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# Consensus Decision-Making and Legislative Inertia at the WTO: Can International Law Help?

Americo B. ZAMPETTI<sup>\*</sup>, Patrick LOW<sup>\*\*</sup> & Petros C. MAVROIDIS<sup>\*\*\*</sup>

*The recent emergence of Joint Statement Initiatives (JSIs) – that is, negotiating initiatives among a subset of the World Trade Organization (WTO) membership – has reignited the debate over law-making in the WTO. As things stand, the WTO operates on the basis of a widespread expectation that consensus needs to be achieved for any decision to be taken. Agreements that produce rights and obligations only among a subset of the membership ('plurilaterals', or Annex 4 agreements) are also subject to the consensus rule and thus remain exceptional. Are JSIs the first move towards redressing the current equilibrium in favour of agreements among a subset of WTO members and, if so, can they be integrated within the current regime absent amendments? Even though consensus decision-making does not necessarily lead to failed negotiations, it is undoubtedly a significant contributory factor when parties hold diverse and unaligned priorities. Contracts signed in the WTO involve increasingly heterogeneous players with diverse priorities. In this article, we argue that the first-best approach to moving away from the current legislative stasis at the multilateral level is to acknowledge that it is high time to consider how to allow an additional degree of 'variable geometry' within the multilateral trading system. A textual legal basis for this approach, however, is missing within the WTO legal order. An acceptable alternative would be to acknowledge that the WTO adjudicators (WTO panelists and Appellate Body members), and not the members, will be the ultimate gatekeepers deciding whether agreements among a subset of members can coexist as part of the current multilateral trade framework understood within the context of international law. A necessary precondition for this alternative approach to flourish will, of course, be the resolution of the current judiciary crisis of the WTO. In either scenario, what will matter at the end of the day is that inter se agreements (that is, agreements among a subset of the WTO membership) will not affect the enjoyment of acquired rights by non-participants nor frustrate the objectives of the multilateral trading system.*

**Keywords:** Inter se agreements, Vienna Convention, JSI (joint statement initiative), Plurilaterals

## 1 INTRODUCTION

International economic governance is under stress. The WTO system, a crucial plank of global economic governance, has produced only one new, genuinely

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multilateral agreement in over twenty years – the Agreement on Trade Facilitation (ATF). The WTO also managed to revamp the Information Technology Agreement (ITA), agree to the elimination of agricultural export subsidies, and conclude a few agreements on services, including most recently the negotiation on services domestic regulation. The institution's legislative function is crippled mainly because of one key constitutional defect, namely the pervasive expectation, and in many cases legal requirement, that consensus should be attained on all matters up for decision. On this basis, it is apparent that at the present time, and in the foreseeable future, the WTO has limited capacity to achieve rule-making outcomes in many crucial areas.

Similarly, the traditional rule-making alternative of regional/preferential trade agreements (PTAs) permitted under the WTO, even when they provide answers (to many of the cooperation needs of fast-evolving economic and technological realities), they do so in clinical isolation from the world trading system. Once the decision to go preferential has been taken, both the legislative and the judicial function of the contractual arrangements migrate away from the multilateral edifice.

There is undeniably a demand for international cooperation. Recent work by the World Bank<sup>1</sup> has documented the proliferation over the years of PTAs that increasingly reach behind national frontiers. International cooperation needs span areas as varied as digital regulation, health-related measures (to tackle the Covid-19 pandemic and beyond), supply chain resilience, negative competitive spillovers of subsidies, sustainable development, climate change, competition and tax policy cooperation (especially in digital/services markets), the protection of critical technologies, export controls, and many other issues. In these and doubtless other fields, consensus-based multilaterally agreed solutions, while often preferable from a normative perspective, are virtually unattainable. They would also likely to be less efficient. Reaching agreement among the entire WTO membership on such issues would be unduly time consuming, and consensus – if achievable at all – would likely result in lowest common denominator outcomes.

Moreover, the selection of the cooperation modality should at least in part be dictated by the nature of the specific objectives sought and the urgency of cooperative action. For instance, if the objective is to curtail trade in counterfeit drugs, or foster trade in vaccines and active ingredients, or personal protective equipment during an ongoing epidemic, a grand multilateral approach would not be suitable. A more effective approach would probably entail an administrative/executive agreement among public agencies of the relevant countries to enhance the exchange of investigatory information and mutual assistance in customs

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<sup>1</sup> Espitia et al. (2020); *Handbook of Deep Trade Agreements* (Mattoo, Aaditya, Nadia Rocha & Michele Ruta eds, The World Bank Group: Washington, D.C 2020).

enforcement. Moreover, in some areas a limited number of countries might reflect the totality of those concerned by an issue.

The arguments we want to advance, are as follows:

- Inter se agreements are both desirable and feasible in terms of promoting a trade agenda within, and not necessarily outside, the multilateral forum;
- WTO members are the *prima facie* gatekeepers, but as things stand, there is no guarantee that they will refrain from using this privilege to advance their own interests, or block those of others;
- WTO adjudicators are also competent, depending on the law-making technique used, to decide on the consistency with the WTO of inter se agreements. In contrast to the membership, the adjudicators' mandate is limited to asking only whether inter se agreements are consistent with the WTO in terms of how they affect the rights and obligations of non-participants.
- Since the WTO does not include an elaborate test for reviewing the consistency of the covered agreements, we suggest one consistent with international law.

The paper is organized as follows. Section 2 is a brief account of the current regime. It examines legal constraints on the negotiation and conclusion of agreements in areas covered by the Agreement Establishing the World Trade Organization (WTO Agreement), and the multilateral and plurilateral trade agreements contained in Annexes 1, 2 and 4 of the WTO Agreement (collectively, the WTO agreements).<sup>2</sup> In section 3, we explain how, in our view, the current regime should be understood and revamped in order to better serve the multilateral trading system. The paper concludes in section 4, with some observations on the possible beneficial effects of inter se agreements for the revitalization of the multilateral trading system, as well as for more effective international economic governance.

## 2 THE CURRENT WTO LEGAL REGIME

There is law, and there is practice. It is commonplace to state that all feasible contracts are incomplete, and the WTO is no exception. Legislative foresight has proved wanting time and again. The original GATT (General Agreement on Tariffs and Trade) contract (the predecessor of the WTO) was defective in its institutional dimension, since the GATT was supposed to be part of the ITO

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<sup>2</sup> As defined in Arts II.2 and II.3 of the WTO Agreement.

(International Trade Organization), where institutional questions had been addressed (Jackson, 1969). There was no provision regarding inter se agreements in general neither in the GATT nor in the stillborn Havana Charter establishing the ITO.<sup>3</sup> In law, GATT Article XXIV dealing among other things with the establishment of free trade areas and customs unions, allows a subset of the parties to derogate from the most-favoured-nation (MFN) rule, but only within the confines of specific procedural and substantive requirements. In practice, as early on as the Kennedy Round (1964-67), agreements were concluded among a subset of the membership, even though the GATT statute did not make room for such arrangements (Evans, 1971). During the Tokyo round, as per Winham's (1986) classic account, the number of similar agreements increased.

Practice thus filled gaps in the institutional design when warranted. During the Uruguay Round, explicit provision for amendments to multilateral rules were made, which included the addition of new multilateral agreements, as well as inter se agreements. But yet again, practice digressed from statutory language, as we explain next.

## 2.1 ADDING MULTILATERAL AGREEMENTS

Multilateral agreements can always be added to the WTO rulebook as per Article III.2 of the WTO Agreement. The procedure to introduce new agreements within the WTO order is essentially that of an amendment.<sup>4</sup> Decision-making is discussed in detail in Article IX of the WTO Agreement, but *in practice* all decisions are taken by consensus. Consensus is not necessarily unanimity. As long as none of the members present objects to a decision, consensus is deemed to have been reached.

## 2.2 INTRODUCING INTER SE AGREEMENTS

The WTO Agreement allows for inter se agreements (called 'plurilateral' or 'Annex 4' agreements in the WTO vernacular). We understand the term 'inter se' to cover agreements binding only the Members that have concluded them but that, under certain conditions which we will describe later, can remain part of the WTO edifice. The term 'inter se' should be disaggregated further in the realm of the WTO legal order. We will discuss all this later, and explain where WTO agreements fit in this matrix. One thing is clear, however. By virtue of the

<sup>3</sup> By this we mean that there was no formal acknowledgement akin to Annex 4 of the WTO Agreement. In practice, the way that tariff negotiations took place before any formula-based approach had been adopted, was in essence an inter se approach to commitments – through request-offer deals with careful attention to reciprocity, but with MFN outcomes. MFN has always worked when the 'big players', the 'principal suppliers' in GATT's vernacular, have been satisfied reciprocally.

<sup>4</sup> At least an amendment to the list of covered agreements.

principle *pacta tertiis nec nocent nec prosunt* (a treaty binds the parties and only the parties; it does not create rights or obligations for a third state), non-parties to an inter se agreement can profit (and sometimes in the WTO legal order, must profit), but are not bound by the obligations that other parties have assumed. Only parties must observe the obligations. Box 1 contains a summary of the typology of WTO agreements in terms of the rights and obligations they confer. These different typologies, and their systemic implications for the WTO, are further discussed in the rest of the paper.

*Box 1 A Taxonomy of Rights and Obligations Under WTO Agreements*

<i>Rights and Obligations</i>	<i>Fully Multilateral Agreements</i>	<i>Preferential Trade Agreements (PTAs)</i>	<i>Plurilateral Agreements</i>	<i>Critical Mass Agreements</i>
<b>Option to negotiate an agreement is open to all</b>	Yes	No	No	Yes
<b>Rights</b>				
All Members	X			X
Inter se agreement parties		X*	X	
<b>Obligations</b>				
All Members	X			
Inter se agreement parties		X*	X	X

Fully multilateral agreements embrace the entire membership in terms of both rights and obligations.

\*Reduction or elimination of tariffs and other protective instruments are reserved for PTA parties (under Article XXIV GATT 1994 and Article V GATS), but rights and obligations in other areas (i.e., behind-the-border policies) are to be extended to all WTO Members. Plurilateral agreements that engage only some members in terms of rights and obligations are Annex 4 Agreements under the WTO, and are adopted by the Membership by a consensus decision. The Agreement on Government Procurement is an Annex 4 agreement. Annex 4 agreements are not necessarily open for all to join.

Critical mass agreements enter into force for their signatories when the latter consider that a sufficiently substantial portion of the WTO membership has signed on. Under critical mass agreements only some members assume obligations and all members enjoy rights. In contrast to Annex 4 agreements, all members have the option to join in their negotiation. The Information Technology Agreement is an example of a critical mass agreement.

Inter se agreements are not a WTO invention.<sup>5</sup> They already existed in the Kennedy Round, and proliferated in the Tokyo Round (Evans, 1971; Winham, 1986). A close look at the Kennedy and Tokyo Round experiences suggests that 'variable geometry' or inter se agreements among a subset of the membership were not comprehensively discussed and designed. The Trade Negotiations Committee (TNC) decision that launched the Kennedy round did not contain any provision pertaining to (inter se) 'codes' like those that were signed during the round.<sup>6</sup> A few years later, history repeated itself: the Ministerial Declaration launching the Tokyo Round not only omitted to mention inter se agreements, but explicitly pointed in the opposite direction. Paragraph 8 of the Declaration reads:

The negotiations shall be one undertaking, the various elements of which shall move forward together.

A Preparatory Committee established in the early 1970s to put together the basis for negotiations prepared a series of background documents that eventually became the Tokyo Round agreements.<sup>7</sup> They were open for signature, but not all participants agreed to sign them. It is unclear whether the Tokyo Round variable geometry was an (unintended) consequence of the prior rejection of a proposal by developing countries to adopt agreements by a 2/3 majority.<sup>8</sup> Whatever the rationale or impetus, these agreements were signed by the willing. But of course, the Tokyo Round was not all about Codes. Not at all. Tariff reductions were agreed on an MFN basis, and some agreements, like the 1979 Understanding on Dispute Settlement, as well as the Enabling Clause,<sup>9</sup> bound everyone involved. Alas, the relationship between the inter se agreements, and agreements, like the GATT, that had MFN application, was neither discussed nor resolved. Jackson (1980) expressed his dissatisfaction with this lack of clarity.

<sup>5</sup> The permissibility of inter se agreements was already well established in international law. An early example of an explicit provision authorizing inter se agreements can be found in the 1883 Paris Convention for the Protection of Industrial Property, Art. 19 [Special Agreements] which states: 'It is understood that the countries of the Union reserve the right to make separately between themselves special agreements for the protection of industrial property, in so far as these agreements do not contravene the provisions of this Convention'.

<sup>6</sup> GATT Doc. TN.64/26 of 6 May 1964.

<sup>7</sup> Following on from the Kennedy round precedent, the so-called 'codes' of the Tokyo Round mostly, but not entirely built on existing GATT provisions. They included anti-dumping, customs valuation, import licensing, subsidies and countervailing measures, and technical barriers to trade. These agreements applied on an MFN basis and only created obligations for those that signed them but did not affect the rights of those that did not. In contrast, the Agreement on Government Procurement is an Annex 4 Agreement, and discriminatory in the sense of restricting rights under the Agreement only to signatories.

<sup>8</sup> Don M. McRae & J. C. Thomas, *The GATT and Multilateral Treaty Making: The Tokyo Round*, 77 Am. J. Int'l L. 51–83 (1983) discuss this issue to some detail.

<sup>9</sup> The formal title of the Enabling Clause is the 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries'.

Things improved, but only marginally with the advent of the Uruguay Round. As Wolfe (2009) explains, the move to the single undertaking was a conscious decision, but some room was left for *inter se* agreements as well. The single undertaking was written in black and white, but with a proviso that results could be implemented provisionally or definitively pending conclusion of the Round, but only by agreement, that is, by consensus<sup>10</sup>:

The launching, the conduct and the implementation of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis by agreement prior to the formal conclusion of the negotiations.

It is, however clear, that by virtue of Annex 4, *inter se* agreements have become part of the WTO legal order, without the substantive conditions attached to regional trade agreements,<sup>11</sup> but under a strict consensus requirement. The difference between Annex 4 agreements and other WTO agreements is that the former only bind their signatories and extend neither rights nor obligations to non-signatories.<sup>12</sup> It is thus implicitly accepted that non-participants in plurilateral agreements will continue to enjoy their rights under the WTO agreements, unhindered by the conclusion of plurilateral agreements.

Importantly, the WTO does not discuss in any significant detail the process for concluding multilateral agreements. Article III.2 of the WTO Agreement reads:

The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.

There is even less direction regarding the negotiation of plurilateral agreements. All Article X.9 of the WTO Agreement has to say is that the membership can by consensus add or delete agreements. There is practically nothing stopping members from negotiating *inter se*, as they deem fit. There is no quorum needed, no process for negotiation specified, nothing except the crucial consensus requirement to allow such agreement within the WTO legal order. Hoekman and Mavroidis (2015) have already noted the lack of detail on this score, adding that the consensus requirement probably suffices to deter *inter se* agreements unless there is certainty that their outcome is acceptable to all members.

<sup>10</sup> Ministerial Declaration on the Uruguay Round, GATT Doc. MIN.DEC (20 Sept. 1986) at B(ii).

<sup>11</sup> As now provided for under Art. XXIV of GATT 1994 and Art. V GATS.

<sup>12</sup> The absence of *de jure* rights to the benefits of Annex 4 agreements would not necessarily preclude the enjoyment of *de facto* benefits.



To wrap up our discussion here, while the single undertaking has important implications for outcomes across the various subject matters under negotiation, it refers more to process than to principle. Consensus, on the other hand, has become the principle. Of course, now with the JSIs in the offing, the consensus requirement might lose some of its dominance if these new rule-making modalities were to be accepted.

### 2.3 CHANGING THE ORIGINAL AGREEMENTS

The membership can adjust the meaning and content of existing provisions by adopting an authentic interpretation of the original agreement, following the procedure embedded in Article IX.2 of the WTO Agreement. Authentic interpretations concern specific provisions, and can be adopted by a three-fourths majority of the membership. In practice though, the rule is again consensus, and the membership adopted a decision reaffirming adherence to this decision mode.<sup>13</sup> So far, no authentic interpretation has been adopted.

WTO agreements can be further amended. A strict consensus requirement applies for amending the agreement contained in Annex 2, namely the DSU, and to the list of agreements contained in Annex 4. According to Article X of the WTO Agreement, an amendment takes legal effect only after two-thirds of the Members (currently 164 Members), and in some instances all Members, have deposited formal instruments of acceptance with the Director-General. On 6 December 2005, the WTO adopted the only amendment so far regarding a provision of the TRIPs (Trade-related Intellectual Property Rights) Agreement.<sup>14</sup> Plurilateral agreements under Annex 4 have their own procedures for amendments.

Under international law, while amendments alter the content of the original agreement for all parties, a modification has the same effect, but only for the parties that have accepted it.<sup>15</sup> The WTO Agreement allows for amendments but is silent on modifications. WTO members can in general unilaterally alter the content of their contractual promise if they improve on their offer, and of course, if they observe the WTO legal framework. A GATT Decision which continues to have legal relevance in the WTO era addresses this issue head-on.

Assume Home wants to introduce a change in its schedule of concessions. Respecting the '1980 Decision',<sup>16</sup> it will have to send its text to the WTO

<sup>13</sup> WTO Doc. WT/L/93 of 24 Nov. 1995.

<sup>14</sup> WTO Docs. WT/L/641 and WT/GC/M/100.

<sup>15</sup> For a comprehensive discussion of the issue in public international law, see Malgosia Fitzmaurice & Panos Merkouris, *Treaties in Motion: The Evolution of Treaties from Formation to Termination* (Cambridge University Press: Cambridge, United Kingdom 2020).

<sup>16</sup> Procedures for Modification and Rectification of Schedules and Tariff Concessions, GATT Doc. L/4962, 26 Mar. 1980.

Secretariat.<sup>17</sup> Why submit to the Secretariat, one might ask? The Secretariat is the repository of all schedules of commitments, and is, as per the 1980 Decision, entrusted with the task of certifying the submitted schedule. Certification of schedules ensures that what has been committed is truthfully and completely reflected in the submitted schedules, but does not *per se* confer legality, as the Appellate Body found in its report on EC-Bananas III.<sup>18</sup> The Secretariat has the power to certify if and what the membership agrees to, but the Secretariat has no power to interpret the WTO covered agreements. This power has been exclusively entrusted to the dispute adjudication process as per Article 23.2 of the DSU.

The 1980 Decision distinguishes between ‘rectifications’ and ‘modifications’. The former are innocuous changes, whereas the latter alter the content of a commitment.<sup>19</sup> The content of modifications is circumscribed in the 1980 Decision, and should not extend beyond the subject matter of GATT Articles II, XVIII, XXIV, XXVII, XXVIII. In practice, nevertheless, the coverage has been expanded, as modifications in the realm of export subsidies have been submitted.

Irrespective of whether a rectification or a modification has been submitted, the Secretariat will circulate the received document to the membership. We can then distinguish between two scenarios:

- No WTO Member objects within three months following circulation by the Secretariat, and in this case the schedule will be certified;
- One or more Members object and in this case the schedule will not be certified. If this occurs the modifying Member can resort to dispute settlement to seek legal vindication of its modification.<sup>20</sup>

<sup>17</sup> The corresponding procedure in GATS (General Agreement on Trade in Services) to alter the content of services schedules is Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments, S/L/84, 18 Apr. 2000, discussed comprehensively in Petros C. Mavroidis, *The Regulation of International Trade, vol. 3, Trade in Services: The General Agreement on Trade in Services (GATS)* (MIT Press, Cambridge: Massachusetts 2020).

<sup>18</sup> The EU, in this case had to defend the consistency of its bananas import regime with the relevant WTO rules. It argued, among other things, that its regime was consistent with Art. II.1(b) of GATT, since the WTO had been notified, and the certification process had been observed, without any WTO member raising an issue as to its legality. The Appellate Body, recalling the earlier ‘Headnote’ jurisprudence, held that a WTO member can grant other WTO members rights but cannot diminish its own obligations through conditions added to its schedule (§§ 157–158). By omitting to entertain head-on the EU argument, the Appellate Body sided with the view that certification does not confer legality.

<sup>19</sup> Hunter Nottage & Tom Sebastian, *Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods of Changing WTO Law*, 9 J. Int’l Econ. L. 989–1016 (2006) discuss the process.

<sup>20</sup> GATT Doc. L/4962, of 28 Mar. 1980, at §3.

Recall, nevertheless, that both certified and non-certified schedules can, as noted above, be challenged. This is essentially a consensus procedure – since consensus is not tantamount to unanimity, but it holds in the absence of objection<sup>21</sup> – with judicial recourse as a safety valve to establish the legality of the modification.

Usually, modifications and/or rectifications originate in one individual member. Hoekman and Mavroidis (2017) have argued that nothing stops various WTO members from coordinating, say, a modification. Under this scenario, say Home and Foreign submit a modification with identical content. This has not happened so far in the realm of goods trade, but it could happen one day, and this day could be sooner rather than later. It has already happened in the GATS context, as some WTO members accepted the Telecoms Reference Paper with few if any changes to the template, and introduced it in their schedules. A similar approach is followed in the recently concluded negotiation on services domestic regulation. Will this technique be the way forward for rule making in service trade? What will happen in goods trade? The response, we submit, will depend on how WTO practice evolves, to which we turn next. The reason is this: unlike for Annex 4 agreements, the ‘gatekeepers’ in the ‘scheduling’ scenario, are ultimately the WTO adjudicators (panelists and Appellate Body members as opposed to WTO members). We will return to this issue, and explain it in detail in section 3.2. For now, we want to complete our discussion regarding multilateral and inter se law-making in the WTO, by visiting practice as it has evolved since 1995.<sup>22</sup>

## 2.4 WTO PRACTICE

A lot of confusion exists regarding the terminology of agreements among a subset of the WTO membership. Leaving aside free trade areas and their GATS brethren, the only genuine inter se agreements allowed by statutory fiat are the plurilaterals (Annex 4 agreements).<sup>23</sup>

But there are several other agreements, which, even though are not contemplated as such in the WTO Agreement, have emerged in practice. Critical mass

<sup>21</sup> The meaning of consensus decision-making in the WTO system is set out in Footnote 1 to Art. IX of the WTO Agreement which equates consensus with the absence of formal objection.

<sup>22</sup> Petros C. Mavroidis, *The Regulation of International Trade, vol. 1, Trade in Goods: the General Agreement on Tariffs and Trade (GATT)* (MIT Press, Cambridge: Massachusetts 2016) discusses GATT practice at 156 et seq.

<sup>23</sup> However, it should be noted that GATS Article Vbis authorizes Members to enter into agreements related to labour markets integration and GATS Art. VII provides the rules applicable to bilateral (and presumably plurilateral) agreements for the mutual recognition of ‘education or experience obtained, requirements met, or licenses or certifications granted’ aimed at the authorization, licensing or certification of services suppliers. In addition, the WTO Agreement on Subsidies and Countervailing Measures (SCM), Annex I(k) allows a subset of the WTO membership to add to and/or amend the SCM provisions related to export credits.

tariff agreements, for starters, like the ITA, have been negotiated by a subset of the membership, and could qualify as *inter se* agreements. Nevertheless, the contractual promise was from the outset, as in any tariff negotiation, to allow the entire membership to profit from the outcome on an MFN basis. If at all, non-participants were tolerated free-riders, but free-riding is anyway inherent in MFN multilateral negotiations as well.<sup>24</sup> This *inter se* negotiation modality was not objected to in this context.

In similar vein, various initiatives in the context of trade in services (like telecoms or financial services) were negotiated by a subset of the membership. They are not plurilateral agreements though, as they were never intended to be non-MFN.

Strictly speaking, *inter se* agreements are entered into by a subset of the WTO membership. Participation in an *inter se* agreement may be by invitation or the agreement could be open to all members and some decline to sign on. We recall that the WTO Agreement does not regulate the process of negotiation in a comprehensive manner. An *inter se* agreement in WTO law is one where the package agreed, irrespective of the process followed, binds only a subset of the membership. Non-participants in principle cannot claim rights, as they do not have to assume obligations. Article II.3 of the WTO Agreement is quite clear in this respect:

The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

Article II.3 of course, refers to Annex 4 agreements only, and not to the other *inter se* agreements that we have discussed so far. What matters in the eyes of the WTO legislator is not the process (how we ended up with an *inter se* agreement), but the outcome (the agreement is legally binding only for a few). Viewed from this angle, practice reveals two potential modalities additional to Annex 4. First, agreements may be negotiated by a restricted number of Members. The Trade in Services Agreement (TiSA) could have been an example of this modality had it succeeded. The negotiation took place outside the WTO and, clearly, not all WTO members were invited to participate. Second, there are open agreements negotiated by some Members, such as the joint statement initiatives (JSIs or ‘critical mass agreements’ as referred to earlier), which are negotiated by a subset of the membership with all members invited to participate. It is unclear whether the ongoing JSI negotiations on electronic commerce, investment facilitation and micro small and medium/

<sup>24</sup> In a critical mass context there may be many parties which can benefit from the outcomes of the agreement without assuming its obligations, but these parties are also crucially too small to destabilize the deal and hence outside of the ‘critical mass’.

sized enterprises (MSMEs) will, if successful, be notified as Annex 4 agreements. The likelier scenario is that they will not.

#### 2.4[a] *TiSA, an Agreement Outside the WTO*

TiSA was an initiative to negotiate a comprehensive agreement on services in order to improve on the commitments entered into under the GATS.<sup>25</sup> Some of the participants did not want to offer China a seat at the table, although they did not outright exclude its eventual accession. China would have been acceding, though, to a text the substance of which it could not have influenced. Many with a seat at the table were also opposed to widespread special and differential treatment for developing countries. The developing countries that negotiated TiSA accepted to participate in the elaboration of a document that would largely be one fit for all.

The precursor to TiSA was the so-called Services ‘Signalling Conference’. Thirty-one WTO members participated therein, counting the European Union (EU) as one. Many developing countries (Brazil, and India included) also participated, as did China. The conference was held on 26 July 2008. The purpose of the conference was to ‘signal’ (hence its name) the depth and breadth of commitments that participating members were prepared to undertake. The result was hailed as a success, even though the Chairman of the Trade Negotiation Committee acknowledged that this was the beginning of a long process.<sup>26</sup> The Services ‘Signalling Conference’ was the end of the road, as far as liberalization of services in the Doha Round was concerned.

The willingness to liberalize, however, remained present in some quarters. Should the relevant parties still attempt to do so under the WTO roof? The unwillingness of (some key) developing countries to entertain progress in services negotiations in the absence of a farm trade quid pro quo, was the proximate, but definitely not the ultimate cause for pushing the proponents of services negotiations to search for a new negotiating venue. Key developing countries had much more of an interest in advancing farm liberalization, and less so to continue with negotiations on services trade.

The embassies of the twenty-three WTO members in Geneva (representing roughly 70% of world services trade),<sup>27</sup> a few kilometres, and sometimes meters from the WTO headquarters, provided a roof for those willing to go ahead, and it is there where they decided to organize their talks under the acronym ‘TiSA’. Both Marchetti and Roy (2013) as well as Nakatomi (2015) have explained the options

<sup>25</sup> TiSA was in large part the result of cross-conditionality with agricultural negotiations, and the fact that countries like Brazil blocked service negotiations as a bargaining chip on agriculture.

<sup>26</sup> WTO Doc. JOB(08)/93, of 30 July 2008.

<sup>27</sup> Juan A. Marchetti & Martin Roy, *The TiSA Initiative, an Overview of the Market Access Issues*, Staff Working Paper ERSD 2013-11 (World Trade Organization: Geneva, Switzerland 2013).

that the negotiators of TiSA faced when deciding on the forum to host their endeavour. Within the WTO, the choices were limited. As noted, a critical mass agreement is for all practical purposes a negotiation by a subset of the membership with MFN implementation. This would mean that whatever the participants (the twenty-three) negotiated would have to be extended on an MFN basis to the rest of the membership. This was not a very appealing prospect for some, and especially the US delegation, which was unwilling to compensate non-participants and was also opposed to the participation of China in the negotiations. Others believed that the cost of including China at the risk of diluting the eventual outcome was far smaller than the benefits from Chinese participation (and the ensuing liberalization). The US attitude ultimately prevailed.

TiSA could, of course, have been concluded as a plurilateral agreement. But consensus would have been required for the end product to enter into force as an Annex 4 agreement, and there was absolutely no guarantee that China (and others, who had decided to not participate) would be willing to let this happen. Obtaining a waiver was not a realistic prospect either, since waivers are anyway transitional. This left negotiators with two options to choose from. They could either negotiate TiSA under Article V of GATS as a preferential agreement, or simply negotiate outside the confines of the WTO (and eventually, maybe, notify the agreement under Article V).<sup>28</sup>

At the time of writing there is no TiSA. TiSA was, however, effectively negotiated outside the WTO, and this was not an inconsequential decision. TiSA was a wake-up call, but as we now know, not for some. This was the first, comprehensive service trade negotiation that was taking place outside the WTO. The 'Really Good Friends', as they were dubbed, a group including Canada, the EU, Japan, Mexico, and the United States, and representing over 70% of trade in services worldwide, embarked on an exercise the outcome of which, unless subject to MFN, would be flying in the face of the letter and the spirit of the WTO. The authority of GATS was undeniably challenged by the emergence of TiSA. TiSA was a threat to the multilateral liberalization of trade in services, especially in as far as it could have taken over a core negotiating and liberalizing function of the GATS. However, leaving the specific circumstances surrounding the TiSA experiment aside, this approach of negotiating an agreement outside the WTO could also be understood as an attempt to use an *inter se* agreement as an alternative modality

<sup>28</sup> An interesting earlier attempt to negotiate on a WTO subject matter outside of the WTO was the OECD Steel Subsidy Agreement. The negotiations started at the OECD in 2002 to address issues related to the structural problems facing the industry, and the need to strengthen disciplines on government support to the industry. All major steel-producing economies participated in the negotiations which were suspended in 2006. It should also be noted that there are many, often executive or administrative, agreements among two or more parties that wade into subject matters covered by the WTO agreements and as such can be qualified as *inter se* agreements, at least with respect to some of their provisions. These agreements have not been found controversial. A good example are the many existing customs cooperation agreements.

for rulemaking in areas that would be novel and difficult to deal with under the GATS and the prevailing consensus juggernaut.

#### 2.4[b] *Joint Statement Initiatives (JSIs)*

The history of JSIs has not been properly documented. We quote from an official document issued in 2017:

Three proponent groups announced new initiatives to advance talks at the WTO on the issues of electronic commerce, investment facilitation and micro, small and medium size enterprises (MSMEs). The announcements were made on 13 December [2017] during the final day of the WTO's 11th Ministerial Conference in Buenos Aires.<sup>29</sup>

Following this statement, over eighty members joined the e-commerce initiative, over one hundred the one on investment facilitation, and over ninety the MSME initiative. In addition, also at the margins of the Buenos Aires Conference, a group of WTO members established the Joint Initiative on Services Domestic Regulation with the objective of developing disciplines to enhance transparency, predictability and effectiveness of procedures that service providers have to comply with in order to obtain authorization to supply their services and to reduce any unintended trade restrictive effects of licensing and qualification requirements. Negotiations among sixty-seven Members successfully concluded in November 2021. The agreed disciplines are set out in the 'Reference Paper on Services Domestic Regulation', and are incorporated in participating Members' schedules. Participants will proceed individually with the certification of their revised schedules.<sup>30</sup>

All these initiatives have become known as 'JSIs'. Only one has concluded so far taking the form of a critical mass agreement in services trade. It remains unclear how the other JSIs may evolve, including by resorting to a TiSA style agreement, or will they establish an entirely novel rule-making modality in the WTO. A recent communication from India and South Africa to the General Council, entitled 'The Legal Status of "Joint Statement Initiatives" and their Negotiated Outcomes',<sup>31</sup> was critical of the entire JSI process. However, it is worth noting that the communication clearly acknowledged the legality in principle of (TiSA style) rule-making outside the WTO system.<sup>32</sup> While this is the case, there are

<sup>29</sup> [https://www.wto.org/english/news\\_e/news17\\_e/minis\\_13dec17\\_e.htm](https://www.wto.org/english/news_e/news17_e/minis_13dec17_e.htm).

<sup>30</sup> See 'Declaration on the conclusion of negotiations on services domestic regulation', WTO doc. WT/L/1129 of 2 December 2021. It should also be noted that in 2020 two more initiatives were launched covering 'trade and environmental sustainability' and 'plastics pollution and environmentally sustainable plastics trade'.

<sup>31</sup> WTO Doc. WT/GC/W/819, of 19 Feb. 2021.

<sup>32</sup> *Ibid.*, at 3.

important policy considerations at play in selecting this avenue, as well as significant legal requirements that need to be adhered to. The latter will be discussed in what follows.

## 2.5 SUMMING UP: A FACT AND A FEW DOUBTS

The legal setup of the WTO makes legislating unduly difficult. As a result only one new multilateral agreement has been successfully concluded and added since 1995 – the ATF. A fully multilateral, consensus-based rule-making approach is increasingly unsuited to addressing many policy areas where diversity in priorities and economic realities among Members call for fewer seats at the table reserved for like-minded or directly concerned players. In short, there is a place and an appetite for inter se agreements. This need is a major factor in the mushrooming of FTAs, which are predominantly regulatory in content. Horn et al. (2010) were the first to show this. Mattoo et al. (2020), looking at a wider sample of PTAs, confirmed the trend. But why opt for a PTA with regulatory content when its outcome has to be implemented on an MFN basis? PTAs, as per Article XXIV of the GATT, allow for deviations from MFN for protective instruments (like tariffs), not for instruments that were not meant to protect in the first place (like behind-the-border policies, the bread and butter of today's PTAs). Home can, for example, treat Foreign better than Away with respect to its customs duties, but must apply the same environmental requirements to both Foreign and Away. The situation is, of course, different with respect to PTAs in the realm of services trade, where the very purpose of going preferential is to eliminate behind-the-border barriers. But then, the overwhelming majority of PTAs concern trade in goods, even though recently PTAs addressing services trade are proliferating at a faster pace. The data set put together by the World Bank (Mattoo et al., 2020) leaves no doubt in this respect.

PTAs are often bilateral, and 'heavy duty' as they require liberalization of substantially all trade. As Grossman and Helpman (1995) have explained, the requirement to liberalize 'substantially all trade' was an insurance policy to avoid MFN *à la carte*. The very purpose of the GATT was to establish a non-discriminatory world trade order, so statutory authorization to conclude PTAs binding only a subset of the contracting parties had to be constrained and understood in terms that would not prejudice this quintessential objective of trade integration.

However, some regulatory issues only concern a subset of the membership, and addressing them effectively does not require comprehensive liberalization. Think of cooperation on competition issues, or labour standards among participants in global value chains. PTAs are not designed to deliver on such objectives,



unless they are couched in a more comprehensive agenda. This is where Annex 4 agreements would need to kick in, but recall no agreement will be added if one or more members object to it. Securing consensus, though, does not necessarily depend on 'legal' criteria. Even if the end product is offered on an MFN basis, and even if it does not require any action by free-riders benefitting from the agreed package, it cannot be ruled out that a non-participant objects to the inclusion in the WTO legal order of an agreement among a few Members only on 'political' or 'strategic' grounds. A motivation for such obstruction could simply be to exact concessions in other contexts.

How then to overcome such hurdles? For instance, India and South Africa appear to object to even the possibility of negotiating JSIs, irrespective of the outcome, be they MFN-based or not. There are thus legitimate doubts that the efforts under way, assuming they are notified as Annex 4 Agreements, will find a acceptance in the WTO. Are these doubts legitimate? The WTO is not the only regime where this question is asked. It could be asked in the realm of any multi-lateral regime, where a subset wants to go further, faster.<sup>33</sup>

There is room for inter se agreements within the EU legal order, a much more homogenous group than the WTO, under the rubric 'enhanced cooperation'.<sup>34</sup> Enhanced cooperation is a procedure whereby a minimum of nine EU Member States will be allowed to integrate or cooperate in a particular field within the EU when it has become clear that the EU as a whole cannot achieve the goals of such cooperation within a reasonable period. Of particular interest are the voting procedures for accepting this kind of agreements, which are embedded in Article 20 of the Treaty of the European Union (TEU):

- (1) The decision authorizing enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least

<sup>33</sup> And it was. The possibility of State parties to a multilateral agreement to deny the opportunity of a subset of them to agree rules only binding on them was a crucial concern in the discussion of the rules governing inter se agreement under the 1969 Vienna Convention on the Law of Treaties. During such negotiations, already in 1964 the distinguished Uruguayan jurist Jiménez de Aréchaga observed that '[c]omplementary or supplementary inter se agreements had, in practice, become an essential technique, and a necessary safety valve, for the adjustment of treaties to the dynamic needs of international society. ... [T]he inter se procedure [was necessary] so as to avoid the stagnation that would result from the *liberum veto* of a single party'. This observation is relevant to the WTO's current predicament. See YB ILC, 1964, Vol. I, at 150, [https://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1964\\_v1.pdf](https://legal.un.org/ilc/publications/yearbooks/english/ilc_1964_v1.pdf).

<sup>34</sup> Practice in this area is discussed in a European Parliament publication, namely, [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604987/IPOL\\_STU\(2018\)604987\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604987/IPOL_STU(2018)604987_EN.pdf).

nine Member States participate in it. The Council shall act in accordance with the procedure laid down in Article 329 of the Treaty on the Functioning of the EU.

- (2) All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote.

It follows that only those in support will vote, while the control of the Commission will focus, *inter alia*, on the existence of negative external effects affecting non-participants. What matters for the purposes of our discussion is that a relatively homogenous group of countries, like the EU, saw no inconvenience in opening the door to agreements among a subset of its members without subjecting them to consensus voting.

The probability that an agreement is not achievable within a reasonable period of time is higher in the WTO than the EU as the size and heterogeneity of its membership is considerably greater. Fukuyama (1992) probably saw too much in the fall of the Berlin wall when arguing that the world community was fully behind a liberal world order as understood by the US, the hegemon in the post WWII-era. However, the world community, the trading community included, does not see eye to eye on various issues regarding integration. A more realistic scenario for the WTO is predicated on a loose multilateral integration baseline (the WTO *acquis*), with deeper and in principle non-discriminatory integration initiatives and agreements among subsets of (more) homogenous members. This approach offers the best chance for the WTO to continue to be policy-relevant.

### 3 INTRODUCING EFFECTIVE VARIABLE GEOMETRY IN THE WTO

Variable geometry *à la* EU is not provided for in the WTO as things stand. The consensus requirement for adding to Annex 4 is a formidable hurdle in and of itself. Other forms of *inter se* agreements are confined by statute or practice.<sup>35</sup> A broader understanding of variable geometry within a multilateral context where agents have asymmetric and divergent preferences seems necessary. We do not need to imagine the counterfactual to this proposition. It is today's world, with the WTO in legislative hibernation.

<sup>35</sup> GATT Art. XXIV, GATS Art. V, Vbis and VII, as well as the prevailing understanding of 'critical mass' agreements.

### 3.1 OUR DISCUSSION SO FAR

Schematically, this is where we stand:

- There is an appetite to conclude trade agreements;
- There are also good arguments in favour of signing inter se agreements, as key behind-the-border measures are hard to address across heterogeneous players with asymmetric preferences;
- The appetite for inter se agreements so far has been dealt with in the WTO, principally through the conclusion of PTAs;
- The WTO makes room for inter se agreements under its aegis, but the stringent conditions imposed for their adoption (consensus), have led the membership to start considering approaches and processes with no statutory underpinnings (such as TiSA and JSIs).

However, as things stand, neither TiSA nor any of the JSIs has reached the stage of conclusion. There is uncertainty regarding the end-product, and, consequently, uncertainty regarding the consistency of similar initiatives within the WTO.

### 3.2 THE ‘GENERIC SOLUTION’: INTER SE AGREEMENTS IN INTERNATIONAL LAW

WTO agreements are ‘treaties’ within the meaning of Article 2.1.a of the Vienna Convention on the Law of Treaties (VCLT).<sup>36</sup> The VCLT, in its Article 41, envisages the scenario that occupies our attention in this article. It reads:

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
  - (a) the possibility of such a modification is provided for by the treaty; or
  - (b) the modification in question is not prohibited by the treaty and:

<sup>36</sup> Vienna Convention on the Law of Treaties (VCLT) 1969, United Nations, Treaty Series, vol. 1155, at 331. While not all WTO Members are parties to the VCLT, the latter remains the central reference point for all issues related to the making, operation, and termination of treaties. As noted by Anthony Aust, *Vienna Convention on the Law of Treaties, Section 14*, in *Max Planck Encyclopedias of International Law* (Anne Peters ed., Oxford University Press: Oxford, United Kingdom 2006) ‘[w]hen questions of treaty law arise during negotiations or litigation, whether concerning a new treaty or one concluded before the entry into force of the VCLT, the rules set forth in the VCLT are invariably relied upon by the States concerned, or the international or national court or tribunal, even when the States concerned are not parties to the VCLT. In treaty negotiations non-parties will refer to specific articles of the VCLT. The justification for invoking the VCLT is rarely made clear, though the unspoken assumption is that the VCLT represents customary international law’. The Appellate Body from its first ever decision (US–Gasoline) has adhered to the VCLT, claiming that the reference to ‘customary rules of interpretation’ in Art. 3.2 of the WTO DSU (Dispute Settlement Understanding), was shorthand for the VCLT rules on this score. See US–Gasoline, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/2ABR.pdf&Open=True>, at 16 et seq.

- (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
- (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

There is agreement among commentators that the provisions laid out in Article 41 are of customary status,<sup>37</sup> or, at least, that the main principles set out therein have attained such character. So, what does international law have to say in simpler terms about inter se agreements? They are permissible, if three distinct conditions have been cumulatively met:

- A possibility for their conclusion is either contemplated in the multilateral treaty, or is not prohibited by it, and
- The inter se agreement does not affect other parties' rights and obligations under the multilateral treaty; and
- The modification does not relate to a provision the derogation from which runs counter to the object and purpose of the multilateral treaty.

One can understand why this test is reflected in prevailing legal culture. This provision strikes a very fine balance between contractual autonomy and lawful opposition to inter se agreements. The threshold condition is the contractual language: if the multilateral treaty disallows modifications (i.e., the inter se agreement), then that is the end of the matter. But if modifications are (explicitly or implicitly) permitted it does not mean that anything goes. In a consensus-based system such as the WTO, the principals (signatories to the multilateral treaty) are the original 'gatekeepers'. However, as noted, they may object on spurious grounds, leaving the legality of inter se rule-making unsettled. A better system would be to seize the WTO adjudicators of the matter and make them the ultimate gatekeepers. According to international law, their benchmark to judge consistency of inter se agreements with the multilateral treaty is twofold. First, they must ensure that the rights and obligations of non-participants will not be affected by the inter se contract, the justification being legitimate expectations when signing a multilateral treaty. Secondly, in order to cement this standard, the adjudicator must ensure that the inter se agreement does not pertain to and impinge upon a foundational element of the multilateral treaty. That is, an element that is integral to the object and purpose of the treaty and ultimately reflects the very aim(s) sought by the parties when entering into the contractual

<sup>37</sup> Doctrine is unanimous on this matter. See e.g., Aust, *supra* n. 37; Kerstin von der Decken, *Article 41*, in *Vienna Convention on the Law of Treaties a Commentary* 777–786 (O. Dörr & K. Schmalenbach eds, Springer Verlag: Berlin & Heidelberg, Germany 2018); Paul Reuter, *Introduction to the Law of Treaties* (2d ed., Kegan Paul International: London, United Kingdom 1995); Sinclair (1984).

arrangement in the first place. What constitutes a foundational element depends of course on the subject matter of the treaty concerned. In the WTO, the MFN requirement certainly qualifies as foundational. However, it should be stressed that not all inter se agreement necessarily fall under the scope of the MFN rules, if for no other reason than that not all inter se agreement may generate a 'benefit' within the meaning of the MFN rules.

### 3.3 WTO

Let us posit that WTO members are bound by Article 41 of VCLT. Recall that it is commonplace that this provision codifies customary international law.<sup>38</sup> We have stated above that the WTO Agreement makes no general provision allowing or disallowing inter se 'modifications' of existing disciplines with respect to a subset of the membership.<sup>39</sup> The GATT, on the other hand, allows for modifications of schedules. It acknowledges the right of members to vary their content, assuming that the conditions embedded in the 1980 Decision have been observed. Nevertheless, the modification of a schedule is not akin to a modification of the WTO agreements, even though the same term is used. Through modification of a schedule, the modifying member affects its legal relation with all members of the WTO, and not only with some of them.

As noted, the 1980 Decision, which constitutes 'GATT acquis',<sup>40</sup> explicitly mentions the terms 'modifications'. While the content of modifications is circumscribed in the body of the 1980 Decision, practice reveals a trend towards an expansive interpretation of coverage. Export subsidies have been routinely added as modifications to schedules, even though Article XVI does not figure in the list of provisions mentioned in the 1980 Decision.

Modifications in the WTO world thus encompass unilateral actions since any member has the prerogative to unilaterally alter its contractual relationship with the remaining members.<sup>41</sup> In addition, modification of schedules may take place as a result of an underlying agreement among the modifying Members. In all cases modifications change the schedules of commitment which are an integral part of

<sup>38</sup> However, invoking customary international law before WTO panels is not necessarily a winner. Graham Cook, *A Digest of WTO Jurisprudence on Public International Law Concepts and Principles* (Cambridge University Press: Cambridge, United Kingdom 2015) has provided evidence to this effect.

<sup>39</sup> It only provides specific authorization under Arts II.3 and X.9, GATT Art. XXIV, GATS Arts V, Vbis and VII, as well as SCM Annex I(k).

<sup>40</sup> In its report on Japan-Alcoholic Beverages II, the Appellate Body held as much (at 15): GATT decisions are 'GATT acquis', and WTO panels and the Appellate Body itself must observe them.

<sup>41</sup> Absent the 1980 Decision this statement would be controversial as in international law a change in a provision of a treaty applicable to all parties (an amendment) needs the agreement of all parties and cannot be pursued unilaterally. See VCLT Art. 39 (General rule regarding the amendment of treaties): 'A treaty may be amended by agreement between the parties'.

the WTO agreements and are applicable not only to the modifying Member(s) but all WTO Members, and as such they are more akin to amendments.<sup>42</sup>

Such modifications must meet the conditions laid out in the 1980 Decision. An objection is upheld only if a WTO panel and – if appealed – the Appellate Body agree to it. If there is a legal challenge against a proposed modification, a WTO adjudicator will ask only one question: is the modification consistent with the WTO? In other words, has it observed the procedural rules (1980 Decision) as well as the substantive rules (predominantly MFN)? As these modifications generally result from an agreement among a limited number of Members (i.e., an inter se agreement), an adjudicator should also ask if the modification affects a foundational provision of the WTO compact, or impinges on any right of other Members. This, in our view, would be a very welcome addition, as otherwise we could end up with a WTO *à la carte*.

Beyond the determination as to whether unilateral or concerted modifications of schedules are WTO-compliant, the general international law standard for deciding on the lawfulness of an inter se agreement is whether the latter negatively affects the enjoyment of rights by non-parties, or affects a foundational norm of the parent treaty, as discussed above. The foundational obligation in the WTO is MFN. Accounts by negotiators, like Wilcox (1950), economic historians, like Irwin et al. (2008), and legal scholars, like Jackson (1969), all concur on this score.

But wait a second, one might retort. The WTO agreements allow for the conclusion of agreements deviating from MFN, albeit within certain confines: what else do Article XXIV of GATT, Article V of GATS, and Annex 4 agreements do? Can we then really defend the view that MFN is a provision, an exception to which puts into question the attainment of the object and purpose of WTO agreements? We believe that an affirmative response is still warranted *in general*, even though the issue should be subject to judicial review.

Indeed, the existing MFN exceptions are carefully crafted. GATT Article XXIV and GATS Article V are supposed to provide a platform for regional integration enabling those who wanted to go further and faster to do so, without undermining the non-discriminatory edifice built through the GATT and then the WTO agreements. As for Annex 4 agreements, the gate is narrow and the key is collectively held by the membership, so these are unlikely to be added to beyond their initial coverage in the WTO agreements. On the other hand, the scope of the various MFN rules within the WTO agreements is not all-encompassing and is in general linked to the existence of a ‘benefit’ that needs to be extended to all Members.

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<sup>42</sup> Even though not all Members have *formally* agreed to them.

### 3.4 WTO vs VCLT

Assume that coordinated scheduling has occurred. Assume, that is, that the members of one of the three JSIs submit to the Secretariat identical texts for inclusion in their respective schedules, on the basis of an underlying inter se agreement among the schedule-modifying Members. Or assume the Members participating in a JSI initiative conclude a traditional agreement. Assume also such an agreement does not relate to trade liberalization either in goods or services so that GATT Article XXIV and GATS Article V exceptions are not available. Further assume that the Annex 4 route is foreclosed on account of the impossibility of a consensus decision. Both the underlying and the traditional inter se agreements posited above would nonetheless be permissible under international law so long as the requirements of VCLT Article 41 are met. But would such agreements be lawful within the WTO system? What courses of action would be available in case of conflict between inter se parties and other objecting Members? Crucial elements of a challenge to an inter se agreement would be to show a violation of a fundamental provision of the WTO legal rulebook and/or infringement of the 'rights' of non-party Members. The natural candidate is MFN. But no matter what legal claim were raised, it would have to concern the outcome because as things stand the process involved in reaching the agreement is not regulated in the WTO.<sup>43</sup>

The content of a specific JSI or of any other possible inter se agreement would largely dictate the substance of a legal complaint. In order to avoid a potentially successful legal challenge to the inter se agreement, benefits within the scope of applicable MFN rules should to be granted unconditionally and automatically to all Members. And while 'automatically' has a clear content in case law (no passage of time), 'unconditionally' risks giving rise to litigation. A key question will be whether 'unconditionally' means no conditions at all, or no conditions additional to those imposed on inter se agreement parties. Case law on the parameters of 'unconditionality', alas, remains unsettled.

At any rate, the VCLT provides an appropriate framework for deciding whether or not the modification/inter se agreement is inconsistent with the WTO. Recourse to the methodology embedded in the VCLT would help an adjudicator decide whether the rights of third parties have been negatively affected, and/or whether besides MFN there are other provisions of the WTO agreements that need to be considered foundational and, as such, need to be safeguarded.

<sup>43</sup> Nor it is to a great extent under international law either. Article 41 of the VCLT only sets out a procedural and transparency requirement: 'the parties in question [the inter-se agreement parties] shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides'. There is no resulting requirement to notify other WTO Members of the intent or initiation of a negotiation, or to accept other negotiating parties or observers.

#### 4 CLUBS UNDER THE WTO TENT

As the World Bank studies cited in this note show, trade integration continues unabated. Two elements stand out in explaining recent trends in international trade cooperation. The first relates to integration among clubs or subsets of the wider WTO membership. The second is that the focus of new agreements is primarily concerned with behind-the-border measures. We submit there is a connection between the two. Sapir (1998) first noted the explosion of the numbers of FTAs entered into right after the conclusion of the Uruguay Round. It happened when customs duties were at an all-time low, and other issues were hard to negotiate further in a consensus-based setting.

Why negotiate behind-the-border measures on a preferential basis? There is (some) justification in the case of services trade, but services PTAs are few. Recall that in case of PTAs all behind-the-border measures must observe MFN by virtue of Article I of GATT. It must be that negotiation will be greatly facilitated if like-minded players only take a seat around the table. But of course, to preserve the relevance of multilateralism, an insurance policy must be taken out to avoid a situation where such negotiations seek to escape MFN.

In our view, the first-best would be to rethink Annex 4. It could be redrafted keeping the EU enhanced cooperation regime in mind, even though we are well aware of the importance of consensus in WTO law, and especially in practice. We recognize, however, that securing consensus to redesign Annex 4 to accommodate ‘open plurilaterals’ may prove an impossible task.<sup>44</sup>

In the absence of such consensus, JSI-type negotiations are likely to continue to gain purchase. Should the WTO close the door on them? We believe it should not because in the absence of such arrangements there is no obvious escape from stasis and the diminishing relevance of the WTO. An alternative is PTAs, but the discriminatory underpinnings of the PTA model means stepping out of the multilateral tent. Under these agreements negotiations, rule-making, the administration of agreements, and dispute settlement all take place in national capitals, not cooperatively in Geneva.

From a purely legal perspective, it is not apparent why JSIs or inter se agreement more broadly would be WTO-inconsistent.<sup>45</sup> Indeed, they are likely

<sup>44</sup> The suggestion (H. Mamdouh, *Legal Options for Integrating a New Investment Facilitation Agreement into the WTO Structure* (International Trade Centre, Geneva, Switzerland 2021)) that this may be the only avenue appears unduly restrictive.

<sup>45</sup> J. Pauwelyn, J. Crawford & J. Bell, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* 316 (Cambridge 2003) also consider inter se agreements permissible: ‘Inter se “modifications”, in the wide sense of the word, may also take the form of outside treaties whose very conclusion changes the legal relationship as between certain WTO members, without having explicitly changed this or that provision of the WTO treaty as it applies between them. If such “modifications” in the wide sense of the word were per se excluded, the legal relationships as between all WTO members set out in the WTO treaty would be written in stone, to be altered only by consensus’.



to be consistent if the conditions we have discussed in this article are met, namely if they do not curtail the rights or impose obligations on non-signatories, and they confer benefits on an MFN basis,<sup>46</sup> consistently with the foundational principle of the WTO legal order.

As a general rule international law permits, subject to the conditions we described, the conclusion of inter se agreements among a subset of parties to a multilateral treaty, such as the WTO agreements. The parties, for instance, to a JSI-type agreement could on this basis notify the result of their negotiation<sup>47</sup> to the General Council as their action is clearly permissible under international law and not forbidden under WTO law. They could also seek a decision setting out the terms under which their inter se agreement could be integrated with the WTO legal order.<sup>48</sup> Dissenting Members could then object, asserting that one or more of their rights or foundational norms under the WTO agreements had been infringed, so that the inter se agreement is *per se* detrimental to the realization of the objectives of the trading system. Such conflicts could only be resolved by the WTO adjudicators.

If judicial resolution is not obtained,<sup>49</sup> a persistent objection by non-parties to an inter se agreement would not result in its illegality under international or WTO law, but only in the impossibility of having the inter se agreement admitted within the WTO tent. The main consequence would likely be that possible violations of the MFN rights of the objectors would not be conclusively established. In addition, the WTO Secretariat would not be allowed to administer the agreement and possible arrangements for the resolution of conflicts between parties and non-parties to the inter se agreement could not be set up. Essentially the inter se agreements would be pushed outside the WTO tent and bridges would not be built, much to detriment of the multilateral trading system and global economic governance.

<sup>46</sup> As noted the investigation as to whether an inter se agreement confers benefits that need to be extended on a MFN basis is a matter open to interpretation and ultimately judicial review.

<sup>47</sup> Preferably prior to the agreement's conclusion in line with Art. 41.2 of the VCLT, which only obliges the perspective parties to an inter se agreement to notify the parties to the multilateral agreement of the content of the inter se agreement once the negotiation are completed and before formal conclusion. While the VCLT does not further elaborate, it is clear that parties to the original multilateral treaty, once notified, would be in a position to contest the legality in full or in part, and object to the conclusion, of the inter se agreement. Conversely, absent any explicit objection the agreement would be deemed as accepted. The VCLT does not provide for a specific procedure to assess the objections or to provide a remedy. Such dispute settlement procedures is however available in the WTO system.

<sup>48</sup> Crucially these terms could set out the scope of the MFN obligation and the possibility and conditions for other Members to accede to the inter se agreement.

<sup>49</sup> Both the objecting Member(s) and the inter se parties have an interest in a the adjudication of the dispute. However, the inter se parties may find it difficult to establish a cause of action under the DSU against the objections lodged by the dissenting Members. If the objecting Member does not resort to dispute settlement, the end result of an objection would be to effectively bar the integration of the inter se agreement within the WTO system.

In conclusion, if the WTO adjudicators become the ultimate gatekeepers, then the VCLT regime has much to offer in overcoming the current legislative crisis and clarifying the benchmark for consistency between the WTO agreements and agreements with limited membership. But of course, a WTO judiciary must first be operational. The current crisis of the judiciary will need to be addressed for our discussion to find an institutional roof.

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