation equals to a more transparent, efficient and investment-friendly business climate that incentivises domestic and foreign investors. The conducted interviews also highlighted that the initiative is primarily about facilitation for development, not about negotiating investment treaties. As for the substantive aspects of the JSI, the research indicates Members are currently working based on an "informal consolidated text". Some issues have been mentioned throughout the interviews, including the possible MFN treatment of the JSI, transparency (publication and notification), administrative aspects, technical assistance and capacity building and corruption. Before discussing the opportunities and challenges, it is important to note that the general impression from *all* interviewees was that these discussions are revolving around "light rules" and/or "not content creation".

Regarding the opportunities, Zhang (2018, 6) argues how this JSI tries to build on the TFA's success in 2013, hence the focus on *facilitation*. In spite of the general impression of soft rules, as investment has always been a hotly debated topic within the WTO and other fora, the *smallest* effort could represent an important step forward. For instance, of particular importance is the aforementioned MFN treatment which, according to the interviews, has no intention so far to be MFN-violating. The Agreement on Trade-Related Investment Measures (TRIMS) currently only has the national treatment component of non-discrimination *directly* included via Art. 2. Even if MFN can be interpreted to apply to trade-related investment aspects via an indirect application of GATT Art. I to GATT Art. III, the latter equivalent to TRIMS Art. 2, one could say that the direct inclusion of an MFN clause in a trade-related investment agreement within the WTO framework would in itself be an improvement.

As for the challenges, some authors stress trade facilitation cannot be compared to investment facilitation. First, trade facilitation (in goods) was the only issue from the Singapore Round that was agreed by consensus to move forward. Second, despite its approach, trade and investment facilitation are different in their scope. Indeed, investment includes broader regulatory space, i.e., laws and regulations on the environment, labour, consumer protection, competition, distribution, corruption, taxation of ongoing enterprises, revenue collection, public health and safety (Dietrich, Mann and Bernasconi-Osterwalder 2019, 4). Given this context, along with the discussion of time limits, Baliño and Bernasconi-Osterwalder (2019)

[8] WT/MIN(17)/59.
[9] WT/L/1072/Rev.1

argue that the delineation between investment facilitation and market access is not clear despite it being stated in the 2017 declaration.

Moreover, since its conception, this JSI was extremely clear of its multilateralisation goal. Several problems arise from this, parting from the fact that investment as a Singapore issue was dropped from being a WTO negotiating topic in July 2004 through a meeting of the WTO General Council (Baliño and Bernasconi-Osterwalder 2019)[10]. Even in the MC11, several developing countries and LDCs announced that this issue does not have a proper WTO mandate. The reasons behind the reluctance are that investment rules include a broad scope, which are considered by many as purely national policies out of WTO's (or any other IO's, for that matter) jurisdiction.

5.3. General assessment

After gathering different conceptualisations of the JSI notion, as well as the comparison of two initiatives – i.e., e-commerce and investment facilitation –, the research shows that any generalisations about shared opportunities and challenges would prove impractical. Besides the general opportunities of being a way forward with trade negotiations, and the general challenges of its insertion into the WTO, whether they present more opportunities than challenges directly depend on what specific items are being discussed.

Moreover, MFN-compliance decision also ultimately depends on the Members involved. Interviews with WTO Missions pointed towards a general understanding that the preferred option is of flexibility and of waiting for the rules to be negotiated first, instead of establishing the MFN compliance as a hard rule for all types of JSIs.

6. Possible insertion of JSIs in the WTO system

After the JSIs negotiations finalised, if successfully concluded, the outcome will be a set of rules the like-minded group has agreed upon. The next question is then how to implement this set of rules. Should they introduce it to the WTO system? If so, how?

The research builds on the simplification of analysing the political and economic feasibilities based on two scenarios: (i) whether benefits derived from JSIs will be delivered through an MFN basis; or (ii) whether JSIs' benefits will be kept within the group. **The first scenario** even includes alterations available to Members in some WTO treaties in order to claim MFN compliance through a "conditional" approach, i.e., subject to the fulfilment of certain requirements (see section 5.1). These options are particularly relevant for the JSIs negotiating e-commerce and domestic regulation of services rules. It also includes the innovative scenario where some JSIs (or certain provisions within them) can be granted through an MFN basis, while others do not. By contrast, the **second scenario** refers to JSIs acting similar to PAs under Annex 4 in terms of MFN violation.

[10] Consequently, the international landscape on investment strongly evolved through Bilerateral Investment Treaties (BITs).

Finally, the legal feasibility subsection summarizes the discussion and provides concrete options to move forward with JSIs.

6.1. Political feasibility

6.1.1. If they are MFN compliant

The first scenario, namely if JSI Members agree to extend benefits to non-signatories, initially appears to be the less controversial of the two from a political perspective. As it would be MFN compliant, in principle, consensus would not be the primary concern. For instance, they could include the new obligations, only applicable to them, in their respective schedules of concessions (GATT) or commitments (GATS).This would however trigger the negotiation process under GATT Article XXVIII and GATS Art XXI[11].

However, when analysing the adoption of new rules through dynamic lenses, the scenario still presents a series of political challenges given its long-term implications. Some developing Members have expressed their general dislike to the idea of JSIs, particularly India and South Africa. Other developing or least developed Members, even if not being equally vocal, have set forth worries about the JSIs currently being negotiated within WTO headquarters, possibly using administrative budget that was not aimed for this. The reasons behind are manifold.

First, the new topics covered by JSI negotiations go against national preferences simply because they do not build on traditional priorities. Most developing countries have long been waiting for the conclusion of the Doha Development Agenda (DDA), where the development dimension was put in the centre of trade liberalization. With the almost inexistent progress of this Round – in fact, most WTO Members consider that the DDA is effectively dead –, some countries hold tight to this mandate to prioritise agricultural subsidies, NAMA negotiations, among others, as a bargaining chip for talking about new issues. To make things worse, interviews with WTO Missions suggested that, as of October 2020, there was little discussion in terms of flexibilities or particular necessities of less-developed Members in JSI negotiations.

Second two interviews with organizations representing developing countries and LDCs voiced the concern of setting a baseline within the WTO, via JSIs, of rules that not all WTO Members want nor can comply with. Importantly, the interviewees perceived the inclusion of JSI rules, regardless of the form they take, to have an effect of what is expected of the entire WTO Membership. Note how MFN treatment plays no role in this matter. Indeed, even the inclusion via schedules (which would be MFN-compliant) is an approach that would be considered as “dishonest” by some actors.

[11] For the GATS, the procedures for modifying schedule of commitments can be found in documents S/L/80 and S/L/84. The authors highlight this ruleset as JSI negotiations are based on regulatory aspects that can be included via the schedules of commitments (GATS), and not of concessions (GATT).

Third, Missions from developing countries and LDCs, as well as organizations representing them, expressed their concerns about a future multilateralisation process of JSIs throughout the interview process; whilst some developed countries highlighted the "negotiation tool" and "stepping stone" aspects of JSIs. Table No. 2 summarises this clash, which indeed seems to be the greatest challenge as it shows strong contradictions in the expectations from the future of JSIs. It also confirms the argument regarding the previous multilateralisation of the majority of Tokyo Codes feeding the current fear of embarking plurilateral agreements. The main worry for developing countries is about the policy space they would be left with for sectors they are yet to develop domestic regulatory schemes for.

Table No. 2. Comparison of JSI-related fears of developing countriesand LDCs versus JSI-related expectations of developed countries

Fears of developing countries and LDCs	Expectations of developed countries
• Setting up a baseline for future agreements. • Previous experiences (Tokyo Codes + multilateralisation process). • Limiting policy space. • Developed countries cheating the system ("dishonest").	• JSIs as "negotiating tool" to achieve future multilateral agreements. • Moving forward with cutting-edge issues. • Misleading assumption: as long as it is MFN extended, developing countries won't mind.

Source: Authors' own elaboration

Fourth,the interviews also presented that the reason why some countries have not even developed regulatory schemes for cutting-edge issues is simply because of their lack of technical capabilities and overall understanding of the topic itself. This entirely transposes to the JSIs negotiations in the WTO and their limited participation.

Thus far, the arguments against addressing new topics, in general, have resulted in *minimum common denominator* results (Haas 1964) in the WTO negotiating pillar. Hence, the few consensus-based outcomes since WTO inception and the absence of rules for new domains. In the next paragraphs, some ideas are presented regarding what actions can be taken in order to move forward with JSIs in this first scenario, i.e., provided they are MFN compliant.

One option would be to exploit the *formation process of national preferences* in order to foster the participation of economic sectors that will benefit from JSIs. Building on the political economy of trade liberalization and how states' positions are formed after the aggregation of preferences by important domestic societal groups (van der Vleuten 1998, 64),once you empower benefitting groups (usually exporters), the formation of national preferences is impacted.

In order for concerned countries to make compromises, there needs to be a rebalancing of their domestic costs-and-benefit analyses. From their perspective, there are currently excessive uncertainty and costs associated with JSIs. Hence, a second option for leading developed countries could be to tilt the balance towards benefits by addressing development issues within JSIs. Conconi and Perroni (2015, 67) interestingly argue for conditionality in

their interpretation of S&DT rules as part of a mechanism of *carrots and sticks* to help developing countries overcome their initial struggles and encourage trade liberalization. By addressing development, the research does not attempt to convey returning to the traditional binary S&DT approach, but rather a more finessed method to respond to specific and identified needs from developing countries. Building on the TFA for instance, fostering talks regarding flexibilities (in terms of longer time periods for implementation and capacity building/technical assistance) to respond to the development concerns of the less-developed Members. Ultimately, this might not only alleviate the resistance of some developing countries, but also act as an incentive for more developing countries to join JSIs. According to van de Vleuten (1998, 65), states might compromise to an agreement – even if the expected costs and benefits deviate from its original preferences – if they fear exclusion from a coalition and are not capable of creating an alternate one. In a situation where additional benefits are created for developing countries to join JSIs, the possibilities of creating an opposing coalition shrink.

6.1.2. If they are MFN non-compliant

Under the current state of the WTO, if JSIs are not extended through an unconditional MFN basis to the entire WTO membership, they would opt the form of PAs under Annex 4. As aforementioned, consensus is needed for initiating formal negotiation or for amending the WTO Agreements in order to introduce a new one. Having previously identified the general rejection of some Members to JSIs, it is important to note that even if they have not been able to block JSI negotiations, they can always block an outcome within the WTO system. In this sense, the second scenario presents *additional* political challenges.

The need for consensus to introduce JSIs as Annex 4 agreements is the major obstacle. Adding to the previous concerns about the general dislike of new topics covered by JSIs, if they are not extended on an MFN-basis, stronger challenges could arise.

It is well known that WTO Agreements, in the strict legal sense, allow for some decisions to be taken by simple and qualified majority voting if the consensus practice does not work. However, Katz (2009, 214) argues that formal or legal arrangements are not the only ones setting the playing field within IOs. In reality, there are informal or unwritten rules as important as the legal ones. For many authors, the WTO has been a prime example of this point by exemplifying how consensus steadily carved its way as WTO's unbreakable rule[12].

The latest G20 Trade and Investment Communiqué (2020, 12) perfectly summarises the opposed opinions on the status of consensus within the WTO system, as some Members consider it to be just a *practice*, while others consider it to be a *principle*. In spite of this, there is a general understanding that with time consensus decision-making, as per the

[12] Katz (2009, 232) mentions the existence of three informal patterns within the WTO; Reinalda (2005, 234) uses the WTO as an example of IO (International Organisation) where decision making takes place in the context of norms or rules that have not been explicated at all (informal notions); Posner and Sykes (2014, 10) state that even if the WTO possesses almost all types of voting-mechanisms, its history reveals a steady and rapid progression toward consensus.

interviews with general practitioners, has transformed in the "tyranny of one". It just suffices one Member to be against an initiative to effectively veto it.

In such an immediate context, introducing *any* JSI that is not be granted through an unconditional MFN basis within the WTO system is extremely difficult. There are close to none political tools that can be introduced in the *status quo*. The variable geometry approach for moving negotiations forward[13]is eclipsed by the tyranny-of-one situation that reigns consensus.

Given this, the interviews with academics and the literature review signalled towards one compromise that is starting to gain momentum, namely to flexibilise the overarching concept of consensus. This would allow making use of the beneficial aspects of the default decision-making mechanisms, i.e., voting, for identified practical situations. Low(2011, 2)presented the notions of *substantive and procedural decision-making*, highlighting that procedural aspects deal with a range of organisational matters, transparency, representation, conditions of access, among others. In contrast, substantive decisions involve the creation of new obligations and rights for WTO Members. In a recent discussion about the AB crisis, Hoekman and Mavroidis (2020) presented the possibility of process-related procedural changes being subject to vote if necessary; while strongly defending consensus decision-making for substantive decisions. Several mentions of this approach were advanced during the conducted interviews.

Given that PAs do not create obligations or rights for non-signatories,an amendment – such as the inclusion of a new agreement under Annex 4– would fall under the procedural category.Hence, the option of relaxing the notion of *consensus* for procedural decisions would allow JSIs to be inserted as Annex 4.

Here it is important to note that by relaxation, the research does not exclusively mean majority voting as a coercive manner to subject opposing Members. Rather, the authors highlight the difference between consensus and unanimity, as well as a provision to any opposing Member with a legitimate platform to voice their concerns regarding the initiatives[14]. It is feasible as well that, even with a possible flexibilisation of procedural consensus, extra incentives (carrots) would still need to be provided to opposing Members in order to offset concerns.

[13] Lloyd (2009) presents the variable geometry approach as an optional strategy that allows negotiations of one particular issue to lead to an agreement that is not binding to all the parties. For negotiations regarding the promotion of international economic integration, this strategy allows for the accommodation of different perspectives and speeds among a vast and diversified membership.

[14] Hoekman and Mavroidis (2020) provide further guidance on how procedural reform proposals should be prepared, highlighting the importance of being informed by consultations and facilitated by the WTO D-G.

6.2. Economic feasibility

JSIs are primarily seen as a negotiating tool, a method or a forum for Member countries to form rules and regulations in new domains. As seen previously, it has overall been a politically sensitive issue.

The way in which a JSI could economically impact its Members and non-Members can vary depending on the distinctive features of each country and the nature of the subject matter of each JSI. Like accession to any other agreement, the Member's decision to join a JSI is contingent upon its cost-benefit analysis. Whether or not a JSI achieves its efficient economic outcome is also influenced by its participants. Building on the logic of CMAs, if all key players are involved in the JSI, then the JSI has achieved critical mass to mitigate any risks of major players free-riding.

Generally, if a country has adequately invested in building expertise to participate in the WTO system, then the marginal bureaucratic cost of joining JSI negotiations and eventually the JSI itself, would be low. However, if a country has inadequate expertise with a small trade ministry that has low political influence domestically, then joining a JSI would be hard especially if it contradicts with other ministries. As with any other WTO negotiations, any country deciding upon joining a JSI also has to determine if the JSI would complement or cause friction with its existing commitments under any existing regional or bilateral agreements.

To conduct an econometric analysis to assess economic feasibility of JSIs for e-commerce is beyond the scope of this study. However, there can be some general inferences that can be drawn to partially evaluate the feasibility of any JSI.

6.2.1. If they are MFN-compliant

The countries who are already a part of the JSIs might decide to extend the provisions of the agreement on an unconditional MFN-basis. Providing an unconditional MFN to every Member of the WTO would not disincentivise the economic rationale of forming the JSI as long as all major players in the sector are on board (i.e., they achieve the critical mass). If all dominant players are a part of the JSI, then the risk of free-riding no longer remains a relevant concern. This thus highlights the importance of a key player like India not being in major JSIs like that of e-commerce. Moreover, extending the provisions on an MFN-basis would also reduce the associated costs in administering the JSI agreement.

On the other side, assuming that a JSI extends its rules and benefits (but not the obligations) on an MFN basis to the entire Membership and the country does not trade significantly in the sector under consideration, it might economically not be worthwhile for the country to join the JSI. In this case, by joining a JSI in a sector where the country currently does not trade much, it accepts to bind itself with rules and regulations in an unfamiliar domain with no significant economic benefits derived in the present.

6.2.2. If they are MFN- non compliant

To begin with, for countries that are part of the JSI might opt to subject provisions of the agreement on a conditional-MFN to mitigate the risk of free-riding especially when other key players are not onboard. They might choose to extend benefits and markets access based on conditions which ensure maximisation of their own economic and political interests.

On the other hand, if JSI Members chose not to extend the rules and benefits to other Members, it might not be of consequence to a country deciding to join the JSI which is not trading much in the sector as long as there is no fear of the JSI being multilateralised. However, if a country trades extensively in the sector, then it needs to evaluate the losses it will incur by not joining the JSI.

A study undertaken by the South African Institute of International Affairs in (2017) does exactly this, where it estimates the potential gains and opportunity costs of a group of LDCs and developing countries[15] of joining plurilateral agreements. It estimated that for TiSA whose negotiations have been paralysed, the countries would witness an increase by between 0.01 and 0.02 percentage points in their aggregate GDP and experience gains ranging from 0.0004 to 0.035 percentage points in overall investments. Their non-participation, on the other hand, would cost them an aggregate of USD 1.2 billion in terms of their welfare gain losses. In case of the GPA which is a closed agreement adopted within the WTO under Annex 4, the study estimated that the countries would witness an increase by between 0.21% and 1.75% in their aggregate GDP and experience gains ranging from 0.11% to 10.36% in overall investments. Their non-participation in the GPA, on the other hand, would cost them an aggregate of USD 54 billion in terms of their welfare gain losses. The results also suggest that the economic losses for non-signatories are much greater if the instruments are MFN-violating. The study, thus, provides a strong rationale to undertake a similar exercise by countries when deciding to join any particular JSI.

6.3. Legal feasibility

After discussing the political and economic feasibility aspects, this last section will review the legal feasibility by summarizing the discussion and providing concrete options to move forward with JSIs.

6.3.1. Consensus

As mentioned earlier, some possibilities to incorporate JSIs into the WTO system would require consensus by the Membership. This becomes a problem given the strong opposition toward JSIs by some countries. Therefore, in order to evaluate the legal feasibility of insertion of MFN compliant and non-compliant JSIs, it proves useful to first analyse the legalities surrounding the consensus obligations and possible ways to depart from it.

[15] The countries included were Chile, Bangladesh, Malawi, Lesotho, South Africa and India.

Articles IX and XII of the WTO Agreement provides for a firm consensus-based decision-making. However, the same articles also lay down the possibility of majority voting, should consensus fail. Although this majority voting option has been largely ignored by the Membership, it is still important to note that, at least theoretically, it does exist.

Nevertheless, not all options are subject to a default majority voting rule. Some exceptions, where consensus is non-optional, are of importance for the possible insertion of JSIs and have to be noted. First, Art. X of the WTO Agreement provides that any amendments to GATT Art. I referring to the MFN principle may be adopted *exclusively* by consensus, as well as any additional PAs to Annex 4[16]. As previously noted, inserting JSIs over Annex 4 of the WTO Agreement could be an option for the adoption of JSIs. However, in this case, the consensus mechanism would have to be respected.

In other words, theoretically speaking,in order to properly avoid the consensus rule, one option for the Members interested in JSIs would be to amend the GATT 1994 and GATS to include an Art. XXIV-like option for JSIs. As presented in the political feasibility section, another option would be to divide the existing consensus obligations among procedural and substantive consensus. While keeping a hard consensus rule for substantive matters, one could give some leeway to voting when it comes to procedural issues. In both scenarios, the WTO Agreement itself would have to be amended, which, as seen by Art. X:1 of the said Agreement, is possible through majority voting.

6.3.2. Insertion into the WTO (MFN compliant and non – compliant)

From a legal perspective, there are several possible options for the insertion of JSIs into the WTO. It is important to note that, from a purely *legal* point of view, there is not great difference between MFN breaching and compliant JSIs in terms of insertion, even if JSIs would be inserted over MFN-compliant amendments of schedules. This is because this does not *legally* change some aspects of the insertion mechanism per se. Put differently, the legal insertion mechanisms would stay vastly the same with procedural rules very similar to the consensus prevailing. Regardless, *factually* speaking, unilateral schedule modifications could not be challenged by other Members. The legalities are once again outperformed by reality. These points will be discussed in the following paragraphs.

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[16] Art X of the WTO Agreement reads:
"2. *Amendments to the provisions of this Article and to the provisions of the following Articles shall take effect only upon acceptance by all Members:*
Article IX of this Agreement;
Articles I and II of GATT 1994;
Article II:1 of GATS;
Article 4 of the Agreement on TRIPS."
"9. 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. The Ministerial Conference, upon the request of the Members parties to a Plurilateral Trade Agreement, may decide to delete that Agreement from Annex 4."

The first four options of JSIs insertion build on the means already available within the WTO, while the last three present innovative approaches. Following are the means **without modifying the current system**:

a) A JSI could be added to Annex 4 of the WTO Agreement as a PA

However, as noted earlier, such an *addendum* would need to be adopted by consensus, which it is extremely unlikely.

b) A JSI could be formed under GATT Art. XXIV or GATS Art. V (under the framework of an PTA/RTA)

This option, however, would have one major legal drawback. In order to form such a PTA/RTA the Members would have to meet certain legal conditions. Namely, the liberalization of "substantially all the trade" under GATT Art. XXIV and the "substantial sectoral coverage" under GATS Art. V. Even if most of the PTAs/RTAs currently in place that do not meet these criteria are not being challenged, it seems questionable whether "Members would engage in aggravating the abuse of those two provisions" by tailoring them to JSIs[17].

Importantly, representatives of developing countries and LDCs, as well as general practitioners dealing with development issues,voiced that this option is their preferred one. In other words, developing countries and LDCs would in fact favour that Members who would like to enter a JSI, would do so over the framework of an PTA/RTA. Representatives of developed countries in turn responded with the fear of fragmentation surrounding PTAs/RTAs, which was especially prevalent at the beginning of the century. Developed representatives also noted that this option would be less optimal for developing countries, as it would not extend benefits to them. As has been noted in several occasions, developing countries' worries are not based on MFN benefits as such, but rather about creating a baseline for JSIs within the WTO framework (which would diminish their own policy space).

c) JSIs'benefits could be added via an Annex to GATS Art. II

At least, with regard to JSIs covering trade in services, i.e., e-commerce, adding certain commitments to the Annex to Art. II GATS would be an option. Even if this option has never been used previously and needs consensus to be approved, theoretically such a possibility would exist. Moreover, as stated in the conditions of the Annex itself, such unilateral exceptions should be maintained for a maximum of 10 years, and shall, in any case, be subject to elimination under the next negotiation round.

d) JSIs' benefits could be included via Amendments of GATS' schedules of commitments

GATS schedules can be amended under GATS Art. XXI to include conditions of market access and national treatment. With regard to JSIs revolving around trade in services (i.e., e-commerce), this option could seem on the first hand like a feasible approach.

[17] Interview with academic, November 2020.

GATS Art. XXI, together with the 1999 Decision on Modifications of Schedules (S/L/80) provides that if a Member would like to modify its schedule, it shall enter into negotiations with affected Members which have notified so. Given the current negotiation deadlock faced by the WTO, it seems questionable how far such an approach would be fruitful.

However, academics and practitioners have stated that an introduction of 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 pursuant to the 2000 Decision on Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments (S/L/84). Even if other Members are allowed to "raise objections" to the amendment of the respective schedule, in practice WTO Members, notably the EU, change their schedules unilaterally irrespective of possible objections. Departing from the purely legalistic approach to the amendment or certification process, it thus seems unrealistic that an opposing Member would be able to stop the insertion of JSI commitments via schedules.

It is important to circle back to the developed-developing divide of the discussion surrounding JSIs. As per the interview with practitioners and academics, this amendment of GATS schedules seems to be a preferred way for developed countries. On the other side, developing countries and LDCs perceive this option as a "dishonest and unfair practice" and a way to "cheat the system". Indeed, they fear that by inserting JSI commitments over schedules, which form a part of the WTO agreements, developed Members will create a benchmark for JSIs within the WTO, depriving developing countries of policy space.

To sum up, given the prevalence of consensus and the contradictory preferences of developed and developing countries, the implementation of JSIs without changing the WTO framework is a controversial task. Building on the understanding that a WTO reform is overdue, the following subsection presents some innovative approaches for inserting of JSIs.

6.4. Innovative approaches

If Members would agree on **reforming some aspects of the existing framework**, a JSI could be incorporated in the following ways:

a) JSIs added via Annex 4, based on a loosening of the procedural consensus rule

This option builds on the previously presented idea of dividing the overarching consensus rule into procedural and substantive consensus, while relaxing the rigidity for procedural matters. In this scenario, a JSI introduced via an addendum to Annex 4 would be subject of a feasible majority voting.

b) A new GATT and GATS Article for sectoral agreements

If WTO Members would be willing to amend the obligations of the GATT and GATS (as discussed above, subject to majority voting), one could include an Art. XXIV look-alike for agreements with sectoral coverage (meaning JSIs). This would lay down the foundation for all other JSIs and at the same time provide future JSIs with a threshold of WTO law to which

they would be accountable. It would also prevent or minimize the misuse of GATT Art. XXIV and GATS Art. V for these purposes, while accommodating the idea of developing countries to "outsource" JSIs into constructs similar to that of PTAs/RTAs.

c) Reinterpretation of the MFN principle

As outlined in the analysis of the MFN principle, there might be some space for the AB to elaborate on the interpretation of the MFN principle based on *Canada – Autos* and *EC – Seals*, in a way that it does not forbid "all conditions" attached to MFN treatment. These case law showed that only conditions based on a "detrimental impact on competitive opportunities" shall be prohibited. However, as most conditions might inherently have an impact on competitive opportunities, it is unclear what the AB meant with this interpretation. This interpretation could be driven by the AB differentiating between "unconditionally" as per the legal text of GATT Art. I:1 and "not attaching any conditions"[18], thereby giving some freedom for conditioning some benefits within the JSIs.

Regardless, given the current deadlock in the WTO's Dispute Settlement Mechanism (i.e., the AB paralysis), such reinterpretation either by the AB or by the Membership seems unfeasible for the time being. Importantly, even if the AB reinterprets the MFN principle, this might be regarded as another example of judicial overreach and face strong resistance from some WTO Members.

7. Conclusion: Moving forward with JSIs

The WTO is undoubtedly one of the most successful examples of IOs in balancing national sovereignty and international commitments. Its success is reflected through the massive trade liberalisation outcomes, the wide-spread use of the Dispute Settlement Mechanism and the 164 Members who joined the organisation over the years. In order for the WTO to remain as relevant, it is imperative that it adapts with the changing times. Currently, the organisation faces three main challenges, i.e., related to its dispute settlement mechanism, the development dimension, and the negotiating deadlock. Those interconnected challenges have to be dealt with simultaneously involving a holistic approach.

In 2017, some WTO Members came up with the innovative notions of JSIs to try to solve the negotiating deadlock. The research shows that JSIs seem to be the most feasible way forward given the current geopolitical scenario. However, since the WTO is a Member-driven organisation, the decision ultimately lays on the will of its Members. Even with the change in the US Administration, there is limited hope for any quick and radical resolution of the current crisis.

[18] *Appellate Body Report, European Communities — Measures Prohibiting the Importation and Marketing of Seal Products, para.5.88*

In the current discussions, the research found that there is a general agreement of JSIs being open in membership and driven by developed like-minded Members with some developing countries participating as well. Regardless, other issues that include the MFN treatment and market access remain controversial. After revising the two case studies regarding e-commerce and investment facilitation, the balance between opportunities and challenges are specific to the topics covered by each JSI.

The feasibility analysis shows two general implementation challenges. First, whether JSIs would be MFN-compliant or not, taking into consideration that MFN breach will face greater resistance. Second, the clash of expectations between developed and developing countries concerning the future of JSIs. Developing countries and LDCs voiced their realistic fear of a possible multilateralisation of JSIs, which turns out to be the ultimate goal according to many developed countries.

Furthermore, the research identified two most feasible options to insert JSIs into the WTO system without altering it: (i) through PTAs/RTAs pursuant to GATT Art. XXIV andGATS Art. V – preferred by developing countries and LDCs; or (ii) through an amendment of the Members schedules, mostly in the area of trade in services through GATS Art. XXI – preferred by developed countries. The abovementioned preferences highlight the inherent dichotomy in approaches to dealing with sectoral issues between developed countries and the developing and least-developed countries. The goal of developed countries with JSIs is creating a baseline of rules and regulations. This tangentially opposes the expectations of developing countries and the LDCs. The developed countries' assumption of MFN compliance ensuring easier multilateralisation is exactly what the developing and least-developed countries fear.

In the authors' opinion, this study brings to the forefront the mismatch of expectations of the WTO members where the fears of developing countries are the goals of the developed countries. For continuing negotiations and cooperation within the WTO, it is ambiguous whether or not the Membership would like to compromise one group's interest for the other. Thus, political will is and remains the driving force behind any progress within the WTO.

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Appendix 1: Most-Favoured-Nation

MFN's origins date back to the eleventh century when the Roman Empire extended customs privileges to other towns (Wüstenberg 2017). Indeed, MFN clauses were historically included in treaties of friendship, commerce and navigation, with the main objective to regulate matters of commercial nature (International Law Commission 2015, 4). Regardless, it was not until the GATT 1947 that the MFN principle started to be presented as the cornerstone and central obligation of the MTS.

MFN treatment implies that if country A signs a treaty with country C, all benefits offered to C also have to be *unconditionally* extended to country B. Thus, the effect of a large network of similar and unconditional undertakings is that concessions – even if granted bilaterally – become effectively multilateralised (Wüstenberg 2017, 526). In this sense, since countries provide equalised treatment to all other countries, the MFN principle prevents discrimination among trading partners, and thereby minimise trade distortions[19]. Art. I of the GATT 1947 first introduced the notion in the realm of trade in goods. Moreover, with the creation of the WTO, the MFN treatment enshrined in the GATT was expanded both to trade in services via Art. II of the GATS, and intellectual property (IP) via Art. 4 of the TRIPS Agreement.

The extension of favoured or liberalising trade conditions to all partners makes the final goal of global liberalisation easier to achieve, turning MFN treatment into one of the most efficient instruments for economic globalisation. Additional motivations for following the MFN principle besides the economic ones also exist. For instance, according to the International Law Commission (2015, 8), given that MFN treatment is a means of providing non-discrimination among states, it can also be interpreted as a reflection of the sovereign equality principle that reigns political science.

However, criticisms of the MFN principle are also widely present. The most important counterargument to the MFN principle is that, although it was meant to be unconditional, all the WTO agreements contain exceptions to its application (International Law Commission 2015, 10). Some examples are the ones provided for free trade areas, customs unions, trade remedies, as well as S&DT. Another important counterargument is that unconditional MFN clauses result in inflexible situations where benefits have to be extended even to non-reciprocal countries, effectively incentivising free-riding (Wüstenberg 2017, 539). Hence, concerns over the real efficiency behind the MFN clause exist. It has often been suggested that the existence of the free-riders due to the MFN clause undermines the efficiency of trade liberalising negotiations, as countries are reluctant to offer unilateral concessions (McCalman 2002, 152).

[19] The case for minimized market distortions is based on MFN's capacity to foster trade *creation*, instead of trade *diversion.* Indeed, MFN treatment allows the comparative theory advantage theory to be implemented effectively, thus resulting in each country specializing in their most competitive sectors, instead of diverting trade to less efficient, but favoured, countries (Wüstenberg 2017, 539).

In addition, the International Law Commission (2015, 9) points out two interesting debates regarding the MFN principle. The first one is that the economic rationale and theories used in its support are based on the field of trade in goods, based on the Ricardian theory, hence not being necessarily pertinent once the treatment is extended to trade in services (including investment) and intellectual properties. On the other hand, the Commission also points out the fairness of non-discrimination in benefits when dealing with developing countries and LDCs. Even if there have been ways to control this within the WTO framework via S&DT, these countries are also expected to comply with the MFN principle.

All of these notions have an important position in the debate surrounding JSIs. As shown through the authors' research, one of the focal points of discussion within the different negotiating groups is whether benefits will be granted on an MFN-basis or not. Therefore, it is crucial to internalise the supporting arguments and the critiques on this principle, as well as possible interpretations and re-interpretations by the jurisprudence which might provide a way forward.

The interviews conducted showed that most academics, practitioners and diplomats agree on the MFN principle being a cornerstone and foundation of the MTS. However, almost all interviewees equally voiced concerns about the *unconditionality* of MFN and whether it makes sense to maintain this element under the growing and diverse Membership of the WTO as we see it today. Hence in the following analysis of case law and jurisprudence on the MFN principle, we shall concentrate on this aspect of conditionality.

Legal text, case law and jurisprudence

The starting point of MFN treatment is **Art. I:1 GATT,** which reads in the relevant part:

1. *With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.*

The AB in *EC – Seals* laid out the legal test of extending the MFN treatment which includes four points of analysis: (i) that the measure at issue falls within the scope of Art. I:1, (ii) that the imported products are "like" products within the meaning of Art. I:1; (iii) that the measure confers an "advantage, favour, privilege or immunity; and (iv) that the advantage so accorded is not extended "immediately and unconditionally". The AB further clarified:

> *5.86. Thus, if a Member grants any advantage to any product originating in the territory of any other country,* ***such advantage must be accorded "immediately and***

***unconditionally" to like products originating from all other Members**. (highlight added)*

As noted earlier, the discussion surrounding MFN in JSIs revolves around the "immediately and unconditionally" requirement. On the first look, it thus seems, that it is not possible to attach any conditions to the MFN treatment, which has been the prevalent view among Member States, the jurisprudence and academics alike. However, there are several excerpts of jurisprudence which might hint at a different direction.

First, the AB equally in *EC – Seals* noted that:

> "***it does not follow that Article I:1 prohibits a Member from attaching any conditions** to the granting of an "advantage within the meaning of Article I:1"*[20]*. (highlight added)*

The AB further noted:

> *5.93. In the light of the above, we consider that Article I:1 prohibits Members from conditioning the extension of an "advantage", within the meaning of Article I:1, on **criteria that have a detrimental impact on the competitive opportunities** for like imported products from any Member.*[21] *(highlight added)*

In light of those excerpts, it seems that there is at least some scope for Members to condition their MFN treatment, at least as long their condition is not based on criteria having a detrimental impact on competitive opportunities. What this means in practice, however, is unclear. Unfortunately, the AB did not continue its discussion in this direction.

Another interesting notion was made by the Panel in *Canada – Autos*, stating that:

> *10.24 An advantage can be granted subject to conditions without necessarily implying that it is not accorded "unconditionally" to the like product of other Members. More specifically, the fact that conditions attached to such an advantage are not related to the imported product itself does not necessarily imply that such conditions are discriminatory with respect to the origin of imported products. **We therefore do not believe that, as argued by Japan, the word "unconditionally" in Article I:1 must be interpreted to mean that making an advantage conditional on criteria not related to***

[20] *"This means, in our view, that any advantage granted by a Member to imported products must be made available "unconditionally", or without conditions, to like imported products from all Members. However, as Article I:1 is concerned, fundamentally, with protecting expectations of equal competitive opportunities for like imported products from all Members, it does not follow that Article I:1 prohibits a Member from attaching any conditions to the granting of an "advantage" within the meaning of Article I:1. Instead, it prohibits those conditions that have a detrimental impact on the competitive opportunities for like imported products from any Member.", Appellate Body EC – Seals, para.5.88*

[21] *A panel is not required, under Article I:1, to assess whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction. Such an assessment is a necessary analytical element of Article 2.1 of the TBT Agreement, but not of Article I:1 of the GATT 1994., Appellate Body, EC – Seals, para. 5.93*

the imported product itself is per se inconsistent with Article I:1, irrespective of whether and how such criteria relate to the origin of the imported products. *(highlight added)*

This view has not been appealed and hence not discussed by the AB, but it shows that there might be some flexibility as to attaching MFN to conditions without breaching Art. I:1GATT.

With regard to the MFN obligation in trade in services, a few special features of the GATS should be noted. As stated earlier, the MFN obligation is contained in **Art. II GATS,** which at the relevant part reads:

"With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country."

The notion of the detrimental impact on the conditions of competition was interpreted by the AB in *Argentina – Financial Services* in a similar way to the AB in *EC – Seals*[22]. However, the AB in the same case further noted that there are certain flexibilities with regard to the conditioning of MFN provided in the Agreement, especially with regard to Art. XX GATS.

Article XX GATS reads in the relevant part:

"Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:

(a) terms, limitations and conditions on market access;
(b) conditions and qualifications on national treatment;
(c) undertakings relating to additional commitments;
(d) where appropriate the time-frame for implementation of such commitments; and
(e) the date of entry into force of such commitments."

The Appellate Body stated:

6.112. More specifically, pursuant to Article XX of the GATS, a Member may undertake specific market access commitments and national treatment obligations

[22] *"6.119. Turning to the context provided by the non-discrimination provisions of the GATT 1994 and the Technical Barriers to Trade (TBT) Agreement, we note that our interpretation of Articles II:1 and XVII of the GATS chimes with the Appellate Body's interpretation of the most-favoured-nation and national treatment obligations in the context of the GATT 1994. As the Appellate Body found in EC – Seal Products, the most-favoured-nation obligation in Article I:1 of the GATT 1994 prohibits measures that "modif[y] the conditions of competition between like imported products to the detriment of the third-country imported products at issue". Furthermore, the Appellate Body found that it is well established in the jurisprudence that, if a measure "has a detrimental impact on the conditions of competition for like imported products, then such detrimental impact will amount to treatment that is 'less favourable' within the meaning of Article III:4" of the GATT 1994."*

only in service sectors or subsectors, and only with respect to the modes of supply that it wishes to liberalize and inscribe in its Schedule of GATS Commitments. In the sectors and modes of supply that a Member chooses to include in its GATS Schedule, such Member is permitted to subject national treatment obligations to conditions and qualifications, and market access commitments to terms, limitations, and conditions.

Hence, unlike the GATT, the GATS seems to provide, from the very beginning, the possibility to condition one's market access rules. This is of extreme importance when thinking of JSIs covering mostly trade in services, i.e., e – commerce.

Returning to MFN conditionality in the WTO

Reintroducing conditional MFN to the MTS would make the WTO move in different directions, some negative and some positive. According to Posner and Sykes (2013, 3), one of the main reasons IOs are created is to serve the interest of its Members, being considered necessary in the first place because of the high transaction and decision costs. By returning to conditional MFN, WTO Members would be re-introducing the costs they were trying to reduce when they opted for an unconditional MFN approach in 1947. Moreover, Tijmes-Lhl(2009, 427)argues that the WTO system is only fair when its rules are based on the approval of all Members (i.e., based on consensus). Some Members' goal of eventually multilateralising JSIs might ultimately hinder WTO's input legitimacy. Indeed, even if they are open in membership, negotiations are not being held in the multilateral arena.

The input legitimacy argument however should be read from a broader spectrum, one of legitimacy as a whole. The legitimacy crisis in the WTO concerns both input (participation aspects) and output (agreements reached) legitimacy. The interviews with general practitioners were clear in signalling that some JSIs based on conditional MFN might be what it takes for Members to move forward. This will be a much-needed relief to the output crisis that the negotiation pillar has been facing since its conception. A related positive outcome of enhancing output legitimacy is the relevance that the WTO would regain as the host of new rules for an ever-changing world. In fact, the interviews showed there is one shared fear among scholars and practitioners, that the concluded JSIs' rules will not disappear if they do not get inserted into the WTO system. They would just move outside the system and not be subject to WTO scrutiny. This in turn would hinder the development of the MTS in these areas to a greater extend. The most popular option is to present them as PTAs/RTAs, even if they are by no means compliant with Art. XXIV of GATT or Art. V of GATS, as will be discussed in the legal feasibility. For most, the counterfactual of not having JSIs in the WTO system, irrespective of their MFN position, is to face "WTO irrelevance".

Regardless, MFN treatment is what makes the discussion on consensus vital. It is the prevalent view that if JSIs were to breach MFN, meaning not extend their benefits to all Members, then the chances of such a JSI being adopted by consensus are slimmer than if they were to be MFN compliant. However, when engaging in the MFN discussion one should always keep in mind thatthe MTS is already subject to various breaches of MFN, most notably Art. XXIV GATT and Art. V GATS (for PTAs/RTAs), as well as S&DT. It is

therefore questionable, whether some Members' objections, mostly from developing countries and LDCs, to JSIs really stem from MFN considerations or from fears and criticisms of another sort. For instance, the fear of "being left out" of negotiations and capacity constraints discussed previously could add as an extra deterrent for Members to accept JSIs. If this is the case, those fears could be addressed legally using capacity-building instruments similar to those of the TFA.

Appendix 2: Decision-making in the WTO

In March 2000, then WTO Director-General Mike More said: "*the consensus principle which is at the heart of the WTO system and which is a fundamental democratic guarantee is not negotiable*"[23]. Given the nature of international trade, it is preferred that the number of Members that sign an agreement is as large as possible to ensure that the outcome of the agreement is legally and economically efficient. Thus, trade agreements are envisioned to be designed in ways that would ensure the highest participation possible (Ehlermann and Ehring 2005, 56). However, important leeway around the consensus mechanism does exist within the WTO framework, even if apparently ignored by Members.

Among the consensus-based outcomes reached in the WTO, there are: (i) the 2005 amendment to the TRIPS Agreement responding to the public health objective of affordable drug imports as generic medicaments, (ii) the 2013 Trade Facilitation Agreement; and (iii) the 2015 Ministerial Decision to eliminate agricultural export subsidies, which primarily affected developed countries.

Legal aspects

Articles IX and XII of the WTO Agreement, along with the document WT/L/93, reign the decision-making procedures under the WTO. Altogether they stress the importance of seeking decisions by consensus as the first-best option, while also allowing voting by default. In spite of this possibility, majority voting has fallen into disuse in the WTO, with the only relevant exception being the negative consensus rule in the Dispute Settlement Undertaking (DSU) (Tijmes-Lhl 2009, 422).

The second part of Articles Art IX and XII of the WTO Agreement reads in the relevant part:

> *"where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting." (Art. IX WTO Agreement).*

In general, throughout the whole WTO Agreement, whenever it lays down a consensus provision, in most cases it adds the possibility of majority voting, should consensus fail. This is especially important with regard to Art. X of the WTO Agreement, governing the amendment of agreements under Annex I, i.e., the GATT, which as the research suggests

[23] Speech available at: https://www.wto.org/english/news_e/spmm_e/spmm26_e.htm

could be one option of introducing the JSIs into the WTO system. Art. X WTO Agreement reads in the relevant part:

> "*Amendments to provisions of this Agreement, or of the Multilateral Trade Agreements in Annexes 1A and 1C, other than those listed in paragraphs 2 and 6, of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it."*

Nevertheless, some exceptions which are of importance for the possible insertion of JSIs have to be noted. First, Art. X provides that any amendments to GATT Art. I may be adopted *exclusively* by consensus, as well as any additional agreements to Annex 4, meaning the Plurilateral Agreements have to be done by consensus. As previously noted, inserting JSIs over Annex 4 of the WTO Agreement seems to be a popular option for the adoption of JSIs. However, in this case, the consensus mechanism would have to be respected.

Political aspects

Consensus in WTO-practice means the absence of dissent. Put differently, that no WTO Member present in a meeting makes a formal opposition/objection to an agreement/decision into consideration (Jones 2015, Ehlermann and Ehring 2005). WTO's decision-making by consensus is largely based on the notion of sovereign equality of states and has been obtained from the natural law theory, later adopted by positivists(Guan 2014, 88). It helps strike a balance between national sovereignty and international regulations. The insights gathered by interviews with WTO Missions confirmed this notion, as developed countries fear being outvoted whereas developing countries fear not being heard. Hence, consensus has been remarked as the "least-bad alternative".

Several authors pose consensus as the clear rule since GATT times (Jones 2015, Schott and Watal 2000), however with very different underlying dynamics and power relations. Particularly, in the early GATT era, the US and the European Union (EU) led *the Quad*[24] that drove the agenda and negotiations, and easily generated consensus for moving forward. As per our interviews with academic scholars, this context changed with the rising of other key players, such as China, India or Brazil.

In this context, developments since WTO establishment seem to highlight consensus' disadvantages instead. For instance, some argue that consensus has aided powerful states to utilise imperceptible weighting processes and to legitimise bargaining outcomes, despite it being based on sovereign equality (Steinberg 2002, 345). Low(2011, 5) even describes consensus as a "hidden system of weighted voting", as in reality larger economies and bigger markets have an easier way to influence voting outcomes.

[24] Negotiating group conformed by the US, EU, Canada and Japan.

Consensus' biggest disadvantage is perhaps that it is a long and tedious process, posing it as the most challenging decision-making alternative. Among the main determinants of the acute difficulty of building consensus, the first item strongly agreed upon by both the literature and interviews is the expansion of the WTO membership. When one introduces the geopolitical changes and consequent reallocation of bargaining powers, the transaction costs of consensus-decision making become extreme. As a consequence, consensus has become a focal point for critics when discussing the current ongoing crisis of the WTO, such as the negotiation deadlock, the appointments of Appellate Body (AB) Members and of a Director-General.

As presented lines above, Since WTO's creation, consensus has delivered some outcomes. However, MC3 in Seattle (1999) was the first time that the mechanism showed warning signs, where besides the several protests, many developing countries tried to actively engage in WTO negotiations for the first time and became frustrated with their exclusion from the decision-making process (Schott and Watal 2000). Moreover, the developments of Doha Round launched in the MC4 in 2001 have proved that the inherited institutional machinery does no longer seem to work (Jones 2015, 31).

On a final note, even if not necessarily recommendable for the WTO context, a review of other decision-making alternatives used other IOs proves helpful. This final paragraph delivers a brief presentation of other decision-making options according to Jenks (1965) and Posner and Sykes (2014):

- *Unanimity* is often confused with consensus. The functionality of both approaches inherently depends on the existence of a homogenous group. The best example of how a wider forum became paralysed by unanimity is the League of Nations (LoN).
- *Veto*, whose working is best seen in the UN Security Council (UNSC)
- *Weighted voting* is a mechanism where voting rights are determined by contribution. The best examples are the International Monetary Fund (IMF) and the World Bank (WB). This approach presents two main difficulties: (i) it represents a departure from the one-state-one-vote approach; and (ii) it is extremely difficult to formulate one objective criterion that will be acceptable for every Member.
- *Majority voting*, as the mechanism which under most IOs currently work, including the UN General Assembly (UNGA) and the International Labour Organization (ILO). Two main variations: (i) simple majority refers to one-half (50%) of votes; whilst (ii) special majorities solicited for certain decisions of utmost importance –Membership, finance and amendments –as conditions range from two-thirds, three-fourths, to four-fifths of votes.
- *Quadratic voting,* as the innovation approach presented by Posner and Sykes (2014, 20) and Posner and Weyl (2013)25 after concluding that the problem with most options is the lack of guarantee for efficient outcomes.

[25] According to the authors, this is a system that provides every state with the right to buy as many votes as they want for or against a certain proposal, paying a price equal to the square of the number of votes they buy. In this sense, the system is designed to force voters to internalize the cost of their voting on third parties and it enables voters with strong preferences to vote more than voters with weak preferences (Posner and Sykes, 2014, 21).

Appendix 3: The precedents of the Tokyo Codes and the single undertaking approach

The Tokyo Round (1973-1979) is widely seen as the conception of plurilateralism in the trade regime. The sixteen reached agreements were not accepted by the entire GATT Membership;hence these were labelled "codes"[26]. However,even if these codes were originally plurilateral, most of them were amended via the single undertaking approach introduced in the Uruguay Round (1986-1994) with the objective to be accepted by the whole Membership under the new WTO framework[27].

The single undertaking approach allowed the cumulative and simultaneous application of all WTO rights and obligations to all WTO Members, as well as the prevention of free-riding from developing countries that would have to abide by the same general set of agreements that developed countries so far had. Regardless, the approach faces a series of challenges, the most important being the limitation of multi-speed advances and the risk of "hostage situations". Moreover, many consider that the geopolitical scenario prevents the approach from being successful, characterising the objective of a single rulebook nowadays as a mirage due to the fragmentation introduced by the hundreds of PTAs/RTAs.

Draper and Dube (2013, 1)argue that the previous multilateralisation of the Tokyo Codes feeds the current fear of embarking plurilateral agreements since WTO Members – especially developing countries and LDCs – are not willing to take the risk of them being eventually imposed on the whole Membership, especially if they did not participate in the negotiating process. Indeed, the interviews with representatives from developing and LDCs missions highlight this as a fear. Moreover, Maier (1980) argues that, during the existence of the Tokyo Codes, there was a pressure on developing countries to participate in the negotiations, since the possible future benefits would stem from it.

The Tokyo Round and resulting codes set an important precedent for JSIs. They show that plurilateralism has historically been an alternative approach used to overcome negotiation deadlocks, also crystallizing concerns regarding whose participation and engagement will be considered in what could possibly later be multilateral agreements. JSIs are being negotiated among a group of like-minded Members with a special interest in a topic, hence departing from the single undertaking approach. As it is the case for every negotiation, even if they are open, latecomers would have no possibility of retroactively adding anything to the negotiating process. They too would be faced with a *fait accompli* for the already existing rules.

In this scenario, consensus plays a vital role in the *multilateralisation* of agreements. Tijmes-Lhl(2009, 421)suggests the *acceptance* of the previously negotiated rules is enough to ensure the participation of every Member in the treaty creation process. Although first negotiated

[26] The sixteen original Codes can be found in:https://www.wto.org/english/docs_e/legal_e/prewto_legal_e.htm

[27] Only four Tokyo Codes remained as plurilateral trade agreements (PAs) under the WTO framework (see section 4.2.2.).

and adopted separately, the codes and the whole treaty were subject to the consensus rule during the Uruguay Round in order to become part of the WTO multilateral treaties. Hence, a possible multilateralisation of JSI should follow the same route (as it will be further discussed in the feasibility section).

Appendix 4: Review of current plurilateral arrangements under the WTO

Preferential Trade Agreements (PTAs/RTAs)

Articles XXIV of the GATT 1994 and V of the GATS make reference to situations where a group of WTO Members engages in further trade liberalisation among themselves, resulting in either free-trade areas or economic integration. The extensive literature and practice refer to these instruments as PTAs/RTAs, as they are without a doubt the most common instrument used by WTO Members to enhance trade liberalisation[28].

WTO law does not forbid PTAs/RTAs, rather it controls for the discriminating ones. Importantly, their coverage has evolved throughout the last decades from pure market access issues to include a wide range of regulatory policies, i.e., competition, labour and environmental policies (Hoekman and Mavroidis 2015, 325). Indeed, PTAs/RTAs have increasingly become an important tool for the WTO Members to address the differences among their domestic regulation schemes(Hoekman and Sabel 2019, 1). However, as per Art XXIV GATT and Art V GATS, both the GATT and GATS condition PTAs/RTAs to a "substantial" liberalisation. It implies that PTAs/RTAsshould not be narrow in coverage. This "substantial coverage" condition is aimed at limiting WTO Members from handpicking liberalisation commitments, and it represents the main reason why JSIs would not pass the legal test for PTAs/RTAs within WTO law. However, the Committee on Regional Trade Agreements (CRTA), where PTAs/RTAs' treatment and analysis takes place, is largely considered ineffective due to transparency mechanism and no recent use of the Dispute Settlement Mechanism (DSM) in holding PTAs/RTAs accountable to the test of "substantial" liberalism.

Importantly, there are no WTO rules in terms of PTAs/RTAs accession, leaving them solely as closed clubs(Hoekman and Mavroidis 2015, 327). Several are indeed established with geopolitical and economic ambitions, with a clear objective of preferring certain trade partners at expense of other ones. Hence, as the "substantial coverage" conditions are hardly met, there is a clear prejudice against the MFN principle.

Plurilateral Trade Agreements under Annex 4 (PAs)

Annex 4 of the Marrakech Agreement allows for the negotiation of agreements among a subset of WTO Membership, outlining the procedure to add them to the WTO treaties. Put differently, the WTO provides the framework for implementation and administration, including the WTO's DSM.

[28] For simplification and operationalisation purposes, regional arrangements (RTAs) under the Enabling Clause adopted in 1979 will also be considered PTAs.

After the Uruguay Round, only four PAs were established: (i) the Government Procurement Agreement; (ii) the Agreement on Civil Aircraft; (iii) the International Dairy Agreement; and (iv)the International Bovine Meat Agreement. Currently, only the first two are still under operation. As easily noted, they usually aim to discipline domestic regulatory instruments in certain sectors. Importantly, PAs only create rights and obligations for signatory Members and they can be applied on a discriminatory basis.

PAs can be sectoral or issue-specific; even building on topics already covered by the WTO as well as topics outside the current WTO spectrum. In fact, there is nothing in the WTO Agreements that conditions the topics covered by PAs, providing them with a greater sense of flexibility (Hoekman and Mavroidis 2015, 326). As a result of this, Hoekman and Mavroidis (2015, 333) divide their impacts on the MFN principle into two scenarios. First, if a PA addresses an area not currently covered by WTO law, the erosion of the MFN principle is not a problem. Indeed, when PAs do not address matters covered by the WTO – in other words, they include WTO+ provisions – they are not even subject to the MFN principle to begin with (Pauwelyn and Alschner 2014, 5). However, there will be a precedent-setting effect, kick-starting a process of rule definition. Second, if a PA addresses an area currently covered by WTO law – for instance, by providing better and more benefits to signatories – there will definitely be some erosion of the MFN principle. The degree depends on how better the benefit standards are.

Thus, PAs are an interesting instrument for WTO Members to engage in further liberalisation within the WTO framework. However, the major challenge lays in their adoption. The WTO Ministerial Conference exclusively decides by consensus to add or delete a PA to/from Annex 4. As discussed in the feasibility section, should consensus fail, there is no recourse to default voting with this instrument. Factually, this means that any WTO Member can reject the final text of a PA to be added to the WTO treaties. PAs are then limited by the politics behind the consensus decision-making mechanism. Hence, circumventing the consensus mechanism underlying PAs is the main reason why some WTO Members decided to launch JSIs instead.

Critical-Mass Agreements (CMAs)

A CMA is a novel approach that cannot be tracked down through WTO law, but that inherently works within the system (unlike PTAs/RTAs), as this was accorded by Members. CMAs consist of commitments that, even if negotiated among a subset of WTO Members, extend their benefits and rights to the entire WTO Membership (Hoekman and Mavroidis 2015, 321). The most famous example is the Information Technology Agreement (ITA) signed in 1996 and expanded in 2015. Low(2011) presented them as a viable option for moving past the negotiations deadlock.

Critical mass is said to exist when a *sufficient* number of WTO Members agree on rules and actions. The market plays a stellar role in defining critical mass, given that the approach builds on the fact that Members left outside the agreement are considered too small to undermine the CMA (Low 2011, 9). Thus, even if they are factually considered free-riders, from an economic perspective, their non-participation does not affect the outcomes. This is

the main reason why this approach is optimal for reducing free-riding to a minimum acceptable level (Hoekman and Mavroidis 2015, 321), and why they can be applied through an MFN-compliant basis unlike PAs covered in Annex 4.

CMAs are not a legal or technical notion within the WTO framework. They cannot be the basis of WTO dispute complaints, as such. In the case of ITA, however, once the commitments were transferred into the schedule of concessions of each signatory, the commitments become part of GATT 1994, and thus binding. Unless a formal insertion like the previous one takes place, since these types of agreements cannot be pointed down to any specific WTO provision, there are several procedural aspects that are left undefined.