

Complexities and Legalities of pursuing plurilateralism in a WTO founded on multilateralism

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What is the legal status of the plurilateral JSIs in a multilateral WTO?

My concern is with negotiation of **new rules**,
not the negotiation of new
tariff concessions in GATT schedules or
specific commitments on services sectors in GATS schedules

Starting with first principles ...

The WTO is a creature of its constitutive instruments.

Its institutional functions, including negotiations and adoption of substantive outcomes must

comply with the rules of **Marrakesh Agreement** and its **Annexes**.

If Members **collectively agree** those rules are not fit for purpose

they must **agree collectively** on changes

and **implement** those changes **collectively**

in **accordance with the existing rules**.

If the meaning of relevant rules is **disputed**,

only the Members collectively can **authoritatively interpret** them.

Sub-groups of Members cannot do so **unilaterally**.



Despite this, advocates of JSIs say plurilaterally negotiated outcomes that seek to insert new rules into Multilateral Trade Agreements through schedules on an MFN basis are consistent with the WTO's constitutive instruments and rules.

I suggest they are not, because they ...

- i. legally and practically **undermine multilateralism**
- ii. **lack a mandate** for the negotiations
- iii. propose to adopt new rules **without formally amending** existing agreements;
- iv. would **misuse GATS schedules**; and
- v. have **systemic consequences** for multilateral processes in ways that further **marginalise developing countries** in the WTO.

1. Multilateralism is at the core of the WTO

Treaties must be interpreted in light of their **objects and purpose**.

The WTO is premised on **multilateralism**,

its annexed agreements are “**Multilateral Trade Agreements**”,

its decision-making structures adopt the **practice of consensus**,

its objects are to “create an integrated, more viable **multilateral** trading system” and “to preserve basic principles and further objectives” that underlie that system.

Plurilateralism is exceptional, whether as a basis for negotiating new rules or entirely new Plurilateral Agreements.

2. The lack of mandate for JSI negotiations

WTO provides 2 sources for negotiating mandates

1. Marrakesh Agreement Art III.2

sets out the WTO's negotiating function and its limits ...

negotiations must be **among WTO Members**

on matters that relate to **their multilateral trade relations**,

- (i) in **existing** Multilateral Trade Agreements (multilaterally), or
- (ii) new matters as agreed consensually by Ministerial Conference.

No **basis for unmandated plurilateral** negotiation on rules relating to existing agreements.

2nd Option: Inbuilt negotiating mandates

GATS Art XIX: Negotiations of Specific Commitments.

This only mandates periodic **multilateral rounds**

References to **plurilateral** processes in Art XIX


are one modality **within those multilateral rounds**.

Further, the rounds are to negotiate on **specific commitments**.

Art XIX and its negotiating Guidelines do **not** mandate stand-alone **plurilateral negotiations** of new GATS rules.

The TiSA Conundrum

If plurilateral negotiations on new trade rules can be launched without a specific WTO mandate, why did the **Trade in Services Agreement (TiSA)** have to be negotiated outside the WTO, then work out how to insert it into GATS?



**3. Can new rules that are developed in the JSIs
be adopted through schedules
without amending existing agreements?**

Options for adopting rules developed in JSIs

1. Amendment by Article X to the Marrakesh or Annexed Agreements

through the practice of consensus, with voting in rare instances. The JSIs clearly lack consensus, hence moves to bypass Art X.

2. Members' Schedules and modifications

Scope of schedules is legally limited in

- GATT Art II to Schedules of Tariff Concessions (per ITA I & II)
- GATS Art XX Schedules of Specific Commitments on market access, national treatment, additional commitments.

Specific modification procedures for each

Rules belong in Part II of GATS

GATS schedules are the favoured option

But they need to operate within the **GATS framework ...**

Part II: General Obligations and Disciplines

Part III: Specific Commitments (sectoral commitments)

- National treatment
- Market access
- Additional commitments

Part IV: Schedules of Specific Commitments

4. Misuse of GATS schedules

The scope of “**additional commitments**” in GATS schedules must conform to the rules on schedules, ie be sector-specific.

General rules proposed in JSIs belong in

Part II: General Obligations and Disciplines .

Extended rules on transparency, administration, contact points, fees and **new rules** eg. on local presence, data location, require **amendments** to relevant rules in GATS **Part II**.

Rules on source code, spam, investment facilitation on goods are **not even GATS issues**.

5. Systemic Impacts

Concerns already raised by Members if JSIs are legitimised, is the **precedent** will allow some Members to

- override **existing mandates**;
- undermine recognised **forums** for decision making;
- bypass rules on **amendments** and **interpretation**;
- set aside demands from **developing countries** in related areas;
- license rule-making by self-selecting groups of Members on **potentially limitless** range of matters.

Formal legal challenges can be expected,

deepening **frictions in WTO** and

fuel to fire of those who **attack legitimacy of WTO**

as dominated by powerful states.



A paper setting out the full legal argument supporting this presentation will be published shortly.

Thank you.

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