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India and South Africa pour cold water on alternative approach to WTO talks

MINUTES OF MEETING

HELD IN VIRTUAL FORMAT ON 1-2 AND 4 MARCH 2021

Chairperson: H.E. Dr. David Walker (New Zealand)

[...]

Subjects discussed: 1:

10. INTRODUCTION OF A PAPER ON "LEGAL STATUS OF JOINT STATEMENT INITIATIVES AND THEIR NEGOTIATED OUTCOMES" – REQUEST FROM INDIA AND SOUTH AFRICA (WT/GC/W/819)

[...]

10.1. The Chairman recalled that the item was on the agenda at the request of the delegations of India and South Africa and related to the introduction of a paper on "Legal Status of Joint Statement Initiatives and their Negotiated Outcomes" together with the communication in WT/GC/W/819.

10.2. The representative of India recalled that India and South Africa had submitted the paper in document WT/GC/W/819 dated 19 February 2021 on the "The Legal Status of 'Joint Statement Initiatives' and their Negotiated Outcomes". As a co-sponsor, India was not questioning the right of Members to meet and discuss any issue. However, when such discussions turned into negotiations and their outcomes were to be brought into the WTO, the fundamental rules of the WTO should be followed. The WTO had been established as a forum concerning multilateral trade relations in matters dealt with under the agreements in the Annexes to the Marrakesh Agreement and for further negotiations among its Members concerning their multilateral trade relations and to provide a framework for the implementation of results of such negotiations.

10.3. The Marrakesh Agreement defined "Plurilateral Agreements" as the agreements and associated legal instruments that were included in Annex 4 to the Agreement. The Ministerial Conference, upon the request of the Members party to a trade agreement, decided exclusively by consensus to add that agreement to the said Annex 4. Procedures for amending rules were enshrined in Article X of the Marrakesh Agreement. On the other hand, the GATT and GATS contained specific provisions for modifications of Schedules containing specific commitments of Members.

10.4. Amendments or additions to the rules were governed by multilateral consensus based decision-making or voting – right from the outset when a new proposal for an amendment was made. On the other hand, negotiations on modifications or improvements to Schedules could arise

1 The proposed agenda was circulated in document WT/GC/W/820.
either as the outcomes of consensual multilateral negotiations pursuant to Article XXVIII of GATT or Article XXI of GATS or be reached through a bilateral request and offer process or as a result of a dispute. In fact, even changes to Schedules could not be made unilaterally as other Members had the right to protect the existing balance of rights and obligations.

10.5. The GATS read in concert with the Marrakesh Agreement provided for different rules and procedures for amendment of rules and modification of schedules. While the GATS rules were governed by the GATS Part II, "General Obligations and Disciplines", Part III of the GATS contained provisions concerning Members individual "Specific Commitments" pertaining to distinctly identified services sectors which were inscribed in Members' Schedules. In case of conflict in interpretation, Article XVI.3 of the Marrakesh Agreement provided that in the event of a conflict between a provision of the Marrakesh Agreement and a provision of any of the Multilateral Trade Agreements, the provisions of the Marrakesh Agreement should prevail.

10.6. Each of the JSIs was likely to pose different legal challenges to the existing WTO rules and mandates given the differences in the nature and scope of issues covered under each of those initiatives. However, any attempt to bring in the negotiated outcomes of the JSIs into the WTO by appending them to Members' Schedules, even on MFN basis, following modification of Schedules procedures, bypassing multilateral consensus would be contrary to the provisions of the Marrakesh Agreement.

10.7. Any attempt to introduce new rules, resulting from JSI negotiations, into the WTO without fulfilling the requirements of Articles IX and X of the Marrakesh Agreement would be detrimental to the functioning of the rules-based multilateral trading system. Among others, it would erode the integrity of the rules-based multilateral trading system, create a precedent for any group of Members to bring any issue into the WTO without the required mandate. bypass the collective oversight of Members for bringing in any new rules or amendments to existing rules in the WTO, usurp limited WTO resources available for multilateral negotiations, result in Members disregarding existing multilateral mandates arrived at through consensus in favour of matters without multilateral mandates, lead to the marginalization or exclusion of issues which were difficult but which remained critical for the multilateral trading system such as agriculture and development thereby undermining balance in agenda setting, negotiating processes and outcomes and fragment the multilateral trading system and undermine the multilateral character of the WTO.

10.8. The document listed various options to move ahead. As per the provisions of the Marrakesh Agreement, for bringing in their negotiated outcomes in the WTO, the JSI Members could seek consensus among the whole WTO Membership, followed by acceptance by the required proportion of Members according to Article X of the Marrakesh Agreement. Alternatively, they could get the new agreements included in Annex 4 following Article X.9 of the Marrakesh Agreement. They also had option to pursue agreements outside the WTO Framework, as had been envisaged in the Trade in Services Agreement (TISA) or as had been done in multiple bilateral or plurilateral FTAs or RTAs. The proponents of a "flexible multilateral trading system" could even seek amendment to Article X of the Marrakesh Agreement following procedures enshrined therein to provide for such an approach.

10.9. Through the paper WT/GC/W/819, India and South Africa reiterated that basic fundamental principles and rules of the rules-based multilateral trading system as enshrined in the Marrakesh Agreement should be followed by all Members including the participants of various JSIs. Negating the decisions of past Ministerial Conferences by decisions taken by a group of Ministers on the side-lines of a Ministerial Conference or the side-lines of any other event would be detrimental to the existence of the rules-based multilateral trading system under the WTO.

10.10. The representative of South Africa said that the WTO had been established as a forum concerning multilateral trade relations. South Africa's interest in submitting the paper was to remind Members of the legal architecture that governed the functioning of the WTO which was critical to preserve its multilateral character. The pandemic was a sharp reminder of the importance of global cooperation in dealing with global challenges. The challenges facing humanity were not limited to the pandemic but included rising inequality both within and between countries, poverty and food insecurity, among others. Those necessitated that Members avoided measures that undermined or fragmented the trading system.

10.11. Any group of Members could discuss any issue informally. However, when discussions turned into negotiations, and their outcomes were sought to be formalized into the WTO framework, it could
only be done in accordance with the rules of procedure for amendments as well as decision-making as set out in the Marrakesh Agreement. The plurilaterals were provided for in the Marrakesh Agreement and were included in Annex 4 to the Agreement – and there were specific rules to be followed to integrate those into the WTO framework. It was however important to note that the Ministerial Conference, upon the request of the Members party to a trade agreement, decided exclusively by consensus to add that agreement to the said Annex 4.

10.12. The provisions in the Marrakesh Agreement had been carefully negotiated and were a result of the experience acquired in the GATT which had been characterized especially after the Tokyo Round by agreement on a number of plurilateral codes. There had been recognition that those plurilateral codes had created a fragmented system of rules. In respect of some Contracting Parties, the GATT rules had been applicable, while in respect of the rest, both the GATT rules and the rules of plurilateral codes had been applicable. That created considerable complexity in determining what obligations had been applicable in respect of which Contracting Party.

10.13. The Preamble to the Marrakesh Agreement clearly articulated Members’ vision for the WTO and it was to develop an integrated, more viable and durable multilateral trading system. Article II.1 stated that “The WTO shall provide the common institutional framework for the conduct of trade relations among its Members.” Article III.2 stated that “The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations”. It provided for consensus-based decision-making as enshrined in Articles III.2, IX, X and also X.9 as well as procedures for the amendments of rules as articulated in Article X.

10.14. The Marrakesh Agreement did not make provision for the so-called open plurilaterals and flexible multilateralism. Therefore, any suggestion that when offered on MFN basis, no consensus was required for bringing new rules into the WTO was legally inconsistent with the fundamental principles and procedures of the Marrakesh Agreement. Importantly, new rules could not be brought into the WTO through amendment of Members’ Schedules. It had also been suggested that the Telecommunications Reference Paper justified why the consensus principle could be bypassed. However, as part of the package of the Uruguay Round outcome, there had been a multilateral consensus and a formal mandate for the negotiations, including agreement on inscribing outcomes into Schedules without an amendment procedure.

10.15. There were systemic and developmental implications inherent in plurilaterals especially if they attempted to subvert established rules and foundational principles of the Marrakesh Agreement. They risked eroding the integrity of the rules-based multilateral trading system, creating a precedent for any group of Members to bring any issue into the WTO without the required consensus, including disregard of existing multilateral mandates, marginalizing issues which were difficult but yet critical for the multilateral trading system such as agriculture and development thereby undermining balance in agenda setting, negotiating processes and outcomes, fragmenting the system and undermining the multilateral character of the WTO which Members had sought to resolve by creating the WTO following the GATT experience.

10.16. The legal framework of the WTO provided clear options for Members who were part of JSIs as outlined in the paper. South Africa was therefore calling on Members to respect the rules which continued to underpin the functioning of the WTO.

10.17. The representative of Vanuatu, on behalf of the Pacific Group, said that the Pacific Group was still studying the paper so its comments that day were still preliminary. The Pacific Group had seen the proliferation of Joint Statement Initiatives in the WTO which posed constraints for small countries that did not have the capacity to follow all those negotiations. In addition, the Group was unclear as to what were the rules of engagement in the JSIs and importantly, how the development dimension would be addressed. On the one hand, Members had fundamental issues contained in the Marrakesh Agreement and, on the other, the crucial trade issues that needed to be addressed. The paper by India and South Africa pointed to the need to clarify the relationship between JSIs and the multilateral rules. While appreciating some Members for wanting to proceed at a fast paced manner, Members should follow the different timeframes legally prescribed in the multilateral rules. The Pacific Group encouraged Members to engage in the discussions on the proposal.

10.18. The representative of Zimbabwe noted that the issue under discussion concerned the systemic implications that would result from an erosion of the sanctity of the decision-making procedures in the Marrakesh Agreement. As a founding Member, Zimbabwe attached great
importance to the sanctity of the rules-based system as spelt out in the Marrakesh Agreement. A fundamental pillar of the WTO’s success had been the adherence of Members to the letter and spirit of the WTO Agreements. Zimbabwe did not question the right of sovereign nations to discuss and agree on agreements defining their bilateral or plurilateral relations.

10.19. It was however concerning when plurilateral issues and interests were sought to be silently introduced into the WTO rulemaking system without going through the necessary procedural processes as outlined in Articles IX and X of the Marrakesh Agreement. The JSI discussions were not mandated under any WTO decision or Ministerial declaration and could not be construed in any way to de facto assume any validity or recognition by the Marrakesh Agreement. Zimbabwe would welcome responses and clarifications provided by JSI proponents and would engage in discussions on the issues raised in the paper. Zimbabwe continued to consult internally on the paper and the views expressed that day were without prejudice to its final national position.

10.20. The representative of Nepal shared preliminary observations on the paper as it was still being studied in its capital. The WTO was for safeguarding multilateralism and facilitating rules-based, predictable, transparent and inclusive trade with a view to raising living standards, reaching full employment, high real income and effective demand and expanding the production of and trade in goods and services. It had however been observed over the past few years that the WTO was making its efforts on some plurilateral initiatives with a view to concluding their negotiations as soon as possible. Despite the absence of any agreement and consensus among Members on their mandates, such plurilateral initiatives in the guise of Joint Statement Initiatives continued to take place. All proponents of those initiatives seemed to have tried to cover major emerging issues, challenges and opportunities in the global trade regime.

10.21. However, leaving a significant number of the Membership outside the JSIs could not be helpful in achieving the main objectives of the WTO. Volume of international trade and size of global GDP could not serve as sufficient evidence to ensure an inclusive and sustainable multilateral trading system. That essentially needed to integrate all Members regardless of the size of their population and economy. The number of Members outside the JSIs and the size of population they covered were in no way less important. While carrying out any negotiation in the multilateral trading system, it was equally important that Members made positive efforts to ensure that developing countries especially the least developed among had a just share of benefits from the growth of international trade. The successful conclusion of mandated negotiations such as fisheries subsidies, agriculture and S&DT, among others, would be more relevant among Members than focusing on the JSIs.

10.22. AB members should be appointed soon to bring the dispute settlement mechanism back on track and to enhance the WTO’s functional credibility. Members should progress in WTO reform initiatives to ensure an inclusive and rules-based multilateral trading system and to safeguard multilateralism with a view to addressing global challenges including inequality by incorporating emerging issues and opportunities of global trade and supporting weaker economies to meaningfully integrate into the global trading system. It would be much more relevant to conclude the existing mandates and those to be agreed at MC12 to make all WTO matters multilateral, inclusive and just.

10.23. The representative of Cuba said that the document had been submitted to capital where it was currently being studied and would provide some general comments without prejudice to making further comments at a later time. Cuba had never objected to the right of any group of Members to informally discuss any topic. There was however no agreed multilateral mandate for the development within the WTO context of the JSI negotiations that were currently taking place. The procedures adopted by JSIs in Buenos Aires contravened the rules that were multilaterally agreed by all WTO Members. That was causing a precedent which could have an impact on the participants in those initiatives – challenging the consensus required to introduce new rules in the WTO.

10.24. The representative of Australia noted Members’ commitment to improving the effectiveness of the WTO’s rulemaking function. Australia was a participant in all the current JSI negotiations under way and strongly supported that important work at the WTO. Plurilateral initiatives were neither novel nor revolutionary in the multilateral trading system. They had always been a part of the WTO architecture had constituted the predominant form of rulemaking in the multilateral trading system for decades. WTO-consistent plurilateral trade agreements with wide participation played an important role in complementing global liberalization efforts. The current JSIs had the potential to deliver vital outcomes that strengthened the WTO’s rulemaking function and its health more generally. More than 110 Members were participating in one or more of the current JSI negotiations
– demonstrating the wide acknowledgement from across the Membership that that was a legitimate and useful form of rulemaking. They had and continued to be inclusive, open and transparent.

10.25. Australia did not agree with the legal analysis in India and South Africa’s paper. For instance, the suggestion that Members could not improve their GATT or GATS Schedules without consensus agreement was not accurate. Members could always incorporate improvements to their Schedules whether unilaterally or as a group of Members. That was the legal architecture which participants had agreed to use in the services domestic regulation JSI. Australia had full confidence in the WTO consistency of that approach. In the case of the e-commerce JSI, its participants were still exploring the legal structure options they could best use to incorporate eventual outcomes into the WTO legal framework but were confident that those pathways could be found. Australia encouraged all Members to participate in or at least keep an open mind on those plurilateral discussions to pursue outcomes that modernized and enhanced WTO rules for the whole Membership.

10.26. The representative of Costa Rica was focused on ensuring that the WTO operated within the legal framework agreed by the Members. Costa Rica would reject any attempt to force Members to abide by new obligations without their consent. Costa Rica was a participant in the Joint Statement Initiatives on Electronic Commerce, Investment Facilitation for Development, MSMEs and Services Domestic Regulation. The reason for that was simple. Costa Rica was recognizing the need to adapt to the trade policy challenges of the 21st century. But that did not mean that any Member who chose to remain outside those discussions would be forced to adhere to any new obligations.

10.27. Costa Rica focused its remarks that day on the negotiations on services domestic regulation as that was the initiative that it had the pleasure of coordinating. Those negotiations and the outcome they would produce were firmly within the rules of the WTO. 59 proponents of services domestic regulation had established the initiative at the end of 2017 after they had to accept with great regret that no further progress had been possible in the Working Party on Domestic Regulation. Each and every proposal submitted had been rejected in its entirety by South Africa and other Members. Proponents of domestic regulation had no choice but to accept that position.

10.28. Since that time, work on the subject had so far advanced in the Joint Statement Initiative on Services Domestic Regulation. To the extent that participants considered it to be a viable prospect for an outcome to be delivered that year, Costa Rica clarified that the outcome would consist of a set of disciplines on licensing, qualification and standards which would bind only participating Members but would benefit services suppliers from all Members who traded with the participating Members which currently represented more than 70% of world services trade.

10.29. The outcome that was envisaged would be incorporated into participating Members’ GATS schedules of specific commitments. In substance, it covered precisely those types of measures that were listed in the GATS as areas for additional commitments, namely, qualification standards and licensing matters. That was important because the paper introduced by India and South Africa suggested that the disciplines developed by the initiative constituted some form of not further specified rules which did not fit under the architecture of services schedules. That was quite untrue. Rather, the disciplines constituted improvements of participating Members’ existing commitments.

10.30. Participating Members would give legal effect to the outcome by inscribing the disciplines as additional commitments in the respective GATS schedules. That would not be done by seeking to add a new agreement to the WTO architecture but by applying well established multilateral WTO procedures to improve Members’ schedules of specific commitments. Concerns about the work of the JSI had been raised already at the end of 2019. At that time, India had argued that some of the disciplines could be of a GATS minus nature and the GATS Article VI.4 mandate could be affected by the work of the initiative. As the Coordinator of the initiative, Costa Rica had had the pleasure of discussing those concerns with India in more detail and to report back to the group. While participants in the initiative did not agree that the disciplines in question could be understood to undercut existing GATS obligations, they agreed wholeheartedly with India that the disciplines should not be understood to weaken any provision contained in the GATS.

10.31. Indeed, participants had recently incorporated in the negotiating text language expressing clearly that the disciplines should not be constructed to diminish any obligations under the GATS. The GATS Article VI.4 mandate to develop any necessary domestic regulation disciplines was not, would not and could not be affected by the fact that Members participating in the JSI would undertake additional commitments on domestic regulation. Costa Rica was therefore disappointed
to see that India currently appeared to question the right of any WTO Member to improve its services commitments. The JSI on Services Domestic Regulation remained open and transparent and all Members were welcome to join the meetings and to constructively engage ensuring that the outcome benefited service suppliers across the world and included as many Members as possible.

10.32. The representative of Chinese Taipei noted that the plurilateral approach had contributed to global trade in the past. The ITA was an example. Certain limited use of the plurilateral approach could support and supplement the multilateral trading system by facilitating international trade. The discussions under JSIs had given the WTO new momentum which was necessary and healthy for the multilateral system. It was an unavoidable trend that more and more trade issues were emerging that urgently needed Members to establish new disciplines for them. It was highly important to update WTO rules and to make the WTO a living organization and not be left behind by the world.

10.33. Through Joint Statement Initiatives, Members had developed a creative way to address the trend so that the WTO’s legislative function could be improved for it to maintain its relevancy given new developments in the world – with Members still maintaining the flexibility not to opt in. Chinese Taipei called on Members to jointly think about how plurilateral agreements could be integrated into the multilateral trading system while considering Members’ needs for their respective development stages and maintaining the existing rights and obligations of non-participating Members.

10.34. The representative of Colombia believed that that was an important discussion for the future of the organization as those initiatives covered the interests of many Members to move forward on crucial issues in global trade relations. Colombia appreciated the interest the Director-General had expressed on JSIs. That was a necessary step for the strengthening of the WTO. Colombia was happy to see how the path that had begun with previous processes such as the ITA was currently joined by many Members who were involved in the JSIs – an important space to resolve pending priorities.

10.35. Such perspective had led Colombia to actively and formally participate in the JSIs on e-commerce, investment facilitation for development, services domestic regulation, MSMEs and trade and gender. Colombia also expressed its interest in other nascent initiatives which would likewise have an important impact on the WTO’s future as a driver of development for Members. With regard to the document being reviewed that day, Colombia did not share the legal analysis that the paper had set out but remained ready to continue that discussion in the appropriate forum. Colombia reiterated its commitment to the JSIs and its support for any work that could be done in that area.

10.36. The representative of Mexico said that JSIs provided an excellent opportunity to furnish the WTO with tools that would allow it to face the current challenges in global trade. Members were in a situation where some of them believed that they were still not in a position to fully integrate themselves into the work under way. The JSI participants had never foreclosed the possibility for more Members to join those initiatives when they deemed it appropriate to do so nor did those initiatives diminish the rights and obligations of non-participating Members. Rather, the JSIs offered a possibility to move forward and help the WTO become more relevant by promoting trade as a vehicle for development. Mexico had been a strong proponent of the JSIs as the work had taken place openly, inclusively and transparently with voluntary participation at its core.

10.37. The representative of the Russian Federation found the paper by India and South Africa upsetting. There was no doubt that Members should respect the right of any of them to express its attitude towards current developments within the multilateral legal system and to point out issues which it could see as contradictory to the system’s rules. The paper was however not about that but dealt with the issue of whether the WTO should move forward and regain its relevancy amid the changing global economic environment or should it be further bogged down by disagreements among Members and lack of consensus eventually turning into an archaic and useless institution.

10.38. The multilateral outcomes at MC11 had clearly been quite poor. The decision to promote and accelerate fisheries subsidies negotiations – the only multilateral and negotiation-related result achieved in Buenos Aires – was evidently not enough to chart a way forward for the WTO. The JSIs in which Russia was proud to participate in had been considered globally as a signal of Members’ ability and readiness to explore possible formats to move ahead. The progress achieved in all JSIs since then demonstrated the effectiveness of that approach. For example, the JSI on Services Domestic Regulation was an attempt to deliver on a long standing commitment of all Members to develop the respective disciplines as set out in GATS Article VI.4.
10.39. As for the incorporation of new plurilateral initiatives into the WTO Agreements, Russia agreed with suggestion of India and South Africa that it should be done in accordance with the relevant provisions of the Marrakesh Agreement. However, the final goal of the JSIs was not to create a set of isolated rules among like-minded Members but rather to update the multilateral legal system as a whole. That was why the JSIs remained open to all Members at any stage.

10.40. The most disappointing fact about the submission was that while attacking JSIs, it did not provide any way forward essentially keeping the WTO to languish in the current limbo. No Member had taken the position to leave behind the core WTO mandated issues like agriculture or "horizontal" S&DT. However, if the needs of the businesses and the people worldwide including in developing countries required Members to agree on adequate and up-to-date rules on other important issues, they had no right to keep those requests as hostages of their inability to reach progress on all fronts.

10.41. The representative of Japan appreciated the Joint Statement Initiatives as an essential framework to allow the WTO to address in a flexible and realistic manner the changing global economic needs of the 21st century. The JSIs responded to calls from a broad range of stakeholders by discussing key economic issues and would contribute to updating the WTO rulebook and to ensuring the relevance of the WTO in today's world. Without the JSIs, the WTO risked becoming less relevant and even losing its raison d'être as a cornerstone of the multilateral trading system. The JSI meetings were organized in an open, transparent and inclusive manner.

10.42. While taking into account the convenience of respective Members including the size of their delegations in organizing the process, the fact that many of them were participating in the JSIs and actively engaging in negotiations in a creative and innovative way clearly showed the JSI's importance. A number of achievements made in the GATT and the WTO had initially been taken up or discussed in plurilateral initiatives which were later merged in the system. Japan believed that the JSIs were consistent with the WTO and had high hopes that they would be a key part of the MC12 outcomes. Japan would continue to work with other Members to deliver substantial outcomes in the JSIs as a positive achievement of the WTO.

10.43. The representative of the Republic of Korea, as a staunch supporter of the multilateral trading system, was disappointed to see the WTO in limbo in particular its failure to function as a forum for plurilateral trade negotiations in response to the diverse needs and interests of Members. Upon such impasse and trade liberalization shifting weight to regional agreements outside the WTO, plurilateral negotiations could be a meaningful stepping-stone for multilateral agreement. It also served as a test pad for pioneering new trade rules as demonstrated by the GPA and the ITA. The JSIs which were held parallel with multilateral negotiations were essential to maintain the WTO's relevance in the changing trade environment. Those negotiations were responsive to the demands of diverse stakeholders which would help rebuild trust in the multilateral trading system. Korea therefore expressed its concern on the communication submitted by India and South Africa which raised questions on the concerted endeavours for revitalizing the WTO's negotiating function.

10.44. The representative of the United States believed that plurilateral negotiations at the WTO could be a useful means to advance issues of interest to Members and to keep the WTO relevant. It did not view plurilateral negotiations and outcomes as undermining multilateral ones. In fact, plurilateral initiatives could foster new ideas and approaches and build momentum toward multilateral outcomes. The various rigid positions expressed in the paper would seem to foreclose Members' ability to pursue creative and flexible approaches at the WTO to the challenges of today and tomorrow.

10.45. The representative of Chile noted that the paper had opened up an interesting discussion which should take place in a forum other than the General Council. Considering Joint Statement Initiatives separately could be a way to incorporate them into the WTO. While it was still assessing the legal considerations raised in the document, Chile noted that the paper had made assertions which could not be based on reality. JSIs tackled topics that were fundamental for 21st century global trade in an open, inclusive and constructive manner. Chile welcomed the possibility of achieving multilateral discussions on those areas as that would benefit every Member. That was why Chile, a Member committed to multilateralism, was actively participating in the JSIs on services domestic regulation, investment facilitation for development and e-commerce.

10.46. As Chile respected the decision of those Members who decided not to join JSIs, those Members should also respect the decision of others who wished to move those discussions forward
since the rights of non-participating Members would be in no way diminished. Chile was looking for a pragmatic, respectful and necessary way forward to break the stagnation of the WTO negotiating function and Members should begin to reflect on how to create a swifter way to allow agreements negotiated in that format to integrate into the organization.

10.47. With regard to the JSI on Investment Facilitation for Development and as its Coordinator, Chile invited India, South Africa and those Members who had not yet done so to participate in the JSI discussions. That would allow the JSI participants to learn more about their opinions, interests and perspectives including on the elements reflected on their paper and to effectively address them. That would also facilitate the entire Membership in achieving consensus multilaterally on the matter which could in turn contribute to the effective management of global trade flows particularly in the post COVID-19 period.

10.48. The representative of the Philippines was a willing and active participant in most JSIs. The JSIs were positive contributions to the multilateral trading system even if their pursuit and their eventual implementation were not shared universally by the Membership. For the Philippines and many other Members, the JSIs served to deepen trade relations among them and to clarify rules that bound them more strongly. More importantly, they responded to the policy exigencies of modern-day global trade. The provisions of the Marrakesh Agreement were indeed clear and undisputable. The Philippines believed that no one questioned Article X of the Marrakesh Agreement.

10.49. The Philippines had not foreseen however when it had signed on to that treaty in 1994 that efforts that day to cope with and keep abreast of modern-day realities in global trade could easily be frustrated by the refusal of a minority to move forward towards a deeper and clearer basis for their trade relations. Perhaps, it was also not fair to expect the larger majority of Members to stay still because a few others preferred to do so. The Philippines understood plainly the institutional and legal hurdles WT/GC/W/819 tossed on the path of the JSIs and asked India and South Africa to at least collaborate with JSI participants to find an institutional and legal way to allow the JSI outcomes to thrive and benefit all Members.

10.50. The representative of Turkey said that, in the negotiating history of WTO rules, every single word of the agreement had been achieved through intense discussions and with earnest efforts of the Contracting Parties. Since 1947, the negotiations around various topics had evolved differently under diverse configurations. Progressive dismantling of obstacles in trade in goods and services was a difficult task and that progress could only be ensured incrementally. In achieving that, multilateral platforms were ideal while in some occasions, additional instruments and different configuration could also be needed to foster and reinforce negotiations among Members. Discussions under JSIs contributed to the WTO's main objective as long as they continued to maintain their transparent and inclusive character and adhere to the fundamental principles of the WTO. Through those instruments, Members could craft new ways for ensuring additional benefits for international trade in goods and services. The rules in the organization could be more up to date. Members could also have further discussions on how those agreements could be integrated into WTO acquis.

10.51. The representative of Bangladesh noted that the questions and concerns raised in the communication were important – demanding deeper discussions which should involve all Members. Bangladesh said that its capital was still examining the paper and looked forward to engage constructively with Members on the matter.

10.52. The representative of Uruguay said that his country was fully committed to the multilateral trading system and its rules going as far back as the Havana Conference. Uruguay expressed its trust that the rules would prevail. Otherwise, Uruguay would not be in the WTO and committed to its rules. Uruguay fully trusted in the WTO's ongoing ability to remain faithful to its international mandate. The best gift delegates could give the new Director-General would be to give up their petty in-fighting that had already gone far too long. Members should instead firmly commit with good will to the ongoing discussions that took into account the real needs of today's global economy without losing sight of the commitment to ongoing pending discussions which were of utmost importance to all Members particularly those that were small and developing such as Uruguay.

10.53. As the convenor of an open and inclusive JSI – the Informal Working Group on MSMEs, Uruguay noted that the Informal Working Group did not craft rules but made recommendations and suggestions. Despite continuing their discussions virtually, it had still been extremely difficult for the JSI participants to achieve the outcome of the package of recommendations they had agreed in the
Informal Working Group in December – the only negotiated result that the WTO had achieved in 2020. Clearly, the WTO needed reform. But equally important, it required a change in attitude of all Members. Absent that, Members would be doing the multilateral trading system a great disservice.

10.54 The representative of Pakistan welcomed the paper which raised pertinent questions on an element of fundamental nature for the WTO. Notwithstanding the content or topic in any of the JSIs, they posed a serious challenge to the consensus-based decision-making principle of the multilateral system. While some Members wished to advance certain discussions, that did not take away the desire of a large number of Members to focus on mandated issues or consider some of the subjects taken up in JSIs as premature for negotiations.

10.55. While JSI participants noted their transparent and inclusive manner of conducting discussions, Members’ initial understanding had been that JSIs were merely exploratory in nature. The JSIs had however eventually developed into fully fledged negotiations on potential agreements that could cut across existing rights and obligations of Members that were not part of the JSIs. True inclusivity would have demanded that it be manifested before launching the JSIs. Pakistan saw those questions as pertinent and looked forward to discussing that aspect particularly with reference to upholding the fundamental pillars of the system.

10.56. The representative of Brazil noted that a number of points raised in the paper were not new and had been addressed elsewhere. For example, with respect to the Joint Statement Initiative on Services Domestic Regulation, it had been noted that the mandate contained in GATS Article VI:4 was not affected by the fact that a subset of the WTO Membership undertook additional commitments in accordance with GATS Article XVIII. Participants of that initiative had made it clear that they would give legal effect to the disciplines on domestic regulation by incorporating them in their respective GATS Schedules so that they would be applied on a most-favoured nation basis.

10.57. Nothing in the WTO agreements prevented a group of Members willing to improve their commitments from doing so either individually or collectively. A revision of the WTO architecture should be part of any WTO reform package. Members should be able to do more than just improving commitments in their Schedules. If that was not done, the world would not stop and wait for the conclusion of multilateral agreements in the WTO. New rules for international trade were already badly needed, and if they were not crafted there, they would be agreed elsewhere. Members needed to find a better way of incorporating the results of plurilateral negotiations into the WTO framework.

10.58. The representative of Canada did not agree with the argumentation presented in the paper. However, irrespective of whether one or not agreed in any of its details, to ensure that the WTO remained effective, Members should be prepared to address important trade related issues in a number of areas. Creating new or modified trade rules was more than overdue. In some cases, Members could proceed multilaterally. For others, the JSI model was the best avenue for interested Members to pursue common objectives. The JSI negotiations were inclusive, transparent and open to all Members. Canada welcomed the progress made so far in those negotiations and noted the increase in participation by developing Members. It was premature to pre-judge the legal architecture for any of the JSIs as each initiative was unique and was evolving at its own pace. The true test of any outcome, be it plurilateral or multilateral was whether it promoted development and sustainable growth and secured an increase in the predictability in the global trading environment.

10.59. The representative of the European Union said that plurilateral agreements had been a driving force under the GATT and beyond and had paved the way for many multilateral agreements that were an integral part of the WTO Agreement. They were not antithetical to multilateralism. They paved the way towards it. Beyond those agreements, the WTO’s negotiating arm had not been able to deliver many of the significant improvements in the multilateral trade rulebook that were needed to respond to important trade issues. It was clear that modernizing WTO rules could not be achieved only through multilateral agreements based on single undertaking. It was therefore vital for the WTO’s relevance and credibility to maintain the option of developing rules that corresponded to the economic and trade realities of the 21st century through plurilateral agreements.

10.60. A very large number of Members were involved in plurilateral negotiations under the JSIs on services domestic regulation, e-commerce and investment facilitation for development. JSIs brought many benefits and were essential to make global trade rules responsive to the digital transformation of economies, the growing importance of services and the need to facilitate investment which was key for development. If no effective formula was found to integrate plurilaterals in the WTO, there
would be no other option than developing such rules outside the WTO framework which would increase fragmentation and risk to eventually condemn the WTO to irrelevance.

10.61. Meaningful WTO reform should recognize that reality. As indicated in the European Union's recently published Trade Policy Review, the European Union favoured an inclusive approach to open, plurilateral agreements that facilitated participation by developing countries and allowed them to decide whether they would wish to join the agreement, leaving the door open for them to join at a later date. There were various ways in which plurilaterals could be incorporated in the WTO. Some were included already in the WTO Agreement such as in the GATS that provided that Members could inscribe additional commitments in their Schedules which was the legal architecture that the participants in the JSI on Services Domestic Regulation had chosen.

10.62. Nobody could doubt the benefits from various types of plurilaterals such as the GPA or the ITA. What mattered was not their legal form but that they brought undeniable benefits. Legal form should be a secondary consideration. The focus should be on how the organization could remain relevant by developing rules that addressed pressing issues. The European Union was in favour of having further discussions on that with Members and called on them to adopt a constructive approach and make positive contributions to that discussion.

10.63. The representative of Sri Lanka noted that although JSIs had been in existence since December 2017, they did not have any locus standi in the multilateral trading system. While any group of Members could come together to discuss any issue informally, the discussions under JSIs did not provide them any recognition or legal standing in the WTO. Those discussions had turned into negotiations and outcomes were sought to be formalized into the Marrakesh Agreement Establishing the WTO and its Annexes. A careful examination of the WTO's rules was required. Any formalization of outcomes could only be done in accordance with existing WTO rules – particularly those rules on amendments and on decision-making as set out in the Marrakesh Agreement.

10.64. Sri Lanka thanked India and South Africa for the paper and supported the flagging of Members’ attention to the important legal aspects that warranted close and careful analysis by all Members. The paper indicated the systematic implications on the multilateral trading system and on Members who had not joined JSIs. The paper deserved to be further discussed to better understand the issues raised therein and arrive at ways to minimize possible legal and systemic conflicts for upholding the fundamental principles in the WTO Agreements. The JSI proponents should address those concerns through active engagement if they were serious and genuine of their intentions. Sri Lanka was studying the paper as it explored the possibility of co-sponsoring it in the future.

10.65. The representative of Tanzania said that the paper provided a timely reminded for Members to abide to the agreed WTO rules, principles and procedures as a multilateral organization. The JSIs were a result of lack of consensus on respective issues for which likeminded Members had decided to pursue certain issues of their interest in coalition outside the WTO framework. Outcomes achieved from JSIs would not be multilateral as their negotiations had been initiated while Members were still in disagreement. Members such as Tanzania were not participating and would not be obliged to implement agreements which had never been part of the multilateral negotiations. Tanzania had previously expressed that the areas covered by JSIs had serious implications to its existing policy space for development. Tanzania would not however object to certain JSIs being brought under Article X.9 of the Marrakesh Agreement for consideration to include them into Annex 4 of the Marrakesh Agreement as Plurilateral Agreements.

10.66. The representative of the United Kingdom did not share the view that the work of the JSIs was inconsistent with the rights and obligations of Members or the appropriate functions of the WTO. JSI discussions had brought much-needed energy and dynamism to the WTO enabling a significant proportion of the Membership to make vital progress on areas where new rules and commitments were urgently needed to update the global trading system. The JSIs were some of the most important reforms undertaken at the WTO. The United Kingdom would encourage participants of the JSIs to continue attracting wider interest and participation from across the Membership. That would ensure those negotiations were as inclusive as possible, would pave the way for them to be adopted multilaterally in the future and would allow the WTO to remain relevant.

10.67. The representative of Hong Kong, China was a strong supporter and active participant in the JSIs on e-commerce, services domestic regulation and investment facilitation for development. Hong Kong, China shared the common goal to modernize and strengthen the multilateral trading
system on issues of increasing relevance to the global trading system. The need for more transparent and predictable trade rules was particularly pressing in light of the COVID-19 pandemic. Work in the JSIs was contributing to reinvigorating the efforts of the WTO in making new rules that responded to the aspirations of consumers and business communities across the globe.

10.68. The JSIs would build upon the extensive work of existing WTO bodies and programmes such as the Working Party on Domestic Regulation and the Work Programme on Electronic Commerce without affecting their multilateral mandates or ongoing work. Without prejudging the respective legal formats of the outcome in the JSIs which were still under discussion, JSI participants acknowledged that the outcome should be incorporated into the WTO framework in accordance with WTO rules and procedures. As the common goal of the JSIs was to deliver multilateral outcome with participation of as many Members as possible, participants were committed to keeping their work Member-driven, transparent, inclusive and open to all WTO Members.

10.69. Participants were also providing constructive inputs to ensure that the development angle was central in the JSI discussions with a view to facilitating the participation of Members at different levels of development through technical assistance, capacity building and transitional arrangements. Hong Kong, China encouraged more Members to join the JSI meeting which were open to all of them and looked forward to engaging with them constructively.

10.70. The representative of Norway noted that Norway was one of the founding Members of the multilateral rules-based trading system. Since 1947, the world had gone through tremendous changes including the global trading regime both in terms of scope, commitments and participation. Plurilateral approaches and initiatives had been part of the development of both the GATT and the WTO. The world still needed a global, rules-based trading system. But in the same way as the world changed, so should the rulebook. Norway welcomed the energy that the JSIs had injected into the WTO with Members who believed in the future of the system joined by a large number of Members – developed and developing, small and large – and those that believed that the system needed to develop to stay relevant and that an updated framework of rules was beneficial for social and economic development for all.

10.71. The representative of Switzerland said that the content of the paper had left it somewhat perplexed. JSIs were appropriate instruments for developing the trading system and strengthening the WTO's negotiating function, and enabling the organization to address the challenges posed by the modern-day economy. They constituted an effective and relevant approach that was not new and that most certainly did not undermine the multilateral approach nor did they affect the rights and obligations of Members not participating in them. Those initiatives were transparent, open to all Members and consistent with the spirit of multilateralism.

10.72. The representative of Singapore noted that the JSIs were in line and in sync with the workings of the WTO. Members had started discussing JSIs around 2017 after prolonged periods of languishing talks with no prospect of attaining consensus from the full Membership. JSIs encouraged the participation of all Members with the aim of obtaining a multilateral outcome and were operating legitimately within the WTO as open plurilaterals. They were conducted in an inclusive and transparent manner and the relevant materials were made available to all Members.

10.73. Legal architecture was a topic which was still premature across most of the JSIs. It was prudent to determine the substance of the agreements before considering the legal modalities. It was heartening to determine that Members had engaged in a constructive, technical discussion across all JSIs in the last couple of years. While they had differences, that had not stopped them from having fruitful conversations. Singapore frankly struggled to understand the paper's motive. The JSI outcomes were critical to maintaining the WTO's relevance. There was significant interest in the JSIs from key stakeholders which was evident from the considerable support that the business community extended to them. Contrary to some claims in the paper, the JSIs supported WTO multilateral values.

10.74. In times of crisis, JSIs represented bright spots that had brought together a vast majority of Members determined to work towards meaningful and relevant outcomes that addressed new and emerging issues. That was a tangible demonstration that the WTO remained relevant, useful and meaningful to their stakeholders and could deliver results. The WTO stood at a crossroad that day. Dr. Ngozi's appointment had injected renewed optimism and her support for the JSIs had been encouraging. Members were well placed to deliver outcomes at MC12. As responsible Members, they
had to decide if they wanted to have aetiological and historical debates that divided them or if they genuinely wanted to bridge their differences and work together to strengthen the WTO.

10.75. The representative of Israel said that it was an important paper which required further analysis and discussion. Israel had always been a strong supporter of the multilateral trading system. As an open and relatively small economy, Israel strived to further develop its international trade and economic collaboration with countries around the world based on the multilateral trading system and WTO rules. Israel recognized the importance of supporting a well-functioning WTO including taking up negotiations within its old framework. However, in recent years, Members had not achieved negotiated outcomes, apart from a few, expected by the ever-changing global trade landscape.

10.76. The plurilateral route had been able to partially fill in some of the gaps and complement them. Plurilateral agreements and JSIs should not replace multilateral negotiations and Israel preferred the latter. At the same time, they presented a complementary route that could deliver tangible results in new areas. Like many others, Israel had benefitted from those plurilateral negotiations and agreements such as the ITA I, ITA II and the revised GPA. Currently, Israel actively participated in JSIs on e-commerce and on services domestic regulation.

10.77. Israel would continue to participate in all multilateral trade negotiations and similarly in plurilateral negotiations in which it had specific trade interest. Both routes were viable and complementary of the rulemaking function of the WTO. It is worth noting that plurilateral agreements as stated in Article II:3 of the Marrakesh Agreement were binding on those Members who had chosen to accept them and did not create obligations for Members who had not accepted them. Israel encouraged Members to recognize those initiatives as bottom up attempts to reinvigorate the multilateral trading system. Israel looked forward to continuing that important discussion.

10.78. The representative of Peru noted that the paper allowed Members to generally reflect on the value of creativity and capability of JSIs in enriching the multilateral trading system while taking due consideration of the WTO’s legal framework. JSIs had facilitated progress on important matters of international trade required and called for by stakeholders. Peru currently participated in the JSIs on e-commerce, MSMEs, services domestic regulation and trade and gender. Each JSI would continue to develop in such a way as to ensure its legal relevance in line with Members’ commitments within the organization. Members would tackle that issue with creativity and energy seeking to strengthen the multilateral trading system to progress on the path towards development which was all the more necessary during that extreme situation caused by the COVID-19 pandemic.

10.79. The representative of Indonesia said that the discussion on the legal status of JSIs and their negotiated outcomes was both timely and important. While Indonesia participated in two JSIs, it put forward the same question upon joining those initiatives. On the Structured Discussions on Investment Facilitation for Development, Indonesia sought information on what steps would be taken by the convener to integrate the outcome to the WTO knowing that there was no WTO mandate on that initiative yet. Indonesia was looking forward to such discussions and would like to understand better how the Coordinators of each of the initiatives would try to integrate the JSIs into the WTO rules. The motive to pursue an ambitious agenda on several trade-related areas through the WTO should respect and be in line with the fundamental principles set out in WTO rules.

10.80. The representative of Oman shared some systemic concerns highlighted by the paper. Oman was concerned that by allowing Members to introduce any issue they wished in the WTO under the umbrella of the JSI, it would open doors to some controversial issues. Most Members had not challenged the legal arguments presented by India and South Africa. The paper needed further discussion. While its capital was still studying the paper, Oman hoped to come back with more specific comments in the near future.

10.81. The representative of the Kingdom of Saudi Arabia noted that the request was valuable and merited further discussion both in Geneva and in capitals. At the same time, Saudi Arabia was an active participant in JSIs and believed in both plurilateralism and multilateralism. Both were in the hands of Members to help them enhance the negotiations and to move forward with a view to facilitating the organization to regain the trust of the entire world. Such a submission was valuable but Members should also tackle it carefully by entering into more discussions on the matter preferably in informal mode – which would be more practical.
10.82. The representative of Cameroon had forwarded the paper to its capital. Without prejudice to its right to provide future comments, Cameroon believed that the paper was an invitation for Members to bridge the gap on the issue and see how they could reach an agreeable platform on all the topics under discussion. Cameroon was following the discussions on the JSI on E-Commerce. JSI processes could lead to consensual outcomes by recognizing the need for a collective approach to the issues raised by the proponents and by the way JSIs would carry those discussions forward based on consensus. Cameroon had taken note of the paper to be transmitted to its capital. As they entered a new era, it was time for them to find ways to best address that issue within the WTO.

10.83. The representative of Nigeria was fully committed to the multilateral trading system. At the same time, Nigeria participated in three JSIs including on MSMEs and on trade and gender given their importance especially in the 21st century. The legal opinion of a Member or group of Members on the scope and application of the provisions of the Marrakesh Agreement and other WTO agreements could not always be accurate. It was within the sovereign right of each Member to determine and pursue their respective development interests especially in plurilaterals which would lead to multilateral outcomes by consensus. Nigeria was confident that final outcomes on the respective JSIs would take into account some development priorities and avail as the requisite tool to unlock their economic potential. Nigeria was likewise open to further discuss the paper with the proponents to deepen its understanding on the specific elements.

10.84. The representative of India thanked Members for their engagement on that agenda item. It was sad that those who had objected to moving forward on mandated issues were currently complaining of the WTO being in a limbo. India understood that JSI proponents would need time to respond and reflect on the legal issues raised in the paper. India had not heard much on legal arguments in various statements except for phrase "we do not agree". There was a difference in improvement and changes. In the name of improvement, changes could not be made. As far as the JSI on Services Domestic Regulation was concerned, India was still awaiting responses from the proponents of that JSI on the concerns raised in the Working Party on Domestic Regulation. If numbers were the only way to show acceptance, then Members should have already agreed on the G-90 proposal on S&DT, on the TRIPS Waiver proposal with 57 co-sponsors, and on many other proposals. The negotiating function was important as it brought new rights and obligations. But without the dispute settlement system, even existing negotiated outcomes would lose their purpose.

10.85. The representative of South Africa welcomed Members’ engagement on that important issue and thanked those who said that the discussion was timely and important. Some of the issues in the JSI were issues where there was already a multilateral mandate. Members had seen how the Work Programme on Electronic Commerce that aimed to ensure balanced and equitable outcomes had suffered with the launch of the JSI. The developmental concerns and the principles that underpinned the WTO were increasingly ignored. South Africa differed with the view that new rules could be integrated through Members’ Schedules. Modification or improvements to Schedules of Concessions on the other hand followed certification procedures. Therefore, there was a difference between changes to rules and changes to Schedules. South Africa reiterated that it did not question the right for any group of Members to discuss any issue informally. However, when discussions turned into negotiations and their outcomes were sought to be formalized into the WTO framework, it could only be done in accordance with the rules of procedure for amendments as well as decision-making as set out in the Marrakesh Agreement. Members should carefully consider the legal arguments in the paper including the options raised. It was not about the number of Members that participated in a specific initiative but its paper was about the legal provisions that underpinned the functioning of the WTO that should be respected. South Africa looked forward to engage further with Members on the legal aspects related to how negotiated outcomes were integrated into the WTO framework in view of the provisions of the WTO legal framework.

The General Council took note of the statements. [...]