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Analysis

Delivering Plurilateral Trade Agreements within the World Trade Organization

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1. Introduction

This paper makes the case for trying to advance the World Trade Organization's (WTO) agenda via plurilateral trade agreements (plurilaterals). Plurilaterals are agreements among sub-sets of WTO Members, which undertake obligations pertaining to trade that either create benefits for all Members on a non-discriminatory basis or restrict benefits to signatories to the agreement, but which have been sanctioned by the WTO Membership as a whole. They have a long history within the trading system.

Plurilaterals are superficially less attractive than a set of non-discriminatory perfectly multilateral rules but are better suited to the fact that there is genuine diversity among countries in their desire and ability to regulate certain aspects of commerce: so long as the differences between countries do not lead to discrimination or encroach on other countries' rights under WTO rules. It is potentially better to allow groups of countries to improve regulation among themselves even if other countries do not wish to follow suit. In addition, a realistic appraisal of the state of the trading system suggests that multilateral agreement on anything is a long way off. The alternatives to making plurilaterals work are progress among small groups of countries in exclusionary and discriminatory clubs (Free Trade Agreements and Economic Integration Agreements), no progress at all, or even the demise of multilateralism.

After an introduction making the case for plurilaterals, the paper discusses different styles of agreement and the legal framework within the WTO that Members must operate within. We then discuss the history of plurilaterals – partly those that operate within the WTO but also some that have been attempted but failed and those that have been located outside the WTO. We use this to identify several lessons for pursuing plurilaterals in the current circumstances. Plurilaterals (indeed, any progress within the trading system) depend on restoring trust among WTO Members. Thus, their governance is a critical issue, so we devote a section to discussing this and developing concrete recommendations. In the final section, we offer some further recommendations, deriving mainly from the historical discussion and a few hints of topics that might lend themselves to the restoration of forward progress.

2. The Current State of Play with Plurilaterals

2.1 – The Concept of Plurilaterals and Why They Are Important

Strictly, a plurilateral trade agreement – a plurilateral – would be any agreement between more than two and fewer than all WTO Members, with agreements between two being termed ‘bilateral’ and between all being ‘multilateral’. In the present paper, we use a somewhat narrower but less precise definition: an agreement with fewer than all WTO Members but which is conceived as supplementing and strengthening the world trading system by being either, part of, or formally sanctioned by, the WTO or which is intended and has a plausible prospect of becoming so. We make the case that, in the current circumstances, such agreements represent the most credible – perhaps the only – means of preserving and extending the relatively liberal world trading order that has brought so much prosperity to the modern world.

The attraction of plurilaterals lies partly in their long history within the General Agreement on Tariffs and Trade (GATT), which suggests their feasibility, but mainly in the fact that, currently, the alternatives seem worse.

The fact that multilateral progress on trading arrangements has stalled needs no emphasis. Even setting aside geopolitical issues, WTO Members are deeply divided on issues of trade policy and do not currently have much mutual trust. The WTO’s convention of proceeding only by consensus makes formally agreeing on anything very difficult, even before strategic behaviour kicks in, e.g., attempting to link basically unrelated issues together. Plurilaterals may not need consensus across all WTO Members but can nonetheless be accommodated within the WTO architecture; therefore, they offer a prospect of progress where pure multilateralism is failing.

There are a number of reasons why seeking to revive the WTO makes more sense than abandoning it wholesale: for example, exactly the same forces that stymie multilateral agreements in the WTO would prevent the negotiation of any successor; the WTO has an architecture and structure that still provides useful services even if the negotiation and dispute settlement processes are sickly; there is a long tradition of respecting WTO rules and rulings, even if imperfectly, which would be hard to replicate de novo.

The same arguments apply to trying to create new agreements on specific aspects of trade outside the auspices of the WTO. Establishing modus operandi would be time-consuming; achieving consistency across areas of trade would be difficult; having multiple rulebooks for trade in the same product would be complex for traders – the very opposite of the role that an efficient trading system should play in reducing transactions costs and uncertainty; discrimination between ‘ins’ and ‘outs’ would proliferate. Plurilaterals do not cure all these challenges but locating specific agreements within the overall context of the WTO and using the latter’s transparency systems would help to overcome some of them.

We distinguish plurilaterals from preferential trade agreements (PTAs) – regional trading agreements or economic integration agreements in WTO terms – which are sanctioned under GATT Article XXIV and GATS Article V respectively. Like plurilaterals, PTAs contain only a sub-set of WTO Members, but they are fundamentally discriminatory and closed to the bulk of WTO Members. We enlarge on this distinction in Section 1.2 below.

Before doing this, however, it is useful to ask what plurilaterals imply for the WTO system. The Uruguay Round of GATT negotiations that concluded with the creation of the WTO was underpinned with the so-called Single Undertaking. This required that all Members subscribed to all the rules embodied in the various agreements under the WTO and its component parts and all were subject to a single dispute settlement process. These rules were differentiated in cases – the main example being Special and Differential Treatment for developing countries – but could not, except in a small number of cases, be evaded entirely. This was ‘issue-linkage’ writ large, and it turned the creation of the WTO into a take it or leave it offer, which every active GATT party chose to take. As such the

Single Undertaking extended the reach of trade liberalisation and the strength of enforcement of the WTO considerably relative to its precursor. This was widely held to be a success at the time, but in fact it has contributed substantially to the lack of progress subsequently.

For many countries, even if they preferred to accept rather than reject the Single Undertaking, it contained several features which they found uncomfortable or difficult. In some cases, the complexity and discomfort were not recognised at the time, but in others, developing countries disliked elements of what they had to sign right from the start, and this has been compounded by the uneven delivery of the commitments that developed countries undertook. Moreover, with the threat of strong enforcement via dispute settlement hanging over them, developing countries felt they could not ignore the parts of the agreement they disliked. All this substantially eroded developing countries' trust in the system. If the Single Undertaking is part of the fundamental ethos of the WTO, it must apply to future developments of the WTO, which – as we have noted – need to be agreed by consensus. Thus, any area in which advancement is sought must come in a form that is indisputably Pareto-improving – i.e., which ensures that no party loses and some parties gain. Constructing such packages has proved very difficult so far: there have been several relatively minor agreements – the Public Health Waiver in TRIPS (2001), the Services Waiver (2011), the Declaration on Export Competitiveness (agricultural subsidies, 2015) and the Trade Facilitation Agreement (2015) – but major updating of the 27-year-old Agreement has proved impossible.

A system facilitating plurilaterals for future agreements could break this logjam: once they have the security and ability to stand aside from new agreements, the nervous or indifferent might no longer feel the need to veto them. This would reduce the ability of 'the system' to bring laggards along – i.e., to muscularly encourage reluctant parties to liberalise – but equally, it would greatly reduce the incentive for those laggards to hold everybody else back. The resulting system would be more fragmented and complex, with different rules for the same product applying to different partners. If one thinks only in terms of barriers to trade, this seems second-best compared to uniformity, but once one recognises that countries genuinely have different preferences for and capacities to implement specific regulations, allowing for differentiation could well be first-best. Moreover, given that the alternatives at present appear to be no progress for anyone, the proliferation of exclusionary preferential trading agreements or the demise of the WTO, even second-best would be a leap forward.

2.2 – Classes of Plurilateral Agreement

As *Hoekman and Sabel (2021, p. 50)* note, plurilaterals differ from traditional trade agreements in that (i) they are issue-specific or combine a small number of policy issues and (ii) do not focus solely on the liberalisation of market access barriers. Traditional trade agreements – which may include any number of WTO Members – started off as shallow integration arrangements imposing limits on the imposition of barriers to international trade and – when they were other than multilateral – applying those limits only between signatories¹. Thus, for example, GATT rounds were originally mostly concerned to constrain tariff levels, prevent discrimination between different trading partners and ensure that domestic policies did not replace liberalised border restrictions by requiring that domestic regulations and taxation did not discriminate between domestic and foreign supplies (national treatment). Preferential arrangements started with the same objectives – see, for example, the early history of the European Economic Community.

Both multilateral and bilateral agreements gradually evolved towards deeper integration, however, by including prescriptions about domestic regulations. Having at its birth introduced several such issues in the Uruguay Round, the WTO has found it impossible to move further in this direction because of a lack of agreement within its highly diverse membership about appropriate rules on domestic regulations. (Some) PTAs, on the other hand, have been able to advance because they are negotiated between smaller numbers of less heterogenous signatories – although, even here,

¹ In what follows we adopt the following terminology: 'Members' refers to WTO Members; 'participants' refers to those negotiating a potential agreement and 'signatories' to those which actually sign (implement) it.

not without frictions. The key feature of PTAs, however, is that, although they are conditionally sanctioned by the WTO, they are designed to discriminate between signatories and non-signatories.

Plurilaterals introduce two extensions to the traditional trade agreements menu within the WTO. First, trade agreements of the traditional kind that are implemented by a sub-set of Members, but whose benefits either apply to all Members or have been agreed by all Members to apply only between the sub-set which introduced them. Agreements in the former group are referred to as critical mass agreements (CMAs) which, while accepted (signed) by a few, apply to their trade with everybody. Non-signatories are essentially free riding: getting benefits but without contributing benefits to others and so the essential requirement for CMAs is that the signatories are willing to tolerate this. Typically, this would be because between them they account for a substantial proportion (a critical mass) of the market concerned and find other signatories' concessions sufficient to warrant their own 'costs' of accepting the disciplines of the agreement. In the second group, the benefits – as well as the obligations – are restricted to signatories, but because the incorporation of such agreements must be agreed by WTO Members by consensus, they have multilateral sanction.

The second development that plurilaterals permit is the opportunity to introduce what *Hoekman and Sabel* call 'open plurilateral co-operation'; this is either non-discriminatory in its outcome or – if it is restricted – is 'open' in the sense of permitting accession by any country that meets (at least in principle) certain specified conditions. These forms of co-operation are typically domain-specific, and their primary focus is less on liberalisation (constraining the use of discriminatory policies) than on regulatory co-operation. Examples include harmonisation (i.e., commitments to develop common standards), implementing agreed good regulatory practices, and mutual recognition of regulatory regimes. They may have market access dimensions and may get implicitly or explicitly linked into a package with discriminatory policies, but their fundamental focus is on domestic regulation. As such, open plurilateral agreements have intrinsic value and hence rely much less on reciprocity to be attractive than do simple market access measures.

Table 1 (based on *Hoekman and Sabel, 2021*) summarises this classification: the two main rows refer to the type of agreement and the columns to the existence or otherwise of discrimination against non-signatories. Plurilaterals refer to the issue-specific type 1 agreements and potentially all the type 2 agreements.

2.3 – The Legal and Political Constraints on Plurilaterals That Need to Be Managed

Given the purpose of this paper is to show how plurilaterals might revive the WTO process and make new initiatives to reduce trade costs feasible, it is important that its recommendations be compatible with WTO rules. This section describes how plurilaterals can be introduced into the WTO, identifying the different approaches necessary for goods and services and for matters already within the WTO's ambit versus those that are not. The issues are both legal and political.

The WTO places no constraint on how plurilateral negotiations are initiated and organised. There is a long tradition of negotiations occurring between small groups of Members, starting with the GATT's practice of determining tariff concessions by talks between the market and the principal supplier of the product and then extending it to other Members via the Most-Favoured Nation (MFN) clause². Moreover, the legitimacy of plurilateral negotiations is explicitly recognised in the WTO Treaty (Article II.4) and the GATS (Article XIX.4). Thus, there is no legal constraint on sub-sets of WTO Members discussing any aspect of trade policy among themselves and formulating proposals to improve it.

This is not to say, however, that there are no constraints of other kinds. If a discussion is hoped to bear fruit in terms of a WTO-sanctioned policy change, it would be wise for the participants to think at the outset how they might best assuage concerns and potential opposition from other WTO Members. Non-signatories may be able to block the adoption of a decision formally and even if not, the WTO offers more than enough opportunities for disgruntled Members to disrupt its work.

² Irwin, Mavroidis and Sykes, 2008.

Table 1 – Instruments for Co-Operation

Type of cooperation	Main focus	Type of spill-over	Characteristics of cooperation outcome	
			Non-discrimination (MFN)	Benefits limited to signatories
Type 1: Trade agreements Binding State-to-State treaties with fixed terms and binding, self-enforcing dispute resolution	<i>Discriminatory policies affecting market access</i>	“Terms of trade” effects of trade/industrial policies Pecuniary spill-overs	Multi-issue <u>multilateral agreements</u> (Uruguay and Doha rounds) Issue-specific <u>critical mass agreements</u> (E.g., Information Technology Agreement; GATS Telecom Reference paper; Environmental Goods negotiations)	Reciprocal <u>preferential trade agreements</u> (PTAs) Issue-specific, discriminatory <u>plurilateral agreements</u> under Art. II WTO (E.g., Government Procurement Agreement)
Type 2: Open plurilateral cooperation Severable, flexible, dynamic, issue-specific	<i>Regulatory heterogeneity</i>	Cross border effects of domestic regulatory policies Non-pecuniary spill-overs	<u>International standard setting</u> (E.g., ISO, Codex Alimentarius, UNECE) <u>Good regulatory practices</u> (OECD, APEC) Open plurilateral agreements Digital Economy Partnerships Covid-19-specific public health agreements New WTO clubs	<u>Mutual recognition</u> (E.g., conformity assessment agreements) <u>Regulatory equivalence regimes</u> (Unilateral: e.g., EU data adequacy findings. Bilateral: e.g., air safety agreements; EU Forest Law Enforcement, Governance and Trade regime)

Source: Hoekman and Sabel (2021)

As just hinted, although negotiating is not constrained, the incorporation of any resulting proposals for policy change into the WTO system is. The details depend on the exact nature of the changes proposed and on whether they concern goods, and hence, fall under the GATT, or services, in which case they fall under the GATS. For historical reasons, the latter is more accommodating.

2.3.1 – Modifying WTO Schedules

Bureaucratically is where the changes to be made by the signatories in the plurilateral will apply to all WTO Members via the MFN clause, will contribute to, rather than detract from, their rights under the WTO and will not impose any further obligations upon non-signatories. If the obligations in such an agreement can be inscribed into existing WTO schedules, signatories may do this via defined procedures (and can – if they wish – make doing so conditional upon other signatories doing likewise). These procedures entail making the changes to the schedule, notifying the WTO which then circulates the revised schedules to all WTO Members who can then either certify them or within three months deny certification specifying reasons about how the changes impose obligations on them or erode their rights³.

The only option for aggrieved parties to challenge a measure that does not affect a bound WTO obligation is to initiate a dispute about the change. Certification of a new schedule incorporates the new schedule into the WTO agreement and so integrates it with other elements of that agreement, but it does not insulate it from subsequent challenge in the dispute settlement process⁴. There is no experience of cases where a challenge is made to something that improves the trading position of the complainant (either certified or not), but if the improvement is genuine, it is difficult to imagine the challenge succeeding.

Scheduling practice grew up in a world where tariffs on goods were basically the only instruments affected. However, referring to the structure of schedules under the Uruguay Round, *Hoekman and Mavroidis (2017)* argue that even for goods, commitments on non-tariff barriers can be scheduled so long as details of the covered products and the type of concessions are included. The situation on services is more explicit under the GATS: as *Mamdouh (2021)* notes, ‘new commitments under Part III of the GATS can only take the form of either bindings (in the form of “limitations”) on market access and national treatment or, new obligations (“undertakings”) regarding services related measures as “Additional Commitments”’. *Mamdouh* makes clear that WTO guidance in the form of such additional commitments casts them very broadly. If a WTO Member inserts an obligation in its schedule, this essentially makes it subject to the WTO dispute settlement. This both offers partners some reassurance about its application and makes it more difficult for domestic opponents to unwind it in future⁵.

The ability to inscribe the outcome of a plurilateral into signatories’ WTO schedules offers a way in which almost anything can be recorded as a WTO obligation subject only to ex-post dispute. Proceeding in this way would clearly be confrontational if there were widespread objections to the change from non-signatories. However, it might offer a way to overcome trivial or strategic objections from a small minority of other Members, because the reasons for the objection would ultimately be tested in terms of the effect of the changes themselves, not in terms of issue-linkages.

WTO schedules offer little scope for discriminating between trading partners because the MFN rule is the dominant principle in WTO law. Thus, this approach to implementing plurilaterals is appropriate only to CMAs, where signatories have sufficient mass to generate positive returns within the agreement even allowing for ‘free riding’ by non-signatories or where free riding is not an issue

³ GATT Article XXVIII deals with re-certification cases where a Member raises a scheduled (bound) tariff rate and prescribes that if there are objections there shall be negotiations about compensation for the tariff increase, but this is not the case we are considering here.

⁴ *Hoekman and Mavroidis (2017)*.

⁵ The GATS was designed to permit WTO Members to make commitments in addition to market access and national treatment, either unilaterally or on a concerted, plurilateral or multilateral, basis. This is not the case with the GATT—a matter that complicates scheduling plurilateral agreements that pertain to trade in goods or to issues that are not covered by existing WTO agreements.

because each participant has sufficient incentives to sign individually. Given the mercantilist calculus that governments typically apply to trade policy, CMAs are more or less the only option for plurilaterals on market access issues. Improvements in regulation, on the other hand, must apply the MFN principle anyway. For example, adopting good regulatory practices and inscribing them into a Members' WTO schedules may offer potential advantages. Even if scheduling is not necessary to allow a participant to apply good practice domestically, it may still be attractive in terms of signalling commitment to the relevant reforms. Doing so in a co-ordinated manner with other WTO Members increases the benefits further. That WTO commitments are in principle subject to dispute by trading partners increases the costs of backsliding.

2.3.2 – New Agreements

The alternative to unilaterally inscribing the actions required by a plurilateral agreement into existing schedules is to create a new agreement and insert it into the body of the WTO agreement where the plurilateral will benefit all WTO Members via the MFN clause. It will contribute to – rather than detract from – their rights under the WTO and will not impose any further obligations upon them. It is possible to create a new agreement (protocol) and append it to one of the WTO annexes: 1A (the GATT), 1B (the GATS) or 1C (TRIPS). The procedures for this are laid out in WTO Article X: a proposal is made to the Ministerial Conference and the latter submits it to Members for acceptance. By convention, acceptance is made only by consensus. To be sure, the Article permits it to be done by super-majority (as do several other articles), but consensus has become an established norm within the organisation, partly as a trust-building measure but partly, also, because no single Member seems inclined to challenge it and hence permanently destroy its own veto⁶.

A difficulty that arises with the protocol route is that Annex 1 agreements are multilateral: they apply to all WTO Members. In the case of plurilateral agreements where obligations apply only to signatories, the amendment protocol path may be blocked by non-signatories. This would be done on the basis that Annex 1 was designed for multilateral agreements and not for plurilateral agreements under which signatories extend the benefits to all WTO Members. There is no provision in the WTO for such agreements – the presumption being that plurilateral agreements that apply on a non-discriminatory basis will be incorporated via existing schedules or articles in existing multilateral agreements.

The WTO does, however, make some provisions for plurilateral agreements where the benefits of the agreement may be restricted to signatories. Article II.3 of the WTO Agreement recognises plurilateral agreements incorporated into Annex 4 of the WTO as a full part of the WTO Agreement and permits them to be made under Article X.9 of the WTO Agreement. A pre-condition for incorporation into the WTO is that the Ministerial Conference decides to add an agreement to the existing set of agreements listed in Annex 4 '*exclusively by consensus*'.

Members base decisions on the text negotiated between participants and there are no constraints on what it may contain. Thus, the consensus process bears a heavy responsibility for ensuring that a proposed Annex 4 agreement does not reduce existing rights or damage the WTO. The text can contain provisions for future accession to the agreement, or its modification or termination, none of which must go back to the full WTO Membership – *Mavroidis and Hoekman (2015)*. Any modification that compromised the rights of non-signatories could presumably be disputed, but subtle future developments – e.g., of the philosophy behind a regulatory practice – may be difficult to counter in this way. The major challenge in designing plurilaterals to incorporate into the WTO in this co-operative way is preparing for and achieving this consensus.

The decision of the Ministerial Conference is at least as much political as technical and so any plausible initiative for creating a plurilateral must consider, for example:

- How widespread agreement is about the need for modifications. The consensus convention implies that only one objection is sufficient to block an agreement, although,

⁶ A fuller discussion of consensus is given in Tijmes-Lhl, 2009.

with diplomatic effort, and even side-deals, it may be possible to persuade individual opponents.

- How to offer sufficient assurances to non-signatories that their immediate interests are not compromised.
- How to give them sufficient protections so that the agreement will not evolve in ways that disadvantage them in future – e.g., by increasing the cost of accession.

Part of the political process is to be clear about the alternatives to the plurilateral. For example, while there are conditions surrounding the creation of preferential trading agreements – Articles XXIV (GATT) and article V (GATS) – these are neither precise nor actively enforced. This means that bringing an agreement that has discriminatory elements under Annex 4 may be the best opportunity that potential non-signatories have to exert any influence over it at all.

As outlined above, it is feasible to inscribe plurilaterals in which obligations apply only to signatories, but benefits are extended to all WTO Members into signatory Members' schedules. It requires no consent from non-signatories although they can institute disputes about the new clauses. Such an approach is straightforward if the subject matter falls under an existing multilateral agreement but may be more difficult for subjects that are not addressed by the WTO. In these cases, adding a new agreement to the WTO through a protocol is the cleanest and most desirable path, even though it needs to attain consensus.

There is also the possibility of completing negotiations and implementing their outcome in institutions other than the WTO – e.g., OECD or some of the UN Specialised Agencies. For sure, any erosion of non-signatory trading rights would be open to dispute in the WTO, but more subtle dimensions would not be so protected. The UN Specialised Agencies deserve particular note here because they already have responsibility for or have created regulatory codes for aspects of trade. For example, the World Customs Organization (WCO) 'owns' the Harmonised System trade classification and its predecessor, the Customs Co-operation Council, was instrumental in the preparatory work and drafting of the Uruguay Round Customs Valuation Agreement on Article VII of GATT (1994). The latter agreement's internal flexibility may indeed reflect this origin. Similarly, the Food and Agriculture Organization (FAO) has a significant engagement in the implementation of Sanitary and Phytosanitary rules via its links with Codex Alimentarius.

2.4 – Some Historical Examples of GATT/WTO Plurilaterals

Plurilaterals evolved under the GATT, starting in the Kennedy Round (1964-67). A major accomplishment of the Tokyo Round, which concluded in 1979, was the negotiation of eleven stand-alone general treaty agreements. Six referred to specific non-tariff barriers (NTBs) on anti-dumping, subsidies, standards, government procurement, customs valuation and import licensing procedures. Three were sector-specific non-tariff agreements on civil aircraft, dairy products, and bovine meat. Collectively, these became referred to as 'codes' – *Stern and Hoekman (1987)* – and are discussed further in the appendix. Some of these codes were explicitly included in the Uruguay Round Agreement and several other plurilaterals have been implemented since 1994. This section briefly discusses some of these to serve as examples of what does and does not work for future agreements.

As noted above most of the Tokyo Round codes were incorporated into the Single Undertaking of the Uruguay Round and became multilateral agreements. Four survived as plurilaterals, being incorporated into Annex 4 of the WTO Agreement. Two were de-commissioned shortly after the Round (bovine meat and dairy). The Civil Aircraft Agreement – which had removed a set of tariffs on an MFN basis and laid out more specific disciplines on the use of subsidies than prevailed at the time – continues today. However, its disciplines on subsidies have been superseded by the WTO Agreement on Subsidies and Countervailing Measures and by the Government Procurement Agreement (GPA), which includes rules on public purchases of civil aircraft. All three were of interest

only to narrow constituencies of WTO Members and so were not plausible candidates for the Single Undertaking.

The GPA – on the other hand – was not incorporated into the Single Undertaking because there was reluctance by many WTO Members to join it, mostly because they wanted to continue to use government procurement as industrial policy. The GPA comprises a mix of market access commitments and rules (agreed good practices). The former gives rise to potential free-rider (reciprocity) concerns that motivate limiting the benefits of the agreement to signatories, but the market access dimension has arguably also been the main reason why membership has not grown significantly since the Tokyo Round. The associated opportunity cost has been to inhibit the realisation of the benefits that would come from wider participation in the development and implementation of good procurement procedures that are independent of market access policies⁷.

An important dimension of the GPA is that it addresses a subject that was explicitly excluded from the GATT: Article III of the GATT states that national treatment does apply to public procurement. Because of this, procurement could not readily be incorporated into schedules. However, given it had already been accepted as a plurilateral in 1979 its continuation in Annex 4 was a default in 1994 regardless of whether non-participants would have been able to create it at that time.

Three further significant plurilaterals were created shortly after the completion of the Uruguay Round. Two were unfinished business from the Round and, indeed, it was because of this legacy that the GATS was equipped with a straight-forward procedure for adopting plurilaterals by attaching them as protocols to the agreement. These were the Agreement on Basic Telecommunications (ABT)⁸ and the Agreement on Financial Services⁹. The ABT was negotiated between 69 WTO Members, who made various liberalisation commitments, and has attracted further participation since then. It also included the so-called Reference Paper, which defines good regulatory practice in the sector, such as having an independent regulator and abiding by certain disciplines, including requiring that inter-connection fees be cost-based. The ABT was a CMA with the original Members accounting for 91% of global telecommunications revenues. The Reference Paper, which does not concern market access because it dealt with the domestic regulation of telecoms, and which is strictly independent of the ABT's market access provisions, has to date, attracted 82 WTO Members. These Members have adopted its provisions as an 'additional commitment' under Article XVIII of the GATS.

The Agreement on Financial Services was also a CMA, with 70 original Members covering 95 per cent of trade in banking, insurance, securities, and financial information. It contained various regulatory elements but was substantially concerned with liberalising market access. Both agreements were implemented via amendments to participants' GATS schedules. The purpose of the formal protocols that were written into the GATS was less to define the liberalisations than to consolidate concessions and co-ordinate their timing to ensure that there really were critical masses of liberalisers when the agreements came into force.

The third plurilateral from the immediate post-Round period was the Information Technology Agreement (ITA), concluded by 29 Members at the first WTO Ministerial meeting, located in Singapore in 1996. It, too, was a CMA and involved a zero-for-zero agreement on many tariff headings in the information technology sector. Since 1996, it has attracted over fifty further participants and the list of products was expanded in 2015; the ITA now covers 80% of trade in the listed products. As with the two sectoral services agreements, the ITA was implemented through

⁷ Many developing countries do not have industries with the capacity to bid for foreign procurement contracts, making accession less attractive when viewed through the mercantilist lens that tends to drive trade negotiations. As mentioned previously, incentives are further reduced insofar as countries seek to retain the ability to use procurement as a tool of industrial policy. These disincentives are well understood by officials and motivated the effort to launch negotiations on transparency in procurement at the WTO Ministerial meeting in Singapore. The fear of an agreement on transparency in procurement being a Trojan horse for pressure at a later stage to agree to market access commitments was a major factor leading many developing countries to reject this proposal in 2003 at the Cancun Ministerial. These issues are discussed at greater length in Hoekman (2017).

⁸ https://www.wto.org/english/tratop_e/serv_e/4prote_e.htm

⁹ https://www.wto.org/english/tratop_e/serv_e/5prote_e.htm

changes to participants' GATT schedules. In an excellent piece of research, *Gnutzmann-Mkrtchyan and Henn (2018)* suggest that the ITA had a strong positive effect on the exports and production of what they call 'passive accedents' – Members whose accession could plausibly be attributed to broader forces than just spotting a commercial opportunity in this sector¹⁰.

Starting in 2000, talks were launched to expand the coverage of the GATS. These were subsequently merged into the Doha Development Agenda (DDA) negotiations in 2001. This complemented parallel talks on domestic regulation of services and on e-commerce – both initiated in the late 1990s – that sought to address specific dimensions of the complex policy framework that governs trade in services. A feature of all three discussions was that – as noted above – the eventual agreements did not need all WTO Members to join because the GATS' flexible design permits (anticipates) an à la carte approach to determining the coverage of commitments.

The lack of progress on improving the coverage of GATS market access schedules arose at least in part from the single undertaking design of the DDA. Differences on agriculture and non-agricultural market access meant that the incentives to engage seriously on services were reduced. In 2013, this motivated a group of 23 WTO Members to launch separate negotiations for a Trade in Services Agreement (TiSA)¹¹. If successful, the outcome of these talks might have been embodied in a new preferential trade agreement under Article V of the GATS (because it would have had substantial sectoral coverage). Alternatively, it could have resulted in a plurilateral agreement under which signatories would have added new commitments to their GATS schedules and/or additional commitments under Article XVIII of the GATS. This issue was never clarified. The TiSA talks ceased at the end of 2016 because of the opposition of the Trump Administration to the initiative.

A further failure for a putative plurilateral is the Environmental Goods Agreement¹². Talks were started multilaterally under the DDA, and some progress was made in terms of an APEC agreement to reduce tariffs on a list of 54 goods. Efforts to extend these lists failed essentially because WTO Members treated the exercise as a simple mercantilist one in which they sought to maintain their own high tariffs while obtaining market openings in goods in which they perceived themselves to have a comparative advantage. Developing countries saw only the threat that they would have to liberalise their imports in return for what they believed would be next to no export advantages.

In frustration, in 2014, 14 countries initiated plurilateral negotiations aiming for an EGA that would have substantially reduced or eliminated tariffs on a long list of environmental goods (EGs). They attracted four further countries over time, but the EGA remained the province of just developed countries plus China and Costa Rica¹³. Between them, they account for a substantial share of EG trade, and their expressed intention is to extend any benefits on an MFN basis. Even on this limited agenda, however, the negotiations failed for essentially the same mercantilist reason, and the talks never approached the more important issues of non-tariff barriers, environmental services, and domestic regulations. The WTO website notes rather plaintively, '*There are no recent news items on this subject*'¹⁴.

The EGA demonstrates how – despite something like a critical mass – it will remain difficult to make any progress on market access matters until the atmosphere between WTO Members improves

¹⁰ The broader forces were that these countries signed comprehensive trade agreements which pushed them towards ITA membership. This research is important because, except over several decades, it is usually difficult to identify the effects of voluntary trade agreements on trade because the volunteers may have signed up precisely because, for extraneous reasons, they expected commercial benefits. These authors' use of 'passive accedents' and the existence of an explicit control group of related products that were not part of the ITA, allows them to circumvent these problems.

¹¹ Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, EU, Hong Kong (China), Iceland, Israel, Japan, Liechtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, South Korea, Switzerland, Turkey, and the United States.

¹² See, for example, De Melo and Solleder (2020).

¹³ Australia, Canada, China, Costa Rica, European Union, Hong Kong, China, Iceland, Israel, Japan, Korea, New Zealand, Norway, Singapore, Switzerland, Liechtenstein, Chinese Taipei, Turkey, and the United States.

¹⁴ https://www.wto.org/english/tratop_e/envir_e/ega_e.htm

sufficiently to allow a negotiating set to be defined that offers the prospect of a Pareto-improving outcome.

2.5 – Non-GATT/WTO Plurilateral Initiatives

Plurilateral agreements may be negotiated and implemented by WTO Members outside the WTO. Although the WTO would remain relevant, the resulting agreement would impinge on existing WTO rights and obligations. Perhaps the best known of these external cases was the effort to conclude a Multilateral Agreement on Investment (MAI) under OECD auspices. The talks aimed at an agreement to liberalise policies towards foreign investment. They spanned OECD member countries and an additional eight non-OECD countries, including Argentina and Brazil. As discussed at greater length by *Henderson (1999)*, these negotiations failed to result in an agreement because the range of topics tabled proved too ambitious. This led to countries submitting long lists of derogations and exceptions to the general provisions of the proposed MAI, reducing interest by the business community in the negotiation. In parallel, the MAI attracted public opposition by NGOs, concerned that the MAI would give too much power to foreign investors to contest host country regulatory policies through investor-state arbitration mechanisms. Realisation that any feasible agreement would entail limited liberalisation and come at significant political cost led to the eventual abandonment of the initiative.

Another example of a non-WTO effort to negotiate a plurilateral agreement is the Anti-Counterfeiting Trade Agreement (ACTA). Negotiations were launched in 2008 among 32 WTO Members. This centred on enforcement of intellectual property rights (IPR)¹⁵, including proposed provisions on civil, criminal, and border enforcement, and co-operation mechanisms among signatories. ACTA was conceived as a treaty instrument that would operate outside (in parallel to) international bodies dealing with substantive IPR standards, i.e., the WTO and the World Intellectual Property Organization (WIPO). A draft ACTA text was agreed in 2010, but it did not enter into force because the European Parliament declined to ratify the treaty. A key reason for the negative vote was a concerted campaign by NGOs that centred on the lack of transparency of the negotiations, concerns that the focus on strengthening IPR enforcement could undercut human rights and arguments that the process was imbalanced given the very limited representation of developing countries (*Dür and Mateo. 2014*). A feature of the ACTA is that it is salient for the subject of this paper; it was designed to be open to participation by other countries that wished to join at a later stage, but with significant uncertainty regarding the criteria that would apply. Article 43(2) of the draft ACTA simply stated that “*the Committee shall decide upon the terms of accession for each applicant*”¹⁶.

2.6 – Currently Ongoing Efforts Inside and Outside the WTO

At the December 2017 WTO Ministerial Conference in Argentina, WTO Members launched four ‘Joint Statement Initiatives’ (JSIs) spanning e-commerce, domestic regulation of services, investment facilitation, and measures to enhance the ability of micro and small and medium enterprises (MSMEs) to utilise trading opportunities¹⁷. The e-commerce JSI talks involve 80+ WTO Members, mostly middle- and high-income nations and focus on digital trade facilitation¹⁸: regulation of cross-border data flows, data localisation requirements, and issues like electronic signatures, e-invoicing, electronic payment for cross-border transactions and co-operation on consumer protection. The services domestic regulation talks involve 60+ WTO Members and centre on matters associated with the authorisation and certification of foreign services providers (licensing, qualification, and technical standards). The aim is to reduce the trade-impeding effects of domestic regulation by enhancing the transparency of policies through enquiry points and establishing good practice and timeframes for processing of applications, including acceptance of electronic applications by service providers, the use of objective criteria, ensuring national authorising bodies are independent and impartial, and mechanisms for foreign providers to request domestic review of

¹⁵ ACTA participants included Australia, Canada, the EU (on behalf of all EU member states), Japan, Mexico, Morocco, New Zealand, Republic of Korea, Singapore, Switzerland, and the United States. Mexico withdrew in 2010.

¹⁶ https://www.keionline.org/wp-content/uploads/acta1105_en.pdf

¹⁷ https://www.wto.org/english/news_e/news17_e/minis_13dec17_e.htm.

¹⁸ For a summary of the issues tabled by different participants, see https://www.wto.org/english/tratop_e/ecom_e/joint_statement_e.htm and Ismail (2020).

decisions. In December 2021, the 67 WTO Members participating in the Services Domestic Regulation talks agreed to include a new GATS Reference Paper incorporating a set of principles for domestic regulation of services that will be inserted into their respective GATS schedules of commitments¹⁹.

Both e-commerce and services domestic regulation are subjects that have been discussed at the WTO since the late 1990s. A WTO work programme on e-commerce was initiated in 1998, and a Working Party on Domestic Regulation was established under the GATS in 1999²⁰. These work programmes were anchored in existing WTO treaties. The mandate of the Working Party on Domestic Regulation was to develop horizontal (cross-sectoral) disciplines called for in Article VI of the GATS. E-commerce touches on matters addressed by all three of the major WTO multilateral agreements – GATT, GATS, and TRIPS.

The MSME and investment facilitation JSIs differ from the other two in not being tied to existing WTO agreements. The aim of the MSME talks, which include some 90 WTO Members, is to identify measures that governments can take to support the internationalisation of small firms²¹. Any agreement will be applied on a voluntary basis²². Talks on investment facilitation, launched by some 70 WTO Members in Argentina, have grown to encompass more than 100 participants²³. The talks cover investment in goods and services sectors and centre on good regulatory practices, such as, transparency of investment-specific policies, streamlining administrative procedures and information sharing. The agenda explicitly excludes the liberalisation of inward FDI policies, measures on protection of foreign investors and investor-state dispute settlement. The focus on facilitation as opposed to liberalisation is very similar to – and builds on – the approach taken in the WTO Trade Facilitation Agreement.

Outside the WTO, groups of countries have also begun to negotiate plurilateral agreements that are distinct from PTAs. These look to address trade-specific matters and non-trade policies. Examples include the Digital Economy Partnership Agreement between Chile, New Zealand, and Singapore²⁴, the Digital Economy Agreement between Australia and Singapore²⁵, the Japan-US Agreement on Digital Trade²⁶, and negotiations between Singapore and South Korea on a digital partnership agreement²⁷. Such initiatives address cross-border transfer of data, data localisation and protections for source code, encourage co-operation on compatible e-invoicing and e-payment frameworks and establish benchmarks (focal points) for regulatory reforms that support the digital economy and inclusion, and bolster the associated governance frameworks²⁸.

Beyond the digital arena, mention should be made of the ongoing negotiations between New Zealand, Costa Rica, Fiji, Iceland, Norway, and Switzerland on a plurilateral Agreement on Climate

¹⁹ See https://www.wto.org/english/news_e/news21_e/jssdr_02dec21_e.htm. The text of the new Reference Paper is available at <https://www.mofa.go.jp/mofaj/files/100267585.pdf>.

²⁰ A precursor Working Party on Professional Services agreed in 1998 on a set of principles for regulation of licensing of accountants and accountancy services. These were adopted by the Council on Trade in Services in 1998 but did not enter into force because of linkage to a successful conclusion of the Doha round negotiations.

²¹ https://www.wto.org/english/news_e/news20_e/msmes_05nov20_e.htm

²² Campos-Leal et al. (2020).

²³ https://www.wto.org/english/news_e/news19_e/infac_05nov19_e.htm. See also Baliño et al. (2020).

²⁴ Chile, New Zealand and Singapore (2020); <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/digital-economy-partnership-agreement-depa/>

²⁵ Australia and Singapore (2020); <https://www.dfat.gov.au/trade/services-and-digital-trade/Pages/australia-and-singapore-digital-economy-agreement>

²⁶ The agreement bans data localisation, barriers to cross-border data flows and conditioning access to the market on transfer of source code or algorithms and covers financial services. See https://ustr.gov/sites/default/files/files/agreements/japan/Agreement_between_the_United_States_and_Japan_concernin_g_Digital_Trade.pdf

²⁷ <https://www.mti.gov.sg/-/media/MTI/Newsroom/Press-Releases/2020/06/22-Jun-2020-Singapore-and-the-Republic-of-Korea-launch-negotiations-on-Digital-Partnership-Agreement.pdf>.

²⁸ See e.g., Elms (2020).

Change, Trade and Sustainability (ACCTS)²⁹. The goal of the ACCTS participants is to negotiate an open plurilateral agreement that includes commitments on measures to reduce greenhouse gas emissions through specific policy commitments, including trade and subsidy policies. Examples of possible areas for concerted action include reductions in fossil fuel subsidies and the removal of import tariffs on environmental goods.

2.7 – Some Lessons from Plurilateral Efforts to Date

Successful plurilaterals have common characteristics, including the following elements:

- Engagement with and support by epistemic communities: A common understanding among participants regarding the salience of the subjects to be addressed. The existence of a group of stakeholders with knowledge of – and a tangible interest in – addressing cross-border spill-overs created by national policies is a necessary condition for progress to occur. WTO agreements on customs valuation, trade facilitation, product standards and services were all influenced and informed by work in and by associated epistemic communities (*Hoekman and Kostecky, 2009*).
- Preparing the ground: Investment in the compilation of information, analysis of the costs of the status quo, identification of alternative possible solutions, the potential benefits of co-operation and the magnitude of associated implementation and adjustment costs. Epistemic communities can play an important role in providing these types of inputs.
- Transparency: Both the MAI and ACTA failed in part because of process design issues, including inadequate and ineffective engagement with the citizens and their representatives (parliaments) of participating countries to clarify objectives and recognise and address their concerns, and non-participating WTO Members.
- Openness and inclusion: Although plurilaterals are, by construction, instruments for like-minded countries to co-operate, non-signatories may have concerns about the implications of a potential agreement even if it is voluntary and non-discriminatory. Complementing transparent processes with proactive efforts to identify and address possible participation constraints in the design of negotiations and eventual agreements can help to reduce opposition and encourage greater membership over time.
- Issue linkage and separability: Plurilateral agreements may deal with market access and/or regulatory co-operation and good policy practices. Much of what was contained in the Tokyo Round codes and was incorporated into the WTO was concerned with due process-related types of provisions. This contrasts with agreements that centre on liberalisation. Mixing the two features may not be necessary to attain a Pareto-improving outcome. Doing so needs careful consideration.
- Technical assistance: Because many of the Tokyo Round codes and subsequent plurilateral agreements include administrative provisions and define what signatories accept as good practices, there are likely to be implementation costs, especially for developing countries with weaker regulatory systems and fewer resources. Recognising this and including mechanisms to help bolster capacity to implement an agreement is an important way to make openness and inclusiveness a reality. Both by supporting expanding membership over time and increasing the benefits of membership for the countries that join.

Many of the lessons noted in the text were internalised in the Trade Facilitation Agreement (TFA) negotiations (Box 1). The TFA is not actually a plurilateral because eventually all Members were persuaded to agree to it, but it shares many of the features which we consider central to plurilaterals.

²⁹ <https://www.mfat.govt.nz/en/trade/free-trade-agreements/trade-and-climate/agreement-on-climate-change-trade-and-sustainability-accts-negotiations/>

Indeed, during the period in which it was delayed by one Members' objection (to make a point about a completely different issue), making it a plurilateral was seriously considered.

3. Harnessing the Potential of Plurilaterals

For the pursuit of plurilateral approaches to become part of the solution to the problem confronting WTO Members seeking to negotiate better access to markets and agree on trade policy disciplines, it is necessary that a sufficiency of Members demonstrate a willingness to pursue this option. The JSIs make clear that this condition has been met. While revealed preference reflected in action is necessary, it is not sufficient, as signatories of new plurilaterals must be able to incorporate the outcome into the WTO. As discussed above, much can be done through concerted scheduling of new commitments under existing multilateral agreements, but this approach confronts difficulties if the subject matter is not covered by an existing WTO agreement. This implies that WTO Members should consider how to incorporate new agreements that are non-discriminatory in application but that bind only signatories. The prospects for such incorporation would be enhanced by establishing a set of governance principles for Open Plurilateral Agreements (OPAs).

Extract 1 – Lessons on Constructing Plurilaterals from the Trade Facilitation Agreement

As it concerns positive (deep) integration in the sense of specifying what should be done rather than not be done, and because Members had diverse abilities to implement it, the TFA is constructed to permit very different levels of commitment/activity for different WTO Members. It has an explicit link between the provision of technical assistance by developed countries and the implementation of the agreement by developing countries. Trade facilitation was extensively analysed during the TFA's gestation and eventually became widely accepted to be Pareto-improving. Nonetheless, it encountered serious negotiating delays.

The TFA negotiations were informed by an 'epistemic community' that spanned national Customs agencies – often working with and through the WCO – development agencies, other international organisations, and the private sector, notably several international express carriers. This community helped negotiators craft an agreement that explicitly recognises the prevailing heterogeneity in initial conditions and the differential capacity to implement trade facilitation improvements. One result of this is that the design of the TFA differs substantially from the other multilateral agreements included in the WTO.

A major contribution made by these actors was to provide information and analysis. This helped to establish a common understanding of what trade facilitation comprised of and why it matters. Analysis showing that facilitating trade was distinct from removing explicit market access barriers (tariffs, taxes, etc.) and could greatly reduce trade costs helped to address concerns of developing countries that trade facilitation was code for trade liberalisation. The OECD compiled a set of specific trade facilitation indicators that helped to establish a baseline for the state of play across countries.

Following the signature of the TFA, the regional UN economic commissions launched an initiative to track implementation of the TFA through a Global Survey on Trade Facilitation and Paperless Trade Implementation. This helps to track progress in setting up the domestic institutional framework required by the TFA and to identify areas that deserved more attention. This epistemic community also provided substantial technical assistance to countries requesting this during the negotiations.

One significant contribution involved in estimating the likely costs of implementing different types of trade facilitating measures was documenting that such costs were not insignificant but manageable if donors provided support to lower-income nations. Once the TFA had been agreed, many of the organisations have continued to work together to help countries to implement the different provisions of the agreement. In doing so, the organisations working in this area benefited from dedicated co-ordination mechanisms at national level, the WTO TFA Committee, the Aid for Trade partnership between the WTO and the donor community, and several dedicated (earmarked) multi-donor trust funds supporting TFA implementation assistance.

3.1 – Towards Some Governance Principles for Plurilaterals

Plurilateral initiatives offer a means to attenuate the need for consensus, but in doing so raise potential concerns for non-signatories. Even if agreements do not discriminate – which is the presumption – countries that decide not to participate may have an interest in what is agreed to constitute good practice by a plurilateral group. In part, this is because they may want to participate later, and in part, because their firms will confront the consequences of co-operation on regulatory policies when they trade with signatories. In practice, not all countries will be able to engage on an equal footing in the negotiation of an OPA. There is considerable diversity in capacities to engage on regulatory matters and the ability to participate in a fully informed way. Some governments may find it difficult to determine the ‘return’ to applying a proposed rule. This suggests that any OPA should include an aid for trade component—mechanisms to assist countries to improve their standards, regulation, etc. to the level that is required to benefit from the OPA. Including an operational aid for trade dimension in OPAs could enhance their relevance to low-income countries and enhance their inclusiveness.

Ensuring that agreements are truly open to any country wishing to join, are fully transparent, and encourage participation by international and sectoral organisations with relevant expertise could help address potential concerns of non-signatories. Particularly important is to put in place mechanisms to assist countries not able to participate despite being interested in doing so because of weaknesses in their institutional capacity and capabilities. An agreed set of principles that applies to new OPAs would provide assurance that the incorporation of such clubs is consistent with the goals of the multilateral trade system. The absence of a dedicated governance framework for OPAs is a gap in ongoing JSI discussions in the WTO: it arguably reduces the incentive for non-participants to accept efforts by WTO Members to form clubs and the credibility of claims by proponents that the aim is to promote multilateral co-operation.

Addressing these types of concerns is important. One way to do so is through the establishment of a code of conduct – a set of principles that signatories of plurilateral agreements commit to apply³⁰. Creating a governance framework in the WTO for plurilateral initiatives to ensure that they promote the goals of the multilateral trading system – e.g., as defined in the preamble of the WTO agreement – would clarify the conditions that must be satisfied for co-operation among sub-sets of WTO Members to be appropriate and desirable.

In principle, such a framework should be multilateral and agreed by all WTO Members. The elements of such a framework arguably should be considered in the broader discussion on WTO reform. Amendment of the WTO to include new provisions to govern the design elements of plurilaterals will require consensus. This is appropriate as all WTO Members must be comfortable with the WTO becoming more accommodating to the use of OPAs as a means of revitalising the negotiation function of the WTO. Obtaining consensus on the principles to apply to OPAs will require deliberations to determine how to address the concerns of countries regarding the potential downsides of permitting a more variable geometry in the WTO, even if this is explicitly required to be consistent with the over-riding principle of non-discrimination. This will take time. The process could start with the creation of a working group by the Director-General, supported by an independent expert group tasked with taking evidence from the Membership (officials) and stakeholders and making suggestions on how to address the concerns of opponents. The findings of this expert group would be an input into deliberations by the working group to develop and submit a proposal on a governance framework for plurilateral initiatives to the WTO General Council.

The inevitable time and contention associated with a multilateral process to agree on a governance framework for new plurilaterals means that the working group-cum-General Council route cannot be used to guide the design of the current set of JSIs. Putting these on hold is clearly not desirable. However, in the short-term, a start can be made at putting in place a set of principles for plurilateral agreements by the proponents of (participants in) the JSIs. A pragmatic approach would be for a common set of principles to be incorporated into all proposed plurilateral agreements. This can take

³⁰ This suggestion was first made by Lawrence (2006). See also Levy (2006).

the form of a binding (i.e., enforceable) code of conduct that is incorporated as an integral element of a JSI agreement, as was done with the Reference Paper on Basic Telecommunications laying out specific obligations on access to the network. In the case of the Reference Paper, signatories incorporated the agreement into their GATS schedules. A pledge by a group of significant traders – say, a subset of the G20 – to include a code of conduct in any OPA of which they are part would be an important start on this process. First, it would signal commitment to ensuring that plurilateral co-operation is inclusive and supportive of the rules-based trading system by being open and non-discriminatory. Second, as it operated, it would gradually demonstrate the appropriateness of this approach and start to defuse the anxieties among WTO members who are currently sceptical about OPAs.

A possible code of conduct for plurilaterals could include the following elements and provisions (Hoekman and Mavroidis, 2015; Hoekman and Sabel, 2021):

- Membership is voluntary; WTO Members that decide not to participate initially will not be pressured to join subsequently.
- Openness to subsequent accession by WTO Members that did not join when an OPA was first agreed, and inclusion of a section laying out the requirements and procedures to be followed for accession by aspiring Members³¹.
- Language stating that accession to an OPA cannot be on terms that are more stringent than those that applied to the incumbent parties, adjusted for any changes in substantive disciplines adopted by signatories over time³².
- An obligation to provide reasons to accession-seeking countries for decisions to reject membership applications.
- The agreement must be implemented on a non-discriminatory basis, with benefits extending to non-signatories. Insofar as benefits are conditional on satisfying requirements pertaining to standards of regulation and regulatory enforcement in a jurisdiction, which should be clearly specified.
- A provision committing signatories to assist WTO Members that are not yet able to satisfy the institutional/regulatory preconditions for membership in terms of applying specific substantive provisions of the agreement but desire to do so.
- Wherever it is appropriate and in instances where capacities must be built for a country to meet OPA requirements, consideration be given to establish a stepwise schedule of compliance. Wherever possible, designing agreements to permit ‘incremental’ accession – adoption of specific disciplines that can be implemented on a separable basis, as is the case under the TFA and foreseen in the modular approach taken in recent Digital Partnership Agreement (see below) – can help to encourage participation.
- Provisions ensuring that non-participants have full information on the implementation and operation of the agreement. These transparency-related requirements should include:
 - a. Compliance with WTO requirements pertaining to publication of information on measures covered by the OPA (along lines of Art. X GATT).
 - b. Simple, robust notification requirements for OPA members regarding the implementation of the agreement, which could draw on recent proposals to develop augmented procedural guidelines for the operation of WTO bodies³³.
 - c. Creation of a body to oversee implementation of the OPA that is open to observation by non-signatories, including mechanisms to engage stakeholders in an ongoing conversation about how the agreement is working and future needs³⁴.

³¹ Open access in the sense that once negotiated any plurilateral agreement must permit accession by any WTO Member is not explicitly required in Art. X(9) WTO.

³² This leaves open the possibility that parties to a plurilateral can offer accession on less demanding terms for developing countries if they agree to do so, but for reasons discussed below does not make this obligatory.

³³ See Wolfe (2018) for an extended discussion on improving notification processes and performance.

³⁴ Wolfe (2021) suggests options for WTO bodies to organise periodic sessions that focus on learning and engagement with stakeholders.

- d. Annual reporting to the WTO General Council by the OPA on its activities.
- e. A mandate for the WTO Secretariat to assess the effects of implementing OPAs on the functioning of the trading system as part of the Director-General's annual monitoring report of developments in the trading system³⁵.
- o Inclusion of consultation and conflict resolution procedures for non-signatories of OPAs in cases where they perceive that incumbents do not live up to the code of conduct adopted by signatories.
- o Provisions indicating whether the OPA envisages recourse to WTO dispute settlement mechanisms to enforce the agreement, and, if so, specifying the standard of review as well as the criteria that will apply in the selection of arbitrators – e.g., to assure arbitrators have the expertise required in the subject matter addressed by the agreement.

It should be stressed that ultimately establishing a governance framework for OPAs within the WTO is important. The case for advancing OPAs is to bolster the multilateral system – to give it the ability to deal with current problems and ensure that the WTO has the moral authority that goes with being the predominant locus for trade co-operation. Unilateral actions offer less assurance of stability and even-handedness – especially to sceptics – than a universal framework, even if the latter contains several levels of obligation.

Finally, it is worth observing that the code of conduct says very little about the negotiation of OPAs. As noted above, the WTO makes no stipulation about how agreements are negotiated. This is because it is not necessary: Members are able to adjust their schedules unilaterally or in concert as long as doing so does not compromise the rights of other Members, and any new agreement that applies to all Members requires the consent of all Members. What matters is what emerges as a proposal, not where it comes from. We see OPAs as part of that tradition. We would advocate openness and transparency in the negotiating process as a salve for concerned outsiders and would require that potential Members of an OPA receive, by right, technical help to accede. However, we would not advocate an obligation to accept into negotiations some extraneously defined set of Members.

One consequence of the relaxed stance on negotiation is that OPAs may offer a route to multilateralising regionalism. If several PTAs had similar provisions on a matter, it would be perfectly feasible for them to suggest generalising the provisions to the whole trading community by proposing an OPA. If that were acceptable to other Members, this would be a step forward in terms of extending good (proven) practice and multilateralising the dispute settlement mechanism and thereby improving the confidence that all nations can have in its continuation. Indeed, hints of this are already evident: the Digital Economy Partnership Agreement between Chile, New Zealand and Singapore is designed in a modular fashion with the aim of facilitating gradual multilateralisation of specific parts of the agreement (*Ramasubramanian, 2020*).

3.2 – Mobilising Issue-Specific Epistemic Communities

Perceptions and claims by some WTO Members that a policy implemented by a fellow Member gives rise to negative international spill-overs will often be contested by that Member. National policies presumably are intended to enhance national welfare, however defined, and attenuation of any spill-over effects may reduce that enhancement, leading to calls for compensation. This is the bread and butter of trade negotiations. Successful co-operation to internalise spill-overs must enhance joint welfare, i.e., be Pareto-improving: co-operation will not be possible if a country loses from whatever

³⁵ This overall report is not a commitment to examine the consistency of every OPA with WTO obligations at the time it is proposed. WTO members may choose to reject proposed plurilaterals in new areas and can use the dispute settlement procedure to challenge any plurilateral implemented via the unilateral modification of schedules. One might expect this to benefit from having a view from the WTO. However, the GATT started off with a mandate to examine new PTAs and determine their consistency with the Agreement; however, the process only very rarely reached a clear decision, and it was gradually watered down in the WTO to being merely an information report by the Committee on Regional Trading Arrangements, which to our knowledge has never been referred to in a dispute (see Mavroidis, 2005; 2011). Thus, determining WTO-consistency seems likely to be best carried out by interested parties.

is proposed. A necessary condition for that co-operation is that parties have a common understanding of the substantive features of an issue, including the magnitude and incidence of cross-border spill-over effects and the implications of potential rules and alternative policies for the realisation of national goals. This requires time and the investment of resources, including engagement with stakeholders on the specific issue at hand, especially in areas where the parties lack consensual understanding of the issues, and relations of trust are yet to emerge.

To achieve common understandings, the epistemic communities must be open to parties with concerns/opposition. Where these are developing countries, special efforts may be required to assist their participation and build appropriate capacity (as we discuss in Section 3.3 below). There is also a role here for international institutions beyond the WTO in representing developing country interests.

As noted, successful WTO agreements on sanitary and phytosanitary measures, technical barriers to trade and trade facilitation are all associated with a body of agreed technical knowledge and accumulated goodwill among the relevant national regulatory agencies who co-operate through international fora and institutions. They establish what constitutes good regulatory practice and specific standards that will help realise common objectives. Such epistemic communities with a common interest in using policies to attain desired outcomes can collaborate to identify regulatory approaches that are effective and efficient while reducing potential negative trade spill-over effects. A key output of such communities and a potential foundation for co-operation and legitimation is the creation and exchange of commonly agreed forms of information. For any subject of interest, various government agencies are likely to be involved in the design and implementation of pertinent policies. International organisations may collect information on and monitor the use of the associated policies. Mobilising an epistemic community that builds bridges across the relevant entities is necessary to help prepare the ground for international co-operation, starting with mapping the available data and the information-sharing necessary to identify gaps in knowledge and to build trust.

Such efforts will benefit from an institutional anchor. In the case of the TFA, for example, the World Customs Organization played a key role in the epistemic community that supported the negotiation process, along with the OECD and World Bank. The latter two provided critical analytical inputs, including the development of indicators to measure initial conditions and that could be used to monitor improvements over time. In instances where no extant international organisation exists, proponents should seek to identify and engage with the associated epistemic community to inform deliberations and prepare the ground for negotiations. Developing a work programme to collect and analyse information on applied policies and their effects on international competition, drawing on relevant international organisations, the international business community, and other stakeholder groups, will be necessary to provide a solid basis for deliberations.

3.3 – Recognising and Addressing Differential Capacities

The set of governance principles suggested above do not include ‘special and differential treatment’ (SDT) for developing countries of the type that is part and parcel of the WTO, i.e., ‘less than full reciprocity’ and exemptions and exceptions to agreed disciplines that can be invoked by developing countries. This is not because it is not important to recognise different levels of economic development and institutional capacities; to the contrary. However, addressing such differences calls for tailored and targeted measures as opposed to general opt-outs and exemptions. Inclusion of ‘standard’ SDT would defeat a major rationale for groups of WTO Members to consider OPAs: namely, to adopt what signatories agree are good regulatory/policy practices. Insofar as OPAs deal with domestic regulatory matters, it makes no sense to consider that some countries should permanently fail to implement parts of whatever standards and processes are agreed, as this would undercut the achievement of the domestic regulatory objectives of OPA Members and make co-operation impossible. Instead, the focus should be on ensuring that rules and common regulatory principles and approaches are, in principle, beneficial to participating countries independent of their levels of development, and that those countries that cannot immediately implement an agreement are assisted to do so. A commitment that parties to OPAs must assist non-signatories desiring to participate but unable to do so because of capacity weaknesses addresses the key development-

related factor that may impede participation and benefitting from a given agreement. Doing so is important to assure inclusion (openness) and to increase the benefits of plurilateral co-operation by expanding the set of countries that (can) participate.

Putting in place a mechanism through which incumbents provide such assistance will enhance the credibility of commitments by OPA signatories to use plurilaterals to support an open, rules-based, multilateral trading system. In the case of the TFA, the credibility of promises to provide assistance was a major issue in the negotiations. Many developing countries sought to establish a dedicated trust fund to support developing countries' implementation of TFA provisions. Donor countries resisted such earmarking as being incompatible with aid effectiveness principles. In the event, what emerged was an agreement where the implementation of specific provisions could be conditioned on provision of assistance. Most the assistance would be provided by international organisations (supported by donor funding), and annual oversight and monitoring by the WTO TFA Committee and periodic global Aid for Trade review conferences.

Currently there is no system that makes available assistance on request in areas proposed for co-operation in OPAs, both to countries before accession – to aid the technical aspects of their accession – or to countries subsequent to signing an agreement to assist in implementing provisions that need not be enacted as a pre-condition for membership. A TFA model for the latter separable or modular-type provisions may be appropriate for several other OPAs. Whether pre- or post-accession, what is needed is that commitments of assistance are credible. This is particularly salient in the current context given the erosion of trust among many WTO delegations in Geneva: promises of assistance that – in the past – might have been taken at face value are more likely now to be regarded as 'cheap talk' and heavily discounted.

The discussion regarding the importance of mobilising/engaging with relevant issue-specific epistemic communities in the design of potential OPAs, and the need for assisting countries that are not able but are willing to participate, suggests consideration be given to establishing a mechanism that supports both pre-conditions for making OPAs effective and inclusive forms of international trade co-operation. Epistemic communities may have a strong interest in supporting OPA deliberations but not have the resources to do so. Entities that are asked to provide expertise need to be able to cover the associated costs. Even if international organisations such as the World Bank or the OECD are tasked with information gathering and analysis, this will still need to be resourced. The same pertains to meeting technical assistance requests, whether for diagnostic assessments of the prevailing regulatory regime in a country to generate information on the potential implications of specific OPA provisions or helping to address the identified need for reform or upgrading.

Expecting the WTO Secretariat to provide these services has several problems. First, because not all WTO Members are interested in any given OPA discussion, they cannot be asked to cover the associated Secretariat/support services as part of their annual contribution to the WTO budget. Second, the Secretariat is small and does not necessarily have the capacity and expertise to service discussions on matters that lie outside the ambit of extant multilateral agreements. Third, the Secretariat is tightly controlled by the WTO Membership and if there are sceptics among them, it would not be difficult for them to frustrate the provisions of technical assistance.

Examples of programmes to support the epistemic communities that prepared the ground for and helped to design trade programmes are the UK's support for the Aid for Trade initiative and technical assistance programmes in developing countries to reduce trade costs for local firms, the German support of the ongoing JSI on Investment Facilitation and the analytical work that was done to support the TFA negotiations. Building on these initiatives, a multi-donor facility to support plurilateral initiatives and agreements – both ex-ante and ex-post – would fill an important gap. It would also do much to signal both (i) the importance accorded to revitalising international co-operation on trade under the auspices of the WTO and (ii) the commitment to the principle that such co-operation should be inclusive, i.e., open to all the countries that are willing to participate, including those that require assistance to do so. The terms of reference for such a facility must go beyond local capacity strengthening and span upstream research and analysis of the type that was done for the TFA

negotiations to clarify the potential gains and (opportunity) costs of alternative options and the associated implications for participating – and non-participating – WTO Members. A facility could also play a valuable role in incentivising robust monitoring and evaluation of the implementation of OPAs, further assuring non-signatories that OPAs will be subject to serious scrutiny and contributing to the information base and learning needed to guide efforts by signatories to improve the operation of agreements over time.

An OPA support facility will ideally be multi-donor. Agreeing on the design, location, and management of such a mechanism requires deliberation among potential contributing parties and will take time. What matters in the short run is the signal that can be given by a significant coalition of trading nations. The overall financial commitment associated with any mechanism to support upstream analysis of potential subjects for plurilateral discussion will be limited in magnitude: it needs to cover only the compilation of information, analysis, and indicative needs assessments (national diagnostics). The need for and potential costs of implementation of an OPA will need to be determined during the negotiation of new agreements and will depend on what is agreed.

3.4 – Enforcement Considerations

The need for enforcement and recourse to the Dispute Settlement Understanding (DSU) is an important design decision for potential OPAs. There are two dimensions to this question. The first concerns the type of co-operation that is envisaged – binding or best endeavours – and if binding, the substance of disciplines and the associated standard of review. The second concerns the ability of non-signatories to invoke the WTO DSU to challenge non-implementation of the code of conduct by signatories of JSI agreements.

Apart from the JSI on MSMEs, where the contours of an agreement have been determined, if successful, the other JSIs are likely to involve a mix of hard and soft law, akin to what is found in the TFA. The presumption of WTO Members engaged in JSIs appears to be that if binding commitments are agreed, the DSU will apply. If commitments pertain to the non-discriminatory application of policies, recourse to the dispute settlement by non-signatories is straightforward – the matter is no different from bringing cases under current WTO agreements, given the presumption that signatories of OPAs must abide by the MFN rule. The delicate part will be to determine what MFN means when negotiated benefits are conditional on attainment of regulatory requirements and mutual recognition of regulatory regimes.

Suppose a non-signatory WTO Member C claims that its regulatory regime is equivalent to those of JSI agreement signatories A and B, whereas the latter decide to the contrary. If C has not expressed an interest in joining the negotiated agreement, this should exclude it from bringing such litigation insofar as the application of provisions is conditional on joint action that permit co-operation between A and B. However, what if C has sought to join an OPA and A and B have rejected it based, for example, on differences in regulatory regimes that prevent C from being included? An example would be a plurilateral data adequacy regime, in which regulators accept that data protection and privacy standards in signatory countries are equivalent, permitting the free flow of data between the jurisdictions concerned. For an outside country to benefit from the arrangement, it must be able to argue its data regime is equivalent to that applied by club members. Assume the club decides that this is not the case, and a dispute arises. Similar issues arise in cases where incumbent OPA members are alleged to impose more stringent requirements on countries wishing to accede to an OPA than apply to insiders.

Whether the DSU should – or even can – apply to such situations deserves careful consideration. In practice, it is very unlikely that regulators of countries participating in a plurilateral arrangement will accept having a WTO panel second guess their decisions or wish to become embroiled in potential cross-retaliation. In the PTA context, regulatory chapters often explicitly exclude regulatory measures from the dispute settlement. Analogously, the effort to establish ‘necessity’ criteria in the WTO talks on services domestic regulation was a major factor impeding agreement because of the chilling effect of the associated prospect of litigation and external scrutiny of national regulatory

decisions, even if the focus of agreement is limited to procedural/process requirements and not the substance of the regulations.

More broadly, WTO panels and the Appellate Body may not be well placed to determine if the authorities in a signatory are acting inconsistently with one or more of the principles included in the code of conduct. Alternative mechanisms to address such conflicts that put the emphasis on engagement between the relevant authorities may be more effective and efficient. These should aim to establish the facts of a matter in an objective and independent manner and provide information that can serve as a basis to identify actions that can be taken to support the realisation of the principles that are agreed to apply to OPAs. This can include deliberations in the body charged with oversight of the agreement along the lines of the specific trade concern process in the TBT and SPS agreements, consultations between parties informed by independent expert groups to understand and propose solutions to implementation problems, and regular independent analysis of the effects of implementing specific provisions of an agreement.

An implication is that OPAs should be designed to support such activities. The type of expert advisory group process that is foreseen in the TFA is a good example, as it is premised on a presumption of good faith and focuses on identifying and resolving specific implementation problems³⁶. Greater reliance on expert groups that have no enforcement role – i.e., do not engage in arbitration or judgement – is not adding a fifth wheel to the process of dispute resolution, but a useful contribution to efficiency. Their non-judgemental role and expertise will help to diffuse tensions, provide objective evidence on the causes of non-implementation or non-realisation of specific provisions of an agreement, identify potential remedies to address specific constraints, and create an overview of the implementation of the OPA, which will help it to attain its objectives.

Expert groups will not be unduly costly, but they would still need to be funded. Doing so could be another function of the OPA support facility proposed above. The use of expert groups to address implementation difficulties does not imply that dispute settlement processes should not apply – depending on the subject and the type of commitments negotiated, standard enforcement procedures as foreseen in the WTO should be available if deemed appropriate by signatories. This is an important dimension of what the WTO offers to Members. Rather, our point is that the DSU may not be appropriate to some contexts and that defusing potential disputes can be the more effective path to sustaining co-operation.

3.5 – Possible Topics for Plurilateral Agreements

There are many potential policy areas where OPAs could be a potential path forward for both the big players and open-minded smaller countries. For example, one might seek to:

- Build on the modular approach in the recent non-WTO plurilateral Digital Economy Agreements among Asia-Pacific Economic Co-Operation (APEC) countries and recent PTAs such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) to extend the reach of specific chapters to additional countries through issue-specific OPAs in the WTO.
- Expand participation in the effort by several EFTA and Asia-Pacific countries to negotiate an agreement on climate change, trade, and sustainability (ACCTS), including both import liberalisation as foreseen by the EGA discussions in recent years and concerted action to reform specific tax-subsidy programmes to reduce greenhouse gas emissions.

³⁶ Expert panels are foreseen in the EU-UK Trade and Cooperation Agreement. The TCA features mechanisms by which either side can apply remedial measures against the other, resulting in a complex web of dispute settlement processes. In addition to an overall arbitration procedure, there are bespoke measures for the non-regression elements of labour and environmental standards. As in a 'Canada-style' FTA, there are specialist panels of experts dedicated to environment and labour provisions. Article 9 of Part Two, Heading 1, Title XI, Chapter 6 details a standard ladder-style escalation of disputes from consultation to arbitration. The decision as to what to do about the recommendations of an expert panel's report is unilateral (Art 9.2.16), but Article 9.2.19 then opens it up to various elements of the general arbitration process which permit temporary retaliation (Part Six, Title I, Art. INST. 24-25). See <https://blogs.sussex.ac.uk/uktpo/publications/taking-stock-of-the-uk-eu-trade-and-cooperation-agreement-governance-state-subsidies-and-the-level-playing-field/>

- Build on the China-EU Comprehensive Agreement on Investment (CAI) to maintain progress on state-owned enterprises and subsidies. If the CAI remains on ice, it would be worth considering launching plurilateral discussions in the WTO to include more countries while narrowing their scope to promote domain-specific co-operation that is not tied to a broader agreement that includes linkages with non-trade issues.
- Revisit the Trade in Services Agreement (TiSA) effort, expanding the talks to encompass China and India.
- Pursue the proposal by the Ottawa Group for a Trade and Health Initiative (TaHI) in the WTO (WTO, WT/GC/223), including as a vehicle to engage with – and support – the epistemic community that has emerged because of the Covid-19 pandemic.

4. Summary and Recommendations

4.1 – Summary

While OPAs that address matters where free riding concerns arise will be feasible only if a critical mass of countries sign an eventual agreement, whether this constraint binds is case-dependent and is ultimately an empirical matter. If critical mass cannot be obtained, it will often be possible for its advocates to design co-operation as a preferential trade agreement (PTA). Starting with deliberations that are premised on negotiating a critical mass agreement—which may span all WTO Members but accepting that not all WTO Members need to sign an agreement – can revitalise multilateral trade co-operation and the relevance of the WTO. Given PTAs are always an option, the opportunity cost of pursuing an OPA as an alternative to the pursuit of multilateral agreements among all WTO Members is low. Of course, this does not necessarily mean that a PTA will generate significant benefits if large trading nations are left out.

Matters are more straightforward for regulatory policies where free-riding concerns do not apply – either because co-operation and thus the ability to benefit is conditional on equivalence of regulatory regimes, or because it does not matter what non-signatory countries do because the policy area does not give rise to international spill-overs. In such instances, pursuit of OPAs may – in practice – be superior to efforts that seek to apply the results of negotiations to all WTO Members, because of divergences in societal preferences and national priorities across the heterogenous membership.

In considering the costs and benefits of plurilateral co-operation under the auspices of the WTO, it is important to recognise that PTAs are much less transparent to non-signatories than OPAs. The latter will be subject to greater scrutiny and be much more transparent than PTAs as regards to their operation because of the institutional support services provided by the organisation – a dedicated committee, reporting requirements to the WTO General Council, and the use of the WTO dispute settlement procedures if signatories decide to make enforceable commitments.

The aim of this paper is not to make a case for specific subjects for plurilateral co-operation. The point we would emphasise is simply that there is – in principle – great scope for plurilateral initiatives, that this type of co-operation may be first-best, and that the feasibility of OPAs cannot be determined ex-ante. Experience will determine whether critical mass can be obtained and what types of issues lend themselves to separable agreements and where it is necessary to link issues (craft packages) for co-operation to become feasible. It is worth recording that while we believe that making provision for and signing OPAs will engender trust among Members of the WTO, it could have the opposite effect if it is mishandled. The code of conduct is intended to head off many of the mistakes that could have this effect, but negligence or attempts to circumvent it would push us further back than ‘square one’.

The prospects for more variable geometry in the WTO will be enhanced if WTO Members can agree on rules of the road for new OPAs, incorporating the type of principles suggested above into a code of conduct that proponents of a new OPA commit to. Preferences and priorities will change over time. Countries that may not have been interested in joining an OPA when it was first negotiated may become interested later. They may need technical assistance to satisfy the pre-conditions for joining – and benefiting from – an OPA. Credible commitments that OPAs under the WTO are – and will remain – open, that they apply on a non-discriminatory basis, and that incumbents will assist countries that request it will help to ensure that OPAs support the realisation of the goals of the WTO.

4.2 – Recommendations

- I. OPAs are a way forward to revitalise negotiations in the WTO. Variable geometry on an MFN basis was a feature of the GATT and is part and parcel of the design of the GATS; as a result, WTO Members have substantial discretion to incorporate new OPAs via their existing

schedules. This was illustrated by the agreement of 67 WTO Members to adopt a new Reference Paper on Services Domestic Regulation into their GATS schedules.

- II. Scheduling is not first-best, however, for new OPAs that address matters not covered by the WTO. A work programme in the WTO to define rules/criteria/procedures on how such OPAs can be annexed to the WTO will increase the prospects that WTO Members will be willing to pursue plurilateral co-operation inside – as opposed to outside – the WTO.
- III. In parallel and in anticipation of the outcome of efforts to clarify and facilitate the incorporation of OPAs into the WTO, those participating in JSIs and proponents of new OPAs should unilaterally commit to a code/set of governance principles that provide credible assurances to non-signatories that OPAs will be, and remain, open; will not undercut the multilateral trading system and will not result in de-facto discrimination. A draft 10-point code is outlined in Section 3.1. It includes commitments on the implementation and operation of the agreements.
- IV. To utilise the potential of plurilateral co-operation, greater effort is needed to better prepare the ground and assist participation by countries that need to undertake regulatory reforms/upgrading to participate in/benefit from OPAs. This involves, inter alia, working with relevant epistemic communities to understand the issues fully, ensuring full transparency during the analysis and negotiation phases, and support for expert technical and other assistance where required. These issues cannot be delegated to the WTO Secretariat because it is not adequately resourced for the tasks or able to keep them separate from more direct negotiating and dispute settlement activities. A coalition of like-minded donors could provide leadership by proposing to establish a dedicated OPA support facility.

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