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**PLURILATERAL TRADE AGREEMENTS:
AN ESCAPE ROUTE FOR THE WTO?**

RUDOLF ADLUNG and HAMID MAMDOUH

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**PLURILATERAL TRADE AGREEMENTS:
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RUDOLF ADLUNG AND HAMID MAMDOUH*

'That's the funny thing about trying to escape. You never really can.
Maybe temporarily, but not completely.'
Jennifer L. Armentrout, *Onyx*

Abstract

There are essentially two types of plurilateral trade agreements (PAs) among WTO Members, an exclusive and an open variant. While the benefits of the former agreements are shared among participants only, the latter are implemented on an MFN-basis, thus profiting non-signatories as well. The most prominent examples are the Information Technology Agreement (1996) and the Fourth and Fifth Protocols under the GATS (1997) on telecom and financial services, respectively. To preclude 'free riding', their entry into force was made contingent on the participation of a 'critical mass' of countries. The respective benchmarks, usually market shares of some 80% or more, are quite challenging, however. To promote more widespread use of plurilaterals, given the plethora of pressing policy concerns, whether investment-, competition- or labour-related, and the persistent stalemate in the Doha Round negotiations, the conclusion of exclusive agreements is thus being (re-)considered in ongoing policy discussions. This article takes a sceptical view, since any such PA would need to be agreed by consensus among all 160-odd WTO Members. It may prove more rewarding to further explore the potential of open agreements to address policy concerns among interested Members either in the form of co-ordinated improvements of their current schedules or, if not covered by existing treaty frameworks, as 'WTO-extra' understandings.

Keywords: WTO, Doha Round, plurilateral agreements, critical mass
JEL Classifications: F13, F15, F53

* Rudolf Adlung is an independent trade policy analyst who formerly worked in the WTO Secretariat; Hamid Mamdouh is the Director of the WTO Secretariat's Trade in Services and Investment Division. The authors would like to thank Stuart Harbinson, Juan Marchetti and Weiwei Zhang for very inspiring comments on earlier drafts. Nevertheless, as usual, they remain fully responsible for the views expressed as well as any remaining errors and omissions.

1. BACKGROUND

This article is inspired by, and seeks to add to, some recent publications on the future role of plurilateral trade agreements (PAs) in the WTO. Such agreements among sub-groups of Members are increasingly viewed, potentially at least, as an escape route from the stalemate in the Doha Round which is likely to persist for quite some time. While the Ministerial Conference in Nairobi (December 2015) delivered some significant results, it did not help to advance the Doha Development Agenda (DDA) or open the door for ‘new issues’ that have emerged over the past 15 years.¹

Though the concluding Declaration contains a ‘strong commitment by all Members to advance negotiations on the remaining Doha issues’, it also notes, for the first time since the launch of the Round, that some Members refused to reaffirm the respective mandates as they believe ‘new approaches are necessary to achieve meaningful outcomes in multilateral negotiations’. And while all participants agreed that future work should focus on the unresolved DDA issues, some also wished ‘to identify and discuss other issues for negotiation’. Though not further elaborated upon, the latter certainly include policy concerns that have hitherto been addressed in some Regional Trade Agreements (RTAs), but are not equally covered by current WTO Agreements. Potentially relevant issues include environmental problems, disregard of basic worker rights, conduct of state-owned enterprises (SOEs) or absence of proper competition laws and/or their impartial enforcement. The Declaration provides that ‘[a]ny decision to launch negotiations multilaterally on such [other] issues would need to be agreed by all Members’.²

The DDA’s extended paralysis appears particularly frustrating from a trade-in-services perspective. This is for at least two reasons. First, current commitments under the General Agreement on Services (GATS), mostly scheduled during the Uruguay Round (UR), are generally very shallow. While many Members had remained hesitant at the time of the Round, possibly due to lack of experience with the new concepts and ensuing government-internal coordination problems, technical and regulatory innovations (e-commerce!) have created since many new trading opportunities. In other words, a lot of additional water has been impounded.³ Second, the particularly wide scope of the GATS, extending *inter alia* to investment, labour and competition issues, opened a broad range of negotiating areas beyond the comparatively narrow scope of the GATT.⁴ The GATS would thus offer more space for sectoral deals across the full Membership than

¹ The possibly most impressive achievements are a decision to completely eliminate agricultural export subsidies and, on a plurilateral basis, to significantly expand the product coverage of the 1996 Information Technology Agreement (ITA, Section 3.B.1).

² World Trade Organization, Ministerial Conference - Tenth Session, Ministerial Declaration, Document WT/MIN(15)/DEC, 21 December 2015.

³ See, for example, Gootiiz and Mattoo, ‘Services in Doha - What’s on the Table?’, 45 *Journal of World Trade* (2009) 1013; S. Miroudot and K. Pertel, *Water in the GATS: Methodology and Results*, OECD: Working Paper of the Trade Committee, TAD/TC/WP(2014)19/FINAL (2014).

⁴ There is no basis in our view for sweeping claims that ‘in areas such as investment, competition and environmental protection ... no multilateral disciplines exist at all’ (Hoekman and Mavroidis, ‘WTO “à la carte” or “menu du jour”? Assessing the Case for More Plurilateral Agreements’, 26 *The European Journal of International Law* (2015) 319, at 325) or that investment measures are covered only, tangentially at least, by the Agreement on Trade-Related Investment Measures (Hufbauer and Cimino-Isaacs, ‘How will TPP and TTIP Change the WTO System?’ 18 *Journal of International Economic Law* (2015) 679, at 682). Concerning the applicability of GATS to investment see, for instance, Adlung, ‘International Rules Governing Foreign Direct Investment in Services: Investment Treaties versus the GATS’, 17 *Journal of World Investment & Trade*

possibly exists in any other negotiating area.⁵ There appear to be ample opportunities for agreements, provisional or definitive, to be reached prior to the full completion of the DDA agenda.

It is true that para 47 of the Doha Ministerial Declaration of 2001 requires that the conduct, conclusion and outcome of the negotiations shall form part of a single undertaking. However, the Declaration also provides that 'agreements reached at an early stage may be implemented on a provisional or a definitive basis.'⁶ Ten years later, the Chairman's summary of the Eighth Ministerial Conference confirms that Ministers are committed 'to advance negotiations, where progress can be achieved, including focusing on the elements of the Doha Declaration that allow Members to reach provisional or definitive agreements based on consensus earlier than the full conclusion of the single undertaking.'⁷ Yet, the number of such early agreements has remained quite limited to date. Worth mentioning in the current context are the Trade Facilitation Agreement (TFA) and the so-called 'services waiver', both adopted at the Bali Ministerial Conference in 2013, as well as Members' commitment, at the Nairobi Ministerial Conference in late 2015, to abolish export subsidies in agriculture.⁸ After a multi-year logjam, these results might be viewed as an indication that 'at the WTO, life has been stirring anew'.⁹

(2016) 41; De Meester and Coppens, 'Mode 3 of the GATS: A Model for Disciplining Measures Affecting Investment Flows?', in Z. Drabek and P. Mavroidis (eds), *Regulation of Foreign Investment - Challenges to International Harmonization* (2013) 99; and M. Matsushita, T. Schoenbaum, P. Mavroidis and M. Hahn, *The World Trade Organization - Law, Practice, and Policy* (Oxford, 2015). According to the latter publication, '[a]s the GATS addresses not only the product "service", but also (and possibly in particular) "services suppliers" ... mode 3 (commercial presence) essentially includes the acceptance of liberalizing investment' (at 563). Regarding the role of competition-related provisions under the Agreement, actual and potential, see Warner, 'Competition Policy and GATS', in P. Sauvé and R. M. Stern (eds), *GATS 2000. New Directions in Services Trade Liberalization* (2000) 364 as well as Section 3.B.2(a)).

⁵ As noted by Collier, 'trade in services has enormous potential for expansion. This is probably the main case in which there is scope for mutual gains that are *intra*-sectoral and so the bargaining should in principle be considerably easier than the 'grand bargain' needed for the rest of the trade round.' See Collier, 'Why the WTO is deadlocked', 29 *The World Economy* (2006) 1423, at 1444.

⁶ World Trade Organization, Ministerial Conference - Fourth Session, Ministerial Declaration, Document WT/MIN(01)/DEC/1, 20 November 2001, para 47.

⁷ World Trade Organization, Ministerial Conference - Eighth Session, Chairman's Concluding Statement, Document WT/MIN(11)/11, 17 December 2011, at 3.

⁸ For further information on the *Trade Facilitation Agreement*, see for example Czapnik, 'The Unique Features of the Trade Facilitation Agreement: A Revolutionary New Approach to Multilateral Negotiations or the Exception Which Proves the Rule?', 18 *Journal of International Economic Law* (2015) 773. In order to enter into force, the Agreement needs to be ratified by two thirds of the WTO membership. At the time of writing (December 2016), a few ratifications were still lacking. See also *infra* note 69.

The *services waiver* allows non-LDC Members, notwithstanding the Most-favoured-Nation (MFN) clause, to extend preferences to services and service suppliers from least-developed countries. (World Trade Organization, Preferential Treatments to Services and Service Suppliers of Least-Developed Countries, Document WT/L/847, 17 December 2011, at 3.) By the time of the Nairobi Ministerial Conference, in December 2015, 21 Members had submitted notifications indicating the preferences they extend under this Waiver.

For an overview of the Nairobi Decisions on *export competition in agriculture*, consisting of the abolition of all forms of export subsidies as well as the introduction of disciplines on other export policies (export finance, food aid and the operations of agricultural state trading enterprises), see the WTO Secretariat's note at www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_agriculture_e.htm#exportcompetition (last visited 8 December 2016).

⁹ Harbinson, *Trade Negotiations: Is the Bicycle Tipping Over?*, Asia Global Institute, at 5 (available at <http://www.asiaglobalinstitute.hku.hk/en/trade-negotiations-bicycle-tipping/>, last visited 8 December 2016).

The lack of progress across broad areas of the DDA has drawn attention to the possibility of smaller-scale negotiations, on a plurilateral basis, intended to promote a commonly shared agenda among like-minded countries. The negotiating mandate concerning future trade rounds, in GATS Article XIX, already calls for the process of 'progressive liberalization' to be advanced through 'bilateral, plurilateral and multilateral negotiations' and, correspondingly, Annex C of the 2005 Hong Kong Ministerial Declaration institutionalizes the plurilateral option for the DDA market access negotiations in services.¹⁰ Ten years later, the Nairobi Declaration acknowledges that 'WTO Members have also worked successfully and reached agreements in plurilateral formats'.¹¹

The respective negotiations had taken place mostly within autonomously constituted groups of interested Members, with the results being implemented on a most-favoured-nation (MFN) basis. The entry into force of such open agreements has generally been conditioned on the contribution of economically significant commitments from a 'critical mass' of countries. These are normally expected to involve all major participants in the sector to the point of eliminating or substantially reducing the risk of 'free riding', which normally implies that some 80 or 90% of the global market concerned is covered. The bar to cross is thus quite high. While recognizing the desirability of this approach, in principle, an apparently increasing number of observers therefore advocates the negotiation of exclusive plurilateral agreements (PAs) the benefits of which remain confined to the signatories only.¹² The risks surrounding such agreements - use for protectionist purposes, scope for power-based strategies, avoidance of reciprocal liberalization moves - are deemed to be acceptable if compared to the risks associated with the status quo: disengagement from the multilateral system and further proliferation of Regional Trade Agreements.¹³

While RTAs have traditionally been geared towards the abolition or reduction of formal trade barriers between participants, they are now increasingly being used as fora to address wider policy concerns that have emerged over time (see above). With the gradual lowering of formal trade restrictions, in particular in the form of GATT-bound industrial tariffs, and the emergence of international production chains, these other barriers have gained in economic importance. In addition, RTAs provide a basis to extend trade disciplines to factor flows - investment and labour - that are covered by the GATS, but essentially remain beyond the scope of GATT.¹⁴ RTAs might thus

¹⁰ Pursuant to Article XIX:4, '[t]he process of progressive liberalization shall be advanced in each ... round through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement'. In turn, para 7 of Annex C of the Hong Kong Ministerial Declaration stipulates that '[i]n addition to bilateral negotiations,... the request-offer negotiations should also be pursued on a plurilateral basis in accordance with the principles of the GATS and the Guidelines and Procedures for the Negotiations on Trade in Services'.

¹¹ *Supra* note 2.

¹² See, for example, Hoekman and Mavroidis, *supra* note 4; Trebilcock, 'Between Theories of Trade and Development: The Future of the World Trading System', 16 *Journal of World Investment & Trade* (2015) 122; and Lawrence, 'Rule-Making Amidst Growing Diversity: A Club-of-Club Approach to WTO Reform and New Issue Selection', 9 *Journal of International Economic Law* (2006) 823.

¹³ Trebilcock (*ibid.*, at 132).

¹⁴ See also *supra* note 4. The Agreement on Trade-Related Investment Measures (TRIMS), which was negotiated during the Uruguay Round, certainly deals with investment measures concerning trade in goods. In substance, however, it is mostly concerned with clarifying the application of key GATT Articles to certain investment measures and reaffirming WTO Member's commitment to better compliance. Its Article II:1 requires WTO Members not to apply any TRIM that is inconsistent with Article III (National Treatment) and Article XI (General Elimination of Quantitative Restrictions) of the GATT. Inconsistent measures, which were to be notified to the Council for Trade in Goods after the WTO Agreement's entry into force, were exempt during specified transition periods. See also de Sterlini, 'The Agreement on Trade-Related Investment Measures, in P.

help to ensure the consistent application of rules across all types of production processes and stages, enabling participants to commit on, and lock in, measures beyond the current reach of the WTO regime.

However, RTAs are certainly no panacea. In particular, they might not only be used as mechanisms to establish more open and harmonious trading conditions among the signatories, but to exclude other Members, for whatever reasons, from participation.¹⁵ There are no access rights for countries interested in joining at a later stage as their economies and their ability to live up to more ambitious regulatory challenges develop. Moreover, the dispute settlement procedures provided under most RTAs, if any, do not generally match WTO standards in terms of ease of access, predictability and enforceability.¹⁶ And, finally, there is ample evidence that RTAs have been used not only as instruments to add to, but also to modify and/or detract from, existing WTO disciplines, thus introducing additional elements of fragmentation into the trading system.¹⁷

The challenge thus arises, in services and beyond, to develop mechanisms that, regardless of the DDA's confines, would promote co-operation and liberalization among interested Members in a manner consistent with the WTO's legal framework and relevant Ministerial Decisions and Declarations. As indicated before, the focus will be on plurilateral agreements.

Starting point of the following discussion are the WTO provisions dealing with trade negotiations among Members and their relevance for different scenarios. This is followed in the third Section by an overview of plurilateral agreements as achieved in the wake of the Tokyo Round (1973-79) and, later on, the launch of the WTO in 1995. While the early agreements, reflecting the limited scope of the GATT system, remained confined to merchandise trade, various agreements concluded under the WTO's auspices cover services. If there is a common facet, it is an increasing trend over time to focus on MFN-based (open) rather than on exclusive PAs. The fourth Section then reflects on the implications of a return to exclusive PAs, as recently proposed to overcome (or bypass) the stalemate in the Doha Round. Yet there appear to be strong reservations among some Members, and the legal barrier - consensus requirement - is high. The fifth Section thus refocuses on the potential use of open PAs as a possible way forward. One issue deserves particular attention:

F. J. Macrory, A.E. Appleton and M. G. Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (2005) 437, at 480f.

¹⁵ See, for example, H. Dieter, *The Return to Geopolitics - Trade Policy in the Era of TTIP and TPP*, Friedrich Ebert Stiftung (2014).

¹⁶ In turn, this may explain why the respective provisions have rarely been invoked to date. A recent study, based on 226 WTO-notified RTAs, found indeed that, where applicable, RTA partners continued to resort to the WTO dispute settlement mechanism to resolve disputes between them. See Chase et al, 'Mapping of dispute settlement mechanism in regional trade agreements – innovative or variations on a theme?', in R. Acharya (ed.), *Regional Trade Agreements and the Multilateral Trading System* (2016) 608, at 610.

¹⁷ See, for example, Adlung and Miroudot, 'Poison in the Wine? Tracing GATS-Minus Commitments in Regional Trade Agreements', 46 *Journal of World Trade* (2012) 1045. A comparison of GATS-neutral, GATS-plus and GATS-minus commitments across 56 RTAs is contained in Miroudot, Sauvage and Sudreau (2010), *Multilateralising Regionalism: How Preferential are Services Commitments in Regional Trade Agreements?*, OECD Trade Policy Working Paper No. 106, TAD/TC/WP(2010)18/FINAL. For a similar comparison focusing on provisions in the North American Free Trade Agreement (NAFTA) and the EU's Economic Partnership Agreements (EPAs) see Marconini, *Revisiting Regional Trade Agreements and Their Impact on Services Trade*, ICTSD Issue Paper No.4. There can be little doubt that similar inconsistencies also exist under other WTO Agreements. A case in point are quantitative restrictions on exports of goods. A recent study found that 44% of the reviewed 240-odd RTAs exempt certain sectors or products from the GATT's general ban on such restrictions. See Zhang, 'Tracing GATT-Minus Provisions on Export Restrictions in Regional Trade Agreements', 11 *Global Trade and Customs Journal* 3 (2016) 122.

While a broad range of policies affecting services trade under the GATS' four modes of supply, whether related to investment, labour or competition, can be addressed within the Agreement's existing framework, the scope of the GATT has remained confined essentially to cross-border trade in goods. It would be possible, however, to negotiate open PAs not only based on current treaty provisions, but to address wider ('WTO-extra') policy concerns in the form of MFN-based understandings among interested Members. The final Section summarises and concludes.

2. NEGOTIATING APPROACHES IN THE WTO

The conduct of negotiations is one of the main functions of the WTO. Article III:2 of the WTO Agreement states: 'The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.'

For good reasons, Article III:2 did not specify the legal forms that negotiated outcomes might take or the exact procedures that should be followed in that respect. Indeed, the legal approach and the related procedures can be determined for each negotiating process in the light of its peculiarities such as the nature of the subject matter (e.g. new substantive obligations in the form of liberalization commitments or new rules); relationship of the outcome to pre-existing provisions; scope of the participants concerned; further institutional matters, etc.

While Article III:2 is silent on this issue, other provisions of the WTO Agreement provide for specific procedures to be followed in particular circumstances. They can be found in Article IX:2 (interpretation), Article IX: 3 and 4 (waivers), and Article X (amendments). The latter Article distinguishes between various WTO provisions which are then subjected to different procedures and benchmarks.¹⁸ However, while providing guidance in particular situations, these provisions do not exhaust all possible scenarios concerning the results of 'negotiations' within the meaning of Article III:2 in all their forms.

Indeed, to implement the outcomes of past WTO negotiations, various approaches have been used that are not codified in the WTO Agreement. In the negotiations on basic telecommunications and financial services, for example, the results were annexed to protocols specifying the procedural requirements on the basis of which they would enter into force.¹⁹ Relevant elements include the time-frame for acceptance; approval conditions (e.g. acceptance by all Members concerned, a certain number of Members or any other formula); the ensuing legal effect (replacing, supplementing or modifying pre-existing commitments); consequences if not all Members concerned have accepted within the given time-frame (normally those who have accepted would decide upon entry into force); and institutional provisions such as depositary, registration, date and venue.

¹⁸ For example, while changes to the MFN obligations of GATT (Article I), GATS (Article II:1) and TRIPS (Article 4) would need to be accepted by all Members, there is a possibility for other amendments to be decided upon, shall consensus not be reached, by a two-thirds majority. The amendments would be binding only on those Members that have accepted them.

¹⁹ For basic telecommunications, see Fourth Protocol to the General Agreement on Trade in Services (Document S/L/20, 30 April 1996), for financial services, see Fifth Protocol to the General Agreement on Trade in Services (Document S/L/45, 3 December 1997).

Such protocols are not based on any particular provisions in the WTO Agreement. Rather, their content, including the approval conditions and expected effects, depends on the circumstances of a particular negotiation. A consensus decision by all Members to adopt the protocol would not be legally required, though this was the course taken, for political reasons, in previous cases under the GATS. Yet, there would have been no legal impediments that could have prevented interested Members from negotiating and implementing the respective protocols among each other without adoption by the entire membership.

Negotiations in the WTO are open in principle to all Members, and consensus must be the main decision-making practice, as provided for in Article IX:1 of the WTO Agreement. Nevertheless, with the increasing diversity of issues and their complexity, reaching consensus has become more challenging. In many instances, negotiations have thus been conducted among a subset of the WTO membership, with the results being implemented on an MFN basis. In other words, plurilateral negotiating processes have produced outcomes that potentially benefit all Members. Such processes, by their very nature, do not need to be approved by the entire membership to start or conclude. Market-access request/offer negotiations are typical examples. While relieving non-contributing Members from the expectation of joining a consensus, this also facilitates the negotiating process among participants and helps achieve a satisfactory conclusion.

Such critical mass-based approaches have been used not only in market-access negotiations, but also, albeit to a lesser extent, in rule-making. The creation and implementation of a template of regulatory principles for basic telecommunications, the so-called 'Reference Paper' (RP), is a case in point (Section 3.B.2(a)). The template was developed by a group of negotiating participants and has been inscribed, sometimes with variations, in the schedules of commitments of over 90 WTO Members (counting EU member states individually).

Though protocols have normally been used as instruments to give legal effect to negotiating outcomes, there are other options as well. For example, the results of the Information Technology Agreement (Section 3.B.1) have been enacted simply through individual certification of the tariff schedules of the Members participating in the negotiations, adding new tariff concessions on the products concerned. This approach obviously requires a clear understanding among the governments concerned on the procedural steps to be taken.

Since the negotiating function of the WTO has been floundering for quite some time, the question arises, whether and to what extent the methods used in conducting and concluding previous negotiations could provide guidance for the future. In particular, should Members seek to rely more often on open plurilateral negotiations, among a critical mass of participants, with MFN-based outcomes? Or would exclusive plurilaterals, as recently proposed, constitute a realistically feasible option? Whatever approach might finally be chosen, however, there is at least one precondition: the existence of a core group of Members that would mobilize the expertise and political energy needed for such a project and their readiness to reach agreed outcomes.

3. 'PLURILATERAL TRADE AGREEMENTS' (PAS): PAST AND PRESENT

A. Looking into the Rear-View Mirror

The history of plurilateral agreements within the GATT/WTO system goes back at least to the 1970s. Nine such agreements or codes, then called MTN Agreements and Arrangements, were negotiated in the Tokyo Round. They either were sector-specific - International Dairy Agreement, International Bovine Meat Agreement and the Agreement on Trade in Civil Aircraft - or dealt with

particular policy issues on a cross-sectoral basis: the Agreement on Government Procurement (GPA) as well as further five Codes concerning Technical Barriers to Trade, Subsidies and Countervailing Duties, Anti-dumping, Customs Valuation, and Import Licensing. The latter five Codes, plus the Agreements on Dairy Products and Bovine Meat, were subject to a Contracting Party (CP) Decision of 28 November 1979 confirming that the existing rights and benefits of non-participants under the GATT, including those derived from the MFN obligation, are not affected.²⁰ Reportedly, this decision was taken in order to overcome the resistance of a number of developing countries to concluding the Tokyo Round and allowing the GATT to service agreements to which they were not parties.²¹

Nevertheless, many CPs and academic observers expressed concern that, due to the limited coverage of these arrangements, generally relevant policy challenges were addressed only by relatively small groups of countries. And not all Codes were consistently applied by signatories on an MFN basis.²² The need to restore greater coherence was widely shared. This subsequently led to the concept of a single undertaking which was adopted as a guiding principle for the Uruguay-Round negotiations (1986-1993/4) at least as far as goods trade was concerned. The services negotiations were subject to a separate mandate.²³

With the entry into force of the WTO, almost all elements of the new regime are universally applicable across the full membership, save one exception provided for under Article II:3 of the WTO Agreement. It stipulates that 'Plurilateral Trade Agreements' as included in Annex 4 to the Agreement are binding only on those Members that have accepted them and do not create rights or obligations for others.

The only exclusive agreements that are covered by this Annex today are those on Trade in Civil Aircraft and on Government Procurement.²⁴ Both agreements may be considered special cases, for different reasons: a very limited product focus, civil aircraft, that is of little commercial interest to many Members; and particular sensitivities in an area, government procurement, where industrial policy-related motivations may coexist with notions of national sovereignty. All other Tokyo Round Codes were transformed during the Uruguay Round into commonly binding multilateral agreements or have been relinquished since.²⁵

²⁰ Action by the CONTRACTING PARTIES on the Multilateral Trade Negotiations, Decision of 28 November 1979, Document L/4905, BISD 26S (1980), at 201, para 3.

²¹ S. Harbinson and B. De Meester, *Analysis of WTO-consistent approaches to plurilateral and non-MFN trade agreements*, National Foreign Trade Council (2012), at 26f, available at <http://www.nftc.org/default/trade/WTO/NFTC21stCenturyTradeAgenda2012.pdf> (last visited 8 December 2016).

²² For more details on this and the following observations see J. Croome, *Reshaping the World Trading System - A History of the Uruguay Round* (2nd ed., 1999) at 63f; Rodríguez Mendoza and Wilke, 'Revisiting the single undertaking: towards a more balanced approach to WTO negotiations', in C. Deere Birbeck (ed.), *Making Global Trade Governance Work for Development* (2011) 486, at 499; and Harbinson and De Meester, *supra* note 21.

²³ The Punta del Este Declaration launching the Uruguay Round introduced a two-track approach. The negotiations on trade in goods were covered by one part of the Declaration, which was adopted by ministers in their capacity as contracting parties to the GATT. In contrast, the negotiating mandate for services was contained in a second, far smaller part which ministers adopted as representatives of their governments. This distinction was maintained throughout the Round. For more details See Croome, *supra* note 22, 25f.

²⁴ Tellingly, the section on the WTO Website dealing with these Agreements is entitled 'Plurilaterals: of minority interest'. See https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm (last visited 8 December 2016).

²⁵ The Agreements on Dairy Products and Bovine Meat were terminated in 1997.

The *Agreement on Government Procurement (GPA)* has been thoroughly overhauled since its inception in the early 1980s and currently comprises 47 WTO Members, including the 28 EU member states.²⁶ A further nine Members are seeking accession. They would then gain non-discriminatory access to the other signatories' procurement markets, consisting of government purchases of goods, services and construction services. Coverage is confined to transactions in those products and entities, including at sub-federal level, that are listed in the parties' schedules and exceed specified threshold levels. Pursuant to Article XXII of the GPA, any affected party may invoke the WTO's dispute settlement provisions to solve conflicts arising under the Agreement.²⁷ However, any suspension of concessions by a prevailing claimant must remain confined to obligations under the GPA and cannot be extended to those assumed under any of the multilateral trade agreements, and *vice versa* (Article XXII:7).

The *Agreement on Trade in Civil Aircraft* provided from its very beginning, in January 1980, that the customs duties on the covered range of products be eliminated on an MFN basis and no pressure or incentives be used by governments to affect purchases of civil aircraft (Article 2).²⁸ There is an exclusive element in the extension of some procedural benefits, however. In particular, only signatories may participate in the Committee on Trade in Civil Aircraft, which is mandated to oversee and review the Agreement's implementation and operation and to conduct further negotiations on its expansion and improvement. In the event of disputes, should consultations within the Committee not lead to a satisfactory outcome, the signatory concerned would be free to invoke the WTO's dispute settlement mechanism even on issues not covered by a multilateral agreement.²⁹ However, there have been no such cases to date.

B. More Recent (Post-Uruguay Round) Cases

In the years following the entry into force of the WTO Agreement, in 1995, a few initiatives continued or were newly launched by sub-groups of WTO Members with a view to co-ordinating liberalization or regulatory harmonization/facilitation initiatives in selected sectors. The outcomes were put into effect once a critical mass of Members had agreed to participate.

There is one common denominator in all cases: the results were to be extended on an MFN basis and more Members may join and/or assume similar obligations at a later stage. The rationale underlying such open plurilaterals was eloquently summarized by the Warwick Commission some nine years ago: 'In the name of justice and fairness, the principle of non-discrimination should apply to all Members, regardless of whether they participate in critical-mass agreements. To the extent that benefits do not only accrue as a direct result of obligations, the idea is that non-signatories benefit from a non-discriminatory application by signatories of the provisions of an agreement as well as access to benefits arising from the agreement. Thus, when it comes to variable geometry and

²⁶ For a detailed account of the GPA's negotiating history see Anderson and Müller, 'The Revised WTO Agreement on Government Procurement (GPA): Key Design Features and Significance for Global Trade and Development', manuscript, publication pending.

²⁷ Since 1995, four disputes under the GPA have been brought to the WTO; for an overview see www.wto.org/english/tratop_e/gproc_e/disput_e.htm (last visited 8 December 2016).

²⁸ The Agreement has 32 signatories, including the EU and 19 EU member states (see https://www.wto.org/english/tratop_e/civair_e/civair_e.htm, last visited 8 December 2016).

²⁹ In any event, signatories retain their pre-existing rights to refer to WTO dispute settlement in case of disputes arising under the GATT or other multilateral agreements. See also Cunningham and Lichtenbaum, 'The Agreement on Trade in Civil Aircraft and Other Issues Relating to Civil Aircraft in the GATT/WTO System', in Macrory et al (eds), *supra* note 14, 1165, at 1168.

rules negotiations, we have a clear precedent from the Tokyo Round Codes on standards, import licensing, anti-dumping, subsidies and countervailing measures and customs valuation'.³⁰

1. *Merchandise Trade*

In the area of trade in goods, the *Information Technology Agreement* constitutes the possibly most significant achievement in the WTO's history since its inception in 1995.³¹ It was initiated on the fringes of the WTO's first Ministerial Conference in Singapore, in 1996, by 29 participants which accounted for well over 80% of world trade in the information-technology (IT) products covered.³² The Agreement provided for tariff eliminations, to be incorporated in the respective Members' tariff schedules and staged in equal rates between 1997 and 2000. The underlying Ministerial Declaration of 1996 expressly invited other WTO Members to join in the finalizing technical discussions and the tariff elimination programme.³³ Implementation was to start no later than April 1997, provided that the participants, estimated to represent approximately 90% of world trade in the products covered, had notified their acceptance and the phase-in programme been agreed.³⁴ The number of participants has more than doubled since, increasing the ITA's coverage to some 97% of world trade in the respective products. Though sector-specific, it appears that the positive outcome of the initial negotiations is not attributable only to a balance of negotiating interests across the products concerned; reportedly, some concessions were also made in non-related areas.³⁵

Fifteen years later, in 2012, talks commenced among interested Members on the expansion of the ITA. After various delays and stand-offs, participants ultimately agreed, in July 2015, on tariff reductions on some 200 additional IT products. They are estimated by the WTO Secretariat to account for some 10% of world merchandise trade.³⁶ The accord was approved, as noted before, at the Nairobi Ministerial Conference. It is to be implemented in stages from July 2016.

³⁰ University of Warwick (2007), *The Multilateral Trade Regime: Which Way Forward?*, at 30f, available at http://www2.warwick.ac.uk/research/warwickcommission/worldtrade/report/uw_warcomm_tradereport_07.pdf (last visited 8 December 2016). The Commission consisted mostly of academics, but also included some public and private sector representatives. Similar views are held, *inter alia*, by Rodríguez Mendoza and Wilke, *supra* note 22. In turn, Gallagher and Stoler recommend exploring the potential of an MFN-based critical-mass approach, similar to the Fourth and Fifth Protocols under GATS, to overcome the DDA deadlock over agricultural liberalization. Gallagher and Stoler, 'Critical Mass as an Alternative Framework for Multilateral Trade Negotiations', 15 *Global Governance* (2009) 375.

³¹ As noted before, at the time of writing (December 2016), the Trade Facilitation Agreement, another major accomplishment, was still awaiting ratification by the required quorum of the Membership (two-thirds).

³² Counting the then 15 EC member states individually. For more details see WTO, Sector Specific Discussions and Negotiations on Goods in the GATT and WTO, Note by the Secretariat, Document TN/MA/S/13, 24 January 2005, at 10.

³³ WTO, Ministerial Declaration on Trade in Information Technology Products, WT/MIN(96)/16, 13 December 1996.

³⁴ *Ibid.*, para 4. According to an assessment in March 1997, the coverage of the Agreement, following the participation of 10 more countries, had reached 92.5% of world trade in the products concerned. See Document TN/MA/S/13, *supra* note 32.

³⁵ Reportedly, final agreement on the ITA was reached only after the United States had conceded, at the EU's insistence, to liberalize its liquor imports. (Levy, 'Do We Need an Undertaker for the Single Undertaking? Considering the Angles of Variable Geometry', in S. J. Evenett and B. M. Hoekman (eds), *Economic Development and Multilateral Trade Cooperation* (2006) 417, at 426.)

³⁶ See https://www.wto.org/english/tratop_e/inftec_e/itaintro_e.htm (last visited 8 December 2016).

The successful conclusion of this negotiation seemed to augur well for another recent initiative, among 18 participants (representing 46 WTO Members), to conclude an *Environmental Goods Agreement* (EGA). The idea was to agree on tariff exemptions on a broad range of environmentally friendly goods by end 2016.³⁷ However, in early December 2016, it turned out that the remaining gaps between the negotiators could not be bridged at this point and the negotiations needed to continue.³⁸

Further attempts to address specific trade and environmental concerns include recent initiatives, promoted by the United States and the European Union, to discipline *fisheries subsidies*. Reportedly, the United States' focus is on concluding a plurilateral agreement, while the EU envisages a multilateral outcome.³⁹

2. Services Trade

Not all elements of the Uruguay-Round services negotiations were concluded in time to be incorporated into the GATS and the annexed schedules of specific commitments. The Agreement itself contains negotiating mandates on four rule-making issues (domestic regulation, emergency safeguards, government procurement, and subsidies), and Members agreed towards the end of the Round to extend negotiations on specific commitments in four areas: maritime transport, mode 4, basic telecommunications, and financial services. The rule-making negotiations are still ongoing, formally at least, with no concrete outcomes currently in sight.⁴⁰ Among the negotiations on specific commitments, those on maritime transport were suspended in mid-1996 to be taken up again, on the basis of existing or improved offers, in the DDA.⁴¹ In contrast, the negotiations on mode 4, extended until end-July 1995, achieved at least some modest results: under the Third Protocol to the GATS, six Members (including the then EC 15) agreed to upgrade their existing commitments on this mode. Far more commercially relevant are the results of the extended negotiations on basic telecommunication services and financial services, which were implemented by way of the Fourth and Fifth Protocols, respectively, in early 1998.⁴² As noted before, the outcomes of both negotiations were implemented on a critical-mass basis.

³⁷ See http://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/t1395000.shtml (last visited 8 December 2016).

³⁸ See https://www.wto.org/english/news_e/news16_e/ega_04dec16_e.htm (last visited 8 December 2016).

³⁹ The US initiative is endorsed by 12 other WTO Members (as of November 2016); it builds on language contained in the then envisaged Trans-Pacific Partnership (TPP) Agreement. (World Trade Online, *U.S., EU take differing approaches toward a WTO fisheries subsidies agreement*, 26 October 2016, at <http://insidetrade.com/inside-us-trade/us-eu-take-differing-approaches-toward-fisheries-subsidies-agreement>, last visited 8 December 2016) In turn, the EU has submitted its proposal to the DDA Negotiating Group on Rules. (WTO, *Advancing Toward a Multilateral Outcome on Fisheries Subsidies in the WTO*, Document TN/RL/GEN/181, 20 October 2016.)

⁴⁰ See, for example, the annual reports of the Working Parties on Domestic Regulation and on GATS Rules (available at www.wto.org/english/tratop_e/serv_e/s_coun_e.htm, last visited 8 December 2016).

⁴¹ By the same token, the application of the MFN clause was suspended for those Members that had not undertaken commitments in the sector. See WTO, *Decision on Maritime Transport Services*, Document S/L/24, 3 July 1996

⁴² As noted in the following Section, the Fifth Protocol was preceded by the Second Protocol on financial services which, however, was shunned by some main players for its perceived lack of substance.

(a) Fourth Protocol (Telecommunication Services)

At the time of the Uruguay Round, the telecom sector underwent fundamental institutional reforms in a significant number of countries, implying the termination of traditional monopoly arrangements and the emergence of competitive markets. The early liberalizers, including in particular the United States, were hesitant, however, to undertake bindings in the sector as long as these were not reciprocated, at least in the form of GATS-bound liberalizing programmes, by a sufficiently large number of trading partners.⁴³ In turn, however, it proved difficult at this stage for a number of governments of the Round to clearly anticipate the future course of the reform programmes they envisaged, and to undertake relevant bindings. Though a number of countries were prepared to schedule commitments during the Round, their scope remained mostly limited to so-called value-added services and did not extend to basic services, including voice telephony. The negotiations were thus extended beyond the timeframe of the Round in order to be concluded, despite a temporary breakdown, in early 1997. The resulting commitments are among the most ambitious undertaken by Uruguay-Round participants to date, putting an end to many monopoly regimes.⁴⁴

To ensure that all participants lived up to their obligations, the respective schedules and lists of MFN exemptions were annexed to a protocol which was to enter into force only if accepted by all participants, 69 in total (counting the EU members individually), by a specified date.⁴⁵ The protocol was thus nothing but a legal device to make sure that everybody remained on board; it entered into force on 5 February 1998.

In the course of these negotiations, a growing number of participants had realized that in order to provide effective market access, the respective commitments needed to be accompanied by a range of 'competitive safeguards'. This resulted in an informal group of interested Members developing a template of regulatory disciplines, intended to promote transparency, efficiency and competition, for incorporation in the respective schedules. In the end, the so-called telecom 'Reference Paper' (RP) was inscribed, sometimes with a few modifications, by 57 of the 69 participating Members as Additional Commitments under Article XVIII of the GATS (Section 3.B.2(a)).⁴⁶ The telecom sector accounts for the vast majority of the commitments undertaken under this Article. The respective bindings are considered to constitute 'a breakthrough at international level', reflecting participants' recognition that long monopolized sectors cannot be liberalized

⁴³ According to a statement by the US Trade Representative, over 40% of world telecom revenue and over 34% of global international traffic were not covered by acceptable offers at the time. See Bronckers and Larouche, 'A Review of the WTO Regime for Telecommunications Services', in K. Alexander and M. Andenas (eds), *The World Trade Organization and Trade in Services* (2008) 319, at 322.

⁴⁴ See, for example, Sherman, "'Wildly enthusiastic' About the First Multilateral Agreement on Trade in Telecommunications Services', 51 *Federal Communications Law Journal* (1998) 61, at 63. As in other sectors, reflecting the particular situation of the countries concerned, the commitments undertaken in many WTO accessions are in a class of their own.

⁴⁵ The initial deadline for acceptance, 30 November 1997, was extended later by the Council for Trade in Services to 31 July 1998 to allow some remaining signatories to complete the domestic ratification process.

⁴⁶ Article XX:1 of the GATS requires each Member to submit a schedule of specific commitments under the Agreement without further specifying the nature or number of the sectors to be covered or the levels of liberalization to be conceded. For each scheduled sector, the Member concerned must inscribe the levels of Market Access and National Treatment, pursuant to Articles XVI and XVII, respectively, it is prepared to accept for each of the Agreement's four modes of supply. In addition, there exists the possibility to undertake Additional Commitments on measures affecting trade in services, but not covered by Articles XVI and XVII. See also Section V.

without appropriate regulatory supervision and enforcement of competition law principles.⁴⁷ According to the RP, measures must be taken to prevent ‘major suppliers’ from engaging in anti-competitive cross-subsidization, using information obtained from competitors, and withholding necessary technical and commercial information. Also, interconnection with major suppliers must be ensured at any technically feasible point in the network, in a timely fashion, and at cost-oriented rates. The telecom regulator must be separate from, and not accountable to, any supplier of basic telecom services.⁴⁸

(b) Fifth Protocol (Financial Services)

Towards the end of the Uruguay Round, the negotiating scenario in financial services was comparable to that in telecommunications: reluctance of some major players, in particular the United States, to contribute to an exercise which, in their view, had remained highly disappointing in substance. They thus insisted on maintaining broad exemptions from MFN treatment, based on reciprocity. While an initial extension of the negotiations, leading to the conclusion of the Second Protocol to the GATS in July 1995, brought no major advances, significant improvements were achieved on their resumption in 1997. The United States, among others, decided to drop, or at least scale down, their previously listed MFN exemptions. Unlike telecommunication services, however, there is only little evidence of commitments that actually improved on already existing access conditions.⁴⁹ Nevertheless, a number of participants, almost exclusively developed countries, assumed obligations under the Understanding on Commitments in Financial Services, which in various respects exceed the generally applicable obligations and disciplines as contained in the GATS itself.⁵⁰

Although not all participants had accepted the Fifth Protocol by the agreed date, end-January 1999, the 50-odd Members that had done so, out of a total of 70 signatories, decided to put it into effect on 1 March 1999. The door was left open, however, for latecomers.

The *Understanding on Commitments in Financial Services* is a unique instrument insofar as it was included in the Uruguay Round Final Act, but does not form an integral part of the GATS. It was developed during the negotiations when it became clear that not all obligations envisaged by some participants for inclusion in the horizontally applicable Annex on Financial Services were acceptable to all Members. The Understanding’s rules and disciplines are normally integrated into respective schedules by way of a headnote in the financial services section.⁵¹ The content of the Understanding must not be replicated *tel quel* but, comparable to the telecom RP, can be qualified through Member-specific reservations or limitations. And such qualifications are quite numerous. In their absence, the Understanding provides, *inter alia*, for the following disciplines beyond the standard

⁴⁷ Bronckers and Larouche, *supra* note 43, at 330 and 344.

⁴⁸ Detailed assessments are provided by Sherman, *supra* note 44, at 71-87; and Tuthill, ‘The GATS and New Rules for Regulators’, 21 *Telecommunications Policy* (1997) 783.

⁴⁹ For an analysis of the results from the vantage point of developing and transition economies see Mattoo, ‘Financial Services and the WTO: Liberalization Commitments of the Developing and Transition Economies’, 23 *The World Economy* (2000), 351.

⁵⁰ Among the initial participants, Nigeria and Sri Lanka (excluding insurance services) were the only developing countries to incorporate the Understanding in their schedules. For more details see WTO, Council for Trade in Services (2010), ‘Financial Services’, Background Note by the Secretariat, S/C/W/312, 3 February, at 9-13.

⁵¹ Forty-five Members, counting the participating EU member states individually, have hitherto scheduled their financial services commitments in accordance with the Understanding.

coverage of schedules:⁵² a standstill provision ensuring that the prevailing trading conditions at the time of scheduling are bound without ‘water’; an obligation to list any existing monopoly rights in the respective sectors and to endeavour eliminating or reducing them in scope; and a commitment not to discriminate domestically established foreign suppliers of financial services in the purchase of such services by public entities. Moreover, the established foreign suppliers must be permitted to offer any new financial services in the respective Member’s territory.⁵³

3. Summary Observations

As mentioned before, all Post-Uruguay Round PAs in the WTO were developed and adopted by freely accessible ‘clubs’ of WTO Members for application on an MFN-basis. Even if the respective club members had wanted to exclude certain countries from the negotiations, for some reason, they would not have been able to exempt them from the agreed benefits and/or from the assumption of equally binding obligations on an autonomous basis. By the same token, since there is no need to seek other Members’ approval, there is no risk of the process being taken hostage and saddled with requests in basically unrelated areas.

A particularly interesting feature of the GATS is its extension to areas beyond conventional concepts of cross-border trade. This includes not only on investment and labour issues within the definitional scope of modes 3 and 4, but any government measures ‘affecting trade in services’ within the modal structure of the Agreement.⁵⁴ Indeed, the Fourth and Fifth Protocols thus combined trade liberalizing with rule-making elements which, in turn, are specified at a level of detail not previously experienced in the multilateral system. In particular, the two Protocols provided a basis for participants to incorporate, in full or in part, the telecom RP (Fourth Protocol) and the Financial Services Understanding (Fifth Protocol) into their schedules, thus redefining the borderline between what were traditionally considered to be international (trade-related) concerns and issues falling within the domestic regulatory domain.⁵⁵

The history of the Fourth Protocol also suggests that such initiatives can develop their own momentum. After the Protocol had entered into force, two Members, which had not participated in the negotiations (Egypt and Honduras), scheduled telecom commitments on their own initiative, and one participant (Morocco) upgraded its existing commitments to include the RP.⁵⁶ Traditional reciprocity-related concerns were apparently overcome by the perceived need to keep pace with what was going on elsewhere in a sector of key infrastructural importance, with potentially significant productivity effects on a wide range downstream user industries.

⁵² For a detailed assessment see De Meester, *Liberalization of Trade in Banking Services - An International and European Perspective* (2014), at 64-68.

⁵³ A new financial service is defined in the Understanding (Article D.3) as ‘a service of a financial nature, including services related to existing and new products or the manner in which a product is delivered, that is not supplied by any financial service supplier in the territory of a particular Member but which is supplied in the territory of another Member’.

⁵⁴ Competition-related aspects are discussed, for example, by Warner, *supra* note 4. See also Section 3.B.2(a) above.

⁵⁵ There is a historical difference insofar as the Financial Services Understanding had already been developed during the UR, while the telecom RP was negotiated in the context of the Fourth Protocol after the conclusion of the Round. Nevertheless, they share the same legal character of providing ‘templates’ for scheduling commitments.

⁵⁶ In addition, late submissions came from Barbados, Kenya and Uganda.

Doubts have been expressed, however, whether past critical-mass negotiations, MFN-based, could serve as a model for the future. A sceptical view suggests that the respective cases - ITA, Fourth and Fifth Protocols - are misleading insofar as they dealt with left-overs from the Uruguay Round and, thus, did not affect the overall balance of obligations.⁵⁷ Nevertheless, there should still be scope for negotiations that would be to everybody's benefit or, at least, leave no losers behind. The recently agreed expansion of the Information Technology Agreement and the ongoing initiative concerning fisheries subsidies are examples in the field of merchandise trade. And the potential for similar deals may be even larger in services trade, given the generally modest levels of current commitments and a wide range of regulatory issues that remain to be addressed.

Among the four modes of supply, the main focus of services commitments tends to be on mode 3 (commercial presence), which accounts for the lion's share of the trade flows falling under the Agreement.⁵⁸ To a certain degree, the expectations surrounding these commitments are similar to those associated with bilateral investment treaties (BITs): stimulating inward FDI in order to promote growth and development, including via an economy's better integration into international supply chains. What other factors could explain the explosive growth of BITs over the past two decades to over 2900 at present? However, if these treaties have proliferated, despite what might appear to be an imbalance of obligations between many of the signatories, typically either sources or destinations of FDI, why not more liberal GATS commitments? The gradual substitution of hub-centred obligations under BITs or RTAs with broadly agreed rules and disciplines could be expected to reduce the recipients' exposure to the trade and negotiating power of a few source countries.

Nevertheless, 'trade and investment' was among the three Singapore issues that needed to be dropped, in 2004, in order to secure the continuation of the DDA.⁵⁹ The respective Decision by the WTO's General Council provides that there be 'no work towards negotiations' during the Doha Round.⁶⁰ This was an early indication, followed by others, of how difficult it is to overcome deeply-entrenched negotiating patterns and achieve consensus in the DDA environment.

⁵⁷ Wolfe, 'The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor', 12 *Journal of International Economic Law* (2009) 835, at 850. In addition, the telecom negotiations certainly benefitted from the fact that the prevailing regulatory regimes had been rendered obsolete by profound technical changes.

⁵⁸ Mode 3 alone is estimated to represent some 55-60% of world services trade. (J. Magdeleine and A. Maurer, *Measuring GATS Mode 4 Trade Flows*, WTO Staff Working Paper ERSD-2008-05 (2008), at 18.) In turn, service sectors were found to account for 63% of the world's inward FDI stock in 2012, followed by manufacturing with 23% and primary production with 7%. (UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (2015) at 13.)

⁵⁹ The Singapore Ministerial Conference in 1996 had set up three working groups to deal, respectively, with trade and investment, competition policy, and transparency in government procurement. In addition, the WTO Goods Council was mandated to explore possibilities of simplifying trade procedures. These four issues were initially included in the DDA. Negotiations should have started after the 2003 Cancún Ministerial Conference, 'on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations'. However, there was no consensus, and Members agreed in 1 August 2004 to drop the former three issues. Work on the fourth issue ultimately led to the Trade Facilitation Agreement, which was adopted at the Bali Ministerial Conference in December 2013. As noted before, it is to enter into force once two-thirds of the Membership have ratified. For more details see https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm (last visited 8 December 2016).

⁶⁰ WTO, 'Doha Work Programme: Decision Adopted by the General Council on 1 August 2004' (2 August 2004) WT/L/579. For preceding discussions in the WTO's Working Group on the Relationship between Trade and Investment (WGTI) see De Man and Wouters, 'Improving the Framework of Negotiations on International Investment Agreements' in O. De Schutter, J. Swinnen and J. Wouters (eds), *Foreign Direct Investment and Human Development - The Law and Economics of International Investment Agreements* (2013) 233.

4. RECENT PROPOSALS

In view of the prolonged stalemate in the DDA, a number of recent publications discuss the conclusion of exclusive PAs ('conditional MFN PAs') as a potential option to address trade-related concerns among like-minded countries.⁶¹ Such plurilaterals could focus on individual sectors and/or policy matters without being subjected to the disciplines governing RTAs, including the need to eliminate 'duties and other restrictive regulations' on 'substantially all the trade' (GATT Article XXIV:8) or achieving 'substantial sectoral coverage' in the elimination of 'substantially all discrimination' (GATS Article V:1) among participants.

As noted by Hoekman and Mavroidis, it is obviously far easier to conclude RTAs than to achieve Members' approval of new exclusive PAs. Compliance with the RTA-related obligations could be ensured only *ex post* via a WTO Member questioning an RTA's content/impact under the respective treaty provisions. However, experience shows that the likelihood of such challenges is quite remote.⁶² In contrast, given the consensus requirement under Article X:9 of the WTO Agreement, the conditions for accepting exclusive PAs are far more restrictive. The Article provides that '[t]he Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4'.⁶³ In the end, however, both routes would permit sub-sets of the Members to agree on a mutually binding liberalizing programme and prevent others from 'free-riding' on the concessions made.

Proponents of PAs tend to emphasize the agreements' potential for 'greater transparency, a much closer "connection" with day-to-day WTO activities and processes, and greater coherence when it comes to case law/dispute settlement'.⁶⁴ From the proponents' perspective, PAs might prove a more suitable forum than RTAs whenever the participants' focus is not on reducing formal trade barriers, i.e. import duties on goods or restrictions on market access and national treatment in services trade, but advancing a common rule-making agenda. The scope of relevant agreements would not need to be confined to WTO-covered matters, but could extend to new ground, comparable to the GPA. Access to the WTO dispute settlement could be guaranteed on similar terms as under the GPA, i.e. without the possibility for a prevailing party to suspend concessions under other WTO Agreements.⁶⁵ (Yet one might wonder whether a lot of substance would be left should such agreements focus on narrowly defined policy areas only.)

⁶¹ See, for example, the publications listed in *supra* note 12 and D. A. Gantz, *Liberalizing International Trade after Doha - Multilateral, Plurilateral, Regional, and Unilateral Initiatives* (2013).

⁶² Cases in point are *Turkey - Textiles* and *Peru - Agricultural Products*. See WTO Appellate Body Reports, *Turkey - Restrictions on Imports of Textile and Clothing Product*, adopted 19 November 1999, and *Peru - Additional Duty on Imports of certain Agricultural Products*, WT/DS457/AB/R, adopted 31 July 2015.

⁶³ As noted elsewhere, a range of other exemptions from the MFN obligation exists. Apart from RTAs as covered by GATT Article XXIV and GATS Article V, there is the possibility for Members to request a waiver pursuant to Articles X:3 and 4 of the WTO Agreement or, specifically in the area of services, to list MFN exemptions or seek cover for recognition measures under GATS Article VII. However, these exemptions are available only in closely defined circumstances. See Adlung and Carzaniga (2009), 'MFN Exemptions under the General Agreement on Trade in Services: Grandfathers Striving for Immortality?', 12 *Journal of International Economic Law* (2009) 357, at 362.

⁶⁴ Hoekman and Mavroidis, *supra* note 12, at 331. In a similar vein: Trebilcock, *supra* note 12, at 132. Nevertheless, the authors also recognize the ensuing risks for the multilateral system, including the limited possibilities in fact for countries acceding at later stage to influence the initially agreed rules or a long-term fragmentation of the WTO Membership.

⁶⁵ See also Lawrence *supra* note 12, at 830.

Of course, governments remain free to conclude whatever type of stand-alone agreement on issues *not* subject to WTO disciplines. The MFN requirement under the respective GATT or GATS provisions would not apply. However, given the particularly wide scope of the GATS, the range of potentially relevant issues that would overlap with existing multilateral obligations and commitments is far larger in services than in merchandise trade (see following Section). And whenever such overlaps exist, the respective MFN obligations kick in.

What could be done to make non-benefitting Members tolerate the formation of new exclusive PAs? The proponents tend to agree on some possibly facilitating strides.⁶⁶ In particular, negotiations should be open to all WTO Members or, at least, all Members should be entitled to accede at a later stage. And participants could be free, if they wish, to extend the benefits on an MFN basis; LDCs might automatically qualify in any event. In addition, adding an Aid-for-Trade dimension might help improve an agreement's relevance (and chance of acceptance) among low-income Members.⁶⁷ Nevertheless, there is also widespread recognition that little might be achieved if the consensus requirement in Article X:9 of the WTO Agreement was not relaxed. The possibility of negotiating a code of conduct with certain minimum requirements that a PA would need to meet in order to be adopted by the Membership, for example by qualified majority, was raised in this context.⁶⁸

5. WHICH WAY FORWARD?

Are the expectations surrounding the negotiation of exclusive PAs realistic? A good dose of scepticism appears warranted. The approval process of the Trade Facilitation Agreement suggests that the consensus requirement might even be used to prevent changes that would ultimately be implemented on an MFN basis and, thus, not disadvantage any particular Member.⁶⁹ And, apparently, the scope for blockage (or 'hostage taking') has not been narrowed since.

As noted before, the concluding sentence of the Nairobi Ministerial Declaration explicitly provides that any decision to launch multilateral negotiations on non-DDA issues would need to be agreed by all Members.⁷⁰ Against this background, who would want to take the initiative, identify focal areas for exclusive PAs, map out the respective structure, propose the procedural framework for adoption, and build support across the membership? In the end, the respective approval processes may turn into 'renewed versions of Doha Round squabbles'.⁷¹

The focus of the following discussion is therefore on 'open PAs' among a critical mass of interested Members. As noted before, such agreements could cover far more ground, in terms of

⁶⁶ See the articles quoted in *supra* note 12.

⁶⁷ Hoekman and Mavroidis, *ibid.*, at 343.

⁶⁸ *Ibid.*, at 341. See also Draper and Dube, 'Plurilaterals and the Multilateral Trading System', in E 15 Initiative - Strengthening the Multilateral Trading System, *Regional Agreements Group Proposals and Analysis* (2013). Available at http://e15initiative.org/wp-content/uploads/2015/02/E15_RTAs_Proposals-Analysis_Final.pdf (last visited 8 December 2016).

⁶⁹ After its adoption at the Bali Ministerial Conference in December 2013, it took almost one more year for Members to agree on a Protocol of Amendment to insert the TFA into the WTO Agreement. The process came close to the brink of collapse because, in the words of an observer, it was used by some parties as leverage for pushing other agendas, which may well have been equally desirable but proved more controversial (A. Deardorff, *The Conversation*, 5 September 2016, available at <https://theconversation.com/decision-from-g20-leaders-could-prove-the-tipping-point-for-free-trade-64863>, last visited 8 December 2016). The Protocol text ultimately adopted on 27 November 2014 does not fix a deadline for individual Member's acceptance.

⁷⁰ See *supra* note 2.

⁷¹ K. Jones, *Reconstructing the World Trade Organization for the 21st Century* (2015), at 111.

measures and types of transactions, in services than would be possible in merchandise trade. In the latter area, reflecting the GATT's definitional scope, they would essentially be *one-dimensional* with tariffs and other measures impinging on cross-border trade being the key parameters. In contrast, the GATS provides a *multi-dimensional* framework that covers a wide variety of measures affecting trade in services which, in turn, is defined to encompass four modes of supply. In addition to conventional cross-border trade, the consumption of services abroad, under mode 2, as well as factor flows, i.e. investment and labour as covered by modes 3 and 4, thus come into play. Furthermore, the concept of 'supply' covers the entire value chain of services, from production to distribution, marketing, sale up to the delivery of the service. This means that government measures at any or all of those stages might fall within the scope of the Agreement. The measures that participants may want to address and discipline could include quantitative restrictions and foreign equity ceilings, denials of national treatment under discriminatory tax or subsidy regimes, the deterrent effects of excessively restrictive licensing and authorization procedures as well as access or cost problems encountered by (potential) users of government-controlled public services.

A particularly interesting option is the negotiation of Additional Commitments under GATS Article XVIII. The Article allows for the adoption of commitments 'with respect to measures affecting trade in services' that are not subject to scheduling under the market-access and national-treatment provisions of Articles XVI and XVII, 'including those regarding qualifications, standards and licensing matters'. Any government measure that affects trade in services within the definitional structure of the Agreement could thus be addressed.⁷²

It would thus be technically possible to inscribe quite a number of the disciplines negotiated under recent mega-regionals, such as the Trans-Pacific Partnership (TPP) Agreement, virtually unchanged into the parties' GATS schedules. Cases in point are the TPP Chapters on Electronic Commerce (Chapter 14), state-owned Enterprises and Designated Monopolies (Chapter 17), and Transparency and Anti-Corruption (Chapter 26) insofar as they reach beyond already existing GATS provisions. By the same token, virtually all issues raised in connection with a recent proposal to create a Trade Facilitation Agreement in Services, inspired by the current TFA in merchandise trade, could be covered by Additional Commitments under Article XVIII. The concept note submitted by India in the Working Party on Domestic Regulation lists a very broad range of issues, from disciplines on services-related taxes, fees and charges, to the streamlined ('single-window') clearance of applications for commercial establishment, to simplified work permit and visa procedures for access-seekers under mode 4.⁷³

Given the participation of broad groups of WTO Members, the process leading to the Fourth Protocol and the telecommunications RP may prove inspiring in this context (Section 3.B.2(a)). The respective negotiations have certainly been facilitated by the fact that the lifting of long-entrenched

⁷² The Appellate Body has expressly recognized the broad reach of the language used: 'In our view, the use of the term "affecting" reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term "affecting" in the context of Article III of the GATT is wider in scope than such terms as "regulating" or "governing". [fn] We also note that Article I:3(b) of the GATS provides that "'services' includes any service in any sector except services supplied in the exercise of governmental authority" (emphasis added), and that Article XXVIII(b) of the GATS provides that the "'supply of a service' includes the production, distribution, marketing, sale and delivery of a service". There is nothing at all in these provisions to suggest a limited scope of application for the GATS.' See WTO Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas (EC - Bananas)*, WT/DS27/AB/R, adopted 25 September 1997, para 220.

⁷³ World Trade Organization, Document S/WPDR/W/55, 27 September 2016.

monopoly regimes might not be viewed from the same (mercantilist) vantage point as predominantly access-based liberalization initiatives and that several reform-minded economies had already experienced positive growth and employment effects on a wide range of commercially significant downstream industries. The absence of any similar strides in services after 1997 is not necessarily indicative of lack of interest, but may rather be blamed on the deterrent effects of the DDA's extended paralysis, combined with what might be viewed as a lower status of the services track in the WTO compared to the negotiations on agriculture and non-agricultural market access (NAMA).⁷⁴

Governments' scope to undertake WTO-enforceable obligations under the GATS is not unlimited, however. There are various white spots beyond the reach of the Agreement ('WTO-extra provisions')⁷⁵, including obligations concerning foreign investments that do not lead to majority ownership or control of the respective companies or undertakings relating to the foreign employees of domestically owned companies.⁷⁶ In this regard, RTAs would offer more scope for obligations. And the same may be true for certain labour- or environment-related obligations that are contained, e.g., in RTAs concluded by the United States or the European Union.⁷⁷

Nevertheless, it is obvious that the GATS provides a basis to address a far wider range of policy issues, from the regulation of investment and labour flows to competition disciplines, than the GATT. And nothing would prevent interested Members to fill any perceived gaps in existing GATS and/or GATT disciplines by a common understanding that reaches beyond the existing framework(s). For example, a BIT-type understanding on investment issues, while adding completely novel elements to existing multilateral disciplines in merchandise trade, might also contain additional facets, including stronger protection from 'takings of property' (expropriation), compared to mode 3-related obligations under the GATS.⁷⁸ In areas of overlap, the GATS' MFN clause would ensure in any event that the more ambitious set of disciplines prevails. However, compared to coordinated upgrades of existing GATS commitments, the conclusion of such understandings would require a particular dose of negotiating stamina since, in the absence of suitable templates, any related attempts would need to start from scratch. One key issue that inevitably arises in this context is the question of legal enforceability: Could the scope of the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) be extended to WTO-extra obligations?

⁷⁴ Under para 24 of the Hong Kong Ministerial Declaration of 2005 ('Balance between Agriculture and NAMA') participants undertook to instruct their negotiators 'to ensure that there is a comparable high level on ambition in market access for Agriculture and NAMA'. In contrast, the following para ('Services Negotiations') simply provides, recalling relevant treaty provisions, declarations and guidelines, that 'the negotiations on trade in services shall proceed to their conclusion with a view to promoting the economic growth of trading partners and the development of developing and least-developed countries.' See World Trade Organization, Ministerial Conference - Sixth Session, Ministerial Declaration, Document WT/MIN(05)/DEC, 22 December 2005.

⁷⁵ Unlike WTO-plus provisions, which are about the deepening of already existing obligations and commitments, WTO-extra provisions venture into areas not currently covered by multilateral disciplines.

⁷⁶ Concerning the scope of modes 3 (commercial presence) and 4 (presence of natural persons), see for example the respective background notes by the WTO Secretariat (World Trade Organization, Documents S/C/W/314, 7 April 2010 and S/C/W/301, 15 September 2009).

⁷⁷ The relevant provisions are not always legally enforceable, however. For an overview see Horn, Mavroidis and Sapir, 'Beyond the WTO? An anatomy of EU and US preferential trade agreements', 33 *The World Economy* (2010) 1565. More detailed information specifically on labour standards is contained in Grynberg and Qalo, 'Labour Standards in US and EU Preferential Arrangements', 40 *Journal of World Trade* (2006) 619.

⁷⁸ Adlung, *supra* note 4, at 62.

In principle, Members would be free to make any necessary additions to Appendix 1 of the DSU which lists the Agreements covered (at present: WTO Agreement, GATT, GATS, TRIPS, DSU, GPA and the Agreement on Trade in Civil Aircraft).⁷⁹ Sceptics may wonder, however, whether such an initiative would prove politically productive in the current environment as it might be used as an opportunity by frustrated Members to extract concessions elsewhere. On the other hand, pursuant to a mandate in the Doha Ministerial Declaration, negotiations on ‘improvements and clarifications of the Dispute Settlement Understanding’ are to be conducted in any event. And, interestingly, these negotiations are explicitly exempt from the single-undertaking proviso of the DDA.⁸⁰ Therefore, there would not only be a suitable forum, but also an exemption from a potentially suffocating requirement.

6. TENTATIVE CONCLUSIONS

The DDA has by now continued for some 15 years, during which numerous changes have taken place in the world of international trade. Geopolitical forces and trading interests have shifted, the number of WTO Members has been consistently on the rise, and many new substantive issues have come to the forefront (SOEs and other competition-related concerns, cross-border data flows, localization requirements, privacy policies, environmental and labour standards, other regulatory challenges). Unlike in the Uruguay Round, large swathes of the membership are seeking participation in the negotiations. These changes inevitably made it even more difficult to reach consensus.

Various commentators have pointed at ‘decision-making’ in the WTO as being at the root of the problem, suggesting that departing from the consensus principle might be the solution. This claim is not fully convincing, however. It is not decision-making in general, but one particular type of decisions that have proven difficult to take: those relating to the continuation and conclusion of DDA-related negotiations. These decisions would normally result in new treaty obligations to be undertaken by the sovereign states participating in the negotiations. They will have to be arrived at with the consent of the parties involved.⁸¹ In other words, voting could not take place in any case.

The ‘practice of decision-making by consensus’ will thus continue to be the guiding principle in the WTO, not just because it is stipulated in the treaty (Article IX:1), but because it is the only realistic basis for moving forward. At the same time, waiting for each of the 160-odd Members, or at least for those taking interest in the negotiations, to approve of each and every element involved cannot work either.

A potential way out of this dilemma, which deserves to be carefully explored, is resorting more frequently to plurilateral, critical-mass based negotiations in producing outcomes that apply

⁷⁹ The Annex further lists two plurilateral trade agreements, the International Dairy Agreement and the International Bovine Meat Agreement which, as noted before (Section 3.A), have been rescinded since. The Annex provides that the DSU’s applicability to each PA be subject to a decision of the parties setting out the relevant terms.

⁸⁰ World Trade Organization, Ministerial Conference - Fourth Session, Ministerial Declaration, Document WT/MIN(01)/DEC/1, 20 November 2001, paras 30 and 47.

⁸¹ More specifically, as observed by Jones, ‘the institutional framework of the GATT/WTO system creates “pooled” sovereignty among its participants, based on trade-off by each member to sacrifice absolute sovereign control over access to its domestic market in exchange for an extension of its sovereignty, through the negotiated agreement, over market access abroad’. In turn, however, the terms at which such trade-offs are deemed acceptable, are a matter of sovereign decision by each and every participant. (Jones, *supra* note 71, at 34.)

on an MFN basis. Such kinds of plurilaterals have traditionally been the main approach in market-access negotiations in the GATT/WTO system.

A further step in the negotiating agenda would be the use of such open PAs not only for the market-access track, but also for rules-related negotiations. The negotiation of regulatory disciplines has worked well in individual cases, with the prime example of the Reference Paper in telecommunications. The respective process might provide inspiration and guidance of how difficult negotiating issues can be addressed among interested Members while at the same time ensuring an MFN-based outcome. As indicated before (Section 2), it would be possible to avoid any procedural requirements in this context that might provide room for non-participants to intervene with a view to extracting concessions in substantially unrelated areas.

Given the broad scope of the GATS, a wide range of burning issues, including investment-, competition- and labour-related disciplines, could be tackled within the Agreement's existing framework. In the same vein, virtually all intentions recently voiced in connection with a Trade Facilitation Agreement for Services could be accomplished, on a critical-mass basis, building on current GATS schedules. As noted before, successful models already exist in a sectoral context.

However, there is no conceivable equivalent under the GATT that could allow for the extension of a similarly broad range of disciplines, governing, for instance, investment- or visa-approval procedures, to merchandise trade. The GATT has remained 'one dimensional', focusing on the application of tariffs and other measures impacting on cross-border supplies.⁸² This is highly unfortunate, given that the distinction between services and merchandise trade has increasingly been rendered void. As they move along international supply chains, products and/or their components may criss-cross the borderlines between the two spheres which, in cases such as contract manufacturing, may well exist on paper, but defy any economically persuasive rationale.⁸³

Attempts to overcome this artificial divide between services- and goods-related disciplines can be observed in some recent RTAs. The respective chapters governing investment-, labour-, and competition-related disciplines, *inter alia*, tend to apply on a cross-sectoral basis. Among other factors, including the stalemate in the DDA and geo-political motivations, this may help explain the attractiveness of RTAs and their recent proliferation. Unfortunately, past initiatives to contain the attendant risks for the multilateral system, including through common monitoring and surveillance procedures, have not apparently generated a lot of interest. At least, there have been attempts recently to promote more substantive exchanges on the RTAs' systemic implications and to put the existing (provisional) Transparency Mechanism on a permanent basis.⁸⁴

What has not been tried so far is the creation of consistent cross-sectoral obligations in the form of open PAs that would be accessible to all WTO Members. The services-related aspects might

⁸² According to its Preamble, the GATT's underlying objectives (raising standards of living, etc.) are to be pursued via 'reciprocal and mutually advantage arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce'.

⁸³ Adlung and Zhang, 'Trade Disciplines with a Trapdoor: Contract Manufacturing', 16 *Journal of International Economic Law* (2013) 383.

⁸⁴ Para 28 of the Nairobi Ministerial Declaration reads: 'We reaffirm the need to ensure that Regional Trade Agreements (RTAs) remain complementary to, not a substitute for, the multilateral trading system. In this regard, we instruct the Committee on Regional Trade Agreements (CRTA) to discuss the systemic implications of RTAs for the multilateral trading system and their relationship with WTO rules. With a view to enhancing transparency in, and understanding of, RTAs and their effects, we agree to work towards the transformation of the current provisional Transparency Mechanism into a permanent mechanism in accordance with the General Council Decision of 14 December 2006, without prejudice to questions related to notification requirements.'

be inspired by already existing attempts, including the Fourth Protocol on telecommunication services. These could be complemented by the extension of similar disciplines, of a GATS- or, in merchandise trade, GATT-extra nature. There are no legal constraints that could prevent interested governments from launching and participating in such a project. Even the gap in enforceability - WTO dispute settlement for the GATS-covered elements without an apparent equivalent for other components - might be closed. In principle, participants would be free to seek the project's inclusion in Annex 1 of the DSU, thus rendering it legally enforceable in the WTO. Non-participants would have no credible reason to object to such a move from which they would benefit at 'zero cost', i.e. without assuming own obligations.

While open plurilaterals could help subsets of interested Members to escape from DDA-related negotiating blockades, the above discussion suggests that this route is more easily accessible and less winding in services than in merchandise trade. Regardless of the area, it is important to bear in mind, however, that there is no procedural substitute for the input and energy which would need to be provided by dedicated initiators. The above analysis, based on actual cases, focused on how negotiating interests could be accommodated through technical and legal solutions, but it is certainly not meant to imply that agreed outcomes could ultimately be achieved without a proper dose of political determination and guidance.

Finally, it might be worth recalling that the WTO has a broad deliberative and exploratory function concerning all issues relating to the conduct of trade relations between Members. This function has been stifled on various occasions by linking it closely with negotiating propositions and, thus, the stalemate in the Round.⁸⁵ It has also made deliberations, if any, more rigid in scope and content due to creeping suspicion about the underlying motives. However, there are no suitable other settings; RTAs would never be able to serve similar functions. Regardless of what happens in and around the DDA, it is therefore essential to resuscitate and promote the WTO's role as a forum for conceptual exploration and exchange, including, of course, on the issues raised in this article.

⁸⁵ In this context, the WTO's former Director General Pascal Lamy has coined the term of a 'missing middle'. See also Low, 'Potential Future Functions of the World Trade Organization', and Evenett, 'Aid for Trade and the "Missing Middle" of the World Trade Organization', 15 *Global Governance* (2009) 327 and 359.