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Professor Jane Kelsey
E j.kelsey@auckland.ac.nz
The University of Auckland
Private Bag 92019
Auckland 1142
New Zealand

"Why the Joint Statement Initiatives Lack Legal Legitimacy in the WTO"

A Response to Hamid Mamdouh, 'Plurilateral Negotiations and Outcomes in the WTO'

(21 April 2021)

In April 2021, a legal opinion by the former head of the World Trade Organization (WTO) services and investment division and now senior counsel at Geneva law firm King & Spalding was circulated to certain WTO Members. That opinion offers legal arguments in support of plurilateral negotiations for new rules in the WTO, although it eschews specific reference to the current Joint Statement Initiative (JSI) processes.

This paper is a response to and rebuttal of that opinion. It is concerned specifically with plurilateral negotiation of rules, as distinct from schedules of tariff bindings in the General Agreement on Tariffs and Trade (GATT) and specific commitments on services sectors in the General Agreement on Trade in Services (GATS). The paper only addresses questions of procedural legality, not the equally controversial substantive concerns over what is currently being negotiated in the JSIs on services domestic regulation, electronic commerce and investment facilitation.

Summary

Discussions of plurilateral negotiations in the WTO cannot be "**political in the first order**", as Hamid Mamdouh suggests in the conclusion to his opinion.[1] As an international organisation, the WTO must operate within the parameters of the legal instrument that constituted it, being the Agreement Establishing the World Trade Organization (Marrakesh Agreement). Discussions on plurilateral negotiations in the WTO, including the current "Joint Statement Initiatives" (JSIs), must be "**legal in the first order**".

If the Members decide collectively that the constituting Agreement and/or other legal rules are not fit for purpose to achieve a shared vision and need to change, they must **collectively agree** on those changes and **implement them collectively in accordance with the existing rules**. If the meaning of the relevant provisions is disputed, only the Members collectively can make an authoritative interpretation. Self-selected groups of Members cannot strike out on their own path and offer tenuous *ex post justifications* in the hope that it will be too late or too difficult to challenge the legality of what they have done.

The Vienna Convention on the Law of Treaties is clear that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in its context and in light of its **object and purpose**".[2] If the object of the JSIs is to "**restore the functionality of the WTO negotiating arm**" as Mamdouh says,[3] they must do so in conformity with the object of the Organization set out in the Marrakesh Agreement: to create "an **integrated, more viable multilateral trading system**" among its Members,[4] based on its fundamental principles of multilateralism, reciprocity, liberalisation of market access, non-discrimination, decision-making by consensus, and the development acquis.

Of necessity, **different rules relate to the procedures and the adoption of substantive outcomes of WTO negotiations**.[5] However, the initiation and conclusion of negotiations are organically, and often formally, linked. The launching and scope of any negotiation, and the outcomes and mechanism(s) for their adoption, are all subject to the parameters set by the WTO's legal instruments and its objects and principles.

The Marrakesh Agreement provides for negotiations only where they are **among WTO Members**, concern existing Agreements or the conduct of negotiations on new matters that **relate to Members' multilateral trade relations,** and are **mandated** directly or indirectly by the **Ministerial Conference**. Negotiations for **Plurilateral**, as opposed to Multilateral, Agreements in the WTO are subject to separate rules in the Marrakesh Agreement and can only be adopted by consensus, which reflects their exceptional status within a multilateral organisation. There is no third option for plurilateral negotiation of new rules among a sub-

[1] Hamid Mamdouh, "Plurilateral Negotiations and Outcomes in the WTO", King & Spalding, 16 April 2021 at [38]
[2] Vienna Convention on the Law of Treaties, 1155 UNTS 331, Adopted on 23 May 1969, Entered into force 27 January 1980, Article 31
[3] Mamdouh at [5]
[4] Agreement Establishing the World Trade Organization (Marrakesh Agreement), Concluded at Marrakesh on 15 October 1994, Entered into force 1 January 1995, 1867 UNTS 154, Preamble.
[5] Mamdouh at [3]

group of Members, even if they propose to apply them on a most-favoured-nation (MFN) basis.

References to plurilateral modalities for negotiations in the General Agreement on Trade in Services (GATS) are exclusively within the context of a multilateral negotiating round and do not authorise stand-alone plurilateral negotiations. If they did, **there would have been no need for the Trade in Services Agreement (TiSA)** plurilateral negotiations to take place outside the WTO, with no clear pathwat for their subsequent export back to the WTO.

Rules on the **adoption of outcomes** of negotiations in the WTO are variously specified in the **amendment** provisions of the Marrakesh Agreement, in its Annexed Agreements, and by mandates or other instruments adopted by the Ministerial Conference or General Council or delegated bodies, including decisions relating to the modification of **schedules** under the GATT and the GATS.

A "**diagnostic review" of how plurilateral negotiations on rules have been conducted historically**[6] shows that negotiations on financial services, regulation of basic telecommunication services, and maritime transport services that continued past the end of the Uruguay round did so under multilateral mandates that were overseen by nominated WTO bodies. The processes for conducting them and the modalities for their implementation were specified in consensus decisions.

Negotiations since the WTO was established have involved: the comprehensive and unfinished Doha round of multilateral negotiations that was mandated by the Ministerial Conference; a Trade Facilitation Agreement (TFA) that was explicitly mandated by the Ministerial Conference and adopted as an amendment to the Marrakesh Agreement; specific negotiations pursuant to standing mandates in the GATS and the Agreement on Agriculture; and a sectoral Information Technology Agreement (ITA) that was concluded among a number of Members who modified their tariff schedules to the GATT and did not seek to amend any GATT rules.

Members' ability to **implement the outcomes of negotiations through the modification of schedules**[7] is limited to the legal scope of those schedules, being tariff concessions for the GATT and sector-specific commitments on services in the GATS. That mechanism does not allow for the adoption of general rules in schedules. New general rules belong to the appropriate part in the text of the relevant Agreement and are subject to the process for amendment set out in the Marrakesh Agreement.

The extent to which the WTO's rules "**provide flexibility** to accommodate various negotiating configurations",[8] and that a "plurilateral approach to WTO negotiations remains a **legally viable and useful tool**",[9] is therefore not open-ended. Where there is disagreement on the interpretation of the scope of relevant provisions, and whether those provisions permit such negotiations and the adoption of their outcomes, the matter must be resolved according to

[6] Mamdouh at [4d)]
[7] Mamdouh, esp at [31]
[8] Mamdouh at [4a)]
[9] Mamdouh at [4e)]

the mechanism for **authoritative interpretations** by Members in Article IX.2 of the Marrakesh Agreement. The nature and scope of "flexibility" cannot be determined by a self-selected group of WTO Members acting on their own initiative.

The proponents assert that the JSI approach will not prejudice any non-participating Members because it involves "**open plurilateralism on an MFN basis**". "Open plurilateralism" addresses one central pillar of the WTO: the equal treatment of all WTO Members. But it **erodes the WTO's foundational principle of multilateralism** whereby all WTO Members can, at least in theory, promote and protect their interests through jointly creating global norms. If sub-groups of Members are permitted to develop their own rules on their own terms based on a self-serving interpretation of the relevant legal provisions, the WTO ceases being a multilateral institution and becomes a vehicle for those Members to redesign the global rulebook to serve their interests. Any group of Members could bypass the WTO's multilateral processes, announce it is launching negotiations on a topic that may have little genuine relationship to "trade", and adopt the resulting rules on the basis of "open plurilateralism", even when a significant number of Members are opposed.

Accepting this modality as lawful would **seriously undermine** another foundational tenet of the WTO: that (at least in theory) its global norms reflect **the development acquis**. "Open plurilateralism" is essentially a device to bypass the demands from developing countries for a rebalancing of the WTO's rules, obligations and commitments which they were promised in the now moribund Doha "Development" Round, and to advance the offensive and ideological interests of mainly developed countries. Despite rhetorical references to "for development" in some JSIs, the available draft texts show they are driven by developed countries' agendas and precedents with minimal influence by developing countries or sensititivity to their needs. If the JSIs are legitimised, the voice of the Global South, already foresaken in the stagnant Doha round, will become even more marginalised in the WTO.

The advocates of the JSIs should not under-estimate the **risk of challenges to the legal legitimacy of the negotiations and their outcomes** in relevant WTO Councils and committees, attempts to validate them in the Ministerial Declaration to the MC12 through the misuse of GATS schedules, or by alleging breaches of fundamental rules and norms set out in the Marrakesh Agreement and other annexed agreements, especially the GATS. That would deepen the existing fissures in the WTO and **further undermine the legitimacy of an international organization in crisis**.

A. Plurilateralism in a multilateral institution

The WTO is a multilateral institution. The WTO's covered agreements in Annexes 1, 2 and 3 are described in Article II.2 as "*Multilateral Trade Agreements*". Under Article III.2 of the Marrakesh Agreement, negotiations are about existing or new matters must be "*among its Members*" and concern their "*multilateral trade relations*", not among "some or all its Members" on "those Members' trade relations". Citing the reference in the Preamble to the "multilateral trading system", and to "multilateral trade relations" in Article III.2 (and Article 23.1 of the DSU), the panel in *US – Shrimp* observed "by its very nature, the WTO Agreement favours a multilateral approach to trade issues".[10]

The Appellate Body Report in *Brazil – Desiccated Coconut* took this point further, citing the Preamble to the Marrakesh Agreement that articulates the primacy of multilateralism in the WTO and "Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system" than had existed under the GATT. Crucially for today's attempts to legitimise the current resort plurilateralism by reference to the past, the Appellate Body observed how "[t]he authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system". The "previous system" to which they refer was the system of Plurilateral Codes that came into existence after the Tokyo Round of the GATT.[11]

By contrast to the centrality of multilateralism, "*Plurilateral Trade Agreements*" are relegated to Annex 4 and are explicitly differentiated from multilateral agreements under Article II.3, Article III.1 and Article IX.5 of the Marrakesh Agreement. They are clearly not considered to be negotiations "among WTO Members" on "their multilateral trade relations". The requirement that Plurilateral Agreements must be adopted by consensus[12] before they can operate under the institutional framework of the WTO[13] confirms the anomalistic and exceptional status of plurilateralism in a WTO founded on multilateralism.

The lack of consensus support for the JSIs has spurred the attempt to develop alternative justifications for their pursuit and the adoption of their outcomes. Mamdouh seeks to distinguish Plurilateral Agreements that require consensus adoption under Annex 4 from plurilateral outcomes that can be inserted in existing agreements and adopted by a plurality of Members on a MFN basis. That approach is patently inconsistent with the object and principles of the WTO sourced in multilateralism. It also raises complex legal questions about whether negotiation of new rules in the WTO requires a mandate and, even if they were considered legitimate, whether and how their outcome might be adopted and/or challenged.

B. The Anomaly of TiSA

Negotiations for a plurilateral **Trade in Services Agreement (TiSA)** were launched in 2013 and conducted by 23 WTO Members (EU=1) **outside the WTO** until they were suspended in late

[10] *US - Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/R, Panel Report at [7.43] (*US – Shrimp)*. While the Appellate Body overturned the panel's application of that test to the chapeau of Article XX General Exceptions, it did not dispute the Panel's clarification of Article III.2.

[11] *Brazil - Measures Affecting Desiccated Coconut,* WT/DS22/AB/R , Appellate Body Report, (21 February 1997) at 18.

[12] Marrakesh Agreement, Article X.9

[13] Marrakesh Agreement, Article IV.8

2016, with no signs of resumption. Most state parties to the TiSA negotiations are also WTO Members participating in the JSIs. Those Members clearly believed that TiSA could not be pursued legally and legitimately within the WTO, presumably because they had no mandate and the GATS2000 negotiations were underway as part of the Doha Round. That is still the situation today.

The TiSA negotiating texts were built around the core GATS text, with a raft of annexes covering sector-specific rules and commitments on market access and national treatment (eg logistics, e-commerce), new general rules (e.g. domestic regulation of services, transparency), commercial structures (e.g. SOEs), and modes (e.g. mode 1, mode 4). The plan was to conclude these negotiations outside the multilateral WTO context and "dock" these new rules onto the GATS back in the WTO. However, when the TiSA negotiations were suspended in November 2016 there was still no clarity or agreement among participating parties on how to do so. The most concrete proposal was the EU's modular approach, which included inserting new rules into Members' schedules as "understandings" or "reference papers" pursuant to GATS Art XVIII Additional Commitments.[14] However, the legal grounds for doing this were never robustly articulated, let alone tested.

TiSA is a clear example where a group of WTO Members made a political decision to pursue unmandated negotiations to change the multilateral rulebook and left the legalities to be worked out afterwards. The WTO Secretariat facilitated this process without authorisation from Members or any formal budget allocation. The JSIs have pushed the boundary even further, as a group of Members, supported by the Director-General and Secretariat and sympathetic commentators, claim that plurilateral negotiations on new rules within the WTO are legitimate WTO activities and can be adopted by them on a MFN basis, despite objections from other Members to their legality.[15]

C. Mechanisms for adopting new WTO rules

If the JSIs were limited to the liberalisation of tariffs on specified products and sector-specific services on an MFN basis, consistent with the relevant GATT and GATS provisions and the legal scope of schedules, they would be less controversial. The most problematic and objectionable procedural aspect of the JSIs is the intention to develop new rules. The WTO is a Member-driven organisation in which only Members can make formal collective decisions on its rules, whether these rules relate to the institution itself or to its subject-specific Agreements.

As Mamdouh rightly says, "WTO rules are made by Members and can be changed by Members". [16] But this begs the questions of who, when, why and how? Under the WTO Agreement (Article IX.1) the **practice of consensus decision-making** is mandatory ("shall"), with a fall-back position of voting according to specified modalities when consensus has been sought but cannot be arrived at. Certain decisions can only be made by consensus, notably

[14] European Union, "A modular approach to the architecture of a plurilateral agreement on services", non-paper, September 2012

[15] This position is most clearly articulated in General Council 1-2 March 2021, The Legal Status of Joint Statement Initiatives' and their Negotiated Outcomes, WT/GC/W/819 (19 February 2021), a statement circulated at the request of the delegations of India and South Africa.

[16] Mamdouh at [4f)]

amendment to the rules on decision making and on the making of amendments,[17] amending the MFN obligations in the GATT, GATS and TRIPS,[18] and the adoption of a Plurilateral Agreement.[19] Even where provision is made for decisions by three-quarters or two-thirds of Members, the practice of multilateral decision making by consensus still applies. There is no mechanism for sub-sets of Members to adopt new rules outside of these decision-making procedures.

The rules for changing the WTO's rules are set out in Article X of the Marrakesh Agreement, which governs amendments to that Agreement and to the rules in the existing Agreements in Annexes 1,[20] 2,[21] and 3[22]. These amendments must be pursued through the process and quorum specified in Article X. Different thresholds apply depending on the provisions being amended and whether the amendment would alter the rights and obligations of Members. Amending a Plurilateral Agreement in Annex 4 is governed by its own rules.

The Marrakesh Agreement also governs the **adoption of any new multilateral agreement**. That may occur through a protocol to an existing Annexed Agreement (as with the Protocol of Amendment to insert the Trade Facilitation Agreement (TFA) into Annex 1A (GATT) of the Marrakesh Agreement, which set out the requirements for its acceptance and entry into force[23]) or by adding an agreement on a new trade matter to the Agreements in the Annexes.

Amending the rules of the WTO's agreements **is distinct from modifying** Members' GATT and GATS **schedules**.[24] Both the GATT and the GATS make Members' schedules an integral part of the Agreements. The scope of the schedules is set out in Article II (Schedules of Concessions) in the GATT and Article XX (Schedules of Specific Commitments) in the GATS. The former are limited to liberalising the tariff schedules of Members with reference to specific products, which are designated by HS codes; the latter are limited to sector-specific commitments envisaged under Part III of the GATS dealing with market access, national treatment and "additional commitments", usually identified by reference to the W/120 classification document.[25]

Modification of a tariff concession (in GATT) or a sectoral commitment (in GATS) that a member has inscribed in its **schedule** is not treated as an amendment.[26] Schedules are modified either through the special procedures established in GATT Article XXVIII (Modification of Schedules) and GATS Article XXI (Modification of Schedules) that aim to ensure that the original balance of concessions is not disturbed or by adopting the outcome of a multilateral round of negotiations.

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[17] Marrakesh Agreement, Article X.2
[18] Marrakesh Agreement, Article X.2
[19] Marrakesh Agreement, Article X.9
[20] GATT, GATS and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)
[21] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)
[22] Trade Policy Review Mechanism (TPRM)
[23] Protocol to Amend the Marrakesh Agreement Establishing the World Trade Organization, Decision of 27 November 2014, WT/L/940
[24] The differences between amending agreements and modifying schedules were clearly articulated in *European Communities – Regime for the Importation, Sale and Distribution of Bananas,* Second Recourse to Article 21.5 of the DSU by Ecuador, WT/DS27/AB/RW2/ECU, [383] – [385] *(EC- Bananas III DSU)*
[25] Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120 (10 July 1991)
[26] *EC – Bananas III DSU* at [385]

D. Authoritative Interpretation of WTO Agreements

Whether JSIs can be adopted through GATS schedules, as Mamdouh suggests,[27] rather than amendments, is highly contentious, for reasons discussed further below. Resolving that question ultimately requires an **interpretation** of the relevant provisions in the GATS and the Marrakesh Agreement itself; so do other highly contestable interpretations of the Marrakesh Agreement and the GATS in relation to the JSIs.

Four specific questions are particularly important: whether a mandate is required under Article III.2 to start a plurilateral negotiating process;[28] the status of unmandated negotiations where a mandate exists on the same matter, or the subject matter has been explicitly precluded from negotiations; the scope of GATS schedules under Article XX Schedules of Commitments and Article XVIII Additional Commitments, and whether they permit (or even anticipate) the introduction of new rules through those schedules, rather than through amendments to Part II of the GATS (General Obligations and Disciplines); and the status of plurilateral negotiations and resulting outcomes when they affect the systemic rights of non-participating Members under the Marrakesh Agreement and the Annexed Agreements.[29] These arguments are examined in detail below.

The function of **interpretation** of an Agreement is reserved in Article IX.2 of the Marrakesh Agreement **exclusively to the Members** collectively in the Ministerial Conference or the General Council. An Interpretation of one of the Annex 1 Agreements (GATT, GATS or TRIPS) by the Ministerial Conference or General Council, following the practice of consensus and failing that by a three fourths majority, must in turn be based on a recommendation from the relevant Council, which is governed by a similar practice of consensus. An interpretation must not undermine the amendment provisions in Article X.

The Appellate Body in *US – Clove Cigarettes* emphasised that the exclusive authority of the Members collectively to interpret the rules as they apply within the WTO, based on a collective recommendation of the relevant Council, is a core pillar of the Member-driven organisation:

> *Multilateral interpretations adopted pursuant to Article IX.2 of the WTO Agreement have a pervasive legal effect. Such interpretations are binding on all Members. As we see it, the broad legal effect of these interpretations is precisely the reason why Article IX.2 subjects the adoption of such interpretations to clearly articulated and strict decision-making procedures. ... [T]he terms of Article IX.2 do not suggest that compliance with this requirement is dispensable. ... We consider that the recommendation from the relevant Council is an essential element of Article IX.2, which constitutes the legal basis upon which the Ministerial Conference or the General Council exercise their authority to adopt interpretations of the WTO Agreement. Thus, an interpretation of a Multilateral Trade Agreement contained in Annex 1 of the WTO Agreement must be adopted on the basis of a recommendation from the relevant Council overseeing the functioning of that Agreement.*[30]

[27] Mamdouh at [25] to [28]
[28] Mamdouh at [4b)]
[29] Mamdouh at [4c)] and [15]
[30] *US – Clove Cigarettes,* Appellate Body, WT/DS406/ABR, 4 April 2012 at [250] and [253-254] (*US - Clove Cigarettes)*

Article IX.2 is the **only mechanism** through which legal provisions can be **interpreted authoritatively to apply to all WTO Members**. This is in contrast to **clarification** of a provision by a dispute body applies only **for the purposes of the particular dispute** and the parties to it,[31] and cannot substitute for an interpretation by Members as required by Article IX.2. It follows that legal provisions also cannot be interpreted authoritatively per advice from the Secretariat[32] an interpretation provided by the Chair of a JSI,[33] or the text of a JSI regarding its effect on obligations of other Members,[34] let alone by academic writings or a legal opinion.

E. Specific legal contentions

A number of specific contentions in Mamdouh's opinion will be examined against that broader context.

(i) The need for negotiating mandates in the WTO

Article III.2 of the Marrakesh Agreement covers the WTO's negotiating function. It envisages two kinds of negotiations among Members on their multilateral trade relations, which are differentiated by whether or not the matters being negotiated are covered by existing agreements.

> *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 those negotiations, as may be decided by the Ministerial Conference.*

According to Mamdouh: "*There are no legal requirements in the WTO regarding how a negotiating process should be launched, conducted, or concluded. While it may be politically desirable for WTO Members to take decisions by consensus in launching a negotiation, such action is not legally required by the WTO Agreement*."[35] He also states that neither process requires a collective decision by all Members to start negotiations: "*If multilateral, there would be consensus anyway. ... If plurilateral, it would be a matter primarily for participating countries to decide on*".[36] However, Mamdouh provides no legal argument to support the latter contention, and simply asserts that "*such logic has always been foreseen by explicit provisions as well as followed in practice*".

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[31] *US - Clove Cigarettes*, [258]

[32] *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, Panel Report, WT/DS207 (3 May 2002) at [7.94]

[33] See Joint Initiative on Services Domestic Regulation. Relationship between the Disciplines on Services Domestic Regulation Developed by the Joint Initiative and the GATS. Information Note by the Chairperson, INF/SDR/W/4 (11 May 2020) which says: "since the work of the JSI does not aim to modify the WTO treaty provisions, the amendment procedures of Article X do not apply" at [2.1]

[34] Joint Initiative on Services Domestic Regulation. Note by the Chairman, INF/SDR/W/1/Rev.2 (18 December 2020), Preamble.

[35] Mamdouh at [7], see also [12] – [13]

[36] Mamdouh at [13]

As noted, Article III.2 **envisages two kinds of negotiations** among Members on their multilateral trade relations.

The first sentence requires the WTO "*to provide the forum for negotiations among its Members concerning their multilateral trade relations*" on matters already dealt with under the Annexes.[37] "Provide the forum" means the WTO is the only forum for multilateral negotiations among WTO Members on those matters. That forum may be provided in several ways. **Periodic negotiations on specific trade areas** are **already mandated**, for example, in the Agreement on Agriculture[38] and the GATS[39]. Ongoing negotiations on specific rules have also been mandated in Annex 1 Agreements, as with the domestic regulation disciplines in GATS Art VI.4; sometimes, they have timelines to begin or end, such as emergency safeguard measures in GATS Article X (which have still not been met).

The Ministerial Conference can also **launch a comprehensive round of negotiations**. The Doha round in 2001 had a detailed work programme across a range of trade matters and was subject to a "single undertaking". Alternatively, the Ministerial Conference can mandate specific negotiations, as with the TFA, or proscribe negotiations on certain matters, as the General Council did for investment, government procurement and competition policy in the July 2004 package.[40] In all these instances, positive decisions have been taken at a multilateral level by consensus to mandate these negotiations.

Mamdouh argues that such a mandate is not required where the negotiations are plurilateral.[41] That would have the **perverse effect** that plurilateral negotiations on rules that amend the Multilateral Trade Agreements are easier to initiate in an institution that is committed to multilateralism than multilateral "negotiations among Members" on matters concerning "their multilateral trade relations", which require consensus.

The second sentence of Article III.2 says the WTO "*may*" 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". It is grammatically clear from the positioning of the two commas in the second sentence that **both the conduct of negotiations** on matters not covered by the existing agreements **and the framework for implementing** the results of those negotiations are to be **decided by the Ministerial Conference**, which applies the practice of consensus. If the drafters had intended to restrict the Ministerial Conference's role to the implementation of such agreements, there would not be a comma after "such negotiations". The discretionary term "may" reinforces the need for a positive decision of the Ministerial Conference to launch such negotiations.

This interpretation is consistent with the equivalent provision on negotiations in the draft Dunkel Text from 1991:[42] "The [Multilateral Trade Organization] shall provide the forum for

[37] GATT, GATS, TRIPS, DSU, TPRM
[38] Agreement on Agriculture, Article 20
[39] GATS, Article XIX
[40] Decision Adopted by the General Council on 1 August 2004, WT/L/579 (2 August 2004) at [1(g)]
[41] Mamdouh at [13]
[42] Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA (20 December 1991) (Draft Dunkel Text)

further negotiations among its members concerning their multilateral trade negotiations as may be decided by the Ministerial Conference." This draft clearly envisaged that the decision to conduct future negotiations of whatever kind would rest with the Ministerial Conference.

While Mamdouh argues that no mandate is required for the launching of negotiations of either kind, he accepts that the **outcomes** of negotiations **beyond the existing agreements** require adoption by the Ministerial Conference and could involve formal **amendment** of WTO Agreement through Art X.1 or X.9.[43] However, he asserts that: "Clearly, no such requirement [for a Decision of the Ministerial Conference] applies to [the adoption of] matters covered by existing Agreements".[44] Again, there is no explanation for this view, which ignores the role of the Ministerial Conference in adopting amendments to existing Agreements under Article X on Amendments.

In sum, Mamdouh's argument misinterprets the first sentence of Article III.2 as not requiring a Ministerial Conference mandate for plurilateral negotiations or for the adoption of their outcomes, even where they are on a MFN basis. Negotiations on new matters that do not credibly fall within the scope of any of the Annexed Agreements would require the Ministerial Conference to mandate their launch and adoption of their outcomes under the second sentence of Article III.2.

By contrast, the current JSIs on services domestic regulation, electronic commerce and investment facilitation each **conflict with existing mandates or decisions** regarding negotiations on those matters. In the case of domestic regulation disciplines, the unmandated JSI aims to by-pass the terms, process and institutional body established under GATS Article VI.4 for any such negotiations. The relationship between Article VI.4 and the JSI is addressed in more detail below.

In the case of electronic commerce, the group of WTO Members issued a Joint Statement on Electronic Commerce saying they would initiate "exploratory work together towards future WTO negotiations on trade-related aspects of electronic commerce" after they failed to secure a multilateral negotiating mandate at the 11th Ministerial Conference (MC11) in Buenos Aires in December 2017.[45] In January 2019 they formally launched negotiations,[46] which were open to all WTO Members. These negotiations include matters that are already before the WTO Councils for GATT, GATS and TRIPS and the Committee on Trade and Development pursuant to the 1998 Work Programme on Electronic Commerce.[47] However, that Work Programme only mandated Members to "examine" all trade-related issues relating to global electronic commerce, not to negotiate on them.

In the case of Investment Facilitation, the Joint Ministerial Statement at the MC11 announced structured discussions would begin with the aim of developing a multilateral framework on

[43] Mamdouh at [13]
[44] Mamdouh at [13]
[45] Joint Statement on Electronic Commerce, WT/MIN(17)/60 (13 December 2017)
[46] Joint Statement on Electronic Commerce, WT/L/1056 (25 January 2019)
[47] Work Programme on Electronic Commerce, Adopted by the General Council on 25 September 1998, WT/L/274 (30 September 1998), and subsequently renewed, most recently at the 11th Ministerial Conference in Buenos Aires in November 2016.

investment facilitation.[48] That was despite the express consensus decision of Members in the "July 2004 package" that work towards negotiations on the "relationship between trade and investment" was excluded from WTO until the formal conclusion of the Doha round.[49]

(ii) The status of plurilateral negotiations in the GATS

Mamdouh says that *"Plurilateral trade negotiations are explicitly recognized by Article XIX of the GATS*".[50] It is correct that plurilateral negotiations are referred to in Article XIX and elsewhere in GATS documents. However, those references occur in the specific context of a negotiating round, which Mamdouh ignores.

The structure of the GATS has six parts: Part I: Scope and Definition, Part II: General Obligations and Disciplines, Part III: Specific Commitments, Part IV: Progressive Liberalisation, Part V: Institutional Provisions and Part VI: Final Provisions.

Article XIX Negotiation of Specific Commitments is located in Part IV (Progressive Liberalisation) and specifies how negotiations to extend the GATS schedules of specific commitments on services sectors are to occur. Article XIX.1 requires the launching of a new **round of GATS negotiations** to agree on further sectoral liberalisation within 5 years of the Agreement's entry into force and periodically thereafter. Article XIX refers only to "Members" negotiating through "rounds" - in other words, the only negotiations that are prescribed in the GATS involve Members' engaging multilaterally in rounds. Negotiating guidelines and procedures have to be negotiated before each round, based on an assessment of trade in services overall and on a sectoral basis judged against the objectives of the GATS, including the development acquis.[51]

Paragraph 4 of Article XIX says: "The process of progressive liberalisation shall be advanced *in each such round* through *bilateral, plurilateral or multilateral* negotiations ...". In other words, **plurilateral negotiations are referred to only as a modality in the context of a round** of negotiations that is launched under Paragraph 1. It is inaccurate to suggest that this paragraph "directly calls on Members to engage in plurilateral negotiations",[52] without acknowledging that any such plurilateral negotiations must be part of a multilateral round. It is equally incorrect to say that Paragraph 4 does "not require non-participating Members to take part in deciding on the launch, conduct or conclusion of such negotiation",[53] when Article XIX negotiations can only involve a multilateral round.

The **Guidelines and Procedures for the Negotiations** adopted in 2001 for the GATS2000 round said negotiations shall "*take place within* and shall *respect the existing structure and principles* of the GATS".[54] The existing structure distinguishes between Part II on general disciplines, Part III on specific commitments, and Part IV on progressive liberalisation, which

[48] Joint Ministerial Statement on Investment Facilitation for Development, WT/MIN(17)/48, 11 December 2017
[49] Decision Adopted by the General Council on 1 August 2004, WT/L/579 (2 August 2004) at [1.g)]
[50] Mamdouh at [14] – [16]
[51] Article XIX.3
[52] Mamdouh at [15]
[53] Mamdouh at [15]
[54] Guidelines and Procedures for the Negotiations on Trade in Services. Adopted by the Special Session of the Council for Trade in Services, 28 March 2001, S/L/93 (29 March 2001)

is linked to Part III. As discussed above, the principles of the GATS include multilateralism, the practice of consensus decision-making and the development acquis.

According to Paragraph 11 of the Guidelines, which addressed the modalities of these negotiations, liberalisation was to be advanced primarily through the request and offer approach involving bilateral, plurilateral or multilateral negotiations. Paragraph 11 did not refer to, let alone authorise, stand-alone plurilateral negotiations; consistent with Article XIX.4, plurilateral negotiations were a modality for advancing the mandated multilateral round.

The GATS2000 negotiations became part of the Doha round and the "single undertaking". The **Doha Work Programme 2001** in relation to services made no reference to modalities, aside from request and offer negotiations.[55] The General Council Decision of July 2004 that followed the failure of the Cancun Ministerial Conference in 2003 contained a brief Annex C on services negotiations, which referred to ongoing requests and offers and again made no reference to modalities.[56]

Paragraph 7 of **Annex C to the Hong Kong Ministerial Declaration 2005**[57] provided that: "*In addition to bilateral negotiations*, we agree that the request and offer negotiations should be pursued on *a plurilateral basis* in accordance with the principles of the GATS and the Guidelines and Procedures for the Negotiations on Trade in Services". It also set out the process for those request and offer negotiations. Plurilateral negotiations were to be organised with a view to facilitating the participation of all Members and take into account the limited capacity of developing countries and smaller delegations to participate in such negotiations. The results of request and offers would be extended to all Members on an most-favoured-nation (MFN) basis.

None of these decisions or instruments mandated stand-alone plurilateral negotiations. Plurilateral requests and offers were to **complement the bilateral process within the parameters of the multilateral GATS** negotiations, which from 2001 were part of the single undertaking of the **Doha Round**.

(iii) Historic plurilateral GATS negotiations

Mamdouh draws on the history of negotiations in the Uruguay round and under the WTO to support his argument:

> *Outcomes of plurilateral negotiations under existing multilateral agreements in the WTO are those that can be consolidated in Members' schedules under the GATT and GATS. In such situations, which are by no means exceptional in the history of the GATT and the WTO,* ***the negotiating processes are plurilateral while the outcomes are implemented multilaterally on an MFN basis****. This has been the case for the ITA under the GATT as well as other plurilateral negotiations under the GATS.*[58]

[55] WTO Doha Ministerial Declaration, Adopted 14 November 2001, WT/MIN(01)/DEC/1 (20 November 2001), Para 15
[56] Doha Work Programme. Decision Adopted by the General Council on 1 August 2004, WT/L/579 (2 August 2004), para 1(e) and Annex C
[57] Doha Work Programme Ministerial Declaration, Adopted on 18 December 2005, WT/MIN(05)/DEC (22 December 2005)
[58] Mamdouh at [21], original emphasis; see also [19]

At the end of the Uruguay Round, ongoing negotiations on financial services, basic telecommunications and maritime transport were explicitly mandated by consensus decisions of Ministers taken at the Ministerial Conference in Marrakesh in April 1994 and set out in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations 1994, as well as in Annexes to the GATS.

These mandates clearly create problems for Mamdouh's assertion that mandates are not required for the launch of plurilateral negotiations. He seeks to neutralise that fact by suggesting that: *"Some historic examples of association between collective decisions of Members and the launch of plurilateral negotiations could create the misperception that such decisions are legally required in all cases"*.[59] In particular, he claims that the post-Uruguay round mandates were required only to **address a legal lacuna:** because the WTO was not yet in force, it was impossible to issue a waiver from obligations relating to MFN exemptions and modifications of schedules of specific commitments under Article IX.3 of the Marrakesh Agreement for the duration of those negotiations.

As Mamdouh says, each of the annexes to the GATS that related to the three sectoral negotiations did preserve space to adjust Members MFN exemptions and modify their sector-specific schedules. However, the related instruments also covered a number of **additional matters normally found in a mandate**, including the scope, institutional locus and duration of the negotiations and mechanisms for adopting the outcomes.

The **Annex on Negotiations on Maritime Transport Services** to the GATS was limited to the issues of MFN and schedules of specific commitments. However, the Decision on Negotiations on Maritime Transport set out the scope of the negotiations, expected outcomes, established a negotiating group to carry out the mandate, specified the timeline, and provided for the suspension of Article II (MFN) and Article XXI (for modifying schedules) during the course of those negotiations.[60] The negotiations on Maritime Transport were suspended in June 1996. Some countries made modifications to previous schedules of commitments and it was agreed that MFN would continue not to apply to maritime services. Significantly, negotiations in the GATS2000 round were to resume from the point reached at the time of suspension,[61] effectively integrating the original mandate into the formal GATS Article XIX process.

The mandating and oversight of the **financial services negotiations** went far beyond a mere substitute for waivers. Numerous decisions taken before the WTO came into existence and subsequently by the WTO's Council for Trade in Services and delegated bodies showed active ownership and oversight of the process by the Members and specified modalities for implementation of the outcome.

As with maritime transport, the **Second Annex on Financial Services** to the GATS made provision for additional entries to Members' annex of exemptions from MFN, and for greater or lesser liberalisation of specific commitments on financial services to be inscribed in a

[59] Mamdouh at [8]
[60] Decision on Negotiations on Maritime Transport, Adopted on 15 April 1994LT/UR/D-5/5,
[61] Decision on Maritime Transport Services, Adopted by the Council for Trade in Services on 28 June 1996, S/L/24 (3 July 1996)

Member's schedule, with a specific timeline. However, a series of Decisions also saw the establishment of a Committee on Financial Services with responsibility to formulate proposals or recommendations for the Council for Trade in Services to consider, including proposals to amend the sectoral annex.[62] Minutes of the meeting that established an Interim Group on Financial Services to monitor and report on the ongoing negotiations noted "the objective of the Group's work remained a multilateral, MFN-based agreement covering financial services".[63] Negotiations progressed in stages, with the adoption of interim outcomes,[64] extensions,[65] and ongoing reporting to and oversight by the Committee on Financial Services reporting to the Council for Trade in Services,[66] with an active monitoring role for the Secretariat.[67] The Fifth Protocol to the GATS on Financial Services, which implemented the concluded negotiations, was adopted by consensus on 3 December 1997.[68]

The mandate for, and formal institutional oversight of, negotiations on the **Regulatory Principles for Basic Telecommunications** was even more hands-on. The negotiations were mandated by a consensus Ministerial Decision[69] and inscribed in the Annex to the GATS on Negotiations on Basic Telecommunications. The Ministerial Decision specified that negotiations should occur through a Negotiating Group on Basic Telecommunications, prescribed the scope of the negotiations, identified the Members that had indicated their intention to participate with future participants to notify the depositary, set the timeline, required periodic reports on the negotiations to the Members, prevented gaming by Members to improve their negotiating positions, and specified the adoption of the outcome in Members' services schedules.

The Reference Paper on Basic Telecommunications was adopted through the Fourth Protocol to the GATS, which recorded the end of negotiations that had been mandated by the Ministerial Decision in 1994.[70] The Protocol was agreed by Members whose supplementary schedules of sectoral telecommunications commitments and MFN exemptions were attached and it was opened for adoption by them before a specified date. The Reference Paper was annexed to the sectoral schedules and was adopted by inscribing it in the column on "additional commitments". Crucially, those revised sectoral schedules were adopted as the outcome of the process mandated by consensus. Subsequent adoption of the Reference

[62] Decision on Institutional Arrangements for the General Agreement on Trade in Services, Adopted on 15 April 1994, LT/UR/D-5/3. A Council decision in March 1995 reiterated the delegation to the Committee S/L/1 (4 April 1995). Second Annex on Financial Services at [3].
[63] General Agreement on Trade in Services Interim Group on Financial Services, Note of the meeting on 12 October 1994, S/IGFS/1 (7 November 1994)
[64] S/L/11
[65] Decision on the Application of the Annex on Financial Services, Adopted by the Council for Trade in Services on 30 June 1995, S/L/6 (4 July 1995); Second Decision on Financial Services, Adopted 21 July 1995, S/L/9 (24 July 1995)
[66] Decision on Financial Services, Adopted by the Trade Negotiations Committee, 15 December 1993, S/IGFS/1 (7 November 1994); Decision on Financial Services Marrakesh 14 April 1994; S/L/9; Decision Adopting the Second Protocol to the General Agreement on Trade in Services, Adopted by the Committee on Trade in Financial Services on 21 July 1995, S/L/13 (24 July 1995); S/L/6.
[67] Status of Acceptance of the Second Protocol to the General Agreement on Trade in Services (GATS), Note by Secretariat, S/FIN/W/7 (3 May 1996)
[68] Fifth Protocol to the General Agreement on Trade in Services, S/L/45 (3 December 1997)
[69] World Trade Agreement 1994, III. Ministerial Decisions and Declarations 7(d) Decision on Negotiations on Basic Telecommunications, Adopted 15 April 1994, LT/UR/D-5/4
[70] Fourth Protocol to the General Agreement on Trade in Services, S/L/20 (30 April 1996)

Paper by other Members through the S/L/84 modification process[71] was consistent with that initial Ministerial Decision.

None of these three mandated, sector-specific processes bears any resemblance to the JSIs, where a group of WTO Members on their own initiative initially declared an intention to explore plurilaterally what they deem to be trade-related matters of interest to them and subsequently launched negotiations on those matters without a mandate.

(iv) Plurilateral negotiations post-establishment of the WTO

The only plurilateral negotiation concluded in the WTO has been **the sectoral ITA**. Mamdouh observes that: *"In the context of the Information Technology Agreement (ITA), for example, not a single decision was adopted by all Members to launch, conduct, or conclude the negotiations".*[72] That statement is correct as far as it goes. But its significance for the JSIs is undermined by the **narrow sectoral scope of the ITA**, which only liberalised tariffs on specified products, and the adoption of the outcome by modification of participating Members' schedules through a procedure established consensually by the Members in the GATT text.

The initiation of ITA negotiations in 1996 was not expressly mandated. The outcome was adopted by a plurilateral Statement from Ministers from the 29 countries involved at the WTO's 1st Singapore Ministerial Conference in 1996. According to the Statement, described as a Decision, those Members would all amend their GATT schedules on an MFN basis. The Ministerial Declaration formally "took note" of that development.[73] Subsequent negotiations to expand the ITA were launched as an "informal process" in 2012, the 15th anniversary of the ITA, fell within the Doha round negotiating mandate on tariffs on goods.[74] At the Nairobi Ministerial Conference in December 2015, 54 Members announced they had concluded the expansion of the Agreement. Its adoption was not a formal Decision of the Ministerial Conference.

However, as noted, the ITA has no precedent value for the development of new rules in the JSIs. It was solely concerned to reduce or eliminate tariffs on a sectoral category of goods and bind them in Members' tariff schedules. The process for modifications of those schedules is set out in Article XXVIII of the GATT. Neither the initial nor enhanced ITA involved the adoption of new rules; they did not conflict with existing mandates or ministerial decisions; and they did not involve a contentious interpretation of the provisions of the GATT.

Sectoral negotiations for an **Environmental Goods Agreement** sought to follow the approach of the ITA, but in this case operated within a mandate. The Doha Ministerial Declaration 2001 instructed Members to negotiate for the reduction or, as appropriate, elimination of tariff and non-tariff barriers on environmental goods and services.[75] In July 2014 a group of 18

[71] See Committee on Specific Commitments, Application of Procedures Under Article XXI, JOB/SERV/123 (26 November 2012) at [29]
[72] Mamdouh at [17]
[73] Singapore WTO Ministerial Declaration, Adopted on 13 December 1996, WT/MIN(96)/DEC (18 December 1996) at [18]
[74] Doha WTO Ministerial Declaration, Adopted on 14 November 2001, WT/MIN(01)/DEC/1 (20 November 2001) at [16]
[75] WT/MIN(01)/DEC/1 at [31.3]

participants from 46 countries (with only China and Costa Rica from the developing world) began negotiating an agreement to cut tariffs on an agreement list of goods. The parties were unable to agree, and negotiations have been suspended since November 2016.[76]

(v) Implementing new plurilateral rules through schedules

That historical analysis poses problems for Mamdouh's claim that: "*Outcomes of plurilateral negotiations under existing multilateral agreements in the WTO are those that can be consolidated in members' schedules under the GATT and the GATS.*"[77] That was certainly correct in relation to the tariff cuts in the sectoral ITA under the GATT. However, it is only correct for the GATS to the extent that the outcomes fall within the scope of Part IV (Progressive Liberalisation) and Part III (Specific Commitments). It **does not extend to the adoption of new rules that belong under Part II** (General Obligations and Disciplines).

Mamdouh suggests otherwise, arguing that: "*While such a plurilateral approach has often been used in market access negotiations, it has also been used, albeit to a lesser extent, in rulemaking"*.[78] To support this position, he says "*[t]he history of the WTO provides examples of plurilateral negotiations that successfully integrated their outcomes into the GATT and GATS in the form of improved schedules"* and cites the Fourth and Fifth Protocols to the GATS on telecommunications and financial services, respectively, as having "*consolidated new commitments on market access and national treatment as well as new rules on regulatory matters in these two sectors to the respective schedules of participating Members."*[79]

There are **four problems with that historical analogy** in the contemporary JSI context. First, the sector-specific negotiations on telecommunications and financial services were supported by explicit and detailed negotiating mandates and consensus agreement on the modalities for their adoption. Secondly, the current JSIs are governed by WTO rules that differ from those post-Uruguay mandates on financial and telecommunications services. Thirdly, expert commentators say the Financial Services Agreement adopted by the Fifth Protocol contains no regulatory content in its text *per se.*[80] Fourthly, both negotiations were sector-specific, as required by GATS Part III and Part IV, and did not develop rules of general application.

In the WTO era, as noted above, the only plurilateral negotiation concluded to date under the WTO's auspices was the ITA that *only* liberalised Members' **commitments in their tariff schedules**, with phase in periods and longer transition periods for developing countries. It did not develop any new rules.

The **Trade Facilitation Agreement (TFA)** is the only negotiation of **new rules** to be concluded by the WTO and provided for its entry into force in line with Paragraph 3 of Article X of the Marrakesh Agreement. The TFA was accordingly added to Annex 1A to the GATT through a

[76] WTO, "Environmental Goods Agreement", https://www.wto.org/english/tratop_e/envir_e/ega_e.htm
[77] Mamdouh at [21]
[78] Mamdouh at [16]
[79] Mamdouh at [19]
[80] Armin Von Bogdandy and Joseph Windsor, "Fifth Protocol to the GATS", in Rüdiger Wolfrum, Peter-Tobias Stoll and Clements Feinäugle (eds) *WTO - Trade in Services,* 2008, Brill, 643

Protocol to Amend the Agreement.[81] The General Council adopted the Protocol on 27 November 2014,[82] opening it to acceptance by Members. That occurred in February 2017 after ratification by two-thirds of Members.

The preamble to the Protocol recited: the history of paragraph 27 of the Doha Ministerial Declaration 2001, which provided for negotiations on trade facilitation to begin after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on the modalities of negotiations; the Decision of the General Council by explicit consensus in 2004 to commence negotiations on the basis of the modalities set out in Annex D to that decision; and the Ministerial Decision of 7 December 2013 to draw up a Protocol of Amendment to insert the Agreement on Trade Facilitation into Annex 1A of the WTO Agreement. The preamble also recorded "consensus to submit this proposed amendment to the Members for acceptance".

So, the **only negotiation of new rules in the WTO** has followed the orthodox process of mandate, multilateral negotiations, and adoption by consensus.

(vi) Implementing new general rules through GATS schedules

The favoured vehicle to implement the JSIs is through the GATS schedules. This would be used not only to further liberalise sectors commitments on market access and national treatment, but also to **introduce new rules in the name of "undertakings" under Article XVIII** (Additional Commitments), without the need for amendments under Article X of the Marrakesh Agreement.

Mamdouh writes of plurilaterals generally that: "*new rules incorporated in GATS schedules as additional commitments, subject to certain parameters and consistent with the rules and procedures of the Agreement, on the one hand, and amendments of provisions of the WTO Agreement and its Annexes as provided for in Article X, on the other [are each] governed by different rules and legal procedures*."[83]

However, his distinction between "new rules incorporated in GATS schedules as additional commitments" and "amendments of provisions of the WTO Agreement and its Annexes" **misrepresents the nature and scope of GATS schedules**.

As Mamdouh acknowledges, the content of schedules is subject to certain parameters and needs to be consistent with the rules and procedures of the Agreement. The **distinction between general rules and sectoral commitments** is most easily demonstrated with the JSI on Domestic Regulation disciplines. In the GATS, general rules belong to Part II (General Obligations and Disciplines), not to Article XVIII in Part III (Specific Commitments) and schedules of specific commitments under Part IV (Progressive Liberalisation).

[81] Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization, Decision of the General Council adopted on 27 November 2014, WT/L/940 (28 November 2014)
[82] WT/L/940
[83] Mamdouh at [28]

For example, **generic rules on Transparency** are in Article III under Part II. The Article VI:1 disciplines on the administration of measures of general application affecting trade in services are also located in Part II, even though they apply only to sectors in which a Member has taken specific commitments through their schedules. Interim disciplines on licensing, professional qualifications and requirements, licensing requirements and technical standards are in paragraph 5 of Article VI, again located in Part II.

The scope and process for **development of any "necessary" disciplines** on domestic regulation are prescribed in **Article VI:4,** to be overseen through appropriate bodies established by the Council for Trade in Services. The initial work involved sector-specific disciplines conducted through a Working Party on Professional Services,[84] a distinct subset within the W/120 sectoral classification list. Priority was accorded to the accountancy sector. Disciplines Relating to the Accountancy Sector were adopted in 1998, to be applicable to Members who had taken a sectoral commitment on accountancy services.[85] The Working Party committed to continue working on general disciplines for professional services, while retaining the possibility for sectoral disciplines.[86] These disciplines were to be completed no later than the conclusion of the forthcoming multilateral GATS2000 round.

In preparation for that round, the Council for Trade in Services replaced the Working Party on Professional Services with a Working Party on Domestic Regulation (WPDR).[87] The new Working Party was, consistent with Article VI:4, to develop any "necessary" generally applicable disciplines, including those for individual sectors or groups thereof, and report back to the Council. The **modalities for adopting the general, as opposed to sector-specific, disciplines were not resolved**. As general rules, they might have been adopted by an amendment to Article VI, or may have been added as a separate annex to the agreement through a Protocol, which would also have required an amendment.

Discussions in the Working Party on potential disciplines were intensive, but inconclusive as to whether such disciplines were "necessary". Consequently a group of WTO Members issued a Joint Ministerial Statement at the 11th Ministerial Conference in Buenos Aires, explicitly acknowledging the work to date in the WPDR, calling for an intensification of that work and committing to delivering a multilateral outcome.[88] Subsequently, that sub-group undertook plurilateral negotiations and developed a draft Reference Paper on services domestic regulation.[89] During this time, they changed the title from "GATS Article VI:4 Disciplines" to "Reference Paper on Services Domestic Regulation".[90]

[84] Decision on Professional Services, Adopted by the Council for Trade in Services on 1 March 1995, S/L/3 (4 April 1995)
[85] Decision on Disciplines Relating to the Accountancy Sector, Adopted by the Council for Trade in Services on 14 December 1998, S/L/63 (15 December 1998)
[86] Decision on Disciplines Relating to the Accountancy Sector, Adopted by the Council for Trade in Services on 14 December 1998, S/L/63 (15 December 1998)
[87] Decision on Domestic Regulation, Adopted by the Council for Trade in Services on 26 April 1999, S/L/70 (28 April 1999)
[88] Joint Ministerial Statement on Services Domestic Regulation, WT/MIN(17)/61 (13 December 2017)
[89] Joint Initiative on Services Domestic Regulation. Note by Chairperson, INF/SDR/W/1/Rev.2 (18 December 2020)
[90] Joint Initiative on Services Domestic Regulation. Meeting held on 19 July 2019. Informal summary by the chairman, INF/SDR/R/5 (30 August 2019)

In May 2020 the **Chair of the JSI**, Costa Rica's Ambassador to the WTO, circulated an **"information note**" on his "own responsibility" that set out his view of the relationship between the JSI and GATS Article VI.[91] As he observed, the document has no "legal status".

The Note makes a number of overarching claims. First, the GATS Article VI.4 is not affected by a subset of Members taking additional commitments under Article XVIII.[92] Second, measures referred to in Article XVIII (Additional Commitments) are precisely those to which the Reference Paper pertains.[93] Third, these additional commitments cannot be considered as full or partial fulfilment of the GATS mandate.[94] Fourth, the reference paper "will neither diminish the obligations of the participating Members under the GATS or any other WTO Agreements, nor affect their existing specific commitments."[95] Lastly, since the work of the JSI does not aim to modify the WTO treaty provisions, the amendment procedures of Article X do not apply.[96]

Far from justifying the proposed approach, however, the **Chair's Note identifies multiple aspects** of the draft "Reference Paper" **that properly belong in Part II of the GATS** and therefore impugn the legality of introducing them through Members' schedules. These include a series of general rules "designed to improve Members' regulatory frameworks" that "illustrate the interplay between the disciplines in the draft Reference Paper and existing 'General Obligations and Disciplines' contained in Part II of the GATS", and which claim to introduce new "sound regulatory practices" related to licensing, qualifications and technical standards "which are not rooted in specific GATS provisions".[97]

The proposed provisions the Chair identified variously:

a) "expand the obligations" and "fill certain gaps" in Article VI.3 on processing of applications;[98]

b) add new requirements to Article III.1 on Transparency;[99]

c) build on Article III.4 by requiring Members to establish new "Enquiry Points" to respond to enquiries,[100] and expand the obligations in Article IV.2 to establish contact points;[101]

d) expand the meaning of "objective and transparent criteria" for measures relating to technical standards and licensing and qualification requirements and procedures in Article VI:4 through a footnote;[102] and

e) introduce new provisions not covered by existing rules which involve recognition of professional qualifications, prior comment on proposed laws of general application, rules

[91] INF/SDR/W/4
[92] INF/SDR/W/4 at [1.4]
[93] INF/SDR/W/4 at [1.3]
[94] INF/SDR/W/4 at [1.4]
[95] INF/SDR/W/4 at [2.7]
[96] INF/SDR/W/4 at [2.1]
[97] INF/SDR/W/4 at [3.1]
[98] INF/SDR/W/4 at [3.2]
[99] INF/SDR/W/4 at [3.3]
[100] INF/SDR/W/4 at [3.4]
[101] INF/SDR/W/4 at [3.5]
[102] INF/SDR/W/4 at [3.6]

for authorisation fees, examinations and procedures, and require administration of authorisation not to discriminate on gender.[103]

Lest there be any doubt that the Reference Paper purports to introduce or amend general rules in the GATS, the Information Note concludes that "the disciplines developed by the Joint Initiative expand on provisions already contained in the GATS – partly by building in greater detail on existing regulatory obligations, and partly by introducing additional elements of good regulatory practice".[104] **Hence, an amendment procedure is required**, in accordance with Article X.5 of the Marrakesh Agreement.

(vii) The limits to "additional commitments" in GATS schedules

Despite the explicit function of Part II to host General Rules, Mamdouh seeks to justify the **inclusion of new rules developed in plurilateral negotiations as "Additional Commitments"** through Article XVIII in Part III (Specific Commitments):

> *New commitments under part III of the GATS [Article XVI Market Access, Article XVII National Treatment, Article XVIII Additional Commitments] can only take the form of either bindings (in the form of "limitations") on market access and national treatment or, new obligations ("undertakings") regarding services related measures as Additional Commitments. ... [S]uch "Additional Commitments" could only take the form of new rules adding to a Member's overall level of obligations. Additional Commitments can relate to any regulatory matter than falls within the scope of the GATS to the extent the measures in question are not subject to scheduling under Articles XVI (Market Access) and XVII (National Treatment).*[105]

Taken out of its context, Article XVIII appears to provide that flexibility:

> *Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI [market access] or XVII [national treatment], including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.*

However, Article XVIII (Additional Commitments) is **located in the GATS Part III** (Specific Commitments). Article XX, which describes the nature, structure and content of schedules, is located in Part IV (Progressive Liberalization), which explicitly relates back to Part III. Article XX reads (emphasis added):

> *1. Each Member shall set out in a schedule the <u>specific commitments</u> it undertakes under Part III of this Agreement [Specific Commitments]. <u>With respect to sectors where such commitments are undertaken</u>, each Schedule shall specify:*
>
> *(a) terms, limitations and conditions on market access;*
>
> *(b) conditions and qualifications on national treatment;*
>
> *(c) <u>undertakings</u> relating to additional commitments; …*

[103] INF/SDR/W/4 at [3.7]
[104] INF/SDR/W/4 at [3.7]
[105] Mamdouh at [26] – [27]

Article XX 1(c) therefore provides for the scheduling of additional commitments for services sectors only where specific commitments are undertaken. This limitation is reinforced in the Guidelines for scheduling of specific commitments in the GATS[106] (quoted by Mamdouh[107]), which state that **Article XVIII (Additional Commitments) provides a *sector-specific* mechanism** to implement the kinds of general disciplines anticipated in Article VI, especially Articles VI:4 and VI:5.

Participants in the Services Domestic Regulation JSI have already drafted their revised GATS schedules, with a standard entry in the "additional commitments' column that reads "[State X] undertakes as additional commitments the disciplines contained in Section II of the document INF/SDR/W/1 for all sectors included in this schedule".[108] A few Members add new sectors; some support a separate document for financial services, and reference that; other developing countries inscribe their transition periods and the paragraphs they relate to.

The effect of this is to **achieve an equivalent outcome to GATS Article VI.1 or Article VI.5**, both of which set out general rules in Part II that apply only to scheduled services, **as a scheduled commitment** that does not require amendment, but can – its proponents presume – be adopted simply as a modification to the schedule requiring certification.

(viii) Modifying Schedules

Assuming the JSI participants do not seek to adopt their outcomes through a Protocol, on which would be governed by consensus, but rather through their GATS schedules, the **procedures for "certification" of the modification of schedules under Article XXI** would apply. That would occur even where a group of Members collectively adopt the basis for the proposed modification (as with the ITA).

According to Mamdouh, "*a schedule certification procedure has the sole object and purpose of the verification of the content of the modifying Member's schedule regarding its effect on existing rights of other Members under the Agreement."*[109] Before discussing the certification procedure, it is therefore essential to emphasise that the content of any proposed modification must be consistent with the GATS, including the scope of a schedule and of Article XVIII. **Formal certification** of an entry under the "additional commitments" column of a GATS schedule **cannot remedy a more fundamental inconsistency with the GATS** Agreement itself or with the procedures for amendment set down in Article X of the Marrakesh Agreement.

[106] Guidelines for Scheduling of Specific Commitments under the General Agreement on Grade in Services, Adopted by the Council for Trade in Services on 23 March 2001, S/L/92 (28 March 2001)
[107] Mamdouh at [26]
[108] Indicative Draft Schedule of Specific Commitments under the document reference INF/SDR/IDS followed by the Member's name. Schedules are dated late 2019.
[109] Mamdouh at [32]

There are two processes for modifying schedules. One, set out in S/L/80, covers withdrawal from or amending of schedules;[110] the second, in S/L/84,[111] applies to "new commitments, improvements to existing ones, or rectifications or changes of a purely technical character that do not alter the scope or the substance of existing commitments". Both provide opportunities for objection, followed by consultation.

The Chair of the Domestic Regulation JSI has indicated the intention to rely on S/L/84.[112] That allows another Member to object to the proposed modification within 45 days of notification. The grounds on which they can do so are not specified, but the Member is expected to identify the specific elements that give rise to the objection the extent possible. The proponent and objector then enter into consultations to seek a resolution. If no agreement is reached in 90 days, the process for withdrawal and amending schedules under S/L/80 may come into play. That process provides a further, longer period for consultation. If agreement is not reached between the proponent and the objector, the matter may go to arbitration.

The certification process for modification of a schedule under S/L/80 **assumes a bilateral approach whose aim is to identify impairments to the original bargain** that was reached through the request and offer process amongst Members and restore the balance of sectoral liberalisation through new liberalisation in sectors of commercial interest to an affected Member.

The **terms of reference for arbitration**, set out in S/L/80, reinforce the limited scope of schedules. To **maintain the balance of rights and interests** under the original schedule[113] assumes that commitments on market access, national treatment and additional commitments can be weighed in a recalibration exercise across sectors. These objectives and modalities are incompatible with modifications that involve new rules, especially of a general cross-sectoral nature. To apply a recalibration exercise to the latter through an arbitration would also be impracticable when the objection relates to the impact on other rules, including their implied amendment or abrogation, let alone objections to the systemic implications for the GATS, and the multilateral system generally, of permitting unmandated plurilateral negotiations to misuse schedules in that way.

(ix) Practical complexities of adopting JSIs through GATS schedules

There are further **practical questions** regarding the reliance being placed on the GATS as the Agreement through which the JSIs could be implemented. The Services Domestic Regulation JSI clearly falls within the scope of the GATS and issues that have been discussed above. But the misuse of schedules to adopt rules and avoid the process for Amendment under Article X of the Marrakesh Agreement poses another unresolved question: are the existing GATS provisions that have been duplicated or amended by the Reference Paper intended to co-exist; if so, how?

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[110] Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (GATS), Adopted by the Council for Trade in Services on 19 July 1999, S/L/80 (29 October 1999)

[111] Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments, Adopted by the Council for Trade in Services on 14 April 2000, S/L/84 (18 April 2000)

[112] INF/SDR/W/4 at [2.2]

[113] S/L/80 at [13]

For example, Article VI.4 mandates any "necessary negotiations" on disciplines on licensing and qualification requirements and technical standards. The draft JSI Reference Paper says its objective is to elaborate on the GATS, pursuant to Article VI.4.[114] According to Chair the Reference Paper builds upon proposals submitted to the WPDR in 2017;[115] yet he claims: "The mandate contained in GATS Article VI:4 is not affected by the fact that a subset of the WTO Membership undertakes additional commitments in accordance with GATS Article XVIII".[116]

Leaving aside the underlying issues of legality, this **suggests that Article VI.4 and the Reference Paper would co-exist**. Yet footnote 17 in the Reference Paper redefines "objective and transparent criteria" for domestic regulation disciplines in a manner that alters the meaning of that phrase under VI.4.[117] Does that apply only between those who adopt the Reference Paper? How would implementing states differentiate between adopting and non-adopting Members in their application of that new rule?

Further, GATS Article VI.5 applies limited disciplines of the kind forshadowed in Article VI.4 pending the conclusion of any "necessary negotiations". Does Article VI.5 **operate in parallel** to the Reference Paper as well? And does the new footnote also apply to Article VI.5, which imports the phrase from Article VI.4, for those countries who adopt the Reference Paper? Again, how does that **impact on non-participating Members** who may challenge reliance by those who adopt the Reference Paper on elements provided for in the footnote?

Other JSI outcomes will be more complex. Even where elements of a JSI arguably relate to trade in services, attempting to insert them in a GATS schedule on a sectoral basis would be fraught with difficulties.

Take, for example, the **JSI on electronic commerce**. There is no agreement among trade in services experts about what services sectors digital trade rules apply to. Even the sector of Computer and Related Services, which is defined in most GATS 1994 schedules that use the W/120[118] and CPCprov84[119] classifications, does not clearly include many more recent digital services, such as web hosting, cloud servers or social media. Members may have commitments on a few or many other digitally-relevant sectors, such as advertising, distribution services, professional services, tourism or education services. The commitments will vary across market access and national treatment in each of the four modes, including cross- border supply, and are subject to numerous limitations.

A horizontal entry that applies the general JSI rules, such as those dealing with data location or local content or transparency, to all sectors a Member has committed in its GATS schedule would be impractical to implement unless the Member intends to de facto broaden its

[114] INF/SDR/W/1/Rev.2 , Art 1
[115] INF/SDR/W/4 at 1.2
[116] INF/SDR/W/4 at 1.4
[117] INF/SDR/W/1/Rev.2 , fn 17 to Article 22
[118] Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120 (10 July 1991)
[119] This classification system is no longer hosted on the Un Statistics website. For a pdf version see United Nations, Provisional Central Product Classification ST/ESA/STAT/SER.M/77 at https://www.wto.org/english/tratop_e/serv_e/cpc_provisional_complete_e.pdf

commitments to all sectors potentially affected by those rules.[120] Again, that means general rules would be introduced through an abuse of the GATS scheduling mechanism.

Further complications arise with regard to **subject matter that does not belong in the GATS**. Seeking to bring regulation of spam, consumer protection, privacy or non-disclosure of source code into the GATS as a "measure affecting trade in services" would not be in good faith and would open a Pandora's Box to allow the inclusion of anything as a GATS-related measure. Such rules may belong belong in different agreements; for example, the source code provision belongs in the TRIPS, which would require a formal amendment. A single JSI may therefore span a number of existing agreements. Or it might fall outside them altogether: consumer protection and privacy rules do not clearly belong in any existing Annex 1 Agreement.

The **Investment Facilitation JSI would be more problematic still**, given that not all sectoral entries in Members' GATS schedules commit Mode 3, or do so only for some elements of a sector, and are subject to limitations. To rely on the GATS schedule to implement the Investment Facilitation JSI would also mean limiting its scope to investment in services, which is exceptionally difficult to disentangle from investment in industry or agriculture, especially in the era of servicification. If Investment Facilitation could not credibly be presented as a purely GATS issue, how else might it be adopted in the WTO? How might these rules then cross-fertilise with those in bilateral investment treaties or investment chapters of FTAs, including access to investor-state dispute settlement?

The **same matter may also be covered in several JSIs, but with different wording**. A clear example is the "transparency" obligation to provide opportunities for foreign states and their "affected interests" to comment on proposed measures. The proposed wording differs significantly in the draft Services Domestic Regulation Reference Paper[121] and the Investment Facilitation draft text,[122] and could yet be included in the e-commerce JSI text. The words of the Appellate Body in *Brazil – Desiccated Coconut* resonate again: "The authors of the new **WTO regime intended to put an end to the fragmentation** that had characterized the previous system …".[123]

F. Challenges to the legality of the JSIs

Mamdouh acknowledges that *"integrating a negotiated outcome into the legal architecture of the WTO ... must involve non-participants in various ways, depending on the situation, to ensure that outcomes do not prejudice existing rights of non-participants"*.[124] However, the contingency in this statement begs a number of series questions: **in what ways may non-participants be involved**, what kinds of situations does that depend on, and what forms of existing rights are to be protected?

[120] As is proposed in the draft schedules circulated in late 2019 under the number INF/SDR/IDS/[Member name].
[121] INF/SDR/W/1/Rev.2 , Article 14 to 18.
[122] WTO Structured Discussions on Investment Facilitation for Development, Informal Consolidated Text. Revision, INF/IFD/RD/50/Rev.8 (4 February 2021), Article 3.4
[123] WT/DS22/AB/R at 18
[124] Mamdouh at [18]

The clear objective behind using GATS schedules to implement the JSIs is to **minimise the opportunities for collective intervention by Members**. Mamdouh says the certification process is not **equivalent to consensus**. That is correct to the extent that there is no requirement for Members collectively to adopt the modified schedule. However, an objection by a single Member triggers the process in S/L/84 and, if unresolved, the process in S/L/80. It would be quite possible for a multiplicity of Members to notify the same objections collectively.

The JSI proponents seem to **under-estimate the potential for broader legal challenges** to their strategy. Using the GATS schedules as a Trojan Horse to amend existing or introduce new WTO rules, pre-empt other mandated multilateral negotiations, and overcome the absence of, or even prohibition on, a mandate to negotiate certain matters, would impact on the entire membership of the WTO.

To date, Members who **view the JSIs as lacking in legal legitimacy** have challenged them in relevant Councils and committees and objected to the Secretariat's role in facilitating them. Opposition can be expected to intensify in the lead-up to the MC12, especially if there are attempt to legitimise the JSIs in some way in a Ministerial Declaration. Such an attempt would deepen the rifts that are making the WTO dysfunctional. Subsequent moves to implement the outcomes of the JSIs through schedules would be even more provocative and can be expected to generate divisive disputes that go to the core of the multilateral trade regime.

A significant number of Members have **already signalled specific objections**. India has cited a number of examples where proposed services domestic regulation rules would alter Part II provisions, and specific prejudices to its interests, including the effective foreclosure of negotiations on domestic regulations under Article VI.4 to deal with Mode 4 issues.[125] Members have also objected to the downstream consequences of adopting domestic regulation disciplines under Article XVII, such as the effective sidelining of the Working Party on Domestic Regulation, and the impacts on the integrity of the WTO's institutional rules more generally.[126]

But the **implications run much deeper**. A sub-group of Members has launched breakaway plurilateral negotiations, which they plan to implement through misinterpretations of WTO rules and abuse of schedules. At the same time, they have declared the mandated Doha round to be dead.

Their immediate purpose is to circumvent the rest of the WTO Membership and the practice of consensus, override existing mandates, and bypass blockages to achieve their offensive interests. Those actions have a longer-term systemic effect of sidelining the institutionally recognised forums for decision making that have conferred those mandates and flouting the rules for amendment and interpretation of the WTO Agreements. Conferring legitimacy on that process would have profound **consequences for the integrity of the WTO** as a "rules-based organization" and its constitutive instruments.

[125] Working Party on Domestic Regulation. Communication from India. Joint Initiative on Services Domestic Regulation. Opening statement made at the WPDR meeting on 3 December 2019 (unofficial room document), RD/SERV/154* (December 2019)
[126] See especially WT/GC/W/819

If permitted to proceed, the JSIs would also license rule-making by a select group of Members on **a potentially limitless range of matters** that are not directly related to multilateral trade relations, including other matters that have been explicitly rejected by the Membership, such as labour, environment and investment protection.

There is a strong prospect that attempts to implement the outcomes of the JSIs will face **formal legal challenges** from Members who allege multiple systematic and deliberate breaches of the WTO's core rules relating to negotiations, scheduling, and amendments. The dispute settlement system was never well-equipped to address such fundamental challenges, and it certainly is not now. The current fissures that have riven the Organization could then implode.

If this is what WTO "reform" aims to achieve, then promoters of the JSIs are **adding fuel to** the fire of those who **attack the legitimacy of the WTO as undemocratic, anti-development, and driven by the interests of powerful states** to serve their own interests.