

ORIGINAL ARTICLE

Transience of (In)Formality: The Role of the Joint Initiatives in Reforming the WTO Negotiations

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Abstract

This paper develops the concept of transience of (in)formality to refer to the intersection of formal and informal negotiating procedures in the WTO decision-making system. It argues that both formal and informal negotiating processes are essential for delivering negotiating outcomes in the WTO. Particularly, the article assesses how informal negotiating practices emerge within the WTO formal framework and align with it. The analysis highlights how negotiating practices (re)shape existing norms, both formal and informal, adapting the WTO to overcome challenges and meet current needs. It also disputes legal formalistic perspectives that permeate trade literature and offer limited accounts of Members' agency in the WTO. The paper uses the Joint Initiatives as a case study to illustrate the convergence between formality and informality and a possible way ahead for the WTO negotiations. By broadening the understanding of law-making, it contributes to the discussion on WTO reform. It provides alternatives that reflect the reality of WTO negotiations and underlines the institution's relevance.

Keywords: WTO law-making; negotiating procedures; joint initiatives; WTO reform

1. Introduction

International rules' ability to develop and adapt has long been praised as one of the main strengths of public international law (PIL).¹ However, the law-making process promoting such changes remains a topic of dispute. While some posit that international rules rely on formal processes granting them legitimacy and certainty,² others argue that informal processes are steering

¹D. Endres (2023) 'Conceptualizing Legal Change as "Norm-Knitting" through the Example of the Environmental Human Right', *Leiden Journal of International Law* 1; J. Brunnée and S.J. Toope (2018) 'International Law and the Practice of Legality: Stability and Change', *Victoria University of Wellington Law Review* 49, 429; F. Smith (2018) 'From Agriculture to Food Security: Embedded Liberalism and Stories of Regulatory Change', in G. Moon and L. Toohey (eds.), *The Future of International Economic Integration: The Embedded Liberalism Compromise Revisited*, Cambridge University Press; E. Adler and V. Pouliot (2011) 'International Practices', *International Theory* 3, 1; T.M. Franck (2006) 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium', *American Journal of International Law* 100, 88; M. Finnemore and K. Sikkink (1998) 'International Norm Dynamics and Political Change', *International Organization* 52, 887.

²J. Kelsey (2022) 'The Illegitimacy of Joint Statement Initiatives and Their Systemic Implications for the WTO', *Journal of International Economic Law* 25, 2; J. Klabbers (1998) 'The Undesirability of Soft Law', *Nordic Journal of International Law* 67, 381; P. Weil (1983) 'Towards Relative Normativity in International Law?', *The American Journal of International Law* 77, 413; M. Koskeniemi (2001) *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (1st edn), Cambridge University Press, 494–509; J. d'Aspremont (2011) *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules*, Oxford University Press; See also the analysis in N. Lamp, 'A Historical Perspective on India's and South Africa's Threat to Block the Implementation of the Joint Statement Initiatives in the WTO, and a

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current law-making efforts, especially given the heterogeneity of actors and interests at the negotiating table.³ I argue that this dichotomy misses the mark. In fact, the intersection between these two processes is what creates a fertile environment for rulemaking and rule development, what I call, the transience of (in)formality. This can be described as the dialogue between formal and informal processes in international law-making as they are not mutually exclusive but rather coexist and shape and reshape one another.

I apply this concept to the negotiations taking place at the World Trade Organization (WTO) to make sense of its decision-making system as countries keep developing new negotiating practices. This approach advances a more pragmatic narrative to explain the WTO's functioning as it highlights the living and evolving features of the WTO by foregrounding the agency of its Members in the negotiating process.⁴ In this sense, the negotiating dynamics at the WTO provide evidence that international rules are the result of 'processes of social learning and contestation'.⁵ Countries are not only affected by WTO rules, but they construct⁶ the meaning of those rules themselves⁷ as they interact and forge their identities.⁸ This contrasts with the rigid rules-based system rationale upon which the Agreement Establishing the WTO (WTO Agreement) was concluded.⁹ The argument casts light on the shortcomings of dominant trade literature centred on legal formalistic views that reduce the WTO to its rules and institutions and overlook its most important element – its membership.

WTO norms are not autonomous but exist within a context that gives them meaning.¹⁰ Such meaning emerges largely from formal and informal interactions between Members as they negotiate in pursuit of their interests. The WTO itself 'is a product of historical struggle and an institution of its time'.¹¹ Social practices play a key role in supporting and legitimizing the legality of norms.¹² To make sense of such practices, I bring to the fore the agency of WTO Members and, supplementarily, the interactions among diplomats, negotiators, capital specialists, the Secretariat

Potential Way Forward', International Economic Law and Policy Blog, 26 February 2021, <https://ielp.worldtradelaw.net/2021/02/a-historical-perspective-on-indias-and-south-africas-threat-to-block-the-implementation-of-the-joint.html> (accessed 1 March 2021).

³See A.-M. Slaughter (2009) *A New World Order*, Princeton University Press; J. Pauwelyn, R.A. Wessel, and J. Wouters (2014) 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking', *European Journal of International Law* 25, 733; C.B. Roger (2020) *The Origins of Informality: Why the Legal Foundations of Global Governance Are Shifting, and Why It Matters*, Oxford University Press; C. Tan (2013) 'Navigating New Landscapes: Socio-Legal Mapping of Plurality and Power in International Economic Law', in A. Perry-Kessaris (ed.), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext*, Routledge; K.W. Abbott et al. (2000) 'The Concept of Legalization', *International Organization* 54, 401; K.W. Abbott and D. Snidal (2000) 'Hard and Soft Law in International Governance', *International Organization* 54, 421; B. Choudhury (2018) 'Balancing Soft and Hard Law for Business and Human Rights', *International & Comparative Law Quarterly* 67, 961; A.T. Guzman and T.L. Meyer (2010) 'International Soft Law', *Journal of Legal Analysis* 2, 171; J. Pauwelyn, R. Wessel, and J. Wouters (eds.) (2012) *Informal International Lawmaking*. Oxford University Press.

⁴R. Wolfe (2008) 'Arguing and Bargaining in the WTO: Does the Single Undertaking Make a Difference?' (Prepared for the Canadian Political Science Association held 4–6 June 2008, www.cpsa-acsp.ca/papers-2008/Wolfe.pdf), 2.

⁵Brunnée and Toope, 'International Law and the Practice of Legality' (supra n. 1), 432.

⁶See the analysis by Lang on the contribution of a constructivist approach to international trade law and Ruggie's notion of an 'intersubjective framework of meaning'. A.T.F. Lang (2006) 'Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime', *Journal of International Economic Law* 9, 81.

⁷L. Webley (2012) 'Qualitative Approaches to Empirical Legal Research', in P. Cane and H.M. Kritzer (eds.), *The Oxford Handbook of Empirical Legal Research*, Oxford University Press, 930.

⁸Wolfe, 'Arguing and Bargaining in the WTO' (supra n. 4), 3.

⁹M.E. Footer (2006) *An Institutional and Normative Analysis of the World Trade Organization*, Nijhoff, 270.

¹⁰L. Mather (2011) 'Law and Society', in R.E. Goodin (ed.), *The Oxford Handbook of Political Science*. Oxford University Press, 289.

¹¹M. Eagleton-Pierce (2012) *Symbolic Power in the World Trade Organization*, Oxford University Press, 7.

¹²R. Wolfe (2005) 'See You in Geneva? Legal (Mis)Representations of the Trading System', *European Journal of International Relations* 11, 339, 343–344.

staff, the WTO DG, and chairpersons, for they directly influence the negotiating dynamics.¹³ Without undermining the high politics behind the WTO system or the political economy strategies supporting countries' stances, the focus on Members allows for a better understanding of how rules are shaped¹⁴ through day-to-day interactions and exchanges in the negotiating branch of the WTO.¹⁵ The negotiating leg is the least formal of the three WTO functions, which also comprises dispute settlement and trade policy review.¹⁶ It aims at achieving an outcome that may take the form of different decisions, such as exemptions, amendments, and new agreements.¹⁷ The interactions underpinning WTO negotiations range from coffee breaks and bilaterals to General Council and committee meetings, also covering informal meetings such as in the context of coalitions and small groups.

Formality and informality coexist in the WTO decision-making system. Informal processes are as relevant as formal ones in achieving negotiating outcomes, according to which all the items in the negotiating round agenda should be agreed upon by all the 164 WTO Members, and overcoming the current procedural trap resulting from the consensus and the single undertaking.¹⁸ The Joint Initiatives (JIs) offer a good example of this intersection. The JI on Investment Facilitation for Development (IFD), in particular, shows how Members use the WTO structure and emulate the formal stages of negotiations in an informal initiative not regulated by the WTO Agreement and disputed by some countries. Whereas political science and international relations scholars have long been discussing formal and informal processes in the WTO,¹⁹ the topic lacks further consideration by law.²⁰ Particularly, legal literature on the WTO's informal negotiating mechanisms is minimal²¹ and the focus is on the deliberative activities of WTO committees, especially through specific trade concerns (STCs).²² In this context, this article adds a

¹³See, for example, G.R. Winham (2006) *An Institutional Theory of WTO Decision-Making: Why Negotiation in the WTO Resembles Law-Making in the US Congress*, Munk Centre for International Studies, University of Toronto; R. Wolfe (2004) 'Informal Political Engagement in the WTO: Are Mini-Ministerials a Good Idea?', in J. Curtis and D. Ciuriak (2004) *Trade Policy Research 2004*, Dept of Foreign Affairs and International Trade; M. Elsig (2011) 'Principal-Agent Theory and the World Trade Organization: Complex Agency and "Missing Delegation"', *European Journal of International Relations* 17, 495.

¹⁴See R. Adler-Nissen (2016) 'The Social Self in International Relations: Identity, Power and the Symbolic Interactionist Roots of Constructivism', *European Review of International Studies* 3, 27.

¹⁵J.S. Odell (2000) *Negotiating the World Economy*, Cornell University Press, 4.

¹⁶S. Cho (2014) 'How the World Trade Community Operates: Norms and Discourse', *World Trade Review* 13, 685, 703; R.W. Stone (2011) *Controlling Institutions: International Organizations and the Global Economy*, Cambridge University Press, 103.

¹⁷J.H. Jackson (2006) *Sovereignty, the WTO and Changing Fundamentals of International Law*, Cambridge University Press, 108. See H. Nottage and T. Sebastian (2006) 'Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods of Changing WTO Law', *Journal of International Economic Law* 9, 989.

¹⁸J. Tjmes-Lhl (2009) 'Consensus and Majority Voting in the WTO', *World Trade Review* 8, 417, 435; J.H. Jackson (2001) 'The WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited', *Journal of International Economic Law* 4, 67, 78.

¹⁹See J.S. Odell (2009) 'Breaking Deadlocks in International Institutional Negotiations: The WTO, Seattle, and Doha', *International Studies Quarterly* 53, 273; J.S. Odell (ed.) (2006) *Negotiating Trade: Developing Countries in the WTO and NAFTA*, Cambridge University Press; A. Narlikar (2003) *International Trade and Developing Countries: Bargaining and Coalitions in the GATT and WTO*, Routledge; Wolfe, 'Arguing and Bargaining in the WTO' (supra n. 4); Wolfe, 'Informal Political Engagement in the WTO' (supra n. 13); K. Hopewell (2016) *Breaking the WTO: How Emerging Powers Disrupted the Neoliberal Project*, Stanford University Press.

²⁰Indeed, most of the legal literature is on the effect of rules and agreements and their impact on countries, also addressing the main bottlenecks of the formal structure and proposing reforms to tackle them.

²¹Some of the main exceptions being Footer, *An Institutional and Normative Analysis* (supra n. 9); N. Lamp (2017) 'The Receding Horizon of Informality in WTO Meetings: The Receding Horizon of Informality in WTO Meetings', *Journal of the Royal Anthropological Institute* 23, 63; N. Lamp (2018) 'The "Practice Turn" in International Law: Insights from the Theory of Structuration', in M. Hirsch and A. Lang (eds.), *Research Handbook on the Sociology of International Law*, Edward Elgar Publishing.

²²M.B. Karttunen (2020) *Transparency in the WTO SPS and TBT Agreements: The Real Jewel in the Crown*, Cambridge University Press; F. Bohnenberger (2021) 'What Is the "Regular Work"? Constructing and Contesting Everyday Committee Practices in the World Trade Organization', *Review of International Political Economy* 1; R. Wolfe (2021) 'Informal Learning and WTO Renewal Using Thematic Sessions to Create More Opportunities for Dialogue', *Global*

legal lens to the examination of the WTO negotiations, including its structure, procedures, and dynamics, to understand how norms evolve and adapt.

My analysis of law as a constellation of normative behaviours that go beyond formal law-making and dispute settlement provides a comprehensive way of making sense of law-making in international institutions and the WTO in particular. The argument I develop contributes to the WTO reform debate, proposing that such reform should not be limited to a top-down approach or to formal institutional and legal changes; instead, the WTO reform is continually taking place through Members' interactions as they keep adapting the organization to new needs, interests, and contexts. This means that discussing WTO reform should include how Members engage with the existing rules and institutional arrangements. The WTO design enables its survival and relevance in a fast-paced world. Concerning the employed terminology, whilst *practice* refers to informality, *process*, *procedure*, and *mechanism* are all linked to both formal and informal negotiating instruments. Similarly, norms and rules are used interchangeably.

This paper starts by assessing how formal and informal negotiating processes coexist in the WTO and support the decision-making system. I develop the concept of transience of (in)formality to embody the intersection between formality and informality. Following this, the analysis discusses examples of the creation and improvement of negotiating mechanisms in the WTO. The article then applies the notion of transience of (in)formality to show how informal practices could propel WTO negotiations following the reform-by-doing approach. I use the JIs as a case study to explore how informal tools emerge and are construed to fit within formal rules and arrangements. The article concludes by stressing the role of informal procedures in keeping the WTO updated and relevant to address current challenges and needs.

2. Transience of (In)Formality in the WTO Negotiations

Transience of (in)formality is the fluidity between formal and informal processes in the WTO, revealing how one gives place to the other and the common space they share in the negotiations. It builds on the perception of the WTO's legal dimension as a reality constructed by Members' interactions through their practices²³ conferring legality²⁴ – and legitimacy²⁵ to rules. Such practices must reflect the extant needs and understandings drawing on and forming the trade

Policy 12, 30; K. Holzer (2018) 'Addressing Tensions and Avoiding Disputes: Specific Trade Concerns in the TBT Committee', Vol. 2018/11, World Trade Organization, WTO Working Papers 2018/11, www.wto-ilibrary.org/content/papers/25189808/229 (accessed 17 July 2023); H. Horn, P.C. Mavroidis, and E. Wijkström (2013) 'In the Shadow of the DSU: Addressing Specific Trade Concerns in the WTO SPS and TBT Committees', Research Institute of Industrial Economics IFN Working Paper n. 960; Columbia University Law School, The Center for Law & Economic Studies Working Paper n. 494; A. Lang and J. Scott (2009) 'The Hidden World of WTO Governance', *European Journal of International Law* 20, 575.

²³For a discussion on the meaning of the term 'practices' and their legal implications see Lamp, 'The "Practice Turn" in International Law: Insights from the Theory of Structuration' (supra n. 21); Adler and Pouliot, 'International Practices' (supra n. 1); N.M. Rajkovic, T.E. Aalberts, and T. Gammeltoft-Hansen (2016) 'Introduction: Legality, Interdisciplinarity and the Study of Practices', in Rajkovic, Aalberts, and Gammeltoft-Hansen (eds.) *The Power of Legality*, Cambridge University Press; Brunnée and Toope, 'International Law and the Practice of Legality' (supra n. 1); J. Brunnée and S.J. Toope (2010) *Legitimacy and Legality in International Law: An Interactional Account*; J. Brunnée and S.J. Toope (2011) 'Interactional International Law: An Introduction', *International Theory* 3, 307.

²⁴Rajkovic, Aalberts, and Gammeltoft-Hansen, 'Introduction: Legality, Interdisciplinarity and the Study of Practices' (supra n. 23) 11; F. Dos Reis and O. Kessler (2016) 'The Power of Legality, Legitimacy and the (Im)Possibility of Interdisciplinary Research', in Rajkovic, Aalberts, and Gammeltoft-Hansen (eds.) (supra n. 23), 99, 110–111.

²⁵In his treatise about legitimacy, Franck advances the argument that a legitimate rule is the one able to gather consensual compliance and adherence. T.M. Franck (1990) *The Power of Legitimacy among Nations*, Oxford University Press. In a later work, the scholar clarifies that law can evolve through practices, including through a practice of violating existing law. As long as they have been approved and adopted by a large number of states, practices can, thus, change the law, adapting it but never repealing it. The adaptability of rules would not impact their determinacy, protecting their legitimacy even under changing circumstances. Franck, 'The Power of Legitimacy and the Legitimacy of Power' (supra n. 1).

knowledge²⁶ shared by the WTO membership. The WTO's functioning and values revolve around this common knowledge, which endorses or transforms existing law.²⁷ The intersection between formal and informal negotiating processes foregrounds the dynamism of WTO rulemaking, which relies on social interactions and intersubjective communication²⁸ to create and transform meanings and concepts.²⁹

The multilateral trading system has been 'built on experience'³⁰ and is the result of a 'process of continuous evolution'³¹ that is no stranger to informal procedures. The evolution of the 1947 General Agreement on Tariffs and Trade (GATT/47) from a provisional agreement to a de facto organization reveals how informality is in the DNA of the GATT/WTO. The WTO has, to a large extent, entrenched the arrangement and practices developed over more than four decades seeking to protect both old and new rules.³² For that, countries needed a stronger institution and a Dispute Settlement System (DSS).³³ Yet, this formalization effort does not mean the WTO is exempt from informality. In this sense, the WTO differs from other international organizations (IOs), such as the UN. In the first years following the WTO's inception, Members had to strike a balance between two different 'diplomatic cultures'.³⁴ On the one hand, trade diplomats from industrialized powers were used to the highly informal GATT/47 decision-making process based on small clubs and the consensus practice. On the other hand, delegates from new WTO Members and developing countries, most of which remained passive during the GATT/47 negotiations, expected the activities of the new organization to be similar to the arrangements they were familiar with. They drew most of their experience from the UN system, where decisions were based on the work of formal drafting committees instead of informal subgroups.³⁵ As a result, the WTO was not a rupture with the past, i.e., the GATT/47 and its practices; rather, it was a natural evolution to adequate the rules to new actors and interests.

Article III:2 of the WTO Agreement states that the WTO should ensure a negotiating forum to advance Members' multilateral trade relations, as well as a framework to assist in the implementation of the outcomes of such negotiations. Accordingly, the WTO functioning is based on the work of committees and the General Council, underpinned by Members' agency.³⁶ Article IX of the WTO Agreement provides for the rules on decision-making, centred on consensus and single undertaking. In this sense, these provisions reveal institutional and legal frameworks grounding

²⁶Cho, 'How the World Trade Community Operates' (supra n. 16).

²⁷R. Wolfe (2005) 'Decision-Making and Transparency in the "Medieval" WTO: Does the Sutherland Report Have the Right Prescription?', *Journal of International Economic Law* 8, 631, 633.

²⁸Cho's trade community concept focuses on the objective feature of the WTO legal discourse, differentiating social knowledge and subjective knowledge, Cho, 'How the World Trade Community Operates' (supra n. 16) 690; Departing from this perspective, I understand that as WTO Members' practices are constantly shaping the norms by confirming, adapting, undermining, or creating them, they bring their own views and interpretation to the table, as 'we all construct our own reality'. Webley, 'Qualitative Approaches to Empirical Legal Research' (supra n. 7) 930.

²⁹Rajkovic, Aalberts, and Gammeltoft-Hansen, 'Introduction: Legality, Interdisciplinarity and the Study of Practices' (supra n. 23) 11–12.

³⁰T. Cottier (2010) 'A Two-Tier Approach to WTO Decision-Making', in D.P. Steger (ed.), *Redesigning the World Trade Organization for the Twenty-First Century*, CIGI and Wilfrid Laurier University Press, 60.

³¹V. Rege (2012) 'Developing Countries in the WTO Negotiations: Moving from the Margins to the Middle', in P.S. Mehta et al. (eds.), *Reflections from the Frontline: Developing Country Negotiators in the WTO*, (Published by Academic Foundation in association with CUTS International) 4.

³²G.R. Winham (1998) 'The World Trade Organisation: Institution-Building in the Multilateral Trade System', *The World Economy* 21, 349, 360; C. VanGrasstek (2013) *The History and Future of the World Trade Organization*, World Trade Organization, 303.

³³Winham, 'The World Trade Organisation' (supra n. 32) 365.

³⁴J.S. Odell (2005) 'Chairing a WTO Negotiation', *Journal of International Economic Law* 8, 425, 446.

³⁵Ibid.

³⁶Cottier, 'A Two-Tier Approach to WTO Decision-Making' (supra n. 30) 49.

and guiding Members' activities.³⁷ However, the WTO Agreement does not offer an exhaustive list of tools or negotiating arrangements.³⁸ Likewise, there is little regulation on the functioning of the WTO committees, which have rather evolved through Members' practices when deliberating. The room the WTO Agreement leaves for informality and for Members to develop practices is exactly what enables the organization to keep operating and evolving alongside the global economy.

Understanding the negotiations as 'a series of nested "concentric circles"' ³⁹ shows that, although decisions are made in formal meetings, they are not negotiated in such venues.⁴⁰ In this configuration,⁴¹ the formal WTO meetings, as provided for by the WTO Agreement, are in the outer ring circle and would be held for the record. The large number of participants challenges the viability of these meetings as negotiating forums to reach outcomes. The next circle contains meetings with a mix of formal and informal features – they are informal plenary meetings of regular bodies, chaired by the relevant chairperson, and account largely for improving transparency. The two inner circles comprise informal meetings where most of the negotiations happen. Those are, firstly, restricted meetings, usually held outside the WTO building and with no support from the Secretariat, where the relevant chairperson meets with a number of technical experts and where a few Members are invited to discuss specific issues. Secondly, those informal meetings can also take the shape of club meetings, such as the Green Room,⁴² consultations or bilateral sessions that are held in a more unofficial setting over lunch or coffee, aiming at bridging differences and gathering information.⁴³ The negotiations in the WTO usually move from the inner to the outer circles, when smaller groups pre-cook deals, i.e., engage in bargaining and consensus-building that will be presented for approval in the plenary.

In this scenario, formalizing practices or relying solely on authoritative interpretation and dispute settlement to determine the meaning of a rule⁴⁴ are evidence of a futile attempt to conquer the law as if its purpose would lie in the ceaseless effort to provide certainty to an ever-evolving

³⁷See, for instance, Kelsey, 'The Illegitimacy of Joint Statement Initiatives and Their Systemic Implications for the WTO' (supra n. 2) 8–9.

³⁸R. Adlung and H. Mamdouh (2017) 'Plurilateral Trade Agreements: An Escape Route for the WTO?', WTO Working Paper ERSD-2017-03 1, 7.

³⁹Wolfe, 'Arguing and Bargaining in the WTO' (supra n. 4) 15.

⁴⁰Lamp, 'The Receding Horizon of Informality in WTO Meetings' (supra n. 21) 66–67; P. Ungphakorn and R. Wolfe, 'How Wide Should the WTO Window Be Set? 3 Negotiations' (*Trade β Blog*, 26 April 2021), <https://tradebetablog.wordpress.com/2021/04/26/wto-transparency-3/> (accessed 15 June 2021).

⁴¹The system described in this paragraph is developed in more details by Wolfe, 'Arguing and Bargaining in the WTO' (supra n. 4); M. Elsig (2006) 'Different Facets of Power in Decision-Making in the WTO', NCCR Trade Regulation Working Paper No 2006/23.

⁴²For more information, see N. Lamp (2016) 'The Club Approach to Multilateral Trade Lawmaking', *Vanderbilt Journal of Transnational Law* 49, 107; Cottier, 'A Two-Tier Approach to WTO Decision-Making' (supra n. 30); P. Ungphakorn and R. Wolfe, 'How Wide Should the WTO Window Be Set? 1 Transparency' (*Trade β Blog*, 26 April 2021), <https://tradebetablog.wordpress.com/2021/04/26/wto-transparency-1/> (accessed 30 September 2021); X. Tu and R. Wolfe 'Reviving the Negotiation Function of the WTO: Why the Onus Falls on the Three Major Powers', in B.M. Hoekman, X. Tu and D. Wang (eds.), *Rebooting Multilateral Trade Cooperation: Perspectives from China and Europe*, CEPR Press; Wolfe, 'Decision-Making and Transparency in the "Medieval" WTO' (supra n. 27); A. Narlikar and J.S. Odell (2006) 'The Strict Distributive Strategy for a Bargaining Coalition: The Like Minded Group in the World Trade Organization, 1998–2001', in J.S. Odell (ed.), *Negotiating Trade: Developing Countries in the WTO and NAFTA*, Cambridge University Press; Elsig, 'Different Facets of Power in Decision-Making in the WTO' (supra n. 41); R.H. Steinberg (2002) 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', *International Organization* 56, 339.

⁴³See Wolfe, 'Informal Learning and WTO Renewal Using Thematic Sessions to Create More Opportunities for Dialogue' (supra n. 22); Wolfe, 'Informal Political Engagement in the WTO: Are Mini-Ministerials a Good Idea?' (supra n. 13); Cottier, 'A Two-Tier Approach to WTO Decision-Making' (supra n. 30).

⁴⁴In fact, international trade law actors interpret the rules through their day-to-day practices as exemplified in T. Dorlach and P. Mertenskötter (2020) 'Interpreters of International Economic Law: Corporations and Bureaucrats in Contest over Chile's Nutrition Label', *Law & Society Review* 54, 571; See also I. Venzke (2012) *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, Oxford University Press.

community.⁴⁵ Yet, if formal rules and mechanisms change through practices and are, consequently, transient, so are informal ones. Informality's contribution rests on how it enables law to be open to different contexts at different periods of time. That is why the relationship between the formal and informal dimensions of the WTO is not one of opposition, but rather of complementarity. Each dimension serves different purposes, ensuring both legal certainty and flexibility in the WTO arrangement.⁴⁶

As both dimensions are transient, informality can lead to formality, as in the case of the consensus practice in the GATT/47 resulting in the consensus rule in the WTO Agreement. Likewise, formality can give way to informality. The consensus rule, for instance, unfolded into two new practices – precluding the resort to voting and the positive consensus rule required to advance the Singapore issues: namely, trade and investment, trade and competition policy, transparency in government procurement, and trade facilitation.⁴⁷ Alternatively, informality can remain as such when Members adapt and improve an informal procedure but do not formalize it, such as the open plurilateral agreements, the first of which was concluded in 1996. Members can use informal procedures whilst benefiting from the existing formal structure for as long as they can bear the outdated system – or until they can afford the costs of introducing formal changes.⁴⁸ The sections below will discuss some of these examples in more detail.

2.1 Formal Negotiating Procedures: Consensus and the Single Undertaking

Formal norms are those emerging from the formal sources of PIL recognized by Article 38 of the Statute of the International Court of Justice, namely, treaties, customs, general principles of law, and, as auxiliary means, judicial decisions, and works of scholars. They are arguably clear and precise, aiming to ensure legal certainty and stability.⁴⁹ In the WTO, the formal arrangement gives predictability to multilateral trade relations for they ensure the existence of more static rules and consistency in their interpretation and application. These features reflect the expectations of world leaders when they first proposed the creation of the International Trade Organization (ITO) to increase trade flows and cooperation among countries, peacefully settling trade disputes.⁵⁰ That is why I refer to formal negotiating procedures in the WTO as traditional, for they reflect an orthodox rationale, based on formalist processes and instruments. Yet, this label does not imply that those rules are obsolete. The main formal negotiating rules at the WTO are the consensus and the single undertaking.

Consensus is at the core of the WTO decision-making system comprising 'complex and relatively numerous'⁵¹ procedures, whose general rule is set by Article IX:1 of the WTO Agreement.

⁴⁵Lamp, 'The Receding Horizon of Informality in WTO Meetings' (supra n. 21) 65.

⁴⁶Ibid. Even Stone, who argues the existence of a tension between formal and informal governances, recognises their mutual dependency. Stone, *Controlling Institutions* (supra n. 16) 14.

⁴⁷World Trade Organization, 'Doha Ministerial Declaration, WT/MIN (01)/DEC/1' Paragraphs 20 (for trade and investment), 23 (for trade and competition policy), 26 (for transparency in government procurement), and 27 (for trade facilitation); Y.H. Kamal, 'Chairman's Words – "May I Take It That This Is Agreeable?" Gavel, Applause, Congratulations ... (on the Occasion of the Introduction of the Ministerial Declarations and Decision in the Closing Plenary Session of the Doha Ministerial Conference, 14 November 2001)', https://www.wto.org/english/thewto_e/minist_e/min01_e/min01_chair_speaking_e.htm#clarification (accessed 24 September 2021); B.L. Das, *WTO: The Doha Agenda: The New Negotiations on World Trade* (Zed Books; Penang, Malaysia: TWN 2003) 34; L. Bartels (2004) 'The Separation of Powers in the WTO: How to Avoid Judicial Activism', *International and Comparative Law Quarterly* 53, 861, 865.

⁴⁸F. Vabulas and D. Snidal (2013) 'Organization without Delegation: Informal Intergovernmental Organizations (IIGOs) and the Spectrum of Intergovernmental Arrangements', *The Review of International Organizations* 8, 193, 213; For more on institutional design and change see E. Voeten (2019) 'Making Sense of the Design of International Institutions', *Annual Review of Political Science* 22, 147; J. Mahoney and K.A. Thelen (eds.) (2010) *Explaining Institutional Change: Ambiguity, Agency, and Power*, Cambridge University Press.

⁴⁹Stone, *Controlling Institutions* (supra n. 16) 12–13.

⁵⁰Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (supra n. 17) 147.

⁵¹Ibid., 112.

For the first time, a multilateral trade agreement provision expressly included the rule of consensus,⁵² which is virtually the only formal rule applied in reality,⁵³ enshrining Members' participation and formalizing their veto right.⁵⁴ However, before that, the consensus had already replaced voting procedures as the rule of thumb in multilateral trade negotiations, reflecting the role of practices in the evolution of the multilateral trading system.⁵⁵

The Contracting Parties to the GATT/47 grew sceptical about the majority voting based on the 'one nation, one vote' principle provided for in Article XXV:3 since it no longer mirrored the reality of international trade relations. The increasing accession of developing countries, corresponding to most of the Contracting Parties, represented a threat in the majority voting system for the most powerful players.⁵⁶ Moreover, against the Cold War background, the US wanted to attract and retain developing nations to the GATT/47. The country found that consensus, based on the notion of sovereign equality, would be more appealing than any voting system.⁵⁷ Consensus would increase the legitimacy of the outcomes of the negotiations, as well as offer an information-gathering tool regarding the different stances of the countries involved in the discussions.⁵⁸ Consensus would be, then, a middle ground where powerful and weaker countries could meet to negotiate trade rules.

None of the GATT/47 provisions makes reference to consensus; yet it was gradually developed and defined by practice.⁵⁹ Such change reflects the GATT/47 'quiet mutation'.⁶⁰ Dating back to as early as 1953, the chairperson of a meeting would rather take a sense of the discussions instead of submitting the issues to voting.⁶¹ Contracting Parties would usually negotiate the agreement before the formal meetings where it was adopted by consensus.⁶² Consensus-building became, hence, key in a negotiating process pervaded by informal and dynamic interplays between countries.

In the WTO, a matter will be put to voting only when reaching a consensus is not possible, following the same GATT/47 principle of 'one country, one vote'. In practice, because Members value the consensus rule and the subsequent veto power, they do not easily resort to voting, not even when they fail to reach a consensus, albeit the provisions in the WTO Agreement.⁶³ This embodies the informal rule of the *consensus practice*, i.e., Members' understanding that they should not resort to voting when they cannot reach a consensus, which subsection 2.2 below also discusses. The only time the membership voted on an issue was back in 1995 regarding draft decisions on the accession of Ecuador and certain waves. However, even on that occasion, when 'the General Council held votes by postal ballot ... this came only after reaching consensus on each matter'.⁶⁴ In the same year, the General Council decided to apply the consensus rule, as per Article IX:1, to 'matters related to requests for waivers or

⁵²In footnote number 1, referring to Article IX.1, the consensus rule is clearly defined as follows: 'The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision'. World Trade Organization, 'Marrakesh Agreement Establishing the World Trade Organization'.

⁵³Footer, *An Institutional and Normative Analysis of the World Trade Organization* (supra n. 9) 178.

⁵⁴J. Pauwelyn (2005) 'The Transformation of World Trade', *Michigan Law Review* 104, 1, 26.

⁵⁵Winham, 'The World Trade Organisation' (supra n. 32) 359.

⁵⁶Steinberg, 'In the Shadow of Law or Power?' (supra n. 42) 344; See also the genealogy of consensus developed by C. O'Hara (2021) 'Consensus Decision-Making and Democratic Discourse in the General Agreement on Tariffs and Trade 1947 and World Trade Organisation', *London Review of International Law* 9, 37.

⁵⁷Steinberg, 'In the Shadow of Law or Power?' (supra n. 42) 344–345.

⁵⁸*Ibid* 360.

⁵⁹Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (supra n. 17) 112. Pauwelyn brings some examples of the early cases where consensus was adopted by countries in the GATT/47 decision-making procedures, such as different resolutions agreed upon in 1955 and several Tokyo Round outcomes in 1979, including the Enabling Clause. Pauwelyn, 'The Transformation of World Trade' (supra n. 54) 21.

⁶⁰Pauwelyn, 'The Transformation of World Trade' (supra n. 54) 18.

⁶¹Steinberg, 'In the Shadow of Law or Power?' (supra n. 42) 344.

⁶²Pauwelyn, 'The Transformation of World Trade' (supra n. 54) 21.

⁶³*Ibid* 28; Cottier, 'A Two-Tier Approach to WTO Decision-Making' (supra n. 30) 49.

⁶⁴VanGrasstek, 'The World Trade Organisation' (supra n. 32) 213.

accessions to the WTO,⁶⁵ turning to voting only when consensus could not be reached. Besides that singular event, since 1959, all the legislative decisions in the GATT/47 and WTO systems have virtually been taken by consensus.⁶⁶

The single undertaking is a 'natural extension'⁶⁷ of the consensus rule, stressing the Members-driven feature of the WTO by placing Members at the centre of the decision-making process and granting them 'a voice and a veto'.⁶⁸ Moreover, the single undertaking constrains domestic decision-makers since they cannot pick and choose the rules by which they want to abide.⁶⁹ The membership shows a commitment to the WTO regulatory system as a collective endeavour rather than aggregated individual efforts,⁷⁰ accepting small losses in exchange for the benefits of being part of the multilateral trade regime.⁷¹ In this regard, the single undertaking upholds the WTO legal framework, presenting it as a whole and cohesive system whose legitimacy lies in the membership accepting all the multilateral rules.⁷² That does not entail, however, uniformity of Members' obligations. Governments make individual commitments as identified in specific schedules, and obligations also depend on the development status of Members.⁷³ Countries' different obligations reflect the variable geometry of the WTO framework and depart from the 'one size fits all' approach.⁷⁴

Consensus and the single undertaking are intertwined in the WTO negotiations, for achieving a single package depends on full consensus. These rules contribute to a coherent and consolidated arrangement, which stresses the unity of the multilateral trading system.⁷⁵ Yet, due to their degree of formality, they may be burdensome and strict, directly impacting the negotiations, especially when it comes to reaching outcomes. The combination of consensus with the single undertaking can create a 'straitjacket'⁷⁶ by hindering the progress of the discussions. It results in a procedural trap – 'a complex web of linkages and hierarchies'⁷⁷ involving Members in an 'unbreakable deadlock'.⁷⁸ Such strategy would benefit those that can block the discussions and hold the system

⁶⁵World Trade Organization, 'Decision-Making Procedures under Articles IX and XII of the WTO Agreement, WT/L/93'. VanGrasstek, 'The World Trade Organisation' (supra n. 32) 213.

⁶⁶Steinberg, 'In the Shadow of Law or Power?' (supra n. 42) 344; J. Hillman 'Three Approaches to Fixing the World Trade Organization's Appellate Body: The Good, The Bad and the Ugly?', *Institute of International Economic Law* 12, www.law.georgetown.edu/wp-content/uploads/2018/12/Hillman-Good-Bad-Ugly-Fix-to-WTO-AB.pdf (accessed 26 January 2021).

⁶⁷W. Guan (2014) 'Consensus Yet Not Consented: A Critique of the WTO Decision-Making by Consensus', *Journal of International Economic Law* 17, 77, 82.

⁶⁸Wolfe, 'Arguing and Bargaining in the WTO' (supra n. 4) 18.

⁶⁹As set by Article XIV.1 of the WTO Agreement, according to which all Members must accept the agreed package of rules in its entirety. Likewise, Article II.1 establishes a common institutional framework for all the agreements and legal instruments included in the annexes, whereas Article II.2 stipulates that all agreements and legal instruments included in Annexes 1, 2, and 3, the so called 'Multilateral Trade Agreements', are integral parts of the WTO Agreement and, consequently, binding on all Members.

⁷⁰Wolfe, 'Arguing and Bargaining in the WTO' (supra n. 4) 18.

⁷¹Winham, *An Institutional Theory of WTO Decision-Making* (supra n. 13) 13.

⁷²Wolfe, 'Arguing and Bargaining in the WTO' (supra n. 4) 18; Guan, 'Consensus Yet Not Consented' (supra n. 67) 91; Panel Report, *Indonesia - Certain Measures Affecting the Automobile Industry*, WT/DS54/R; WTDS55/R; WT/DS59/R; WT/DS64/R [14.56] adopted 2 July 1998; Appellate Body Report, *Brazil - Measures Affecting Desiccated Coconut* WT/DS22/AB/R [11–13] adopted 21 February 1997.

⁷³VanGrasstek, 'The World Trade Organisation' (supra n. 32) 312.

⁷⁴P. Sutherland et al. (2004) *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, World Trade Organization, 65; S.E. Rolland (2010) 'Redesigning the Negotiation Process at the WTO', *Journal of International Economic Law* 13, 65, 84; C. VanGrasstek and P. Sauvé (2006) 'The Consistency of WTO Rules: Can the Single Undertaking Be Squared with Variable Geometry?', *Journal of International Economic Law* 9, 837, 862–863.

⁷⁵Guan, 'Consensus Yet Not Consented' (supra n. 67) 82.

⁷⁶Elsig, 'Different Facets of Power in Decision-Making in the WTO' (supra n. 41) 13; Pauwelyn, 'The Transformation of World Trade' (supra n. 54) 35.

⁷⁷Elsig, 'Different Facets of Power in Decision-Making in the WTO' (supra n. 41) 13.

⁷⁸VanGrasstek and Sauvé, 'The Consistency of WTO Rules' (supra n. 74) 858; Guan, 'Consensus Yet Not Consented' (supra n. 67) 92.

hostage.⁷⁹ During the Uruguay Round, developed countries used this to pressure other negotiating parties into accepting the inclusion of new issues such as services and intellectual property into the negotiating agenda and the final package.⁸⁰ Nowadays, larger developing Members, especially emerging economies, have learnt to employ the same technique to block negotiations that do not reflect their interests, as the events related to the Singapore issues exemplify.⁸¹ In light of this, negotiating practices offer alternatives for Members to deliver and keep the WTO operating.

2.2 Informal Negotiating Procedures

The evolution from the GATT/47 to the WTO happened gradually and organically, preserving most of the former's negotiating process and structure. Equally natural was the development of informal procedures and tools, either not codified in the WTO Agreement or loosely so,⁸² to address new needs and the complexity of the world economy. They allow the WTO to adapt within the existing legal and institutional frameworks.⁸³ The apparent level of formality in the protocols and traditions pervading the diplomatic world and, consequently, the WTO, may give a sense of rigidity in the WTO negotiating process and outcomes.⁸⁴ This, however, could not be further from reality.

Hinging on the aforementioned Article III:2 of the WTO Agreement, the WTO offers Members space to advance and adapt the existing negotiating procedures. In doing so, Members have created a web of informal practices – some already entrenched in the WTO negotiations – to assist them in delivering outcomes in the WTO decision-making system. Examples of such practices include coalitions, the consensus practice, informal meetings, critical mass, and most recently the JIs. These informal instruments are in line with the dynamism and pragmatism of WTO negotiations,⁸⁵ as well as the agency of Members and their willingness to benefit from the flexibilities of the WTO structure. They can also lead to greater participation without undermining the levels of commitment or legal ambition, despite impacting the uniformity of the obligations.⁸⁶

The normative framework of the multilateral trade regime is changing and our understanding of how law works therein should adapt accordingly. Formal rules and structures pervading the WTO negotiations and decision-making stemmed mostly from a time when the main goal in international trade was to secure market-access concessions through shallow integration.⁸⁷ Such rationale was relatively successful until the Uruguay Round if one considers the progress in trade liberalization.⁸⁸ However, in light of the introduction of broader interests and objectives in the WTO and the development of international trade relations, claiming for regulation in areas that were previously exclusively regulated by domestic policies, formal procedures are no longer enough or adequate. As the regime leans toward regulatory cooperation and coherence,⁸⁹

⁷⁹Guan, 'Consensus Yet Not Consented' (supra n. 67) 92.

⁸⁰P. Low (2011) 'WTO Decision-Making for the Future', WTO Staff Working Paper ERSD-2011-05 1, 4; Guan, 'Consensus Yet Not Consented' (supra n. 67) 92; Steinberg, 'In the Shadow of Law or Power?' (supra n. 42) 364–365.

⁸¹Rolland, 'Redesigning the Negotiation Process at the WTO' (supra n. 74) 68.

⁸²Adlung and Mamdouh, 'Plurilateral Trade Agreements' (supra n. 38) 7.

⁸³Cottier, 'A Two-Tier Approach to WTO Decision-Making' (supra n. 30) 50.

⁸⁴As the notion from which Czapnik starts his analysis. B. Czapnik (2015) 'The Unique Features of the Trade Facilitation Agreement: A Revolutionary New Approach to Multilateral Negotiations or the Exception Which Proves the Rule?', *Journal of International Economic Law* 18, 773, 774.

⁸⁵Footer, *An Institutional and Normative Analysis of the World Trade Organization* (supra n. 9) 180.

⁸⁶G. Marceau (2020) 'Never Waste a Good Crisis: The End of the WTO Dream, or the Beginning of Something Greater?', *International Organizations Law Review* 17, 345, 349.

⁸⁷'The WTO Is in Trouble. Econ 101 to the Rescue?', <https://tradetalkspodcast.com/podcast/180-the-wto-is-in-trouble-econ-101-to-the-rescue/> (accessed 24 July 2023).

⁸⁸Cottier, 'A Two-Tier Approach to WTO Decision-Making' (supra n. 30) 50.

⁸⁹See T.J. Bollyky and P.C. Mavroidis (2017) 'Trade, Social Preferences and Regulatory Cooperation the New WTO-Think', *Journal of International Economic Law* 20, 1; B. Hoekman and C. Sabel (2019) 'Open Plurilateral Agreements, International Regulatory Cooperation and the WTO', *Global Policy* 10, 297.

informal tools are key for they reflect a multi-layered decision-making system.⁹⁰ These tools usually allow more flexibility⁹¹ to ‘temper the rigid effects of single undertaking and consensus’,⁹² contributing to cooperation and changing loyalties according to the interests at stake. This scenario reflects the reality of the extant consensus-building process in the WTO, which happens through different mechanisms, both formal and informal, including the work of committees, informal meetings, and critical mass; in different configurations, such as plenary meetings, subgroup coordination, and coalitions; and at different levels, encompassing ministers, officials, and experts from capitals, ambassadors, and delegates.⁹³

Informal law-making in the WTO facilitates both the agenda-setting and discussion processes to reach concrete outcomes⁹⁴ that Members seek to integrate into the WTO structure.⁹⁵ It stems from Members’ practices in the decision-making system rather than the revision and amendment of formal legal rules.⁹⁶ This suits the perception of the WTO as a ‘plural global polity’,⁹⁷ comprising a ‘myriad of informal practices’⁹⁸ that play a key role in the negotiating process. Such negotiating practices are neither in violation of WTO rules nor fully regulated by them;⁹⁹ instead, practices expand the extant rules, redefining their meaning and scope, (re)producing norms to be applied to different situations.¹⁰⁰ By interpreting¹⁰¹ existing norms through their interactions, WTO Members develop negotiating practices attributing social meaning and legal status to the resulting rules.¹⁰² Perceiving norms as transient reconciles the claim for predictability and certainty in trade relations with the need for adapting the WTO to keep it relevant and address current challenges.¹⁰³ The adaptability of the law reveals its resiliency instead of its weakness.¹⁰⁴

Informal processes can be ‘creative solutions’¹⁰⁵ to overcome new challenges not foreseen at the time of the WTO’s inception. When reform discussions have not resulted in any major formal changes in the WTO,¹⁰⁶ informal mechanisms are the ones adapting and improving the decision-making system.¹⁰⁷ They could offer fresh insights, if not an answer, when ‘traditional structures of

⁹⁰Elsig, ‘Different Facets of Power in Decision-Making in the WTO’ (supra n. 41) 32.

⁹¹That is not to say, however, that there are no rigid negotiating practices. An example would be the consensus practice of not resorting to voting, even when reaching consensus is not possible. That creates deadlocks in the negotiations, leading to Members holding the system hostage.

⁹²A. Ansong (2018) ‘Single Undertaking, Different Speeds: Pliable Models for Decision-Making in the WTO’, *Journal of International Economic Law* 21, 395, 395.

⁹³Wolfe, ‘Informal Political Engagement in the WTO’ (supra n. 13) 36.

⁹⁴Low, ‘WTO Decision-Making for the Future’ (supra n. 80) 8.

⁹⁵Anonymous Interviewee Number 9’ (12 November 2019).

⁹⁶Cottier, ‘A Two-Tier Approach to WTO Decision-Making’ (supra n. 30) 60–61.

⁹⁷Wolfe, ‘Decision-Making and Transparency in the “Medieval” WTO’ (supra n. 27) 645.

⁹⁸Footer, *An Institutional and Normative Analysis of the World Trade Organization* (supra n. 9) 163.

⁹⁹This perspective is analogous to the understanding of the Permanent Court of International Justice (PCIJ) in the *Lotus* case, according to which states are free to act when there is no prohibitive international rule, and as long as they do not overstep into each other’s jurisdiction. *The Case of the SS Lotus, Judgement n9* (Permanent Court of International Justice) 19.

¹⁰⁰Lamp, ‘The “Practice Turn” in International Law: Insights from the Theory of Structuration’ (supra n. 21) 280.

¹⁰¹Interpretation here differs from the idea of authoritative interpretation of WTO agreements as posited by Art. IX:2. The social construct feature of law challenges the notion that actors should automatically apply rules without exercising any influence on those same rules. For a different opinion, see Kelsey, ‘The Illegitimacy of Joint Statement Initiatives and Their Systemic Implications for the WTO’ (supra n. 2) 21–22.

¹⁰²Rajkovic, Aalberts and Gammeltoft-Hansen, ‘Introduction: Legality, Interdisciplinarity and the Study of Practices’ (supra n. 23) 16. WTO committees also play an important role in interpreting WTO rules, see footnote 22 above.

¹⁰³Brunnée and Toope, ‘International Law and the Practice of Legality’ (supra n. 1) 430.

¹⁰⁴Franck, ‘The Power of Legitimacy and the Legitimacy of Power’ (supra n. 1) 105.

¹⁰⁵Marceau, ‘Never Waste a Good Crisis’ (supra n. 86) 349.

¹⁰⁶Odell, ‘Chairing a WTO Negotiation’ (supra n. 34) 446.

¹⁰⁷M. Patel (2007) ‘New Faces in the Green Room: Developing Country Coalitions and Decision-Making in the WTO’, GEG Working Paper No. 2007/33 6. Footer, *An Institutional and Normative Analysis of the World Trade Organization* (supra n. 9) 174.

formal law-making ... become shackles'.¹⁰⁸ In this regard, reform talks benefit from a shift in perspective by recognizing the value of informal mechanisms upholding trade discussions, information exchange, and learning processes.¹⁰⁹ Members are continuously adapting the institution and its rules in an enduring 'reform-by-doing' effort.¹¹⁰ Drawing on the WTO community and its social context,¹¹¹ Members have recurrently endorsed the need for open, transparent, and inclusive participation. Only actions supporting such values will be repeated as patterns and become practices. Eventually, informal procedures serve as the glue keeping the WTO's rigid legal principles together, i.e., formal sovereignty, consensus, single undertaking, and its member-driven nature.¹¹²

Informal small meetings and subgroups, for instance, help promote trade governance and cooperation in WTO negotiations by accommodating different geometries, circumstances, and needs.¹¹³ The issues discussed influence the regularity of the meetings, the expertise of the participants, and the nature of the interactions.¹¹⁴ These meetings are diverse and take place in different venues, even over coffee at the atrium in the WTO building – in many aspects the centre of the organization. If these mechanisms are open and inclusive, they provide a venue where participants can defend their instances and gather information about the negotiations. Transparency allows Members to understand the negotiating dynamics and the WTO functioning.¹¹⁵ Indeed, emerging powers harnessed such informal meetings and subgroup coordination to increase their relevance in the decision-making process.¹¹⁶ Having subgroups in WTO negotiations does not mean that an exclusive club comprising homogeneous countries would take the decisions, or that information would be monopolized by the members of those groups. Instead, a legitimate club model approach should comprise representative groups that could draft proposals to be presented in the plenary.¹¹⁷ It should be a procedural tool to 'streamline and shape decisions'¹¹⁸ in the WTO. Even if not all Members participate in informal processes, they must have access to the outcomes of the discussions.¹¹⁹

In this context, coalitions have become an essential part of the WTO negotiations to overcome the complexities of the discussions, promote shared interests, and engage the participants in cooperation. Their configuration and composition are dynamic depending on the circumstances and interests at stake.¹²⁰ Their lifespan also varies, as they can be short-lived depending on the issue pushed forward or survive a longer period if supporting a broader interest.¹²¹ Coalitions

¹⁰⁸Pauwelyn, Wessel and Wouters, *Informal International Lawmaking* (supra n. 3) 734.

¹⁰⁹Wolfe, 'Informal Learning and WTO Renewal Using Thematic Sessions to Create More Opportunities for Dialogue' (supra n. 22) 37.

¹¹⁰A. Durkin, 'US Leadership and the World Trade Organization' (2022 Yeutter Institute Symposium: New Patterns of Trade Integration, 2 November 2022), <https://yeutter-institute.unl.edu/2022-cme-group-foundation-symposium-yeutter-institute> (accessed 24 March 2023).

¹¹¹Cho, 'How the World Trade Community Operates' (supra n. 16).

¹¹²A. Narlikar (2002) 'The Politics of Participation: Decision-Making Processes and Developing Countries in the World Trade Organization', *The Round Table* 91, 171, 182.

¹¹³Winham, *An Institutional Theory of WTO Decision-Making* (supra n. 13) 27.

¹¹⁴Wolfe, 'Decision-Making and Transparency in the "Medieval" WTO' (supra n. 27) 639.

¹¹⁵Steinberg, 'In the Shadow of Law or Power?' (supra n. 42) 368. Yet, the author argues that enhancing transparency could only do so much to improve asymmetrical outcomes and ensure Members have opportunities to influence the discussions. Limits should be imposed on the US and the EU. The changes and developments in the world economy and the WTO decision-making system since 2002, when the cited article was published, show that the rise of powerful actors in the negotiations has contributed to reshuffle the power balance in the WTO.

¹¹⁶Narlikar, 'The Politics of Participation' (supra n. 112) 179.

¹¹⁷Tijmes-Lhl, 'Consensus and Majority Voting in the WTO' (supra n. 18) 433.

¹¹⁸Elsig, 'Different Facets of Power in Decision-Making in the WTO' (supra n. 41) 32.

¹¹⁹Wolfe, 'Arguing and Bargaining in the WTO' (supra n. 4) 17.

¹²⁰Wolfe, 'Decision-Making and Transparency in the "Medieval" WTO' (supra n. 27) 638.

¹²¹J.S. Odell (2006) 'Introduction', in J.S. Odell (ed.), *Negotiating Trade Developing Countries in the WTO and NAFTA*, Cambridge University Press, 13.

emerge, evolve, and fade away as the negotiating context changes.¹²² Any attempt to regulate or formalize them would do little to improve the WTO decision-making system.¹²³

The most emblematic coalition to date, the trade G20, is an informal and spontaneous negotiating instrument that contributed to ending the GATT/47 way of negotiating.¹²⁴ It represents a broad and diversified articulation of WTO developing Members¹²⁵ whose primary purpose is to protect the development commitments made on the Doha agenda.¹²⁶ The G20 is the outcome of a long learning process by developing Members – its spontaneous creation notwithstanding. Whilst the WTO was a negotiated transition resulting from natural evolution, largely institutionalizing trade relations at the height of neoliberalism,¹²⁷ the G20 was a rupture – a ‘tectonic shift’¹²⁸ – resulting from Members’ practices. As the most successful developing countries coalition, the G20 revealed that constant cooperation and articulation among Members are essential to improve the existing invisible weighting in the WTO decision-making process.¹²⁹

Critical mass is another informal negotiating mechanism Members use to reach substantive rules in the absence of consensus. Through a critical mass, WTO Members put into effect the outcomes of a given negotiation with the possibility of more Members joining later. Critical mass means the adherence of the major players accounting for around 90% of the global market in the relevant sector.¹³⁰ However, Members should also assess the inclusiveness and legitimacy of such an approach. Otherwise, this model could favour larger economies, which, similarly to a UN Security Council dynamic, could articulate agreements among themselves and frustrate outside initiatives.¹³¹ In this regard, setting the requirements to achieve a critical mass should be made on a case-by-case basis, considering the interest of smaller economies. These countries may not have a large global market share of a given sector, but their gross domestic product (GDP) may rely heavily on that same sector.¹³²

Critical mass eases the bargaining process in the WTO, especially in services and tariff liberalization negotiations.¹³³ It stems from a practice not regulated by the WTO Agreement, building on the plurilateral alternative without falling within the consensus requirement of Article X:9 of

¹²²Coalitions reflecting geographic groups tend to be more stable and perennial. ‘Anonymous Interviewee Number 7’ (12 December 2019); Odell, ‘Introduction’ (supra n. 121) 13.

¹²³Wolfe, ‘Decision-Making and Transparency in the “Medieval” WTO’ (supra n. 27) 642.

¹²⁴R. Azevêdo and B. Baracuh (2012) ‘Agriculture – At the Centre of DDA Negotiations’, in P.S. Mehta et al. (eds.), *Reflections from the Frontline: Developing Country Negotiators in the WTO* (Published by Academic Foundation in association with CUTS International) 60; See also J. Nedumpara, A. Sinha and G. Shaffer (2021) ‘India: An Emerging Giant’s Transformation and Its Implications’, in G. Shaffer, *Emerging Powers and the World Trading System: The Past and Future of International Economic Law*, Cambridge University Press, 147–148.

¹²⁵On the importance of the G20, see A. Narlikar and D. Tussie (2004) ‘The G20 at the Cancun Ministerial: Developing Countries and Their Evolving Coalitions in the WTO’, *World Economy* 7, 27, 960.

¹²⁶V. Thorstensen et al. (2012) ‘Novos Temas’, in V. Thorstensen and I.T.M. Oliveira (eds.), *Os BRICS na OMC: políticas comerciais comparadas de Brasil, Rússia, Índia, China e África do Sul*, IPEA, 302, 314.

¹²⁷Hopewell, *Breaking the WTO* (supra n. 19) 175.

¹²⁸Expression used by an ambassador registered in *ibid.* 81.

¹²⁹Steinberg, ‘In the Shadow of Law or Power?’ (supra n. 42) 368–369.

¹³⁰Adlung and Mamdouh, ‘Plurilateral Trade Agreements’ (supra n. 38) 5.

¹³¹Rolland, ‘Redesigning the Negotiation Process at the WTO’ (supra n. 74) 89.

¹³²M.R. Mendoza and M. Wilke (2011) ‘Revisiting the Single Undertaking’, in C.D. Birkbeck (ed.), *Making Global Trade Governance Work for Development*, Cambridge University Press, 502. The authors further suggest that Members should identify those requirements for a critical mass before launching the negotiations, which, on its turn, should be approved by consensus by the WTO membership. This proposal underpins the argument developed by the authors that a critical mass approach should be an ‘opt-out’ tool, in which all Members would be involved in the launch of the negotiations and in establishing the scope and requirements of the critical mass, with an option to opt out of the discussions at a later stage. *ibid.* 502–503. Rolland also addresses an opt out negotiating design in Rolland, ‘Redesigning the Negotiation Process at the WTO’ (supra n. 74) 84–87. However, this would do little to improve the WTO negotiations, given the stance adopted by some Members that recurrently veto the launch of any initiative that does not meet their interests.

¹³³Cottier, ‘A Two-Tier Approach to WTO Decision-Making’ (supra n. 30) 50. The use of critical mass is nothing new in the multilateral trading system, dating back to the GATT/47. Countries resorted to a critical mass for the first time to

the WTO Agreement. Consequently, it does not add agreements to Annex 4 of the WTO Agreement. The rules resulting from a critical mass initiative constitute rather ‘open plurilaterals’¹³⁴ or ‘unconditional plurilaterals’,¹³⁵ as opposed to Annex 4 ‘exclusive plurilaterals’.¹³⁶ Because of their open and unconditional nature, any advantage granted by such agreements must be extended to all WTO Members, following the MFN principle, regardless of whether they are contracting parties. Hence, the outcomes of critical mass efforts may benefit all WTO Members.¹³⁷ There is no need to secure the approval of Members outside the initiative, which means that they cannot use consensus to hold the negotiations hostage.¹³⁸ The new commitments should not violate existing WTO rights and obligations, including the MFN principle. To avoid placing an additional burden on the Secretariat and the WTO budget, Members participating in open plurilaterals would have to cover such additional costs.¹³⁹ Likewise, to prevent the fragmentation of the multilateral trading system and the increase of free riders,¹⁴⁰ open plurilaterals should be additional area-specific agreements built on a common regulatory base adjusted to Members’ needs.¹⁴¹ Moreover, the WTO DSS could review the legality of such agreements.

The obligations resulting from open plurilaterals are usually implemented by hooking them to the existing Members’ schedules of commitments. Members can do it by adding an entry into their relevant schedules referring to rules covered by an initially non-binding document, ‘committing themselves to observe the rules set out in that document’.¹⁴² Those rules would then receive legal effect as per the modification of schedules approach.¹⁴³ Only the group of Members referring to the rules would be bound by them, whereas the MFN principle would apply to any advantage granted thereof.¹⁴⁴ That was the rationale behind the implementation of the Reference Paper on basic telecommunications establishing the regulatory principles on the subject. A subgroup of countries negotiated the document that was later ‘inscribed, sometimes with variations, in the schedules of commitments of over 90 WTO Members (counting EU member states individually)’.¹⁴⁵ Similarly, Members participating in the Information Technology Agreement (ITA) negotiations implemented the results of this effort through certification of their individual tariff schedules regarding the relevant goods.¹⁴⁶ The ITA currently comprises

negotiate a separate agreement in addition to the GATT obligations during the Kennedy Round, resulting in the Anti-Dumping Code. Lamp, ‘The Club Approach to Multilateral Trade Lawmaking’ (supra n. 42) 140.

¹³⁴ Adlung and Mamdouh, ‘Plurilateral Trade Agreements’ (supra n. 38) 8.

¹³⁵ B. Vickers (2014) ‘The Relationship between Plurilateral Approaches and the Trade Round’, E15Initiative. International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum 3.

¹³⁶ Adlung and Mamdouh, ‘Plurilateral Trade Agreements’ (supra n. 38) 5.

¹³⁷ Ibid 8.

¹³⁸ B.M. Hoekman and P.C. Mavroidis, ‘MFN Clubs and Scheduling Additional Commitments in the GATT: Learning from the GATS’, EUI Working Paper RSCAS 2016/06 1, 13.

¹³⁹ Ibid; Jackson, ‘The WTO “Constitution” and Proposed Reforms’ (supra n. 18) 75.

¹⁴⁰ To some, such fragmentation is inevitable when there are two major players blocking four essential discussions in the WTO. In this regard, one interviewee argues that the future of the WTO would be to become something similar to a trade OECD, with different plurilateral agreements under the WTO institutional framework, taking the notion of variable geometry one step further. ‘Anonymous Interviewee Number 3’ (3 December 2019). See also R.Z. Lawrence (2006) ‘Rulemaking Amidst Growing Diversity: A Club-of-Clubs Approach to WTO Reform and New Issue Selection’, *Journal of International Economic Law* 9, 823.

¹⁴¹ Low, ‘WTO Decision-Making for the Future’ (supra n. 80) 7–8.

¹⁴² Nottage and Sebastian, ‘Giving Legal Effect to the Results of WTO Trade Negotiations’ (supra n. 17) 1012.

¹⁴³ See General Agreement on Tariffs and Trade, ‘Procedures for Modification and Rectification of Schedules of Tariff Concessions, L/4962’; World Trade Organization, ‘Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments, S/L/84’; Nottage and Sebastian, ‘Giving Legal Effect to the Results of WTO Trade Negotiations’ (supra n. 17).

¹⁴⁴ Nottage and Sebastian, ‘Giving Legal Effect to the Results of WTO Trade Negotiations’ (supra n. 17) 1013–14.

¹⁴⁵ Adlung and Mamdouh, ‘Plurilateral Trade Agreements’ (supra n. 38) 8.

¹⁴⁶ Ibid.

82 participants that represent about 97% of the trade in IT products.¹⁴⁷ More recently, the reference paper on SDR (Services Domestic Regulation)¹⁴⁸ was accepted by 70 Members that are incorporating the agreed commitments into their services schedule.¹⁴⁹ The new obligations address one of the most pressing issues for international businesses, i.e., the need for improving the regulatory environment for services suppliers entering foreign markets. Since they benefit all trade partners of the relevant Member, challenging the modification of schedules seems a fruitless endeavour.¹⁵⁰ These examples show how informal processes may yield outcomes that can be transplanted into the formal WTO structure.

3. Reforming-by-Doing

The intersection between formal and informal mechanisms reveals that Members are reforming the WTO through their agency. WTO Members are practical actors, less interested in philosophical debates over meanings and sources than in finding solutions to overcome challenges. Discussions over technical legal issues usually take place to legitimize Members' efforts, making them compatible with the WTO governance. Negotiating practices do not fragment or undermine a rules-based multilateral trading system as some argue.¹⁵¹ The WTO is a living institution, and its legal regime is ever-evolving. Members attribute legal meaning to norms in line with social, economic, and geopolitical contexts. To think otherwise, that WTO norms should be static to achieve fixed goals reflecting the global economy and power distribution in 1995, reveals a paradox: by advocating the strict observance of the formal WTO framework to promote development and fairer rules, some countries and authors contribute to maintaining a flawed and unfair system.

Recent discussions on WTO reform¹⁵² have focused on the 'reform-by-doing' approach. This highlights the need for 'improving the daily functioning of WTO bodies'.¹⁵³ The goal is to facilitate the participation of Members in different WTO bodies, including negotiating groups, without modifying the balance of rights and obligations.¹⁵⁴ Such an 'experimental reform'¹⁵⁵ does not require a top-down one-off formal revision but happens rather through time as WTO Members develop and test different alternatives to meet needs as they arise. I explore below one particular tool – the JIs – and how they are reshaping the WTO negotiations and triggering its reform.

¹⁴⁷World Trade Organization, 'Information Technology Agreement', www.wto.org/english/tratop_e/inftec_e/inftec_e.htm (accessed 13 January 2021); Members agreed on the expansion of the ITA in the Nairobi Ministerial: World Trade Organization, 'Ministerial Declaration on the Expansion of Trade in Information Technology Products WT/MIN(15)/25'.

¹⁴⁸World Trade Organization, 'Reference Paper on Services Domestic Regulation, INF/SDR/2, 26 November 2021'.

¹⁴⁹'The Services Domestic Regulation WTO Plurilateral – Explained' (11 October 2021), https://wtoplurilaterals.info/plural_initiative/services-domestic-regulation/ (accessed 6 November 2023).

¹⁵⁰P. Ungphakorn, 'Experts: India, S.Africa Unlikely to Succeed in Blocking WTO Services Deal' (*Trade β Blog*, 7 February 2023), <https://tradebetablog.wordpress.com/2023/02/07/india-s-africa-unlikely-succeed-services/> (accessed 6 November 2023); P. Ungphakorn, 'Objections dropped on services regulation say nothing about other plurilaterals' (*Trade β Blog*, 28 February 2024), <https://tradebetablog.wordpress.com/2024/02/28/objections-dropped-services-nothing-other-plurilaterals/> (accessed 27 March 2024).

¹⁵¹World Trade Organization, 'The Legal Status of "Joint Statement Initiatives" and Their Negotiated Outcomes, Joint Communication from India and South Africa', WT/GC/W/819' para 11. Kelsey, 'The Illegitimacy of Joint Statement Initiatives and Their Systemic Implications for the WTO' (supra n. 2).

¹⁵²DG Okonjo-Iweala: "Our Work Is Cut out for Us" on Achieving Concrete MC13 Outcomes', www.wto.org/english/news_e/news23_e/gc_01nov23_e.htm (accessed 10 November 2023).

¹⁵³'Senior Officials Meeting Paves Way for Progress on Deliverables at MC13', www.wto.org/english/news_e/news23_e/gc_24oct23_e.htm (accessed 10 November 2023).

¹⁵⁴The latter requirement is a key claim from the African Group. 'General Council, Communication from the African Group, A Development Perspective on Institutional Reforms of the World Trade Organization, WT/GC/W/895'.

¹⁵⁵J. Pauwelyn (2023) 'The WTO's Multi-Party Interim Appeal Arbitration Arrangement (MPIA): What's New?', *World Trade Review* 1, 9.

3.1 The Role of the JIs in the WTO Negotiations

The need for negotiating alternatives became more evident with the Doha deadlock and the challenges in delivering trade issues on a forum comprising 164 Members that relies on consensus and the single undertaking principle. In this sense, the hurdles in concluding negotiations through formal means also unveil challenges in reconciling multiple interests and perspectives. Considering the WTO's flexible geometry, the JIs offer those Members willing to advance trade issues an opportunity to further their commitments, complementing and reinforcing the multilateral trade rules.¹⁵⁶ The first JIs – SDR, IFD, E-commerce, and Micro Small and Medium Enterprises (MSMEs) – emerged during the 2017 Ministerial in Buenos Aires.¹⁵⁷

The JIs embody the fluidity between formality and informality in the WTO since negotiations draw largely on practices, yet participating Members strive to place JIs within the WTO formal framework. Their novelty is two-folded – JIs are a creative approach to negotiations, and they offer a fresh perspective on topics previously discussed in the WTO, such as investment, e-commerce, and the environment. Each JI comprises a like-minded group of WTO Members that launch informal discussions upheld by a critical mass aiming at agreeing on new rules. The desired outcome is a multilateral one. The Joint Statement has virtually become the mandate for the JIs, encompassing the purpose and goals of each initiative. Instead of coming from the formal WTO structure, such as the General Council or a ministerial conference, the decision to start discussions on the JIs comes from a group of Members that co-sponsor a ministerial statement in that direction.¹⁵⁸ The political will of at least a relevant subgroup of Members is essential to provide momentum and expertise to the discussions and yield concrete outcomes.¹⁵⁹

As the JIs are a new effort, Members also needed new terms to define, and consequently categorize, what they are doing. In this regard, the expression *structured discussions* conveys both the novelty of the initiative and its procedures and the level of formality translated into the structure the Joint Statement created. It refers to the first stage of the initiative, which was less than negotiations but more than the informal dialogue that took place before the issuing of the Joint Statement.¹⁶⁰ This was a political response rather than a technically legal one, given the sensitive climate in the WTO.¹⁶¹ This arrangement includes a chairperson – also called a coordinator – an agenda, a docket number for written submissions, and scheduled meetings.¹⁶² The structured discussions phase is a good example of how countries try to legitimize their actions in the WTO, aligning formal and informal instruments, traditional and innovative approaches, to uphold their efforts in the WTO decision-making system and gather support from other Members.

Take the JI on IFD as an example. After the submission of the first proposal on investment facilitation by Russia in March 2017, and in the months leading to MC11, the WTO Members supporting the discussions started their outreach efforts. The goal was to persuade as many Members as possible to adhere to the future Joint Statement. However, the challenges of the new endeavour were evident early on. For instance, countries did not know where to submit statements on investment facilitation, e.g., the General Council or the Council for Trade in Services,

¹⁵⁶World Trade Organization, 'The MC-12 Package: Moving the WTO Forward. Communication from Brazil, JOB/GC/253'.

¹⁵⁷New JIs were also announced since Buenos Aires, such as Trade and Environmental Sustainability and Plastics Pollution and Environmentally Sustainable Plastics Trade. For more information see 'WTO Plurilaterals' (28 July 2023), <https://wtoplurilaterals.info/> (accessed 6 October 2023).

¹⁵⁸'Anonymous Interviewee Number 4' (5 December 2019).

¹⁵⁹Adlung and Mamdouh, 'Plurilateral Trade Agreements' (supra n. 38) 8.

¹⁶⁰'Anonymous Interviewee Number 6' (27 November 2019).

¹⁶¹'Anonymous Interviewee Number 5' (14 November 2019).

¹⁶²Even these formal steps retain a level of creativity, such as the establishment of the series INF/IF to categorize the documents circulated about investment facilitation, bringing together the existing code for informative documents (INF) and the one created for the JI (IF). Ibid.

and, consequently, under which dock number to circulate the documents.¹⁶³ The launch of structured discussions in March 2018 was a way to address this issue.¹⁶⁴ The first step was to identify the main elements the future negotiations – and a future Investment Facilitation for Development Agreement (IFDA) – should comprise. By November 2018, Members had raised a thorough checklist of issues used as the starting point for the next steps. During the first half of 2019, Members focused on sharing their experiences and voicing their concerns and interests. By resorting to text-based examples to develop the previously identified issues, Members started outlining the multilateral investment facilitation framework. In July 2019, the chairman circulated a working document on IFD gathering Members' written contributions to assist the participants in recognizing areas of convergence. The co-sponsors considered each provision of the working document and concluded the first read at the end of 2019. The goal was to make the text consistent with the WTO legal framework and eliminate brackets to find greater convergence in the language.

Moving on to negotiations in the WTO arguably 'implies that a commitment has been made to establish new rules or agreements'.¹⁶⁵ In light of this, launching negotiations on a new topic usually warrants the consensus of the membership over a negotiating mandate.¹⁶⁶ However, such consensus would only be needed for negotiating processes that create rights and obligations for the entire membership.¹⁶⁷ Whereas there are no legal constraints for open plurilateral negotiations in the WTO, a legitimacy limit remains – the need for achieving a critical mass.¹⁶⁸ Returning to the example of the JI on IFD, negotiations became a viable option once Members reached an overwhelming critical mass, with more than 100 co-sponsors, and a streamlined working document.¹⁶⁹ Accordingly, negotiations were quietly launched on 25 September 2020,¹⁷⁰ shifting the focus to an *informal consolidated text* prepared by the chairman of the initiative, the Chilean Ambassador Mathias Francke. Based on this streamlined text, participants conducted more focused consultations with the capitals and advanced specific outreach efforts towards developing Members and LDCs. Participating Members then agreed on a document entitled *Easter Text*,¹⁷¹ which encompassed the proposals and contributions discussed at plenary meetings. It combined the two working documents previously produced during the discussions to help Members in shaping the framework for a future agreement. This led to the conclusion of textual negotiations in July 2023. Members are now working in Geneva toward incorporating the IFDA into the WTO rulebook since an outcome at MC13, when the IFDA was made available to the public, was not possible.¹⁷²

¹⁶³ 'Anonymous Interviewee Number 1' (11 November 2019).

¹⁶⁴ A. Berger (2018) 'What's Next for the Investment Facilitation Agenda?', Columbia FDI Perspectives 2. 'Anonymous Interviewee Number 1' (supra n. 163); 'Anonymous Interviewee Number 2' (28 November 2019). The process and timeline described in the next paragraphs draw on the accounts provided by interviewees who directly participated in the mentioned negotiating stages, as well as observations of meetings of the structured discussions.

¹⁶⁵ M. Khor (2007) *The 'Singapore Issues' in the WTO: Evolution and Implications for Developing Countries*, Third World Network, 32.

¹⁶⁶ 'Anonymous Interviewee Number 5' (supra n. 161).

¹⁶⁷ Tu and Wolfe, 'Reviving the Negotiation Function of the WTO' (supra n. 42) 38.

¹⁶⁸ Hoekman and Mavroidis, 'MFN Clubs and Scheduling Additional Commitments in the GATT' (supra n. 138) 15.

¹⁶⁹ 'Anonymous Interviewee Number 5' (supra n. 161).

¹⁷⁰ 'Structured Discussions on Investment Facilitation for Development Move into Negotiating Mode' (WTO News and Events, 25 September 2020), www.wto.org/english/news_e/news20_e/infac_25sep20_e.htm (accessed 1 December 2021).

¹⁷¹ 'Easter Text' to Facilitate Negotiations for an Investment Facilitation Agreement' (WTO News and Events, 23 April 2021), www.wto.org/english/news_e/news21_e/infac_27apr21_e.htm (accessed 1 December 2021).

¹⁷² 'Members supporting Investment Facilitation for Development Agreement discuss next steps' (WTO News and Events, 19 March 2024), www.wto.org/english/news_e/news24_e/infac_19mar24_e.htm (accessed 27 March 2024); World Trade Organization, 'Draft Ministerial Decision on Adding the Investment Facilitation For Development Agreement to Annex 4 of the WTO Agreement: Communication from the Members Parties to the Investment Facilitation For Development Agreement, WT/MIN(24)/W/25' 29 February 2024.

The JIs may raise some concerns given the parallels that may be drawn with the Tokyo codes.¹⁷³ This shows the multilateral trading system's pendular motion – from a largely informal, fragmented, and loose structure to a formal and highly institutionalized framework, and now back to the centre as Members try to find a balance between formal and informal venues.¹⁷⁴ Therefore, the multilateral trading system has not gone back to square one or retroceded to the Tokyo times. Despite the similarities between the geopolitical moments, in the 1970s and nowadays – they are marked by attempts to recover from global economic crises (the oil crisis and the financial and pandemic crises respectively), polarization, new trade needs and the pursuit of novel ways to address them, and disagreement among countries about the best way forward – the arrangements are different. The Tokyo codes belong to a context where there was no institutional umbrella since the GATT was a provisional agreement. Conversely, the WTO has a legal and institutional framework that Members need to consider.¹⁷⁵ Yet, countries can learn lessons from previous experiences, such as the value of having greater flexibility.¹⁷⁶ The main differences between the two moments are the level of engagement of developing countries in the JIs, and the fact that these initiatives, if implemented as open plurilaterals, add new obligations to the co-sponsors while extending the benefits to all Members according to the MFN principle. Moreover, the JIs are based on transparency and openness to the WTO membership. In this regard, all Members have timely access to the documents and are welcome to participate in the meetings and join the initiatives.¹⁷⁷

The JIs show deference to the formal rule of consensus, which applies to the approval of both multilateral agreements and Annex 4 plurilateral agreements in the WTO. It also complies with the informal rule of not resorting to vote. For the JIs, violating any of those rules would lead to several legal issues and weaken the legitimacy of the initiatives. Instead, the co-sponsors of the JIs are 'using the WTO existing rules to try to figure out a solution'.¹⁷⁸ Such a solution could be not only a temporary one but an alternative to achieve broader cooperation, which requires well and carefully crafted techniques and procedures.¹⁷⁹ The main issue remains on how to place the new obligations within the WTO structure. The solution for this does not need to be perfect but rather feasible;¹⁸⁰ it warrants the creativity and flexibility of the WTO Members while abiding by the existing WTO rules – formal and informal. Such a solution will also be the outcome of not only legal considerations but also political inputs.¹⁸¹ As mentioned, one option is hooking the obligations to the existing schedules of commitments through the certification mechanism as countries are doing for SDR. For IFD, co-sponsors are seeking consensus to add the IFDA to Annex 4 of the WTO Agreement.¹⁸² Many of the provisions in the IFDA cannot be operationalized simply by inserting them into goods and services schedules. Making the IFDA an Annex 4 plurilateral enables the co-sponsors to fully implement their obligations.

¹⁷³Winham, 'The World Trade Organisation' (supra n. 32) 353.

¹⁷⁴This analogy is inspired by the perception of members of the WTO staff. 'Anonymous Interviewee Number 5' (supra n. 161); 'Anonymous Interviewee Number 9' (supra n. 95).

¹⁷⁵'Anonymous Interviewee Number 9' (supra n. 95).

¹⁷⁶'Anonymous Interviewee Number 8' (12 November 2019).

¹⁷⁷The JIs may appear less transparent for outsiders because most of the meetings and documents are classified and restricted. Tu and Wolfe, 'Reviving the Negotiation Function of the WTO' (supra n. 42). When confronted with the issue of whether to make the working document available, some of the co-sponsors objected arguing that this could create confusion and misunderstandings, misleading stakeholders and the public at large about the content and legal value of the document being negotiated. This step would also generate expectations to derestrict all other documents, hampering the progress of the talks.

¹⁷⁸'Anonymous Interviewee Number 2' (supra n. 164).

¹⁷⁹'Anonymous Interviewee Number 5' (supra n. 161).

¹⁸⁰'Anonymous Interviewee Number 2' (supra n. 164).

¹⁸¹'Anonymous Interviewee Number 6' (supra n. 160).

¹⁸²World Trade Organization, 'Adding the Agreement on Investment Facilitation For Development (IFD) into the Marrakesh Agreement Establishing The WTO, JOB/GC/373'.

Past failures in the WTO decision-making system have been productive¹⁸³ for they highlight spaces and tools, and the need to resort to them, to advance new initiatives and deliver on trade negotiations. In this scenario, the JIs innovate on how Members negotiate and are evidence of ‘a new way of thinking’.¹⁸⁴ The JIs also reveal the pragmatic feature of the WTO decision-making system, where the membership seeks solutions to address challenges as they arise, seizing the opportunities the negotiations create. Regardless of the JIs substantive outcome, they have been successful in advancing the discussions on the WTO negotiating mechanisms, revealing the need – and the possibility – to combine formal and informal procedures. Above all, the JIs shed light on how informal practices can be an ally, and not an obstacle, to improve legal and institutional frameworks. The interconnection between formal and informal processes may offer the needed answer to address two of the main challenges in the WTO decision-making system, namely, i) to ensure the relevance of the multilateral trading rules and the WTO’s timely response in a fast-paced and ever-changing global economy; and ii) to reach those goals in a system based on the consensus among 164 Members.¹⁸⁵ The WTO future would be less about moving away from the past than learning from it and using the existing and possible instruments to achieve negotiating outcomes.

3.2 A Way Ahead for the WTO Negotiations

Despite the criticism and challenges faced by the consensus rule,¹⁸⁶ most of the membership do not endorse abandoning it to ensure an effective and inclusive decision-making system.¹⁸⁷ On the contrary, such a move would compromise the space for the different WTO Members to express their interests and needs by creating winners and losers, which are more evident in voting methods.¹⁸⁸ Indeed, as cumbersome as a consensus decision-making system might be, it supports the multilateral trading system by adding to its input legitimacy.¹⁸⁹ Limiting the WTO political element would impair the participation of Members and could spill over to other WTO activities. There would be increased pressure to weaken the DSS and the trade policy review mechanism (TPRM), creating an ‘efficiency without loyalty’¹⁹⁰ kind of situation. Likewise, WTO Members are the main source of support to maintain the single undertaking and the current trade round format because they want to advance their agendas and ensure they have enough support to table proposals whilst avoiding free riders.¹⁹¹ Moreover, Members want to integrate their topics

¹⁸³ Anonymous Interviewee Number 3’ (supra n. 140).

¹⁸⁴ Anonymous Interviewee Number 2’ (supra n. 164).

¹⁸⁵ U.S. Bhatia (2012) ‘G20 – Combining Substance with Solidarity and Leadership’, in P.S. Mehta, et al. (eds.) (2012) *Reflections from the Frontline: Developing Country Negotiators in the WTO*, Published by Academic Foundation in association with CUTS International 2012, 239–240.

¹⁸⁶ Guan, ‘Consensus Yet Not Consented’ (supra n. 67) 86–87; 102–104; Low, ‘WTO Decision-Making for the Future’ (supra n. 80) 3, 5; Narlikar, ‘The Politics of Participation’ (supra n. 112) 173–175; Steinberg, ‘In the Shadow of Law or Power?’ (supra n. 42) 365; J.J. Schott and J. Watal (2000) ‘Decision-Making in the WTO’ (Peterson Institute for International Economics 2000) PB00-2; Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (supra n. 17) 114; Pauwelyn, ‘The Transformation of World Trade’ (supra n. 54) 32, 44.

¹⁸⁷ Tijmes-Lhl, ‘Consensus and Majority Voting in the WTO’ (supra n. 18) 429.

¹⁸⁸ Narlikar, ‘The Politics of Participation’ (supra n. 112) 177.

¹⁸⁹ Pauwelyn, ‘The Transformation of World Trade’ (supra n. 54) 39; Marceau, ‘Never Waste a Good Crisis’ (supra n. 86) 346; Wolfe, ‘Decision-Making and Transparency in the “Medieval” WTO’ (supra n. 27) 643.

¹⁹⁰ Pauwelyn, ‘The Transformation of World Trade’ (supra n. 54) 39. Pauwelyn goes further and draws parallels between the WTO and the European integration process. In the latter, even with a high level of integration between countries, the increase in the regulatory scope highlighted the need to ensure the participation of each single member. As a result, the European project counted with the building of loyalty around it. In the WTO, a much more complex and less integrated institution, the claims for greater participation by all, to guarantee a truly Members-driven organization, is even more important. Due to the existing distance between the WTO and domestic politics and civil society, there are several uncertainties about the ‘WTO project’, which does not benefit from the loyalty of the participants to the multilateral trading system. Ibid 41.

¹⁹¹ Anonymous Interviewee Number 8’ (supra n. 176); Anonymous Interviewee Number 9’ (supra n. 95).

of interest into the WTO framework to make them enforceable under the DSS. The single undertaking becomes a political tool to negotiate new trade rules. In this capacity, the single undertaking promotes a linkage approach¹⁹² to negotiations to reach package deals¹⁹³ according to the understanding that more items on the negotiating agenda may result in better and more balanced trade-offs.¹⁹⁴ Yet, it unveils the shortcomings of the WTO decision-making system over the past couple of decades.¹⁹⁵ The single undertaking could drive countries to focus on parts of the negotiating package with which they are not pleased instead of those issues on which they would like to agree, halting the discussions.¹⁹⁶

Starting in 2011 during MC8, Members recognized ‘the need to more fully explore different negotiating approaches while respecting the principles of transparency and inclusiveness’¹⁹⁷ to deliver the DDA. In the following years, Members agreed on the Trade Facilitation Agreement (TFA) outside the single undertaking and disagreed on reaffirming the Doha mandate. The frustration with the Doha Round became more evident in 2015 through paragraph 34 of the Nairobi Ministerial Declaration.¹⁹⁸ Members agreed to the possibility of identifying and discussing new issues for negotiations if they were willing to do so. Such a stance meant that WTO Members could start addressing topics outside the DDA and its single undertaking or the WTO built-in agenda, no longer fully accepting the negotiating methodology established by the Doha Round.¹⁹⁹ This further shows the interest of some of the WTO Members in holding continuous negotiations in the daily work of the WTO instead of the simultaneous negotiating process of interdependent topics in a trade round.²⁰⁰

Seeking negotiating alternatives in the WTO can steer important changes. For instance, despite the difficulties in identifying the requirements of a critical mass, a broader membership supporting the endeavour is a central factor.²⁰¹ This explains the constant outreach efforts of the JIs participants in gathering support from a larger share of the WTO membership, if not to multilateralize the initiative, at least to legitimize it as an open plurilateral. The outreach work reveals the need for increasing communication among capitals, bringing not only ambassadors but also ministers to the table. A closer connection to domestic governments helps understand the different needs and concerns of countries. As argued by a Member’s delegate, in Geneva the discussions and positions are sometimes political, whereas in the capitals there usually is more space for dialogue and acceptance of an initiative that could improve the quality of imported FDI²⁰² or the regulation on e-commerce. When the main obstacles to advancing

¹⁹²See D.W. Leebron (2002) ‘Linkages’, *American Journal of International Law* 96, 5; C.L. Davis (2004) ‘International Institutions and Issue Linkage: Building Support for Agricultural Trade Liberalization’, *American Political Science Review* 98, 153.

¹⁹³VanGrasstek, ‘The World Trade Organisation’ (supra n. 32) 306; Guan, ‘Consensus Yet Not Consented’ (supra n. 67) 83. Tu and Wolfe argue that the single undertaking is dead, but ‘package deals a negotiation reality’. Tu and Wolfe, ‘Reviving the Negotiation Function of the WTO’ (supra n. 42) 40.

¹⁹⁴Rolland, ‘Redesigning the Negotiation Process at the WTO’ (supra n. 74) 77.

¹⁹⁵Wolfe, ‘Arguing and Bargaining in the WTO’ (supra n. 4) 7; Guan, ‘Consensus Yet Not Consented’ (supra n. 67) 92–93; Ansong, ‘Single Undertaking, Different Speeds’ (supra n. 92); Mendoza and Wilke, ‘Revisiting the Single Undertaking’ (supra n. 132); A. Lanoszka (2007) ‘The Promises of Multilateralism and the Hazards of Single Undertaking’, *Michigan State Journal of International Law* 16, 655.

¹⁹⁶VanGrasstek and Sauv  , ‘The Consistency of WTO Rules’ (supra n. 74) 858.

¹⁹⁷World Trade Organization, ‘Ministerial Conference, Eighth Session – Elements for Political Guidance, WT/MIN(11)/W/2’ (1 December 2011).

¹⁹⁸‘Anonymous Interviewee Number 10’ (14 July 2021).

¹⁹⁹‘Anonymous Interviewee Number 7’ (supra n. 122); ‘Anonymous Interviewee Number 10’ (supra n. 198).

²⁰⁰Rege, ‘Developing Countries in the WTO Negotiations’ (supra n. 31) 47.

²⁰¹‘Anonymous Interviewee Number 2’ (supra n. 164).

²⁰²*Ibid.* The difference between capitals and Geneva-based officials was evident during the TFA negotiations, when delegates of African countries wanted to use the agreement as a bargaining tool, while capital-based officials of those same African countries were focusing their efforts on implementing the TFA, understanding the relevance of the new rules to address domestic constraints. N. Lamp (2019) ‘Strategies for Developing Countries in Multilateral Trade Negotiations at

negotiations are political rather than technical, ministers are better equipped to address them and find convergence.²⁰³ Ministerial conferences are only ‘the tip of an iceberg of diplomatic activity in and out of Geneva, and that is what needs reviving’.²⁰⁴ Accordingly, the routine negotiating process in the WTO needs to be able to overcome political divergences and take a pragmatic turn, addressing the needs of governments and domestic societies.

Informal meetings of trade ministers – the mini-ministerials²⁰⁵ are a good alternative to enhance the bond between multilateral decision-making and domestic interests. They are unofficial meetings, not formally part of the WTO structure, comprising a representative group of Members offering leadership to the WTO. The aim is not to make decisions but rather to take stock of the negotiations and work out the technicalities to facilitate concessions to achieve consensus in the ministerial. Mini-ministerials are, hence, an informal policy forum to discuss systemic issues. In an attempt to make these meetings more transparent, African ministers started to be invited to mini-ministerials.²⁰⁶ Indeed, the participation of smaller countries that are leaders of coalitions or chair WTO committees is essential to ensure that all WTO Members will be briefed about the discussions and outcomes of mini-ministerials.²⁰⁷ In the long term, reforms could improve the system by making the ministerial meetings annual, so that ministers could be informed of the newest developments and decide on more routine matters, having a condensed agenda.²⁰⁸ Regardless of the mechanism, ministers need to be involved in formal and informal multilateral trade discussions because they bring the negotiations in Geneva closer to the debates and interests of the domestic constituency.²⁰⁹

Some of the long-standing challenges in the WTO decision-making system concern finding alternatives to overcome the distance between international bodies and domestic realities, and the lack of accountability and challenging instruments.²¹⁰ There lies the importance of a bottom-up approach. For instance, it was only during the TFA negotiations that Members established a mechanism to allow for ‘Geneva-based negotiators to visit their major ports or capitals along with international experts to familiarize themselves with their countries’ trade facilitation needs and priorities. That gave them a better idea of the cost implications of the proposed measures’.²¹¹ Because most of the current discussions in the WTO involve behind the border measures, the negotiating process must connect delegates, government officials, domestic regulators, civil society, and the private sector if Members are to address domestic needs and interests. JIs contribute to enhancing the input of civil society and business in the WTO decision-making system, which has long been debated.²¹² For instance, the participants in the Trade and

the World Trade Organization’, in J. Pauwelyn and M. Wang (eds.), *Building Legal Capacity for a More Inclusive Globalization Barriers to and Best Practices for Integrating Developing Countries into Global Economic Regulation*. The Graduate Institute and Centre for Trade and Economic Integration, 21–22.

²⁰³Rege, ‘Developing Countries in the WTO Negotiations’ (supra n. 31) 43.

²⁰⁴Tu and Wolfe, ‘Reviving the Negotiation Function of the WTO’ (supra n. 42) 31.

²⁰⁵Wolfe, ‘Decision-Making and Transparency in the “Medieval” WTO’ (supra n. 27) 638, 644–645; Wolfe, ‘Informal Political Engagement in the WTO’ (supra n. 13).

²⁰⁶Odell, ‘Chairing a WTO Negotiation’ (supra n. 34) 446; Odell, ‘Breaking Deadlocks in International Institutional Negotiations’ (supra n. 19) 290.

²⁰⁷Wolfe, ‘Informal Political Engagement in the WTO’ (supra n. 13) 42.

²⁰⁸Wolfe, ‘Decision-Making and Transparency in the “Medieval” WTO’ (supra n. 27) 641; Wolfe, ‘Informal Political Engagement in the WTO’ (supra n. 13) 47.

²⁰⁹Wolfe, ‘Informal Political Engagement in the WTO’ (supra n. 13) 56–57.

²¹⁰L. Pascal (2010) ‘Global Governance: Lessons from Europe’ (17 February 2010), www.theglobalist.com/global-governance-lessons-from-europe/ (accessed 13 May 2018).

²¹¹M. Ahmad (2012) ‘Trade Facilitation – Negotiations towards a Win–Win Outcome’, in P.S. Mehta et al. (eds.), *Reflections from the Frontline: Developing Country Negotiators in the WTO*. Published by Academic Foundation in association with CUTS International, 125.

²¹²See S. Charnovitz (1996) ‘Participation of Nongovernmental Organizations in the World Trade Organization’, *University of Pennsylvania Journal of International Economic Law* 17, 331; D.C. Esty (1998) ‘Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion’, *Journal of International*

Environmental Sustainability Structured Discussions (TESSD) and the Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade (IDP) invite different stakeholders to their meetings to inform the discussions with their expertise.²¹³ Such participation is only possible because these initiatives are not ‘formally part of the WTO’.²¹⁴ Likewise, thematic sessions in WTO committees are informal meetings including different stakeholders that foster experience sharing to assess the challenges and opportunities in WTO negotiations and implementation of rules.²¹⁵

The JIs also show the importance of strengthening the role played by the WTO Secretariat and the relevant chairperson in the negotiations.²¹⁶ A few Members questioned the involvement of the Secretariat with the JIs since the topics are not covered by any of the WTO formal bodies.²¹⁷ The Secretariat can only act at a specific request of the JIs co-sponsors, helping in their activities in the WTO. The language of the documents circulated by the Secretariat stresses that it is answering a demand from a Member.²¹⁸ For instance, the Secretariat provides invaluable assistance in preparing documents and conducting research for substantial negotiations by doing the heavy lifting work of compiling examples. The Secretariat also provides opinions to address technical questions raised by Members during the discussions.²¹⁹ Likewise, the chairperson of each JI is central in ensuring swift progress and a constructive approach in the negotiations. Despite the political struggles in the past few years regarding the procedures to choose chairpersons, especially given the lack of clear requirements,²²⁰ the JI on IFD has benefited greatly from its chairpersons. They have actively facilitated the dialogue between the co-sponsors to bridge differences and reach compromises, preparing working documents to signal areas of convergence and disagreement. They also have produced and circulated summaries of the meetings to provide a record of some of the issues discussed by Members. Such documents have assisted delegations in reporting the debates and conducting negotiations with their capitals.²²¹ Moreover, the chairpersons lead confessionals with the co-sponsors, holding informal meetings with a few Members at a time to facilitate convergence and assess the negotiating climate in moving forward.

4. Conclusion

Through the concept of transience of (in)formality, I argue that formal and informal negotiating processes coexist in the WTO. The evolution of the multilateral trading system is evidence of such intersection. Formality and informality are complementary rather than contradictory. They are

Economic Law 1, 123; S. Charnovitz (2000) ‘Opening the WTO to Nongovernmental Interests’, *Fordham International Law Journal* 24, 173; P. Van den Bossche (2008) ‘NGO Involvement in the WTO: A Comparative Perspective’, *Journal of International Economic Law* 11, 717; R. Keohane and J.S. Nye Jr. (2001) ‘Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy’ (Social Science Research Network 2001), SSRN Scholarly Paper ID 262175; E. Hannah et al. (2017) ‘Reforming WTO-Civil Society Engagement’, *World Trade Review* 16, 427; S. Charnovitz (2006) ‘Nongovernmental Organizations and International Law’, *The American Journal of International Law* 100, 348.

²¹³J. Pauwelyn (2023) ‘Taking Stakeholder Engagement in International Policy-Making Seriously: Is the WTO Finally Opening Up?’, *Journal of International Economic Law* 26, 51.

²¹⁴*Ibid* 58–59.

²¹⁵Wolfe, ‘Informal Learning and WTO Renewal’ (supra n. 22).

²¹⁶This finding differs from Elsig’s understanding that the Secretariat has become less influential. Even in an informal initiative, the co-sponsors of the JIs have made sure they can count with the support from the WTO Secretariat. M. Elsig (2011) ‘Principal-Agent Theory and the World Trade Organization: Complex Agency and “Missing Delegation”’, *European Journal of International Relations* 17, 495, 504.

²¹⁷‘Anonymous Interviewee Number 4’ (supra n. 158); ‘Anonymous Interviewee Number 5’ (supra n. 161).

²¹⁸‘Anonymous Interviewee Number 5’ (supra n. 161).

²¹⁹‘Anonymous Interviewee Number 6’ (supra n. 160).

²²⁰‘Anonymous Interviewee Number 11’ (21 July 2021).

²²¹E. Galvez (2019) ‘WTO Public Forum, Session 91 – Investment Facilitation for Development’ (WTO Public Forum 2019, Geneva, Switzerland, 10 October 2019).

both manifestations of Members' interactions in the WTO. Members resort to a combination of tools to shape practices to advance their needs and reflect new configurations of the global economic governance. Accordingly, practices may offer a different lens to understanding the WTO negotiations and Members' role therein. Informal procedures include small group meetings, coalitions, JIs, and critical mass creating open plurilaterals.

Drawing on the JIs, the research findings reveal that informality is key in promoting needed changes and maintaining WTO's relevance. JIs align with the 'reform-by-doing' approach that highlights a bottom-up process grounded on Members' agency. In this sense, the JIs contribute to the WTO reform by not only attempting to update the WTO rules to meet current challenges but also offering a new way to do so within the WTO's regulatory and institutional frameworks. Claims may arise that the argument advanced undermines the legal certainty and predictability of WTO law or is incompatible with multilateralism and the rule of law. However, far from diminishing the role played by law in trade governance, the purpose is to show that law in the WTO is more nuanced and dynamic than concerns over stability and order may first suggest.

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